

26 NOV 2010

## POINTS OF CLAIM

### COURT DETAILS

Court The Land and Environment Court of New South Wales  
Registry 225 Macquarie Street, Sydney  
Case number 10/40965

### TITLE OF PROCEEDINGS

Applicant **Australians for Sustainable Development Inc**  
First Respondent **Minister for Planning**  
Second Respondent **Lend Lease (Millers Point) Pty Ltd**  
**ACN 127 727 502**  
Third Respondent **Barangaroo Delivery Authority**

### FILING DETAILS

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### THE APPLICANT CLAIMS THAT:

#### The Parties

- 1 The Applicant is an incorporated association formed to ensure independent transparent development processes, superior architecture and town planning, ecological sustainable outcomes for all major NSW developments including Barangaroo.
- 2 The First Respondent is the NSW Minister for Planning.
- 3 The Second Respondent is Lend Lease (Millers Point) Pty Ltd which is incorporated under the *Corporations Act 2001* (Cth).
- 4 The Third Respondent is the Barangaroo Delivery Authority which is constituted under the *Barangaroo Delivery Authority Act 2009* (NSW).

### Background – The Barangaroo Site

- 5 On 23 May 2005 the State Government of New South Wales commenced an urban design competition for the development of a 22 hectare site on the north western edge of the Sydney central business district.
- 6 The site was originally referred to as “East Darling Harbour”.
- 7 The site is now referred to as “Barangaroo”.
- 8 Barangaroo is bounded by Sydney Harbour foreshore to the west and north, Hickson Road and Millers Point to the east and Kings Street Wharf, Cockle Bay, and Darling Harbour to the south.
- 9 The site consists of Lots 1 to 6 DP 876514, Lot 7 DP 43776, Lot 100 DP 838323, and Lots 6 and 7 DP 869022.

### Background to the development

- 10 The urban design competition (“**the competition**”) comprised two stages.
- 11 Stage 1 of the competition consisted of an open invitation to urban designers, planners, architects and landscape architects to submit conceptual designs as per the competition brief.
- 12 Stage 2 of the competition invited finalists chosen from stage 1 to further develop their entries and respond to a more detailed competition brief.
- 13 In March 2006 Hill Thalys Architecture + Urban Projects, Paul Berkemeier Architects, Jane Irwin Landscape Architecture were nominated as the winning entrant of the competition.

### The Project Approvals

- 14 By letter dated 24 February 2006 the Sydney Harbour Foreshore Authority (“**the Authority**”) requested that the Minister for Planning authorise the Authority to submit a Concept Plan application for the proposed redevelopment of Barangaroo.
- 15 On 22 March 2006 the Minister for Planning (“**Minister**”) formally recorded his opinion under cl 6 of the *State Environmental Planning Policy (Major Projects) 2005* (“**Major Projects SEPP**”) that the development is of a kind described in Schedule 2, cl 10(1)(d) of the Major Projects SEPP and is therefore a project to which Part 3A

of the *Environmental Planning and Assessment Act 1979* (NSW) ("**EP&A Act**") applies.

- 16 On 30 June 2006 the Director General's Environmental Assessment Requirements ("**DGRs**") for the Concept Plan application were issued under s 75F of the EP&A Act.
- 17 On 9 February 2007 the Minister determined to approve the Concept Plan ("**the Concept Plan approval**").
- 18 On 28 May 2007, the Environment Protection Authority ("**EPA**") declared parts of Lot 5 and Lot 3 in deposited Plan 876514, Hicksons Rd, Millers Point known as Wharves 5 and 7, Lot 12 in DP 1065410- 36 Hickson Rd, Millers Point and the part of Hickson Rd adjacent to the above area on the Barangaroo site as an investigation area under the *Contaminated Land Management Act 1997* (NSW) ("**the investigation order**").
- 19 The investigation order stated that the EPA believed that the site was contaminated with polycyclic aromatic hydrocarbons (PAHs), benzene, toluene, ethylene and xylene (BTEX), copper, cyanide, lead and phenol.
- 20 The investigation order also determined there were reasonable grounds to believe that the site was contaminated in such a way as to present a significant risk to human health and environment as follows:
1. Groundwater in the area has been found to be contaminated by PAHs, BTEX, copper, cyanide, lead and phenol at concentrations significantly exceeding the relevant trigger values for the protection of aquatic ecosystems in the *Australian and New Zealand Guidelines for Fresh and Marine Water Quality* (ANZECC and ARMCANZ 2000).
  2. The groundwater contaminants include human carcinogens and substances toxic to aquatic ecosystems.
  3. Contaminated groundwater is likely to be migrating from the site to Darling Harbour and could ultimately affect aquatic ecosystems.
  4. Contaminated groundwater is migrating from the site into the basement of a residential building adjacent to the site and potentially could expose humans in that building to vapours, however it is currently being effectively controlled.

