# EDO CASE

## Drake-Brockman v the Minister for Planning & Anor

## (the CUB case)

# Drake-Brockman v the Minister for Planning & Anor [2007] NSWLEC 490


**Summary**

*This case comprised a challenge to a proposal for 1600 apartments and 4000 workers on the Carlton United Brewery site. Amongst other grounds, the applicant, Mr Drake-Brockman alleged that the Minister for Planning failed to properly consider the principles of Ecological Sustainable Development when approving the site (and rather adopted a business as usual approach). The Land and Environment Court dismissed the appeal on all grounds. The EDO has filed a holding appeal.*


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The applicant, Matthew Drake-Brockman, challenged the validity of concept plan approval granted by the Minister for Planning for the redevelopment of the Carlton United Brewery site for residential apartments, commercial offices and retail premises.

The case is important because it is one of the few cases that has considered the application of Part 3A of the *Environmental Planning and Assessment Act 1979*. Part 3A has given the Minister for Planning significant discretion when deciding to approve major projects of State significance, and in the formulation of the assessment requirements for such projects.

Mr Drake-Brockman argued that the application of ecologically sustainable development required a detailed consideration of the climate change impacts of the development. Those arguments and a number of procedural arguments that related to the application of Part 3A of the *Environmental Planning and Assessment Act 1979* were unsuccessful. Set out below in detail are Her Honour Justice Jagot's findings on each of the grounds of appeal.

**Ground 1**

> **The applicant had not lodged a valid concept plan application at the time the Director-General's Environmental Assessment Requirements ("EARs") were issued, therefore the EARs were not validly issued; and**
>
> **the Director-General ("D-G") did not properly consult with relevant government agencies in relation to the EARs, as required under s 75F(4) of the *Environmental Planning and Assessment Act 1979* ("the Act").**

On 5 July 2006 the Proponent had written to the Minister requesting the Minister's authorisation to submit a concept plan application and the preparation of EARs. The letter contained a brief description of the proposal. On 8 August 2006 the Department convened a 'stakeholder reference panel' attended by local residents and some government agencies, however key government agencies such as the Department of Conservation and Climate Change were not invited. The stakeholder panel reported to an Expert Panel which the Minister formally convened at the end of August. The Minister authorised submission of a

concept plan on 28 August 2006 and on 4 October 2006, without any further application being submitted by the applicant, the Director-General's Requirements ("DGRs") were issued. A completed application form was submitted as an annexure to the Environmental Assessment Report on or about 20 October.

Her Honour found that the Act did not require the applicant to submit any formal application form in order to initiate the concept plan approval process, indeed the form lodged with the Environmental Assessment Report was held to be a legal irrelevance. Under Part 3A of the Act, a development becomes a "project" not when an application is lodged, but when the Minister declares a particular development to be a project either under a State Environmental Planning Policy, or by order in the Government Gazette.

Her Honour found that the words "when an application is made" could be interpreted broadly. In particular, they could apply to applications still to be made to allow for the D-G to prepare assessment requirements prior to an application being formally lodged. Her Honour reasoned that this must be so because the Minister relied on information contained in the concept plan to determine whether or not to authorise the submission of a concept plan or make a declaration that the proposal was a major project, whether it was called an "application" or not.

It was held that consultation which had occurred via the stakeholder reference panel constituted effective consultation for the purposes of s 75F(4). In this regard, her Honour held that it was artificial to distinguish between consultation relating to the project proper and consultation relating to preparation of the DGRs, because "(c)onsultation relating to issues that actually concern public authorities about the project is necessarily also consultation about the environmental assessment requirements".

**Ground 2**

> **That the Director-General failed to include in his Environmental Assessment Report a statement relating to compliance with the EARs.**

Section 75I(2)(g) requires the D-G to include in his Environmental Assessment Report a statement relating to compliance with the EARs under Part 3A, and s 75O provides that the Minister is to consider this statement when deciding whether or not to approve a concept plan.

The Environmental Assessment Report did not, in terms, contain such a statement. It appeared that this requirement had been overlooked, since it had only come into force about one month before the Environmental Assessment Report was completed.

The applicant argued that the specific reference to the statement in s 75O meant that consideration of this statement was a prerequisite to the Minister making a valid determination of a concept plan application.

It was submitted that when Part 3A was first enacted, the Minister's power to approve a concept plan had been contingent upon the environmental assessment requirements being

complied with in fact. The effect of the January 2007 amendments was to replace this jurisdictional prerequisite with a less onerous one, which was that the Minister merely had to consider a statement relating to compliance with the environmental assessment requirements. It was argued that in order for the statement to fulfill this important purpose in relation to the Minister's decision, it had to be a clear, unambiguous statement occurring in one section of the report.

