



Land and Environment Court New South Wales

Case Title: Sweetwater Action Group Inc v Minister For Planning

Medium Neutral Citation: [2011] NSWLEC 106

Hearing Date(s): 22-24 June 2011, 25 June 2011 (written submissions)

Decision Date: 7 July 2011

Jurisdiction: Class 4

Before: Biscoe J

Decision: Subject to considering any alternative orders proposed by the parties to give effect to this judgment:
1. Declaration that the decision by the first respondent to recommend that the Governor amend State Environmental Planning Policy (Major Developments) 2005 through the State Environmental Planning Policy (Major Developments) Amendment (Huntlee New Town Site) 2010, gazetted on 31 December 2010, is void.
2. Declaration that State Environmental Planning Policy (Major Developments) Amendment (Huntlee New Town Site) 2010, gazetted on 31 December 2010, is void.

Catchwords: JUDICIAL REVIEW:-Whether Minister a "planning authority" under cl 6 of State Environmental Planning Policy No 55 Remediation of Land (SEPP 55) - whether SEPP 55 and State Environmental Planning Policy (Major Developments) 2005 inconsistent - whether Minister's recommendation to Governor to make a State environmental planning policy (SEPP) justiciable - whether cl 6 of SEPP 55 applied to the Minister - whether Minister failed to comply with cl 6 - whether failure to comply

with cl 6 of SEPP 55 spells invalidity of Minister's recommendation decision - whether SEPP is invalid because Minister's recommendation to Governor to make it was invalid - whether planning agreement failed to comply with s 93F(3)(g) of the Environmental Planning and Assessment Act - whether Minister who must have assumed that it complied thereby took into account an irrelevant consideration or whether there was jurisdictional error - whether reasonable apprehension of bias by Minister in the form of predetermination of whether to recommend that the SEPP be made.

Legislation Cited:

Cessnock Local Environmental Plan 1989
Environmental Planning and Assessment Act 1979 ss 15, 34 A, 36, 37, 38, 54, 93F-L, 145A, 145B
Interpretation Act 1987 s 14
Land Acquisition (Just Terms Compensation) Act 1991
Real Property Act 1900
Singleton Local Environmental Plan 1996
State Environmental Planning Policy (Major Development) 2005
State Environmental Planning Policy No 55 – Remediation of Land

Cases Cited:

Attorney General of NSW v World Best Holdings Ltd [2005] NSWCA 261, 63 NSWLR 557
Australians for Sustainable Development Inc v Minister for Planning [2011] NSWLEC 33
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
CREEDNZ Inc v Governor-General [1981] NZLR 172
Darling Casino Ltd v Minister for Planning (1995) 86 LGERA 186
Director of Public Prosecutions (SA) v B [1998] HCA 45, 194 CLR 566

Ebner v Official Trustee in Bankruptcy
[2000] HCA 63, 205 CLR 337

F & D Bonaccorso Pty Ltd v Canada Bay
Council (No 2) [2007] NSWLEC 537,
158 LGERA 250

Franklin v Minister for Town and Country
Planning [1948] AC 87

Gwandalan Summerland Point Action Group
Inc v Minister for Planning
[2009] NSWLEC 140, 75 NSWLR 269

Hot Holdings Pty Ltd v Creasy [2002]
HCA 51, 210 CLR 438

Jarratt v Commissioner of Police (NSW)
[2005] HCA 50, 224 CLR 44

Kioa v West [1985] HCA 81, 159 CLR 550

Mayfair Trading Co Pty Ltd v Dreyer (1958)
101 CLR 428

McGovern v Ku-ring-gai Council
[2008] NSWCA 209, 72 NSWLR 504

McGuinness v State of New South Wales
[2009] NSWSC 40, 73 NSWLR 104

Minister for Aboriginal Affairs v Peko-
Wallsend Ltd [1986] HCA 40, 162 CLR 24

Minister for Immigration and Multicultural
Affairs v Jia Legeng [2001] HCA 17,
205 CLR 507

Minister for Local Government v South
Sydney City Council [2002] NSWCA 288,
55 NSWLR 381

Minister for Urban Affairs and Planning v
Rosemount Estates Pty Ltd (1996) 91
LGERA 31

Nature Conservation Council of New South
Wales Inc v The Minister Administering the
Water Management Act 2000
[2005] NSWCA 9, 137 LGERA 320

Oshlack v Rous Water [2011] NSWLEC 73

Parks and Playgrounds Movement Inc v
Newcastle City Council [2010]
NSWLEC 231, 179 LGERA 346

Project Blue Sky Inc v Australian

Broadcasting Authority [1998] HCA 28,
194 CLR 355

R v Toohey; ex parte Northern Land Council
(1981) 151 CLR 170

R v West Coast Council; Ex parte Strahan
Motor Inn (1995) 87 LGERA 383

Re Refugee Review Tribunal; Ex parte H
[2001] HCA 28, 179 ALR 425

Save the Showground for Sydney Inc v
Minister for Urban Affairs and Planning
(1997) 95 LGERA 33

Stewart v Ronalds [2009] NSWCA 277,
76 NSWLR 99

Transport Action Group Against Motorways
Inc v Roads and Traffic Authority of New
South Wales [1999] NSWCA 196,
46 NSWLR 598

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

Vanmeld Pty Ltd v Fairfield City Council
[1999] NSWCA 6, 46 NSWLR 78

Texts Cited:

Aronson, Dyer and Groves, *Judicial Review
of Administrative Action*, 4th ed (2009),
Sydney Lawbook Co

Category:

Principal judgment

Parties:

Sweetwater Action Group Incorporated
(Applicant)
Minister for Planning (First Respondent)
Huntlee Pty Ltd (Second Respondent)

Representation

- Counsel:

Ms C Adamson SC with Mr J Hutton
(Applicant)
Mr S Free (First Respondent)
Dr J Griffiths SC with Ms S Pritchard

- Solicitors:

Environmental Defender's Office of New
South Wales (Applicant)
Department of Planning & Infrastructure
(First Respondent)
Corrs Chambers Westgarth (Second
Respondent)

File number:

40245 of 2011

JUDGMENT

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INTRODUCTION

- 1 The applicant challenges the validity of the State Environmental Planning Policy (Major Development) Amendment (Huntlee New Town Site) 2010 (**Huntlee MD SEPP Amendment**) made by the Governor and gazetted on 31 December 2010. The Huntlee MD SEPP Amendment, inter alia, rezoned certain land (**the Site**) through the mechanism of listing the proposed Huntlee New Town Site as a State Significant Site in Schedule 3 of the State Environmental Planning Policy (Major Development) 2005 (**MD SEPP**). The applicant contends that the Huntlee MD SEPP Amendment is invalid because the recommendation to the Governor (**Recommendation**) by the first respondent, the Minister for Planning (**Minister**), to make the SEPP was invalid.

- 2 The Site has an area of about 1,702 hectares and is located in the Lower Hunter region south of Branxton. The proponent of the rezoning is the second respondent, Huntlee Pty Limited (**Huntlee**), which proposes to carry out a 15 year project of large-scale residential development on the Site comprising about 7,200 dwellings.

- 3 The applicant attacks the validity of the Minister's Recommendation on the following grounds:
 - (1) failure to comply with cl 6 of State Environmental Planning Policy No 55 – Remediation of Land (**SEPP 55**);
 - (2) taking into account an irrelevant consideration, namely, a planning agreement, the terms of which did not provide for the enforcement of the agreement by a suitable means, as required by s 93F(3)(g) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**). Alternatively or further, it was a jurisdictional error for the Minister to consider that the planning agreement was made in accordance with the EPA Act

and this error infected the Recommendation decision;
and

- (3) reasonable apprehension of bias, in the form of apprehension that the Minister had predetermined whether to make the Recommendation.

4 The respondents generally support each other's submissions.

5 I uphold Grounds 1 and 2, reject Ground 3 and propose to grant relief.

BACKGROUND FACTS

The first State Significant Site request

- 6 On 17 October 2006 the NSW Government released a document titled "Lower Hunter Regional Strategy" (**LHRS**) which had been prepared by the Department of Planning (**Department**). The LHRS states that it "represents an agreed NSW government position on the future of the Lower Hunter. It is the pre-eminent planning document for the Lower Hunter Region and has been prepared to complement and inform other relevant State planning instruments".
- 7 The LHRS classified the Site, described as "Branxton-Huntlee", as a "major urban release" site of up to 7,200 dwellings.
- 8 On 22 December 2006 a deed was entered into between the then proponent of the Site, Huntlee Holdings Pty Ltd (**Huntlee Holdings**), the Minister and the Minister for the Environment in relation to, amongst other areas, the Site (**Deed**). The Deed operated in conjunction with a memorandum of understanding between the Minister and the Minister for the Environment in relation to, amongst other areas, the Site, which had been entered into on 16 October 2006 (**Memorandum of Understanding**).

- 9 Broadly speaking, the Memorandum of Understanding and the Deed contemplated that certain land offsets and other contributions would be provided by Huntlee Holdings in exchange for the rezoning of the Site to enable the type of development contemplated in the LHRS (namely, residential development to achieve up to 7,200 residential dwellings, and associated development).
- 10 On 9 January 2009 the Governor purported to make, in accordance with a recommendation by the Minister, State Environmental Planning Policy (Major Projects) 2005 Amendment No 35 (**Amendment No 35**). The purported effect of Amendment No 35 was to amend Schedule 3 of the MD SEPP (then known as the State Environmental Planning Policy (Major Projects) 2005) to list the Site as a State Significant Site and rezone the Site to enable the development contemplated in the LHRS. On 9 February 2009 the Minister purported to grant a concept plan approval under s 75O in respect of the Site.

The 2009 Proceedings

- 11 The applicant brought proceedings in this Court in which it challenged the validity of Amendment No 35 and the concept plan approval (**2009 Proceedings**). Those proceedings were discontinued after declarations and orders were made by consent on 19 October 2009 declaring Amendment No 35 and the concept plan approval to be void and of no effect and quashing them.
- 12 The 2009 consent orders noted that the declarations and orders were made on the basis that the parties had agreed, having regard to the decision of this Court in *Gwandalan Summerland Point Action Group Inc v Minister for Planning* [2009] NSWLEC 140, 75 NSWLR 269, that the recommendation of the Minister in respect of Amendment No 35 and the Minister's purported decision to grant concept plan approval involved

administrative law errors, namely, reasonable apprehension of bias and the taking into account of an irrelevant consideration, by reason of the Minister's entering into the Deed and the Memorandum of Understanding.

The second State Significant Site request

- 13 In November 2009 a briefing note was prepared, signed by the Deputy Director General of the Department, the Director General and the Minister, which stated:

The [LHRS] was not directly reviewed by the Land and Environment Court in [Gwandalan].

The Department considers that the [LHRS] remains a sound strategy and its validity is not dependent on the existence of the Memorandum of Understanding or Deeds of Agreements.

...
Moving forward, should the developments proceed as envisaged under the [LHRS], any land offsets would be facilitated through the preparation of VPAs in accordance with section 93F of the [EPA Act].

- 14 On 23 November 2009 JBA Urban Planning Consultants Pty Ltd (**JBA**), on behalf of Huntlee Holdings, wrote to the Director General requesting that the Huntlee New Town Site be considered as a State Significant Site.
- 15 By letter to JBA dated 22 December 2009, the Director General responded that in light of the consent orders made in the 2009 Proceedings, the Department was not willing to consider Huntlee Holding's request unless the Deed and Memorandum of Understanding were "extinguished". He then stated: "Notwithstanding the above, the NSW Government remains committed to the [LHRS] and the Lower Hunter Regional Conservation Plan [(LHRCP)] and recently re-endorsed both."
- 16 On 18 February 2010 the NSW Government published a media release headed "Lower Hunter Regional Strategy". Amongst other things, the media release stated:

- (a) that a new "development proposal" for the Site was expected to be re-lodged in coming months;
- (b) that the Minister had been looking at the existing regional strategy following legal action in relation to the Site;
- (c) that the legal action (being the proceedings in *Gwandalan*) "affected a small number of development sites where memorandums of understanding (MOUs) and deeds were in place";
- (d) that "the existing regional strategy, independently of those MOUs and deeds, continues to provide a clear basis that all sites in the strategy to be considered on their merits and assessed according to law"; and
- (e) that "conservation land offsets will now be facilitated through the preparation of Voluntary Planning Agreements within the framework of the *Environmental Planning and Assessment Act 1979*."

- 17 On 26 February 2010 the Deputy Director General wrote to interested councils and others regarding the effect of the decision in *Gwandalan* in the following terms:

Although the Court's judgment only affected a small number of development sites, the NSW Government felt it was appropriate to confirm that the [LHRS] still provided a secure foundation for planning and development proposals. Accordingly, the [LHRS] has been re-endorsed by Cabinet.

- 18 A Department briefing note of the same date noted that the LHRS had been re-endorsed by Cabinet and stated:

The Department considered that the Strategy remains sound and recommended that Cabinet re-endorse the Strategy to provide a reliable basis upon which future applications could be based.

- 19 On 6 July 2010 the parties to the Deed and Memorandum of Understanding executed a deed of partial termination, the effect of which was to terminate the Deed and Memorandum of Understanding insofar as those agreements apply to the Site.

- 20 On 8 July 2010 Huntlee requested the Minister to give consideration to the inclusion of the Huntlee New Town Site as a State Significant Site in the MD SEPP. By that time the provisions of the Deed of Agreement and Memorandum of Understanding relating to the site had been expressly extinguished. The Minister was advised that he was under no obligation of any nature that may have arisen from the past agreements insofar as they applied to the Site.

The third State Significant Site request

- 21 In May 2010 (that is, before the termination of the Deed and Memorandum of Understanding) the second respondent, Huntlee, was established for the purposes of implementing the Huntlee development.
- 22 On 8 July 2010 JBA on behalf of Huntlee wrote to the Director-General of Planning (**Director-General**) and requested that consideration be given by the Minister to rezoning the Site for a mix of uses by way of its inclusion as a State Significant Site under Schedule 3 of the MD SEPP.
- 23 Between 8 and 16 July 2010 a Department briefing note was provided to the Minister recommending that the Minister agree to investigate the listing of the Site as a State Significant Site.
- 24 On 16 July 2010 the Minister agreed to consider the Site as a potential State Significant Site. The Department advised JBA of the Minister's decision by letter dated 26 July 2010, and asked Huntlee to prepare a State Significant Site Study (**SSS Study**) for the rezoning of the Site in accordance with the requirements of the Director General.
- 25 The SSS Study was prepared by JBA on behalf of Huntlee and submitted to the Department on 24 September 2010. The SSS Study addresses contamination issues at section 7.6.2 and Appendices L and M.