5. Contaminated groundwater from the site may enter service trenches potentially exposing maintenance workers to vapours.
21. By letter dated 9 August 2007 an application was made on behalf of Sydney Harbour Foreshore Authority to modify the Concept Plan approval ("**the first modification**").
22. The first modification sought the correction of minor typographical errors and amendment of Condition C2.
23. On 25 September 2007 the Minister determined to approve the first modification to the Concept Plan approval.
24. On 12 October 2007 notice was given in the Government Gazette of the State of New South Wales No 146 for the making of *State Environmental Planning Policy (Major Projects) 2005 (Amendment No 18)* ("**Major Projects SEPP**") under the EP&A Act.
25. The Major Projects SEPP identified Barangaroo as a State significant site to which Part 3A of the EP&A Act applies.
26. By letter dated 26 May 2008 the Department of Planning informed MG Planning Pty Ltd that the DGRs issued on 30 June 2006 for the Concept Plan application did not require amendment for the proposed second modification application.
27. By written application dated 16 June 2008 the Authority sought a modification to the Concept Plan approval ("**the second modification**").
28. The second modification sought to increase the maximum Gross Floor Area by up to 120,000 sqm to accommodate additional commercial floorspace.
29. On or about 19 June 2008 an environmental assessment ("**EA**") for the second modification was submitted to the Department of Planning by MG Planning Pty Ltd on behalf of Sydney Harbour Foreshore Authority.
30. From 16 July 2008 to 15 August 2008 the EA for the second modification was publicly exhibited.
31. By letter dated 4 September 2008 the Department of Planning informed MG Planning Pty Ltd that the DGRs issued on 30 June 2006 for the Concept Plan application did not require amendment for the proposed third modification application.

32 By written application dated 30 September 2008 the Authority sought a modification to the Concept Plan approval ("**the third modification**").

33 The third modification sought to reconfigure the Headland Park and Northern Cove. It included a proposed removal of the Sydney Ports Harbour Control Tower.

34 On or about 14 January 2009 an EA for the third modification was submitted to the Department of Planning by MG Planning Pty Ltd on behalf of Sydney Harbour Foreshore Authority.

35 From 4 February 2009 to 6 March 2009 the EA for the third modification was publicly exhibited.

36 On 16 February 2009 the Minister determined to approve the second modification to the Concept Plan approval subject to conditions.

37 The Barangaroo Delivery Authority was constituted on the enactment of the *Barangaroo Delivery Authority Act 2009* ("**BDA Act**"), being 30 March 2009.

38 Under the BDA Act the Barangaroo Delivery Authority ("**BDA**") has responsibility for the development of the Barangaroo site.

39 On 6 May 2009, the EPA made a declaration of a remediation site for parts of the Barangaroo site at Lot 5 and Lot 3 in deposited Plan 876514, Hicksons Rd, Millers Point known as Wharves 5 and 7, and the part of Hickson Rd adjacent to 30-34 Hickson Rd, being Lot 11 DP1065410, 36 Hickson Rd being Lot 5 DP873158 and Lot 12 in DP 1065410, 38 Hickson Road being SP72797 Millers Point ("**remediation site declaration**").

40 The remediation site declaration was based on the contamination of the above areas with gasworks waste and waste tar including the following contaminants: PAHs, benzene, toluene, ethylene and xylene (BTEX), copper, cyanide, ammonia and phenol.

41 The remediation site declaration determined there were reasonable grounds to believe that the site is contaminated in such a way as to present a significant risk to human health and environment as follows:

1. Groundwater in the area has been found to be contaminated by PAHs, BTEX, TPHs, ammonia, cyanide and phenol at concentrations significantly exceeding the relevant trigger values for the protection of aquatic ecosystems in the

*Australian and New Zealand Guidelines for Fresh and Marine Water Quality*  
(ANZECC and ARMCANZ 2000).

