Administrative Law in an Environmental Context: An Update

by
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1. Purpose of the paper

The purpose of this paper is to review some of the more significant decisions in administrative law in an environmental context in the last two or so years. Primarily, I have focused on decisions of the Land and Environment Court of New South Wales and the New South Wales Court of Appeal. However, I have included a couple of other recent decisions of other jurisdictions which raise interesting questions.

I have grouped the recent decisions under the relevant grounds of review they concern to place the decisions in a context. For the same reason of context, I have given a brief overview of the law under the selected grounds of review.

2. Illegality

2.1 Introduction

The head of review of illegality encompasses the grounds of ultra vires in the narrow sense. An administrative decision will be ultra vires in the narrow sense if the decision-maker does not have substantive power under the empowering statute to make the decision or has failed to conform to a procedure in the statute.[1]

Two circumstances where an administrative decision-maker may have no substantive power and any decision will be ultra vires in the narrow sense, are:

(a) the person who purported to make the decision did not have the jurisdiction to make the decision (the wrong decision-maker); and

(b) the decision is made conditional upon the satisfaction of a criterion (whether of fact or law) but the criterion is not in fact satisfied (jurisdictional fact).

Recent decisions have involved each of these circumstances.

2.2 Wrong decision-maker

In *GPT Re Ltd v Wollongong City Council*[2] and *Belmorgan Property Development Pty Ltd v GPT Re Ltd*[3], the purported determination by the general manager of the Council of a development application was held to be ultra vires on the ground that the delegation from the Council was not valid.

The Council had resolved in relation to a particular development application that "the General Manager be delegated authority to approve Development Application 1565/2004 as per Option 3 of the report". Option 3 of the report was to approve the application. (Option 1 was to redesign the development and Option 2 was to refuse the application).

Biscoe J at first instance in the Land and Environment Court and the Court of Appeal on appeal held that such a delegation was invalid as a delegation of the Council's function under s 80(1) of the *Environmental Planning and Assessment Act* 1979 of determining the development application. Although the Council could determine an application by either granting consent conditionally or unconditionally on the one hand or refusing consent on the other hand, nevertheless there was only one

[1] M Allars, *Introduction to Australian Administrative Law*, Butterworths, 1990 at 165 [5.10]
[2] (2006) 151 LGERA 116 (Land and Environment Court, Biscoe J)
[3] [2007] NSWCA 171 (18 July 2007) (Court of Appeal)

function that was capable of being delegated, namely the function to determine the application. In this sense, the function was indivisible so that a delegation to determine a development application only by granting consent was not a delegation of the function at all.

At first instance, Biscoe J said:

> "[45] The function of determining a development application under s 80(1) requires either an unconditional or conditional consent or a refusal of consent. Supporting the conclusion that a function such as the s 80(1) function is indivisible are two Federal Court of Australia cases, albeit decided in a different statutory context. The first is *Singh v Minister for Immigration, Local Government and Ethnic Affairs*. In this case, instruments of delegation purported to empower government officers to accept recommendations of the Immigration Review Panel refusing an application for resident status. The officers were not authorised to grant an application for resident status. Keely J held at 402:
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> *'In my opinion the respondent Minister was not empowered by those words in s 66D(1) of the Migration Act 1958 and in section 34AB of the Acts Interpretation Act 1901 to delegate to an officer the power to decide against granting resident status to an applicant whilst at the same time deliberately withholding from that officer the power to grant the application for resident status.*
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> *In my opinion, an instrument so framed that the officer could only exercise the power against an applicant is not a valid delegation of the Minister's power to grant resident status. The power is the one indivisible power to grant resident status; it necessarily includes the power to decide that an application will not be granted but there is no separate power to refuse to grant it. A test umpire given the power to decide whether a batsman is out or not out is given one power not two.*'
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> [46] *Singh v Minister for Immigration, Local Government and Ethnic Affairs* was approved and followed by Spender J in the same context in the similarly named *Singh v Castello* [unreported, Spender J, 16 July 1990] at [32]-[33]…
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> [47] Also supporting a conclusion that the s 80(1) function is indivisible are the opening words of s 79C that the matters listed therein must be considered (if relevant) when "determining" a development application. It is the whole of the s 80(1) determination function that has to be exercised in accordance with s 79C. That is, by granting consent conditionally or unconditionally or by refusing consent. To limit the conclusion that can be reached is to limit the determination. It is difficult to see how s 79C matters can be properly, genuinely and realistically considered in making a determination if the determination can go only one way. To delegate to the general manager a power to approve only is a limitation on the nature of the opinion that can be formed and, I think, inconsistent with the statutory scheme that the delegate standing in the shoes of the council must make a s 80 determination on relevant matters referred to in s 79C.

[48] It may be unnecessary to go so far, but there is substance, I think, in the applicant's submission that the delegate had in effect been told to approve the development application. If the delegate had no authority to refuse the application and no authority to do nothing, and thereby to bring about a deemed refusal, it may be said that he had no discretion at all and was in effect being told to approve.

[49] The *Singh cases* I see as the outworking of a principle that an administrative function to determine an application is generally indivisible, in the absence of a contrary legislative intention, in the sense that the power to grant consent cannot be delegated without the power to refuse consent or vice versa. I respectfully agree with this thread in the fabric of the law and would apply it in the present case. I do not think that the different statutory context of the *Singh cases* requires them to be distinguished in point of principle. Another difference is that they were concerned with delegation of a power to refuse only, whereas the present case is concerned with a delegation of a power to approve only, but this is not a reason for distinguishing them.

[50] It is not possible, in my opinion, to delegate a function defined only by s 80(1)(a) – that is, the power to approve – without delegating the whole of the function under s 80(1) – including the s 80(1)(b) power to refuse".[4]

On appeal, Tobias JA (with whom Beazley JA agreed) said:

"[56] As to the first proposition, in my opinion it is correct to categorise the relevant function of the Council under s 80(1) of the EPA Act delegable pursuant to s 377 of the LG Act, as being the function "*to determine a development application*" rather than the function to determine that application in a particular manner. The Council's function is to lawfully exercise its discretion in determining a development application either by granting consent conditionally or unconditionally, or refusing consent. It is not the function of the Council to determine the application only in one way as this would not only be inconsistent with the terms of the function itself but also would be inimicable to the valid exercise of that function in terms of the duty to take into consideration relevant matters prescribed by s 79C(1).

[57] In the present case, there can be no doubt in my view that the 2005 resolution did not delegate to the General Manager any discretion with respect to the granting or refusing consent to the application. In particular, it did not contemplate that he could refuse such consent by declining to exercise the authority specifically delegated to him. He was given no choice except with respect to the content of the conditions which were to be imposed upon the grant of consent. The former may have been negotiable but the latter was not. The giving of a direction requiring a discretionary power or function of the Council to be exercised in only one way was not a valid delegation of the Council's function to determine the application within the meaning of s 80(1) of the EPA Act.

[4] *GPT Re Ltd v Wollongong City Council* (2006) 151 LGERA 116 at [45]-[50]

[58] The foregoing is also supported by the context in which the 2005 resolution was passed. First, it expressly required the General Manager to approve the application "*as per Option 3 of*" Mr Zwicker's report. That option, which was not recommended by him, was to approve the application. Second, the negativing of the amendment to the motion that the General Manager be delegated authority to refuse the application on planning, urban design and economic impact grounds was a clear manifestation of the intention of those councillors who voted for the motion that the General Manager was not being delegated a discretion which included the refusal of the application. On the contrary, he was being directed to approve the application subject to conditions.

[59] Accordingly, the 2005 resolution did not constitute a valid delegation by the Council of the relevant function and the primary judge was correct to so hold for the reasons set forth in [47] of his judgment as set out in [30] above. Rather, as a resolution it constituted a direction to the General Manager to issue a consent to the application"[5].

