Land and Environment Court

New South Wales

Medium Neutral Citation
Australians for Sustainable Development Inc v Minister for Planning[2011] NSWLEC 33
Hearing Dates
31 January 2011, 1-3, 14, 17, 22 (written submissions) February 2011
Decision Date
10/03/2011
Before
Biscoe J
Decision
1. Proceedings dismissed; 2. Costs reserved. Unless a party applies within three working days for a different costs order accompanied by written submissions, respondents are to pay applicant's costs and first respondent is to pay those costs on an indemnity basis; 3. Exhibits returned.

Catchwords
Judicial review - two project approvals in respect of contaminated Barangaroo site - whether approvals invalid or whether proponents should be restrained from carrying out project work - whether remedial action plans failed to comply with cl 17(1)(c) of State Environmental Planning Policy No 55 - Remediation of Land (SEPP 55) - whether cl 17(1)(c) of SEPP 55 applicable to the carrying out of projects approved under Part 3A of Environmental Planning and Assessment Act 1979 - post trial amendment to SEPP 55 making cl 17 inapplicable to the subject project approvals - whether failure to comply with cl 7 of SEPP 55 - whether cl 7 applicable to part 3A projects at approval stage - whether failure to consider principles of ecologically sustainable development as part of the public interest - whether failure to make requisite inquiries and constructive failure to exercise jurisdiction - whether impermissible development as part of a project relating to the extraction of sandstone - costs where applicant would have succeeded but for amendment to SEPP 55 made by Minister post-trial and before judgment.
Legislation Cited
Barangaroo Delivery Authority Act 2009
Broadcasting Act 1922

Contaminated Land Management Act 1997, s 15(1)
Environmental Planning and Assessment Act 1979, ss 4, 75A, 75(2A), s 75I(2)(d), 75F, 75J, s 75O, 75R(2), 75R(3A), 145B, 145C, Schedule 6 cl 89
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005
Interpretation Act 1987, ss 5, 11
State Environmental Planning Policy No 55 - Remediation of Land, cll 4, 7, 8, 9, 17
State Environmental Planning Policy (Major Development) 2005 cll 6, 7, 8, 9

Cases Cited

Ainsworth v Criminal Justice Commission (1992) 125 CLR 564
Aldous v Greater Taree City Council [2009] NSWLEC 17, 167 LGERA 13
Aon Risk Management Services Australia Pty Ltd v Australian National University [2009] HCA 27, 239 CLR 175
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 123
Baulkham Hills Shire Council v O'Donnell (1996) 69 LGRA 404
Belle Design Group Pty Ltd v Woollahra Municipal Council [2004] NSWLEC 284, 136 LGERA 1
Birch v Allen (1942) 65 CLR 621
Board of Fire Commissioners (NSW) v Ardouin (1961) 109 CLR 105 at 116
Bob Blackmore Pty Ltd v Anson Bay Company (Australia) Pty Ltd (Court of Appeal, 23 March 1990, unreported
Buck v Bavone [1976] HCA 24, (1975) 135 CLR 110
Chamwell Pty Ltd v Strathfield Council [2007] NSWLEC 114, 151 LGERA 400
Colgate Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225
Commissioner of Police v Ryan [2007] NSWCA 196, 70 NSWLR 73
Drake-Brockman v Minister for Planning [2007] NSWLEC 490
Foley v Badley (1984) 154 CLR 349
Foodbarn Pty Ltd v Solicitor-General (1975) 32 LGRA 157
Harrison v Schipp [2005] NSWCA 133
Hill Top Residents Action Group Inc v Minister for Planning [2009] NSWLEC 185, 171 LGERA 247
Houssein v Under Secretary of Industrial Relations and Technology

(NSW) (1982) 148 CLR 88
Imperial Chemical Industries of Australia and New Zealand v Federal Commissioner of Taxation (1972) 46 ALJR 35
Kelly v Jowett [2009] NSWCA 278; 76 NSWLR 405
Kennedy v Minister for Planning [2010] NSWLEC 240 at [77] - [79]
Kostrzewa v Southern Electricity Authority of Queensland [1969] HCA 32, (1970) 120 CLR 653
Lake Macquarie Shire Council v Aberdare County Council [1970] HCA 32, 123 CLR 327
Lizzio v Ryde Municipal Council (1983) 155 CLR 211
Miltonbrook Management Pty Ltd v Shellharbour City Council [2004] NSWLEC 86
Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40, 162 CLR 24
Minister for Immigration and Citizenship v SZGUR [2011] HCA 1, 273 ALR 327
Minister for Immigration and Citizenship v SZIAI [2009] HCA 39, 259 ALR 429
Minister for Immigration and Citizenship v SZMDS [2010] HCA 16, 240 CLR 611
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6, 185 CLR 259
Minister for Immigration and Multicultural Affairs v Eshetu [1999] HCA 21, 197 CLR 611
Minister for Planning v Walker [2008] NSWCA 224, 161 LGERA 423
Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council [2010] NSWLEC 48
Penrith City Council v Waste Management Authority [1983] HCA 22, (1990) 71 LGRA 376
Peters v Manly Municipal Council [2007] NSWCA 343
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Prasad v Minister for Immigration & Ethnic Affairs (1985) 6 FCR 155
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Puntoriero v Water Corporation [1999] HCA 45, 199 CLR 575
R v Connell; Ex parte Hetton Bellbird Collieries Ltd (1944) 69 CLR 407
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S J Connelly CPP Pty Ltd v Ballina Shire Council [2010] NSWLEC 128, 174 LGERA 335
Shire of Perth v O'Keefe (1964) 110 CLR 529
Stannic Securities Pty Ltd v Wyong Shire Council [2010] NSWLEC 249
The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd [1953] HCA 22, 88 CLR 100
Tugun Cobaki Alliance Inc v Minister for Planning and RTA [2006] NSWLEC 396
Warriewood Properties Pty Ltd v Pittwater Council [2010] NSWLEC 215
Warringah Shire Council v Raffles (1978) 38 LGRA 306
Williams v NSW Minister for Planning (NSW)(No 3) [2010] NSWLEC 204

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Pearce & Geddes, Statutory Interpretation in Australia, 6th ed (2006) LexisNexis

Category

Principal judgment

Parties

Australians for Sustainable Developments Inc (Applicant)
Minister for Planning (First Respondent)
Lend Lease (Millers Point) Pty Ltd (Second Respondent)
Barangaroo Delivery Authority (Third Respondent)

Representation

Solicitors:
Environmental Defender's Office (Applicant)
Department of Planning (First Respondent)
Henry Davis York (Second Respondent)
Clayton Utz (Third Respondent)

Counsel:
Mr J Kirk with Ms F Ramsay (Applicant)
Mr J Griffiths SC with Mr H El-Hage (First Respondent)
Mr N Williams SC with Ms A M Mitchelmore (Second Respondent)
Mr R Lancaster SC with Ms C Spruce (Third Respondent)

File Number(s)

40965 of 2010

JUDGMENT

CONTENTS

A. INTRODUCTION

1

The applicant, Australians for Sustainable Development Inc, seeks judicial review of two decisions of the first respondent, the Minister for Planning (**the Minister**), to grant approval to the carrying out of two

projects at Barangaroo, adjoining the Sydney central business district, made under s 75J of the *Environmental Planning and Assessment Act* 1979 (**EPA Act**):

(a)
a decision dated 2 November 2010 to approve major project application MP10_0023 in respect of the bulk excavation, remediation and construction of a basement car park (**Basement Car Parking Approval**). The proponent is the second respondent, Lend lease (Millers Point) Pty Ltd (**Lend Lease**);

(b)
a decision dated 8 November 2010 to approve major project application MP10_0047 in respect of Barangaroo Headland Park and Northern Cove (Early Works) (**Early Works Approval**). The proponent is the third respondent, the Barangaroo Delivery Authority (**BDA**).

2
The applicant raised six grounds of challenge in its pleading but no longer presses Ground 4. The grounds pressed are as follows:

- Ground 1 - Impermissible development as part of the Early Works Project relating to the extraction of sandstone.
- Ground 2 - Failure to comply with cl 17(1)(c) of State Environmental Planning Policy No 55 - Remediation of Land (**SEPP 55**) with respect to the carrying out of the two projects in that there is no plan of remediation approved by the consent authority prepared in accordance with the contaminated land planning guidelines.
- Ground 3 - Failure to comply with cl 7(1)(b) and (c) of SEPP 55 in relation to the two project approvals relating to what the consent authority must be satisfied of in consenting to the carrying out of development.
- Ground 5 - Failure to consider the principles of ecologically sustainable development as part of the public interest.
- Ground 6 - Failure to make requisite inquiries and constructive failure to exercise jurisdiction (this is closely related to Ground 5).

3
Ground 1 is discrete and this judgment addresses it last. Grounds 2, 3, 5 and 6 relate to one core factual issue: the way in which contamination and remediation issues have been dealt with in the approval process.

Contamination is significant in relation to both soil and groundwater. There are toxins from the original use of the site as gasworks. Consequently, remediation is required in relation to the whole Barangaroo site.

4

At the centre of this factual issue is whether remedial action plans (**RAPS**) prepared to deal with the contamination are in accordance with the contaminated land planning guidelines referred to in cl 17(1)(c), and whether they have been approved by the Minister as provided for in that clause. There is an overarching RAP for the whole Barangaroo site dated 1 June 2010 (**Overarching RAP**) which foreshadowed more specific RAPS for particular sites. Despite that intention and the fact that the Director General of Planning's environmental assessment requirements under s 75F(2) of the *EPA Act* required the development of site specific RAPS, there is no site specific RAP for the Early Works Project although there is one dated 2 June 2010 for the Basement Car Parking Project (**Basement Car Parking RAP**).

5

The applicant places Ground 2 at the forefront of its submissions. Clause 17(1)(c) of SEPP 55 mandates that all remediation work must be carried out in accordance with "in the case of a category 1 remediation work-a plan of remediation, as approved by the consent authority, prepared in accordance with the contaminated land planning guidelines".

6

The "category 1 remediation work" referred to in cl 17(1)(c) is described in cl 9 of SEPP 55. The applicant relies on cl 9(d): "development for which another State environmental planning policy ...requires development consent". The applicant says that consent was required

by State Environmental Planning Policy (Major Projects) 2005, as it was then called (**Major Development SEPP**). The "contaminated land planning guidelines" referred to in cl 17(1)(c) are the State government's guidelines entitled "Managing Land Contamination Guidelines SEPP 55 - Remediation of Land" (**SEPP 55 Guidelines**). They require a RAP to be prepared by an appropriately qualified consultant in accordance with the Environmental Protection Authority's "Contaminated Sites: Guidelines for Consultants Reporting on Contaminated Sites" (**Consultants Guidelines).**

7

The applicant claims that the RAPS do not comply with the SEPP 55 Guidelines as informed by the Consultants Guidelines because they are incomplete in that they do not provide site specific criteria as to acceptable levels of contamination and in other respects.

8

In addition to declaratory relief, the applicant seeks injunctive relief preventing Lend Lease and BDA proceeding with the two projects. This relief is sought on two bases: the invalidity of the project approvals, and because (pursuant to Ground 2) to proceed with the carrying out of the projects would conflict with the requirements of SEPP 55.

9

The respondents contend, among other things, that cll 17(1)(c) and 7 are inapplicable and in any event have been complied with. The respondents broadly adopt each other's submissions subject to three express qualifications by the Minister.

10

I would have upheld Ground 2, rejected the other grounds and granted relief.

11

However, on 2 March 2011, about two weeks after the completion of he hearing, there was an extraordinary development which spelt the death knell of Ground 2. The Minister made an order under s 75R(3A) of the *EPA Act* amending SEPP 55 by providing that cl 17 and a closely related provision, cl 8(4), do not apply to these two projects. Accordingly, I must reject Ground 2 and dismiss the proceedings.

12

The applicant would have succeeded in the proceedings on the basis of Ground 2 but for the 2011 amendment. This is relevant to the question whether the respondents should pay the applicant's costs and, given the lateness of the 2011 amendment, whether the Minister should pay those costs on an indemnity basis. I therefore propose to set out my reasons why the applicant would have succeeded on Ground 2 but for the 2011 amendment. I will also address the costs question.

A. BACKGROUND

Barangaroo

13

The Basement Car Parking Project and the Early Works Project involve the carrying out of work at Barangaroo, which is located at Miller's Point on the northern end of Darling Harbour adjoining the north-western edge of the Sydney central business district. Barangaroo has an area of 22 hectares with 1.4 kilometres of harbour foreshore on its western and northern sides. The majority of the Barangaroo site is owned by BDA, with other government entities owning land within the

site.

14

Currently, Barangaroo is covered by hard surfacing, including concrete and bitumen, with only a few structures and large light towers. A cruise passenger terminal is located on the site. The proposed works will expose contaminated or potentially contaminated soil.

15

Barangaroo has been identified for urban renewal by the NSW State government. The redevelopment proposed by the concept plan approved under Part 3A of the *EPA Act* provides for approximately half of Barangaroo, comprising the northern and western parts, to be dedicated to parkland and public open space with a new Headland Park and Northern Cove at the northern end; and about 489,500 m 2 of commercial, residential, tourism and community space in the development zone.

16

The *Barangaroo Delivery Authority Act* 2009 constituted BDA and gave BDA responsibility for the development of Barangaroo. Section 3 states the objects of the Act:

The objects of this Act are as follows:
(a) to encourage the development of Barangaroo as an active, vibrant and sustainable community and as a location for national and global business,
(b) to create a high quality commercial and mixed use precinct connected to and supporting the economic development of Sydney,
(c) to facilitate the establishment of Barangaroo Headland Park and public domain land,
(d) to promote the orderly and sustainable development of Barangaroo balancing social, economic and environmental outcomes,
(e) to create in Barangaroo an opportunity for design excellence outcomes in architecture and public domain design.

17

On 20 December 2009, the Premier announced that Lend Lease had been selected as the developer of Stage 1 comprising Blocks 1-4 on

the southern portion of the site. On 5 March 2010, a contract was entered into between BDA and Lend Lease for the development of Stage 1.

18
BDA's Early Works Project is at the northern end of Barangaroo where it is proposed to build Headland Park in two stages: the Early Works and the Main Works. The Early Works include extraction of up to 60,000 m 3 of sandstone from beneath the existing concrete apron for reuse within Barangaroo, and the shaping and filling of Headland Park including receipt of some 150,000 m 3 of fill from the Basement Car Parking Project.

19
Lend Lease's Basement Car Parking Project is at the southern end of Barangaroo within what is sometimes called Stage 1. It involves bulk excavation and construction of a basement car park to accommodate up to 880 car parking spaces and associated services and infrastructure to support the initial phases of the future development of Stage1.

Barangaroo is contaminated

20
Barangaroo has been used for a range of shipping and industrial purposes over the years, a number of which involved contaminating activities, including the use of part of the site as a gasworks.

21
On 28 May 2007, the Environment Protection Authority (**EPA**) declared a portion of Barangaroo coinciding with the former gasworks as an investigation area, pursuant to s 15(1) of the *Contaminated Land*

Management Act 1997, as it then was (**Investigation Order**). On 6 May 2009, the EPA declared some of that area to be a Remediation Site, pursuant to s 21 (**Remediation Site Declaration**).

22

Environmental site assessments of Barangaroo, including by Environmental Resources Management Australia (ERM) in 2007 and 2008, identified high levels of soil and groundwater contamination in the area associated with the former gasworks and its immediate vicinity and lesser contamination of soil elsewhere on the site. Exceedences of the assessment criteria for groundwater were also, with minor exceptions, located within the gasworks footprint. The ERM assessments recommended remedial measures to mitigate risks posed by contaminated soil and groundwater to human and environmental receptors, and to render Barangaroo suitable for the intended future mix of land uses.

23

Although the old gasworks site is the most severely contaminated, there is significant contamination of the areas of the subject project approvals which requires remediation because it constitutes risks to human health and the environment by exposing workers and others to contaminants during the carrying out of work and the completed works will also raise issues about potential exposure to contaminants.

24

As regards contamination and remediation of the Basement Car Parking Project site, the Director General's report to the Minister identified the key environmental issues as including remediation and waste management in relation to which it identified the actual and potential contamination and remediation measures as follows.

5.1 Remediation and Waste Water Management

Barangaroo has been used for wharf/port related activities since the 1800s. Original finger wharves were removed and the site was largely filled in 1961-1968 for the construction of longshore berthage, with some additional filling in the north of the site (area of former Southern Cove) in the late 1980s or early 1990s. The primary potential for contamination at Barangaroo is associated with uncontrolled fill used in various stages of site reclamation and potential migration of contamination from the former gasworks site located to the north and northeast. Based on soil and groundwater testing, the relevant contaminants of concern are:

Fill : could include metals, TPH, BTEX, PAHs, PCBs, OCPs, VOCs, SVOCs, asbestos.
Gasworks : could include metals, TPH, BTEX, PAHs, phenols, sulphate, cyanide, ammonia.
There is also potential for Acid Sulphate Soils (ASS) and hazardous building materials such as lead, PCBs, asbestos to be present.

It is important to note however, that no part of the site the subject of this Project Application falls within the DECCW Declaration Area associated with the former gasworks site. As detailed previously in this report, a separate Project Application will be submitted in the future for the remediation of this land.

The *Overarching Remedial Action Plan* for Barangaroo prepared by ERM and *Remedial Action Plan Other Remediation Works (South) Area* prepare by AECOM establish the endorsed remediation activities for Stage 1 of the Barangaroo development including the subject site. The proposed remediation works will be undertaken in conformance with these two RAPs and the detailed Human Health and Ecological Risk Assessment (HHERA).

The preferred remediation strategy for the Project Application Site is to remediate the contaminated soil which is either a source of groundwater contamination and/or a risk to human health. Therefore the remedial process is focused on soil remediation technologies. Active groundwater remediation is not currently proposed as the groundwater contamination will be addressed by removing the contaminated soil.

The treatment of contaminated material is proposed to be through the ex-situ solidification or stabilisation of materials. Chemical additives will be blended into the contaminated soil to reduce its toxicity and limit solubility and mobility. This is a proven method of treating a broad range of contaminants including petroleum hydrocarbons, PAHs and metals.

Suitably treated and excavated material will be re-used across the broad Barangaroo site to minimise the need to import fill for public domain works, and the creation of the Headland Park. The treated material will be validated to ensure suitability for use at the Headland Park, or any other parts of the Barangaroo site as appropriate (subject to further necessary approvals). Temporary stockpiling may be required across the Barangaroo site to store excavated and (where relevant) suitably treated material. Material unsuitable or unavailable for re-use on-site will be disposed offsite at a suitable waste management facility.

25

The contaminants referred to in the above quotation include asbestos. The acronyms for the contaminants referred to are explained in the Overarching RAP: TPH is total petroleum hydrocarbons; BTEX is benzene and some related compounds; PAH are polycyclic aromatic hydrocarbons; PCBs are polychlorinated biphenyls; OCPs are organochlorine pesticides; VOCs are not expressly defined but appear to refer to volatile organic compounds; SVOCs refer to semi volatile organic compounds.

