



## Land and Environment Court New South Wales

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**Case Title:** Gray and Anor v Macquarie Generation  
(No 3)

**Medium Neutral Citation:** [2011] NSWLEC 3

**Hearing Date(s):** 5 August 2010

**Decision Date:** 1 February 2011

**Before:** Pain J

**Decision:** Determination that applicants should be granted leave to amend their claim, subject to the provision of further particulars

**Catchwords:** PROCEDURE:- whether leave to amend pleading ought be granted – whether abuse of process and/or issue estoppel seeking to rely on amended pleading – whether cause of action disclosed – whether particulars embarrassing

**Legislation Cited:** Civil Procedure Act 2005 s 56, s 57, s 58, s 64(1), s 64(2), s 98  
Clean Air Act 1961 s 16  
Energy Services Corporation Act 1995  
Judiciary Act 1903 (Cth) s 39(2)  
Land and Environment Court Act 1979 s 16(1), s 16(1A), s 20(1), s 20(2), s 20(3)  
Land and Environment Court Rules 2007 r 4.2(1)  
Native Vegetation Conservation Act 1997  
Protection of the Environment Operations Act 1997 s 3, s 45, s 63, s 64, s 115(1), s 115(2), s 252, s 322, Ch 3, Pt 8.4  
State Pollution Control Commission Act 1970 s 17K  
Uniform Civil Procedure Rules 2005 Pt 13 r 13.4, Pt 14 r 14.28, Pt 42 r 42.1

**Cases Cited:** Agar v Hyde [2000] HCA 41; (2001) 201

CLR 552  
Allen v Gulf Oil Refining Ltd [1981] AC 1001  
Arnold v Minister Administering the Water  
Management Act 2000 [2008] NSWCA 338;  
(2008) 73 NSWLR 196  
Arnold v Minister Administering the Water  
Management Act 2000 [2010] HCA 3;  
(2010) 240 CLR 242  
Blair & Perpetual Trustee Co v Curran  
(1939) 62 CLR 464  
Director-General, Department of Land and  
Water Conservation v Bailey [2003] NSWCA  
361; (2003) 136 LGERA 242  
Geddis v Proprietors of Bann Reservoir  
(1878) 3 App Cas 430  
General Steel Industries Inc v  
Commissioner for Railways (NSW) [1964]  
HCA 69; (1964) 112 CLR 125  
Gray v Macquarie Generation [2010]  
NSWLEC 34  
Gray v Macquarie Generation (No 2) [2010]  
NSWLEC 82  
Gunns Ltd v Marr [2005] VSC 251  
Harrison v Melhem [2008] NSWCA 67;  
(2008) 72 NSWLR 380  
Kuligowski v MetroBus [2004] HCA 34;  
(2004) 220 CLR 363  
Leerdam v Noori [2009] NSWCA 90; (2009)  
255 ALR 553  
Malika Holdings Pty Ltd v Stretton [2001]  
HCA 14; (2001) 204 CLR 290  
Meckiff v Simpson [1968] VR 69  
Murphy v Abi-Saab (1995) 37 CLR 280  
National Parks & Wildlife Service v Stables  
Perisher Pty Ltd (1990) 20 NSWLR 573  
Neighbourhood Association DP 285121 v  
Murray Shire Council [2001] NSWLEC 247;  
(2001) 117 LGERA 95  
Potter v Minahan [1908] HCA 63; (1908) 7  
CLR 277  
Project Blue Sky Inc v Australian  
Broadcasting Authority [1998] HCA 28;  
(1998) 194 CLR 355  
Reichel v Magrath (1889) 14 App Cas 665  
R v Janceski [2005] NSWCCA 281; (2005)  
64 NSWLR 10  
Tate & Lyle Industries Ltd v Greater London  
Council [1983] 2 AC 509  
Van Son v Forestry Commission of New  
South Wales (1995) 86 LGERA 108

Walton v Gardiner [1993] HCA 77; (1993)  
177 CLR 378

Texts Cited: J Basten, Commentary on "Statutory interpretation and indigenous property rights" (2010) 21 Public Law Review 263  
D C Pearce and R S Geddes, Statutory Interpretation in Australia, 6th ed (2006)  
LexisNexis Butterworths  
Ritchie's Uniform Civil Procedure NSW, LexisNexis, Sydney, 2005

Category: Procedural and other rulings

Parties: Peter Robert Gray (First Applicant)  
Naomi Crystal Hodgson (Second Applicant)  
Macquarie Generation (Respondent)

Representation

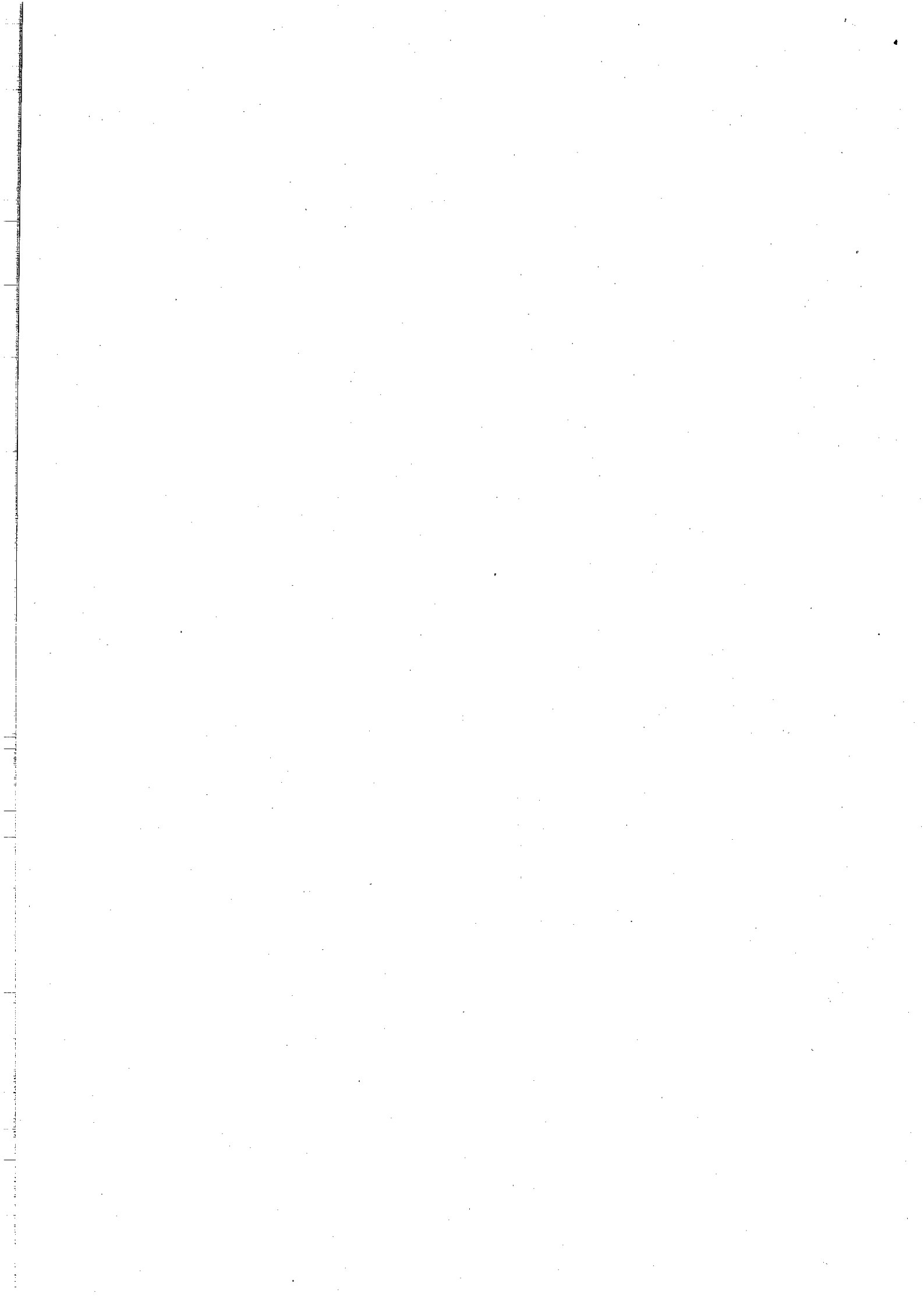
- Counsel: Mr I Lloyd SC (Applicants)  
Mr B Walker SC (Respondent)

- Solicitors: Environmental Defender's Office  
Clayton Utz

File number(s): 40500 of 2009

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**THE LAND AND  
ENVIRONMENT COURT  
OF NEW SOUTH WALES**

**Pain J**

**1 February 2011**

**40500 of 2009 Gray and Anor v Macquarie Generation  
(No 3)**

**JUDGMENT**

- 1 **Her Honour:** In *Gray and Anor v Macquarie Generation* [2010] NSWLEC 34 (*Gray No 1*) I summarily dismissed part of the Applicants' amended summons. I held that par 54A and par 54B of the Amended Points of Claim (APOC) could proceed and that the Applicants' case would need to be repleaded. By a Notice of Motion dated 15 June 2010 the Applicants seek an order for leave to rely on a Further Amended Summons (FAS) and Further Amended Points of Claim (FAPOC). Leave to amend a pleading can be given under s 64(1) and (2) of the *Civil Procedure Act 2005* (CP Act). The Respondent opposes leave being granted pursuant to Pt 14 r 14.28 of the *Uniform Civil Procedure Rules 2005* (UCPR).
  