2.3 Jurisdictional fact

The jurisdictional fact doctrine as a ground of review continues to be popular. A number of recent decisions involve a challenger invoking the doctrine.

There have been a number of decisions that have held that development applications and certain types of documents statutorily required to accompany such applications are jurisdictional facts; the existence of those documents enlivens the power of the consent authority to determine a development application.[6] The court can determine for itself whether the jurisdictional fact is satisfied. A recent illustration is *Corowa v Geographe Point Pty Ltd*[7] where Jagot J determined whether on the facts a species impact statement was required to accompany the development application. Jagot J determined a species impact statement was not required.[8]

However, one cannot generalise. Each statutory formulation containing a condition precedent must be construed. This is because the determination of whether a condition precedent to a statutory power is a jurisdictional fact involves a process of statutory interpretation.[9] The court construes the statutory formulation which contains a factual reference "so as to determine the meaning of the words chosen by Parliament, having regard to the context of that statutory formulation and the purpose or object underlying the legislation"[10].

The question raised in three recent decisions was whether the statutory formulation under the *Environmental Planning and Assessment Act* 1979 and *Environmental Planning and Assessment Regulation* 2000 requiring a statement of environmental effects to accompany a development application for non-designated development established a jurisdictional fact: see *Cranky Rock Road Action Group Inc v Cowra*

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[5] *Belmorgan Property Development Pty Ltd v GPT Re Ltd* [2007] NSWCA 171 at [56]-[59]
[6] For example, *Helman v Byron Shire Council* (1995) 87 LGERA 349; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55
[7] [2007] NSWLEC 121 (13 March 2007)
[8] *Corowa v Geographe Point Pty Ltd* [2007] NSWLEC 121 (13 March 2007) at [81]. Another example is *Anderson v Ballina Shire Council* [2006] NSWLEC 76 (24 February 2006) at [115]-[120]
[9] *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [37]; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at [6]
[10] *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55 at [39]

Shire Council[11]and *MCC Energy Pty Ltd v Wyong Shire Council*[12]. In all three decisions, the conclusion was that, on a proper construction of the statutory formulation, a jurisdictional fact was not involved; a statement of environmental effects was not "an essential condition" or an "essential preliminary" to the grant of a valid consent. In each case, a distinction was drawn between the statutory requirements for an environmental impact statement or species impact statement (which have been held to involve jurisdictional facts) and those for a statement of environmental effects. In particular, the former but not the latter met the test of essentiality, that is to say that the legislature intended that the absence of the fact (the requisite accompanying document) would invalidate the decision to grant consent under the statute.[13]

In a similar vein, in *Drake-Brockman v Minister for Planning*,[14] Jagot J held that, on a proper construction of Part 3A of the *Environmental Planning and Assessment Act* 1979, the lodgment of a concept plan application was not a jurisdictional pre-condition to the Director-General being able to prepare and consult with other public authorities about project specific environmental assessment requirements.[15]

A different type of jurisdictional fact was considered in *Bungendore Residents Group Inc v Palerang Council (No. 3)*[16] Pain J held that a clause of a local environmental plan that provided that the consent authority may grant development consent to a certain type of subdivision "only if the consent authority has had regard to a detailed analysis" of various specified environmental factors established a jurisdictional fact or condition precedent to the exercise of the power to grant consent.[17] As a matter of fact, Pain J held that the condition precedent had not been satisfied.[18]

3 Irrationality

3.1 Introduction

The head of review of irrationality encompasses the grounds of ultra vires in the broad sense, involving an abuse of power. Recent decisions have involved the grounds of failure to consider relevant matters, acting unreasonably by making a manifestly unreasonable decision or acting in a manifestly illogical manner, acting in bad faith and making an uncertain decision.

3.2 Failure to consider relevant matters

3.2.1 Matters to be considered

The ground of review of failing to take into account a relevant matter will, of course, only be made out if the decision-maker fails to take into account a matter which the decision-maker is bound to take into account. The matters which a decision-maker is

[11] (2005) 143 LGERA 356 (Land and Environment Court, Bignold J); (2006) 150 LGERA 81 (NSW Court of Appeal)
[12] (2006) 149 LGERA 59 (Land and Environment Court, Jagot J)
[13] See *MCC Energy Pty Ltd v Wyong Shire Council* (2006) 149 LGERA 59 at 75 [62]-76 [67] and *Cranky Rock Road Action Group Inc v Cowra Shire Council* (2005) 143 LGERA 356 at [50]-[102] (Bignold J) and (2006) 150 LGERA 81 at 99 [65]-105 [90] (Tobias JA with whom Young CJ in Eq and Campbell JA agreed). See also *McGovern v Ku-ring-gai Council* [2007] NSWLEC 22 (20 February 2007) at [31]
[14] [2007] NSWLEC 490 (13 August 2007)
[15] at [62], [63]-[78]
[16] [2007] NSWLEC 251 (15 May 2007)
[17] at [69], [70]
[18] at [92]

bound to take into account in making the decision, are determined by statutory construction of the statute conferring the discretion. Statutes might expressly state the matters that need to be taken into account. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute.[19]

There rarely is a debate about the relevance of a matter where the statute expressly states it must be considered, but there is often a debate as to whether the statute impliedly requires a matter to be considered. Recent decisions illustrate this latter type of debate.

In *Gray v Minister for Planning*[20], Pain J held that the principles of ecologically sustainable development, although not expressly referred to in Part 3A of the *Environmental Planning and Assessment Act* 1979, were nevertheless impliedly relevant matters which decision-makers exercising discretion under Part 3A were bound to take into account[21]. This was an extension of previous decisions that had held that the principles of ecologically sustainable development were relevant matters to be considered by consent authorities exercising discretion under Part 4 of the *Environmental Planning and Assessment Act* 1979.[22] However, the principles of ecologically sustainable development are expressed at a level of generality.[23] In ascertaining the matter that a decision-maker is bound to consider, the level of particularity with which a matter is identified may be significant.[24] In *Gray*, the applicant's case was not that there had been a complete failure to address the subject of the principles of ecologically sustainable development, but rather that there had been a failure to make some inquiry about facts said to be relevant to that subject.[25] However, for an applicant to succeed in such a challenge, the statute must expressly or impliedly oblige the decision-maker to inquire and consider the subject matter at the level of particularly involved in the applicant's submission.[26]

In *Gray*, the Director-General had required, as part of the coal miner's environmental assessment to be submitted to the decision maker (the Minister for Planning), a "detailed greenhouse gas assessment".[27] The applicant's submission in *Gray* was that consideration of the principles of ecologically sustainable development obliged the decision-maker to inquire and consider the greenhouse gas emissions not only from sources owned or controlled by the coal miner (Scope 1: direct greenhouse gas emissions) and from the generation of purchased electricity consumed by the coal miner (Scope 2: electricity indirect greenhouse gas emissions) but also from sources not owned or controlled by the coal miner as a consequence of the activities of the coal miner (Scope 3: other indirect greenhouse gas emissions). In that case, scope 3 emissions could include potential greenhouse gas emissions from the burning of coal originating from the coal mine by third parties (mostly overseas) outside the

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[19] *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 39-40, 55; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228
[20] (2006) 152 LGERA 258; [2006] NSWLEC 720 (27 November 2006)
[21] *Gray v Minister for Planning* (2006) 152 LGERA 258 at 289 [107]-292 [117]
[22] *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237 at 262 [113]; *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 at [54] and *Telstra Corporation Limited v Hornsby Shire Council* (2006) 146 LGERA 10 at 37 [121]-38 [124]
[23] "Ecologically sustainable development" is defined in s 4(1) of the *Environmental Planning and Assessment Act* 1979 as having the same meaning as it has in s 6(2) of the *Protection of the Environment Administration Act* 1991(NSW)
[24] *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at 452 [23]
[25] *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at 452 [23] citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 289
[26] *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at 452 [23] and *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490 (13 August 2007) at [126]
[27] *Gray v Minister for Planning* (2006) 152 LGERA 258 at 270 [16]

control of the coal miner. The coal miner's environmental assessment report included a study of scope 1 and scope 2, but not scope 3 greenhouse gas emissions.