- 26 The SSS Study was placed on public exhibition from 29 September 2010 to 17 November 2010, during which 77 submissions were received by the Department. On 26 November 2010 JDA on behalf of Huntlee provided a Submissions Response to the Department. Mine rehabilitation and contaminated land were identified as a "key issue" in the SSS Submissions Response, and was addressed at section 2.6.

The 2010 Agreement

- 27 On 5 August 2010, Huntlee offered to enter into a planning agreement with the Minister and the Minister for the Environment, which it provided to the Department in draft form (**Draft 2010 Agreement**). The Draft 2010 Agreement was proposed in connection with Huntlee's request for the listing of the Site as a State Significant Site and intended applications for project approval under Part 3A of the EPA Act in respect of the Site. The Draft 2010 Agreement was put on public exhibition together with the SSS Study from 14 October 2010 to 17 November 2010.
- 28 In November 2010 the Minister was provided with a Department briefing note headed "Huntlee – Potential State Significant Site – Status Update". The briefing note included the following statements:
- A voluntary planning agreement (VPA) relating to environmental offsets and mandatory contributions is also currently on exhibition
- ...
- The VPA proposes to transfer up to approximately 5,612 ha of environmentally significant land for environmental conservation which is proposed to be dedicated under the *National Parks and Wildlife Act* 1974. The VPA also proposes a contribution of \$100,000 towards the conservation of *Persoonia pauciflora* and contribution of \$1,000,000 towards the management of the Conservation Offset Lands.
- 29 On or about 2 December 2010 the Minister was provided with a further Department briefing note headed "Huntlee – Voluntary Planning Agreement", which recommended that the Minister execute the Draft 2010 Agreement and authorise the Department to notify local councils as

required by s 93G (4) it stated that it had been publicly exhibited in accordance with s 93G(1) of the EPA Act. The briefing note stated:

The Planning Agreement provides that a Developer will make various contributions towards environmental conservation offsets, comprising the following:

- transfer of 5,612 hectares of land for environmental conservation ...including 607 hectares of land within the Huntlee site, 17 hectares for "Personia Park" and 4988 hectares of land throughout Lower Hunter Region.
- demolition and/or removal of any dwellings, houses, sheds or dumped motor vehicles on the Conservation Offset Lands;
- a contribution of \$100,000 towards the conservation of *Personia pauciflora* ... ; and
- a contribution of \$1,000,000 towards the management of the Conservation Offset Lands."

- 30 On 3 December 2010, the Minister, the Minister for the Environment, Huntlee and Misthold Pty Ltd (**Misthold**) (being the owner of some lots within the Site) executed an agreement substantially in the form of the Draft 2010 Agreement (**2010 Agreement**).
- 31 The 2010 Agreement uses the expression "Land Owner" to refer to Huntlee and Misthold collectively. The expression "Land" is defined, by reference to Table 2 of Schedule 2, The expression "Conservation Offset Lands" is defined by reference to Table 2 of Schedule 2, and also comprises a series of numbered lots. The Land and the Conversation Offset Land include the area covered by the Site as well as additional lands.
- 32 Important provisions of the 2010 Agreement include the following:
- (a) The recitals include that the Land Owner is or will be the owner of the Land, intends to develop the Land, seeks to change an environmental planning instrument (being the MD SEPP) and intends to lodge Part 3A project approval applications for the development of the Land in accordance with the MD SEPP as amended on a stage-by-stage basis.

- (b) Clause 3 recites that the 2010 Agreement "constitutes a planning agreement within the meaning of section 93F of the [EPA Act]".
- (c) Clause 5 imposes an obligation on the Land Owner to provide or procure the provision of "Development Contributions" (defined by reference to Schedule 4) in accordance with the Development Contributions Schedule (defined by reference to Schedule 3), the Development Contributions Timetable (defined by reference to Table 1 of Schedule 5) and the terms of the 2010 Agreement.
- (d) Having regard to the relevant Schedules, the Land Owner's obligations to provide the Development Contributions may be summarised as follows:
 - (i) The Land Owner undertakes to pay the Contribution Amount to the Minister in accordance with the Development Contributions Timetable (Schedule 4, cl 1.1).
 - (ii) The "Contribution Amount" is described in Table 1 of Schedule 3 as a payment of \$1,100,000 by the Land Owner. The payment is broken down as follows:
 1. The first \$200,000 (being \$100,000 for conservation of personia pauciflora in the North Rothbury area and \$100,000 towards the management of the Conservation Offset Lands) is to be paid to the Minister by 31 January 2012 unless a "Relevant Legal Challenge" is on foot at that time, such that the validity of the MD SEPP Amendment is in question. In those circumstances, the money is payable upon the Relevant Legal Challenge being discontinued or final orders being made (Schedule 5 Table 1).
 2. The remaining \$900,000 is to be paid in six equal instalments of \$150,000 (as adjusted by movements in the CPI as provided for in Schedule 3) paid to the Minister annually, the first instalment to be paid on 31 January 2014 (Schedule 5, Table 5).
 - (iii) The Conservation Offset Lands are required to be transferred to the Minister within 30 days after the later of the date of the registration of the Plan of Subdivision in respect of the Site or the date which is four months

after the Gazettal Date, subject to the obligation being suspended by reason of a "Relevant Legal Challenge" (cl 2.3 of Schedule 4; Column 2 of Table 2 of Schedule 5).

1. The "Plan of Subdivision" is defined to mean a statutory plan of subdivision to, amongst other things, create separate lots for part of the Conservation Offset Lands in accordance with Annexure D. Clause 2.2 of Schedule 3 imposes an obligation on the Land Owner to obtain the Plan of Subdivision.
 2. The "Gazettal Date" is defined to mean the date when the MD SEPP Amendment commences.
- (e) Clause 7.1 provides that the 2010 Agreement "may be enforced by any Party in any Court". Clause 7.2(a) notes that nothing in the 2010 Agreement is to be taken to prevent enforcement by bringing proceedings in this Court. Schedule 1 is headed "Section 93F Requirements". It asserts that the requirements of s 93F(3)(g) are satisfied by cl 7.
- (f) By cl 9.2 Huntlee represents and warrants to the Minister and the Minister for the Environment that it is the legal owner of the Land (subject to specific exceptions for particular lots), and Huntlee and Misthold each give the same warranty in respect of portions of the Conservation Offset Lands (again, subject to specific exceptions).
- (g) By cl 9.4 the Land Owner acknowledges and agrees that the Minister will, upon the 2010 Agreement coming into operation, acquire an equitable interest in the Land and the Conservation Offset Lands and that it will not object to the Minister lodging a caveat in respect of the Land and Conservation Offset Lands. By cl 9.6 the Land Owner represents and warrants to the Minister that the Financier (being any financier of the Land Owner) consents to the Land Owner entering into performing under the 2010 Agreement and the registration of the 2010 Agreement, and gives priority to rights of the Minister under the 2010 Agreement.

- (h) Clause 13 adjusts the rights of the parties in the event of a Relevant Legal Challenge. It suspends the Land Owner's obligations to pay the Development Contributions and provides, in certain circumstances, for the re-transfer of the Conservation Offset Lands to the Land Owner and the repayment of the Contribution Amount in the event of a successful challenge to the validity of the MD SEPP Amendment.
- (i) Clause 14 contains releases and indemnities. Amongst other things, the Land Owner indemnifies the Minister against all liabilities or loss arising from, and any Costs incurred in connection with the Minister enforcing the Land Owner's obligation to provide the Development Contributions in accordance with the 2010 Agreement.
- (j) Clause 15 provides for the payment of interest by the Land Owner if the Land Owner fails to pay any of the Contribution Amount (or any other amount payable under the 2010 Agreement) when it falls due.

33 The 2010 Agreement has been registered by the Registrar General with the agreement of the parties, as contemplated by s 93H of the EPA Act.

The Recommendation and SEPP Amendment

34 On or about 2 December 2010 the Minister was provided with a further Department briefing note headed "Proposed Amendment to Schedule 3 of [MD SEPP]".

35 In describing the proposed MD SEPP Amendment, the briefing note stated "there is remediation on certain areas of the Site that needs to occur before residential development can be placed on the site". It also noted that rehabilitation of "former mining areas" was required prior to use of the land for urban purposes.

- 36 The briefing note recommended that the Minister, amongst other things, recommend to the Governor that she "for the purpose of environmental planning by the State, make the [Huntlee MD SEPP Amendment] pursuant to s 47(1) of the EPA Act." The briefing note also stated under the heading "Contamination":

Several submissions raised concerns regarding the former mining area contamination the need for rehabilitation prior to development.

Departmental Response

The Department is satisfied that appropriate remediation can be carried out prior to any development of the land for urban purposes and further consideration will occur as part of future development assessment.

- 37 The "Background" section of the briefing note recited the history of the first State Significant Site listing request, and noted that: "[t]he original Huntlee rezoning and Concept Plan approval were declared void and of no effect ... due to matters of procedure surrounding the Deed of Agreement between the developer and the Government".

- 38 The briefing note attached a copy of the MD SEPP Amendment and a Department document headed "Consideration of Issues Raised in Submissions". It included a section headed "Issue - Contamination", which stated:

Some areas of the site have been found to contain contaminated land as a result of former mining and landfill activities...

Remediation Notices of Preventative Action are currently in place for the former Ayrfield Colliery property. These notices require a number of on-going management and monitoring measures to be put in place.

The proponent has outlined that further detailed investigations of this and other affected areas will be undertaken prior to any applications for subdivision and works in these locations.

Under SEPP 55 – Remediation of Land, contamination and remediation of contaminated land must be considered in regards to a rezoning proposal. The planning authority, in this case the Minister, has considered whether the land is contaminated and is

satisfied that land will be suitable for mixed use development (including residential and recreational) purposes after remediation has been carried out.

- 39 On or after 2 December 2010 the Minister made the Recommendation.
- 40 In this case, particularly in relation to Ground 1, much turns on what material was before the Minister when he made the Recommendation. The documents that were before the Minister when he made the Recommendation were the briefing note, a copy of the MD SEPP Amendment, and a Department document headed "Consideration of Issues Raised in Submissions" referred to above. Those documents did not include the SSS Study or the attachments thereto. There is nothing to indicate that the SSS Study was put before the Minister at any earlier point in time.
- 41 On 21 December 2010 the Governor accepted the Recommendation and made the MD SEPP Amendment.
- 42 Prior to the making of the MD SEPP Amendment the Site was zoned 1(a) Rural "A", 1(c) Rural-Residential/Rural (Small Holdings) and 1(v) Rural (Vineyards) under the Cessnock Local Environmental Plan 1989 and Rural 1(a) and Rural (Small Holdings) 1(d) under the Singleton Local Environmental Plan 1996. The zonings following the making of the MD SEPP Amendment are Mixed Use, National Parks and Nature Reserves, Environmental Management, General Residential, Low Density Residential and Large Lot Residential.

GROUND 1: NON-COMPLIANCE WITH SEPP 55

43 Ground 1 is that the Minister failed to comply with the conditions in cl 6(1)(b) and (c) and cl 6(2) of SEPP 55. Clause 6 specifies conditions that must be satisfied before a planning authority, in preparing an environmental planning instrument, includes land in a particular zone.

44 Clause 6 relevantly provides:

6 Contamination and remediation to be considered in zoning or rezoning proposal

- (1) In preparing an environmental planning instrument, a planning authority is not to include in a particular zone (within the meaning of the instrument) any land specified in subclause (4) if the inclusion of the land in that zone would permit a change of use of the land, unless:
 - (a) the planning authority has considered whether the land is contaminated, and
 - (b) if the land is contaminated, the planning authority is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for all the purposes for which land in the zone concerned is permitted to be used, and
 - (c) if the land requires remediation to be made suitable for any purpose for which land in that zone is permitted to be used, the planning authority is satisfied that the land will be so remediated before the land is used for that purpose.

Note. In order to satisfy itself as to paragraph (c), the planning authority may need to include certain provisions in the environmental planning instrument.

- (2) Before including land of a class identified in subclause (4) in a particular zone, the planning authority is to obtain and have regard to a report specifying the findings of a preliminary investigation of the land carried out in accordance with the contaminated land planning guidelines.

- (5) In this clause, planning authority has the same meaning as it has in section 145A of the Act.

45 The respondents contend that:

- (a) clause 6 is inapplicable because the Minister was not a relevant planning authority under cl 6 of SEPP 55;

- (b) clause 6 is inapplicable because the Minister did not prepare the MD SEPP Amendment;
- (c) the MD SEPP and cl 6 of SEPP 55 are inconsistent such that the latter does not apply; and
- (d) in the event that cl 6 is applicable, in fact the Minister complied with cl 6(1)(b), (c) and (2);
- (e) even if the Minister did not comply, a breach of clause 6 of SEPP 55 would not spell invalidity; and
- (f) in any event, the Minister's Recommendation decision is not justiciable.

46 SEPP 55 was gazetted in 1998. Its object is specified in cl 2:

- (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.

47 The following matters are uncontentious:

- (a) Clause 6 (1) applies to the Site because the Site is specified in subclause (4). The MD SEPP permits a change of use of the Site by rezoning land within the Site to residential and other uses.
- (b) The expression "contaminated land planning guidelines" in cl 6(2) is defined in cl 4 to mean "guidelines under s 145C of the [EPA] Act". The relevant guidelines are the State government guidelines titled "Managing Land Contamination

Planning Guidelines SEPP 55 – Remediation of Land 1998”
(**SEPP 55 Guidelines**): *Australians for Sustainable
Development Inc v Minister for Planning* [2011] NSWLEC 33
at [76].

- (c) The planning authority referred in cl 6(2) is also the planning authority referred to in cl 6(1).
- (d) In this case, the “preliminary investigation” referred to in cl 6(2) is the SSS Study of 24 September 2010: see [24] – [26] above. The SSS Study was considered by the Department but was not seen by the Minister.