26

As regards contamination and remediation of the Early Works Project site, the Director-General's Report to the Minister also identified the key environmental issues as including remediation and waste management, in relation to which it identified the actual and potential contamination and remediation measures as follows:

5.3 Contamination and Remediation

Previous environmental investigations conducted at Barangaroo have identified a number of contamination issues, principally associated with fill materials, natural soil and ground water within the footprint of a former gasworks (located in southern half of Barangaroo), which require remediation/management.

On the Headland Park site, limited contamination of fill materials was identified, being restricted to Total Petroleum Hydrocarbon (TPH), Polycyclic Aromatic Hydrocarbon (PAH) and metal impacted fill materials. No significant contamination of groundwater was identified.

In accordance with the site-wide Remediation Action Plan an Early Works Remedial Action Plan (RAP) is being prepared to document the procedures and standards to be followed in order to manage the risks posed by contamination anticipated to be encountered during the proposed Early Works. The following remediation/management approach is proposed to be adopted in the Early Works RAP.

...

The proposed Early Works RAP will be prepared and approved by the site auditor prior to

the commencement of works on site. To mitigate any potential adverse contamination impacts arising from the proposed early works, the following mitigation measures will be employed by the Proponent:

- Adoption and implementation of an Early Works RAP prior to the commencement of works on site;
- Preparation of a Human Health and Ecological Risk Assessment (HHERA), to establish a risk-based criteria which formed part of a Site Acceptance Criteria for the Headland Park Site;

...

The Proponent has addressed these concerns [concerning contamination] in the PPR, which details that the EA for the Early Works Project Application has addressed contamination issues in accordance with all relevant DECCW guidelines, and independently audited by DECCW Accredited Site Auditor. A draft Detailed Remedial Action Plan (D-RAP) and draft Human Health and Ecological Risk Assessment (HHERA) has been prepared and submitted to the Site Auditor for review. Once the HHERA is finalised, the site criteria will be incorporated into a Detailed Remediation Work Plan (D-RWP) for the Headland Park.

...

At this stage of the process, the areas of the Headland Parks site shown in Figure 13 below have been identified as being subject to contamination. It should be noted that this represents approximately 15,000 m 3 in area and comprises an approximate in situ (unbulked) volume of 20,000 m 3 . These areas and volumes may, however, change as a result of the proposed additional delineation investigations and related revisions to the risk-based criteria.

Part 3A EPA Act project approval process

27

The case is concerned with project approvals under Part 3A (ss 75A - 752A) of the *EPA Act* . Part 3A was inserted by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act* 2005, most of which commenced on 1 August 2005.

28

Part 3A establishes a much less prescriptive regime than Part 4 for development assessment and approval and makes the Minister the approval authority for the "carrying out" of development that is declared under s 75B to be a project to which it applies by a SEPP or by order of the Minister published in the Gazette. The kind of development that may be declared includes "major infrastructure or other development that, in the opinion of the Minister, is of State or regional environmental planning significance": s 75B(2)(a).

29

One of the aims of *State Environmental Planning Policy (Major Projects)* 2005 (**Major Development SEPP**) (now called the *State Environmental Planning Policy (Major Development) SEPP* 2005) is "to identify development to which the development assessment and approval process under Part 3A of the Act applies": s 2(a). Another aim is to rationalise and clarify the provisions making the Minister the approval authority for development of "sites of State significance": s 2(e).

30

Under Part 3A of the EPA the Minister may approve a concept plan for a project: Division 3 (ss 75M - s 75Q).

31

The sequence of provisions of Part 3A for approval to carry out a project is set out in Division 2 as follows. The proponent may apply for the approval of the Minister to carry out the project: s 75E. The Director-General prepares and notifies the proponent of the Director-General's environmental assessment requirements (**EARs**): s 75F. The proponent prepares the environmental assessment (**EA**) and submits it to the Director-General: s 75H(1). The Director-General

decides whether the EA is adequate for public exhibition: s 75H(2). The public make submissions with reference to the proponent's environmental assessment: s 75H(3) and (4). The Director-General may require the proponent to submit as a response to the issues raised in the submissions, a preferred project report (**PPR**) that outlines any proposed changes to the project to minimise its environmental impact and any revised statement of commitments: s 75H(6). The Director-General's report on a project (**DG Report**) is to be given to the Minister "for the purposes of the Minister's consideration of the application for approval to carry out the project" (**DG report**): s 75I(1). The report is to include the documents listed in s 75I(2) which include the EA and a statement relating to compliance with the EARs. The Minister is bound to consider the documents nominated in s 75J(2)(a) to (c). Those documents are the DG report and the reports, advice and recommendations contained in the DG report; any advice of the proponent's portfolio Minister if the proponent is a public authority; and any findings or recommendations of the Planning Assessment Commission following a review in respect of the project. It is unnecessary for me to express a view on dicta that the Minister is not bound to (but may) consider any other documents, such as the EA itself: *Tugun Cobaki Alliance Inc v Minister for Planning and RTA* [2006] NSWLEC 396 at [124].

32

On 22 March 2006 the Minister recorded his opinion under cl 6(1) of the Major Development SEPP that the Barangaroo development was of a kind described in cl 10(1)(d) of Schedule 2 of the SEPP; namely, development with a capital investment value of more than $5 million within an identified area, and was therefore a project to which Part 3A of the *EPA Act* applied.

33

On 9 February 2007 the Minister approved a concept plan for a project at Barangaroo under s 75O of the *EPA Act* . The concept plan has been modified on four occasions.

34

Under the concept plan as modified, Barangaroo has been divided into three development areas (from north to south): Headland Park, Barangaroo Central and Barangaroo South (also known as Barangaroo Stage 1).

35

On 12 October 2007 Barangaroo was rezoned to facilitate its redevelopment by an amendment to Schedule 3 of the Major Development SEPP which inserted a new Part 12. By cl 7 of Part 12 the site is divided into two zones: Zone RE1 Public Recreation to the north and Zone B4 Mixed Use to the south.

36

In 2010, approvals were sought for the carrying out of the Basement Car Parking Project and the Early Works Project.

37

The EA dated 23 June 2010 for the Early Works Project stated that the proposed early works will include the following components: site establishment including security arrangements; demolition works; site investigation; environmental protection measures; existing services modifications; heritage protection; extraction of up to 80,000 m 3 of sandstone (later reduced to 60,000 m 3); and the receipt, management and retention of up to 150,000 m 3 of fill from Stage 1.

38

A preliminary assessment accompanying the Basement Car Parking

Project approval application dated 18 February 2010 stated that it sought approval for bulk excavation of basement areas to varying levels within Blocks 1 to 3; construction of basement car parking areas and indicative allocation of car parking spaces; demolition; remediation of contaminated material; and provision of sustainability infrastructure. It estimated that approximately 300,000 m 3 of material will be excavated and that consideration will need to be given to the presence of contaminated material and the need for any remediation where required in accordance with a RAP (or environmental management plan).

39

On 3 May 2010, the Director-General's EARs were issued for both projects under s 75F of the *EPA Act* . The EARs identified SEPP 55 as one of the relevant environmental planning instruments applicable to the site. They required to the EAs to address SEPP 55 as one of the "key issues" and to outline the nature and extent of any non-compliance with it and any justification for non-compliance. They included requirements that a site wide RAP and detailed works RAP for the relevant section of the site be prepared in accordance with the Consultants Guidelines; that the latter RAP must clearly demonstrate that the site will be remediated; and that the plans must be audited by an EPA accredited site auditor and include a site audit statement detailing the findings.

40

That position taken by the Director-General of the Department of Planning seems at odds with the position now taken by the Minister for Planning that cl 17(1)(c) of SEPP 55, which requires RAPS, is inapplicable.

41

In partial compliance with those requirements, a site wide RAP for Barangaroo dated 1 June 2010 (**Overarching RAP**), commissioned by BDA, was prepared by ERM. It was included in the EA for both project applications.

42

In addition, in relation to the Basement Car Parking Project, a site specific RAP dated 2 June 2010 commissioned by Lend Lease was prepared by AECOM Australia Pty Ltd (**Basement Car Parking RAP**) **. I** t was included in the EA for that project approval application.

43

No site specific RAP for the Early Works Project was finalised.

44

In June 2010, a site audit report on the Overarching RAP from an EPA accredited auditor was provided

45

On 3 June 2010 a letter from the same EPA accredited auditor relating to the Basement Car Parking RAP was provided. The letter stated that it did not constitute a site audit report or a site audit statement.

46

On or about 23 June 2010, the proponent's EA for the Early Works Project was submitted to the Department of Planning. From 14 July 2010 to 12 August 2010 it was publicly exhibited. The EA stated that (a) the Overarching RAP was determined by the site auditor to have fulfilled the requirements of SEPP 55 and the Consultants Guidelines and (b) it is considered that the requirements of SEPP 55 have been met by the Overarching RAP as confirmed by the site audit statement. As analysis of the site auditor's report will show (see below), the first

statement was incorrect; and, as these reasons will show, the second statement was not supportable in terms of cl 17(1)(c) of SEPP 55.

47

On or about 21 June 2010 the proponent's EA for the Basement Car Parking Project was submitted to the Department of Planning. From 7 July 2010 to 5 August 2010 it was publicly exhibited.

48

A submission by the Department of Environment, Climate Change and Water (**DECCW**) to the Department of Planning dated 24 August 2010 concerning the Early Works EA stated:

The need to better identify the existence and extent of contaminated material which will be excavated to ensure appropriate treatment prior to placement at the headland park site. The proponent needs to ensure completion of and compliance with the relevant assessments and plans - i.e. Remediation Action Plan and Human Health and Ecological Risk Assessment, including addressing all the issues raised by the Site Auditor.

49

On or about 20 September 2010 Lend Lease responded to the issues raised in public submissions on the Basement Car Parking Project in a PPR submitted to the Department of Planning, which stated:

A Draft Detailed Remedial Action Plan (D-RAP) and Draft Human Health and Ecological Risk Assessment (HHREA) has been prepared and submitted to the Site Auditor for review. Once the HHERA is finalised, the site criteria will be incorporated into a Detailed Remedial Work Plan (D-RWP) for the Headland Park. In addition, the extent of contaminated material requiring excavation within the Headland Park Site will be defined by survey and will likely be based on additional delineation investigations.

50

Likewise, on 24 September 2010, BDA responded to the issues raised in public submissions on the Early Works Project in a PPR submitted to the Department of Planning.

51

In October 2010, the DG report for the Basement Car Parking Project,

was provided to the Minister.

52

In November 2010, the DG report for the Early Works Project was provided to the Minister. It noted that, at the time of writing an Early Works RAP was being prepared and that it would be approved by the site auditor prior to commencement of works on site. In addition, it included timetabling for the preparation of various contamination and remediation studies and plans, including an Early Works RAP. The timetabling reflects that provided for in the Statement of Commitments in the PPR (set out below).

53

In fact, an Early Works RAP has not been finalised and provided to the Minister.

54

On 2 November 2010 the Minister granted approval to the carrying out of Basement Car Parking Project. The approval was expressed to apply (inter alia) to the proponent's Statement of Commitments set out in Schedule 3, subject to the conditions in Schedule 2.

55

On 8 November 2010 the Minister granted approval to the carrying out of the Early Works Project. The approval was expressed to apply (inter alia) to the proponent's Statement of Commitments set out in Schedule 3, subject to the conditions in Schedule 2.

56

A condition of each project approval required the proponent to "provide a copy of the Amended Remediation Action Plan and the Human Health and Ecological Risk Assessment to DECCW prior to

implementation". Significantly, there was no provision for them to be provided to or approved by the Minister.

57

A condition of each approval required the development to be undertaken in accordance with (inter alia) the respective EA and PPR.

58

The following timetabling in BDA's statement of commitments under the heading "Contamination" shows that no finalised Early Works RAP is to be assessed and approved by the Minister:

Commitments

1. Adoption and implementation of an Early Works RAP prior to the commenc

2. Preparation of a Human Health and Ecological Risk Assessment to establis form part of the Site Acceptance Criteria for the Headland Park site;

3. Preparation and adoption of a Remediation Environmental Management Pl and management measures required to control the environmental impacts of t the validation protocols are being addressed.

4. Preparation and adoption of a Remediation Occupational Health and Safety document the procedures to be followed to manage the risks posed to the hea workforce.

5. Upon completion of the Early Works program, a validation report document

the Early Works program will be prepared by the Remediation Consultant to b for certification that the Early Works have been carried out in accordance with RAP.

6. Reports as required by Commitments 1-5 above will be provided to the Site DECCW

59

In relation to the Basement Car Parking approval, paragraph 1.3 of Lend Lease's Statement of Commitments stated:

The remediation works will be undertaken to make the site suitable for the proposed uses as envisaged under the Concept Plan.

Remediation works will be undertaken in conformance with the Overarching RAP (ERM) and the site specific RAP (AECOM).

A HHERA will be prepared and set to detail specific remediation works.

...

Lend Lease will obtain a Section B Site Audit Statement for the proposed remediation works and will provide a copy to DECCW prior to obtaining the relevant construction certificate.

60

In granting approval for the carrying out of the two projects, the Minister had before him documents totalling about 2300 pages in the case of the Basement Car parking Project and about 1,600 pages in the case of the Early Works Project, comprising in each case a Department of Planning briefing note and the attachments thereto, namely the:

(a)

DG report to which were appended the voluminous EA (notified by an electronic reference and on a compact disc), submissions, proponent's response to submissions, the Department of Planning's consideration of environmental planning instruments including SEPP 55, and recommended conditions of approval; and

(b)

project approval instrument

B. GROUND 2 - NON-COMPLIANCE WITH CL 17(1)(C) SEPP 55

61

Ground 2 is not a challenge to the validity of the project approvals. Rather, the applicant alleges that the proponents are intending to carry out work pursuant to the project approvals in breach of cl 17(1)(c) of SEPP 55 and seeks injunctive relief to prevent the alleged apprehended breach. Ground 2 does not depend upon SEPP 55 applying to the Project approvals, only to the carrying out of the works (as to the possibility of SEPP 55 applying to the approvals, see Ground 3).

62

As noted at [10] - [12] above and explained further when discussing costs below, the Minister's 2011 amendment to SEPP 55 made cl 17 and a closely related provision, cl 8(4), inapplicable to these two projects, thereby destroying Ground 2. It was on 2 March 2011 that the Minister exercised his power under s 75R(3A) of the *EPA Act* to amend SEPP 55 by an order published on the NSW legislation website, as follows:

1 Name of Order
This Order is the Environmental Planning and Assessment Amendment (State Environmental Planning Policy No 55-Remediation of Land) Order 2011.

2 Commencement
This Order commences on the day on which it is published on the NSW legislation website.

3 Amendment of State Environmental Planning Policy No 55-
Remediation of Land

Clause 19A
Insert after clause 19:

19A Application of SEPP to certain development at Barangaroo subject to Part 3A approvals
(1) This clause applies to development that is the subject of the following project approvals under Part 3A of the Act:
(a) project application number 10_0023, approved by the Minister for Planning on 2 November 2010,
(b) project application number 10_0047, approved by the Minister for Planning on 8 November 2010.
(2) To avoid doubt, the following provisions of this Policy do not apply to the carrying out of development to which this clause applies:
(a) clauses 8 (4) and 17,
(b) any other provision of this Policy that prohibits or restricts the carrying out of that development.

63

It is unnecessary to consider whether the 2011 amendment has retrospective effect because cl 17 is concerned with the carrying out of remediation work and, as it happens, such work under the subject projects has not yet commenced.

64

But for the Minister's amendment, I would have upheld Ground 2. That is relevant to the question whether the respondents should be ordered to pay the applicant's costs. Consequently, I will set forth the reasons why I would have upheld Ground 2 but for the 2011 amendment. What follows therefore assumes that the 2011 amendment had not been made.

65

Until the 2011 amendment, SEPP 55 was last amended prior to the introduction of Part 3A of the *EPA Act* in August 2005. Therefore SEPP 55 uses the language of Part 4 of the *EPA Act* dealing with development assessment and approval, and not the language of Part 3A.

66

The important object and aims of SEPP 55 are set out in cl 2:

2 Object of this Policy

(1) The object of this Policy is to provide for a Statewide planning approach to the remediation of contaminated land.
(2) In particular, this Policy aims to promote the remediation of contaminated land for the purpose of reducing the risk of harm to human health or any other aspect of the environment:
(a) by specifying when consent is required, and when it is not required, for a remediation work, and
(b) by specifying certain considerations that are relevant in rezoning land and in determining development applications in general and development applications for consent to carry out a remediation work in particular, and
(c) by requiring that a remediation work meet certain standards and notification requirements.

67

Clause 17(1)(c) of SEPP 55 provides:

17 Guidelines and notices: all remediation work

(1) All remediation work must, in addition to complying with any requirement under the Act or any other law, be carried out in accordance with:
...
(c) in the case of a category 1 remediation work-a plan of remediation, as approved by the consent authority, prepared in accordance with the contaminated land planning guidelines.

68

Clause 8(4) of SEPP 55 provides that:

8 Remediation work permissible

...
(4) A person who carries out a remediation work must ensure that clause 16 (if it applies) and clauses 17 and 18 are complied with in relation to the work.

69

Clause 7(1), to which Ground 3 relates, should also be considered here because there is an overlapping issue concerning the use of Part 4 language in both cl 17 and cl 7(1):

7 Contamination and remediation to be considered in determining development application

(1) A consent authority must not consent to the carrying out of any development on land unless:
(a) it has considered whether the land is contaminated, and
(b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
(c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose

70

"Category 1 remediation work" referred to in cl 17(1)(c) is defined in cl 9. The applicant relies solely on cl 9(d). Clause 9 provides in part:

9 Category 1 remediation work: work needing consent

For the purposes of this Policy, a category 1 remediation work is a remediation work (not being a work to which clause 14 (b) applies) that is:
(a) designated development, or
(b) carried out or to be carried out on land declared to be a critical habitat, or
(c) likely to have a significant effect on a critical habitat or a threatened species, population or ecological community, or
(d) development for which another State environmental planning policy or a regional environmental plan requires development consent, or
...

71

In terms of cl 9(d), the applicant submits that the subject remediation work is development for which the Major Development SEPP, in cll 8(2) and 9(2) of Part 12 (entitled "Barangaroo site") of Schedule 3, requires development consent.

72

Under the Major Development SEPP the Barangaroo site is divided into two zones: Zone B4 Mixed Use and Zone RE1 Public Recreation: cl 7 of Part 12 of Schedule 3. The Early Works Project is to be carried out wholly or substantially within the Public Recreation Zone. Pursuant to cl 9(2) and (3), development for certain identified purposes may be carried out "with consent" within that zone but otherwise development

is prohibited. The Basement Car Parking Project is to be carried out within the Mixed Use zone. Pursuant to cl 8(2), development may be carried out for any purpose "with consent" within that zone unless it is prohibited under cl 8(3).