Pain J held that at least two of the principles of ecologically sustainable development, intergenerational equity and the precautionary principle, in their application to the facts of the case at hand, required assessment of scope 3 emissions:

> "[126] While the Court has a limited role in judicial review proceedings in that it is not to intrude on the merits of the administrative decision under challenge (see par 102-104) it is apparent that there is a failure to take the principle of intergenerational equity into account by a requirement for a detailed GHG [Greenhouse Gas Emissions] assessment in the EAR [Environmental Assessment Report] if the major component of GHG which results from the use of the coal, namely scope 3 emissions, is not required to be assessed. That is a failure of a legal requirement to take into account the principle of intergenerational equity. It is clear from the evidence that this failure occurred on the Director-General's part and that the Applicant is able to discharge its onus in that regard. While that conclusion is shortly stated I will return to the scope of environmental impact assessment as it relates to intergenerational equity again later in the judgment.
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> …
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> [133] As this case focuses on the environmental assessment stage not the final decision whether the project should be approved, the extent to which the precautionary principle applies is as yet undetermined. What is required is that the Director-General ensure that there is sufficient information before the Minister to enable his consideration of all relevant matters so that if there is serious or irreversible environmental damage from climate change/global warming and there is scientific uncertainty about the impact he can determine if there are measures he should consider to prevent environmental degradation in relation to this project.
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> …
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> [135] I also conclude that the Director-General failed to take into account the precautionary principle when he decided that the environmental assessment of Centennial was adequate, as already found in relation to intergenerational equity at par 126. This was a failure to comply with a legal requirement."[28]

Pain J therefore held that the Director-General's decision to accept the coal miner's environmental assessment as adequately addressing the environmental assessment requirements of the Director-General was vitiated by reason of a failure to take into account the relevant matters of the precautionary principle and intergenerational equity.

The decision in *Gray* was relied on by the applicant in *Drake-Brockman v Minister for Planning*.[29] The Minister for Planning approved under Part 3A of the *Environmental Planning and Assessment Act* 1979 a concept plan for a large redevelopment of the former Carlton United Breweries site at Chippendale. The applicant alleged the Minister had failed to consider the principles of ecologically sustainable development,

[28] *Gray v Minister for Planning* (2006) 152 LGERA 258 at 294 [126], 296 [133], [135]
[29] [2007] NSWLEC 490 (13 August 2007)

including the precautionary principle and inter-generational equity, when granted the approval. Again, the challenge was not that there had been a total failure to consider these matters; the Minister had specifically addressed them. Rather, the challenge was that there had been a failure to address facts relevant to that subject matter, in particular a quantitative analysis of the greenhouse gas emissions of the redevelopment project.

Jagot J first distinguished the decision in *Gray* as turning on the terms of the Director-General's requirements in that case.[30] The grounds of challenge in *Drake-Brockman* did not include, as appeared to have been critical in *Gray*, any alleged disjunction between what the Director-General had required and what the Director-General had accepted as adequate.[31] Instead, the applicant to succeed had to establish that the *Environmental Planning and Assessment Act* 1979, by necessary implication, bound the Minister to consider one aspect of the complex of matters that might inform the concept of ecologically sustainable development (greenhouse gas emissions) in the particular manner and to the particular extent alleged by the applicant (a quantitative analysis of greenhouse gas emissions of the project).

Jagot J held that, on a proper construction of the *Environmental Planning and Assessment Act* 1979, the relevant matter could not be defined at that level of particularity. Jagot J held that Parliament, in enacting the *Environmental Planning and Assessment Act* 1979, did not subordinate all other considerations to ecologically sustainable development; the definition of ecologically sustainable development does not mandate any particular method or analysis of a potentially relevant subject matter or outcome in any case; the *Environmental Planning and Assessment Act* 1979 did not dictate that the content of any assessment under Part 3A of that Act must include a quantitative analysis of greenhouse gas emissions; and the statutory scheme does not support the idea that the Minister can only consider ecologically sustainable development by considering a quantitative analysis of greenhouse gas emissions.[32] Jagot J further held that, as a matter of fact, the applicant had not established that the Minister failed to consider ecologically sustainable development including the precautionary principle and intergenerational equity.[33]

In a different context, in *Randall v Willoughby City Council*[34], the Court of Appeal examined the extent to which the express, generic consideration of "the likely impacts of that development…including social and economic impacts in the locality" in s 79C(1)(b) of the *Environmental Planning and Assessment Act* could be constrained by reference to an undefined concept of what constitutes planning. In a series of cases, all springing from the High Court's decision in *Kentucky Fried Chicken Pty Ltd v Gantidis*[35], the Land and Environment Court had restricted the ambit of the relevant consideration of the social and economic impacts of a proposed development[36] to exclude economic competition between individual trade competitors and threatened impacts on the profitability of existing business in the locality.[37]

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[30] *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490 (13 August 2007) at [130]
[31] *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490 (13 August 2007) at [131]
[32] *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490 (13 August 2007) at [132]
[33] *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490 (13 August 2007) at [133]
[34] (2005) 144 LGERA 119
[35] (1979) 140 CLR 675
[36] Originally stated in s 90(1)(d) and currently in s 79C(1)(b) of the *Environmental Planning and Assessment Act* 1979
[37] See, for example, *Fabcot Pty Ltd v Hawkesbury City Council* (1997) 93 LGERA 373 at 378 and *Cartier Holdings Pty Ltd v Newcastle City Council* (2001) 115 LGERA 407 at [34] but contra see *City West Housing Pty Ltd v Sydney City Council* (1999) 110 LGERA 262

Basten JA (with whom Giles and Santow JJA agreed) rejected this former approach as not justified by the current statutory language. The decision emphasises yet again that the considerations that are relevant, and the particularity of the considerations, are to be identified "primarily, perhaps even entirely", by reference to the statute reposing the power on the decision-maker.[38]

First, Basten JA cited with approval Bignold J's conclusion in *City West*[39] that the enactment in 1979 of the *Environmental Planning and Assessment Act* "materially and radically changed the scope of planning law in this State. No longer could it be said…that economic or social considerations were irrelevant to the determination of a development application".[40]

Basten JA continued his reasoning as follows:

> "[34] Secondly, reliance upon the objects of the legislation, set out in s 5, which "are very wide in their ambit" (to adopt the words of Pearlman J), provides little assistance in construing specific statutory provisions. The objects are of greater use in seeking to ascertain the limits of a consideration such as "the public interest", set out in s 79C(1)(e).
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> [35] Thirdly, the suggested limitation of s 79C(1)(b) to only those economic impacts which can be described as "an environmental or planning matter" is unclear both as to the extent and the justification for the limitation. Leaving aside the question of "environmental", which is not relied upon by the claimant in the present circumstances, the concept of a "planning matter" is largely meaningless as an implied constraint. The EP&A Act may reasonably be described as "planning legislation": those factors which it prescribes as mandatory or discretionary considerations may therefore be described as "planning matters". There is no independent point of reference to avoid circularity. In my view, it is neither necessary nor appropriate to impose such a gloss on the language of para (b) of s 79C(1). That is not to say that all economic impacts are mandatory considerations, but rather that any limitation must be specific and justified.
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> [36] It remains, of course, to consider whether there is some inviolable constraint on the statutory concept, which has been contravened in the present case. At the point of greatest limitation, it may be argued that the economic impact of a proposal on the application for development consent may not be the kind of impact which should be considered. Nevertheless, as is illustrated by the judgment of Kerr LJ in *R v Westminster City Council; Ex parte Monahan* (1989) 3 WLR 408 at 425, quoted by Bignold J in *City West* at [139], the imposition of a condition may involve financial constraints on the economic viability of a particular development, which may be of significance in particular circumstances. At the very least, such a consideration will not necessarily fall outside the boundary of "planning" considerations sought to be identified by the claimant."[41]