2. The groundwater contaminants include human carcinogens and substances toxic to aquatic ecosystems.
3. Contaminated groundwater is likely to be migrating from the site to Darling Harbour and could ultimately affect aquatic ecosystems.
4. Contaminated groundwater is migrating from the site into the basement of a residential building adjacent to the site and potentially could expose humans in that building to vapours, however it is currently being effectively controlled.

- 42 On 24 August 2009, the EPA gave a notice to end the significantly contaminated land declaration and management order in relation to part of the Barangaroo site and the previous order as it applied to land at part of Lot 5 and Lot 3 in deposited Plan 876514, Hicksons Rd, Millers Point known as Wharves 5 and 7, Lot 12 in DP1065410, 36 Hickson Rd, Millers Point and the part of Hickson Rd, adjacent to the above, however the remediation site declaration order continues in force in the remaining areas.
- 43 On 11 November 2009 the Minister determined to approve the third modification to the Concept Plan approval.

**The Deed of Agreement**

- 44 In April 2008 the Authority called for commercial expressions of interest in delivering Stage 1 of the Barangaroo Project, also known as Barangaroo South.
- 45 In September 2008 a short-list of Stage 1 proponents was announced.
- 46 In August 2009 two short-listed proponents, being Lend Lease and Brookfield Multiplex, were chosen to compete in a final phase selection process.
- 47 In November 2009 final phase bids were lodged.
- 48 On 20 December 2009 the Premier of the State of New South Wales announced that Lend Lease was selected to develop Stage 1 of Barangaroo.
- 49 On 23 February 2010 the Premier of the State of New South Wales and the Minister signed an authorisation for the execution of a contract between the BDA and Lend Lease.

- 50 On 5 March 2010 a deed ("**the Project Development Agreement**") was entered into between the BDA, Lend Lease (Millers Point) Pty Ltd, and Lend Lease Corporation Ltd.
- 51 On 8 June 2010 a deed ("**the First Amending Deed**") was entered into between BDA, Lend Lease (Millers Point) Pty Ltd, and Lend Lease Corporation Ltd to amend the Project Development Agreement.
- 52 On 30 July 2010 a deed ("**the Second Amending Deed**") was entered into between the BDA, Lend Lease (Millers Point) Pty Ltd, and Lend Lease Corporation Ltd to amend the Project Development Agreement.

**Other related projects yet to be determined**

- 53 By written application dated 18 February 2010 Lend Lease (Millers Point) Pty Ltd sought approval for the remediation of the EPA declared remediation site and land forming works project ("**remediation project**").
- 54 By letter dated 19 February 2010 an application was made on behalf of Lend Lease Development Pty Ltd to modify the Concept Plan approval ("**the fourth modification**").
- 55 On 23 March 2010 the DGRs for the remediation project were issued under s 75F of the EP&A Act.
- 56 By letter dated 11 June 2010 the fourth modification application was amended by Lend Lease (Millers Point) Pty Ltd, the amended application being referred to as the "Current Revised Scheme".
- 57 The Current Revised Scheme sought to increase the total Gross Floor Area within Blocks 1 to 4, increase the height of a number of proposed towers within those blocks, and establish a new 85 metre long pier and hotel building extending into the harbour, among other proposals.
- 58 On 2 July 2010 the DGRs for the fourth modification were issued under s 75F of the EP&A Act.
- 59 On or about 6 August 2010 an EA for the fourth modification was submitted to the Department of Planning by JBA Urban Planning Consultants Pty Ltd on behalf of Lend Lease (Millers Point) Pty Ltd.

60 From 11 August 2010 to 10 September 2010 the EA for the fourth modification was publicly exhibited.

**Approvals subject of this proceeding: basement car parking project & early works project**

61 By written application dated 18 February 2010 Lend Lease (Millers Point) Pty Ltd sought project approval for bulk excavation, remediation and construction of basement car parking for blocks 1 to 3 ("**basement car parking project**").

62 Lend Lease (Millers Point) Pty Ltd is the proponent for the basement car parking project.

63 By written application dated 31 March 2010 the BDA sought project approval for works to create the proposed Barangaroo Headland Park and Northern Cove, comprising "early works" and Headland Park Main Works ("**early works project**").

64 The BDA is the proponent for the early works project.

65 On 3 May 2010 the DGRs for the basement car parking project were issued under s 75F EP&A Act.

66 On 6 May 2010 the DGRs for the early works project were issued under s 75F EP&A Act.

67 On or about 23 June 2010 an EA for the early works project was submitted to the Department of Planning by MG Planning Pty Ltd on behalf of the BDA.