73

Clauses 6 to 9 are among the clauses within Division 3 (titled "Provisions applying to development within Barangaroo site") of Part 12 of Schedule 3 of the Major Development SEPP. Clause 6 provides:

This Division applies with respect to any development within the Barangaroo site and so applies whether or not the development is a project to which Part 3A of the Act applies.

74

"Consent authority", referred to in cl 17(1) and cl 7 of SEPP 55, is defined in cl 10(1) of that SEPP in relation to a development application as follows:

10 Consent authority in relation to remediation works

(1) The consent authority in relation to a development application for consent to carry out a remediation work is:

(a) the person or authority that, in accordance with a provision made by an environmental planning instrument that applies to the land, is the consent authority for the development, or

(b) in default of any such provision:

(i) the council for the local government area in which the land is situated, or

(ii) the Western Lands Commissioner, if the land is within the unincorporated area.

(2) (Repealed)

This definition differs from the definition of "consent authority" in s 4 of the *EPA Act* .

75

"Development consent", referred to in cl 9(d) of SEPP 55, and "development application", referred to in the cl 10 definition of "development authority", are defined in s 4 of the *EPA Act* as follows:

development consent means consent under Part 4 to carry out development and includes, unless expressly excluded, a complying development certificate.

development application means an application for consent under Part 4 to carry out development but does not include an application for a complying development certificate.

76

Clause 4(1) of SEPP 55 defines the "contaminated land planning guidelines", referred to in cl 17(1)(c), as guidelines under s 145C of the *EPA Act.* They are the State Government's guidelines titled "Managing Land Contamination Guidelines SEPP 55 - Remediation of Land" 1998 (**SEPP 55 Guidelines**). Apart from their relevance to cl 17(1)(c), substantial compliance with the SEPP 55 Guidelines exempts a planning authority from liability for anything done or omitted to be done in good faith in exercising prescribed planning functions. In that regard, ss 145B and 145C of the *EPA Act* relevantly provide:

145B Exemption from liability-contaminated land

(1) A planning authority does not incur any liability in respect of anything done or omitted to be done in good faith by the authority in duly exercising any planning function of the authority to which this section applies in so far as it relates to contaminated land (including the likelihood of land being contaminated land) or to the nature or extent of contamination of land.
(2) this section applies to the following planning functions:
(a) the preparation or making of an environmental planning instrument, including a planning proposal for the proposed environmental planning instrument,
(b) the preparation or making of a development control plan,
(c) the processing and determination of a development application and any application under Part 3A,
(d) the modification of a development consent,
(d1) the processing and determination of an application for a complying development certificate,
(e) the furnishing of advice in a certificate under section 149,
(f) anything incidental or ancillary to the carrying out of any function listed in paragraphs (a)-(e).
(3) Without limiting any other circumstance in which a planning authority may have acted in good faith, a planning authority is (unless the contrary is proved) taken to have acted in good faith if the thing was done or omitted to be done substantially in accordance with the contaminated land planning guidelines in force at the time the thing was done or omitted to be done.
(4) This section applies to and in respect of:
(a) a councillor, and
(b) an employee of a planning authority, and
(c) a public servant, and
(d) a person acting under the direction of a planning authority,
in the same way as it applies to a planning authority.

145C Contaminated land planning guidelines

(1) For the purposes of section 145B, the Minister may, from time to time, give notice in the Gazette of the publication of planning guidelines relating to contaminated land and that a copy of the guidelines may be inspected, free of charge, at the principal office of each council during ordinary office hours.
...

77

Paragraph 4.4.5 of the SEPP 55 Guidelines says that a RAP "must be prepared by an appropriately qualified consultant in accordance with the EPA's guidelines (1997b). For further information, see Chapter 3". Those 1997 guidelines are the Environment Protection Authority's (**EPA**) "Guidelines for Consultants Reporting on Contaminated Sites" (**Consultants Guidelines**).

78

The heart of the applicant's Ground 2 challenge is that in this case the RAPS do not comply with SEPP 55 Guidelines as informed by the Consultants Guidelines and therefore do not comply with cl 17(1)(c) of SEPP 55.

79

Section 75R(2) within Part 3A of the *EPA Act* provides:
75R Application of other provisions of Act

...
(2) Part 3 and State environmental planning policies apply to:
(a) the declaration of a project as a project to which this Part applies or as a critical infrastructure project, and
(b) the carrying out of a project, but (in the case of a critical infrastructure project) only to the extent that the provisions of such a policy expressly provide that they apply to and in respect of the particular project.

80

As s 75R(2)(b) provides that SEPPs apply to the "carrying out" of a

Part 3A project (subject to an immaterial exception), the provisions of SEPP 55 are potentially applicable to Part 3A projects if they are referable to the "carrying out" of work. Clause 17(1)(c) of SEPP 55 is such a provision because it is expressly referable to the carrying out of work. The application of SEPP 55 according to its terms with respect to Barangaroo is confirmed by cl 3 in Part 12 (titled "Barangaroo Site") of Schedule 3 of the Major Development SEPP, which provides:

3 Relationship with other environmental planning instruments

The only environmental planning instruments that apply, according to their terms, to or in respect of development on land within the Barangaroo site are this Policy and all other State environmental planning policies except *State Environmental Planning Policy No 1-Development Standards* .

81

The steps in the applicant's argument are as follows:

(a)

cl 17(1)(c) of SEPP 55 applies to the carrying out of the Early Works Project and the Basement Car Parking Project because remediation work required to be carried out as part of those projects are "category 1 remediation works" within the meaning of cl 9(d). Insofar as cll 17(1)(c) and 9(d) use Part 4 *EPA Act* language, an intention is manifest that they extend to the carrying out of work under a Part 3A approval;

(b)

there is no RAP approved by the consent authority and prepared in accordance with the SEPP 55 guidelines referred to in cl 17(1)(c); and

(c)

the proponents propose to carry out the remediation work in the absence of such a RAP in contravention of cl 17(1)(c).

82

The respondents submit that cl 17(1) of SEPP 55 does not apply to the carrying out of the work permitted by the approvals for the following reasons:

(a)

cl 17(1)(c) is inapplicable to Part 3A remediation work because it uses Part 4 language of

"consent authority", the definition of which in cl 10 does not include the Minister giving Part 3A approval;

(b)

in any event, the approved work is not "category 1 remediation work" within the meaning of cl 9(d) because cl 9(d) also uses Part 4 language of "development consent", and cll 8 and 9 of the *Major Development SEPP* (on which the applicant relies) do not require "development consent" only "consent";

(a)

even if cl 17(1)(c) is applicable, it has been satisfied by the Overarching RAP strengthened, in the case of the Basement Car Parking Project, by the Basement Car Parking RAP (there is no site-specific Early Works RAP).

83

BDA, supported by Lend Lease, also makes the submission, which the Minister as well as the applicant contest, that the "plan of remediation" referred to in cl 17(1)(b) is not a "remedial action plan" (RAP) referred to in the SEPP 55 Guidelines. I reject the submission. In my opinion, the two expressions are synonymous. This is reflected in the SEPP 55 Guidelines [3.5.4] which states that a "RAP, or plan of remediation, should be based on the information from investigations and on the proposed land use".

Whether SEPP 55 applies despite the use of Part 4 language

84

SEPP 55 was made and (prior to the 2011 amendment) last amended before the introduction of Part 3A into the *EPA Act* in August 2005. Therefore, SEPP 55 uses Part 4 language because that was the only relevant statutory language when it was made. Clauses 17(1)(c) and 7(1) use Part 4 language (" consent authority"), which is defined in cl 10 in relation to a "development application", and cl 9(d) also uses defined Part 4 language ("development consent").

85

The question is whether the language of SEPP 55 is, as the applicant submits, generic - that is, capable of encompassing Part 3A notions - or, as the respondents submit, specifically crystallized and attaching only to Part 4 notions.

86

On the respondents' proposed construction, SEPP 55, which provides for a Statewide planning approach to the remediation of contaminated land is relevantly inapplicable. This may be thought surprising, particularly as the environmental assessment requirements (EARs) of the Director-General of the Department of Planning identified SEPP 55 as a relevant environmental planning instrument applicable to the Barangaroo site: see [39] above.

87

Words and expressions in a statutory instrument have the same meanings as they have in the Act under which the instrument is made, unless a contrary intention appears in the statutory instrument: ss 5, 11, *Interpretation Act* 1987. SEPP 55 is a statutory instrument made under the *EPA Act.*

88

"Development consent" is defined in s 4 of the *EPA Act* as "consent under Part 4 to carry out development". Therefore "development consent" in cl 9(d) means consent to carry out development under Part 4 of the *EPA Act* and not an approval to carry out a project under Part 3A unless a contrary intention appears in SEPP 55. Likewise, "consent authority" in cl 17(1)(c) has, in relation to a "development application", the meaning attributed to that expression in cl 10 which does not include the Minister granting approval under Part 3A unless a contrary intention appears. However, the definition of "consent authority" is not

exhaustive as it is only "in relation to a development application" (a Part 4 term) and does not necessarily preclude a consent authority being the Minister with power to grant Part 3A project approval.

89

The applicant submits that a contrary intention to the definitions is evinced such that "development consent" in cl 9(d) should be construed as including a Part 3A approval and "consent authority" in cl 17(1)(c) and cl 7(1) should be construed as including the Minister empowered to approve under Part 3A.

90

If the statutory definition of "development consent" is put to one side for a moment, the term can be read in one of two ways. One is the purely Part 4 concept. The other is the ordinary, generic meaning of consent for development. A Part 3A approval is a consent for development in the generic sense even though Part 3A prefers alternative language. Examples of the use of "development consent" in the generic sense appear in documents in evidence using the terms "development consent" and "consent authority" in the context of the subject Part 3A approvals, including the Director-General's reports to the Minister; and even experienced counsel in Part 3A cases, including this one, occasionally slip into using such terms.

91

Where the Major Development SEPP uses a generic term such as "consent", it clearly includes a Part 3A approval: eg cl 14 of Part 12 of Schedule 3 The Major Development SEPP plainly is intended to incorporate references to both Part 4 and Part 3A. The applicant submits that the same reading can be given to SEPP 55. That is the burden of the applicant's contrary intention submission.

92

In my view, the following factors support that contrary intention, substantially as submitted by the applicant.

93

First, the legislature plainly intended in s 75R(2) that at least some SEPPs would apply to the carrying out of work under Part 3A as at August 2005 when Part 3A commenced. This stops short of saying that s 75A(2) is a deeming provision, that is, deeming that all references to Part 4 language in a SEPP should be construed as Part 3A language. If the respondents are right on their rigorous adherence to Part 4 language not being relevant to Part 3A projects, then most SEPPS in force when Part 3A commenced will not apply to Part 3A projects because they tended to use Part 4 language, which was the only relevant statutory language.

94

It is reasonable to suppose that the legislature intended s 75R(2) to be a meaningful provision and that provisions of SEPPs in force when Part 3A commenced would not automatically be outside its ambit merely because these SEPPS used the only language known to them, being Part 4 language.

95

Second, the object of SEPP 55 is "to provide for a Statewide planning approach to the remediation of contaminated land": cl 2(1). In particular, SEPP 55 "aims to promote the remediation of contaminated land for the purpose of reducing the risk of harm to human health or any other aspect of the environment by requiring that a remediation work meet certain standards and notification requirements": cl 2(2)(c). Those two provisions are supportive of a generic, State-wide approach to remediation.

96

Third, cl 19(1) of SEPP 55 provides that if SEPP 55 is inconsistent with another State environmental planning policy, SEPP 55 prevails (subject to immaterial exceptions). Clause 19(1) and cl 2 in combination manifest an intention that SEPP 55 is a generic, state-wide, fundamental, overriding SEPP in the area of contamination and remediation.

97

Fourth, cl 17(1)(c) clearly enough applies to category 1 remediation work in a Part 3A *EPA Act* project of the kinds referred to in cl 9(b) and (c). The respondents, however, say that cl 17(1)(c) cannot apply to remediation work of the kind referred to in cl 9(d) because it uses the words "development consent", which is a defined Part 4 *EPA Act* term. It is reasonable to ask why cl 17(1)(c) would have been intended to apply to some kinds of category 1 remediation works referred to in cl 9 but not where cl 9(d) applies. There is no obvious reason.

98

Sixth, cl 13(1)(b) of SEPP 55 suggests that SEPP 55 covers "State significant development", which used to be a Part 4 concept but became a Part 3A concept upon the introduction of Part 3A. Clause 13(1)(b) provides:

a category 1 remediation work is identified as advertised development, unless the remediation work is ...State significant development.

99

SEPP 55 is a 1998 instrument and, prior to the introduction of Part 3A of the *EPA Act* in 2005, "State significant development" required development consent under Part 4: see the repealed s 76A(3)(b). At that time "State significant development" was defined in the now repealed s 76A(7)(b)(ii) to include:

State significant development is:
...
(b) particular development, or a particular class of development:
...
(ii) that, in the opinion of the Minister, is of State...environmental planning significance...

100

When Part 3A was enacted, s 76A was simultaneously repealed and "State significant development" disappeared from the Part 4 lexicon. However, a provision simultaneously appeared in Part 3A in s 75B(2) which describes the kinds of development that may be declared to be a project to which Part 3A applies including one kind which is substantially the same as that appearing in the old s 76A(7)(b)(ii), namely, "major infrastructure or other development that, in the opinion of the Minister, is of State environmental planning significance".

101

One of the stated aims of the Major Development SEPP is to rationalise and clarify the provisions making the Minister the approval authority for "sites of State significance".

102

Clause 13(1)(b) of SEPP 55 by its reference to "State significant development" suggests that Part 3A development is governed by SEPP 55, which assists the conclusion that "development consent" in cl 9(d) should be construed as including a Part 3A approval.

103

That conclusion is confirmed by cl 89 of Schedule 6 of the *EPA Act* , which is a savings and transitional provision relating to the operation of Part 3A. Clause 89 provides :

89 State significant development matters

(1) If a development application for State significant development is pending on the commencement of Part 3A of this Act, the application is to be determined (unless

withdrawn by the applicant) as if the amendments made to this Act by Schedule 1 to the 2005 Amending Act had not been made.
(2) A reference in any Act or instrument to State significant development within the meaning of this Act is taken to be a reference to a project to which Part 3A of this Act applies.

104

Clause 89(1) illustrates that Part 3A of the *EPA Act* first replaced the previous provisions dealing with State significant development, which were encompassed by SEPP 55. The effect of cl 89(2) is that the reference in cl 13(1)(b) of SEPP 55 to "State significant development" should be read as a reference to a project to which Part 3A applies. Consequently, SEPP 55 can be taken to refer to Part 3A projects, subject to any limitation arising from the terms of s 75R(2) (considered below in the context of Ground 3).

105

On the respondents' construction, the reference to "State significant development" in cl 13(1)(b) seems to me to be superfluous. This sits unhappily with the principle that a court "construing a statutory provision must strive to give meaning to every word of the provision": *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28,194 CLR 355 at [7].

106

Sixth, the contrary intention finds some support in the principle that legislation should be construed as "always speaking"- that is, as ambulatory, thereby embracing future changes in subject matter - unless it evinces a different intention. The principle casts some light on the issue in the present case, namely, how one reconciles, if at all, the old language of SEPP 55 with the new part 3A concepts introduced subsequently.

107

Two High Court cases illustrate the application of the "always speaking" principle. In *Lake Macquarie Shire Council v Aberdare County Council* [1970] HCA 32, 123 CLR 327 there was a question whether a statutory reference to the power of a council to supply "gas" included the supply of liquefied petroleum gas. The legislature had in contemplation only coal gas when the Act was passed because it was the only type of gas then available. The High Court by majority considered that the word "gas" was used in its generic sense and was thus not limited to coal gas. In *Imperial Chemical Industries of Australia and New Zealand v Federal Commissioner of Taxation* (1972) 46 ALJR 35 Walsh J had decide whether an operation undertaken by the appellant taxpayer constituted "mining" within the meaning of a tax Act thereby entitling the taxpayer to a deduction for its expenditure. When the word "mining" was inserted in the Act, that operation was not known in Australia. His Honour reasoned that if it had been asked, when the word was being included in the Act, whether this sort of operation was a mining operation, the answer would have been in the affirmative. Accordingly, he held that the activity fell within the meaning of the word. On the *Imperial Chemical* approach, it may be asked in the present case whether the maker of SEPP 55 would have intended to include Part 3A concepts in the SEPP 55 language if the maker had known about them (the intention, of course, must be objectively ascertained). An affirmative answer seems reasonable.

108

The respondents suggest that assistance my be found in authorities concerning whether an expression in a regulation has the same meaning as in the Act under which it was made at the time the regulation was made or at the time when the meaning of the regulation is being considered. The second approach is supported by *Birch v Allen* (1942) 65 CLR 621. The first approach is supported by *Kostrzewa v Southern Electricity Authority of Queensland* [1969] HCA 32, (1970)

120 CLR 653, at least per Barwick CJ (who did not refer to *Birch*). In *Belle Design Group Pty Ltd v Woollahra Municipal Council* [2004] NSWLEC 284, 136 LGERA 1, Bignold J held that when the issue of the validity of an instrument is in question, its meaning is fixed at its date of making. See the discussion in Pearce & Geddes, *Statutory Interpretation in Australia* , 6 th ed (2006) LexisNexis at [6.32] - [6.57]. It is unnecessary to engage in this debate because it is not quite the issue in the present case where it is not so much which meaning is picked up but how to reconcile the old language of SEPP 55 with new language of Part 3A subsequently introduced.

109

Seventh, the applicant's contrary intention construction is consistent with cl 17(1)(c) and 7(1) in that they do not speak of development consent or a development application but refer to "consent authority" which is defined in cl 10. The definition is not exhaustively about Part 4 because it is only expressed to be in relation to a development application (a Part 4 concept) and therefore does not necessarily exclude the possibility of a development authority being the Minister under Part 3A. There is no need to define who the consent authority is in relation to a Part 3A application for project approval because there can be only one: the Minister.

110

The respondents submit that their construction is supported by *Rivers SOS Inc v Minister for Planning* [2009] NSWLEC 213 That case was concerned with cl 12 of the SEPP (Mining, Petroleum Production and Extractive Industries) 2007, which provided that: "Before determining an application for consent for development for the purposes of mining... the consent authority must" consider and evaluate certain matters. Preston CJ held (relevantly to Ground 3 in the present case) that SEPPS do not apply to the approval or disapproval of a project under

part 3A. In case he was wrong, his Honour held (relevantly to Ground 2 which I am presently considering) that cl 12 only applied to Part 4 *EPA Act* development consents and not to Part 3A project approvals, at [109] - [111]:

109 ...I consider that in any event cl 12 of the Mining SEPP did not apply to the Minister's determination of the application for approval of the Project under Part 3A of the Act. Clause 12 uses the language found in Part 4 of the Act of "an application for consent for development", "consent authority" and "development". None of these words, phrases or terms are used in Part 3A where, instead, application is made for "approval" (not "consent") to carry out a "project" (not "development") and there is no "consent authority" but simply "the Minister" who may "approve" or "disapprove" of carrying out of the Project. It is to be noted that cl 12, containing this language of Part 4 of the Act, is contained within Part 3 of the Mining SEPP which is entitled "Development application - matters for consideration".