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[38] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [73]
[39] *City West Housing Pty Ltd v Sydney City Council* (1999) 110 LGERA 262 at 297 [137]
[40] *Randall v Willoughby City Council* (2005) 144 LGERA 119 at 128 [33]
[41] *Randall v Willoughby City Council* (2005) 144 LGERA 119 at [34]-[36]

Basten JA concluded stating, “It is therefore implausible to suggest that economic impacts on others must fall outside the statutory concept”.[42]

3.2.2 Proper, genuine and realistic consideration

As noted above, often an applicant for judicial review does not allege a complete failure to consider a relevant matter, but rather a constructive failure. A collocation of words to express constructive failure that has been frequently invoked is a failure to give “proper, genuine and realistic consideration to the merits of the case”.[43]

This formulation has, however, been criticised in recent times for its tendency to tempt a reviewing court to trespass impermissibly into merits review.

In *Minister for Immigration and Multicultural Affairs v Anthonypillai*[44], a Full Court of the Federal Court rejected the formulation for judicial review of Commonwealth decisions as running counter to the statutory scheme for judicial review[45]. The Court stated that the formulation does this by creating “a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [administrative] decision can be scrutinised”.[46]

Recent cases also caution against too ready an employment of the formulation by courts exercising common law supervisory jurisdiction.[47] In *Kindimindi Investments Pty Ltd v Lane Cove Council*[48], Basten JA (with whom Handley JA and Hunt AJA agreed) said:

> “[74] Secondly, and no doubt recognising that the dissenting councillors had clearly spent time in trying to get on top of the issues in order to reach an informed view, the appellant cast its argument in terms that they were required to give "proper, genuine and realistic consideration to the merits of the case". That terminology is taken from the judgment of Gummow J in *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, reiterated in *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472 at 483. However, this terminology should not be turned into an assessment of the adequacy of the consideration accorded in a particular case. That kind of challenge must be assessed on manifest unreasonableness grounds: see *Minister for Aboriginal Affairs v Peko Wallsend Ltd* at 41 (Mason J) and see now *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165.
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> [75] The dangers in giving too much weight to qualifying terminology in this area of judicial review were noted by Spigelman CJ in *Bruce v Cole* (1998) 45 NSWLR 163 at 186E:

[42] *Randall v Willoughby City Council* (2005) 144 LGERA 119 at [39]
[43] See *Khan v Minister for Immigration Local Government and Ethnic Affairs* (1987) 14 ALD 291 at 292; *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1 at 12-13; and *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472 at 483
[44] (2001) 106 FCR 426
[45] Under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)
[46] (2001) 106 FCR 426 at [65]
[47] *Bruce v Cole* (1998) 45 NSWLR 163 at 186; *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 at [62]; *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at [74], [75], [79]
[48] *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at 297

'These particular formulations must be treated with care, so that the relevant/irrelevant considerations ground is not expanded to permit review of the merits. That ground is restricted in accordance with the now classic judgment of Mason J in [Peko Wallsend], to matters which the decision maker was obliged to take into account.'

[76] In *Weal v Bathurst City Council* (2000) 111 LGERA 181, Mason P, although "attracted to" the language adopted by Gummow J in *Khan*, adopted a constrained approach to review of a council's decision-making process. On the other hand, Giles JA (with whom Priestley JA agreed) stated at [80]:

'*Taking relevant matters into consideration called for more than simply adverting to them. There had to be an understanding of the matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration...*'

[77] This latter formulation appears to treat identification of the correct test as a matter of construction of the clause "take into consideration" in the chapeau of s 79C(1). With respect, that approach runs the risk of falling foul of the admonition contained in the judgment of Spigelman CJ in *Bruce v Cole*, with whose reasons Mason P and Sheller and Powell JJA agreed.

[78] The force of the statement in *Bruce v Cole* may, however, have been mitigated to some extent by the adoption by his Honour in *Zhang v Canterbury City Council* (2001) 51 NSWLR 589, 115 LGERA 373 of the language of Gummow J in *Khan*. Although there is reference to the passage in *Bruce v Cole* (at [62] and [64]) the Chief Justice noted, by reference to *Hale* at 339, that "mere advertence to a matter required to be taken into consideration is not sufficient". The reference in *Hale* at 339, in the judgment of Moffitt P read as follows:

'*It was put to us that the authority could consider relevant matters and reject them. An assertion in these terms has an ambiguity likely to produce error. If the submission means that it is sufficient that the authority advert to a relevant matter and that it can then discard it, the submission must be rejected, because the requirement is that the matter shall be taken into consideration.*'

[79] So much must be accepted: the danger is that adoption of the epithets such as "proper, genuine and realistic" consideration, may be understood to qualify the statutory terminology in a manner inconsistent with accepted principles in relation to judicial review. As noted in *Bruce v Cole*, they risk an assessment of the nature of the consideration which will encourage a slide into impermissible merit review. Adoption of the principles set out by McClellan CJ in the Land and Environment Court in *Centro Properties Ltd v Hurstville City Council* (2004) 135 LGERA 257 at [37], to which this Court was referred by the appellant, should be applied subject to a similar caution."[49]

[49] *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at 297 [74]-[79]

Recent decisions of the Land and Environment Court have heeded the admonition to take caution with the formulation.[50]

Basten JA returned to warn about the formulation in *Belmorgan Property Development Pty Ltd v GPT Re Ltd.*[51] Basten JA said:

> "[77] By way of explication, it may be noted that use of the word "proper" may be understood to invoke the requirement that a power can only be used for the purpose or purposes for which it is conferred and not for some extraneous purpose: see, eg, *Sydney Municipal Council v Campbell* [1925] AC 338 and *The Queen v Toohey; Ex parte Northern Land Council (198081) 151* CLR 170 at 232-233 (Aickin J). Similarly, the word "genuine" may be understood to reflect the well-established principle that the decision-maker must undertake his or her function in good faith, a requirement bound up in the concept of "improper purpose", as explained by Aickin J in *Ex parte Northern Land Council.* Nevertheless, both those obligations are properly related to the exercise of power, rather than some discrete aspect of the exercise, namely taking into account a particular mandatory consideration. The third limb of the trinity, "realistic" finds no ready referent in the language of judicial review.
>
> [78] That is not to say that to give grossly inadequate weight to a matter of some importance may not provide a basis for review; however, to qualify as a ground of judicial review, such conduct must satisfy the test of manifest unreasonableness as applied to the exercise of the power: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985-86) 162 CLR 24 at 41 (Mason J). It is not helpfully reflected in a supposed obligation to give "realistic" consideration to a particular matter. "[52]

On one view, the formulation might be seen to do no more than to emphasise that a failure to consider a relevant matter may occur not only where there is a complete or actual failure to consider the relevant matter, but also where there is a constructive failure. A constructive failure occurs where "the ostensible determination is not a real performance of the duty" to consider the relevant matter.[53]

Thus, in *Parramatta City Council v Hale*[54], Street CJ invoked this sense of constructive failure when he noted that the challenge in that case was not a failure to take into consideration the relevant matters of parking, traffic and access (each was, technically speaking, dealt with in the Council's determination), but "a failure sub modo" flowing from the manner in which the Council considered the matters.