68 On or about 30 June 2010 an EA for the basement car parking project was submitted to the Department of Planning by JBA Urban Planning Consultants Pty Ltd on behalf of Lend Lease (Millers Point) Pty Ltd.

69 From 7 July 2010 to 5 August 2010 the EA for the basement car parking project was publicly exhibited.

70 From 14 July 2010 to 12 August 2010 the EA for the early works project was publicly exhibited.

71 In July and August, members of the Applicant and other organisations made submissions in response to the EA for the basement car parking project and the early works project

## Particulars

Barangaroo Action Group Incorporated submission to the Department of Planning on the basement car parking project, dated 19 July 2010.

Kent Street Residents Group submission to the Department of Planning on the basement car parking project, dated 1 August 2010.

City of Sydney Council submission to the Department of Planning on both the basement car parking project and the early works project, dated 18 August 2010.

- 72 On or about 20 September 2010 JBA Urban Planning Consultants Pty Ltd on behalf of Lend Lease (Millers Point) Pty Ltd responded to the issues raised in public submissions on the basement car parking project in a Preferred Project Report that was submitted to the Department of Planning.
- 73 On or about 24 September 2010 MG Planning Pty Ltd on behalf of the BDA responded to the issues raised in public submissions on the early works project in a Preferred Project Report that was submitted to the Department of Planning.
- 74 In or about October 2010, the Director-General of Planning provided the Minister with the Director-General's Environmental Assessment Report (**D-G's report**) in relation to the basement car parking project.
- 75 In or about November 2010, the Director-General of Planning provided the Minister with the DG's report in relation to the early works approval.
- 76 On 2 November 2010 the Minister determined to approve the basement car parking project subject to conditions.
- 77 On 8 November 2010 the Minister determined to approve the early works project subject to conditions.

### **Ground 1 – Impermissible development as part of the early works project**

- 78 Under Part 12, Schedule 3 of the Major Projects SEPP, land within the Barangaroo site is classified into two zones: Zone B4 Mixed Use and Zone RE1 Public Recreation.
- 79 By cl 8(2) of the Major Projects SEPP, development for any purpose may be carried out with consent on land within Zone B4 Mixed Use unless prohibited by cl 8(3).

- 80 Development for the purpose of remediation of land is not prohibited by cl 8(3) and is thus permissible development within Zone B4 Mixed Use.
- 81 Development for the purpose of an extractive industry is prohibited by cl 5(3) and is not permissible development within Zone B4 Mixed use.
- 82 By cl 9(2) only development for the purposes listed therein may be carried out with consent on land within Zone RE1 Public Recreation.
- 83 Except as otherwise provided in the Major Projects SEPP, development is prohibited on land within Zone RE1 Public Recreation unless it is permitted by cl 9(2).
- 84 Development for the purpose of the remediation of land and extractive industries or activities is not permitted by cl 9(2) of the Major Projects SEPP.
- 85 No other provision relevant to permitted uses permits development for the purpose of the remediation of land and extractive industries or activities within Zone RE1 Public Recreation.

**Particulars**

Clause 10 Major Projects SEPP

- 86 The early works project requires remediation work on land within Zone RE1 Public Recreation.

**Particulars**

Major Project Assessment: Early Works for Barangaroo Headland Park & Northern Cove: MP 10\_0047 (pg 22-25).

- 87 This remediation work is prohibited in Zone RE1 Public Recreation.
- 88 The remediation work is not ancillary to any permissible purposes.
- 89 The early works project includes the extraction of 60,000m<sup>3</sup> of sandstone to be carried out on Zone RE1 Public Recreation.

**Particulars**

D-G's report for early works project, p 25.

EA for early works project, p 50.

- 90 The extent of the extraction is such that it constitutes an extractive activity or industry.

**Particulars**

Annexure D, D-G's report for early works project.

- 91 The extent of the extractive activity or industry is such that it constitutes a separate, standalone development as part of the early works project and is not permissible.
- 92 The early works Project Approval purports to grant development consent for development that is not permitted.
- 93 In the premises, the early works Project Approval is invalid.

**Ground 2 – Requirement to comply with SEPP 55 before carrying out the early works project**

- 94 The early works project requires remediation work to be carried out as part of the project.

**Particulars**

D-G's report for early works project (pg 22-25).