48 “Planning authority” in cl 6 has the same meaning it has in s 145A: cl 6(5).
Sections 145A and 145B relevantly provide:

145A Definitions

In this Part:

contaminated land means land in, on or under which any substance is present at a concentration above the concentration at which the substance is normally present in, on or under (respectively) land in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment.

contaminated land planning guidelines means guidelines notified in accordance with section 145C.

planning authority, in relation to a function specified in section 145B, means:

...

(b) in the case of any other function—the public authority or other person responsible for exercising the function.

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.

Applicability of cl 6: Whether the Minister was a relevant planning authority

- 49 The disputed premise of the Ground 1 challenge is that the Minister was a relevant “planning authority” referred to in cl 6 of SEPP 55. The “planning authority” referred to in cl 6(1) is the same planning authority referred to in cl 6(2), that is, a planning authority whose function concerns “preparing” the relevant environmental planning instrument.
- 50 The applicant submits that the Minister and the Director-General both satisfy the definition of planning authority in cl 6(5) or alternatively that the Minister exclusively satisfies that definition. The respondents submit that the Director-General prepares SEPPs, the Governor makes them, the Minister does neither, and therefore cl 6 is inapplicable to the Minister.

- 51 The Department's briefing note before the Minister when he made his recommendation to the Governor appended a Department document which stated that the Minister was the planning authority under cl 6. The Director-General and the Minister signed the briefing note. The applicant would reasonably have launched and conducted the proceedings to hearing with a sense of security that the accuracy of that statement would not be contentious. However, the respondents submit that that statement was incorrect. They submit, correctly, that it is a question of law for the Court to determine.
- 52 Clause 6(5) of SEPP 55 provides that in cl 6 "planning authority" has the same meaning as it has in s 145A of the EPA Act. Section 145A is within Part 7A (ss 145A-145C) titled "Liability in respect of contaminated land". Section 145A(c) relevantly provides that a planning authority in relation to a function specified in s 145B means "the public authority or person *responsible* for exercising the function" (emphasis added). The relevant function is that specified in s 145B(2)(a), namely, "the preparation or making of an environmental planning instrument, including a planning proposal for the proposed environmental planning instrument". The relevant "planning authority" referred to in cl 6 is therefore the authority "responsible" under the EPA Act for exercising the function of preparing SEPPs.
- 53 No provision of the EPA Act expressly identifies who is responsible for "preparing" SEPPs. Part 3 is titled "Environmental planning instruments", which comprise SEPPs and Local Environmental Plans (LEPs). The function of "making" SEPPs is expressly conferred on the Governor: ss 24(2)(a) and 37(1). The function of "recommending" the making of SEPPs expressly belongs to the Minister: s 38. Sections 37 and 38 comprise the whole of Division 2 titled "SEPPs" of Part 3 of the EPA Act. Sections 24(2), 37 and 38 provide as follows:

24 Making of environmental planning instruments

...

(2) Environmental planning instruments may be made:

- (a) by the Governor under Division 2 (called a State environmental planning policy or SEPP), or
- (b) by the Minister (or delegate) under Division 4 (called a local environmental plan or LEP).

37 Governor may make environmental planning instruments (SEPPs)

- (1) The Governor may make environmental planning instruments for the purpose of environmental planning by the State. Any such instrument may be called a State environmental planning policy (or SEPP).
- (2) Without limiting subsection (1), an environmental planning instrument may be made by the Governor to make provision with respect to any matter that, in the opinion of the Minister, is of State or regional environmental planning significance.

38 Consultation requirements

Before recommending the making of an environmental planning instrument by the Governor, the Minister is to take such steps, if any, as the Minister considers appropriate or necessary:

- (a) to publicise an explanation of the intended effect of the proposed instrument, and
- (b) to seek and consider submissions from the public on the matter.

Note. See also section 34A

54 The note refers to s 34A which confers, in the case of a proposed SEPP, a consultation function on the Director-General in relation to threatened species etc, as follows:

34A Special consultation procedures concerning threatened species

- (1) In this section, the relevant authority means:
 - (a) in the case of a proposed SEPP—the Director-General, or
 - (b) in the case of a proposed LEP—the relevant planning authority.
- (2) Before an environmental planning instrument is made, the relevant authority must consult with the Director-General of the Department of Environment, Climate Change and Water if, in the opinion of the relevant authority, critical habitat or threatened species, populations or ecological communities,

or their habitats, will or may be adversely affected by the proposed instrument.

- 55 Section 38 does not say to whom the Minister's recommendation is made. Given that the Governor makes SEPPs, I consider it to be implicit that the recommendation is made to the Governor. Consistently with that conclusion, the briefing note to the Minister proposed that the Minister make that recommendation to the Governor. Of course, the Governor must act on the advice of the Executive Council: s 14 *Interpretation Act* 1987. The MD Amendment SEPP is expressed to be made by the Governor with the advice of the Executive Council.
- 56 The identity of the entity statutorily responsible for the preparation of SEPPs, which is critical to the application of cl 6 of SEPP 55, has to be established by implication. Sections 37 and 38 were inserted in their present form by the *Environmental Planning and Assessment Amendment Act* 2008 (**2008 Amending Act**). Previously Division 2 (ss 37-39) of Part 3 spelt out expressly that the Director-General (then called the Director) prepared SEPPs and submitted them to the Minister and that the Minister recommended to the Governor the making of SEPPs, as follows:

DIVISION 2-State environmental planning policies.

- 37(1) The Director may, after consultation with such public authorities as he determines, prepare a draft State environmental planning policy with respect to such matters as are, in the opinion of the Director, of significance for environmental planning for the State, and may submit it to the Minister.
- (2) The Minister may, after consultation with such Ministers as he determines, cause to be prepared by the Director for submission to the Minister a draft State environmental planning policy with respect to any matter specified by the Minister, being a matter which is, in the opinion of the Minister, of significance for environmental planning for the State.
- 38 Subject to this Act and the regulations, the format, structure and subject-matter of a State environmental planning policy or draft State environmental planning policy shall be as determined by the Minister.
- 39(1) The Minister may, on the submission to him by the Director of a draft State environmental planning policy,

- recommend to the Governor the making of a State environmental planning policy
- (a) in accordance with that draft State environmental planning policy submitted to the Minister; or
 - (b) in accordance with that draft State environmental planning policy with such alterations as the Minister thinks fit, or he may decide not to make that recommendation.
- (2) The Minister shall take such steps as he considers appropriate or necessary to publicise a draft State environmental planning policy and to seek and consider submissions from the public before he makes such a recommendation.
 - (3) The Minister may not make such a recommendation except with respect to such matters as are, in his opinion, of significance for environmental planning for the State.
 - (4) The Governor may make a State environmental planning policy in accordance with a recommendation made under this section.
 - (5) A State environmental planning policy shall apply to the State or such part of the State as is described in the policy.

57 Notwithstanding the removal of the provision in the old s 37 which conferred the function of preparing a SEPP on the Director-General, the respondents submit that the Director-General implicitly still has the preparation function. The respondents contend that recommending the making of a SEPP is not part of its preparation, for the following reasons:

- (a) Having regard to the nature of the functions conferred on the Minister under the EPA Act, particularly in s 7, it would be incongruous for the Minister to be charged with the administrative function of preparing a SEPP. Section 7 provides:

7 Responsibility of Minister

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

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

- (b) to advise councils upon all matters concerning the principles of environmental planning and assessment and the implementation thereof in environmental planning instruments,
- (c) to promote the co-ordination of the provision of public utility and community services and facilities within the State,
- (d) to promote planning of the distribution of population and economic activity within the State,
- (e) to investigate the social aspects of economic activity and population distribution in relation to the distribution of utility services and facilities, and
- (f) to monitor progress and performance in environmental planning and assessment, and to initiate the taking of remedial action where necessary.

(b) A ministerial function of preparing SEPPs is inconsistent with s 34A(1)(a), to which the note to s 38 draws attention: see [54] above.

(c) The function of preparing SEPPs is consistent with the Director-General's general functions under s 15 of submitting proposals "with respect to environmental planning". Section 15 provides:

15 Functions of the Director-General

In addition to the functions conferred or imposed on the Director-General by or under this or any other Act, the Director-General may, for the purposes of this Act:

- (a) submit to the Minister such proposals with respect to environmental planning and assessment as the Director-General considers necessary or appropriate, including proposals for the development and use of land, whether or not in conjunction with the provision of utility services and public transport facilities, and
- (b) consider and furnish reports to and advise and make recommendations to the Minister upon any matter or proposal relating to the development and use of land or to environmental planning and assessment which may be referred to the Director-General by the Minister.

(d) An analogy is drawn with ss 54 and 55, which provides that in the case of local environmental plans the relevant planning authority is normally the local council and that it has an express preparation function. I have difficulty with the

analogy. I observe that the function the subject of ss 54 and 55 is to prepare not the local environmental plan but a document that explains the intended effect of the proposed instrument and its justification.

- 58 In my opinion, the Minister is responsible for preparing SEPPs and is therefore a relevant planning authority referred to in cl 6 of SEPP 55 for two distinct reasons.
- 59 First, in my view, the Minister's recommendation function is part of the preparation of a SEPP: cl 6(5), ss 145A and 145B set out at [44] and [48] above. Assuming that the Director-General is responsible for the other aspects of the preparation of SEPPs – which I do not accept: see [63] below - there are two relevant planning authorities referred to in cl 6: the Minister and the Director-General.
- 60 As analysed above at [52], ss 145A and 145B show that the relevant planning authority in cl 6 is the authority "responsible" under the EPA Act for exercising the function of preparing SEPPs. Section 145B provides exemption from liability for "preparation" or "making" of environmental instruments. This suggests that the statutory process of creation of a SEPP, from go to whoa, is divided into preparation and making.
- 61 If the respondents' submission is correct that the Minister neither prepares nor makes SEPPs and therefore cl 6 is inapplicable to the Minister's recommendation function, then the Director-General and the Governor have the benefit of the exemption from liability under s 145B(2)(a) but the Minister does not – even though it is the Minister who recommends the making of SEPPs to the Governor and is potentially liable in respect of it. The Minister falls between the cracks even though the Minister's role may be viewed as the most important (that is not to diminish the role of the Executive Council on whose advice the Governor must act: *Interpretation Act* s 14). It may reasonably be inferred that the legislature did not intend

to leave the Minister out in the cold by excluding the Minister's recommendation function. The recommendation function is not part of the making of a SEPP, which is expressly vested in the Governor (ss 24(2) and 37). That suggests that under this statutory scheme it is part of the preparation function. That is, preparation covers all aspects of the plan making process up to the "making" of the plan (including investigations, drafting, considering and recommending).

62 The respondents seek to meet this point by submitting that the Minister's recommendation function is incidental or ancillary to the preparation function of the Director-General or the making function of the Governor and therefore comes with the exemption from liability in s 145B(2)(f): "anything incidental or ancillary to the carrying out of any function listed in paragraphs (a) – (e)". I do not accept the submission. In my view the central importance of the Minister's recommendation to the Governor to make a SEPP is such that it cannot be regarded as merely incidental or ancillary to (on the respondents' argument) the preparation or making functions of others.

63 Secondly, in any case, even if the Minister's recommendation to the Governor to make a SEPP is not part of the preparation of a SEPP, then (contrary to the assumption made at [59] above) in my opinion the Minister, not the Director-General, is responsible for the preparation of SEPPs. Therefore the Minister is the relevant planning authority referred to in cl 6. The following considerations support this conclusion:

- (a) The old s 37 which conferred the function of preparing SEPPs on the Director-General was repealed. The repeal suggests that the legislature intended to confer this function, or part of it, on someone else. The only other candidate is the Minister.

- (b) The opening words of s 7 of the EPA Act, dealing with the responsibility of the Minister, contemplate that the Minister may have functions apart from those specified in s 7: see [57](a) above.
- (c) The making of a SEPP is not an administrative act but delegated legislation – as the respondents emphasise in the context of Ground 3 when submitting that its higher character precludes the principle of apprehended bias. It is not inappropriate that the Minister would be “responsible” for the preparation of delegated legislation, albeit the actual preparation would be done for the Minister by the Minister’s Department under the Director-General.
- (d) It is also not inappropriate that the person with responsibility for recommending that the Governor make a SEPP is the person “responsible” for its preparation.
- (e) It is a subtle point but s 34A tends to suggest that the relevant planning authority referred to in cl 6 is not the Director-General and therefore is the Minister: see [54] above. Section 34A is referable to the period of preparation of an environmental planning instrument – as is cl 6 of SEPP 55. If Parliament intended the Director-General to be the exclusive planning authority for preparation of SEPPs, there was no need to make a distinction between SEPPs and LEPPs in s 34A(1)(a) and (b). The fact that the Director General is expressly identified as the “relevant authority” tends to suggest that Director-General is not the relevant “planning authority” in cl 6 of SEPP 55.

Applicability of cl 6: Preparation of the Huntlee MD SEPP Amendment

64 The respondents submit that cl 6 does not apply because the Minister did not prepare the Huntlee MD SEPP Amendment. Rather, the Director-General prepared it using the services of the Department. The respondents argue that this is apparent from the recommendation in the briefing note that the Minister approve the form and subject matter of the proposed Huntlee MD SEPP Amendment pursuant to s 33A(9) of the EPA Act and from the Director-General's signature on the briefing note. Section 33A(9) provides:

33A Standardisation of environmental planning instruments

...
(9) Subject to this Act and the regulations, the form and subject-matter of an environmental planning instrument is (if there is no applicable standard instrument) to be as determined by the Minister.

65 It is apparent that officers of the Department physically prepared the proposed Huntlee MD SEPP Amendment and made the recommendation in the Briefing note. No inference can be drawn from the briefing note that they did so on behalf of the Director-General rather than the Minister: the briefing note in evidence is signed by a Department officer, the Director-General and the Minister.

66 In any case, that is not to the point. I have concluded on two bases that the Minister was *a* or *the* authority "responsible" for preparing SEPPs and therefore was *a* or *the* relevant planning authority under cl 6: see [58] above. On either basis, the Minister was therefore "responsible" for the preparation, and the "preparing" referred to in cl 6(1) is attributable to the Minister.