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[50] See, for example, *Kennedy v Director General of the Department of Environment and Conservation* [2006] NSWLEC 456 (26 July 2006) at [121]; *Anderson v Minister for Infrastructure, Planning and Natural Resources* (2006) 151 LGERA 229 at 251 [52]; *GPT Re Ltd v Wollongong City Council* (2006) 151 LGERA 116 at 133 [44] and *Walsh v Parramatta City Council* [2007] NSWLEC 255 (8 May 2007)

[51] [2007] NSWCA 171

[52] *Belmorgan Property Development Pty Ltd v GPT Re Ltd* [2007] NSWCA 171 at [77]-[78]

[53] *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243; *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at [73]-[79]; *Minister for Immigration and Ethnic Affairs v Yusuf* (2001) 206 CLR 323 at 339-340

[54] (1982) 47 LGRA 319 at 335

Similarly, courts have held that the mere advertence to a relevant matter, but subsequent disregard of it, amounts to a constructive failure to consider the relevant matter.[55]

But even with this formulation of constructive failure, cautionary notes have still been issued. In the recent decision of *Cameron v Resource Planning and Development Commission*[56], Tennent J of the Supreme Court of Tasmania cited the judgment of Stone J in *Appellant V324 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs*[57] as a caution against inappropriate use of the concept of constructive failure:

> "[38] In his written submissions at para 7.5, counsel for the applicants set out a passage appearing at [8] in the majority judgment in *Appellant V324 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 259 as further support for his contention. However it is useful to look at the judgment of Stone J in the same case. While he agreed with the judgment of Hill and Allsop JJ, he [sic] added some extra comments. He [sic] said at [54] and [57]:
>
> *'The appellant submits, however, that the Tribunal failed (or "constructively failed") to make "real" findings of fact in relation to those issues. Mr Ginnane explained his use of "real" and his allegation of "constructive" failure as pointing to the Tribunal's failure to describe, quantitatively or otherwise, the degree or extent of risk involved in either of the two key issues. He submitted that this failure amounted to a constructive failure to exercise jurisdiction and referred to the observations of Gaudron J in Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323 at 339-40:*
>
> > *"[T]here is said to be a "constructive failure to exercise jurisdiction" when a tribunal misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form. A constructive failure to exercise jurisdiction may be disclosed by the Tribunal taking an irrelevant consideration into account. Equally, it may be disclosed by the failure to take a relevant matter into account."'*
>
> *Mr Ginnane submitted that although the Tribunal addressed the issues of risk, the way in which it did so constituted a "constructive failure to perform the task" required by s 43(2B) of the Administrative Appeals Tribunal Act 1975 Cth. With respect, I see this argument as a thinly disguised attempt to take issue with the factual findings made by the Tribunal and with the relative weight that the Tribunal attributed to the risks to the appellant and his family and to the Australian community....*
>
> *The use of the adjective "constructive" to qualify "failure to exercise jurisdiction" must be approached with caution. As used by Gaudron J*

[55] *Elias v Commissioner of Taxation* (2002) 123 FCR 499 at 512; *Weal v Bathurst City Council* (2000) 111 LGERA 181 at 185, 201
[56] (2006) 150 LGERA 248 at 259 [38]-[39]
[57] [2004] FCAFC 259 at [54] and [57]

in the passage quoted at [54] above, it indicates that a failure to exercise jurisdiction may extend to a purported exercise of jurisdiction if that exercise is fundamentally flawed in the manner mentioned by her Honour. In such cases the decision-maker can accurately be said to have failed to carry out the task required of it. However, to say that there has been a constructive failure to make findings of fact when actual findings have been made is to take issue with the adequacy of those findings'.

[39] The cautionary note appearing in Stone J's judgment is useful to keep in mind in the present case."[58]

3.2.3 Weight to be attributed to relevant matters

It is well settled that it is generally for the administrative decision-maker, and not a reviewing court, to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising a discretionary statutory power[59]. However, this general rule applies only in the absence of any statutory indication of the weight to be given to the relevant considerations.[60]

In the environmental context, statutes are increasingly providing an indication of the weight that a decision-maker is required to give to certain relevant considerations. Illustrations are:

(a) the *Water Management Act* 2000 (NSW), s 9(1) which provides:

"It is the duty of all persons exercising functions under this Act:

(a) to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act, and

(b) as between the principles for water sharing set out in section 5(3) to give priority to those principles in the order in which they are set out in that subsection."

(b) the *Fisheries Management Act* 1994 (NSW), s 3(2) states that objects of the Act include, primarily, three specified objects relating to environmental protection and then four other specified objects relating to economic and other use of resources "consistently with those objects".

(c) the *Fisheries Management Act* 1991 (Cth), s 3(1) requires that certain specified objectives "must be pursued by the Minister in the administration of this Act and by AFMA in the performance of its functions" but then specifies the different requirement in relation to other specified objectives that "the Minister and AFMA…are to have regard to the objectives".

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[58] *Appellant V324 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 LGERA 248 at 259 [38]-[39]

[59] See for example, *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291-292; *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 at 580 [197] and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 627 [44]

[60] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41

Another illustration of statutory assignment of weight to relevant matters was considered in the series of litigation in Hong Kong in the last few years concerned with the Town Planning Board's decision to submit a draft zoning plan which proposed reclaiming 26 hectares from Victoria Harbour, to the Chief Executive in Council for approval.[61] The Society for the Protection of the Harbour challenged the decision on grounds that included that the Board had misinterpreted s 3 of the Protection of the Harbour Ordinance. That section provided:

> "(1) The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour.
>
> (2) All public officers and public bodies shall have regard to the principle stated in sub-section (1) for guidance in the exercise of any powers vested in them".[62]

The Board argued that all that s 3 did was to make the matter in s 3(1) a relevant matter that the Board was bound to consider. This argument was rejected by both the Court of First Instance and the Court of Final Appeal.

Chu J of the Court of First Instance held that the objective of the Protection of the Harbour Ordinance was to preserve and protect the harbour against reclamation. This was enshrined in s 3 and the presumption. When fulfilling the objective, the duty and presumption should form the basic tenets or starting point of a public body's decision-making process. They were not just one of the material considerations to be taken into account.[63]

The Court of Final Appeal upheld Chu J's decision that s 3 prioritises consideration of the matter in s 3(1):

> "[32] Section 3(1) establishes a statutory principle recognising the harbour as a special public asset and a natural heritage of Hong Kong people and prescribing that it is to be protected and preserved as such an asset and such a heritage. This principle was enacted in general terms.
>
> …
>
> [35] It is manifest that in enacting the statutory principle, the legislature was giving legal recognition to the great public need to protect and preserve the harbour having regard to its unique character. The principle is expressed in clear and unequivocal language. The legislative intent so expressed is to establish the principle as a strong and vigorous one. By prescribing such a principle, the legislature has accorded to the harbour a unique legal status.
>
> [36] Having established the principle, s.3(1) provides that 'for that purpose, there shall be a presumption against reclamation in the harbour'.

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[61] *Society for Protection of the Harbour Ltd v Town Planning Board* [2003] 2 HKLRD 787 and *Town Planning Board v Society for the Protection of the Harbour Ltd* [2004] 1 HKLRD 396 (Li CJ, Bokhary, Chan and Ribeiro PJJ and Sir Anthony Mason NPJ)

[62] Quoted in *Society for Protection of the Harbour Ltd v Town Planning Board* [2003] 2 HKLRD 787 at 788

[63] *Society for Protection of the Harbour Ltd v Town Planning Board* [2003] 2 HKLRD 787 at 803-804

'That purpose' of course refers to the purpose of protection and preservation of the harbour as a special asset and a natural heritage of Hong Kong people.

[37] Reclamation would result in permanent destruction and irreversible loss of what should be protected and preserved under the statutory principle. The statutory presumption was therefore enacted to implement the principle of protection and preservation. It is a legal concept and is a means or method for achieving protection and preservation. Its legal effect is not to impose an absolute bar against any reclamation. It does not prohibit reclamation altogether. As a presumption, it is capable of being rebutted.