- 95 Section 75R of the EP&A Act provides that State environmental planning policies apply to the carrying out of a project.
- 96 *State Environmental Planning Policy No. 55-Remediation of Land (SEPP 55)* applies to the carrying out of the early works project.

**Particulars**

Section 75R(2) EP&A Act.

Clause 3 Major Project SEPP.

The terms of SEPP 55 indicate that it applies.

- 97 Clause 8 of SEPP 55 prohibits the carrying out of category 1 remediation work except with the consent of the relevant consent authority.

- 98 The definition at cl 9 of SEPP 55 of category 1 remediation work includes remediation work that is development for which another State environmental planning policy or regional environmental plan requires development consent.
- 99 By cl.s 8(2) and 9(2), Part 12, Schedule 3 of the Major Projects SEPP all development on the Barangaroo site that is not prohibited may be carried out with consent.
- 100 At least in respect to cl 8(2), remediation work is development, as it is not prohibited and may be carried out by consent.
- 101 In this respect, remediation work on the site requires development consent.
- 102 The remediation work to be carried out as part of the early works project is category 1 remediation work for the purposes of SEPP 55.

#### **Particulars**

D-G's report for early works project (pg 22-25).

- 103 Clause 17 of SEPP 55 states that all remediation work must be carried out in accordance with:
- (a) the contaminated land planning guidelines; and
  - (b) the guidelines if any in force under the *Contaminated Land Management Act 1997*; and
  - (c) in the case of category 1 remediation work - a plan of remediation, as approved by the consent authority, prepared in accordance with the contaminated land planning guidelines.

- 104 The Remediation Action Plan for the early works project is still to be finalised and, as such, was not before the Minister and was not part of the EA.

#### **Particulars**

D-G's report for early works project (pg 22-25).

The D-G's report in relation to the early works project states that Remedial Action Plan and Human Health and Ecological Risk Assessment are yet to be finalised and audited (pg. 23).

The EA submitted by the BDA indicates these are yet to be drafted and finalised.

- 105 Any application for approval of the finalised Remediation Action Plan is an application for a project approval under Part 3A and will require full Part 3A assessment, including public exhibition.
- 106 The Third Respondent proposes to proceed with the early works project without obtaining a further project approval or development consent with respect to the remediation involved in early works project.
- 107 Remediation works are integral to, and cannot be divorced from, the carrying out of the early works project.
- 108 In the premises, the Third Respondent proposes to carry out the early works project:
- (a) without a plan of remediation as approved by the consent authority, prepared in accordance with the contaminated land planning guidelines; and
  - (b) in contravention of cl 17(1)(c) of SEPP 55 and s 75R(2) of the EP&A Act.

**Ground 3 – Failure to comply with SEPP 55 in relation to both projects**

- 109 Clause 3 of Part 12, Schedule 3 of the Major Projects SEPP states that “the only environmental planning instruments that apply, according to their terms, to or in respect of development on land within the Barangaroo site are this Policy and all other State environmental planning policies except *State Environmental Planning Policy No 1-Development Standards*.”
- 110 In deciding whether to grant project approvals with respect to the Barangaroo site, the Minister was required to consider whether any project proposed with respect to the site complies with SEPP 55.
- 111 Further and in the alternative:
- (a) clause 3 of the Major Projects SEPP evinces an intention by the Minister that he would consider and apply SEPP 55 according to its terms in respect of development on land within the Barangaroo site; and
  - (b) that intention was published and relied upon by the public when making submissions regarding the basement car parking project and the early works project.

112 Clause 17 of SEPP 55 provides, inter alia, that all remediation work must be carried out in accordance with the contaminated land planning guidelines.

113 The current contaminated land planning guidelines, entitled "Managing Land Contamination- Planning Guidelines SEPP 55- Remediation of Land" 1998 ("the **Guidelines**"), states at clause 4.6.

In carrying out planning functions under the EP & A Act in relation to land that is or may be contaminated, planning authorities should take account of the principles summarised below.

- No planning decision should be made unless sufficient information is available to make the decision.

.....

- Changes of use on contaminated land may proceed provided
  - the land is suitable for the intended use; or
  - provisions are included in the planning instrument to require appropriate investigation or restrictions on any subsequent development applications, or
  - conditions are attached to the development consent to ensure that the subject land can and will be remediated to a level appropriate to its intended use prior to, or during, the development stage.