- 2 An agreed bundle of documents was filed with the Court prior to the hearing of the Respondent's motion for summary dismissal the subject of *Gray No 1*. The parties continue to rely on that bundle in this part of the proceedings. Part A of the bundle contains a copy of Environment Protection Licence No 779 (the Licence) granted to Macquarie Generation for the Bayswater Power Station as at 1 January 2002 for the scheduled activities listed as electricity generation, waste activities and waste facilities (coal wash landfill). Successive Notices of Variation of Licence

779 for the period 22 December 2003 to 1 December 2008 and the Licence in its current form are included. The next review date of the Licence is specified as 1 December 2013.

- 3 Part B of the bundle includes the development consent for Bayswater Power Station granted by Muswellbrook Shire Council (the Council) dated 18 September 1980. An environmental impact statement (EIS) (dated June 1979) and an EIS supplementary information volume (dated June 1979) provide a physical description of the development and particularise the coal supply system.
- 4 Part C of the bundle contains other approvals and documents, including a copy of the application under s 16 of the *Clean Air Act* 1961 to construct the Bayswater Power Station (dated 10 July 1979), State Pollution Control Commission approval to install foundations (dated 22 April 1980) and approval to construct Bayswater Power Station (dated 30 June 1981), and an approval under s 17K of the *State Pollution Control Commission Act* 1970 in respect of the receipt of coal deliveries by road truck to the Bayswater Power Station (dated 18 September 1989).
- 5 In *Gray No 1* at [9]-[16] I set out the relevant provisions of *Protection of the Environment Operations Act* 1997 (PEO Act) and some of the terms of the Respondent's Licence.

*Finding in Gray No 1*

- 6 I held in *Gray No 1* at [48]-[58] that the Applicants' claim based on absence of lawful authority under s 115 of the PEO Act to emit carbon dioxide (CO<sub>2</sub>) into the atmosphere at Bayswater Power Station should be summarily dismissed. I also held at [59]-[61] that the Applicants' claim that CO<sub>2</sub> emitted from the power station was waste not covered by the Licence should be summarily dismissed.
- 7 I did not summarily dismiss par 54A and par 54B of the APOC in which the Applicants argued that any lawful authority to emit CO<sub>2</sub> was limited by a

requirement to have reasonable regard and care for the interests of other persons and/or the environment. I considered these grounds at [62]-[67] and held at [67]-[68]:

*The Respondent submits (par 34 above) that the implied limitations are vague and uncertain and could give rise to a possible conviction so that the litigation is a heavy burden on the Respondent. I have upheld the Respondent's summary dismissal claim in relation to the lawful authority issue raised by the Applicants. Paragraphs 54A and 54B will be considered in the context that there is lawful authority to emit CO<sub>2</sub> under the licence. That is the basis on which the Applicants put forward par 54A and 54B. I do not therefore understand that a finding of conduct potentially giving rise to a criminal offence under s 115 can arise in relation to these paragraphs if the Applicants' argument is upheld. The focus of the case will be on whether there are implied limitations as contended by the Applicants on the emission of CO<sub>2</sub> separately from the licence as a matter of law and, if these limitations exist, as a matter of fact. I do not consider that par 54A and 54B should be summarily dismissed as the Respondent has not met the high threshold necessary of demonstrating that no reasonable cause of action exists.*

#### *Conclusion*

*Given my finding that the Applicants' case in relation to the absence of lawful authority under the licence, including that CO<sub>2</sub> is not a waste for the purposes of the licence, should be summarily dismissed, the Applicants will need to recast their summons and APOC. For example, the declaration sought in the Class 4 summons is that the Respondent is wilfully or negligently disposing of waste in breach of s 115 of the PEO Act. That declaration is directed as I understand it to a case based on an absence of lawful authority. Further, I have not discussed par 48-53 of the APOC headed "wilful and negligent" as I did not understand that these paragraphs were raised in argument before me. The Applicants will need to clarify whether these grounds are to continue in whole or part in light of my findings that part of the Applicants' case is summarily dismissed. Additionally the Applicants may need to consider the consequential order(s) they seek if the case is recast.*

- 8 The amended pleading the subject of this motion is filed by the Applicants following *Gray No 1*. Standing for this action is founded on s 252 of the PEO Act which provides that any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations. If the Court is satisfied that a breach of the PEO Act has been committed or that a breach will, unless restrained by order of the Court, be committed, it may make such orders as it thinks fit to remedy or restrain the breach.

*Further Amended Summons (FAS)*

9 Declarations now sought by the Applicants are that:

1. *A declaration that between 1 January 2002 and 26 July 2009, the Respondent wilfully or negligently disposed of waste by way of the emission of carbon dioxide (CO<sub>2</sub>) into the atmosphere in a manner that harmed or was likely to harm the environment, in contravention of section 115(1) of the Protection of the Environment Operations Act 1997 (the Act). (unchanged but for one minor matter)*
3. *Further or in the alternative, a declaration that there is an implied condition in environment protection licence No 779 (the Environment Protection Licence) which requires that the Respondent does not emit CO<sub>2</sub> in a manner that fails to have reasonable regard and care for:  
(a) the interests of other persons; and/or  
(b) the environment (new declaration)*
4. *Further and in addition to paragraph 3 above, a declaration that between 1 January 2002 and 26 July 2009, the respondent has emitted CO<sub>2</sub> at Bayswater Power Station in a manner that fails to have reasonable regard and care for:  
(a) the interests of other persons; and/or  
(b) the environment  
and as such the Respondent has breached the implied condition referred to at paragraph 3 above. (new declaration)*
5. *Further or in the alternative, a declaration that there is an implied limitation on the Respondent's authority to emit carbon dioxide at Bayswater Power Station which requires that it does not emit CO<sub>2</sub> at Bayswater Power Station in manner that fails to have reasonable regard and care for:  
(a) the interests of other persons; and/or  
(b) the environment. (new declaration)*
6. *Further and in addition to paragraph 5 above, a declaration that between 1 January 2002 and 26 July 2009, the Respondent has emitted CO<sub>2</sub> at Bayswater Power Station in a manner that fails to have reasonable regard and care for:  
(a) the interests of other persons; and/or  
(b) the environment  
and as such the Respondent has breached the implied limitation referred to at paragraph 5 above. (new declaration)*
7. *An order that the respondent be restrained from burning any more than an average of 7 million tonnes of coal per calendar year at Bayswater Power Station, from 1 January 2002 until the power station is decommissioned. (new order)*
8. *(Not pressed)*

10 All but the first declaration are new.

*Further Amended Points of Claim (FAPOC)*

- 11 The FAPOC are unchanged from the APOC in par 1 to par 53. These paragraphs detail that the Respondent is a state owned corporation and carries on the generation of electricity from coal-fired Bayswater Power Station which emits large amounts of CO<sub>2</sub>. Carbon dioxide contributes to global warming which is also contributing to ocean acidification. The Respondent is the holder of an environment protection licence under the PEO Act in relation to the Bayswater Power Station. Carbon dioxide is a waste under the PEO Act and is disposed of for the purposes of s 115 of the PEO Act. The emission of CO<sub>2</sub> from Bayswater Power Station is harming or is likely to harm the environment. Wilful or negligent disposal of CO<sub>2</sub> is also alleged on the basis that the Respondent was aware of the harm or likely harm to the environment caused by the emission of CO<sub>2</sub>. The relevant timeframe during which CO<sub>2</sub> emissions were emitted for the purposes of these proceedings is 1 July 2001 to 30 June 2009 referred to in par 30 of the FAPOC. Three grounds of challenge are set out in the FAPOC.

*(i) absence of lawful authority based on s 115 of PEO Act (amended ground in par 54A and par 54B of the APOC).*

- 12 Paragraph 54A alleges that the Respondent does not have lawful authority to emit CO<sub>2</sub> at Bayswater Power Station in a manner that does not have reasonable regard and care for the interests of other persons and/or the environment. This ground is in similar terms to the ground considered in *Gray No 1* at [62]-[67], with expanded particulars as follows:

*The limits on Macquarie Generation's authority to emit CO<sub>2</sub> are to be implied from the terms of the Act, the ESC Act, and the relevant development consent comprising the letter dated 18 September 1980 to the Electricity Commission of NSW by which Muswellbrook Shire Council granted approval for the development of Bayswater Power Station as described in the environmental impact statement and supplementary information volume dated June 1979 (the Development Consent).*

The limit on lawful authority was previously specified in the particulars to be implied by the Licence.