[38] Section 3(2) provides that all public officers and public bodies 'shall have regard to the principle stated in s.3(1) for guidance in the exercise of any powers vested in them'. In its context, the reference to s.3(2) to 'the principle stated in s.3(1)' should be construed to include not only the principle that the harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people established by s.3(1), but also the presumption which is the method for achieving protection and preservation provided for in s.3(1).

[39] Section 3(2) is expressed in mandatory terms with the phrase 'shall have regard to the principle for guidance'. The words 'for guidance' do not dilute the mandatory nature of 'shall have regard to' but are part of the mandatory instruction. In other words, public officers and public bodies must have regard to the principle to guide them in exercising their powers. The effect of s.3(2) is to impose on them the statutory duty, not only to have regard to the principle of protection and preservation, but also to have regard to the presumption against reclamation in exercising their powers"[64].

3.3 Unreasonableness

3.3.1 Introduction

The ground of unreasonableness has two faces: one of manifest unreasonableness in the result of the decision and the other of manifest illogicality in arriving at the decision. The first is well established, the second only recently so.

3.3.2 Manifest unreasonableness in result

The principles for review on the basis of manifest unreasonableness in result are settled.[65] The cases simply involve application of the principles to new factual situations. Occasionally, although rarely, the challenge succeeds. A recent example of successful challenge in an environment context is *King v Bathurst Regional Council*[66].

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[64] *Town Planning Board v Society for the Protection of the Harbour Ltd* [2004] 1 HKLRD 396 at [32], [35]-[39]

[65] Recent summaries appear in *Save Our Street Inc v Settree* (2006) 149 LGERA 30 at 36 [27]-39 [32]; *MCC Energy Pty Ltd v Wyong Shire Council* (2006) 149 LGERA 59 at 72[48] and *Anderson v Minister for Infrastructure Planning and Natural Resources* (2006) 151 LGERA 229 at 256 [71]

[66] (2006) 150 LGERA 362 at 382 [84]-383 [85]

3.3.3 Manifest illogicality in reasoning

Review on the basis of manifest illogicality in arriving at the result of the decision is still being explored by the courts.

An earlier illustration of unreasonableness in the manner of decision-making can be found in cases "where it is obvious that material is readily available which is centrally relevant to the decision to be made". In such cases, for a decision-maker to proceed "to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it"[67].

More recently, courts have construed statutes reposing discretionary powers as requiring a decision-maker to reach a decision by a process of logical reasoning.[68]

However, as a recent case in Tasmania reiterates, a conclusion that a logical process of reasoning is required depends on the statutory context. In *St Helen's Area Landcare and Coastcare Group Inc v Break O'Day Council*[69], a Full Court of the Supreme Court of Tasmania considered an appeal from a decision of the Resource Management and Planning Appeal Tribunal. Such an appeal was restricted to a question of law. One issue on appeal was whether the Tribunal's reasoning in reaching its decision was illogical or irrational in fact-finding. Blow J, who dealt particularly with this issue, referred to the cases espousing review for illogicality in reasoning, including the High Court's decisions in *S20* and *SGLB*. He stated:

> "[54] In the light of that comment, I do not think one should regard *S20* and SGLB as establishing that illogical reasoning in fact-finding always amounts to an error of law for the purpose of a statutory appeal from a specialist tribunal. It is necessary to consider the language and purpose of the section creating the right of appeal in any particular case. We are concerned with the Resource Management and Planning Tribunal Act 1993 Tas (the RMPAT Act), s 25(1), which confers a right of appeal from a decision of the Tribunal "on a question of law". Plainly that provision was not intended to permit anyone to appeal on the ground that the Tribunal had made a wrong finding of fact. Illogical or irrational reasoning can have a number of undesirable outcomes: (i) a wrong finding of fact; (ii) a correct finding of fact, without the support of impeccable reasoning; or (iii) a failure to make a finding of fact as to an issue, despite the presence of sufficient

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[67] *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-170. See also *Luu v Renevier* (1989) 91 ALR 39 and *Lek v Minister for Immigration, Local Government and Ethnic Affairs (No 2)* (1993) 45 FCR 418

[68] *Hill v Green* (1999) 48 NSWLR 161 at [72]; *Gamaethige v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 424 at [28]; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [145]; *Minister for Immigration and Multicultural Affairs; Ex parte applicant S20/2002* (2003) 198 ALR 59; 77 ALJR 1165 at [127]-[128]; *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 (22 December 2003) at [57]-[66]; *Minister for Immigration and Multicultural Affairs v SGLB* (2004) 207 ALR 12; 78 ALJR 992 at [38]; *Woolworths Ltd v Pallas Newco Ltd* (2004) 61 NSWLR 707 at [92]; *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources* (2005) 138 LGERA 11 at 45[129]; *Walter Construction Group v Fair Trading Administration Corporation* [2005] NSWCA 65 (14 March 2005) at [76]; *Carcione Nominees Pty Ltd v Western Australian Planning Commission* (2005) 30 WAR 97 at [98]-[99]; (2005) 140 LGERA 429; *Hedderman v Murray* [2005] NSWSC 262 (15 April 2005) at [20] and *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2006] NSWCA 245 (8 September 2006) at [71]

[69] (2007) 151 LGERA 421

> evidence for a finding to be soundly made. I do not think one could sensibly ascribe to Parliament an intention that there was to be a right of appeal in any of those circumstances when Parliament did not intend there to be a right of appeal if the Tribunal made a wrong finding of fact. The intention of Parliament was that fact-finding was to be a matter for the Tribunal, and that there was to be a right of appeal for the purpose of enforcing the Tribunal's obligation to conduct its proceedings and its decision-making in accordance with the law: *Kempster v Manning* (2006) 148 LGERA 1 at [41]. For these reasons, I conclude that the assertion that the Tribunal's impugned reasoning was illogical or irrational does not raise a question of law within the scope of s 25(1)."[70]

3.3.4 Sliding scale of review

Whilst the test for review on the ground of manifest unreasonableness may be well-established, in its application, there has been considerable diversity in the readiness with which courts have found the test to be satisfied[71]. Courts' readiness to intervene may depend on the subject matter of the decision. English courts, particularly in relation to decisions affecting human rights, have referred to a "sliding scale of review". For example, in *R (Mahmood) v Secretary of State for the Home Department*[72], Laws LJ stated:

> "There is, rather, what may be called a sliding scale of review; the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required".[73]

The possibility of a sliding scale of review was raised in an environmental context by the Hong Kong Court of Final Appeal in *Town Planning Board v Society for the Protection of the Harbour Ltd*.[74] The case involved judicial review of the decision of the Town Planning Board to submit a draft zoning plan which proposed reclaiming 26 hectares from Victoria Harbour to the Chief Executive in Council for approval. The Society for the Protection of the Harbour had been successful in the Court of First Instance,[75] first, on the basis that in making the decision the Board had misinterpreted the Protection of the Harbour Ordinance, in particular s 3, and second, that the declaration was *Wednesbury* unreasonable. The Board appealed to the Court of Final Appeal. On the standard of judicial review, the Court of Final Appeal stated:

> "[66] Any decision made by the Board would of course be subject to judicial review by the courts. The courts' jurisdiction in this regard is a supervisory one. Where it cannot be seen that the decision-maker has erred in law, or has failed to take into account the relevant considerations or has taken into account irrelevant considerations, the

[70] (2007) 151 LGERA at 434-435 [54]
[71] As was noted by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41-42
[72] [2001] 1 WLR 840 at 848-849 [19]
[73] See further on a sliding scale of review, *R v Ministry of Defence, ex parte Smith* [1996] QB 517 at 554; *R v Lord Saville of Newdigate, ex parte A* [2000] 1 WLR 1855 at 1867 [37] and *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 547-548, 549 and J Chan, "A Sliding Scale of Reasonableness in Judicial Review", [2006] *Acta Juridicta* 233
[74] [2004] 1 HKLRD 396
[75] *Society for Protection of the Harbour Ltd v Town Planning Board* [2003] 2 HKLRD 787, Chu J

traditional view has been that the courts will only interfere on the ground that the decision is shown to be an irrational one.