67 Accordingly, in my opinion, cl 6 applied to the Minister.

Inconsistency

- 68 The respondents submit that cl 6 of SEPP 55, gazetted in 1998, does not apply at all because the later MD SEPP, gazetted in 2005, prevails to the extent of any inconsistency and cl 8 of the latter is exhaustive.
- 69 The is contrary to the Department briefing note to the Minister which stated: "Under SEPP 55 – Remediation of Land, contamination and remediation of contaminated land must be considered in regards to a rezoning proposal". These proceedings would reasonably have been commenced on the assumption that this was not contentious. Nevertheless, as the respondents do contest it, it is a question of law for the Court to determine.
- 70 Section 36 of the EPA Act relevantly provides:
- 36 Inconsistency between instruments**
- (1) In the event of an inconsistency between environmental planning instruments and unless otherwise provided:
- ...
- (c) the general presumptions of the law as to when an Act prevails over another Act apply to when one kind of environmental planning instrument prevails over another environmental planning instrument of the same kind.
- ...
- (4) Nothing in this section prevents an environmental planning instrument from being expressly amended by a later environmental planning instrument, of the same or a different kind, to provide for the way in which an inconsistency between them is to be resolved.
- 71 Section 36 does no more than codify the common law. Its use of the words "In the event of any inconsistency" and "unless otherwise provided" must be given effect.
- 72 Both SEPPs express themselves to be superior to any other state environmental planning policy. In that regard, cl 19(1) of SEPP 55 provides:

19 Relationship to other environmental planning instruments

- (1) If this Policy is inconsistent with another State environmental planning policy, a regional environmental plan or a local environmental plan (whether made before or after this Policy), this Policy prevails, except as provided by this clause and section 36 (4) of the Act.

73 Similarly, cl 5 of the MD SEPP provides:

5 Relationship to other environmental planning instruments

Subject to section 74 (1) of the Act, in the event of an inconsistency between this Policy and another environmental planning instrument whether made before or after the commencement of this Policy, this Policy prevails to the extent of the inconsistency.

74 I reviewed the principles of statutory interpretation relating to reconciliation of potentially competing provisions within different statutes which are expressed to apply notwithstanding or despite any other Act in *Parks and Playgrounds Movement Inc v Newcastle City Council* [2010] NSWLEC 231, 179 LGERA 346. I said at [81] – [85] (omitting most citations):

- 81 Conflicting provisions of a statute should be reconciled, so far as possible, on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language, the conflict must be alleviated, so far as possible, by adjusting the meaning of competing provisions to achieve the result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the Court to determine the hierarchy of provisions and which must give way to the other.
- 82 In the absence of express words, partial repeal of an earlier statute by a later statute will only be implied on very strong grounds “for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other”: *Saraswati v The Queen* (1991) 172 CLR 1 at 17. Reading one “as subject to the other” means, I understand, that collision may be avoided by holding that the later statute, which is ex facie in conflict with the earlier statute, does not repeal but merely provides for an exception from the general rule contained in the earlier statute.

...

83 The question of conflict has been expressed in various ways: whether the two items of legislation can stand or live together, whether there is contrariety or direct conflict, whether they are irreconcilable.

85 Where there is conflict between Acts of the same legislature, courts endeavour to reconcile their texts. If they cannot do so, they resort to established canons of construction including priority to the law made later in time and priority to a more specific law over a more general law.

75 I applied the principles discussed in *Parks and Playgrounds in Oshlack v Rous Water* [2011] NSWLEC 73 at [33] – [51]. That case raised a complex construction issue because it concerned two Acts each of which was expressed to apply notwithstanding any other Act. A similar issue arises in the present case in the event of an inconsistency between the two SEPPs.

76 Clause 8 of MD SEPP requires investigation into proposals for the listing of State significant sites, as follows:

8 Proposals for State significant site listing

(1A) The Minister may publish a notice in the Gazette advising of a proposal that Schedule 3 be amended to add a site that the Minister considers to be a State significant site.

(1) For the purposes of considering a proposed amendment to Schedule 3, the Minister may initiate an investigation into the proposal by requiring the Director-General to undertake a study or to make arrangements for a study to be undertaken for the purpose of determining:

(a) whether any development on the site should be declared to be a project to which Part 3A of the Act applies, and

(b) the appropriate development controls for the site.

(2) Any such study is to assess:

(a) the State or regional planning significance of the site, and

(b) the suitability of the site for any proposed land use taking into consideration environmental, social and economic factors, the principles of ecologically sustainable development and any State or regional planning strategy, and

(c) the implications of any proposed land use for local and regional land use, infrastructure, service delivery and natural resource planning, and

(d) any other matters required by the Director-General.

- (3) The Director-General is to make arrangements for any such study to be publicly exhibited with an invitation to the public to make written submissions.
- (4) The Minister may direct that an inquiry be held as part of the investigation into a potential State significant site.
- (5) The Director-General is to provide the Minister with a copy of any such study and any recommendations relating to it.
- (6) This clause does not preclude an amendment of Schedule 3 without compliance with this clause.

77 The single object of SEPP 55 is "to provide for a Statewide planning approach to the remediation of contaminated land": cl 2(1). By contrast, the MD SEPP is facultative. It is designed to "facilitate the development, redevelopment or protection of important urban coastal and regional sites of economic or social significance to the State so as to facilitate the orderly use, development or conservation of the State significant sites for the benefit of the State": cl 2(c).

78 In my opinion, the provisions of the two SEPPs are intended to give effect to harmonious goals. The specific and mandatory provisions of cl 6 of SEPP 55 require consideration of contamination and remediation in zoning and rezoning proposals. The general provisions of the MD SEPP empower the Minister, in the Minister's discretion, to require a study to assist the Minister when determining a proposal for a State Significant Site listing. In my view, they operate in different spheres. Even if they do not, both can be obeyed. There is no relevant inconsistency between the two SEPPs such that they cannot stand together.

Compliance with cl 6(2) of SEPP 55

79 The next question is whether the Minister in fact complied with cl 6(2), which it is convenient to repeat:

Before including land of a class identified in subclause (4) in a particular zone, the planning authority is to obtain and have regard to a report specifying the findings of a preliminary investigation of the land carried out in accordance with the contaminated land planning guidelines.

80 The preliminary investigation report in this case was the SSS Study of November 2010 submitted on behalf of Huntlee: see [24]-[25] above. Although it was expressed to be submitted to the Minister, in fact the Department saw it but the Minister did not. All that the Minister saw when making his Recommendation decision was a Department briefing note and its attachments, namely, the proposed MD SEPP Amendment and a Department document.

81 Clause 6(2) required regard to be had to a report specifying "the findings" of the SSS Study.

82 The applicant submits that the findings of the SSS Study are in the 13 dot points in the executive summary, covering almost two pages, of Appendix L titled "Ayrfield No 3 Colliery Mine Workings Rehabilitation Outline", and in the first five dot points covering one third of a page in the Conclusions and Recommendations (section 8) of Appendix M titled "Remediation and Rehabilitation Plan"(in the tender bundle in evidence they are incorrectly identified as appendices K and L). As the Minister did not see any part of the SSS Study, the applicant submits that he did not have regard to a report specifying the findings of the preliminary investigation as required by cl 6(2).

83 The executive summary in Appendix L states:

A summary of the key issues identified at the site are:

- The landfill operation in the former coal handling and preparation plant (CHPP) fines settling ponds area was found to contain large amounts of putrescible materials placed on top of the capped cells, with the open cells unlined with impervious liners as required by the consent for landfilling and rehabilitations works at the site;
- Coal fines material sampled is above guideline levels for TPH's and PAH's;
- A flat area, below and to the south of the fines settling ponds, contains garnet and black sand blasting grits. These

materials are spread over an area of approximately 400m². Analysis of the sands collected showed that they are above guideline levels for lead, arsenic, copper and zinc;

- Salt scalding was observed at the surface along drainage lines around the northern edge of the railway siding, directly below the capped coal fines emplacements and land fills cells;
- Asbestos sheeting and friable insulation materials were identified at a number of locations on the property. All were observed to be in a poor condition with the potential for fibre exposure, as a result of crushing from vandalism and vehicle movements, considered to be high;
- A storage area for oils, fuels, greases and lead acid batteries was noted to have considerable stained soil material in and around the building. Sampling of these soils confirmed that they are above guideline levels for TPH's and Benzo(a) pyrene;
- Hydrocarbon stained areas were noted around the antique vehicle storage area and the workshops, as a result of leaks from stored vehicles, maintenance and restoration activities. These soils are likely to be above guideline levels for TPH's and inorganics;
- Some hydrocarbon stained soils were observed in the equipment shed in the south-western corner of the site, this area may be above guideline levels for TPH's and inorganics;
- The main dam to the east of the workshops accepts all waters from the workshops, storage areas and coal fines cells. The level of sludge in this dam is unknown and the potential for metals and hydrocarbon contaminants in the sludge is considered by ERM to be high;
- Leachate water from the coal fines cells appears to be drained to a storage dam on the main workshop level of the surface facilities. A pipe was noted in the wall approximately one metre above the current water level. The pipe discharges into the dam wall above a drain, which flows around the workshops and discharges to a gully to the north-west of the workshops. The water in this dam is likely to be highly saline given its source in the coal fines cells and may be affecting aquatic ecosystems in the drainage line to which it drains;
- A 205 Litre drum labelled as containing Ethyl Methyl Ketone (a hydrocarbon solvent) was observed stored at the workshop area to the south of the coal fines cells. Some impacted soils are likely to occur in this area as a result of

maintenance, material preparation (sand blasting) and painting activities;

- The Bath-house, lamp room and Stores building associated with the Maitland Extended No.2 Colliery, located approximately 2.4 kilometres to the south of the Ayrfield No.3 Colliery pit top area, contains broken asbestos sheeting material, burnt 205L drums of ash material, friable asbestos insulation materials, oil stained pavement and soil, an open landfill area containing asbestos and drummed materials and a large number of damaged lead acid batteries. The area is accessed by the public and is subject to rubbish dumping of general wastes and a large amount of oyster shell was observed in this area; and
- The site contains a large amount of disturbance associated with mining activities in the area, at least six underground collieries and one open cut mine associated haul roads, waste emplacements and coal handling areas, which operated on the land holding between the early 1900's and 1985. Apart from the Ayrfield Colliery pit top area, already discussed, the other sites have significant areas of disturbed soil, coal waste and ash materials exposed. These areas of disturbed soil, coal waste and ash materials exposed. These areas are eroding and contributing to sedimentation and potential acidification of drainage lines and Black Creek.

84 The Conclusions and Recommendations section of Appendix M of the SSS Study states:

Based on review of the information supplied by LWP Property and site inspection observations, HLA concludes that the site has been historically used for purposes which have had the potential to cause land contamination, including:

- Coal mining activities including coal fine tailings and reject stockpiles (chiiter dumps).
- Old mine building areas reporting hydrocarbon-like staining of unsealed floors and walls.
- Potential storage and use of chemicals within workshop and maintenance sheds areas and abrasive grit blasting areas.
- Uncontrolled landfilling of former coal collection cells.
- Storage of derelict machinery including bus/automobiles.

- 85 The respondents submit that the relevant findings in the SSS Study are stated in its Executive Summary as follows:

Contamination and Subsidence

Areas principally in the centre of the site at the former Ayfield Colliery, contain contaminated land and subsidence impacts as a result of past mining and landfill activities. These areas have been assessed as part of the SSS Study and, where appropriate, land uses have been designated to these areas that will minimise potential risks to the population. Preliminary investigations conclude that these areas are able to be managed and rehabilitated prior to development. Recommendations have been put forward with regard to future management and monitoring of those areas. Further detailed studies of these areas will be undertaken prior to any applications for subdivision and works in these locations. These areas will be developed as the later stages of the Huntlee development.

- 86 The respondents then submit that those findings are sufficiently and accurately reproduced in the Department document appended to the briefing note before the Minister as follows:

Some areas of the site have been found to contain contaminated land as a result of former mining and landfill activities (see Figure 2 below).

Remediation Notices of Preventative Action are currently in place for the former Ayfield Colliery property. These notices require a number of on-going management and monitoring measures to be put in place.

The proponent has outlined that further detailed investigations of this and other affected areas will be undertaken prior to any applications for subdivision and works in these locations. Under SEPP 55 - Remediation of Land, contamination and remediation of contaminated land must be considered in regards to a rezoning proposal.

Recommendation

A recommendation has already been made for the requirement of the preparation of a DCP that considers contamination, and DGRs for future project applications will require consideration of this issue.

- 87 There follows an odd sentence which the respondents submit, and I accept, should be construed as a submission to the Minister: "The planning authority, in this case the Minister, has considered whether the

land is contaminated and is satisfied the land will be suitable for mixed used development (including residential and recreational) purposes after remediation has been carried out”.

88 Curiously, Figure 2 referred to in the first sentence of the passage quoted at [86] above does not in fact cast any light on the statement in that sentence.

89 I accept that, hypothetically, a Department briefing note to the Minister may be a “report” referred to in cl 6(2) of SEPP 55 if it specifies the findings of a preliminary investigation of the land carried out in accordance with the contaminated land planning guidelines.

90 However, in my opinion, in this case the relevant findings in the SSS Study are as submitted by the applicant. They are much more numerous and specific than the Executive Summary in the SSS Study on which the respondents rely. Clause 6(2) required the “findings”, not a short and general summary, to be the focus of the Minister’s regard. It is an undemanding requirement. The respondents attribute a construction to the word “findings” in cl 6(2) which, in my view, is far too broad and unduly waters down the content of the planning authority’s obligation in the important context of environmental contamination. The findings were not specified in documents before the Minister nor did the Minister otherwise see them. Consequently, the Minister could not and did not comply with the prescriptive requirements of cl 6(2).

91 If I am in error and the quoted Executive Summary in the SSS Study annotated at [85] above contains the “findings”, then in my view the “findings” in at least the second and third sentences therein were not, referred to in the Briefing Note appended document quoted at [86] and the Minister therefore did not consider them.