13 Paragraph 54B alleges that *part of* [emphasis added, amendment to pleading] the CO<sub>2</sub> emitted from Bayswater Power Station is emitted in a manner which fails to have reasonable regard and care for the interests of other persons and/or the environment and is without lawful authority. The particulars have changed to read:

(a) *Macquarie Generation has had and continues to have the reasonable capacity to minimise the amount of CO<sub>2</sub> emitted at Bayswater Power Station for environmental purposes by burning less coal but has not done so or made any reasonable efforts to do so.*

*Further particulars will be provided following discovery and filing of expert evidence.*

(b) *The Applicants refer to and repeat paragraphs 43 to 46 of the Points of Claim. [these pars deal with harm to the environment resulting from the emission of CO<sub>2</sub>]*

*(ii) implied condition based on s 64 of PEO Act (new ground)*

14 Paragraph 55 alleges that there is an implied condition in the Licence which requires the Respondent not to emit CO<sub>2</sub> in a manner that fails to have reasonable regard and care for the interests of other persons and/or the environment. The particulars refer to the terms of the PEO Act, the *Energy Services Corporation Act 1995* (ESC Act) and the development consent. Paragraph 56 alleges that the Respondent has breached this implied condition. The breach is particularised as follows:

(a) *Macquarie Generation has had and continues to have the reasonable capacity to minimise the amount of CO<sub>2</sub> emitted at Bayswater Power Station for environmental purposes by burning less coal but has not done so or made any reasonable efforts to do so.*

*Further particulars will be provided following discovery and filing of expert evidence.*

(b) *The Applicants refer to and repeat paragraphs 43 to 46 of the Points of Claim. [these pars deal with harm to the environment resulting from the emission of CO<sub>2</sub>]*

*(iii) implied (statutory) limitation based on s 115 of PEO Act (new ground)*

15 Further or alternatively, par 57 alleges that there is an implied limitation on the Respondent's authority to emit CO<sub>2</sub> whereby CO<sub>2</sub> cannot be emitted in a manner that fails to have reasonable regard and care for the interests of

other persons and/or the environment. The particulars state (the same as par 55) that there is an implied limitation from the terms of the PEO Act, the ESC Act and the development consent. Paragraph 58 alleges that the Respondent has breached this implied limitation. The particulars provided are the same as for par 56.

*Protection of the Environment Operations Act 1997*

- 16 The FAS and FAPOC rely on s 64 and s 115 of the PEO Act. Sections 115(1) and (2) relevantly provide:

*(1) Offence*

*If a person wilfully or negligently disposes of waste in a manner that harms or is likely to harm the environment:*

- (a) the person, and*
- (b) if the person is not the owner of the waste, the owner,*

*are each guilty of an offence.*

*(2) Defence—lawful authority*

*It is a defence in any proceedings against a person for an offence under this section if the person establishes that the waste was disposed of with lawful authority....*

- 17 Section 63(1) of the PEO Act states that a "licence may be issued subject to conditions or unconditionally." Sections 64(1) and (2) provide:

*(1) Offence*

*If any condition of a licence is contravened by any person, each holder of the licence is guilty of an offence.*

*Maximum penalty:*

- (a) in the case of a corporation—\$1,000,000 and, in the case of a continuing offence, a further penalty of \$120,000 for each day the offence continues, or*
- (b) in the case of an individual—\$250,000 and, in the case of a continuing offence, a further penalty of \$60,000 for each day the offence continues.*

*(2) Defence*

*The holder of a licence is not guilty of an offence against this section if the holder establishes that:*

- (a) the contravention of the condition was caused by another person, and*
- (b) that other person was not associated with the holder at the time the condition was contravened, and*
- (c) the holder took all reasonable steps to prevent the contravention of the condition.*

*A person is associated with the holder for the purposes of paragraph (b) (but without limiting any other circumstances of association) if the person is an employee, agent, licensee, contractor or sub-contractor of the holder.*

18 Also relevant to an understanding of the Applicants' case is the objects clause in s 3, particularly (a) and (d) as follows:

(a) *to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development,*

(d) *to reduce risks to human health and prevent the degradation of the environment by the use of mechanisms that promote the following:*

(i) *pollution prevention and cleaner production,*

(ii) *the reduction to harmless levels of the discharge of substances likely to cause harm to the environment,*

(iia) *the elimination of harmful wastes,*

(iii) *the reduction in the use of materials and the re-use, recovery or recycling of materials,*

(iv) *the making of progressive environmental improvements, including the reduction of pollution at source,*

(v) *the monitoring and reporting of environmental quality on a regular basis,*

#### *Land and Environment Court Act 1979*

19 Sections 16(1) and (1A) of the *Land and Environment Court Act 1979* (the Court Act) provide:

(1) *The Court shall have the jurisdiction vested in it by or under this or any other Act.*

(1A) *The Court also has jurisdiction to hear and dispose of any matter not falling within its jurisdiction under any other provision of this Act or under any other Act, being a matter that is ancillary to a matter that falls within its jurisdiction under any other provision of this Act or under any other Act.*

20 Sections 20(1), (2) and (3) of the Court Act relevantly provide:

(1) *The Court has jurisdiction (referred to in this Act as "Class 4" of its jurisdiction) to hear and dispose of the following:*

(ci) *proceedings under Part 8.4 of the Protection of the Environment Operations Act 1997, (includes s 252)*

(2) *The Court has the same civil jurisdiction as the Supreme Court would, but for section 71, have to hear and dispose of the following proceedings:*

- (a) *to enforce any right, obligation or duty conferred or imposed by a planning or environmental law or a development contract,*
- (b) *to review, or command, the exercise of a function conferred or imposed by a planning or environmental law or a development contract,*
- (c) *to make declarations of right in relation to any such right, obligation or duty or the exercise of any such function,*
- (d) *whether or not as provided by section 68 of the Supreme Court Act 1970—to award damages for a breach of a development contract.*

...  
(3) *For the purposes of subsection (2), a planning or environmental law is:*

- (a) *any of the following Acts or provisions:*

...  
*Protection of the Environment Operations Act 1997*

- ...  
(c) *(Repealed)*

*as respectively in force at any time, whether before, on or after 1 September 1980.*

#### *Applicants' submissions*

21 Paragraphs 54A to 58 of the FAPOC are based on the proposition that if the Respondent is authorised to emit CO<sub>2</sub> it is only authorised to do so in a manner that has reasonable regard and care for the interests of other persons and/or the environment. The exercise of statutory powers or powers under statutory instruments must be undertaken without "negligence", that word having a special meaning as requiring the person undertaking the activity, as a condition of obtaining immunity from action, to carry out those activities in a certain way per *Van Son v Forestry Commission of New South Wales* (1995) 86 LGERA 108 at 129-130. There is an implied limit recognised by the common law or implicit in the power that the power must be exercised without negligence or with all reasonable regard and care for the interests of other persons.

22 The case is recast in three ways. Firstly, in par 54A and par 54B the Applicants allege that the Respondent's authority under the Licence to

emit CO<sub>2</sub> is limited. Secondly, in par 55 and par 56, it is alleged that there is an implied condition in the Licence. Thirdly, in par 57 and par 58 the Applicants allege that there is an implied statutory limitation on the Licence. The limit is recognised by the common law and is implied or implicit in the powers themselves. In *Van Son, Allen v Gulf Oil Refining Ltd* [1981] AC 1001 and *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, a breach of the relevant limit was prosecuted by reference to the law of nuisance or negligence. Here the Applicants seek to prosecute a breach of the limitation of the Respondent's authority to emit CO<sub>2</sub> by reference to the relevant common law principles as applied to the statutory scheme.

- 23 Applying the principles in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, a legislative instrument must be construed by reference to the instrument viewed as a whole in light of the statutory context. The Respondent's construction results in the Licence permitting the unlimited emission of CO<sub>2</sub> into the atmosphere. There is a common law principle of limitation of statutory authority where the holder of a licence fails to have reasonable regard and care for the interests of other persons and/or the environment. Construction of the Licence to allow unlimited emission of CO<sub>2</sub> into the atmosphere would result in serious environmental harm, a result at odds with s 3 of the PEO Act. Parliament would not have intended that licence holders should be authorised to undertake their activities in a manner that does not have regard for the interests of other persons and the environment and which is wholly inconsistent with the PEO Act.
- 24 The claim of "wilful and negligent disposal of CO<sub>2</sub>" (par 48 to par 53 FAPOC), while identified separately, is to be considered as part of par 54A and par 54B. The claim that the Respondent failed to have reasonable regard and care for the interests of other persons and/or the environment requires a finding of negligence. If there is no finding of negligence by the Court the implied condition in the Licence (par 55) (based on s 64) would

still be breached. The wilful and negligent pleading in par 48 to par 53 could be included as a particular of the par 54A ground.

- 25 Even if there is no negligence found or if that part of the claim cannot proceed, the limitation would be to the extent of the lawful authority and would be subject to the *Van Son* test which is essentially nuisance.
- 26 Section 45 of the PEO Act specifies matters which the appropriate regulatory authority, the Environment Protection Authority (EPA), is required to take into account when undertaking its functions. Unlimited CO<sub>2</sub> emissions are not consistent with the regulatory authority issuing the Licence in accordance with s 45 and also the objects in s 3 of the PEO Act.
- 27 In par 55 and par 56 of the FAPOC the Applicants argue that a proper analysis of the terms of the Licence itself establishes that there is an implied condition in the Licence which limits the emission of CO<sub>2</sub> from the power station to a level that has reasonable regard and care for the interests of other persons and/or the environment. For example, the requirement to monitor CO<sub>2</sub> in condition M2.1 of the Licence is consistent with the Applicants' contention that any authority the Respondent may have to emit CO<sub>2</sub> is not unlimited. There is an implied condition in the Licence which limits the emission of CO<sub>2</sub> to a level which has reasonable regard and care for the interests of other persons and/or the environment. Paragraphs 57 and 58 are a variation of 54A and 54B.
- 28 The objects of the ESC Act are also relevant in construing the Licence because the emission of unlimited amounts of CO<sub>2</sub> is inconsistent with the objects of the ESC Act.
- 29 The relief sought in the FAS reflects the FAPOC in relation to prayers 1 – 6. Prayers 1 and 2 arise from par 54A and par 54B of the FAPOC, prayers 3 and 4 arise from par 55 and par 56 of the FAPOC, and prayers 5 and 6 arise from par 57 and par 58 of the FAPOC. The relief claimed at par 7 of

the FAS restricting the burning of coal to an average of seven million tonnes per calendar year is in addition to the other relief claimed in the FAS. In the Applicants' submission, such relief might be ordered by the Court in the event that the other claims are successful. The restraint would give effect to the obligation upon the Respondent, in undertaking its activities under the Licence, to have reasonable regard and care for the interests of other persons and/or the environment, howsoever that obligation is expressed. It was never contemplated that more than seven million tonnes of coal would be burned at the Bayswater Power Station per year. In the EIS for the Bayswater Power Station dated June 1979 (Agreed Bundle of Documents, B2, p 240) the proponent represented (p 22) as follows:

*Construction of Units 3 and 4 to bring the station to its full 2640 capacity will increase requirements up to 7 million tonnes of coal per annum.*

- 30 The Respondent submits that the finding in *Gray No 1* provides a complete defence to any claim for contravention of s 115 of the PEO Act. Any reformulated case founded on a contravention of s 115 of the PEO Act or a breach of the terms of the Respondent's Licence misstates the effect of *Gray No 1*. Paragraphs 54A and 54B of the APOC raised squarely for determination an alternative argument that notwithstanding that the Licence gives the Respondent lawful authority to emit CO<sub>2</sub> such authority is not unlimited. The Applicants' case goes to the issue of the extent of the lawful authority defence under s 115. That issue was preserved for final hearing. That issue remains and is articulated in alternative ways. The lawful authority is subject to an implied limitation or condition, as articulated in *Gray v Macquarie Generation (No 2)* [2010] NSWLEC 82 (*Gray No 2*) at [1] and [9(b)]. It is not therefore open now for the Respondent to contend that no cause of action under s 115 remains.
- 31 The Applicants' case relies on s 252 of the PEO Act, alleging breaches of s 115 and s 64 of that Act. The Applicants do not allege that a failure by the holder of an authority to have reasonable regard and care for the interests of other persons itself gives rise to a free-standing cause of

action of legal wrong. There is no issue estoppel or abuse of process raised by the FAPOC or the APOC. The claim is clearly intelligible on the pleading. The principal issues are whether there is a limitation on the Respondent's capacity to emit CO<sub>2</sub> implied in the Licence and whether the Court has jurisdiction to dispose of the Applicants' claims.

*Respondent's submissions*

32 Leave to amend should be refused as the proposed further amended pleading discloses no arguable cause of action, has a tendency to cause prejudice, embarrassment or delay in the proceedings or is an abuse of process of the Court as identified in Pt 14 r 14.28 of the UCPR. In summary the critical and operative paragraphs of the FAPOC (par 54A to par 58):

- (a) do not disclose any reasonably maintainable contravention of s 115(1) of the PEO Act;
- (b) do not disclose any other reasonable cause of action;
- (c) are unintelligible, ambiguous or so imprecise as to deprive the Respondent of proper notice of the real substance of the claim;
- (d) constitute a collateral attack upon, or an impermissible attempt to re-litigate issues determined in the judgment of this Court delivered on 22 March 2010; and
- (e) make claims which fall outside the statutory jurisdiction of the Court.

33 A novel claim, as this is, must nevertheless identify a recognisable cause of action or legal claim. In *Gray No 1* at [67] in declining summarily to dismiss par 54A and par 54B, the claim in those paragraphs which the Court was permitting to proceed in a recast form would necessarily be a claim:

- (a) made independently of s 115 of the PEO Act and not involving any allegation of a contravention of s 115; and
- (b) made independently of the Licence.

34 The Court considered that any claim based upon par 54A and par 54B would be made in reliance on a claim outside the PEO Act. That is clear from the reference to s 322 of the PEO Act in *Gray No 1* at [66].

35 By virtue of the reasons given in *Gray No 1* and the making of the orders giving effect to those reasons, this Court has conclusively determined that:

- (a) the Respondent has lawful authority to emit CO<sub>2</sub> under the Licence;
- (b) CO<sub>2</sub> does not constitute "waste" within the meaning of the Licence;
- (c) the Respondent has lawful authority, and therefore a complete defence under s 115(2) of the PEO Act, in respect of the emission of CO<sub>2</sub> at Bayswater Power Station; and
- (d) any reformulated case founded upon an alleged implied limitation sourced from *Van Son* and couched in terms of "reasonable regard and care for the interests of other persons and/or the environment" would, of its nature, not be a claim for either:
  - (i) a contravention of s 115 of the PEO Act; or
  - (ii) a breach of the terms of the Respondent's Licence;

but instead would be some other claim (not then articulated by the Applicants) in reliance upon the principle associated with *Van Son*.

*No reasonable cause of action*

36 The FAS and FAPOC disclose no arguable cause of action. No claim based on a breach of s 115 is reasonably available given the reasoning in *Gray No 1*. Any cause of action must arise separately from a breach of s 115 of the PEO Act. The authorities from which the Applicants have extracted the criterion of "reasonable regard and care for the interests of other persons" involved claims in tort for nuisance. Those cases involved an analysis of the extent of authority or immunity conferred by particular statutory provisions in determining whether, or to what extent, the defendant was liable in nuisance. The focus of analysis was the interaction between the statutory regime and the plaintiff's claim in tort. Those authorities do not establish that, in the exercise of authority conferred by statute, any failure by the recipient of the authority to have reasonable regard and care for the interests of other persons itself gives rise to a free-

standing cause of action or legal wrong. It remains necessary in each case for the plaintiff to plead and prove that the material facts and the absence (or excess) of statutory authority establish a recognised cause of action.

- 37 The Applicants rely on relevant common law principles to argue these operate as a limitation upon an authority conferred by statute and not an independent source of rights. A cause of action must still be identified. There is no claim in nuisance or negligence or any other claim or general law. The FAPOC does not plead that the alleged breach of the alleged implied limitation gives rise to any liability or cause of action under another provision of the PEO Act or under any other statute. Nor is there a pleading of a cause of action for breach of statutory duty.
- 38 Assuming the Applicants could prove the Respondent had emitted CO<sub>2</sub> without reasonable care for the interests of other persons or the environment, no curially enforceable right or liability is identified. No legal consequence is identified between the facts pleaded and a cause of action known to the law.
- 39 The absence of any cause of action is not surprising. The scheme of Ch 3 of the PEO Act is to confer upon the EPA a wide discretion in the making, varying and revocation of licences, and the imposition of (express) conditions thereon, by reference to certain clearly identified principles and considerations (s 45). It would defeat the statutory regime if a vague, implied limitation were to be extracted from private law, given a wider operation than in that setting, and then be treated, in that transmogrified form, as an independent source of a right of action against the holder of a licence granted and held pursuant to a careful legislative scheme of express conditions formulated and monitored by the EPA.
- 40 The case is not founded on the restraint of a breach of a development consent. The development consent and the Licence are expressed to allow for the generation of kilowatt hours greater than a particular low

figure (see condition A1.2 of the Licence authorising the generation of electrical power from coal on a scale of generation greater than 4,000 gigawatt hours). The development consent also does not impose a gigawatt hour limit. The relief in prayer 7 relies on a statement in the EIS as if that can provide a limitation on authority under the Licence.

- 41 There is no pleading of the tort of negligence or the tort of nuisance whether public or private so that no common law claim is mounted.
- 42 Section 115 has wilful and negligent at its heart, that being an element of the offence. As held in *Gray No 1* if there is lawful authority under an environmental protection licence there can be no breach of s 115. Paragraphs 48 to 53 are not available given the finding in *Gray No 1* and are now immaterial. The claim based on s 115 or s 64 of an implied condition in the Licence is not maintainable in conformity with *Gray No 1*.

*Abuse of process/issue estoppel*

- 43 The FAS and FAPOC raise issues already finally determined in *Gray No 1*. Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories: (1) the Court's procedures are invoked for an illegitimate purpose; (2) the use of the Court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the Court's procedures would bring the administration of justice into disrepute. The taking of, as well as the failure to take, procedural steps in the course of proceedings is capable of constituting an abuse of process.
- 44 There can be an abuse of process where a plea of res judicata, cause of action or issue estoppel is not available, "*if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again*" per *Reichel v Magrath* (1889) 14 App Cas 665 at 668 (Lord Halsbury LC); *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378 at 392-393 (Mason CJ, Deane and Dawson JJ). The underlying premise is that

success on the reformulated case would contradict the outcome, or determination of an issue, in earlier proceedings. In *Gray No 1* the Court held that a claim based on absence of lawful authority giving rise to a breach of s 115 was not maintainable. The amended pleading should be considered in an appeal against that finding. The newly pleaded case continues to be based on a breach of s 115. That alone renders it impermissible.