110 The use of the language and concepts of Part 4 of the Act in cl 12 of the Mining SEPP, but not the language and concepts of Part 3A of the Act, would appear deliberate and intended. The Mining SEPP was made after the insertion into the Act of Part 3A. The Mining SEPP does expressly refer to Part 3A in certain provisions. In the interpretation provision of cl 3(2) of the Mining SEPP, the word "approved" is defined to include any development or any use of land, not only for which any required development consent under Part 4 of the Act has been granted but also for which approval under Part 3A of the Act has been granted. Clause 19 of the Mining SEPP, containing savings and transitional provisions, again expressly distinguishes between an application for approval under Part 3A of the Act and an application for development consent under Part 4 of the Act.

111 In circumstances where the legislative draftsperson of the Mining SEPP has expressly referred in some of the provisions of Mining SEPP to the language and concepts of Part 3A of the Act, but not in cl 12 of the Mining SEPP, and has expressly referred in cl 12 to "determining an application for consent for development" by "a consent authority" but not "approving an application for approval of a project", cl 12 should be interpreted as referring only to determining an application for consent for development under Part 4 of the Act and not approving an application for approval under Part 3A of the Act.

111

Rivers , in my view, does not support the respondents' contention that cll 17(1)(c) and (7)(1) of SEPP 55 are inapplicable merely because they and cl 9(d) use Part 4 language. Indeed *Rivers* weighs against that construction. In *Rivers* Preston CJ was careful not to rest his decision simply on the use of Part 4 language in cl 12 of the Mining SEPP. The central plank of his Honour's reasoning was that the Mining SEPP had been made after the introduction of Part 3A and made a deliberate and

intended distinction between development to which Part 3A and Part 4 applies. This central plank is absent in the present case. SEPP 55 was made and last amended before the introduction of Part 3A and, consequently, makes no distinction between Part 4 and Part 3A.

112

In my opinion, the contrary intention factors to which I have referred justify the conclusion that cll 17(1), (7)(1) and 9(d) of SEPP 55 are not inapplicable merely because they use Part 4 language.

Clause 9(d) : category 1 remediation work

113

Clause 9(d) of SEPP 55 defines "category 1 remediation work" by reference to development for which another SEPP requires "development consent". The applicant submits that that requirement is relevantly found in clauses 8(2) and 9(2) of Division 3 (titled "Provisions applying to development applying to Barangaroo Site") of Part 12 of Schedule 3 of the Major Development SEPP. The respondents dispute this on the basis that those provisions do not refer to "development consent" but to "consent". I accept the applicant's submission. Clause 6 of Division 3 says: "This Division applies with respect to any development within the Barangaroo site and so applies whether or not the development is a project to which Part 3A of the Act applies". Clause 6 is an indicator that cll 8 and 9 apply both to Part 3A development approvals and to Part 4 development consents and that the word "consent" in those provisions is employed generically to include both.

Whether cl 17(1)(c) is satisfied

114

On the assumption that cl 17(1)(c) applies, the parties are at issue as to whether it has been satisfied.

115

The applicant submits that it has not been satisfied because core elements of a RAP which complies with the SEPP 55 Guidelines have not been met.

116

The submission requires examination of the SEPP 55 Guidelines, the Consultants Guidelines (which are referred to in and inform the SEPP 55 Guidelines), the Overarching RAP, the Basement Car Parking RAP (there is no Early Works RAP), the auditors' reports relating to those RAPS, and certain conditions of the project approvals.

SEPP 55 Guidelines

117

The SEPP 55 Guidelines set out how a planning authority is to deal with contamination issues in the context of SEPP 55, including what information is needed to make a decision. Its stated purpose "is to establish 'best practice' for managing land contamination through the planning and development control process. The Guidelines explain what needs to be done to show that the planning functions have been carried out in good faith. Obviously they cannot provide a definitive answer in all cases, so planning authorities will also need to exercise their judgment".

118

This "good faith" reference concerns ss 145B and 145C of the *EPA Act* , set out at [76] above. They provide that a planning authority does not

incur any liability in respect of anything done or omitted to be done in good faith by the authority in duly exercising any planning function of the authority in so far as it relates to contaminated land or to the nature and extent of contamination of land; and that the planning authority is (unless the contrary is proven) taken to have acted in good faith if the thing was done or omitted to be done "substantially in accordance with" the SEPP 55 Guidelines.

119

Under the heading "Key Principles", the SEPP 55 Guidelines state that the integration of land contamination management into the planning and development control process will "ensure that changes of land use will not increase the risk to health or the environment" and "provide information to support decision-making and to inform the community".

120

The SEPP 55 Guidelines say that:

Any significant departure from the Guidelines should be justified by demonstrating that the overall aims and principles have been met

121

In the present case the RAPS did not purport to justify any significant departure from the Guidelines.

122

The SEPP 55 Guidelines state that a RAP "must be prepared by an appropriately qualified consultant in accordance with [the Consultants Guidelines]. For further information see Chapter 3". Thus, the Consultants Guidelines inform the SEPP 55 Guidelines.

123

Chapter 3 of the SEPP 55 Guidelines is concerned with the information needed to make a decision on a proposed land use and requires

sufficient information to be provided to consider options and make planning decisions. The decision process for land use changes is described as involving four stages: Stage 1 Preliminary Investigation, Stage 2 Detailed Investigation, Stage 3 Remedial Action Plan, Stage 4 Validation and Monitoring. The objective of a Stage 3 (RAP) is explained as follows: "The objective of an [sic] RAP, or plan of remediation, is to set objectives and document the process to remediate the site".

124

Paragraph 3.5 states: "Ultimately, a planning authority needs to be satisfied that a site is suitable for its proposed use or can and will be made suitable, based on what they know of the site. This will involve an evaluation or review of the information submitted by the proponent".

125

Paragraph 3.5.3 states:

A detailed investigation should provide information about the extent and degree of contamination. It should also include an assessment of the risk posed by the contaminants to health and the environment.

126

Paragraph 3.5.4 is important and provides:

3.5.4 Stage 3-Site Remedial Action Plan

An[sic] RAP, or plan of remediation, should be based on the information from investigations and on the proposed land use. The objectives of the remediation strategy and the recommended clean-up criteria should be clearly stated in the RAP. The RAP should demonstrate how the proponent or their consultant proposes to reduce risks to acceptable levels and achieve the clean-up objectives for the site.

It is important to note that the remediation of contaminated land is considered to be development and may require planning approval, even if the proposed land use does not require approval. If development consent is required, an [sic] RAP must be submitted with the development application for approval. Refer to SEPP No 55-Remediation of Land for further information.

Consultants Guidelines

127

As noted earlier, the SEPP 55 Guidelines require a RAP to be prepared in accordance with the Consultants Guidelines. The stated purpose of the Consultants Guidelines "is to ensure that reports prepared by consultants on the investigation and remediation of contaminated land contain sufficient and appropriate information to enable efficient review by regulators, the Site Auditor and other interested parties".

128

Consistently with the SEPP 55 Guidelines, the Consultants Guidelines identify four stages: 1 Preliminary Site Investigation; 2 Detailed site investigation; 3 Site remedial action plan (RAP); and 4 Site validation and ongoing monitoring.

129

Paragraph 2.3 states that the Stage 3 RAP should:

- set remediation goals that ensure the remediated site will be suitable for the proposed use and will pose no unacceptable risk to human health or to the environment
- document in detail all procedures and plans to be implemented to reduce risks to acceptable levels for the proposed site use
- establish the environmental safeguards required to complete the remediation in an environmentally acceptable manner
- identify and include proof of the necessary approvals and licences required by regulatory authorities.

130

The Consultants Guidelines contain a checklist "to help achieve a uniform approach" and state in bold:

Where a consultant chooses to deviate from the requirements in this checklist, clear reasons should be given and any significant deviations listed.

131

In relation to a RAP, the checklist includes requirements for (a) sampling analysis and data quality objectives; (b) a table listing all selected assessment criteria, references and rationale for an appropriateness of the selection of the criteria and assumptions and limitation of criteria; (c) a contingency plan if the selected remedial strategy fails; and (d) a clear statement that the consultant considers the subject site to be suitable for the proposed use.

132

The Minister suggests that the checklist does not include a reference to "recommended clean-up criteria" (the words used in the SEPP 55 Guidelines). Although it does not use those words, I think, as the applicant submits, that it is apparent from its contents described above that that is what it is referring to.

Core Elements of a RAP

133

It may be accepted that the true character of the SEPP 55 Guidelines document is just that - guidelines; that it is dealing with the complex subject of contamination of soil and groundwater which involves some uncertainty; that it should not be construed as being prescriptive in the same way as a legislative list of considerations; that it covers a wide range of circumstances in which contamination and remediation could arise; and that it is intended to be flexible to some extent as indicated by its statement that the Guidelines cannot provide a definitive answer "in all cases, so planning authorities will need to exercise their judgment". It may also be accepted that the Consultants Guidelines are intended to have a degree of flexibility.

134

Nevertheless, the SEPP 55 Guidelines mandate that "any significant departure from the Guidelines should be justified by demonstrating that their overall aims and principles have been met". The Consultants Guidelines contain a similar statement.

135

The applicant submits that to accord with the SEPP 55 Guidelines as informed by the Consultants Guidelines, a RAP must have the following five core elements, the first four being based on paragraph 3.5.4 of the SEPP 55 Guidelines set out at [126] above and the fifth said to be implicit on a purposive construction of the Guidelines:

(a)
identification of the "objectives" (usually to render the site suitable for some identified proposed use);

(b)
identification of the extent and degree, and thus characterisation, of the contamination ie what requires remediation (this will often have been done in a Stage 2 "Detailed Investigation)";

(c)
identification of the criteria to be applied in remediation - ie to what standard/s does the identified contamination have to be remediated?

(d)
identification of the proposed actions to reduce contamination to the levels in the identified criteria;

(e)
that, in light of the above four elements, there is sufficient information to establish that the objectives are likely to be realised in the opinion of the decision-maker (ie, generally, that the site will thereby be rendered suitable for use).

136

Whilst warning of the dangers of departing to any extent from the language of the Guidelines, the respondents, with the exception of the Minister, appear to concede that core elements of a RAP are identified in paragraph 3.5.4 of SEPP 55 and to concede that they include at least some of the applicant's core elements. The Minister's submission

appears to be that there are no core elements "of necessity" because the Guidelines are flexible and accommodate departure from their own terms. That submission seems to me to go perilously close to stripping the SEPP 55 Guidelines of any real efficacy.

137

The respondents suggest that the SEPP 55 Guidelines should be construed broadly so that not much is required of a planning authority in order to gain the protection of s 145B of the *EPA Act* set out at [76] above. On the contrary, in my opinion, legislative provisions that exempt governmental bodies from legal liability as a result of the exercise of statutory power should be narrowly construed and should not "be carried further than a jealous interpretation will allow": *Puntoriero v Water Corporation* [1999] HCA 45, 199 CLR 575 at [6] per Gleeson CJ and Gummow J citing Kitto J in *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 116. By analogy, that principle of statutory construction should be applied to the SEPP 55 guidelines which are incorporated by reference into s 145B . .

138

Having regard to the terms of paragraph 3.5.4 of the SEPP 55 Guidelines and the fact that the SEPP 55 Guidelines mandate that any significant departure from the Guidelines should be justified by demonstrating that the overall aims and principles have been met and the similar statement in the Consultants Guidelines, I consider that the core elements of a RAP that complies with the Guidelines are captured in the applicant's submission.

139

As noted earlier, the RAPS in this case did not purport to justify any departure from the Guidelines.

The Overarching RAP

140

The objective of the Overarching RAP stated in its Executive Summary is to:

Identify remediation options in order to address Significant Contamination of the Remediation Site and once that has been addressed, to render the Remediation Site suitable for the proposed redevelopment; and to render the Development Area suitable for the proposed redevelopment. This Overarching RAP requires that specific RAPs be developed for the Remediation Site and each individual portion of the Site, when the nature of the development is known, and with specific Remediation Works Plans, which will detail the remedial measures.

141

The "Remediation Site" is defined as the land the subject of the Remediation Site Declaration, and "Development area" is defined as areas not within the Remediation Site.

142

The Overarching RAP's "primary objective" is to "present a summary of the Contamination issues identified by the previous environmental site assessments and to present principles for remediation/management and a number of options for each of four designated areas of the Site". Its secondary objective is "to provide an outline for a coordinated approach to the remediation and management of the site as a whole".

143

The Overarching RAP says that it has been developed in general accordance with relevant guidance documents including the Consultants Guidelines and the DEC 2006 "Guidelines for the NSW Site Auditor Scheme (2 nd ed)". These Audit Guidelines contain mandatory matters as well as recommendations. They state that, as a general principle, contamination must be remediated to meet the appropriate clean-up criteria. The assessment and remediation of contaminated sites is said to be technically difficult because of the

complex behaviour and effects of chemicals in the environment. They contain a table of soil investigation levels for urban development, similar to a table in the Overarching RAP.

144

The Overarching RAP requires that specific RAPS be developed for each portion of the Site:

This Overarching RAP requires that specific RAPS be developed for each portion of the Site, when the nature of the development is known, and with specific Remediation Work Plans (RWP), which will detail the remediation measures:

- to address the Significant contamination of the Remediation Site, and once that has been addressed, to render the Remediation Site suitable for the proposed development; and

- to render the Development Area suitable for the proposed development and address the specific requirements of the development proposed in the areas comprising the Development Area.

145

In order to aid the review and interpretation of the soil analysis results, the Overarching RAP divides Barangaroo into four assessment areas, based on proposed future land use and whether the area fell within the boundary of the Remediation Site. Area 1 is the portion of the site that is the subject of the Remediation Site Declaration zoned for mixed use. Area 2 is the portion of the site to the south of the Remediation Site zoned for mixed use and includes the area of the Basement Car Parking Project. Area 4 is the portion of the site outside the Remediation Site to the north that is zoned for open space land use and includes the area of the Early Works Project. Area 3 is the portion of the site within the Remediation Site and within Hickson Road.

146

Tables 5.2, 5.3 and 5.5 detail the maximum soil concentrations that

have been identified in those four areas, and indicate lower levels of contamination in Areas 2 and 4 compared with Area 1. In relation to groundwater, the Overarching RAP identifies primary zones of groundwater impacts by reference to monitoring wells located within or adjacent to the footprint of the former gasworks.

147

Unlike Area 1, Areas 2 and 4 are said to have no immediate regulatory driver necessitating immediate remediation or management of contamination because the observed impacts to soil and groundwater "have not been identified as being significant enough to warrant regulation". Nonetheless, the Overarching RAP notes that as Areas 2 and 4 are to be respectively developed for mixed use (commercial/residential) and public recreation, there is to be a development-based driver for remediation.

148

Under the heading "Scope of Works" at par 1.6, the Overarching RAP again emphases that specific RAPS are required to be developed for each portion of the site:

This Overarching RAP is required to identify a preferred approach to remediate the Site, which may incorporate a variety of remedial techniques and will (if carried out in an appropriate and well coordinated manner) address the Significant Contamination of the Remediation Site; and once that has been addressed, to render the Remediation Site suitable for the proposed redevelopment; and render the Development Area suitable for the future intended land uses, which include commercial, high density residential, open space and public thoroughfare (Hickson Road).

This Overarching RAP requires that specific RAPs will be prepared for the various portions of the Site with specific Remediation Work Plans, which will document the specific remedial measures to be implemented:

- to address the Significant Contamination of the Remediation Site, and once that has been addressed, to render the Remediation Site suitable for the proposed redevelopment; and
- to render the Development Ara suitable for the proposed redevelopment.

149

The Overarching RAP is therefore not intended to meet all of the reporting requirements for a RAP as outlined in [the Consultants Guidelines. In this respect, the Overarching RAP does not address whether the Barangaroo site (or those parts of the Barangaroo site on which the Early Works Project and the Basement Car Parking Project will be carried out) will be suitable for the proposed redevelopment after completion of the remediation works. Rather, it states that this is the goal of the proposed remediation works.

150

Under a further heading "Scope of Works" at par 6.8, the Overarching RAP envisages "that the remediation/management works will comprise, as a minimum, the following initial scope for all areas of the site". There follows a list of matters including:

Completion of a Quantitative HHERA to develop RBCLs for the protection of human health and the environment for each of the various areas of the Site. The HHERA should take into account propose containment/control measures and the impact these will have on source/pathway/receptor relationships.

- Completion of any necessary pilot trial and additional assessment works to the satisfaction of the appointed Site Auditor to inform the detailed RAPs or RWPs as may be appropriate.
- Preparation of additional documentation which will include the following:

1. Preparation of additional area specific RAPs as required for individual portions of the Site.
2. Remediation Works Plan (RWP) that will set out in detail the remediation/management works to be conducted in each portion of the Site, provide detailed engineering design for any control/containment measures necessary (including a barrier between the Site and Hickson Road, if necessary) and present a detailed scope of works for the remediation contractor.

151

In relation to area 2 (the Early Works Area) the listed matters include "In-situ treatment in areas where this is deemed appropriate" and "appropriate management of potentially contaminated groundwater collecting within excavations". No answer is provided to the questions:

What "treatment"? What is "appropriate?"

152

These statements in the Overarching RAP are at a high level of generality. Similar high level of generality statements appears in relation to Area 4. It is unnecessary to consider whether they would suffice to avoid civil liability under s 145B of the *EPA Act* .

Audit of Overarching RAP

153

The Site Audit Report - Overarching Remedial Action Plan, Barangaroo" undertaken by ENVIRON Australia Pty Ltd in June 2010 for BDA states in Section B (footnotes omitted):

The purpose of the plan which is the subject of the audit was to provide a site wide remediation action plan containing principals [sic] which could be incorporated into individual RAPS for portions of the site.

I certify that, in my opinion:

The remedial action plan is appropriate for the purpose stated above.

154

The auditor considered that the Overarching RAP "provides an adequate basis for development of RAPs/RWPs for individual areas of the site. It generally establishes the principle of on-site treatment and reuse when practical".

155

In section 7 "Environmental Quality Criteria ", the auditor states that the Overarching RAP:

Envisages that remediation and management will be based on quantitative human health and environmental risk assessment. Site Specific Target Criteria (SSTC) will be developed and incorporated into RWPs"

156

The auditor explained that he had assessed the Overarching RAP by comparison with the checklist included in the Consultants Guidelines.