Compliance with cl 6(1)(b) and (c) of SEPP 55

- 92 Clause 6(1)(b) and (c) required the Minister to attain certain states of satisfaction – relevantly, that the contaminated land, if remediated, will be suitable for all the purposes for which it is permitted to be used and that it will be so remediated before it is used for those purposes. The respondents submits that the Minister “shared in” the necessary states of satisfaction.
- 93 There is no summary of the remediation issues identified in the SSS Study in the documents that were before the Minister. There are two references to remediation consisting of three lines each in the briefing note. Apart from those two references, which are inadequate, the Department simply submitted to the Minister that he “had considered” certain matters and “was satisfied” of other matters: see [87] above. Clause 6(1) requires the Minister to be “satisfied” of certain matters. Satisfaction in this context must mean a genuine satisfaction based on a review of the relevant materials or, at least, a summary of those materials. I considered the meaning of the word “satisfied” in the context of SEPP 55 in *Australians for Sustainable Development Inc v Minister for Planning* [2011] NSWLEC 33. I said at [218] – [219] and, after reviewing the authorities, concluded at [232] as follows:
- 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).

.....

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, 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.

- 94 The evidence of what was before the Minister shows that he never had the opportunity to form such a state of satisfaction.

Whether breach of cl 6 of SEPP 55 spells invalidity

95 The respondents submit that breach of cl 6(1) and (2) of SEPP 55 has no invalidity consequence.

96 The test for invalidity stated in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, 194 CLR 355 at [91] is as follows:

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.

97 The respondents invoke *Attorney General of NSW v World Best Holdings Ltd* [2005] NSWCA 261, 63 NSWLR 557 at [108] where Spigelman CJ (Mason P and Tobias JJA agreeing) said:

There may, of course, be legislative requirements with respect to which it is appropriate to conclude that Parliament intended every breach to lead to invalidity. There are other requirements where it is appropriate to consider the particular circumstances of the case when determining what are the consequences of the defective compliance.

98 The respondents also invoke *Nature Conservation Council of New South Wales Inc v The Minister Administering the Water Management Act 2000* [2005] NSWCA 9; 137 LGERA 320 at [93] where Spigelman CJ concluded that whilst, on balance, various textual indications would support a conclusion of invalidity, it was "however...the factual context...rather than the textual context of the legislative scheme, [which was] determinative".

99 The respondents submit that in the present case, the factual context, including the following, tells strongly against invalidity:

- (a) a rezoning which covers a very large area (1,702 ha) and numerous properties;
- (b) a development which will be undertaken in stages over 20-25 years;
- (c) cl 8(6) of the MD SEPP (set out at [76] above), and;
- (d) cl 25(2)(f) of the Huntlee MD Amending SEPP requiring preparation of a DCP providing for the amelioration of site contamination.

100 I do not accept the respondents' submission. The question is, whether there can be discerned a legislative purpose that non-compliance with cl 6 of SEPP 55, being an instrument made under s 37(1) of the EPA Act, should lead to invalidity. Rather than providing a State-wide planning approach for the remediation of contaminated land, SEPP 55 would be relegated to a dead letter if breaches, at least of the variety committed in this case, did not lead to invalidity. The fact that the development is of a large scale, and is proposed over a long time, weighs in favour of invalidity since it makes compliance even more important. Clause 8(6) of the MD SEPP and cl 25(2)(f) of the Huntlee MD Amending SEPP do not, in my view, tell against invalidity. In my opinion the Huntlee MD SEPP amendment is invalid.

Whether the Recommendation decision is justiciable

101 Huntlee submits that the Minister's power to recommend the making of a SEPP is a non-statutory executive power and, as such, Minister's Recommendation decision is not justiciable. It argues that the opening words of s 38 of the EPA Act, "Before recommending", assume the existence of a non-statutory executive power to recommend: see [53] above.

102 I disagree. In my opinion, the Minister's power to recommend is a statutory power. Section 38(1) implicitly empowers the Minister to make a recommendation. It is unlikely that the legislature intended that an autonomous common law power of recommendation should operate in an area governed by statute. The exercise of such a statutory power is justiciable: *Stewart v Ronalds* [2009] NSWCA 277, 76 NSWLR 99. In that case Allsop P (Hodgson JA and Handley AJA agreeing) held (omitting most citations):

39 Until 1981, the apparently prevailing view was that the exercise of power by a representative of the Crown was not reviewable:.... By the 1980s, a distinction had arisen between the review of power under statute by Ministers (which were reviewable) and decisions by a Crown representative, acting on the advice of a responsible minister (which were not)....

40 The High Court in *R v Toohey* and *FAI v Winnecke* made clear that in some cases the courts could examine the exercise of power under a statute by a representative of the Crown. See also Mason J in *R v Toohey* at 219-221 and *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 concerning the review of the non-statutory prerogative.

41 Whatever may be the debate as to the place of judicial review outside the exercise of statutory power and by the Crown in the exercise of non-statutory executive or prerogative power: see generally M Aronson *et al* *Judicial Review of Administrative Action*, 4th ed (2009), Sydney Lawbook Co at 116-117 and 124-134, the power exercised here by the Lieutenant-Governor was pursuant to statute: the *Constitution Act 1902*, ss 35C and 35E.

42 Central to the identification of the kinds of decisions amenable to review by the courts is the suitability of the subject for judicial assessment and, in particular here, whether the assessment of the legitimacy or otherwise of the decision depends on legal standards or by reference to political considerations....

43 It is not necessary or appropriate to attempt a definition of the limits of judicial power by reference to the notion of justiciability. Essential to the task is the identification of the controversy, its limits and character. Often the nature and extent of rights of individuals, whether of a proprietary or other character, as affected by the asserted wrong will bespeak a justiciable controversy. The presence of standards capable of being assessed legally may do likewise. Difficult questions arise if a subject is justiciable, but it is said not to be "appropriate" for the courts to interfere: In his discussions in *Baker v Carr*, Brennan J recognised a degree of lack of coherence in the subject matter of non-justiciability and its

treatment. Brennan J in *Baker v Carr* and Gummow J in *Re Diffort* counselled against sweeping generalisations and urged a specific analysis of the particular controversy in issue.

103 If I am in error and the Minister's power was a non-statutory executive power, in my opinion it would still be justiciable. In the landmark decision in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (CCSU), the House of Lords held that the Prime Minister's exercise of her non-statutory prerogative powers to ban union membership at Government Communications Headquarters was subject to judicial review. CCSU has been followed in England; it was accepted in the High Court of Australia in *Director of Public Prosecutions (SA) v B* [1998] HCA 45, 194 CLR 566 at 569 and *Jarratt v Commissioner of Police (NSW)* [2005] HCA 50, 224 CLR 44 at 65; and it has been accepted by several other Australian courts. The cases are collected in M Aronson, *Judicial Review of Administrative Action* 4th ed (2009), Sydney Lawbook Co at 124-125. Earlier, in *R v Toohy; ex parte Northern Land Council* (1981) 151 CLR 170, although prerogative powers were not in issue, Mason J at 219-221 and Wilson J at 282-283 indicated that prerogative powers were generally reviewable.

104 Further, the validity of SEPPs made by the Governor have been challenged in a number of cases without any suggestion that either the Governor's decision to make the SEPP or the recommendation of the Minister on which it was based were not amenable to judicial review: *Darling Casino Ltd v Minister for Planning* [1995] NSWLEC 62; *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* [1996] NSWSC 348, 91 LGERA 31; and *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* (1997) 95 LGERA 33. The fact that ss 37 – 39 were in a different form when they were decided does not affect the principle. In *Save the Showground* at 34-35 Gleeson CJ said:

The making of SEPP 47 involved an exercise of power conferred upon the Executive Government by the relevant legislation. The function of the court is to address any material legal constraints, and to decide whether, in the facts and circumstances of the case, they result in invalidity as claimed. It is not for the court to decide

what is a proper use for the Showground. Our task is to determine, in the light of the arguments presented on behalf of the appellant, whether the making of SEPP 47 was a valid exercise of a power which the Parliament has vested in the Governor, acting on the advice of the Minister.

Summary of Conclusions re Ground 1

- 105 The Minister's Recommendation to the Governor to make the SEPP is justiciable and was subject to the provisions of cl 6 of SEPP 55. These provisions are not inconsistent with the provisions of the MD SEPP. The Minister contravened cl 6 with the consequence that the Recommendation was invalid and the Huntlee MD SEPP Amendment is accordingly invalid. For those reasons I uphold Ground 1.

GROUND 2: TAKING INTO ACCOUNT AN IRRELEVANT CONSIDERATION OR JURISDICTIONAL ERROR

- 106 Ground 2 is that in making the Recommendation decision the Minister took into account an irrelevant consideration, namely the 2010 Agreement: see [27] – [32] above. With a slightly difference nuance, the applicant alternatively or further submits that it was a jurisdictional error that infected the Recommendation decision for the Minister to have considered that the 2010 Agreement was made in accordance with the EPA Act.
- 107 There is no dispute that the Minister, on the basis of the material before him, must have assumed that the 2010 Agreement was made in accordance with the EPA Act. That is also my conclusion.
- 108 Clause 3 of the 2010 Agreement recites that it "constitutes a planning agreement within the meaning of s 93F of the [EPA] Act". The applicant's contention is that it is not a planning agreement within the meaning of s 93F because it contravenes the mandatory requirement of s 93F(3)(g), which provides:

- (3) A planning agreement must provide for the following:

- (g) the enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer.

109 The 2010 Agreement does not provide for a guarantee or bond or any other security. The applicant submits that is what s 93F(3)(g) requires. The respondents submit that the 2010 Agreement does provide for its enforcement "by suitable means" in the event of a breach by the developer through cl 9.2, under which the land owner agreed to procure the registration of the 2010 Agreement under the *Real Property Act* 1900 thus binding successors in title, and cl 9.4 which empowers the Minister to lodge a caveat to protect that position pending registration. In fact the agreement was registered and the caveat was lodged in the interim and withdrawn after registration.

Whether the 2010 Agreement provides for enforcement by "suitable means"

110 As to the word "enforcement" in s 93F(3)(g), it has been held that the expression "enforceable" in money lending legislation is not limited to judicial or curial remedies and includes the appointment of a receiver as a means of attaining payment or repayment of the debt for money lent and interest: *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428 at 448-449.

111 The 2010 Agreement makes provision for two kinds of development contributions (see [32] (c) and (d) above):

- (a) transfer of the "Conservation Offset Lands" comprising some 5,612 hectares of land for environmental conservation; and
- (b) monetary contributions of \$1.1 million, of which \$1 million was for management of the Conservation Lands and \$100,000 for conservation of *personia pauciflora* in the North Rothbury area.

- 112 In respect of the transfer of the Conservation Offset Lands, the applicant does not contend that there is non-compliance with s 93F(3)(g). That may be because cl 2.4 provides that if the Minister does not transfer the Conservation Offset Lands as required by the 2010 Agreement, the Land Owner consents to the Minister compulsorily acquiring them for \$1 in accordance with the *Land Acquisition (Just Terms Compensation) Act* 1991.
- 113 Accordingly, the only issue is whether the 2010 Agreement provides for its enforcement by a suitable means, such a provision of a bond or guarantee, in the event of a breach of the agreement by the developer in respect of the monetary contribution of \$1.1 million.
- 114 Section 93C of the EPA Act provides that the term “planning agreement” means a voluntary agreement referred to in section 93F. Voluntary planning agreements are provided for in Subdivision 2 (ss 93F-93L) of Division 6 of the EPA Act, which relevantly provides:

93F Planning agreements

- (1) A planning agreement is a voluntary agreement or other arrangement under this Division between a planning authority (or 2 or more planning authorities) and a person (the developer):
- (a) who has sought a change to an environmental planning instrument, or
 - (b) who has made, or proposes to make, a development application, or
 - (c) who has entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies,
- under which the developer is required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.
- (3) A planning agreement must provide for the following:
- (a) a description of the land to which the agreement applies,
 - (b) a description of:
 - (i) the change to the environmental planning instrument to which the agreement applies, or

- (ii) the development to which the agreement applies,
- (c) the nature and extent of the provision to be made by the developer under the agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made,
- (d) in the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of section 94, 94A or 94EF to the development,
- (e) if the agreement does not exclude the application of section 94 to the development, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under section 94,
- (f) a mechanism for the resolution of disputes under the agreement,
- (g) the enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer.

...

- (10) A planning agreement is void to the extent, if any, to which it requires or allows anything to be done that, when done, would breach this section or any other provision of this Act, or would breach the provisions of an environmental planning instrument or a development consent applying to the relevant land.

93G Information about planning agreements

- (1) A planning agreement cannot be entered into, and a planning agreement cannot be amended or revoked, unless public notice has been given of the proposed agreement, amendment or revocation, and a copy of the proposed agreement, amendment or revocation has been available for inspection by the public for a period of not less than 28 days.

...

93H Registered planning agreements to run with land

- (1) A planning agreement can be registered under this section if the following persons agree to its registration:
 - (a) if the agreement relates to land under the Real Property Act 1900—each person who has an estate or interest in the land registered under that Act, or
 - (b) if the agreement relates to land not under the Real Property Act 1900—each person who is seised or possessed of an estate or interest in the land.

...

- (3) A planning agreement that has been registered by the Registrar-General under this section is binding on, and is enforceable against, the owner of the land from time to time as if each owner for the time being had entered into the agreement.

...

93I Circumstances in which planning agreements can or cannot be required to be made

- (1) A provision of an environmental planning instrument (being a provision made after the commencement of this section):
 - (a) that expressly requires a planning agreement to be entered into before a development application can be made, considered or determined, or
 - (b) that expressly prevents a development consent from being granted or having effect unless or until a planning agreement is entered into,has no effect.
- (2) A consent authority cannot refuse to grant development consent on the ground that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.
- (3) However, a consent authority can require a planning agreement to be entered into as a condition of a development consent, but only if it requires a planning agreement that is in the terms of an offer made by the developer in connection with:
 - (a) the development application, or
 - (b) a change to an environmental planning instrument sought by the developer for the purposes of making the development application,or that is in the terms of a commitment made by the proponent in a statement of commitments made under Part 3A.
- (4) In this section, planning agreement includes any agreement (however described) containing provisions similar to those that are contained in an agreement referred to in section 93F.

93J Jurisdiction of Court with respect to planning agreements

- (1) A person cannot appeal to the Court under this Act against the failure of a planning authority to enter into a planning agreement or against the terms of a planning agreement.
- (2) This section does not affect the jurisdiction of the Court under section 123.

93K Determinations or directions by Minister

The Minister may, generally or in any particular case or class of cases, determine or direct any other planning authority as to:

- (a) the procedures to be followed in negotiating a planning agreement, or
- (b) the publication of those procedures, or
- (c) other standard requirements with respect to planning agreements.