114 A plan of remediation serves the purpose of providing sufficient information to enable the Minister to assess the contamination issues.

#### **Particulars**

See the Guidelines at Chapter 3.

115 In relation to the early works project, as the Remediation Action Plan for that part of the project is still to be finalised and was not before the Minister nor part of the EA, there was not sufficient information for the Minister to make the decision to approve the project.

**Particulars**

D-G's report for early works project (pg 22-25).

The D-G's report in relation to the early works project states that Remedial Action Plan and Human Health and Ecological Risk Assessment are yet to be finalised and audited (pg. 23).

The EA submitted by the BDA indicates these are yet to be drafted and finalised.

- 116 Further, neither the EA for the early work project nor the basement car parking project show that the site is currently suitable for its intended uses, as extensive clean up will need to be undertaken on both of these sites and in adjacent areas for them to be used for residential, commercial and public purposes.

**Particulars**

See "Overarching Remediation Action Plan for The Barangaroo Project Site, Sydney" prepared by Environmental Resources Management Australia at appendix J to the EA for the basement car parking project.

- 117 There are no conditions attached to either of the project approvals about contamination, nor any restriction on use of the site prior to its remediation.

**Particulars**

The Statement of Commitments for both approvals indicates they will carry out the projects in accordance with the Remediation Action Plan but these commitments do not form part of the conditions of consent.

- 118 In the premises:

- (a) the Project Approvals were granted contrary to cl 7(1) of SEPP 55;
- (b) the work is proposed to be carried out contrary to the Guidelines and cl 17(1) of SEPP 55; and
- (c) the Minister could not have been satisfied that the projects will be carried out in accordance with SEPP 55.

- 119 Further and in the alternative:

- (a) the Minister departed from the intention in cl 3 Major Projects SEPP that he would consider and apply SEPP 55 in relation to the basement car park project and the early works project;
- (b) the Minister did so without having published a statement that SEPP 55 would not be considered or applied in relation to the basement car parking project and the early works project.

120 In this respect, the public were denied an opportunity to make full and informed submissions on the contamination issue and whether the Minister intended SEPP 55 to apply to his consideration in relation to the basement car parking project and the early works project.

121 In the premises:

- (a) the Project Approvals are invalid; and
- (b) both proponents propose to carry out works in contravention of SEPP 55 and s 75R(2) of the EP&A Act.

**Ground 4 – Erroneous or misleading information in DG’s report for the basement car parking project**

122 The D-G’s report for the basement car parking project states that “conditions of approval are recommended to ensure that the provisions of this [Remediation Action Plan] are implemented” (“**the Conditions Statement**”).

**Particulars**

D-G’s report for basement car parking project at Appendix D.

123 There are no conditions of approval relating to the implementation of the Remediation Action Plan in the basement car parking Project Approval.

124 The implementation of the Remediation Action Plan is only provided for in the Statement of Commitments, which:

- (a) is not and does not form part of the conditions of approval; and
- (b) is not enforceable.

**Particulars**

See terms of approval at Schedule 2 and Schedule 3 of the project approval for basement car parking project.

- 125 In the premises: the Conditions Statement was erroneous and misleading.
- 126 Remediation of contamination was a material matter requiring the Minister's consideration and was a material matter relevant to his approval.

### **Particulars**

Section 5 and s.75F EP&A Act.

SEPP 55.

DGRs for basement car parking project.

D-G's report for basement car parking project.

- 127 The erroneous or misleading statement in the D-G's report was such that the Minister proceeded to approve the basement car parking Project Approval on the misapprehension that the Remediation Action Plan is to be implemented as a condition of his approval.
- 128 The approval by the Minister of the basement car parking project application founded upon a misapprehension as to a material matter constitutes a jurisdictional error.
- 129 In the premises, the approval of the basement car parking project is invalid.

### **Ground 5 – Failure to Consider ESD Principles and Public Interest**

- 130 When the Minister purported to grant Project Approval for the basement car parking project and the early works project under s 75J of the EP&A Act, the Minister was bound to consider the principles of ecologically sustainable development set out in section 6(2) of the *Protection of the Environment (Administration) Act 1991 (NSW)* (**the principles of ESD**), being an element of the public interest.
- 131 In the premises, in the Minister's determination of each Project Approval, the principles of ESD and the public interest, in particular intergenerational equity, the precautionary principle, conservation of biological diversity and ecological integrity and cumulative impacts of development, were mandatory relevant considerations.