157

There appears the statement:

- In the Auditor's opinion;

- the investigations to date have been generally conducted in accordance with SEPP 55 Planning Guidelines.

158

Given the stated limitations of the Overarching RAP, the site audit report makes no assessment of the suitability of Barangaroo for the proposed development.

Basement Car Parking RAP

159

The Basement Car Parking RAP states that the key objective of the "remediation of the Site is to facilitate the future land-use proposed". It contains no statement or assessment about whether the land will be made suitable for the proposed development, including the proposed future land uses. Additional stated objectives of the remediation works are:

- To ensure the remediation site is protective of human health in the context of the intended future land use;
- To protect the environment (specifically groundwater and the adjacent Darling Harbour) by remediation of the Site to a standard that will minimise the risk of ongoing contamination;

160

The Basement Car Parking RAP makes clear the importance of site

specific target criteria (**SSTC**) derived from a future human health and ecological risk assessment (**HHERA**):

Remediation Extent

In the first instance, identified soil impacts have been assessed against the relevant generic soil assessment guidelines dependent on the proposed land use at the Site. The screening method was used to identify where potential impact material (PIM) is present at the Site. Confirmation of whether or not the PIM identified by the screening assessment represents a risk to human health on the environment (ie is Confirmed Impacted Material [CIM], or the resultant extent of remediation works and the suitability (or otherwise) of excavated materials for beneficial reuse, will ultimately be determined by the Site Specific Target Criteria (SSTC) derived from the human health and ecological risk assessment (HHERA).

...

The HHERA will determine different SSTC for different areas/land uses at the Site.

...an addendum to the HHERA will also be prepared following completion of the HHERA. The addendum will confirm locations where CIM will require remediation at the Site to ensure that unacceptable risks to human health or the environment will not occur following the proposed redevelopment works.

Remediation Strategy

The preferred remediation strategy for the Site will involve excavation of CIM, as defined by the HHERA and treatment of these materials (as required) for potential beneficial reuse...

161

The importance of the future HHERA and SSTC is also clear in the following passage:

Soil remediation goals will ultimately be defined by the following [257.1]:

- Reference to generic soil assessment guidelines, where appropriate; and
- A Human Health and Ecological Risk Assessment (HHERA) to define soil concentrations that are able to remain in-situ without remediation/management and the treatment standard for soil to be

beneficially revised elsewhere in the development.

...
The current generic assessment guidelines used in NSW to evaluate soil analytical results are based on the following [reference is then made to, inter alia, the Consultants Guidelines]

...
Adoption of the above general soil assessment criteria is generally considered inappropriate for remediation works as this may result in unnecessarily increased remediation effort and cost. That is the generic criteria are investigation criteria and may be lower than is actually required to adequately remediate the Site to be protective of human health and the environment. Establishing appropriate, site specific criteria allows sustainable, targeted allocation of resources to a remediation solution.

...

The approach considered appropriate for soil remediation goals for the Site is to adopt a combination of:

- Generic soil assessment guidelines (as appropriate); and
- Site-specific Target Criteria (SSTC) based on a site-specific HHERA as discussed in Section 5.3. The SSTC will supersede the generic soil assessment criteria detailed in Table 3.

162

Again, under the heading "Human Health and Ecological Risk Assessment", it is said:

5.3 Human Health and Ecological Risk Assessment

A HHERA will be completed that will develop SSTC for the identification and remediation of CIM, in the context of the proposed development. That is, the SSTC will define:

- Soil concentrations that **will not** represent an unacceptable risk to human health or the environment if:

- left in-situ at the Site ("in-situ SSTC"); or
- incorporated elsewhere into the development (for example within the proposed Headland Park or Public Domain ("re-use SSTC"); and

- Groundwater concentrations that will not represent an unacceptable risk to human health or the environment (ie Darling Harbour).

5.3.1 HHERA Methodology

...
Importantly, the HHERA will also be applicable to defining the standard that must be achieved for excavated soils that are to be beneficially reused within the development. As such, the HHERA will define the inputs for assessing:

the quality of material that is proposed to be re-used on other areas of Barangaroo based on the various exposure scenarios detailed in the HHERA. It is understood that specific re-use criteria for Headland Park will be as specified in a separate Headland Park RAP; and whether any treatment is required to achieve that standard.
...
5.3.2 HHERA Implementation

Implementation of the HHERA, in the form of a Remediation Decision Making Process Flow Chart, is described on **Figure F10** . The flow chart details the various stages of assessment required for determining the fate and remediation requirements (if any) of PIM. The outcome of the remediation decision making flow will be documented in the RWP.

163

The flow chart Figure 10 referred to at the end of the above quotation illustrates that the various stages of assessment required for determining the fate and remediation requirements of potential impact material (PIM) all hinge on comparison with the SSTC in the future HHERA - which have not yet been developed.

164

The Basement Car Parking RAP states that the hotspots of PIM identified within Block 2 are generally considered to present only a minimal unacceptable risk to human health or the environment and that remediation of the hotspots is not expected to be warranted. However, it adds that the requirement to remediate, or otherwise, hotspots of PIM will be subject to confirmation of whether the subject material is CIM, based on the SSTC to be developed as an outcome of the HHERA. The assessment will be documented in the RWP. Similar statements appear in relation to Block 3. Once again this indicates an ultimate hinge on the HHERA and SSTC, which have not yet been developed.

165

The Basement Car Parking RAP sets out the project schedule of the proposed remedial works at the site again emphasising that the final remediation expert will be based on the SSTC's developed by the future HHERA:

- Approvals process, including concept, project and development approval;
- Preparation of a RAP addendum documenting:
  - The final remediation extent based on the "in situ SSTCs" developed by the HHERA (being completed as an outcome of the Blocks 4, 5 and Southern Cove DGI).
- In-situ characterisation/validation of fill materials to be excavated will be undertaken prior to the commencement of excavation and based on the final Stage 1 development plans. Additional samples will be located to address data gaps remaining following the DGI (AECOM, 2010). Field observations of odour and visual appearance will be corrected with analytical data to facilitate visual confirmation of materials characterisation as they are excavated;
- Preparation of a RWP:
- Reiterating the extent of remediation established based on the HHERA; and
- Documenting the outcomes of the stabilisation treatability trials (being completed as a precursor to the Blocks 4, 5 and Southern Cove RAP) and the resultant treatment strategy;
- Site Establishment and construction of treatment plant;
- Excavation and treatment (as required);
- Tracking of all excavated materials in accordance with the Materials Tracking Procedure (refer to Section 12.7.2); Validation (progressive and concurrent with remediation excavation and treatment) to demonstrate compliance with the requirements of this RAP and the Headland Park RAP (in the case of materials to be beneficially reused in Headland Park);
- Reporting;
- Decommissioning and demobilisation; and
- Groundwater monitoring and assessment of groundwater CoC concentrations against the Site Specific Target Criteria.

166

The SSTC and HHREA are still to be developed and were not before

the Minister at the time he granted the project approval. These two documents will determine whether or not identified "potential impacted material (PIM)" represents a risk to human health or the environment, the extent of the remediation works required and the suitability (or otherwise) of excavated materials for beneficial reuse. The HHERA will also determine different SSTC for different areas/land uses at the site.

167

An addendum to the site-specific RAP is proposed to be prepared after the completion of the HHERA. The "addendum will confirm locations where CIM (confirmed impacted material) will require remediation at the Site to ensure that unacceptable risks to human health or the environment will not occur following the proposed redevelopment works".

168

The Soil Remediation Goals and Water Remediation Goals are to be defined by the future HHERA (inter alia which will define soil concentrations that are able to remain in situ without remediation) management, the treatment standard for soil to be used elsewhere and in situ water quality targets that will not represent a risk as defined by the HHERA:

Soil Remediation goals will ultimately be defined by the following:

- Reference to generic soil assessment guidelines, where appropriate; and
- A Human Health and Ecological Risk Assessment (HHERA) to define soil concentrations that are able to remain in-situ without remediation/management and the treatment standard for soil to be beneficially reused elsewhere in the development.

...

Groundwater remediation goals will ultimately be defined by:

- Reference to generic groundwater assessment guidelines, where appropriate;
- On-site water quality targets that will not represent a risk to site users/maintenance works etc as defined by a HHERA; and

- Off-site (at site boundary) water quality that will not represent an unacceptable risk of harm. The effectiveness of the remediation will be assessed by evaluation of groundwater quality against groundwater remediation goals defined by a HHERA.

The proposed remediation approach will be to undertake removal of the primary sources of groundwater contamination such that groundwater quality improves and is not considered a significant risk of harm. The effectiveness of the remediation will be assessed by evaluation of groundwater quality against groundwater remediation goals defined by a HHERA...

169

The RAP states that an environmental management plan (EMP) is also to be prepared. The EMP "will detail the appropriate information and mitigation measures necessary to conduct the remediation works in a manner that will minimise risk to the environment".

170

The subsequent EA summarised the extent of contamination identified in the Basement Car Parking RAP.

Auditor's letter re Basement Car Parking RAP

171

A site auditor has not audited the Basement Car Parking RAP. Rather, a letter to Lend Lease from an accredited site auditor, Environ, dated 3 June 2010 provided an initial review and comments on the suitability and appropriateness of the plan of remediation of the site (**Review Letter**). The Review Letter specifically states that it does not constitute a site audit report or site audit statement.

172

It appears from an email from Lend Lease to DECCW dated 14 April 2010 that the rationale for this approach (ie a Review Letter rather than a site audit) was because of "timing constraints for planning submission" which "may make it difficult to achieve a full site audit".

The email also noted that the requirement for a site audit was an EAR that:

The Remediation Action Works Plan(s) must clearly demonstrate that the site will be remediated to a standard commensurate with the final intended land use. The plans must be audited by an accredited site auditor, and include a site audit statement detailing the findings of the audit.

173

In a reply email dated the same day, DECCW noted that a consequence of such an approach was as follows:

In stating this, it is our advice that a site audit statement that the Remediation Action Works Plan(s) demonstrates that the site can be remediated to a standard commensurate with the final intended land use would be required prior to DECCW being able to provide final advice to planning about the suitability of this part of the proposed development.

174

The Review Letter noted that the process for remediation planning which has been adopted includes the definition of remediation goals through preparation of an HHERA and the preparation of a RAP addendum to define the expert of remediation based on the outcome of the HHERA:

(a)

Environmental investigations

(b)

Preparation of a RAP

(c)

Definition of remediation goals through preparation of a Human Health and Ecological Risk Assessment (HHERA), to be conducted in conjunction with another area of the Barangaroo site.

(d)

Preparation of a RAP Addendum to define the extent of remediation based on the outcomes of the HHERA

(e)

Detailed design of the proposed development

(f)

In situ characterisation/validation of fill materials to be excavated

(g)

Preparation of Remediation Works Plan (RWP) including technical specifications.

175

At the date of the Review Letter, only tasks 1 and 2 had been completed: Review Letter at p 5. Thus, neither the remediation goals, nor the extent of remediation, had been identified.

176

In relation to the process for remediation planning, the Review Letter noted:

The RAP Addendum (Task 4) is proposed to document the final remediation extent, however, the remediation extent cannot be considered "final" until characterisation/validation of the soil to remain in situ is complete and confirms no further remediation outside the proposed excavation area is required.

177

The Review Letter at Table 4.1 provides an evaluation of the Remediation Area Works (South) RAP. It notes that a review of the remediation goal and adequacy of the remediation extent is not possible at this stage: Review letter at Table 4.1 p 7.

178

In relation to the issue of remediation, the Basement Car Parking EA appended the Review Letter and the audit statement for the Overarching RAP and stated:

The purpose of the remediation works is to make the Project Application Site suitable for the proposed uses as envisaged by the approved Concept Plan. A site Auditor's Statement (Appendices H to K) advises that the Project Application Site is capable of being made suitable for its intended use.

179

In its submission letter on the Basement Car Parking EA dated 12 August 2010, DECCW stated that there is a need to ensure compliance with the relevant plans (specifically referring to the Remediation Area Works (South) RAP and the HHREA) and the need to address all the issues raised by the site auditor in the Review letter. Neither the HHREA, a remediation works plan nor the proposed RAP addendum had been prepared prior to the Minister's decision on the project approval application.

180

In relation to remediation, the DG report on the Basement Car Parking Project included the following:

The Overarching Remedial Action Plan for Barangaroo prepared by ERM and Remedial Action Plan Other Remediation Works (South) Area prepared by AECOM establish the endorsed remediation activities for Stage 1 of the Barangaroo development including the subject site. The proposed remediation works will be undertaken in conformance with these two RAPs and the detailed Human Health and Ecological Risk Assessment (HHREA).

181

The Basement Car Parking PPR at p 37 noted that an HHERA will be prepared to set SSTC:

The remediation works will be undertaken to make the site suitable for the proposed uses as envisaged under the approved Concept Plan.

Remediation works will be undertaken in conformance with the Overarching RAP (ERM) and the site specific RAP (AECOM)

A HHERA will be prepared and set Site Specific Target Criteria (SSTC) to detail specific remediation works.

Condition of approval re HHERA

182

As noted earlier, it was a condition of each approval that the proponent provide a copy of the future amended RAP and future HHERA to

DECCW prior to implementation.

Conclusion

183

The applicant submits in relation to both projects that core elements of a RAP identified above at [135] are missing in various respects and therefore cl 17(1)(c) of SEPP 55 is not satisfied.

184

The respondents submit that in the case of both projects a cl 17(1)(c) plan of remediation was provided by the Overarching RAP, and that in the case of the Basement Car Parking Project the Basement Car Parking RAP was the icing on the cake (no specific RAP exists for the Early Works Project).

185

Contamination of the Basement Car Parking site has been investigated in the past, and the respondents suggest, as I understand it, that contamination of that site and the Early Works site is not particularly serious and therefore there is not much to worry about. I do not think that bears examination. Contamination and remediation were identified as a key issue in the EARs and in the DG report. A plan within the Basement Car Parking RAP shows borehole locations and identifies a substantial blue area as "Potential Impacted Material - expected to require remediation". Green areas are identified as "Potential Impacted Material - not expected to require remediation", which is an acknowledgement that they might require remediation.

186

BDA submits that a RAP does not need the level of detail for which the applicant contends because you do not know what you are going to

find until you dig up the hard concrete. There are several answers to this proposition. First, it does not meet the vital point that a RAP should specify the criteria or target for remediation of each contaminant. Second, in any case, it is permissible to have a contingency plan since one of the things listed in the Consultants Guidelines under the heading "Remedial Action Plan" is "Contingency Plan if the selected remediation strategy fails". Third, the EARs in fact required detailed RAPs. Fourth, there is some inconsistency between the fact of many boreholes having been dug in the past to investigate contamination and, on the other hand, the proposition that it not possible to know what is there until the concrete is removed. Fifth, if it is impossible to have a detailed RAP, how could there be certification by an auditor that the requirements of SEPP 55 have been met prior to starting work (as the auditor's letter concerning the Basement Car Parking RAP indicates would happen, assuming he is satisfied with certain things). Sixth, the proposition is inconsistent with the fact that the Basement Car Parking RAP sets out, for example, processes that will be followed once the criteria are known. Finally, the proposition is difficult to reconcile with the fact that BDA has managed to produce a draft RAP and a draft HHERA, which has not been completed and taken to the Minister.

187

The Basement Car Parking RAP attached importance to SSTC to be derived from a future HHERA, and ultimately a condition of each approval required an HHERA to be provided prior to implementation not to the Minister for approval but to DECCW.

188

I consider that in two respects the RAPs do not comply with core elements identified in par 3.5.4 of the SEPP 55 Guidelines and that, consequently, they do not satisfy cl 17(1)(c). First, in relation to both projects the remediation criteria are not identified in the RAPS. The

Overarching RAP sets out in tables the maximum detected concentrations of contaminants. But nowhere in any document before the Minister was there any stated remediation criteria (goals) for those concentrations. That is the task of the future HHERA containing the SSTC, which the Minister will not see and approve and indeed which no-one is designated to approve, but which will merely be sent off in due course to DECCW under a condition of each approval.

189

The analogy of weevils in breakfast cereal is suggested. If their unwelcome presence is inevitable, cereal eaters would agree that maximum permissible weevil level criteria must be prescribed. In the present case, that is the function of the future SSTC in the HHERA in relation to contamination on the site. The Minister has not been told what the SSTC will be and has not approved them. There is no condition of approval requiring the Minister to approve them.

190

In my opinion, the absence of such criteria in the RAPS is contrary to the requirements of the SEPP 55 Guidelines par 3.5.4 that "recommended clean-up criteria should be clearly stated in the RAP". It is also contrary to the requirement of the Consultants Guidelines to "Document in detail all procedures and plans to be implemented to reduce risks to acceptable levels for the proposed site". In order to know what "acceptable" levels are, there must be specified criteria, which in this case are dependent upon future SSTC.

191

Consequently, in my opinion, in order for a RAP to be "prepared in accordance with" the SEPP 55 Guidelines (as informed by the Consultants Guidelines), as required by cl 17(1)(c) of SEPP 55, it should incorporate a SSTC in order to define the acceptable level of

contamination. It would then have to be approved by the Minister in order to comply with cl 17(1)(c).

192

Second, in relation to the Early Works Project, because there is no site specific RAP, BDA has not done what Lend Lease at least has done (in its site specific RAP) which is to spell out in any level of detail what action it will take to achieve the remediation criteria. In that respect, there has been non-compliance with the requirement of paragraph 3.5.4 of SEPP 55 that there be a RAP that demonstrates how the proponent or its consultant propose to reduce risk to acceptable levels and achieve the clean-up objectives for the site. A site specific RAP demonstrating these matters is required. Accordingly, cl 17(1)(c) is also not satisfied in this respect in relation to the Early works Project.

193

For these reasons, I would have upheld Ground 2 of the applicant's challenge except for the Minister's 2011 amendment to SEPP 55 made after the trial, has immunised these projects from the safeguards in cl 17(1)(c). Accordingly, I must reject Ground 2. As stated earlier, I have explained why the applicant would have succeeded on Ground 2 except for the 2011 Amendment because it is relevant to costs.

194

It is therefore unnecessary to rule on whether, as the applicant submits, the Minister's approval under cl 17(1)(c) has to comply with the requirements for a project approval under Part 3A of the *EPA Act* , including the opportunity for the public to make submissions.

D: GROUND 3: CL 7(1)(B) AND (C) SEPP 55

195

The third ground of challenge is that, in considering whether to grant the two project approvals, the Minister was bound by cl 7(1) of SEPP 55, and could not have formed the satisfaction required by cl 7(1)(b) that the land will be suitable after remediation for the purpose for which the development is proposed to be carried out and the state of satisfaction required by cl 7(1)(c) that the land will be remediated before the land is used for that purpose.