115 For present purposes, the most significant provisions of Subdivision 2 of Division 6 are as follows:

- (a) Sub-section 93F(1) relevantly defines a "planning agreement" as "a voluntary agreement or other arrangement under this Division between a planning authority.. and a person (**the developer**)... (a) who has sought a change to an environmental planning instrument... under which the developer is required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a public purpose".
- (b) Sub-section 93F(2) provides an inclusive definition of "public purpose" for the purposes of sub-s 93(1).
- (c) Sub-section 93F(3) provides that a "planning agreement must provide for the following". It then lists seven requirements, the last being "the enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer": s 93F(3)(g).
- (d) Section 93G sets down certain procedures in relation to planning agreements. A planning agreement cannot be entered into or amended or revoked unless it has been made available for inspection by the public for a period of 28 days or more: s 93G(1). Sub-sections (3) and (4) provide for notification to the Minister or the relevant council, and sub-s (5) provides for annual reporting of compliance with the agreement.
- (e) Section 93H provides for registration of a planning agreement so as to make it binding on, and enforceable against, the owner or owners of the land to which it relates as if each owner was party to the agreement: see, in particular, sub-s (3).

- (f) Section 93I governs the circumstances in which planning agreements can or cannot be required to be made by consent authorities, and s 93J provides that there is no appeal against the failure of planning authority to enter into a planning agreement or against the terms of a planning agreement.
- (g) Section 93K empowers the Minister generally or in any particular case or class of case, to determine or direct any other planning authority as to the procedures to be followed in negotiating a planning agreement, the publication of those procedures or other standard requirements with respect to planning agreements. Section 93K empowers the Minister to make requirements which are additional to, not in substitution of, the requirements in s 93F. Nothing in s 93K suggests that the Minister can vary or waive the statutory requirements as to the content of planning agreements (s 93F) or the procedures to be followed in respect of them (s 93G).

116 These provisions relating to voluntary planning agreements were introduced by the *Environmental Planning & Assessment Amendment (Development Contributions) Act 2005*, which commenced on 8 July 2005.

The Explanatory Note contains the following overview:

The object of this Bill is to amend the *Environmental Planning and Assessment Act 1979* (**the Principal Act**) to extend the means by which planning authorities may obtain development contributions to be applied for the provision of public amenities and public services and for other public purposes. As an alternative to obtaining contributions towards public amenities and public services through the imposition of conditions of development consent (as is currently provided for under section 94 of the Principal Act), a council or other consent authority may (if authorised by a development contributions plan) impose a condition of development consent that requires applicants to pay a levy of the percentage of the proposed cost of the development. In addition, planning authorities (including the Minister) will be specifically authorised to obtain development contributions for any public purpose through voluntary planning agreements with the developer.

117 The Second Reading Speech in the Legislative Assembly included the following comments on the purpose of the voluntary planning agreement provisions and the mischief that they were intended to address (Hansard, 8 December 2004, the Hon Craig Knowles MP, pp 13539-13540):

The practice of entering into planning arrangements to provide agreed infrastructure and appropriate public benefits, in addition to or as an alternative to section 94, is not new. Planning arrangements have existed for some years and in recent times have merged as a market response for development or redevelopment of large-scale sites in single ownership such as the Australian Defence Industries site at St Marys and in the Greystanes development.

However, the legal framework surrounding agreements is uncertain and the existing practice is often hidden from public scrutiny and is, therefore, unaccountable. The bill seeks to make best practice in planning arrangements common practice. The amendments set out in the bill clarify and make the approach less cumbersome by expressly acknowledging the role planning agreements play as part of the development contributions system. Planning authorities and developers will be able to voluntarily enter into planning agreements under which the developer is required to dedicate land free of cost, pay a monetary contribution or provide any other material public benefit, or any combination of them, to be used for or applied to a public purpose.

...

The bill will enable communities and the Government to scrutinise the public infrastructure decisions made by planning authorities. The absence of a regulated, fair and transparent system of planning agreements creates an environment conducive to some practices recently reported in the press. However, the system of planning agreements provided for in the bill will ensure that all arrangements between planning authorities and developers are transparent and in the public interest so that the public have the opportunity to comment to the responsible planning authority about the proposed planning agreement and that planning authorities are accountable in the collection and expenditure of funds and the provision of facilities.

The regulations will contain safeguards to ensure that there is no abuse of planning agreements by either planning authorities or developers. Planning agreements must promote the objects of the Environmental Planning and Assessment Act and the applicable environmental planning instrument. They must be directed towards a legitimate planning purpose **and provide for a reasonable means of achieving that purpose. The public interest will be the overriding consideration.** The procedures in the regulations governing the entering into of planning arrangements will be transparent, accessible and fair to all parties. They will provide for effective public participation and

accountability and will protect the regulatory independence of the planning authority involved in negotiating an agreement.

...
In order to ensure open, transparent, accountable and consistent decision making, **planning agreements must be weighed against other planning considerations when the consent authority determines an application.**

(emphasis added)

118 The respondents submit that s 93F(3)(g) does not necessitate the provision of a guarantee or bond or other security, and that the 2010 Agreement provides for enforcement of the Agreement by suitable means, in the following ways:

- (a) pursuant to cl 9.2, the Land Owner agreed to procure the registration of the 2010 Agreement under the *Real Property Act*. An arrangement of this kind does not occur by force of the EPA Act alone. It requires agreement of the parties: see s 93H(1). Registration creates an important mechanism for enforcing the developer's obligations against successors in title. Additional temporary security for the registration obligation, designed to bridge the time until registration, is provided by the provisions for lodgement of a caveat by the Minister under cl 9.4. The respondents argue that if Huntlee were to become insolvent, then the Land would no doubt be sold to a solvent successor in title who would be bound to the 2010 Agreement as a result of its registration; and
- (b) pursuant to cl 7 of the 2010 Agreement, any party may bring proceedings to enforce it.

119 Clause 7.1 provides that the 2010 Agreement "may be enforced by any Party in any Court". Clause 7.2 (a) notes that nothing in the 2010 Agreement is to be taken to prevent enforcement by bringing proceedings in this Court. Schedule 1 is headed "Section 93F

Requirements". I reject the respondents' submission that the requirements of s 93F(3)(g) are satisfied by cl 7. To provide that a binding agreement may be enforced in a court goes without saying. Section 93F(3)(g) requires much more.

120 The applicant disputes that clauses 9.2 and 9.4 satisfy s 93F(3)(g), and submits that paragraph 4 in Schedule 10 of the 2010 Agreement allows the Land Owner to contract out of s 93H(3).

121 Paragraphs 1, 3 and 4 of Schedule 10 provide as follows:

1. Land Owner's right to sell Land

- (a) Except in respect of any part of the Land where the Planning Agreement has been released and discharged under paragraph 1 of Schedule 6, the Land Owner must not sell, transfer or dispose of the whole or any part of the Land in excess of 10 hectares in aggregate otherwise than in circumstances where paragraph 1(b) of this Schedule 10 or paragraph 1(c) of this Schedule 10 applies, unless before it sells, transfers or disposes of any such part of the Land to another person (Transferee).
- (i) it satisfies the Minister acting reasonably that the proposed Transferee is financially capable of complying with such of the Land Owner's obligations under this deed (including without limitation, by providing financial statements for, and credit standing of, the proposed transferee) as the Minister acting reasonably shall nominate must be adopted by the Transferee **(Required Obligations)**;
- (ii) except as provided in the deed set out in Annexure A which is signed in accordance with paragraph 1(a)(iii) of this Schedule, the rights of the Minister under this deed are not diminished or fettered in any way;
- (iii) the Transferee signs a deed in the form set out in Annexure A to the Minister containing provisions under which the Transferee agrees to comply with the Required Obligations as if it were the Land Owner (including obligations which arose before the transfer or assignment) with respect to the land being sold, transferred or disposed of;
- (iv) any default by the Land Owner (other than a material default constituted by the appointment of a Controller of the Land Owner by a Financier) has been remedied by the Land Owner by a Financier) has been remedied by

the Land Owner or that Financier (as the case may be), unless that default has been waived by the Minister; and

- (v) the Land Owner and the Transferee pay the Minister's reasonable Costs in relation to that assignment; and
- (b) The Land Owner acknowledges that if it sells, transfers or disposes of any Land which is not in excess of 10 hectares, nothing in this Planning Agreement requires the Minister to release the Planning Agreement insofar as it relates to that Land unless and until the requirements of paragraph 1 of Schedule 6 have been complied with.
- (c) For the purposes of paragraph 1 of this Schedule 10, the following will be taken to be the sale, transfer or disposal of the whole or any part of the Land in excess of 1 hectare in aggregate:
 - (i) one transaction where that transaction results in the sale, transfer or disposal of Land in excess of 10 hectares;
 - (ii) two or more transactions where the purchaser, transferee or disponee are different people and those transactions result in the sale, transfer or disposal of Land in excess of 10 hectares in aggregate, but excluding the area of Land:
 - A. comprised in any Residential Lot which has been sold, transferred or disposed to a purchaser, transferee or disponee; and
 - B. which has been subject to the release and discharge of the Planning Agreement pursuant to paragraph (b) of Schedule 6.
 - (iii) two or more transactions where the purchaser, transferee or disponee is the same person (or persons) where the Minister, acting reasonably, determines that those separate transactions should be regarded as, in substance, one transaction.

3. Release

If the Land Owner sells, transfers or disposes of the whole or any part of the Land in excess of 10 hectares in aggregate and fully satisfies the requirements of paragraph 1 of this Schedule 10, the Land Owner will be released from its obligations under this Planning Agreement with respect to that Land being sold, transferred or disposed of.

4. Land Owner to retain obligations

If the Land Owner sells, transfers or disposes of the whole or any part of the Land in the manner identified in paragraph 1(a) of this Schedule 10 to a Transferee:

- (a) the Land Owner may elect, by way of notice to the Minister, to continue to be bound by the obligations under the Planning Agreement in respect of the Land in lieu of the Transferee;
- (b) the Minister agrees to release the Transferee from the requirement to comply with the obligations under the Planning Agreement in respect of that Land; and
- (c) the Minister will do all things reasonably necessary to effect the release included in paragraph 4(b) of this Schedule 10, including entering into a further agreement if necessary with the Transferee and Land Owner.

122 Under paragraph 4 of Schedule 10, the developer can elect, when selling the Land, whether to retain the obligations under the Planning Agreement or have them passed on to the transferee, who must be financially capable of complying with those obligations under paragraph 1(a)(i). This, the applicant submits, constitutes contracting out of s 93H of the EPA Act, and reinforces the view that s 93F(3)(g) requires something in the nature of a guarantee or security for the developer's obligations.

123 The respondents' rejoinder is as follows. The obligation to pay the monetary contributions of \$1.1 million is plainly an obligation "under this deed" (the expression used in paragraph 1(a)(i) of Schedule 10) but is not an obligation "under the Planning Agreement in respect of the Land" (the expression used in cl 4 of Schedule 10). Rather, the environmental contribution is to be paid towards the management of the Conservation Offset Lands and the conservation of *personia pauciflora* in the North Rothbury area. It follows that paragraph 4 of Schedule 10 says nothing about the obligation under the 2010 Agreement in respect of the monetary contribution of \$1.1 million and has no impact on the operation of s 93H(3) insofar as that environmental contribution is concerned. Consequently, the respondents submit, the obligation in respect of the environmental contribution will run with the land and bind, and be enforceable against, any future owner as if that owner had entered into the 2010 Agreement.

- 124 I accept the respondents' submission and reasoning that the obligation to make monetary contributions of \$1.1 million is not an obligation "with respect to the Land" and therefore cannot be released under paragraph 4 of Schedule 10. Consequently, it is not directly relevant to the s 93F(3)(g) issue in this case. Nevertheless, the fact that the transferee can be released under paragraph 4 of Schedule 10 from the requirement to comply with obligations "with respect to the Land" seems inconsistent with s 93H(3). However, as that was not put forward as a discrete challenge to validity, I say no more about it.
- 125 Next, the respondents submit that s 93F(3)(g) should relevantly be construed as referring to enforcement of the agreement by a means which the Minister reasonably considers to be suitable. In other words, it is not an objective matter for the Court to determine but entirely a matter for the Minister's judgment. I do not accept the submission. There are no such words in s 93F(3). It is not framed by reference to the Minister's subjective state of satisfaction, in contrast, for example to cl 6(1) of SEPP 55: see [44] above. In my view, it is an objective question whether s 93F(3)(g) is satisfied.
- 126 In my opinion, s 93F(3)(g), by its reference to "suitable means, such as a bond or guarantee", requires an additional, independent and enforceable assurance that the developer's promises under the agreement will be honoured. There is breadth and flexibility in that requirement. Bonds and guarantees are not exhaustive but the suitable means should be ejusdem generis. In my view, the requirement is not satisfied by the contractual provisions on which the respondents rely that the planning agreement be registered and that a caveat may be lodged pending registration. Registration binds successors in title (s 93H) and, with the contractual machinery of novation, merely substitutes one contractual promisor for another. It provides no additional, independent and enforceable

assurance for the developer's promises; nor for those of a successor in title.

- 127 Next, the respondents submit that as there is no question of "suitable means" not having been provided in respect of the Conservation Offset Lands contribution, that is sufficient to satisfy s 93F(3)(g) even if there is no provision for "suitable means" in relation to the enforcement of the monetary contributions provision. As I understand it, this submission is based upon the fact that s 93F(3)(g) refers to "a" (singular) suitable means. I do not accept the submission. The provision is concerned with enforcement in the event of breach of the agreement. It cannot suffice if there are no suitable means for enforcement of the agreement in the event of a breach of important provisions such as the promise to make monetary contributions. That would gravely undermine s 93F(3)(g).

Whether the 2010 Agreement an irrelevant consideration

- 128 An irrelevant consideration is a matter the decision-maker is bound not to consider: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40, 162 CLR 24 at 39-41 per Mason J; *Tugan Cobaki Alliance Inc v Minister for Planning* [2006] NSWLEC 396 at [104] per Jagot J.
- 129 The respondents concede that the 2010 Agreement which, in accordance with ss 93F-L of the EPA Act had been the subject of notification and consultation and had attracted many submissions, was a highly relevant, if not mandatory relevant, consideration.
- 130 There are no express provisions of the EPA Act which regulate the Minister's power to recommend the making of a SEPP. Where a power, such as the Minister's power to recommend, is not expressly confined by statute, an implied limitation on the factors that may legitimately be taken

into account in its exercise may nevertheless be found in the subject matter, scope and purpose of the statute: *Peko-Wallsend* at [141].