*Tendency to cause prejudice, embarrassment or delay in proceedings*

- 45 A pleading is embarrassing if it is "*unintelligible, ambiguous, vague or too general, so as to embarrass the opposite party who does not know what is alleged against him*" per *Meckiff v Simpson* [1968] VR 69 at 70 (Winneke, CJ, Adam and Gowans JJ). A pleading will be embarrassing if allegations are made at such a level of generality that the defendant does not know in advance the case it has to meet. The FAS and the FAPOC articulate no link between the general allegations in par 54A to par 58 and any cause of action or the relief claimed in the FAS. The pleading is so drawn as to obscure, rather than illuminate, the real issues in dispute in the proceedings.
- 46 Further, par 54A to par 58 of the FAPOC are couched in vague and general terms, and include repeated bare assertions of a non-specific nature, such that the Respondent cannot reasonably know the nature of the case made against it. The particular item par 54D refers to the Respondent having the reasonable capacity to minimise the amount of CO<sub>2</sub> emitted from the power station. The meaning of this is unknown. For example, does this mean the power station should stop burning coal or that the use of coal should be no more than the amount needed to generate the existing level of energy or that the amount of coal should be reduced with the consequence that the power output is reduced?
- 47 The particulars also state the Respondent has not made reasonable efforts to minimise the amount of CO<sub>2</sub> emitted from the power station but there is no allegation of what reasonable efforts are required or to any

standard which has been allegedly breached as to fact or conduct. There is no reference to facts which would underpin a claim of unlawful conduct.

- 48 Paragraph 55 of the FAPOC relies on s 64 of the PEO Act. The particulars are similar to those for par 54A and give rise to the same difficulties. Paragraph 57 of the FAPOC alleges that there is an implied limitation on a statutory authority to emit CO<sub>2</sub>. The case and particulars present the same difficulties as previously. No fact that shows any falling short of standard is identified and the language is so vague as to be embarrassing. The maximum amount of coal that can be burned is not specified.
- 49 *Van Son* is a nuisance standard and a claim based on that approach cannot be taken by all persons, past, present or future. There are no facts pleaded as to what is the standard of reasonableness to be set. Such cases are dependent on their facts in establishing that particular activity gives rise to a nuisance but no relevant facts are pleaded here. That strongly suggests that *Van Son* cannot provide the basis for a limitation on an activity carried out pursuant to statutory permissions which can give rise to criminal liability based on the nebulous standard of reasonable regard and care for persons.
- 50 *Van Son* represents old law that an intention appears sufficiently clearly from the words expressly or impliedly that Parliament intended that the person undertaking the regulated activity may do so notwithstanding harm to neighbours without legal remedy, that is, authorising a tort. See for example, *Tate & Lyle* citing *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430. *Van Son* cannot apply in this statutory regime. There cannot be a condition which is not written in the Licence. Statutes giving rise to criminal liability must be construed in favour of the person against whom criminal liability is asserted. See for example, *Director-General, Department of Land and Water Conservation v Bailey* [2003] NSWCA 361; (2003) 136 LGERA 242.

- 51 The formulation "reasonable regard and care for the interests of other persons and/or the environment" yields no judicially manageable standard or criterion appropriate for application by a court in identifying, other than in the legislation, the Licence or the development consent, an alleged boundary of lawful conduct. How is the Court to ascertain the level at which the emission of CO<sub>2</sub> from a particular site ceases to have "reasonable regard and care for the environment"?
- 52 There is nothing in the development consent or the EIS which refers to the production of CO<sub>2</sub> from lawful generation of power greater than a particular level. The seven million tonnes mentioned in the EIS which is referred to by the Applicants is simply a statement about capacity. There is no basis for suggesting that it provides a limit on the amount of CO<sub>2</sub> which can be emitted.
- 53 A pleading in this imprecise form operates to deprive the Respondent of proper notice of the substance of the claim and to disable the Court in its task of quelling controversies by the application of an objective legal standard. The pleading in par 54A to par 58 of the FAPOC accordingly answers the description of an embarrassing pleading. Further, a vague pleading in these terms which does not identify the cause of action relied upon and does not enable the Respondent properly to understand or defend the claim, causes significant prejudice to the Respondent and will cause significant delay in the proceedings.

*Court lacks jurisdiction*

- 54 The Court does not have jurisdiction to consider the Applicants' claims in par 54A to par 58 as the claims do not come within s 20(1) of the Court Act, or under s 20(2) for the enforcement of a right, obligation or duty, or the exercise of a function conferred or imposed by "a planning or environmental law" as defined in s 20(3). The Court does not have jurisdiction to determine a claim in tort which is not ancillary to a matter otherwise within the Court's jurisdiction per *Neighbourhood Association*

*DP 285121 v Murray Shire Council* [2001] NSWLEC 247; (2001) 117 LGERA 95 at 200.

- 55 The matters are not ancillary to a matter otherwise falling within the Court's jurisdiction for the purpose of s 16(1A) of the Court Act. The matters in par 54A to par 58 do not present for determination any matter which is "ancillary" being incidental, accessory or auxiliary to the determination of a matter within jurisdiction, such as the determination of a legal issue constituting an essential step in the course of determining an issue within jurisdiction, per *Arnold v Minister Administering the Water Management Act 2000* [2008] NSWCA 338; (2008) 73 NSWLR 196 at 215 [73]-[75] (Spigelman CJ, Allsop P and Handley AJA agreeing) affirmed by the High Court in *Arnold v Minister Administering the Water Management Act 2000* [2010] HCA 3; (2010) 240 CLR 242.

### ***Finding***

#### *Relevant principles*

- 56 The Applicants seek leave to amend their pleading following *Gray No 1*. This Court is not a court of strict pleading (unlike superior courts with court rules regulating the form of pleading) but an applicant must articulate his or her case in a manner which enables the opposing party to understand the case it must meet. The Court can grant leave to a party to amend a pleading at any time according to s 64(1)(b) of the CP Act. Section 64(2) states that:

*Subject to section 58, all necessary amendments are to be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings, correcting any defect or error in the proceedings and avoiding multiplicity of proceedings.*

- 57 Section 58(1) states that a court must seek to act in accordance with the dictates of justice in deciding to make any order for the amendment of a document. Subsection (2) specifies that in determining the dictates of justice the Court must have regard to s 56 and s 57 and may have regard to the matters set out in s 58(2)(b) such as the degree of difficulty or complexity to which the issues give rise, inter alia. Section 56 identifies the

overriding purpose of the CP Act to facilitate the just, quick and cheap resolution of the real issues in proceedings and states that a court must give effect to that overriding purpose in the exercise of any power under the Act. Section 57 refers to the objects of case management in relation to the just determination of proceedings and their efficient disposal inter alia.

58 The Respondent opposes the grant of leave pursuant to UCPR Pt 14 r 14.28 submitting that the amended pleading should be struck out as it discloses no arguable cause of action (r 14.28(a)), has a tendency to cause embarrassment/prejudice (r 14.28(b)) or is otherwise an abuse of process of the Court (r 14.28(c)). The circumstances in which these subsections apply are not defined or limited in the rule. There is potential overlap between them. Pleadings are embarrassing if unintelligible, ambiguous or so imprecise in the identification of material facts and allegations as to deprive the opposing party of proper notice of the substance of a claim per *Gunns Ltd v Marr* [2005] VSC 251 at [56]-[58] cited in *Ritchie's Uniform Civil Procedure NSW*, LexisNexis, Sydney, 2005 to date (loose-leaf at Service 24, January 2011), "Uniform Civil Procedure Rules", (Ritchie's UCP) at [14.28.22]. *Meckiff* relied on by the Respondent (par 45) is to similar effect.

59 Circumstances that may constitute an abuse of process defy exhaustive categorisation, see the authorities cited in Ritchie's UCP at [14.28.5] which refer to cases where proceedings were doomed to fail or cannot be fairly and properly determined due to prejudicial delays, that are res judicata because an issue has been determined in former proceedings and it is unfair to permit it to be raised afresh. An abuse of process arising from a pleading (r 14.28(1)(c)) is essentially a catch-all provision which the Court can apply in its wide discretion under the CP Act and UCPR.

60 If the Respondent is successful in having the pleading struck out, it argues that no leave ought be given for the Applicants to replead the case so that these proceedings will be at an end unless further leave to replead is allowed. There is substantial similarity to the Respondent's application for

summary dismissal pursuant to Pt 13 r 13.4 of the UCPR considered in *Gray No 1*. The ground for summary dismissal argued in *Gray No 1* was that no arguable cause of action (r 13.4(1)(b)) was disclosed in the Applicants' case. The Respondent refers again to *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125 at 128-130 to submit that the various claims articulated in par 54A to par 58 of the FAPOC are untenable and cannot succeed at trial. Another basis for summary dismissal specified in Pt 13 r 13.4(1)(c) of abuse of process was not argued in *Gray No 1*.

- 61 While this is an application to amend pleadings under s 64 of the CP Act in light of Pt 14 r 14.28 of the UCPR I am resolving once again as I did in *Gray No 1* whether an arguable cause of action is disclosed. The same test must be applied given that if the Respondent is successful in its argument the Applicants' case is arguably at an end unless further leave to replead is allowed. The authorities of *General Steel* applied in *Leerdam v Noori* [2009] NSWCA 90; (2009) 255 ALR 553 and *Agar v Hyde* [2000] HCA 41; (2001) 201 CLR 552 are referred to at [44]-[45] of *Gray No 1* and emphasise that the test for summary dismissal has a high threshold and requires a high degree of certainty. The Applicants' case must be taken at its highest.