196

Clause 7(1) provides:

7 Contamination and remediation to be considered in determining development application

(1) A consent authority must not consent to the carrying out of any development on land unless:
(a) it has considered whether the land is contaminated, and
(b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
(c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.

197

The applicant submits that the Minister could not have been reasonably satisfied as to the subject matters of cl 7(1)(b) and (c) or erred in law, misdirected himself, asked the wrong question or failed to consider what he was required to consider for three overlapping reasons:

(a)
in order to be satisfied as required by cl 7(1), there had to be a plan of remediation approved by the consent authority prepared in accordance with the SEPP 55 Guidelines as required by cl 17(1)(c) and there was not;

(b)
the Minister in effect delegated satisfaction to an auditor; and

(c)
the Minister was misled as to the satisfaction of cl 17(1)(c).

198

The respondents submit that:

(a)
on the proper construction of s 75R(2) of the *EPA Act* , SEPPs do not apply at the approval stage of a Part 3A project, therefore cl 7 is inapplicable;

(b)
in any event, cl 7 of SEPP 55 does not apply to Part 3A project approvals because it uses Part language "consent authority" and (in the heading) "development application" which refer only to determinations under Part 4;

(c)
in any event, having regard to the Overarching RAP, and in the case of Lend Lease, the Basement Car Parking RAP, the applicant has not demonstrated that the Minister did not form the prescribed state of satisfaction, or that the satisfaction was affected by legal error.

199

When considering Ground 2, I rejected the respondents' submission that cl 7(1) is inapplicable merely because it uses Part 4 language: see [84] - [112] above.

200

The applicant's submits that cl 17(1)(c) informs the Minister's satisfaction under cl 7(1) in that the Minister could not be satisfied of the matters in cl 7(1) in the absence of the RAP which complied with cl17(1)(c). It is unnecessary on this submission because the Minister's 2011 amendment to SEPP 55 exempted the subject projects from cl 17. However, if the 2011 amendment were to be ignored, it would seem to me that there is no essential interdependency between cl 7(1) and cl 17(1)(c), even though there may be circumstances where an available plan of remediation complying with cl 17(1)(c) may be relevant to the formation of the state of satisfaction under cl 7(1).

Whether cl 7 applies to Pt 3A approvals

201

I turn to the question whether cl 7 applies to Part 3A approvals. The starting point is 75R(2) of the *EPA Act* :

(2) Part 3 and State environmental planning policies apply to:
(a) the declaration of a project as a project to which this Part applies or as a critical infrastructure project, and
(b) the carrying out of a project, but (in the case of a critical infrastructure project) only to the extent that the provisions of such a policy expressly provide that they apply to and in respect of the particular project.

202

Section 75R(2) expressly applies SEPPS to, first, the "declaration" of a project as a project to which Part 3A applies or as a critical infrastructure project (provided for in ss 75B and 75C); and, secondly, the "carrying out" of a project. It does not expressly apply SEPPs to the intermediate step of giving project approval provided for in s 75J. Clause 7 is not referable to the declaration of a project as a Part 3A project nor, unlike cl 17(1)(c), is it referable to the carrying out of a project. Rather, cl 7 is concerned with "consent" to the carrying out of a project which, as discussed earlier, I think is capable of including a Part 3A approval. Given the terms of s 75R(2), it has been held that SEPPs do not apply to the approval of a project under s 75J: *Rivers SOS Inc v Minister for Planning* [2009] NSWLEC 213 at [78] - [108] per Preston CJ. I reached the opposite conclusion in the slightly earlier case of *Hill Top Residents Action Group Inc v Minister for Planning* [2009] NSWLEC 185, 171 LGERA 247 at [62] - [69]. In *Hill Top* the submission that SEPPs do not apply to Part 3A project approvals, which I rejected, was made late at the hearing by the respondent proponent (in reply to a point raised in reply) The submission was not supported by the respondent Minister administering the Act and the point had to be decided without the assistance of any submission from the Minister. In *Rivers* the Minister took a different position, made the submission which the Minister did not support in *Hill Top* , and thus the

Court had the benefit of the Minister's submission which it did not have in *Hill Top* .

203

In *Hill Top* the Minister approved under Part 3A the carrying out of development on land. A clause of the Major Development SEPP prohibited the subject development on that land. Consequently, the proponent could not lawfully carry out the development. However, the respondent proponent, but not the respondent Minister, submitted that cl 11 did not apply to the approval stage by reason of the terms of s 75R(2) and therefore did not affect the validity of the approval. If that submission was correct, it was common ground that the carrying out of the project was nevertheless unlawful and might be restrained by injunction. Thus, from the practical perspective of a remedy, the point was not of much importance in the circumstances of that case (once it was decided that there should be an inunction). I took the view that the legislature did not intend to empower the Minister to approve the "carrying out" of a project that could not lawfully be carried out because it was prohibited by a SEPP. I thought that was absurd. Accordingly, I held that there was an implied limitation that the Minister cannot grant approval for the carrying out of a prohibited development. Additionally, I held that it was implicit that SEPPs applied to the approval stage under s 75J: at [62] - [69]. I made a declaration that the approval was invalid and restrained the proponent from carrying out the project pursuant to that approval.

204

In *Rivers* the contention was that the Minister failed to comply with preconditions to the exercise of a Part 3A approval power in cl 12 of the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007. Preston CJ disagreed with *Hill Top* and concluded that (a) the text of s 75(2) expressly and exhaustively

specifies the circumstances and times when SEPPS apply and hence they do not apply to the exercise of power to approve or disapprove a project under s 75J; (b) nothing else in s 75R leads to a different conclusion; (c) there is no implied limitation that the Minister cannot grant approval for the carrying out of a prohibited development; and (d) the notion of a valid but inoperative project is not absurd because it is not absurd to do that which the statute allows: at [93] - [108].

205

The notion of a valid approval to carry out a development that is unlawful continues to strike me as odd, to say the least, and misleading. There is a disconnect between a developer holding in his hand an entirely valid, lawful approval for a major project which can be trumpeted in a press release, but then not actually being able to carry out the project. Such an approval has no work to do in the real world. It is also misleading because developers and the public would understand that if the carrying out of a project has been approved by the Minister, the project could be carried out, and yet it could not. Project funding may be entered into and large financial commitments made on a false premise.

206

The respondents submit that the *Hill Top* absurdity characterisation is inconsistent with the decision in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, 194 CLR 355. The decision there was that the ABA's Australian Content Standard for television was valid but was inconsistent with the *Broadcasting Act* 1922 and unlawful. That being so, the High Court said, a person "is entitled to sue for a declaration that the ABA has acted in breach of the Act and in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action": at [100]. The High Court proceeded to make a declaration that the relevant provision

of the Australian Content Standard was unlawfully made and granted liberty to apply (conceivably including liberty to apply for an injunction). The *Project Blue Sky* analogy is, I think, inapposite. The ABA had acted in breach of the law by making the Standard. In the present case, on the respondents' submission, there was nothing unlawful about the Minister's conduct in approving the carrying out of the projects, but the developers, separate bodies who would hold in their hands entirely valid approvals, would breach the law if they acted upon the approvals.

207

The applicant makes a number of submissions critical of *Rivers* or supportive of *Hill Top* . The applicant's first criticism *of Rivers* is that it applied the principle of statutory interpretation embodied in the maxim expressio unius est exclusio alterius (the express mention of one thing implies the exclusion of the other). That principle, which has been described as a valuable servant but a dangerous master, is applied with caution for it is not of universal application and applies only when the intention it expresses is discernable upon the face of the instrument: *Houssein v Under Secretary of Industrial Relations and Technology (NSW) (* 1982) 148 CLR 88 at 94, *Ainsworth v Criminal Justice Commission* (1992) 125 CLR 564 at 575. The criticism focuses on [93] of *Rivers* where it was said that s 75R "is clear in expressly and exhaustively specifying the circumstances in which, and the times at which, SEPPs will apply". Given the three Part 3A concepts of declaration, approval and carrying out and the fact that s 75R(2)(b) refers expressly to the first and third but not the second, Preston CJ concluded that SEPPS were inapplicable at the approval stage. This might be viewed as involving the application of the expressio unius principle albeit regard was had to the context of Part 3A, but the question is whether or not it proved to be a valuable servant.

208

Secondly, the applicant adopts the absurdity point made in *Hill Top* and develops it by saying that it would be odd if parts of SEPP 55 apply to Part 3A projects but not other parts. I agree, particularly as an object of SEPP 55 is to provide for a "statewide planning approach to the remediation of contaminated land". However, SEPP 55 preceded the introduction of Part 3A with its new legal concepts. The question is whether, or the extent to which, SEPP 55 accommodates Part 3A projects having regard to the terms of s 75R(2).

209

The applicant's third criticism of *Rivers* draws attention to s 75I(2)(d) of the *EPA Act* which provides that the Director-General's report to the Minister is to include "a copy of or reference to the provisions of any State Environmental Planning Policy that substantially govern the carrying out of the project". If such SEPPs do not apply at the approval stage, there seems to be little or no point to the provision. There is, however, a point if the Minister has no power to approve the carrying out of a project which a SEPP says it is unlawful to carry out.

210

A point not raised in either *Rivers* or *Hill Top* is the Second Reading Speech of the Minister introducing into the Legislative Council the amending Act which brought in Part 3A being the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act* 2005. The Minister said:

The Bill makes it clear that State Environmental Planning Policies must be considered when making a determination about a project - including a critical infrastructure project

211

The applicant submits that this statement suggests the Minister was required to consider SEPPS, which presupposes that SEPPS apply to the Minister's decision whether to approve. No such statement by a Minister was made in the Second Reading Speech in the House of

Assembly. I do not think the Minister's statement can be explained away, as the respondents suggest, as merely a reference to s 75J(2) which sets out the matters the Minister is required to consider, including the Director-General's report and "the reports, advice and recommendation and the statement relating to compliance with environmental assessment requirements contained in the report". SEPPS, if contained in the Director-General's report, do not constitute "reports, advice and recommendations": *Tugun Cobaki alliance v Minister for Planning* [2006] NSWLEC 396 at [116] - [124] per Jagot J. Nor, contrary to BDA's suggestion, do I think it is explicable by reference to the now repealed s 75J(3)(b) as it appeared in the amending Act that introduced Part 3A, which said that the Minister cannot approve of a project that would (but for part 3A) be wholly prohibited under an environmental planning instrument by the operation of s 76B.

212

The respondents submit that in any event the Minister's statement is of no assistance on the principles stated in my judgment in *Stannic Securities Pty Ltd v Wyong Shire Council* [2010] NSWLEC 249 at [20]:

> In my opinion, statements in the planning circulars should not be used to construe the Directions. An analogy may be found in principles concerning the use of extrinsic material in the interpretation of a provision of a statute. Certain extrinsic material may be used if it is "capable of assisting in the ascertainment of the meaning of the provision": s 34 Interpretation Act 1987. However, statements as to legislative intention made in explanatory memoranda or by ministers, let alone other statements in parliamentary speeches, are rarely, if ever, capable of assisting in the meaning of a provision and cannot overcome the need to consider the words of the statute to ascertain its meaning: *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23, 84 ALJR 507 at [31], *Harrison v Melhem* [2008] NSWCA 67, 72 NSWLR 380 at [12]; *Sheehan v State Rail Authority of NSW* [2009] NSWCA 261 at [40]; *Parks and Playgrounds Movement Inc v Newcastle City Council* [2010] NSWLEC 231 at [80]. That is because the interpretation of statutes or other legal documents is concerned with the objective meaning of words in their context, not with what ministers, parliamentarians or authors subjectively intended them to mean. Statements by third parties, including a minister's department, as to what they think words in a statute mean are of no assistance in ascertaining their objective meaning. Similarly in the present case, statements by the Minister's Department as to what it thinks the Minister's Direction means are of no assistance in ascertaining the objective meaning of the Direction. Moreover, the relevant planning circulars appear to have been issued shortly

after the Directions to which they respectively relate were made and no analogy is to be found in principles concerning the interpretation of statutes or other legal documents which would permit subsequent material or conduct to be used as an aid to interpretation.

213

The applicant suggests that since *Stannic* the tide has turned in favour of the use of extrinsic materials because in a subsequent case about the off-shore processing on Christmas Island of asylum seekers, the High Court construed opaque provisions of the *Migration Act* 1958 (Cth) in significant part by reference to a departmental manual: *Plaintiff M 61/2010E v Commonwealth* [2010] HCA 41, 272 ALR 14. However, that was an unusual case which I do not think was intended to sweep away the pre-existing law without discussion; and it may be that manuals were looked at more in order to determine whether there had been an exercise of power under relevant sections of the *Migration Act* : at [36] - [40].

214

I continue to be of the view, for the reasons stated at [205] above, that the legislature did not intend to confer power on the Minister to grant approval to carry out an unlawful development. That, in my view, is an implied limitation on the power. In that respect, I regret that I am in disagreement with *Rivers* .

215

However, on reflection, I think it was unnecessary in *Hill Top* to go so far as to say that SEPPs apply at the approval stage. That is a difficult proposition to maintain in light of the terms of s 75R(2) and I am persuaded that it is incorrect. To that extent *Rivers* prevails over *Hill Top* . That conclusion is fatal to the applicant's cl 7 case. It means that cl 7 is irrelevant to the validity of the project approval.

216

Accordingly, I reject Ground 3.

"Satisfied"

217

Before departing from Ground 3 I would make the following observations concerning the grounds of judicial review of the state of "satisfaction" prescribed by cl 7(1) of SEPP 55.

218

Where the exercise of a statutory power depends upon the formation of a subjective state of satisfaction or opinion, the decision to form the state of satisfaction or opinion is not an objective determination of the subject matter of that state of satisfaction or opinion. Rather, it is a subjective decision as to satisfaction or opinion regarding that subject matter. It is that subjective decision against which judicial review is available.

219

A determination that the decision-maker is "satisfied" as to a statutory criterion which must be met before the decision-maker is empowered or obliged to act goes to the jurisdiction of the decision-maker and is reviewable. The grounds of review were expressed as follows in *Commissioner of Police v Ryan* [2007] NSWCA 196, 70 NSWLR 73 at [47] per Basten JA (Spigelman CJ and Santow JA agreeing):

Generally speaking, the principles to be applied in cases where the jurisdictional fact is a state of satisfaction or opinion are to be traced back to such authorities as *R v Connell* ; *Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, where, at 430, Latham CJ stated:

Thus, where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.

As noted in more recent cases, such as *Buck v Bavone* (1975-76) 135 CLR 110 at 118

(Gibbs J), "the authority must act in good faith; it cannot act merely arbitrarily or capriciously". Similarly, misdirection as to law, failure to consider matters required to be considered or to ignore irrelevant matters will establish a basis for challenge, as will a decision which "appears so unreasonable that no reasonable authority could properly have arrived at it". See also *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-276 (Brennan CJ, Toohey, McHugh and Gummow JJ) and *Minister for Immigration and Multicultural Affairs v Eshetu* [[1999] HCA 21],(1999) 197 CLR 611 at [133]-[138] (Gummow J).

220

This reference to a decision which "appears so unreasonable that no reasonable authority could properly have arrived at it" is euphemistically referred to as "Wednesbury unreasonableness" (after the seminal case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 123 at 229-231), which doctrinally is concerned with the judicial review of abuse of discretionary powers: *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21 at [40], [124].

221

In *Commissioner of Police v Ryan* , Basten JA cited four High Court authorities. In the first, *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, the jurisdictional fact was whether the decision-maker had been "satisfied" that certain rates of remuneration were "anomalous" within the meaning of regulations. The High Court held that prohibition should go against the decision-maker on the ground that it had not been properly so satisfied. Latham CJ held that the matter presented the question whether or not the decision-maker "could" be satisfied that the rates were anomalous (at 435) and decided the matter in favour of the prosecutor.

222

The second authority cited in *Commissioner of Police v Ryan* was *Buck v Bavone* [1976] HCA 24, (1975) 135 CLR 110. There Gibbs J observed that it was not uncommon for statutes to provide that a

decision-maker shall or may take certain action if satisfied of the existence of certain specified matters. His Honour noted that the nature of the matters of which the decision-maker is required to be satisfied often largely will indicate whether the decision can be effectively reviewed by the courts. His Honour continued, at 123:

It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts.

223

The third authority cited in *Commissioner of Police v Ryan* was *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6, 185 CLR 259. There Brennan CJ, Toohey, McHugh and Gummow JJ held, at 275-276:

From the classic dictum of Sir Owen Dixon in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [(1949) 78 CLR 353 at 36] was derived a list of matters upon which "satisfaction" could be reviewed. In considering a power of the Federal Commissioner of Taxation to make certain decisions based upon satisfaction as to the state of corporate voting power, his Honour said:

His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review

This statement of principle has been applied in numerous cases.

Their Honours proceeded to quote the passage from *Buck v Bavone* extracted above .

224

The fourth authority cited in *Commissioner of Police v Ryan* was *Minister for Immigration v Eshetu* [1999] HCA 21, 197 CLR 611. After considering the authorities relating to review of a decision-maker's statutory satisfaction and quoting the passage extracted above from *Buck v Bavone* , Gummow J said at [137]:

This passage is consistent with the proposition that, where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question. It may be otherwise if the evidence which establishes or denies, or, with other matters, goes to establish or to deny, that the necessary criterion has been met was all one way.

225

Gummow J added that he attached significance to this passage from *Buck v Bavone* and that: *"* It would permit review in cases where the satisfaction of the decision-maker were based on findings or inferences of fact which were not supported by some probative material on logical grounds": at [145].

226

A warning was given by Gleeson CJ and McHugh J that if disagreement with someone else's process of reasoning on an issue of fact described as "illogical" or "unreasonable" or even "so unreasonable that no reasonable person could adopt it", are merely emphatic ways of saying that the reasoning is wrong, then this may have no particular legal consequence: at [40]. This suggests that there should be some self-restraint by the court in concluding that a process of reasoning necessarily manifests illogicality or irrationality amounting to reviewable error. Otherwise, there is a risk that the court may stray into merits of decisions beyond the proper bounds of judicial power. Nevertheless, a new ground for judicial intervention characterised as irrationality or illogicality on the part of the decision maker has been recently confirmed by the High Court: see [225] - [226] below.

227

I would mention another High Court case pre-dating *Commissioner of Police v Ryan* , namely *Foley v Badley* (1984) 154 CLR 349. Brennan J held at 370: "The question for the court is not whether the court would have formed the opinion but whether the repository of the power could have formed the opinion reasonably". Gibbs CJ said 353: "The questions whether the necessary opinion is one which no reasonable council could have formed, and whether the council has misconstrued the statute or taken extraneous matters into account, may sometimes be connected and overlap".