131 In my opinion, if the 2010 Agreement failed to comply with s 93F(3)(g), it was an irrelevant consideration: *Gwandalan Summerland Point Action Group Inc v Minister for Planning* [2009] NSWLEC 140, 75 NSWLR 269 at [144] – [148]. A planning agreement which does not comply with the planning agreement provisions and safeguards in ss 93F - 93L subverts the statutory scheme and is an irrelevant consideration: *Gwandalan*. Lloyd J said at [145] – [148]:

145 I have noted that neither the MOU nor the deed could be regarded as a planning agreement to which s 93F to s 93L apply... the Parliament has recognised the danger that this sort of agreement can subvert the proper operation of the planning and assessment process by providing built-in safety procedures, most notably in s 93G — the public notification, the 28 days inspection period and the associated right to make submission.

146 Although the Minister's discretion is apparently unconfined, I accept that there may still be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard: *Peko Wallsend* at 40, noted at [141] above. The MOU and the deed in the present case are in substance a sort of planning agreement, but neither of which comply with the planning agreement provisions and safeguards. The presence of the statutory scheme for planning agreements suggests that these types of arrangements have no place consistently with the statutory scheme; that is, the statute imposes a limitation on the factors to which the decision-maker may have regard which excludes a consideration of such arrangements.

147 I find that there is the implied limitation...

148 I therefore ... find that by taking into account the existence of both or either of the MOU and the deed, the Minister took into account irrelevant considerations.

132 I do not accept the respondents' submission that *Gwandalan* is relevantly distinguishable. This principle in *Gwandalan* is not in my view affected by the differences between it and the present case. *Gwandalan* challenged the Minister's administrative decisions under Part 3A of the EPA Act and concerned a planning agreement that had not been through the notification

procedures in s 93G. The present case challenges the Minister's administrative decision under Part 3 to recommend the making of a SEPP and concerns a planning agreement that allegedly does not comply with s 93F(3)(g).

Invalidity

- 133 The respondents suggest that s 93F(10) weighs against a conclusion of invalidity of the recommendation. I disagree. That provision is not directed to the mandatory provisions of s 93F(3).
- 134 The respondents submit that as s 93F(3)(g) is directed towards ensuring that planning agreements are enforceable, in the event of breach it would be a very odd outcome, that the legislature cannot have intended, if the consequence of non compliance was that an otherwise binding agreement was entirely void, thus relieving the developer of the obligation to make the contribution.
- 135 I do not accept this submission. If the planning agreement is entirely void, then it is not a matter of the developer being relieved of the obligation to make a contribution. It is a matter of the developer failing to achieve the desired outcome of rezoning for which it entered into the agreement in the first place. If the respondents' submission were to be accepted, then non-compliance with s 93F(3)(g) is of no consequence. That is, there is no sanction for non-compliance and it does not result in invalidity. Parliament has mandated the content of planning agreements. Just as the statutory notification provisions are essential requirements (*Gwandalan*), so too must be the provisions mandating the content of planning agreements (at least in the case of substantial breach). The developer's promises under the 2010 Agreement are a quid pro quo for obtaining a valid Huntlee MD SEPP Amendment. Parliament has allowed this sort of agreement but has strictly regulated its content and public notification.

136 The whole point of s 93F(3)(g) is to provide an assurance that the developer's promises will be met, particularly in the event of the developer's insolvency. That requirement is in the public interest, which the Second Reading Speech described as "the overriding consideration". I do not accept that parliament intended that this requirement, which it expressed in mandatory terms, can simply be disregarded without consequence. The 2010 Agreement lies outside the statutory scheme. As Lloyd J said in *Gwandalan* at [146], although such an agreement is

in substance a sort of planning agreement [it does not] comply with the planning agreement provisions and safeguards. The presence of the statutory scheme for planning agreements suggests that these types of arrangements have no place consistently with the statutory scheme; that is, the statute imposes a limitation on the factors to which the decision-maker may have regard which excludes a consideration of such arrangements.

137 Next, the respondents submit that the following factual context, and the consequences of defective compliance, tell against invalidity of the Recommendation decision:

- (a) a rezoning that covers a very large area (1702 hectares) and numerous properties;
- (b) a development which would be undertaken in stages over 20 – 25 years;
- (c) the registration and caveat provisions of the 2010 Agreement bind successors in title to all the obligations under the agreement and thereby secures the transfer of the Conservation Offset Lands and the \$1.1 million monetary contribution.

138 I do not accept the submission. Indicators supporting a conclusion of invalidity of the Recommendation decision include the importance of s 93F(3)(g) as protection against the developer's breach, particularly if coupled with insolvency; its mandatory terms; and the fact that the contrary conclusion would strip s 93F(3)(g) of all efficacy. Further, in this case, it is not just that the planning agreement did not comply with s 93F(3)(g). In

addition, the Minister, on the limited material before him, must have assumed that it did. In my opinion, the Minister's Recommendation decision is invalid. The factual context does not affect that conclusion.

Relief

139 Finally, the respondents submit that any relief should be limited to a declaration of unlawfulness because of non-compliance with s 93F(3)(g) without a declaration of invalidity. That may be an appropriate form of relief in some cases, as was acknowledged in *Project Blue Sky* at [100] where a declaration of unlawfulness and an injunction were granted. However, in my opinion, it is inappropriate in the case of non-compliance with a provision such as s 93F(3)(g) in the circumstances of this case.

140 Accordingly, I uphold Ground 2.

GROUND 3: APPREHENSION OF BIAS

141 Ground 3 is that the Minister's decision to make the Recommendation was infected by apprehended bias in the form of prejudgment.

142 The NSW Government's formulation of and commitment to the LHRS (the Lower Hunter Regional Strategy) over time has been summarised above at [6], [7], and [13] – [18].

143 The applicant submits that:

- (a) the overall impression is that the Government was committed, and had been committed for some years, to enabling the Huntlee development to proceed;
- (b) as the Minister was not provided with the SSS Study but a short briefing note describing some of the issues at a high level, a fair minded lay observer might conclude that the

Minister might not have assessed the MD SEPP Amendment on its merits, as he was in no position to do so, and instead made the Recommendation without regard to the merits because it was consistent with the Government's high level policy objectives and with the earlier decision to make Amendment No 35.

144 I substantially adopt the respondent's submissions.

145 The test of apprehended bias is whether a fair-minded properly informed lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question the decision-maker is required to decide. Although the test is the same in both curial and non-curial decision-making, different considerations apply depending on the nature and role of the administrative decision-maker: *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, 205 CLR 337 at 345; *F & D Bonaccorso Pty Ltd v Canada Bay Council (No 2)* [2007] NSWLEC 537, 158 LGERA 250 per Biscoe J at [110] ff, [115]; *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28, 179 ALR 425 at [5]. Ministers are not judges and their conduct is to be evaluated "in the light of his or her political role, responsibility and accountability": *Minister for Immigration v Jia Legeng* [2001] HCA 17, 205 CLR 507 at [63].

146 The respondents submit that the principle of procedural fairness by prejudgment is inapplicable because, on its proper construction, s 38 of the EPA Act is not the source of the Minister's power to recommend. They submit that the Minister's power to recommend is a non-statutory executive power which is merely acknowledged in s 38; the source of the duty to afford procedural fairness is statutory; and therefore there is no duty of procedural fairness in this case.

147 The respondents' submission requires consideration of the debate as to whether the source of the duty to afford procedural fairness is the common

law or statute. In the leading case of *Kioa v West* (1985) 159 CLR 550 Mason J favoured the common law (at 584 – 585) while Brennan J favoured statute (at 620). However, that debate was resolved, at least in this State, in *Stewart v Ronalds* [2009] NSWCA 277, 76 NSWLR 99 at [70] where Allsop P (Hodgson JA and Handley AJA agreeing) proceeded “on the basis that the common law is the source of the duty to afford procedural fairness”. Although his Honour noted that that important question did not receive detailed treatment in argument in that case, the decision is binding upon this Court. Consequently, even if the the Minister’s power to recommend the making of a SEPP is not statutory, this is not a reason for excluding the rules of procedural fairness. However, as stated above at [102], in my opinion, the Minister’s power to recommend is statutory: it is implicit in s 38.

148 Next, the respondents submit that procedural fairness obligations do not attach to an exercise of power of this kind (i.e. recommending the making of a SEPP) because the power is legislative in character and results in a planning instrument of general application: *Kioa v West* (1985) 159 CLR 550 at 584-5, 620; *Vanmeld Pty Ltd v Fairfield City Council* [1999] NSWCA 6, 46 NSWLR 78 at 91 – 100; *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* (1997) 95 LGERA 33 at 51 – 53; *Transport Action Group against Motorways Inc v Roads and Traffic Authority* [1999] NSWCA 196, 46 NSWLR 598 at 622 – 625; *Minister for Local Government v South Sydney City Council* [2002] NSWCA 288, 55 NSWLR 381 at 439; *McGuinness v State of New South Wales* [2009] NSWSC 40, 73 NSWLR 104 at 119 – 128.

149 In *Kioa v West* Mason J said at 584:

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention. ... But the duty does not attach to every decision of an administrative character. Many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct

and immediate way. Thus a decision to impose a rate or a decision to impose a general charge for services rendered to ratepayers, each of which indirectly affects the rights, interests or expectations of citizens generally does not attract this duty to act fairly. This is because the act or decision which attracts the duty is an act or decision:

... which directly affects the person (or corporation) individually and not simply as a member of the public or a class of the public. An executive or administrative decision of the latter kind is truly a 'policy' or 'political' decision and is not subject to judicial review.

(*Salemi* [No.2], per Jacobs J.)

150 Mason J added at 585:

When the doctrine of natural justice or the duty to act fairly in its application to administrative decision-making is so understood, the need for a strong manifestation of contrary statutory intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case? It will be convenient to consider at the outset whether the statute displaces the duty when the statute contains a specific provision to that effect, for then it will be pointless to inquire what the duty requires in the circumstances of the case, unless there are circumstances not contemplated by the statutory provision that may give rise to a legitimate expectation. However, in general, it will be a matter of determining what the duty to act fairly requires in the way of procedural fairness in the circumstances of the case. A resolution of that question calls for an examination of the statutory provisions and the interests which I have already mentioned.

151 Brennan J said at 620:

The legislature is not likely to intend that a statutory power of a strictly legislative nature be conditioned on the observance of the principles of natural justice for the interests of all members of the public are affected in the same way by the exercise of such a power: cf *Bates v Lord Hailsham*. But the legislature is more likely to intend the exercise of a statutory power of an executive, administrative or quasi-judicial nature to be so conditioned if an exercise of the power singles out individuals by affecting their interests in a manner substantially different from the manner in which the interests of the public at large are affected....

152 In *Save the Showground* there was a change of government policy that resulted in the making of a state environmental planning policy (SEPP 47) which effected a rezoning of Sydney Showground to permit development for certain purposes. The validity of SEPP 47 was unsuccessfully

challenged on the ground that it was made in circumstances which involved a denial of procedural fairness said to be based upon a legitimate expectation that the applicants would be consulted before the policy was made. Gleeson CJ said at 35: "Our task is to determine, in the light of the argument presented by the appellant, whether the making of SEPP 47 was a valid exercise of a power which the Parliament has vested in the Governor, acting on the advice of the Minister." It was held that the Executive could not by promise fetter itself in the exercise of discretion to change policy. Beazley JA (Powell JA agreeing) also said at 66:

Assuming the absence of circumstances giving rise to a legitimate expectation, the almost untrammelled role for policy and political decisions without the constraint of judicial review finds expression in a number of authorities...

This approach applies equally to all policy areas, including planning matters such as are involved here...

...The power to initiate either the SEPP or the REP process lies with the Minister or the Director in accordance with the provisions of ss 37 and 40 respectively. There is nothing in the legislation which prevents the Minister or Director from abandoning either process, nor is there any procedure which must be followed if one or other process is abandoned. A decision to abandon is as much a matter of policy as is a decision to instigate the process, and is one which a government is free to make, unfettered by any previous representation or promise...

- 153 Mason J's example in *Kioa v West* of a decision to enforce a rate or general charge for services on ratepayers seems to me to be of a different character to a decision to recommend the making of a SEPP to effect a rezoning to permit development. The reality is that a particular developer is usually the proponent of the rezoning and directly affected by the decision. That is reflected in the routine joinder of the developer in proceedings such as these.
- 154 It is unnecessary to reach a concluded view about the applicability of principles of apprehended bias to the exercise of power by the Minister to recommend the making of a SEPP because, assuming that they are applicable, in my opinion the applicant's contention that there is a reasonable apprehension of predetermination of the relevant kind fails on the facts.

155 It is not enough to point to matters that suggest a predisposition by the Minister toward a particular outcome or a strategic policy towards delivering certain results. Apprehension of bias of the relevant kind only arises when the decision-maker's mind appears closed in the sense of not being open to persuasion. In *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17, 205 CLR 507 at [72] Gleeson CJ and Gummow J (Hayne J agreeing) said:

The state of mind described as bias in the form of prejudice is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusions.

156 In *McGovern v Ku-ring-gai Council* [2008] NSWCA 209, 72 NSWLR 504 Spigelman CJ said (omitting citations):

- 22 ...a "fair and unprejudiced" mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it.
- 23 The "open to persuasion" test is an appropriate formulation for bias by prejudice, to which the dual "might" test of apprehended bias must be applied; that is, that an independent observer might reasonably apprehend that the decision-maker might not be open to persuasion.

157 The general principles relating to apprehended bias must be understood in their application to the particular statutory context and the particular position of the Minister in his policy making role of recommending the making of SEPPs. In *McGovern* Spigelman CJ said:

- 6 ...The case law on judicial decision-making is not a starting point when determining the application of the apprehended bias test in a specific statutory context. The statute must be part of the assessment from the outset and not treated as some kind of qualification of a prima facie approach.
- 7 How the apprehended bias test is applied is ...affected by the statutory functions being performed and by the identity and nature of the decision maker who is obliged by statute to perform those functions. The content of what the test requires varies from one context to another by a process involving, and usually determined by, statutory interpretation.