*Applicants' grounds of challenge*

- 62 In *Gray No 1* I dismissed a ground of challenge that the Respondent had no lawful authority to emit CO<sub>2</sub> so as to give rise to a breach of s 115. I did not dismiss the ground of challenge in par 54A and par 54B of the APOC. My (incorrect) understanding of the Applicants' case was that the ground articulated in par 54A and par 54B did not rely on an allegation of breach of s 115 of the PEO Act but arose separately from the PEO Act and the Licence (see [67] *Gray No 1*). The substance of these paragraphs in the FAPOC is unchanged in that these continue to rely on a breach of s 115 on the basis that there are general common law principles which impose a limit on statutory authority which are breached by the emission of part of the unlimited amount of CO<sub>2</sub> from Bayswater Power Station. The pleading

has changed in that it is now alleged that part of the CO<sub>2</sub> is emitted from the power station in the manner identified, not the whole as previously pleaded. The particulars supporting the ground in par 54A and par 54B have changed and are set out above at par 12 above.

63 Because the Applicants' case continues to rely on absence of lawful authority under s 115, similar arguments to those set out at [31]-[34] in *Gray No 1* are raised in these proceedings with additional arguments also made. Those arguments were that no proper basis of claim was identified, the alleged implied limitations are contrary to the terms of the environment protection licensing regime in Ch 3 of the PEO Act, are inconsistent with the scope and purpose of the Ch 3 of the PEO Act if the Court imposes an unspecified and implied limitation otherwise validly granted under s 55 of the PEO Act and the implied limitations are vague and uncertain. Having now heard additional submissions from the Applicants I am able to more fully appreciate the claim sought to be made in relation to par 54A and par 54B so that my statements in [67] of *Gray No 1* are not correct in their description of this part of the Applicants' case.

64 The new ground (FAPOC par 55 and par 56), based on s 64 of the PEO Act, states that there is an implied condition in the Respondent's Licence which limits the emission of CO<sub>2</sub> measured against the same principle. Failure to comply with a licence condition is an offence under the PEO Act. The further new ground (FAPOC par 57 and par 58) is articulated as an implied statutory limitation on the Licence that unlimited CO<sub>2</sub> emissions fail to have reasonable regard and care for the interests of other persons and/or the environment. This was described by the Applicants' counsel as a variation of par 54A and par 54B.

*Is the amended pleading an abuse of process or gives rise to issue estoppel?*

65 The Respondent relies on [67] of *Gray No 1* to argue that the case now pleaded is not permissible because of issue estoppel and is an abuse of process. This argument is directed to par 54A and par 54B in particular as

my finding in *Gray No 1* was in relation to these paragraphs. The summary of the findings in *Gray No 1* in the Respondent's submissions in par 33 is correct, namely that par 54A and par 54B were founded on an (unspecified) cause of action separate from the holding of lawful authority as a defence under s 115 of the PEO Act. That understanding was erroneous. The Applicants' claim in par 54A and par 54B does require consideration of the limits of lawful authority in s 115. The Respondent submits that to allow the Applicants' case to continue is an abuse of process because the Applicants are acting contrary to the Court's findings in *Gray No 1*.

66 I have now heard further argument from the Applicants concerning the basis of the ground in par 54A and par 54B in particular, which was but one of several issues considered in *Gray No 1*. The substantial matter in *Gray No 1* was whether the Respondent had a lawful authority to emit any CO<sub>2</sub> from the power station. To the extent that I did not properly appreciate the nature of the case the Applicants pursued in these paragraphs, I trust that I now do. I determined in *Gray No 1* that par 54A and par 54B should not be summarily dismissed. The Applicants submit that these are directed at the extent of lawful authority held by the Respondent. To allow these to remain is not an abuse of process in these circumstances. As identified in par 58, circumstances which amount to an abuse of process are not closed, each case must depend on its own facts. Here the Respondent has had further opportunity to make submissions to address the Applicants' case so that I do not consider it has suffered undue prejudice in the Applicants seeking to press par 54A and 54B.

67 The Respondent also raises issue estoppel to argue that the Court has finally determined the issue the Applicants now seek to raise again so that it is not open to them to do so in the amended pleading. In *Gray No 1* at [67]-[68] set out above in par 7, I held that par 54A and par 54B should not be dismissed and that the Applicants should have the opportunity to replead this part of their case. While the basis for my finding in *Gray No 1* has been essentially canvassed again in the Applicants' submissions, that

is a necessary reconsideration of my finding rather than the Applicants acting contrary to a final legal conclusion in *Gray No 1*, a decision made within these proceedings (rather than in separate finalised proceedings). *Kuligowski v MetroBus* [2004] HCA 34; (2004) 220 CLR 363 at 373 referred to by the Respondent is authority in the High Court on the nature of issue estoppel where an issue determined finally in one set of judicial proceedings is sought to be raised in later separate proceedings involving the same parties. Such circumstances are identified in other cases referred to in Ritchie's UCP at [14.28.17]. I am determining procedural issues of summary dismissal and strike out within the same proceedings, not the final determination of legal issues after concluded proceedings, the circumstances to which issue estoppel is more usually applied. In *Gray No 2* at [20] I held that the Respondent's Notice of Motion for summary dismissal was a preliminary determination in the proceedings, to be contrasted with a final determination of a legal issue in a final hearing. Issue estoppel should not arise in the circumstances of this procedural motion to prevent the Applicants from relying on par 54A and par 54B. There has not been a final disposition once and for all of the issue per *Blair & Perpetual Trustee Co Ltd v Curran (Adam's Will)* (1939) 62 CLR 464 at 531 quoted by Gleeson CJ in *Murphy v Abi-Saab* (1995) 37 CLR 280 at 287.

*Is a cause of action articulated?*

- 68 All three grounds in the pleading are novel, assuming that three grounds are articulated. The Respondent argues that no cause of action known to the law is identified in the FAPOC. The Applicants' recast claim is that the standard of care for persons and/or the environment identified in *Van Son* is an implied limitation on the statutory authority conferred by the Licence and/or under the PEO Act.
- 69 The grounds need to be assessed in light of the provisions of the PEO Act. Section 115 states that if a person wilfully or negligently disposes of waste in a manner that harms or is likely to harm the environment that person is guilty of an offence. At the final hearing the Applicants bear the onus of

proof on the civil standard in these civil enforcement proceedings. The Applicants' counsel in oral submissions stated that wilful and negligent in par 48 to par 53 is not a separate allegation but part of the ground in par 54A and par 54B. That submission needs to be considered in light of s 115. Section 115(1) requires that the Applicants establish as a threshold issue that there is wilful and negligent disposal of waste by the Respondent. As I understand the Applicants' case the allegation of wilful and negligent disposal in par 48-53 is informed by the alleged infringement of the Respondent's lawful authority identified in par 54A and 54B. Assuming the Applicants can establish that threshold issue, there is a defence of lawful authority available to the Respondent under s 115(2) that as the holder of an environment protection licence it can rely on the Licence to establish that defence. The additional grounds in par 55 and par 56, alleging a limit on statutory authority as an implied licence condition, and par 57 and par 58, alleging an implied statutory limitation under the PEO Act, challenge the extent of that lawful authority in similar terms to par 54A and 54B.

70 Another matter relevant to s 115(1) that has occurred to me in the course of preparing this judgment, it not arising in argument in this part of the proceedings, is the question of waste in s 115(1). The FAPOC par 36 - 39 are unchanged and continue to specify that CO<sub>2</sub> is waste within the definition of the PEO Act. In *Gray No 1* I held at [59]-[60] that CO<sub>2</sub> was not a waste for the purposes of s 115(1) of the PEO Act because of the particular provisions of the Licence, accepting the Respondent's arguments on this aspect of the Applicants' case (set out in *Gray No 1* at [27]-[30]). In *Gray No 1* I was considering whether the Licence lawfully permitted any CO<sub>2</sub> to be emitted and I did not consider the issue of waste in light of par 54A and 54B. Given my present understanding of the case the Applicants seek to mount, to the extent that it is necessary for the Applicants to establish that there is wilful and negligent disposal of part of the CO<sub>2</sub> emitted by the power station as waste under s 115(1), the FAPOC par 36 - 39 and par 48 - 53 should stand.

- 71 The authorities relied on by the Applicants to establish their cause of action are civil actions in nuisance seeking damages where a defence of authorisation by statutory authority of the activity giving rise to the nuisance is raised. An early case relied on by the Applicants is *Tate & Lyle*, a 1983 decision of the House of Lords in which the plaintiff brought an action against the defendants for damages for negligence and nuisance said to result from the construction of two ferry terminals in the Thames which resulted in adverse impacts on the plaintiff's business. The majority of the Court of Appeal held that the plaintiff was entitled to damages for the particular damage suffered as a result of the interference with the public right of navigation unnecessarily caused by the terminals. An individual who suffers damage resulting from a public nuisance is entitled to maintain an action. The terminal operators argued that if guilty of a public nuisance the terminal was approved by the relevant local authority and was authorised by statute. The House of Lords held that the defence of statutory authority to an action for nuisance is available if the work carried out is conducted with all reasonable regard and care for the interests of other persons as stated by Lord Wilberforce in *Allen* at 1011.
- 72 In *Van Son*, considered in *Gray No 1* at [63], the same principle was applied by Cohen J to hold that a statutory licence did not authorise work to be done in a manner which was unreasonable in a claim for damages based on interference with riparian rights. He cited *Allen* and *Tate & Lyle* in reaching that conclusion. The Applicants seek to extend the principle that a statutory authority does not permit a nuisance to a construction of the PEO Act and environment protection licences issued under it to the effect that the Act and/or the Licence have an implied limit whereby they are not a defence to an activity giving rise to a nuisance under s 115(2). This argument seeks to extend the *Van Son* approach, in a logical way, to say that therefore at the time a licence is issued or by implication generally under the PEO Act, a statutory authority cannot permit a nuisance through the emission of materials harmful to the environment. There does not appear to be any directly applicable authority for the legal proposition the Applicants make in par 54A - 58 of the FAPOC.