### ***Intergenerational equity***

132 The principle of intergenerational equity is that the present generation is to ensure that the health, diversity and productivity of the environment is maintained and enhanced for the benefit of future generations.

133 There is a material risk that development on the Barangaroo site, associated with the basement car parking project and the early works project, will cause the migration or escape of contamination off-site, including into Darling Harbour, Sydney Harbour and the surrounding residential premises.

### **Particulars**

See paragraphs 18-20, 39-42 above.

The basement car parking construction site contains a number of contamination issues associated with fill on the site and groundwater contamination from the former gasworks, which require remediation.

The basement car parking project is immediately south of the area of land subject to the DECCW remediation site declaration, which will not be remediated before the excavation works on the basement car parking project commences.

The basement car parking project requires the stockpiling of contaminated fill, which is to be remediated on the Barangaroo site.

The Headland park will contain fill that contains material that has been contaminated and is to be remediated. Works to the Headland may also change the flows of groundwater on that site.

Areas of the Headland park site representing approximately 15,000m<sup>2</sup> in area and comprises an approximate in-situ (unbulked) volume of 20,000m<sup>3</sup> have been identified as subject to contamination, requiring remediation.

The early works project requires the excavation of 60,000m<sup>3</sup> of sandstone as part of the early works project which contains contaminated material requiring remediation.

134 In the premises, the principle of intergenerational equity is and was enlivened with respect to the Barangaroo site and required specific consideration by the Minister with regard to the material risk just identified.

***Precautionary principle***

- 135 The precautionary principle indicates that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- 136 There is a material risk that development on the Barangaroo site, associated with the basement car parking project and the early works project, will cause the migration or escape of contamination off-site, including into Darling Harbour, Sydney Harbour and the surrounding residential premises.

**Particulars**

The particulars to paragraph 133 are repeated.

- 137 In the premises, the precautionary principle is and was enlivened with respect to the Barangaroo site and required specific consideration by the Minister with regard to the material risk just identified.

***Conservation of biological diversity and ecological integrity***

- 138 The conservation of biological diversity and ecological integrity is a fundamental consideration of ecologically sustainable development.
- 139 There is a material risk that development on the Barangaroo site, associated with the basement car parking project and the early works project, will cause the migration or escape of contamination off-site, including into Darling Harbour, Sydney Harbour and the surrounding residential premises.

**Particulars**

The particulars to paragraph 133 are repeated.

- 140 In the premises, the principle of conservation of biological diversity and ecological integrity is and was enlivened with respect to the Barangaroo site and required specific consideration by the Minister with regard to the material risk just identified.

***Cumulative impacts of development***

- 141 The principles of ecologically sustainable development and the public interest also required consideration of all impacts on the environment, including cumulative

impacts of the proposed specific development, associated future development, and existing surrounding development.

142 In relation to the environment at Barangaroo, there are a number of important cumulative impacts:

- (i) Groundwater in and around the Barangaroo site is contaminated;
- (ii) The source of the contamination of the groundwater is both on the Barangaroo site and offsite;
- (iii) The contamination offsite has been exacerbated in particular by building works on adjacent sites at 30-38 Hickson Road, Millers Point;
- (iv) It is not proposed that remediation will occur on these sites and therefore it is unclear whether the contamination will continue into the groundwater from offsite;
- (v) The site is located adjacent to Darling Harbour and the contaminants on the site are currently slowly leaching into the Harbour;
- (vi) The further works proposed to the sandstone as part of the early works project and Headland works will possibly change the substrate of how the groundwater works at the headland.

### **Particulars**

#### *Departmental papers*

DECCW Departmental paper relating to updated Significant Risk of Harm (SRoH) assessment for the segment of Hickson Road within the Millers Point Gasworks and DECC's regulatory strategy, dated 27 May 2008.

DECCW Departmental paper relating to proposal to declare part of the former Millers Point Gasworks site to be a remediation site under the CLM Act, dated 3 February 2009.

DECCW Departmental paper relating to revocation of investigation area – former Millers Point gasworks - Barangaroo, dated 5 August 2009.

#### *Sinclair Knight Merz reports*

Sinclair Knight Merz report to Alinta dated 24 October 2007 – Review of ERM Environmental Site Assessment & Proposed Sampling Analysis & Quality Plan for Additional Investigation Works at Barangaroo, Hickson Road, Millers Point.