158 In *Jia Legeng* Hayne J said at [187]:

It is critical... to understand that assessing how rules about bias, or apprehension of bias, are engaged depends upon identification of the task which is committed to the decision-maker. The application of the rules requires consideration of how the decision-maker may properly go about his or her task and what kind or degree of neutrality (if any) is to be expected of the decision-maker.

159 In the same case Gleeson CJ and Gummow J said at [62] - [63]:

In [*R v Anderson Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189] it was also said that there is "a significant difference between a discretion given to a minister and one given to a departmental head". The context in which that difference was being considered concerned the right to act on the basis of governmental policy/the implication being that, when a power is reposed in a Minister, the statute, in the absence of an indication to the contrary, would be taken to contemplate that the Minister would be entitled, within the limits of any other constraints that may be found in the statute, to act in accordance with such policy. There are other consequences that flow from the circumstance that a power is vested in, and exercised by, a Minister. Relevantly to the present case, they include the consideration that the conduct of a Minister may need to be evaluated in the light of his or her political role, responsibility and accountability.

160 The role of recommending the making of SEPPs involves a policy making function that is associated with high level political decisions of significance to the State. In exercising the function of making such recommendations the Minister operates in the arena of public debate, political controversy and democratic accountability. Elected officials have political ties and are expected to "support particular views as to what is in the best interest of the community": *R v West Coast Council; Ex parte Strahan Motor Inn* (1995) 87 LGERA 383 at 389 per Zeeman J. Ministerial decisions are not subject to the same requirements of manifest impartiality as are required by law of the decisions of courts, tribunals and bureaucratic decision-makers and tribunals

161 In *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 the New Zealand Court of Appeal considered the validity of an Order in Council made under s 3 of the *National Development Act*, which applied the Act to a proposed smelter project. That Act was comparable to Part 3A of the

EPA Act. It was argued in *CREEDNZ* by reference to public statements of Ministers which were recorded in press clippings, that members of the Executive Council had predetermined the advice they gave to the Governor-General in Council and the consent expressed to the making of the Order in Council under s 3 of the *National Development Act*: at 191 – 192. Cooke J stated at 179:

The references, in the amended statement of claim to a real probability or suspicion of predetermination or bias are beside the point in relation to a decision of this nature at this governmental level. Projects of the kind for which the *National Development Act* is intended, whether Government works or private works, are likely to be many months in evolution. They must attract considerable public interest. It would be naive to suppose that Parliament can have meant Ministers to refrain from forming and expressing, even strongly, views on the desirability of such projects until the stage of advising on an Order in Council.

In relation to decisions under s 3(3) I think that no test of impartiality or apparent absence of predetermination has to be satisfied. Any other approach would make the legislation practically unworkable. The only relevant question can be whether *at the time of advising* the making of the Order in Council the Ministers genuinely addressed themselves to the statutory criteria and were of the opinion that the criteria were satisfied. If they did hold that opinion at that time the fact that all or some of them any have formed and declared the same opinion previously does not make the order invalid. No doubt, if Ministers had approached the matter with minds already made up, the inference would readily be drawn that they could not genuinely have considered the statutory criteria when advising the making of the Order in Council. But the newspaper reports fall short of showing closed minds. And the terms of the Order in Council suggest that the minds of the Ministers were not closed.

162 Richardson J stated at 194:

What is fair in a given situation must depend on the circumstances. The application of the rules against bias must be tempered with realism. It would be unrealistic to expect Ministers to have completely open minds as to the criteria set out in s 3(3) of the *National Development Act* or as to the desirability in the public interest of a proposed work. An assumption that the Governor-General in Council may be predisposed to apply the provisions of the *National Development Act* to a project is not enough. It is not expected that Ministers will approach their consideration of the application under s 3(3) with perfect detachment. Before the decision can be set aside on the grounds of disqualifying bias it must be established on the balance of probabilities that in fact the minds of those concerned were not open to persuasion and so, if

they did address themselves to the particular criteria under the section, they simply went through the motions.

- 163 The Court held that the Ministers had genuinely addressed themselves to the statutory criteria, and the evidence before the Court did not show that the Ministers failed to consider the application with minds open to persuasion.
- 164 In *Franklin v Minister for Town and Country Planning* [1948] AC 87 the House of Lords held that a Minister was not subject to the bias rule when considering a report on his proposal to site a larger "new town" in a certain area, although the Minister was under a duty to give genuine consideration to the report. It was also held that the Minister had discharged this duty, despite his pre-report speech indicating that his proposal would prevail over all objections: at 105. In *Jia Legeng*, a majority of the High Court described *Franklin* as a "useful reminder" of how the requirements of bias are modified when applied to Ministers: Gleeson CJ and Gummow J at 539 (Hayne J agreeing).
- 165 The reasonable fair-minded lay observer postulated for the purposes of the apprehended bias test is one who is "properly informed": see *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51, 210 CLR 438 at 459 per McHugh J. In the context of the present case, the notion of being "properly informed" must include a proper appreciation of the role of strategic government policy and environmental planning.
- 166 These matters must be assessed in the context of a legislative scheme which expressly contemplates strategic planning and policy making. The objects of the EPA Act, as set out in s 5(a), relevantly include:
- to encourage:
- (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

- (ii) the promotion and coordination of the orderly and economic use and development of land,
- ...
- (iv) the provision of land for public purposes,
- ...
- (vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats

167 Section 7 provides that the Minister is charged with the responsibility of "promoting and co-ordinating environmental planning and assessment" to fulfil those objects. In discharging that responsibility, the functions of the Minister include:

7 Responsibility of Minister

- ...
- (c) to promote the co-ordination of the provision of public utility and community services and facilities within the State,
- (d) to promote planning of the distribution of population and economic activity within the State...

168 Section 117 contemplates that the Minister may direct councils as to the way in which certain functions, including the preparation of LEPs, are to be exercised. This may include a direction to include in a planning proposal provisions which will "achieve or give effect to such principles or such aims, objectives or policies, not inconsistent with [the EPA Act], as are specified in the direction": s 117 (2)(b).

169 Consistently with these statutory objectives and functions, the Minister was part of a Government which had endorsed high level strategic documents to guide population and economic growth, planning and conservation in the Lower Hunter Region. The LHRS was made in October 2006. The preface to the LHRS describes the strategy as:

an agreed NSW government position on the future of the Lower Hunter. It is the pre-eminent planning document for the Lower Hunter Region and has been prepared to complement and inform other relevant State planning instruments.

170 Part 13 of the LHRS describes the strategy for implementation:

The Lower Hunter Regional Strategy will be implemented primarily through local environmental plans, development control plans, through the State Infrastructure Strategy and through funds collected as developer contributions.

...
IMPLEMENTATION BY COUNCILS

The Lower Hunter Regional Strategy provides the framework and context for statutory planning controls and development assessment of individual projects and proposals. It will guide the preparation of a new local environmental plans prepared by local councils.

171 As anticipated in the LHRS, on 26 February 2007 the Minister issued a s 117 direction (Direction No 30) requiring councils to implement the LHRS.

172 As the terms of the LHRS make clear, the strategy did not purport to override the statutory procedures for the determination of particular development proposals and proposed instruments under the EPA Act. The LHRS was rather intended to provide a strategic policy framework for the coordinated administration of the EPA Act. This is confirmed by the terms on which the Minister publicly endorsed the LHRS in February 2010:

Minister for Planning, Tony Kelly, said the Government has been looking at the existing regional strategy following legal action in regard to approvals for the two sites.

"That action affected a small number of development sites where memorandums of understanding (MOUs) and deeds were in place", the Minister said.

"The existing regional strategy, independently of those MOUs and deeds, continues to provide a clear basis for all sites in the strategy to be considered on their merits and assessed according to law."

173 I do not think that a fair minded observer of the process could reasonably conclude that the stated policy of the Government, as embodied in the LHRS and the LHRCP, indicated that the Minister would not consider the merits of individual proposals, as and when required, pursuant to the EPA Act. At the core of the applicant's case is the notion that a government policy which identifies strategic planning opportunities in particular areas necessarily gives rise to an inference that those charged with exercising statutory functions will perform those functions according to fixed

preconceptions and without reference to the merits of particular proposals. If that were true, no planning policies could be promulgated without giving rise to an apprehension of such a kind.

- 174 The fact that the LHRS uses “unqualified statements” (the applicant’s description) as to the strategic planning opportunities identified in the document does not support any apprehension of predetermination in the relevant sense. In my view, having regard to the passages referred to above, the terms of the Minister’s media release and the policy context of the document, a fair minded reasonable observer would not think that the Minister might have already formed a conclusion, in respect of each and every possible planning outcome described in the strategy, which was incapable of alteration, whatever evidence or arguments may be presented.
- 175 The applicant relies on the fact that certain policies and other documents between 2009 and 2010 referred to the prospect that the planning agreement procedure under the EPA Act would be used as the preferred mechanism for facilitating the conservation land offsets envisaged in the LHRS and the LHRCP. No logical connection exists between the use of the statutory planning agreement procedure and the proposition that the Minister had a relevantly closed mind about the merits of the rezoning proposal. The use of that procedure was consistent with the Minister dealing with the proposal for the SEPP amendment in accordance with the relevant statutory procedures, including by securing development contributions through a planning agreement.
- 176 The applicant suggests that certain references in documents could give rise to a reasonable apprehension that the Government and the Minister were “committed to seeing through the Huntlee Development notwithstanding the decision in *Gwandalan* and the 2009 Orders”. The suggestion seems to be that it is inappropriate for the Minister to determine a fresh application for rezoning, in circumstances where a previous

application in respect of the same land had been determined favourably but then set aside by the Court. This is no more than a conventional operation of decision-making under the EPA Act following the invalidation of a decision by the Court. In my view, a reasonable observer properly informed about the circumstances (including the nature of judicial review) would not draw any adverse conclusion about the open-mindedness of the Minister from the fact that a separate instrument had been invalidated in the past. Neither *Gwandalan* nor the 2009 Orders can be understood as indicating to an informed observer that the Minister was precluded from considering any future applications in respect of the same land.

- 177 The applicant places particular reliance on a reference in the briefing note that was before the Minister at the time of the Recommendation, to the previous SEPP instrument and concept plan approval having been invalidated "due to matters of procedure". To the extent that it is suggested that the description is inaccurate or dismissive of the invalidation of the past decisions (or, by extension, the decision in *Gwandalan*), I do not accept the submission. It is a not inaccurate description of what had occurred. The previous instrument and decision had been set aside on the basis that the grounds of review and surrounding facts were relevantly equivalent to those in *Gwandalan*. The successful grounds in *Gwandalan* involved a reasonable apprehension of bias and taking into account an irrelevant consideration. Those grounds of review relate directly to the procedure adopted by the decision-maker in reaching the decision under review. The bias rule is an aspect of procedural fairness. As noted in Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th ed (2009), Sydney Lawbook Co, at [7.20] (citing *Kioa v West* at 622 and other authorities), the hearing rule and the bias rule "can be described as procedural, in a broad sense, in that they address the manner in which a decision is made and not the merits of the decision itself".

178 The applicant criticises the sufficiency of the material before the Minister regarding the merits of the rezoning proposal. In a related proposition, the applicant contends that the fact that the SSS Study was not before the Minister provides a basis for inferring that the Minister had predetermined the matter. The criticisms of the sufficiency of the material before the Minister do not provide a sound basis for drawing the extreme conclusion that the Minister made the Recommendation without regard to the merits of the proposal. It does not follow that because the Minister received a condensed assessment of the proposal when a more detailed study existed, the Minister must have predetermined the application.

179 In my view, there was nothing in evidence which might have caused a reasonable person to apprehend that the Minister might make the decision to recommend the making of the Huntlee MD Amending SEPP other than on the factual and legal merits. In particular:

- (a) there is nothing untoward in the briefing note signed by the Deputy Director-General and the Minister in November 2009, after consent orders were made on 19 October 2009 in *Gwandalan*, which confirmed:

The Department considers that the [LHRS] remains a sound strategy and its validity is not dependent on the existence of the Memorandum of Understanding or Deed of Agreement... Moving forward should the developments proceed as envisaged under these [LHRS], any land offsets would be facilitated through the preparation of VPAs in accordance with s 93F...

That is consistent with the objects in s 5(a)(ii) and (iv) of the EPA Act, namely, the promotion and co-ordination of the orderly and economic use and development of land and the provision of land for public purposes.

- (b) Likewise with the Director-General's confirmation to JBA by letter dated 22 December 2009 that the NSW Government

remained committed to the LHRS and LHRCP "and recently re-endorsed both";

- (c) Similarly with the Government's media release titled "Lower Hunter Regional Strategy" dated 18 February 2010, which confirmed that "the existing regional strategy independently of ...MOUs and deeds, continues to provide a clear basis that all sites in the strategy to be considered on their merits and assessed according to law" and that "conservation offsets [would] now be facilitated through the preparation of Voluntary Planning Agreements within the framework of the [EPA Act]";
- (d) These comments apply to both the Deputy Director-General's letter of 26 February 2010 to interested councils and others in relation to the effect of the decision in *Gwandalan*, as well as the briefing note of the same date. The effect of the Court's decision in *Gwandalan* was not such that the Minister could never again make a decision in respect of an application designed to overcome the deficiencies which led to the invalidity of a previous approval.

180 Accordingly I reject Ground 3.

ORDERS

181 The applicant has been successful on Grounds 1 and 2. I propose the following orders:

1. Declaration that the decision by the first respondent to recommend that the Governor amend State Environmental Planning Policy (Major Developments) 2005 through the State Environmental Planning Policy (Major Developments)

Amendment (Huntlee New Town Site) 2010, gazetted on 31 December 2010, is void.

2. Declaration that State Environmental Planning Policy (Major Developments) Amendment (Huntlee New Town Site) 2010, gazetted on 31 December 2010, is void.
3. Order that the respondents pay the applicant's costs of the proceedings.
4. The exhibits may be returned.

182 If the parties propose alternative orders to give effect to my judgment, I will hear them tomorrow morning at 10am. Otherwise the orders will be as I have proposed.

I CERTIFY THAT THIS AND
THE 79 PRECEDING PAGES ARE
A TRUE COPY OF THE REASONS FOR
THE JUDGMENT OF THE HONOURABLE
JUSTICE P.M. BISCOE.


.....
Associate

Date.....7 July 2011