228

Since *Commissioner of Police v Ryan* , the High Court has addressed the grounds of review of a jurisdictional fact of the subjective state of satisfaction or opinion variety in two cases. The first was *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant* S20/2002 [2003] HCA 30, 198 ALR 59 at [54] McHugh and Gummow JJ held:

> The "jurisdictional fact" which supplies the hinge upon which a particular statutory regime turns may be so identified in the relevant law as to be purely factual in content. It was to prevent litigation directly on such questions of fact that legislatures stipulated the opinion of the decision-maker as to specified matters [*Bankstown Municipal Council v Fripp* (1919) 26 CLR 385 at 403]. That in turn led the courts to treat the formation of the statutory state of satisfaction as "reasonable" and thus to posit some criterion for the assessment of the factual elements which went to supply that state of satisfaction. For example, the law in question [*R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100] conditioned the power of the Australian Stevedoring Industry Board to cancel or suspend the registration of an employer upon the Board's satisfaction that the employer was "unfit to continue" to be so registered. The decision was that the facts disclosed no basis for supposing such unfitness and an order for prohibition was made. That conclusion was reached without recourse to distinctions between errors of law and those of fact.

229

The second case was *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16, 240 CLR 611. In that case the High Court was concerned with a new basis of judicial review characterised as

illogicality or irrationality on the part of the decision maker. The leading majority judgment was delivered by Crennan and Bell JJ who said at [122], [131] - [133]

122 In R v Connell; Ex parte The Hetton Bellbird Collieries Ltd, it was not suggested that such an officer must prove his or her satisfaction. However it was found that a requirement that a public officer be "satisfied" of certain facts or have "reasonable cause" to believe facts imports a requirement that the opinion is one that could be formed by a reasonable person.

...

131 What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

Was the Tribunal's fact finding "illogical" or "irrational"?

132 Because illogicality or irrationality may constitute a basis for judicial review in the context of jurisdictional fact finding as explained above, it becomes necessary to decide whether the Tribunal's conclusion about the state of satisfaction required by s 65 and its findings on the way to that conclusion revealed illogicality or irrationality amounting to jurisdictional error...

133. However, the correct approach is to ask whether it was open to the Tribunal to engage in the process of reasoning in which it did engage and to make the findings it did make on the material before it...

230

It appears from this passage that unreasonableness cannot be kept in a separate compartment from illogicality or irrationality because the test of illogicality or irrationality was said to involve a question which was not confined to "logical" or "rational" minds but extended to "reasonable" minds: at [122]. Assuming that there are shades of difference between logical minds, rational minds and reasonable minds, the differences were not explored. It seems, however, that

unreasonableness in this context was equated with illogicality or irrationality.

231

Gummow ACJ and Kiefel J, in dissent, jointly agreed with Basten JA in *Commissioner of Police v Ryan* that the principles applicable where the jurisdictional fact is a state of satisfaction or opinion are traced back to the use by Latham CJ in *R v Connell* of the terms "arbitrary, capricious, irrational" as well as "not bona fide" to stigmatise the formation of the opinion upon which a statutory power was enlivened. Their Honours quoted at [122] from the passage of the judgment of Gibb CJ in *Buck v Bavone* extracted above; and commented that "such formulations convey the idea that a court should not lightly interfere with administrative decision-making". Their Honours noted the *Wednesbury* test of unreasonableness in setting aside a discretionary decision in the following passage at [123] (omitting most citations):

Judicial review has commonly been relied on to set aside a discretionary decision which "is so unreasonable that no reasonable authority could ever have come to it" or decisions "which are unjust or otherwise inappropriate, but only when the purported exercise of power is excessive or otherwise unlawful". As remarked by Gaudron J in *Abebe v The Commonwealth* :

"[I]t is difficult to see why, if a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should not be construed so that it is an essential condition of the exercise of that power that it be exercised reasonably, at least in the sense that it not be exercised in a way that no reasonable person could exercise it."

This Court has observed with reference to s 75(v) of the Constitution and jurisdictional error that where a statutory power is conferred the legislature is taken to intend that the discretion is to be exercised reasonably and justly.

232

The law in this area of subjective jurisdictional fact may be still evolving. To date, it has evolved, I think, to the point where it can be said, in relation to reasonableness, that the question is not whether the court would have formed the required state of satisfaction or opinion but whether the decision-maker could have formed it reasonably. If there is any difference between this positively expressed test and the

negatively expressed *Wednesbury* test of unreasonableness in discretionary decision-making, it is subtle. The subjective jurisdictional fact decision may also be infected by error for other reasons which may well overlap: if the decision-maker did not act in good faith, acted arbitrarily or capriciously, failed to consider matters required to be considered or took irrelevant matters into account, in misdirected itself in law, or failed to address the right question; findings were based on inferences of fact unsupported by some probative material on logical grounds; or it was not open to the decision-maker to engage in the process of reasoning in which it did engage and to make the findings it did make on the material before it.

233

Where no reasons are given for a decision, as under Part 3A of the *EPA Act* , some of these grounds may be more difficult to make out. It may be noted that the Land and Environment Court Rules 2007 r 4.3 empower the Court in judicial review proceedings to order the public authority to furnish reasons and make available documents relevant to the decision, and to order particulars, discovery and interrogatories.

234

The inadequacy of the material on which the decision-maker acted is not in itself a ground of judicial review but may support the inference that the decision-maker had applied the wrong test or was not in reality satisfied of the requisite matters: *The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* [1953] HCA 22, 88 CLR 100 at 120; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA 56, 216 CLR 212 at [39]; *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1, 273 ALR 327 at [63]. In the first of those cases a statute conditioned the power of the Australian Stevedoring Industry Board to cancel or suspend the registration of an employee upon the Board's

satisfaction that the employee was unfit to continue to be registered or has acted in any manner whereby the proper performance of stevedoring operations has been interfered with. The decision was that the facts disclosed no basis for supporting such unfitness and an order for prohibition was made.

E. GROUND 5: FAILURE TO CONSIDER ESD PRINCIPLES AS AN ELEMENT OF THE PUBLIC INTEREST

235

Ground 5 is that the two project approvals are invalid because the Minister failed to consider, or adequately consider, principles of ecologically sustainable development (**ESD**) as an element of the public interest.

236

The steps of the applicant's argument may be summarised as follows:

(a)
the Minister was bound to consider the application of the principles of ESD as an element of the public interest;

(b)
a formulaic recitation of the principles of ESD does not constitute adequate consideration of these principles. Rather, at the least, it may require consideration of the application of the ESD principles to any material actual or potential environmental issue, risk or consequence connected to the proposed development;

(c)
the existence of any such material environmental issue, risk or consequence is a matter of objective fact - the Minister cannot avoid application of the mandatory requirement simply by closing his eyes altogether to such issues;

(d)
in the circumstances of this matter there are such material environmental issues, risks and consequences which arise in connection with the development the subject of both

project approvals;

(e)

the materials before the Minister did not enable him to consider these issues, risks and consequences in terms of the principles of ESD, and there was thus a failure to take account of a mandatory relevant consideration.

237

The respondents put their submissions in somewhat different ways but they include the following:

(a)

the Minister was not bound to consider ESD principles in determining whether to grant the project approvals;

(b)

if the Minister failed to consider ESD principles, the failure might lead to an inference that the Minister failed to consider the public interest, depending on the circumstances of the particular case. Any requirement to consider the public interest in a particular case operates at a very high level of generality;

(c)

in any event, the Minister did consider ESD principles in determining to grant the project approvals.

238

An object of the *EPA Act* is to encourage ESD: s 5(a) (vii). According to s 4, ESD has the same meaning as it has in s 6(2) of the *Protection of the Environment Administration Act* 1991, which states that ESD can be achieved through the implementation of four principles and programs, including the precautionary principle and the principle of inter-generational equity:

6 Objectives of the Authority

...

(2) For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:

(a) the precautionary principle-namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
(ii) an assessment of the risk-weighted consequences of various options,

(b) inter-generational equity-namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
...

239

When the Minister grants approval for a Part 3A project, the Minister is bound to consider the public interest: *Minister for Planning v Walker* [2008] NSWCA 224, 161 LGERA 423 at [39]. *Walker* involved a challenge to the validity of a Part 3A concept plan. The Court of Appeal indicated that the principles of ESD were not mandatory relevant considerations at the time when the concept plan was approved in December 2006 (at [56]), but the majority (Hodgson JA, Campbell JA agreeing, Bell JA preferring not to express a view) held that by the date of the judgment, September 2008, ESD was a mandatory consideration as an element of the public interest in relation to most if not all decisions to be made by the Minister under Part 3A: at [56] - [63].

240

This is consistent with a number of my subsequent judgments which have considered the effect of *Walker* : *Kennedy v Minister for Planning* [2010] NSWLEC 240 at [77] - [79]; *Williams v NSW Minister for Planning (NSW)(No 3)* [2010] NSWLEC 204 at [33]; *Aldous v Greater Taree City Council* [2009] NSWLEC 17, 167 LGERA 13 at [27] - [28]; and is consistent with *Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* [2010] NSWLEC 48 at [173], [177] per Preston CJ.

241

The requirement to consider ESD principles cannot be an invitation to

the court on judicial review to consider the merits of the decision, or to hold decisions invalid merely because in the court's view insufficient weight was given to the principles, or because in the court's view incorrect results were reached in light of the principles.

242

Having regard to the statutory terms of the precautionary principle and the principle of inter-generational equity set out earlier, it can be said that those principles of ESD need only be taken into account to the extent that there is some material environmental issue, risk or consequence - actual or potential - relevant to the issue being determined. As such environmental issues, risks or consequences do not necessarily stop at the boundaries of the land the subject of the application, the principles must be considered in the environment in which the land exists.

243

The decision-maker is then required to consider the substance of the matters referred to in the ESD principles with respect to the actual or potential issues, risks or consequences. The requirement is not satisfied by mere reference, recitation or lip service to ESD principles. Nor will it fail to be satisfied merely because the labels of ESD principles were not employed if the decision-maker nevertheless considered the substance in relation to such matters: for example, where the decision-maker considered the possible long term environmental consequences, and did so uninhibited by lack of full scientific certainty.

244

There should be kept in mind that it is for the decision-maker to determine the weight to be given to a particular matter the decision-maker is bound to consider (*Minister for Aboriginal Affairs v Peko-*

Wallsend Ltd [1986] HCA 40, 162 CLR 24 at 41); that in a particular case ESD principles may not operate at the level of particularity for which the applicant contends (eg *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490; 158 LGERA 349 at [132], contrast *Minister for Planning v Walker* at [60] - [62]); and that it is sufficient for the decision-maker to consider the substance of ESD principles in the relevant context (*Walker* at [59]).

245

It should be accepted that in the present case there are material actual or potential environmental issues, risks and consequences. The EARs for both projects required detailed consideration of the contamination and remediation issues.

246

In relation to the Early Works Project, the applicant argues that the Minister could not have properly considered the application of ESD principles to the environmental issues and risks connected to contamination and remediation because he did not have material before him which grappled with the nature and significance of the contamination and remediation essential issues and risks; the effect they might have on the surrounding environment and into the future; and how best to deal with them. In that regard the applicant points to the absence of a site specific RAP.

247

In regard to the Basement Car Parking Project, the applicant similarly submits that there was no material before the Minister which had identified the specific remediation goals or the extent of remediation required, or which established that such remediation would render the site suitable for its intended use, or which considered issues where the long-term and cautious perspective were required by the ESD

principles.

248

The principles of ESD in fact were drawn to the Minister's attention in the DG report for each project. In that report and in other documents before the Minister, reference is made to the ESD principles.

249

In relation to the Early Works Project, in my view the applicant has not discharged its onus of proof that the Minister did not consider the substance of ESD principles. The material before the Minister contained an extensive analysis of the presence of contamination. Conditions of the approval appear to be aimed at bringing about anticipated remediation works to treat the contamination. The Minister considered community concerns regarding contamination issues. The material before the Minister analysed the potential impact of the proposed Works on Sydney Harbour and adjacent areas. The material included an analysis of the potential impact on air quality from the demolition and earthworks. The material included an analysis of the soil and water management issues to be adopted. The Minister considered the issue of climate change and sea level rise.

250

In relation to the Basement Car parking Project, in my view the applicant has also not discharged its onus of proving that the Minister did not consider the substance of ESD principles. The material before the Minister contained an analysis of the presence of contamination and of the approach required to manage the risks. The approval contained conditions aimed at ensuring that measures were adopted and implemented in respect of anticipated remediation work to treat the contamination. The material before the Minister analysed the impact of the proposed work on water quality in Sydney Harbour. The Minister

considered DECCW concerns regarding water quality impacts. The material included an analysis of water management measures to treat contaminated water and to protect the environment. The Minister considered the issue of climate change and sea level rise. ESD principles were addressed in the air quality impact assessment.

251

As discussed earlier in the context of Ground 2, it is true that in the case of each project approval the Minister did not have before him a document which specified the remediation criteria (goals) and that the Minister approved a condition of each approval whereby those criteria would be determined in the future in documents which would be sent to DECCW. I have held that did not comply with a requirement of the SEPP 55 Guidelines and therefore involved a breach of cl 171)(c). However, in my view, that does not also establish that the Minister was in breach of the obligation to consider the principles of ESD.

252

Accordingly, I do not accept Ground 5.

F. GROUND 6: FAILURE TO MAKE ENQUIRIES

253

Ground 6 is that even if the Minister did consider ESD principles, in the context of this case the Minister was also under a duty to make enquiries before deciding to grant the project approvals. Put another way, the Minister constructively failed to exercise his jurisdiction in granting the approvals by making decisions which, it is said, effectively abdicated responsibility for considering and determining contamination and remediation issues.

254

In *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 6 FCR 155 at 169-170 Wilcox j held that:

> The circumstances under which a decision will be invalid for failure to inquire are, I think, strictly limited. It is no part of the duty of the decision-maker to make the applicant's case for him. It is not enough that the court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it.

255

So expressed, in strictly limited circumstances a failure to inquire is a problem with the "manner" in which the decision-maker acted, which might lead to the conclusion that it was exercised in a manifestly unreasonable manner.

256

In M *inister for Immigration and Citizenship v SZIAI* [2009] HCA 39, 259 ALR 429 six member of the High Court said at [25]:

> Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a "duty to inquire", that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.

257

Following that decision, the only basis on which a constructive failure to exercise jurisdiction on the basis of a failure to enquire might be found is where an administrative decision-maker does not make "an obvious finding about a critical fact, the existence of which is easily ascertained". The fact must be "critical" in the sense of critical to the outcome, so as to supply a sufficient link to the outcome to constitute a

failure on the part of the decision-maker to exercise jurisdiction.

258

In an endeavour to bring the case within this principle, the applicant argues that the extent of contamination, the extent of remediation required and the proposed remediation actions to make the sites suitable for the proposed development area were critical facts on which the Minister did not have sufficient material before him; and that they could have been easily ascertained through more time to allow for finalisation of the relevant documents viz the Early Works RAP, the HHERA and associated documents.

259

The applicant has not identified an easily ascertainable existing fact, or any existing fact, that was critical to the outcome of the Minister's decision, but, rather, an issue in respect of which the Minister could have obtained more information. In my opinion, that does not suffice to enliven the principles referred to in *SZIAI* .

260

Accordingly, I do not accept Ground 6.

G. GROUND 1 - IMPERMISSIBLE DEVELOPMENT AS PART OF THE EARLY WORKS PROJECT

261

Ground 1 is a challenge to the validity of the Early Works Project approval on the ground that proposed remediation work involving the excavation of 60,000 m 3 of sandstone constitutes use for a purpose that is prohibited under the Major Development SEPP, namely, "extractive industries".

262

The respondents submit that the purpose is one that is permissible with consent under the Major Development SEPP, namely, "earth works" (the primary position of the Minister and Lend Lease) or "recreation area" (the primary position of BDA) or a purpose ancillary to one of those purposes.

263

Land within Barangaroo is classified into two zones: Zone B4 Mixed Use and Zone RE1 Public Recreation: see Part 12 of Schedule 3 of the *Major Development SEPP* .

264

The Early Works Project requires remediation work in Zone RE1 Public Recreation.

265

Development for any of the purposes listed in cl 9(2) of the Major Development SEPP may be carried out with consent on land within Zone RE1 Public Recreation, otherwise development is prohibited on land within that zone: cl 9(3). In order for development within Zone REI Public Recreation to be permissible, it must be able to be characterised as falling within the scope of a permissible purpose nominated in cl 9(2).

266

Relevantly, the permissible purposes listed in cl 9(2) include "earth works" and "recreation areas"; and do not include "extractive industries", which is a prohibited purpose.

267

By a different drafting route, "extractive industries" is also prohibited in Zone B4 Mixed Use: cl 8(2) permits development for any purpose with consent in that zone unless it is prohibited under cl 8(3). One of the prohibited purposes listed in cl 8(3) is "extractive industries".

268

A word or expression used in the Major Development SEPP has the same meaning as it has in the Standard Instrument (Local Environmental Plans) Order 2006 unless it is otherwise defined in Part 12 of the Major Development SEPP: cl 2(2) of Part 12 of Schedule 3 of the Major Development SEPP. The Dictionary to the Standard Instrument defines "extractive industry", "earthworks" and "recreation area" relevantly as follows:

extractive industry means the winning or removal of extractive materials (otherwise than from a mine) by methods such as excavating, dredging, tunnelling or quarrying, including the storing, stockpiling or processing of extractive materials by methods such as recycling, washing, crushing, sawing or separating, but does not include turf farming.

earthworks means excavation or filling.

recreation area means a place used for outdoor recreation that is normally open to the public, and includes:

...

(c) a public park, reserve or garden or the like, and any ancillary buildings, but does not include a recreation facility (indoor), recreation facility (major) or recreation facility (outdoor).

269

The respondents also submit that, for the reasons discussed earlier in the context of Ground 3, SEPPs do not apply at the stage of the Minister approving the project under s 75J(1). Consequently, whether the extraction of sandstone is permitted in the Recreation Zone under the Major Development SEPP has no bearing, it is said, on the validity of the Early Works approval. Clauses 8 and 9 of Part 12 of Schedule 3 of the Major Development SEPP are within Division 3 titled "Provisions applying to development within the Barangaroo site". Clause 6 within

that division states: "This Division applies with respect to any development within the Barangaroo site and so applies whether or not the development is a project to which Part 3A of the Act applies". If SEPPs do not apply at the approval stage so as to affect validity as s 75R(2) of the *EPA Act* indicates and *Rivers* has held, I consider that a developer would be vulnerable to restraint by an injunction from carrying out development that was prohibited by cll 8 or 9. However, it is unnecessary to provide a concluded view on this point because, in my view, the Ground 1 challenge fails for other reasons.

Characterisation of purpose

270

In characterising the purpose of the Early Works sandstone excavation work, the following legal principles are relevant:

(a)

in planning law, a use of land must be for a purpose. The purpose of development is the end which the land is seen to serve. It describes the character which is imparted to the land at which the use is pursued: *Chamwell Pty Ltd v Strathfield Council* [2007] NSWLEC 114, 151 LGERA 400 at [27].