The respondents argued that the whole Environmental Assessment Report addressed this requirement in substance, although it did not contain a single sentence in the terms of s 75I(2)(g). In the alternative they submitted that if all that was required was a single-sentence statement regarding compliance or non-compliance, this was a mere formality and would not affect the validity of the approval.

Justice Jagot observed that the statement referred to in s 75I(2)(g) did not necessarily have to be prepared by the D-G, and therefore did not necessarily represent the D-G's opinion. The D-G could, for example, ask the proponent to prepare such a statement for inclusion in the Environmental Assessment Report, and this would satisfy s 75I(2)(g). Therefore, her Honour concluded that it could not be an essential part of the statutory scheme, as submitted by the applicants, that the D-G should form an opinion about compliance with EARs, and communicate this opinion to the Minister.

Her Honour held firstly that the use of the words "relating to" militated against an "inflexible" approach to s 75I(2)(g) whereby the statement was to be regarded as certifying that there was compliance or not with the EARs. Secondly, her Honour observed that the question of whether the assessment complied with the EARs would ordinarily involve a complex evaluative exercise, therefore a "certification as the applicant submitted was necessary would be ill adapted to constitute a statement relating to compliance about that requirement". Thirdly, her Honour held that where the word "statement" was used elsewhere in the Act (for example a species impact statement), "the required statement is an evaluative and analytical document (or documents) rather than a single certification". Finally, her Honour held that given the important obligation on the Minister to consider "it is difficult to discern any possible purpose that the additional single sentence might serve".

Assuming, therefore, that the required "statement" could be the whole of the Environmental Assessment Report, and did not need to be a single discrete sentence, her Honour went on to evaluate the extent to which the Environmental Assessment Report as a whole satisfied the requirement of s 75I(2)(g). Her Honour relied on the fact that the Environmental Assessment Report contained a summary of the key issues raised in the D-G's EARs, a copy and discussion of the proponent's Environmental Assessment, (the "primary purpose" of which was to address those requirements), and a statement at the end of the report that "(u)nless noted to the contrary, the Department is satisfied the responses provided by the Proponent in their Environmental Assessment and the additional responses to issues raised in submissions are reasonable".

Her Honour held that this concluding statement, together with statements elsewhere in the report concluding that some of the proponent's responses were *unsatisfactory*, all constituted statements relating to compliance with the EARs under Part 3A, and therefore that s 75I(2)(g) had been complied with.

In the alternative, her Honour held that a statement made in section 5.2 that the D-G considered the proponent's Environmental Assessment adequate for the purposes of exhibition under s 75H(2) and (3) was also a statement within the meaning within the meaning of s 75I(2)(g).

**Ground 3**

**Failure to consider the principles of ecologically sustainable development**

Mr Drake-Brockman submitted that the Minister failed to consider ecologically sustainable development (ESD). The DGRs required the proponent to address the issue of ESD. The Environmental Assessment prepared by the proponent contained a short report dealing with minimum energy, water and health targets for the project, referring to BASIX and 5-star green office requirements. The statement of commitments included compliance with SEPP (Building Sustainable Index: BASIX) 2004, ESD and water sensitive urban design.

Mr Drake-Brockman submitted that *Gray v Minister for Planning* (2006) 152 LGERA 258 held that the principles of ESD were mandatory considerations. The project would lead to an increase in greenhouse gas emissions of 0.45% of total emissions. He further argued the Minister did not have sufficient information to discharge his obligations with regard to ESD and didn't apply the precautionary principle. Mr Drake-Brockman also submitted that the Minister did not consider all alternative options to the proposed concept plan with fewer climate change impacts.

Her Honour found the cases on the precautionary principle were related to merits review in class 1 proceedings, in contrast to these judicial review proceedings. She found no factual basis to suggest the Minister failed to give any consideration to ESD and greenhouse gas emissions. Her Honour found that *Gray* turned on the terms of the DGRs and was distinguishable from this case. She stated that *Gray* does not stand for the proposition that greenhouse gas assessment is required in each case. ESD does not subordinate other considerations, and is only one of the objects of the Act.

Her Honour concluded that the scheme of Part 3A was inconsistent with Mr Drake-Brockman's submissions because the Director-General can determine the content of the Environmental Assessment Report and the weight given to matters contained in it is a matter for the decision-maker. Her Honour rejected the argument that the report gave lip service to the concept of ESD. She found that there were in fact indications that the Minister had considered it by rejecting the public car park on the site, and making it necessary for the proponent to comply with BASIX and green star office.