73 Accepting that civil enforcement is provided under the PEO Act (in contrast to criminal enforcement), this case requires the Applicants to establish the following if the Respondents seek to rely on the Licence as lawful authority. Firstly, that there is a common law duty not to cause nuisance identified in *Van Son* for a party holding a statutory authority and that there is a correlative right of any person not to be affected by a nuisance. Secondly, that lawful authority under the PEO Act extends to include common law rights and duties. Thirdly, applying the principle in *Van Son*, a statutory authority cannot authorise a common law nuisance in the absence of an express statutory provision saying so. This part of the cause of action presumably relies on the well established principle that legislation is presumed not to alter common law doctrines unless expressly stated. There was no express submission by the Applicants' counsel relying on this principle but it must follow from the case pleaded. Cases such as *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277 (cited in D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) LexisNexis Butterworths (Pearce and Geddes) at [5.24]) are authority that there is a presumption against the alteration of common law doctrines by statute unless these are express.

74 Some judges have cast doubt on the operation of this doctrine in more recent cases, see McHugh J in *Malika Holdings Pty Ltd v Stretton* [2001] HCA 14; (2001) 204 CLR 290 at 298 (referred to by Pearce and Geddes at 185); also comment by Kirby J at [121]. Spigelman CJ in *R v Janceski* [2005] NSWCCA 281; (2005) 64 NSWLR 10 at 23 (Pearce and Geddes at 185) and more recently in *Harrison v Melhem* [2008] NSWCA 67; (2008) 72 NSWLR 380 at [2] criticises the presumption. Basten JA also considers the application of the principle at [212] – [219] in *Harrison*. These and other cases are referred to in a paper by J Basten entitled *Commentary on "Statutory interpretation and indigenous property rights"* reported in (2010) 21 *Public Law Review* 263. To the extent this principle is relied on by the Applicants these authorities will need to be considered at a final hearing.

- 75 The finding of a general limit on statutory authority, here the Licence, so as to prevent its use as a defence in criminal proceedings in contrast to civil proceedings is submitted by the Respondent as a further basis as to why there is no cause of action, referring to *Bailey* which was a prosecution under the *Native Vegetation Conservation Act 1997*. The PEO Act provides for civil enforcement as well as criminal. This is a civil enforcement action and the possibility that criminal enforcement exists does not preclude the Applicants' argument in these civil proceedings.
- 76 The Respondent argued (par 48, 49) that *Van Son* cannot provide a basis for a cause of action as it represents old law, does not specify the standard of reasonableness to be met and that such cases depend on their facts to establish that a particular activity gives rise to nuisance and no such facts are pleaded here. That last criticism is more properly considered in relation to whether the pleadings are embarrassing in that adequate detail of the grounds is not provided.
- 77 I am determining whether I consider particular grounds can proceed for final determination. The grounds articulated by the Applicants arise as breaches of the PEO Act and give rise to issues of statutory construction of s 115 and s 64 of the PEO Act in the overall context of that Act including the objects in s 3(a) and (d). The Applicants submit the principles in *Project Blue Sky* requiring a purposive approach to statutory construction underpin this approach. Whether Parliament intended by the statutory scheme to allow unlimited emissions of CO<sub>2</sub> is a matter the Applicants seek to put in issue. Assuming that a limitation based on *Van Son* is found to be implied in the PEO Act or a licence the question will then arise of whether the Licence should be construed so as to oust that implied limitation under the Licence or the Act. While the Respondent has argued that there is no such cause of action, I consider that it is arguable that the Applicants' case is underpinned by a cause of action. The Respondent criticises the pleading because no separate common law cause of action based on negligence or the tort of nuisance is articulated but in the way I

understand the pleading this is not necessary. These issues of the extent of lawful authority should be determined at a final hearing.

- 78 The Applicants' case in par 54A and par 54B is now directed to only part of the CO<sub>2</sub> being emitted from the power station, as identified in par 54B. In *Gray No 1* the focus of the Applicants' case was the whole of the CO<sub>2</sub> being emitted. Paragraphs 55 and 56, and par 57 and 58, are not specifically limited to part of the CO<sub>2</sub> emitted from the power station but I infer these are also intended to address part of the CO<sub>2</sub> emitted in the same way as par 54A and 54B.
- 79 The Respondent submitted that there is no legally enforceable upper limit upon the volume of CO<sub>2</sub> which can be emitted from Bayswater Power Station contained in the Licence which authorises the generation of electrical power from coal on a scale of generation greater than 4,000 gigawatt hours. It argues that the upper limit on the discharge of CO<sub>2</sub> from the power station lies not in a legal or regulatory restraint but in the productive capacity of the industrial machinery. That submission is not a complete answer legally to the case the Applicants seek to mount. The Applicants' case relies on an alternative construction of the statutory regime under the PEO Act and raises whether there is an overriding common law limit which is not ousted by that statutory regime. These competing constructions of the PEO Act are in dispute.
- 80 As noted above, no directly applicable authority is cited by the Applicants to support the novel pleading; the cases summarised above of *Van Son* and *Tate & Lyle* are sought to be applied by logical extension of the principle articulated in those cases. Further inquiry by the Applicants of statutory schemes which have considered the application of implied common law limitations within Australia and relevant overseas jurisdictions will be necessary on final hearing as the matter raised is a fundamental one in the context of regulatory regimes established by statute. I have already referred above to the likely need to consider the principle of the

presumption against the alteration of common law doctrines by statute unless expressly stated.

- 81 The Respondent's submission that there is an absence of legal significance of the facts alleged or the identification of a connection between the material facts pleaded and a cause of action known to the law is not accepted as a complete answer to the Applicants' legal case at this stage of the proceedings. That submission will be considered in relation to whether the particulars are adequate. While the case is novel and lacks supportive authority addressing it directly, it is not so lacking in legal logic that I consider the high threshold necessary to strike out the pleading is met.

*Is the pleading vague or embarrassing?*

- 82 Particulars are not required to specify every fact on which a party relies but are necessary to identify the nature of the case a respondent must answer. The Respondent argues that the pleading is embarrassing for several reasons. The pleading is obscure and does not identify a real issue in dispute. Further criticism made is that the pleading does not articulate a legal standard that is readily applied and is vague. This criticism is directed to the formulation based on the *Van Son* principle, which is in general terms, and also to the particulars for each of the three grounds. These are largely the same, as can be seen in par 12-15. I do not accept all of these criticisms of the pleading in light of my finding that there is an arguable cause of action, as identified above. The grounds rely on a nuisance standard which does not necessarily result in a precise legal test as each case will depend on its facts. Some of the criticism is warranted however. The particulars in par 54A, 55 and 57, which are largely the same, state that the limit on emissions of CO<sub>2</sub> are implied from the terms of the PEO Act, the ESC Act and the relevant development consent from the Council dated 18 September 1980. The Respondent submitted (par 48, 49 and 51 above) that there is no articulation in the particulars for any of the grounds of the content of the standard of having reasonable regard and care for the interests of other persons and the

environment as it applies to this Respondent, which is correct. Further particulars are necessary in order for the Applicants to properly identify this aspect of their case.

83 Further, the manner in which the Respondent is alleged to breach its lawful authority in par 54B, 56 and 58 is that the Respondent has had and continues to have the reasonable capacity to minimise the amount of CO<sub>2</sub> emitted at the power station by burning less coal but has not done so or made any reasonable efforts to do so. The FAPOC state that further particulars are to be provided following discovery and filing of expert evidence. Paragraphs 54B, 56 and 58, as particularised, do not specify with precision how the Respondent's actions result in a breach of the nuisance standard in *Van Son*. The criticisms of the Respondent set out above in par 46 in relation to the meaning of "having reasonable capacity to minimise the amount of CO<sub>2</sub> emitted at the power station" and "not making reasonable efforts to do so" are valid as these phrases do not identify with any precision how the Respondent is said to have failed. Some of the possible meanings of having the reasonable capacity to minimise CO<sub>2</sub> emitted are identified in the Respondent's submissions at par 46. This links to the criticism considered in the previous paragraph that there is a failure to articulate the level of reasonableness required to meet the *Van Son* test. As submitted by the Respondent (par 48) there is no indication of the maximum amount of coal that can be burned as an example of how the FAPOC fails to specify with precision the implied limits on the statutory authority. Further particularisation of this aspect of the Applicants' case is necessary.

84 Further, at par 54B(b), 56(b) and 58(c) the particulars repeat par 43 - 46 of the FAPOC which refer to harm to the environment caused by the increase in atmospheric concentrations of anthropogenic CO<sub>2</sub> which contribute to global warming and increased ocean acidification during the relevant period of July 2001 to June 2009. Earlier par 29 to par 30 of the FAPOC identify the level of CO<sub>2</sub> emitted by Bayswater Power Station from July 2001 to June 2009. I agree with the Respondent that there is no clear

articulation of the link between the harm to the environment alleged and the failure to have reasonable regard and care for the interests of other persons and the environment. Further particularisation of this part of the Applicants' case will also be necessary.