(b)

the nature of the use must be distinguished from the purpose of the use. Uses of different natures can still be seen to serve the same purpose: *Shire of Perth v O'Keefe* (1964) 110 CLR 529 at 534 - 535; *Warringah Shire Council v Raffles* (1978) 38 LGRA 306 at 308;

(c)

the characterisation of the purpose of development must be determined objectively: *Warriewood Properties Pty Ltd v Pittwater Council* [2010] NSWLEC 215 at [45]; and must be done in a common sense and practical way: *Chamwell* at [45];

(d)

characterisation of the purpose of the use of land should be done at a level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on, not in terms of the detailed activities, transactions or processes: *Royal Agricultural Society of NSW v Sydney City Council* (1987) 61 LGRA 305 at 310;

(e)

the question of whether a use for a particular purpose is subservient or incidental to

another purpose, or whether it constitutes an independent use, is one of fact and degree: *Lizzio v Ryde Municipal Council* (1983) 155 CLR 211 at 216 - 217; *Peters v Manly Municipal Council* [2007] NSWCA 343 at [21];

(f)

the task of characterisation is first and foremost a question of fact and degree: *Penrith City Council v Waste Management Authority* [1983] HCA 22, (1990) 71 LGRA 376; *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157.

271

Nice questions can arise about whether a prohibited development is an independent prohibited development or is ancillary to permitted development. In *Foodbarn* Glass JA said at 161:

It may be deduced that where a part of the premises is used for a purpose which is subordinate to the purpose which inspires the use of another part, it is legitimate to disregard the former and to treat the dominant purpose as that for which the whole is being used...Where the whole of the premises is used for two or more purposes none of which subserves the others, it is, in my opinion, irrelevant to inquire which of the multiple purposes is dominant. If any one purpose operating in a way which is independent and not merely incidental to other purposes is prohibited, it is immaterial that it may be overshadowed by the others whether in terms of income generated, space occupied or ratio of staff engaged.

272

A claimed ancillary use must be subordinate to the permissible use, such that the ancillary use can be characterised as an aspect of the overall permissible purpose: *Foodbarn* at 161.

273

Because categories of development are expressed in terms of purposes, it is important to take account of the purpose for which the development in question is to be undertaken. In *Baulkham Hills Shire Council v O'Donnell* (1996) 69 LGRA 404 Meagher JA (with whom Samuels AP and Clarke JA concurred) said at 409 - 410:

Notwithstanding the principles laid down in *Foodbarn* , it does not follow that a use which can be said to be ancillary to another use is thereby automatically precluded from being an independent use of the land. It is question of fact and degree in all the circumstances of the case whether such a result ensures or not. When a resident uses his land to park his motor car at his house, he is no doubt not conducting an independent use of car parking; when an employer installs at his factory a canteen for his workers, no doubt he is not

conducting an independent use of running a restaurant; when the Clarks grew vegetables for their table they were not conducting an independent use of vegetable growing. But when one use of the land is by reason of its nature and extent capable of being an independent use it is not deprived of that quality because it is "ancillary to", or related to, or interdependent with, another use.

His Honour added at 410:
If a book publisher opens a sales room at his publishing house to sell his products, the selling of books is an independent use although ancillary to the use of publishing.

The facts

274

The Early Works EA conceived of the proposed early works as follows:
The proposed early works which are intended to facilitate the future development of Headland Park, a recreation area, are generally permissible with consent. They are consistent with the objectives of the zone and generally fall within the definition of works required to establish the parkland, a "recreation area".

In terms of the proposed sandstone extraction, it is considered that this land use is permissible as it is being undertaken as an ancillary component of the development of the park. The extracted sandstone is proposed to be used on site and is not therefore a separate commercial use in its own right.

275

The Early Works EA at [6.8] described the sandstone extraction as follows:
Early works activities associated with sandstone extraction include:

Extraction of up to 80,000 m 3 of sandstone for project re-use in landscaping and other structures. Sandstone "products" will include rough cut sandstone, dimensioned stone, oversized boulder/rubble/rock materials, drainage blanket and general fill including overburden. Nominal rough surface sections would typically weigh between 5 and 50 tonnes with a small number of unique elements weighing up to 150 tonnes.
In the order of 65% of all material extracted will be used to create the naturalistic shoreline and drainage blanket underlying the fill material. The remaining 35% will be required for other landscape features including those required at Stage 1.
Extracted sandstone will be stored within the Headland Park site.

276

The DG report contained a virtually identical statement except that it

substituted "60,000m 3 " for "80,000m 3" . That is because in the meantime the Early Works PPR had reduced the amount of sandstone extraction to 60,000m 3 and reduced the extraction time by 25 per cent.

277

I do not think that the reference to "products" in the first dot point of the extract quoted above is to commercial or retail style products. Rather, it just indicates the product of the excavation.

278

The applicant's reliance on the use of 20,000 m 3 of extracted sandstone for building cladding is misplaced because although that was said in a noise and vibration assessment in Appendix 9 to the Early Works EA, later reports appended to the later Early Works PPR make clear that the building cladding use was eliminated, as the following analysis shows.

279

Appendix 9 to the Early Works EA was the Early Work Noise and Vibration Assessment dated 22 June 2010. In relation to sandstone extraction it stated at 6:

The extraction process is expected to proceed until the following requirements for the landscaping of the Headland Park area are achieved,

32,000 m 3 of rough cut sandstone for use along headland's water edge, in tidal pools
10,000 m 3 of dimensioned stone for use in seawalls and paving
20,000 m 3 of dimensioned stone for building cladding

280

On the basis of those statements in the EA and the noise and vibration assessment, the applicant submits that as a matter of fact and degree the sandstone extraction is a separate and independent use for the purpose of extractive industry having regard to the following:

(a)
BDA is going to create a range of products including 20,000 m 3 of dimensioned zone has building cladding;
(b)
some of the 35 per cent of the products are to be moved off the part of the Barangaroo site for which BDA is responsible to the Stage 1 part of the site for which Lend Lease is responsible, and for which presumably Lend Lease would otherwise have to pay.

281

Further, the applicant submits that the purpose is not recreation areas or ancillary to recreation areas because:

(a)
the recreation areas have not been approved albeit the approved concept plan says there is going to be a Headland Park;
(b)
in any case, as a matter of fact and degree, the use of some of the product for building cladding cannot be for the purpose of the creation of a recreation area.

282

Appendix 6 to the Early Works PPR is an updated Preliminary Environmental Construction Management Plan of September 2010 which states at p 7:

Early works activities associated with sandstone extraction include:

- Extraction of up to 60,000 of sandstone for project re-use in landscaping and other structures. Sandstone "products" will include rough cut sandstone, dimensioned stone, oversize boulder rubble, rock materials, drainage blanket and general fill including...
- The material extracted will be used to create the naturalistic shoreline and drainage blanket.
- Extracted sandstone will be stored within the Headland Park site at location shown in Appendix A.

283

Appendix 8 to the Early Works PPR is an updated Construction Traffic

Management Plan dated 22 September 2010, which states at p 13 [4.6]:

4.6 Sandstone Block Excavation and Transportation

As part of the excavation for the Headland Park car park, on-site extraction of sandstone will take place as part of the early works. This Sandstone extraction will comprise approximately 60,000 cubic metres for various uses.

Approximately 50,000 cubic metres will be used on site to form the wave cut platform, tidal pools and rock outcrops within the headland park.

Approximately 10,000 cubic metres (25,000 tonnes) will be transported to external quarries for dimensioning of the sandstone blocks for use in retaining walls, walking paths, steps and stone columns. This will be returned to the site during later stages.

284

This is a clearer description of what will be happening with the 60,000 m 3 . The PPR and its appendices do not include any reference to the 20,000 m 3 referred to in the earlier noise and vibration assessment appended to the earlier EA, let alone any reference to using it for building cladding. It appears that the deletion of that 20,000 m 3 for building cladding explains the drop from 80,000 m 3 to 60,000 m 2 to which I have earlier referred.

285

Consequently, I consider that the Minister would have been in a position to conclude that the 60,000 m 3 will be used as set out in the appendices to the PPR and that the 20,000 m 3 previously proposed for cladding was no longer the current position.

Conclusion

286

Once building cladding is eliminated from the equation, the applicant nevertheless submits that an independent use of "extractive industries"

is established by the proposal that up to 35 per cent of the sandstone will be required for other "landscape features" including those required for Stage 1 (Lend Lease's Area). I disagree.

287

The word "industry" in the term "extractive industries" identifies commercial activities carried on through industrial processes: *Miltonbrook Management Pty Ltd v Shellharbour City Council* [2004] NSWLEC 86 at [32] *; S J Connelly CPP Pty Ltd v Ballina Shire Council* [2010] NSWLEC 128, 174 LGERA 335 at [51]. In contrast, "earth works" does not connote commercial activities carried on through industrial processes.

288

The extraction of up to 60,000 m 3 of sandstone permitted by the Early Works Approval is not, in my opinion, for the purpose of an "extractive industry" for the following reasons, substantially as submitted by BDA.

289

First, the extraction is not a "commercial activity". The purpose is to facilitate the creation of a public recreational park with a naturalised foreshore. It is a statutory function of BDA, a government agency, to develop and manage Headland Park so as to encourage its use by the public: s 14(1) *Barangaroo Delivery Authority Act* 2009.

290

Second, the extraction of sandstone is not to be carried on through industrial processes. In *S J Connelly* at [55] - [56] Craig J said:

The "industrial process" contemplated by cl 19 seems to me to require more than the carrying out of preparatory works and the maintenance of static stockpiles. An industrial process carries with it the concept of some continuity in process rather than the one-off deposition of material at a nominated location on the Site and which does not involve any form of processing of the material. It will involve concentrated and labour intensive activities over a relatively short period of time in order to move the soil and rock from the road to the Site. As the applicant submitted, those works that are involved, apart from the

cartage of soil and rock, are essentially civil engineering works in preparing the Site to receive the material rather than some ongoing process of an industrial character.

If reference is made to the dictionary definitions which I have earlier quoted, the stockpiling on the Site of preload soil and rock is not being undertaken in the course of a particular branch of trade or manufacture nor is it being undertaken as part of a large-scale business activity.

291

Similarly, in the present case, the extraction of sandstone is not part of an ongoing process of an industrial character. It is a one-off activity and is not being undertaken in the course of a particular branch of trade or manufacture or as part of a large scale industrial activity.

292

Even if the permitted extraction of sandstone can properly be characterised as a use of land for the purpose of "extractive industry", I do not think it is an independent use. It is ancillary to use of the land for the purpose of facilitating the creation of a recreation area, Headland Park.

293

Where a part of a site is used for a purpose which is subordinate to the purpose which inspires the use of another part, it is legitimate to disregard the former and to treat the dominant purpose as that for which the whole is being used. The same principle applies where the dominant and subservient purposes both relate to the whole and not to separate parts: *Foodbarn* at 161.

294

In determining whether a particular purpose is incidental to another purpose, the primary consideration is the relationship between the two uses: *Bob Blackmore Pty Ltd v Anson Bay Company (Australia) Pty Ltd* (Court of Appeal, 23 March 1990, unreported). In that case, the

extraction of a gravel from a mining site was held to be ancillary or subservient to the use of an open cut coal mine, in circumstances where most of the gravel extracted was used for purposes which improved the use of the land as an open cut coal mine (such as surfacing roads to and from the mine, stabilising logging areas around the mine and erecting stoppings in mine shafts).

295

In the present case, the reason for extracting the sandstone is to enable Headland Park to be created. The use of the land for the extraction of sandstone is not a separate and independent use from the use of the land for the purpose of a recreation area. The purpose of extracting the sandstone is to create the use of the land as a recreation area. The sandstone extraction use subserves the creation of a recreation area use.

296

The applicant submits that the sandstone extraction cannot be viewed as ancillary to a recreation use (the park) because project approval for the park has not been granted. Concept plan approval for the park has been granted and the reason why project approval for the park has not been sought or granted is that it is a staged development with the early works going first. I do not think that the fact that the approval for the early works has preceded the anticipated project approval for the park affects the conclusion that the purpose of the sandstone excavation as part of the early works is for the purpose of that park or is ancillary to that purpose. If that is incorrect, I would alternatively conclude that the excavation is for the purpose of earth works or is ancillary to that purpose.

297

For these reasons, I do not accept Ground 1.

H. COSTS

298

As the applicant would have succeeded in the proceedings but for the Minister's post-trial 2011 amendment to SEPP 55, the question arises whether the respondents should be ordered to pay the applicant's costs and whether, having regard to the lateness of the amendment, the Minister should be ordered to pay those costs on an indemnity basis. I will give the parties the opportunity to make submissions on costs but, subject to consideration of any such submissions, I would make the following preliminary observations.

299

Subject to the rules of Court and to the *Civil Procedure Act* 2005, the Land and Environment Court has full power in civil proceedings to determine by whom, to whom and to what extent costs are to be paid, and may order that costs are to be awarded on the ordinary basis or on an indemnity basis: s 98 *Civil Procedure Act* 2005. Parties are under an obligation to the Court, and in turn to the administration of justice, to assist the Court to further the just, quick and cheap resolution of the real issues in the proceedings: s 56(1), (3) and (4). These provisions reflect the fact that "the courts are concerned not only with justice between the parties, which remains the priority, but also with the public interest in the proper and efficient use of public resources": *Aon Risk Management Services Australia Pty Ltd v Australian National University* [2009] HCA 27, 239 CLR 175 at [23]. The resolution of disputes serves the public as a whole, not merely the parties to the proceedings: *Aon at [113], Kelly v Jowett* [2009] NSWCA 278, 76 NSWLR 405 at [57] - [58].

300

Although costs on the ordinary basis are the norm, it is common knowledge that they provide an inadequate indemnity. In order to award costs on an indemnity basis, there must be sufficient special or unusual circumstances connected with the litigation justifying such an award: *Harrison v Schipp* [2005] NSWCA 133 at [8] - [10]; *Mead v Watson* [2005] NSWCA 133 at [8] - [10]. The categories in which the discretion to award indemnity costs may be exercised are not closed: *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 233.

301

The proceedings were commenced in late November 2010. The hearing commenced on 31 January 2011 and proceeded intermittently over six days concluding on 17 February 2011, followed by a supplementary written submission from the Minister on 22 February 2011. At the conclusion of the hearing, the proponents, with the acquiescence of the Minister and the applicant, requested that judgment be delivered in approximately two weeks. It was explained that the proponents had given some assurance to the applicant that they would not proceed with the work until the hearing but that if judgment could not be given within about two weeks it may be necessary for the matter to return to the Court for the parties to fight out an application by the applicant for an interlocutory injunction to restrain work pending judgment. It was in the interests of all parties that that should be avoided if possible.

302

On 2 March 2011, just before the expiry of that two week period and shortly before the anticipated date of publication of my judgment, the Minister exercised his power under s 75R(3A) of the *EPA Act* to amend SEPP 55 by order published on the NSW legislation website, so as to exclude the application of cl 17 and a closely related provision, cl 8(4), to these two projects only. This was the first amendment to SEPP 55

since Part 3A was introduced into the *EPA Act* in 2005. The amendment spelt the death knell of Ground 2 of the applicant's challenge. The order was in the following terms:

1 Name of Order
This Order is the Environmental Planning and Assessment Amendment (State Environmental Planning Policy No 55-Remediation of Land) Order 2011.

2 Commencement
This Order commences on the day on which it is published on the NSW legislation website.

3 Amendment of State Environmental Planning Policy No 55-Remediation of Land

Clause 19A
Insert after clause 19:

19A Application of SEPP to certain development at Barangaroo subject to Part 3A approvals
(1) This clause applies to development that is the subject of the following project approvals under Part 3A of the Act:
(a) project application number 10_0023, approved by the Minister for Planning on 2 November 2010,
(b) project application number 10_0047, approved by the Minister for Planning on 8 November 2010.
(2) To avoid doubt, the following provisions of this Policy do not apply to the carrying out of development to which this clause applies:
(a) clauses 8 (4) and 17,
(b) any other provision of this Policy that prohibits or restricts the carrying out of that development.

303 On 2 March 2011 the Minister arranged for the matter to be relisted before the Court, all parties attended and I was provided with a copy of the amending order. This development resulted in postponement of delivery of my reasons for judgment for a few days in order to take account of the new legal landscape.

304 An express object of SEPP 55 is to provide for a Statewide planning

approach to the remediation of contaminated land. The effect of the 2011 amendment is to immunise the two subject developments at Barangaroo, and only those developments, from that Statewide approach, so far as concerns the safeguards in cl 17 of SEPP 55.

305

The Minister for Planning's 2011 instrument amending SEPP 55 stated that it was to "avoid doubt". However, the Director-General of the Department of Planning expressed no doubt in his May 2010 environmental assessment requirements (EARs) relating to these Barangaroo projects. The EARs identified SEPP 55 as a relevant environmental planning instrument and required the preparation of RAPS - for which cl 17(1)(c) of SEPP 55 provides: see [39] above. There is a tension between the Director-General's position as expressed in the EARs and the position taken in this litigation by the Minister for Planning and the other respondents that cl 17(1)(c) of SEPP 55 is inapplicable.

306

It is not the role of the Court to pass judgment on the merits of the Minister's decision to exercise his statutory power to amend a SEPP. But it may have costs consequences if the amendment is made after relevant legal proceedings have been commenced against the Minister raising an issue to which the amendment relates. Here litigation was on foot challenging the validity of the Minister's approval of projects or the lawfulness of the carrying out of approved projects on the basis that SEPP 55 had not been complied with. The Minister and the other respondents contested the challenge. The applicant would have achieved success in the proceedings but for the Minister's amendment to SEPP 55 made after the trial concluded. If the Minister wished to exclude these two developments from the application of cl 17 and cl 8(4), he could have exercised his power to make the amendment at

any time after the commencement of the proceedings, if not before. The amendment changed the law on which the case had been fought. The timing of the amendment, almost two weeks after the conclusion of the hearing, has not been explained. Because the amendment was not made in a timely way, considerable legal costs and resources have been wasted by the applicant in relation to Ground 2. Resources of the Court have also been wasted.

307

In these special and unusual circumstances, the respondents are vulnerable to an order that they pay the applicant's costs and, because of the lateness of the amendment to the SEPP, the Minister is vulnerable to an order that he pay those costs on an indemnity basis.

308

I propose to reserve costs with the proviso that unless a party applies for a different costs order, accompanied by written submissions, within three working days, the order will be that the respondents pay the applicant's costs and that the Minister do so on an indemnity basis.

I. ORDERS

309

The orders of the Court are as follows:

1. The proceedings are dismissed.
2. Costs are reserved. Unless a party applies within three working days for a different costs order and the application is accompanied by written submissions, the order will be that the respondents are to pay the applicant's costs and the first respondent is to pay those costs on an indemnity basis.

3. The exhibits may be returned.

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Last updated 18 March 2011