Sinclair Knight Merz report to Jemena dated 4 November 2008 – Technical review of draft RAP for Barangaroo, Hickson Road, Sydney.

Sinclair Knight Merz report to Jemena dated 10 November 2008 – Technical review of draft investigation report for sediments in East Darling Harbour Adjacent to Barangaroo, Sydney.

Sinclair Knight Merz report to Jemena dated 8 April 2009 – Technical review of proposed declaration of remediation site for Barangaroo, Hickson Road, Sydney.

*Other documents*

Email correspondence between DECCW officers including David Wai and John Coffey in August 2008.

DECCW fact sheet: Contamination at former gasworks site - Hickson Road & Darling Harbour Wharves 3-8, Millers Point: Frequently asked questions & answers (13 December 2007).

113. The Minister has not considered any of the above cumulative impacts.

**Particulars**

- (i) The D-G's report for the early works project does not discuss any of these issues it merely notes that there are future project applications for remediation (pg 2).
- (ii) In response to the submissions from the Barangaroo Action Group about the continued contamination from offsite, the second respondent has responded by indicating that DECCW has confirmed their approach is acceptable (see Response to community submissions for bulk excavation and carpark). No advice from DECCW is attached to the Minister's brief to clarify their approval or approach to this issue.

- (iii) The only mention of contamination to Darling Harbour is that there is not any significant water quality issues regarding Darling Harbour but there is no discussion of water quality in the context of the contamination issues.
- (iv) There is no discussion in the D-G's report for the early works project of any impacts on the substrate from the excavation.

***The Project Approvals are invalid***

143 In purporting to grant Project Approval for the basement car parking project, the Minister failed to consider, or adequately consider, the principles of ESD, in particular the application of intergenerational equity, the precautionary principle, conservation of biological diversity and ecological integrity and cumulative impacts of development.

**Particulars**

- (a) The Minister had before him Briefing Note 10/21669 which had no reference to ESD and no information about how the precautionary principle or intergenerational equity applies in this case.
- (b) The Minister had before him the D-G's report (Attachment B to the Briefing Note) which only stated the principles of ESD and not which did not consider how they applied in this case.
- (c) There was no other material before the Minister capable of establishing that he considered the identified principles of ESD and the public interest.

144 In purporting to grant Project Approval for the early works project, the Minister failed to consider the principles of ESD, in particular the application of the application of intergenerational equity, the precautionary principle, conservation of biological diversity and ecological integrity and cumulative impacts of development.

**Particulars**

- (a) Any Briefing Notes the Minister had before him had no reference to ESD and no information about how the precautionary principle or intergenerational equity applies in this case.
- (b) The Minister had before him the D-G's report (Attachment B to the Briefing Note) which only stated the principles of ESD and did not consider how they applied in this case.

- (c) There was no other material before the Minister capable of establishing that he considered the identified principles of ESD and the public interest.

145 Further and in the alternative, in purporting to grant Project Approval, there was no evaluation by the Minister sufficient to demonstrate an understanding of the principles of ESD, in particular intergenerational equity, the precautionary principle, conservation of biological diversity and ecological integrity and the cumulative impacts of the development to warrant the conclusion that those principles had been considered.

146 In the alternative to the paragraph 145, in purporting to grant Project Approval, there was insufficient information before the Minister about the extent of the contamination and proposed remediation to sufficiently discharge his obligation under the EP&A Act to consider, or adequately consider, the principles of ESD, in particular intergenerational equity, the precautionary principle, conservation of biological diversity and ecological integrity and the cumulative impacts of the development.

### **Particulars**

#### SEPP 55

The application for the remediation project on land subject to of the EPA remediation site declaration has not yet been assessed and approved.

There was no finalised Remediation Action Plan for the early works project site.

The Remediation Action Plan and Other Remediation Works (South) Area, the Waste Management Plan and the Water and Stormwater Management Plan accompanying the basement car parking project application lacked sufficient detail.

147 The Minister's failure to have regard to mandatory relevant considerations, or to evaluate them in a manner sufficient to demonstrate an understanding of them or to warrant the conclusion that they had been considered, constituted jurisdictional error.

### **Conclusion**

148 On the grounds set out above the Applicant seeks the relief set out in the Summons.

**SIGNATURE**

Signature of legal representative

A handwritten signature in black ink, appearing to be 'U R' followed by a flourish.

Capacity

Solicitor

Date of signature

26/11/10