- 85 I do not consider that the pleading is so embarrassing that the FAPOC should be struck out. Greater particularisation by the Applicants in the three areas identified is necessary. Firstly, the nature of the *Van Son* test in relation to the limits it is said to impose on this Respondent needs to be better identified. Secondly, the manner of breach in par 54A, 55 and 57 of having reasonable capacity to minimise and the failure to undertake reasonable efforts to minimise CO<sub>2</sub> emissions must be better particularised. Thirdly, particularisation of the link between the harm to the environment and the failure to meet the *Van Son* test is necessary. Whether it is preferable that these further particulars await discovery and the preparation of expert reports, as the FAPOC refers to, or must be provided earlier will be discussed with the parties. The form of the particulars and a timetable for their production will also have to be agreed.

*Relief*

- 86 The relief sought in the FAS is set out in par 9. The Respondent submitted that the FAS and the FAPOC articulate no link between the general allegations in par 54A - 58 and any cause of action or the relief claimed in the FAS. I do not agree with that submission in the sense that each declaration does relate to a particular ground and I have held these should be considered at a final hearing. Whether the Court should make such a large number of declarations can be determined at a final hearing, and will obviously depend on the outcome of the hearing.
- 87 The Respondent's criticism of the order in prayer 7 is justified in the sense that the order sought restraining the burning of more than seven million tonnes of coal per calendar year until the power station is decommissioned is not linked clearly in the FAPOC to any of the grounds raised. It may be this criticism will be overcome by the provision of more particulars. This is

a matter the Applicants must have regard to when providing their particulars.

*Does the Court have jurisdiction?*

- 88 The Respondent argues that the Court has no jurisdiction under s 16(1A) (set out in par 19 above) or s 20 of the Court Act (set out in par 20 above) and cites *Arnold* in particular to support its submission. The Applicants assert that the Court has jurisdiction. Section 16(1) of the Court Act states that the Court has the jurisdiction vested in it by or under this or any other Act. Section 16(1A) states that the Court has jurisdiction to hear matters not falling within its jurisdiction under any other provision of the Court Act, or any other Act, if ancillary to a matter that falls within jurisdiction under the Court Act or under any other Act. Under s 20 the Court has jurisdiction to hear cases under Pt 8.4 of the PEO Act. Section 252, on which the Applicants rely, is in this part. Section 20(2) sets out the Court's powers to dispose of proceedings before it in relation to any planning or environmental law. Such laws include the PEO Act in s 20(3)(a).
- 89 I have found that an arguable cause of action is pleaded in relation to whether there is an implied limitation in a licence condition or under the PEO Act. The FAPOC alleges an implied breach of s 115 and s 64 of the PEO Act, a statute referred to in s 20(3) as a planning and environmental law and arguably seeks to enforce an obligation or duty imposed by the PEO Act by implication, as provided for in s 20(2)(a). Alternatively whether there is a limit on statutory authority conferred by a licence is a matter essential to the determination of the primary issue of whether the Respondent has lawful authority to emit unrestricted amounts of CO<sub>2</sub>. I consider the Court does have jurisdiction to consider the Applicants' claim.
- 90 The Respondent referred to *Arnold* where the Court of Appeal considered the extent to which the Court could exercise federal jurisdiction because of the operation of s 39(2) of the *Judiciary Act* 1903 (Cth) in the context of a challenge to a water sharing plan made under NSW legislation. At [75] Spigelman CJ held "*that where the determination of a legal issue*

*constitutes an essential step in the course of determining an issue that is within the jurisdiction of a court, then determination of the former will be "ancillary" to the determination of the latter.*" I have not determined the question of jurisdiction on the basis of whether the issues raised are ancillary to a matter within jurisdiction but note that his Honour refers to *National Parks & Wildlife Service v Stables Perisher Pty Ltd* (1990) 20 NSWLR 573 where Gleeson CJ stated at 582 that the Court has the power and duty to decide questions of fact or law that need to be determined in order to resolve a matter properly brought before it.

*Conclusion on Notice of Motion to amend*

- 91 Exercising my discretion to allow amendment of a pleading as provided by s 64 of the CP Act, and in light of s 58 of the CP Act I consider the Applicants should be allowed to amend their claim as contained in the FAS and FAPOC. As identified above, further particulars should be provided. Whether this needs to be in a second FAPOC or can be in correspondence will be discussed with the parties.

*Costs of the Motion*

- 92 The Applicants have been generally successful in their Notice of Motion to amend the pleading. If costs follow the event, the usual order in Class 4 proceedings, the Applicants' costs would be payable by the Respondent. The Respondent seeks an order that its costs of the hearing of the Applicants' Notice of Motion be paid regardless of the outcome.
- 93 The affidavits of B Dobbie, solicitor, dated 2 July 2010 and 3 August 2010 were relied on in support of the Respondent's costs submission. The affidavit of 2 July 2010 attaches correspondence between the parties exchanged in the few days before the costs hearing for *Gray No 1* on 24 May 2010. In a letter dated 20 May 2010 the Respondent's solicitor proposed that in light of the Applicants' intention not to file a Notice of Motion seeking leave to file a further amended summons and POC that orders be filed dismissing the proceedings inter alia. By letter dated 21 May 2010 the Applicants' solicitor asked whether the Respondent would

agree to the vacation on Monday 24 May 2010 of the proceedings until the Applicants' appeal to the Court of Appeal had been determined. This proposal was not agreed to by letter from the Respondent's solicitor dated 21 May 2010.

- 94 The affidavit of 3 August 2010 attaches the transcript of proceedings before me on 24 May 2010. The transcript shows that the Applicants' solicitor submitted that any further step in the proceedings in this Court should await the outcome of an appeal against *Gray No 1*. This was rejected as it was my view the Applicants should proceed with their Notice of Motion seeking leave to rely on an amended pleading without waiting for the outcome of any appeal if the Applicants wished to pursue that part of their case. An extension of time to do so was granted. The reason for the delay given from the bar table by the Applicants' solicitor was also in part the necessity for the recent briefing of new junior counsel due to illness in the family of the counsel briefed previously.
- 95 The Respondent submitted that the Applicants' failure to comply with the Court orders made on 31 March 2010 for the filing of their amended application by 28 April 2010 necessitated a separate day of hearing. Had the Court's orders been complied with, the hearing could have taken place at the same time that costs in *Gray No 1* were heard on 24 May 2010. The orders made by the Court on 31 March 2010 contemplated that this occur. The Respondent was prepared to deal with both motions on 24 May 2010. As the Applicants had not complied with the Court's orders they were not in a position to pursue their application to amend and the Respondent has incurred wasted costs in having to attend on a second occasion to argue the Applicants' Notice of Motion to amend the pleading.
- 96 The Applicants' counsel submitted that the Applicants' solicitor made clear to the Court on 24 May 2010 that due to illness in the family of junior counsel it had not been possible to comply with the Court's orders so that the delay was unavoidable, and not, by inference, the result of any lack of attention on the Applicants' part.

*Finding on costs*

- 97 Section 98 of the CP Act provides the Court with wide discretion to award costs in Class 4 proceedings. Under Pt 42 r 42.1 of the UCPR costs follow the event unless in the opinion of the Court another order ought be made. The application of s 98 and Pt 42 r 42.1 is subject to the Land and Environment Court Rules 2007 (the Court rules). Rule 4.2(1) of the Court rules state that the Court can decide not to make an order against an unsuccessful applicant if satisfied that the proceedings have been brought in the public interest. Here the Applicants have been successful in their Notice of Motion seeking leave to amend the pleading.
- 98 In the absence of disentiing conduct on the Applicants' part it should obtain a costs order in its favour as the successful party. The Respondent essentially submits that there is disentiing conduct suggesting such an order should be made in its favour because of the earlier failure of the Applicants to comply with the Court's orders of 31 March 2010. This necessitated a second hearing of the Applicants' Notice of Motion separate to the costs hearing on 24 May 2010. I agree with the Respondent's submission in this regard as had the Court's orders of 31 March 2010 been complied with the Applicants' motion could have been heard on 24 May 2010. The Applicants' solicitor did not advise the Court before 24 May 2010 that it was not intended to comply with the Court's order of 31 March 2010. The correspondence between the solicitors attached to Mr Dobbie's first affidavit and the submissions made by the Applicants' solicitor on 24 May 2010 suggest this was because the Applicants' solicitor had formed the view that an application to amend should await the outcome of an appeal against *Gray No 1*. That view should have been communicated to the Court much earlier, preferably before the expiration of the timetable in the orders of 31 March 2010 which required the Applicants to file a Notice of Motion by 28 April 2010. I consider the Respondent has incurred additional costs as a result of the failure of the Applicants to bring their Notice of Motion before the Court in a timely manner.

99 Taking into account these circumstances and also that part of the difficulty for the Applicants lay in the need to brief new counsel I consider that the Applicants should not have their costs of the Notice of Motion paid by the Respondent. I will not however order the Applicants to pay the Respondent's costs. The appropriate costs order is that each party pay its costs of the Applicants' Notice of Motion to amend the pleading.

100 I will discuss the terms of the final orders to be made with the parties before these are finalised.

I CERTIFY THAT THIS AND  
THE 37 PRECEDING PAGES ARE  
A TRUE COPY OF THE REASONS FOR  
JUDGMENT HEREIN  
OF THE HONOURABLE JUSTICE  
N. H. M. PAIN

  
Associate

Date.....1/2/11.....