[67] With the dynamic development of the common law, whilst the courts' jurisdiction on judicial review remains a supervisory one, a real question exists as to whether there is a sliding scale of review, with the intensity of review depending on the subject matter of the decision. On this approach, the standard of review would be most intensive where a fundamental human right is in question: see *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 paras.16 to 19 (Laws LJ), paras.37 to 40 (Lord Phillips MR); and *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1985) 162 CLR 24 at pp.41-42 (Mason J). That question does not arise in the present case and full arguments have not been addressed on it. It is an important question which has yet to be resolved in this jurisdiction.

[68] Specifically, in relation to a decision of the Board in relation to any reclamation proposal, although as was accepted by counsel for the Society and as noted above, the Ordinance does not give rise to any fundamental or constitutional right, what is the appropriate standard of judicial review remains for future consideration: whether the standard should only be the traditional standard of irrationality or whether, having regard to the unique legal status of the harbour, the standard should be a more intensive one".[76]

3.4 Bad faith, fraud and misrepresentation

An exercise of discretionary power involving bad faith will be an abuse of power.[77] Ordinarily, bad faith refers to conduct by the decision-maker. In *SCAS v Minister for Immigration and Multicultural and Indigenous Affairs*,[78] a Full Court of the Federal Court stated:

> "Bad faith in this context implies a lack of an honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker."[79]

The bad faith must be actual; "there is no such thing as deemed or constructive bad faith".[80] A decision-maker cannot "blunder into bad faith".[81]

Other times, the administrative decision might be induced or affected by fraud. The scope for judicial review for third party fraud will depend on the source and terms of review. For example, the former s 476(1)(f) of the *Migration Act* 1958 (Cth) provided as a ground of judicial review that the decision in question "was induced or affected by fraud". Fraud was held not to be limited to that of the decision-maker, a party or a

[76] [2004] 1 HKLRD 396 at [66]-[68]. The decision was referred to by Biscoe J in *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWLEC 459 (17 August 2007) at [91]
[77] *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35 (2 August 2007) at [12]
[78] [2002] FCAFC 397 (6 December 2002)
[79] *SCAS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 397 at [19]
[80] *Minister for Immigration of Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431 (18 December 2002) at [8]
[81] *NAKF v Minister for Immigration and Multicultural Affairs* (2003) 130 FCR 210 at [24]

party's representative, but to also extend to other persons[82]. The decision in question must be actually induced or affected by the fraud[83]. That statutory provision was subsequently amended. Whether the amendment has restricted the fraud to the decision-maker, a party or a party's representative was not determined by the recent High Court decision in *SZFDE v Minister for Immigration and Citizenship*.[84] In that case, it was sufficient that the fraud of a third party had the consequence of stultifying the operation of the legislative scheme to afford natural justice to the appellants (the appellants did not attend the Refugee Review Tribunal as a result of fraudulent advice given by a purported registered migration agent).[85]

In cases where the impugned conduct is by the person who would benefit by the decision of the decision-maker, questions may arise as to what type of conduct will suffice to vitiate the decision. In a series of decisions on the validity of search warrants, the Federal Court has held that an administrative decision may be vitiated by "fraud or misrepresentation" on the part of the person who benefited by that decision.[86] In migration cases in England and Australia, the courts have held that a permission obtained by fraud or misrepresentation is of no effect.[87]

Whilst the ambit of the concept of fraud is clear, the ambit of misrepresentation is less so. In *Lego Australia Pty Ltd v Paraggio*[88], Beaumont and Whitlam JJ held that "a statement which was a half-truth and thus misleading (see eg *R v Kylsant* [1932] 1 KB 442) would be treated, in this, as in other contexts, as a misrepresentation".[89] However, this left open the question of whether a misrepresentation needs to be fraudulent or whether innocent misrepresentation will suffice. In *Firearm Distributors Pty Ltd v Carson*[90], Chesterman J considered that innocent misrepresentation will not suffice to vitiate a decision. He held:

> "It is not clear from the authorities whether 'fraud or misrepresentation' where it operates to allow a decision to be re-opened is limited to fraudulent misrepresentations or whether an innocent misstatement will suffice. On the basis that a mistake as to the facts is not sufficient to overcome the prohibition against re-making decisions it may well be that an innocent misrepresentation is not enough. The word 'misrepresentation' should perhaps be understood as referring to fraudulent misrepresentation and 'fraud' as referring to dishonesty of a more general kind, so that only conduct of that kind will vitiate a decision and allow the power to be exercised afresh".[91]

The issue arose recently in *Anderson v Minister for Infrastructure, Planning and Natural Resources*.[92] The case involved a challenge to the decision of a Minister to grant consent for a housing subdivision. The applicant alleged that the Minister's

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[82] *Wati v Minister for Immigration and Ethnic Affairs* (1996) 71 FCR 103 at 112; *Jama v Minister for Immigration and Multicultural Affairs* (2000) 61 ALD 387 at 397
[83] *Wati v Minister for Immigration and Ethnic Affairs* (1996) 71 FCR 103 at 113; *Jama v Minister for Immigration and Multicultural Affairs* 92000) 61 ALD 387 at 396
[84] [2007] HCA 35 (2 August 2007) at [28]
[85] *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35 (2 August 2007) at [49], [51]
[86] *Lego Australia Pty Ltd v Paraggio* (1994) 52 FCR 542 at 555
[87] See, for example, *R v Secretary of State for the Home Department; Ex parte Hussain* [1978] 1 WLR 700; [1978] 2 All ER 423 and *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 416
[88] (1994) 52 FCR 542 at 555
[89] See to same effect *Price v Elder* (2000) 97 FCR 218 at 221 [12]
[90] [2001] 2 Qd R 26
[91] [2001] 2 Qd R 26 at [44]
[92] (2006) 151 LGERA 229

decision was vitiated because the developer and its consultant had misled the Minister by failing to inform him of certain relevant information. Biscoe J held that "misleading conduct which is not characterised by fraud, bad faith or the like is, at least generally, insufficient to vitiate an administrative decision."[93] As there was no allegation of fraud or fraudulent misrepresentation - it was at best "innocent misleading conduct" – the challenge on this ground failed.

Misrepresentation was also relied on as a ground of review in *McGovern v Ku-ring-gai Council*[94]. Pain J did not need to determine the type of misrepresentation that would be required to vitiate an administrative decision because the misrepresentation by the applicant for development consent was not fundamental to the decision to grant consent.[95]

3.5 Uncertainty

3.5.1 Introduction

An exercise of power in such a way that the result of the exercise of power is uncertain may also be an abuse of power. Some doubt has been expressed as to the availability of uncertainty as a ground of review at common law.[96] It is available as a statutory ground of review for administrative decisions under Commonwealth law.[97]

The issue is one of construction of the particular statute bestowing the power and the application of that statute to the circumstances of the case.[98] The statutory grant of power may inherently require certainty.[99]

One way in which uncertainty has been said to arise is if an administrative decision approving some action, such as the carrying out of development, leaves open the possibility that the action may be altered in a significant or fundamental respect. For instance, a grant of development consent may be subject to a condition that has the effect of significantly altering the development in respect of which the consent is made or leaving open the possibility that development carried out in accordance with the consent and the condition will be significantly different from the development for which application was made.[100] This has been the subject of a number of recent decisions.[101]

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[93] (2006) 151 LGERA 229 at 258 [79]
[94] [2007] NSWLEC 22 (20 February 2007)
[95] [2007] NSWLEC 22 (20 February 2007) at [31]
[96] *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184 at 195; [1945] ALR 397; *Minister for Primary Industries & Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381 at 381–2; (1993) 112 ALR 211; *Genkem Pty Ltd v Environment Protection Authority* (1994) 35 NSWLR 33 at 42 and 49; *Qiu v Minister for Immigration & Ethnic Affairs* (1994) 55 FCR 439 at 447; 37 ALD 443; *Winn v Director-General of National Parks & Wildlife* (2001) 130 LGERA 508 at [12]; *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at [427]; *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2006] NSWCA 245 (8 September 2006) at [92]
[97] Section 5(2)(h) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)
[98] *Winn v Director-General of National Parks & Wildlife* (2001) 130 LGERA 508 at [12].
[99] *Mixnam's Properties Ltd v Chertsey Urban District Council* [1964] 1 QB 214 at 238; [1963] 3 WLR 38 at 53-4; *Television Corporation Ltd v Commonwealth* (1963) 109 CLR 59 at 70, 71; [1964] ALR 115; *Transport Action Group Against Motorways v Roads and Traffic Authority* (1999) 46 NSWLR 598 at [112]
[100] *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734
[101] *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* (2005) 141 LGERA 376; *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277; *GPT Re Ltd v Wollongong City Council* (2006) 151 LGERA 116; *Hurstville City Council v Renaldo Plus 3 Pty Ltd* [2006] NSWCA 248 (8 September 2006); *St Helen's Area Landcare and Coastcare Group Inc v Break O'Day Council* (2007) 151 LGERA 421; *Mid-Western Community Action Group Inc v Mid-Western Regional Council and Stockland Development Pty Ltd* [2007] NSWLEC 411 (18 July 2007)

Such a decision is an improper exercise of the power to grant consent. This is not because uncertainty is intrinsically a vice, but because such an exercise of power is outside that intended and permitted by the statute. The exercise of a statutory power to grant consent to a development must result in a consent under the statute and furthermore a consent to the application made under the statute. The ancillary power to impose conditions on a consent cannot be exercised in such a way as to have the consequence that the exercise of the power fails to answer the description of a consent or a consent to the application made.[102] A consent with a condition that leaves open the possibility that the development could be significantly different is not a consent to the application made.[103]

Questions of degree are involved.[104] Retention of flexibility or delegation of supervision of some stage of a development may be desirable and in accordance with the statutory scheme.[105] The statute may expressly permit an exercise of power to grant consent subject to conditions which leave certain aspects to be carried out to the satisfaction of the consent authority or some other person specified by the consent authority[106] or which identify express outcomes or objectives which the development or a specified aspect of it must achieve and clear criteria against which achievement of the outcome or objective must be assessed.[107]

A condition will only be invalid if it falls outside the class of conditions which the statute either expressly or impliedly permits.[108] Where a condition does fall outside what the statute permits, the purported consent is not a consent at all.

3.5.2 Judicial approach to uncertainty

Initially, courts try to avoid a conclusion of uncertainty by adopting a construction which gives statutory instruments and decisions practical effect. This approach has been reiterated in a number of recent decisions.

In *Westfield Management Ltd v Perpetual Trustee Company Ltd*[109] Hodgson JA (with whom Tobias and Basten JJA agreed) held:

> "[36] Certainty as such was not a requirement for validity, though uncertainty could be an element of unreasonableness: *Cann's Pty. Limited v. The Commonwealth* (1946) 71 CLR 210 at 227-8; *Genkem Pty. Limited v. Environment Protection Authority* (1994) 35 NSWLR 33

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[102] *Winn v Director-General of National Parks & Wildlife* (2001) 130 LGERA 508 at [13], [14]; *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at 292 [54]; *Hurstville City Council v Renaldo Plus 3 Pty Ltd* [2006] NSWCA 248 (8 September 2006) at [62], [90]

[103] *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 and *Winn v Director-General of National Parks & Wildlife* (2001) 130 LGERA 508 at [16]; *St Helen's Area Landcare and Coastcare Group Inc v Break O'Day Council* (2007) 151 LGERA 421 at 426 [11]-[12] and *Mid-Western Community Action Group Inc v Mid-Western Regional Council and Stockland Development Pty Ltd* [2007] NSWLEC 411 (18 July 2007) at [22]

[104] *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* (1999) 46 NSWLR 598 at [117]

[105] *Scott v Wollongong City Council* (1992) 75 LGRA 112 at 118 and *Transport Action Group Against Motorways v Roads and Traffıc Authority* (1999) 46 NSWLR 598 at [117]-[122]

[106] See s 80A(2) of the *Environmental Planning and Assessment A*ct 1979 (NSW)

[107] See s 80A(4) of the *Environmental Planning and Assessment Act* 1979 (NSW)

[108] *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* (2005) 141 LGERA 376 at 412 [89]; *Kindimindi Investments Pty Ltd v Lane Cove Council (*2006) 143 LGERA 277 at 292 [55] and 293 [57]; *GPT Re Ltd v Wollongong City Council* (2006) 151 LGERA 116 at 146 [90]; *Hurstville City Council v Renaldo Plus 3 Pty Ltd* [2006] NSWCA 248 (8 September 2006) at [89]-[90]

[109] [2006] NSWCA 245 (8 September 2006)

> at 42. In any event, he [Mr Walker] submitted, as part of upholding the effectiveness of instruments, the Court would try to give them practical effect by avoiding uncertainty. Instruments such as consents and conditions of consent are to be construed, not as documents drafted with legal expertise, but to achieve practical results: *Gill v. Donald Humberstone & Co. Limited* [1963] 1 WLR 929 at 933-4; *Driscoll v. J. Scott Pty. Limited* (1976) 50 ALJR 528 at 531; *Hecar Investments & Co. Pty. Ltd. v. Lake Macquarie Municipal Council* (1984) 53 LGRA 322 at 323.
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> …
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> [40] In my opinion, the question of interpretation should be approached on the principles referred to by Mr. Walker. Just as a contract should be construed, if possible, so that its validity is preserved and uncertainty avoided (see for example *Meehan v. Jones* (1982) 149 CLR 571 at 589, and *Upper Hunter County District Council v. Australian Chilling & Freezing Co. Limited* (1968) 118 CLR 429 at 436-7), so also should instruments of this kind. Plainly, the Council intended to achieve something substantive by condition 56, and it should be construed if possible so as to give effect to that intention."[110]

The High Court refused special leave to appeal but added a comment as to the correct approach to construing conditions of consent:

> "Special condition 56 is to be construed and its validity assessed in accordance with the principles explained by Justice Dixon in *King Gee Clothing Company Proprietary Limited v The Commonwealth* 91946) 71 CLR 210 at 227 to 228, and not by recourse to those principles directed to saving bargains between consensual parties and stated by Chief Justice Barwick in *Upper Hunter County District Council v Australian Chilling and Freezing Company Limited* (1968) 118 CLR 429 at 436 to 437."[111]

The passage from the Court of Appeal's judgment was applied recently by Biscoe J in *Anderson v Minister for Infrastructure and Planning and Natural Resources*[112] and by Jagot J in *Mid-Western Community Action Group Inc v Mid-Western Regional Council and Stockland Development Pty Ltd*.[113]

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[110] [2006] NSWCA 245 (8 September 2006) at [36] and [40]
[111] *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA Trans 367 (1 August 2007) at p 23
[112] (2006) 151 LGERA 229 at 258 [82]
[113] [2007] NSWLEC 411 (18 July 2007) at [23]; See also *Kennedy v Director General of the Department of Environment and Conservation* [2006] NSWLEC 456 (26 July 2006) at [74]