Land and Environment Court
New South Wales

Case Name:	Billinudgel Property Pty Ltd v Minister for Planning
Medium Neutral Citation:	[2016] NSWLEC 139
Hearing Date(s):	13 July 2016
Date of Orders:	4 November 2016
Date of Decision:	4 November 2016
Jurisdiction:	Class 4
Before:	Robson J
Decision:	(1) The summons is dismissed. (2) The applicant is to pay the respondent's costs. (3) The exhibits are returned.
Catchwords:	JUDICIAL REVIEW – Part 3A concept plan approval – power of Minister to modify – meaning of "modification of approval" – inappropriate to apply "test" – proposed revocation of condition beyond power to modify JUDICIAL REVIEW – Part 3A concept plan approval – power of Minister to modify – whether an implied or ancillary power to modify – implied power must be reasonably necessary to exercise express power – no implied or ancillary power
Legislation Cited:	Environmental Planning and Assessment Act 1979 (NSW) s 5, Pt 3A, ss 75J, 75O, 75P, 75W, Pt 4, ss 96, 96A, Sch 6A, cll 2, 3 National Health Act 1953 (Cth) s 133 State Environmental Planning Policy (Major Development) 2005 (NSW) cl 6
Cases Cited:	Barrick Australia Ltd v Williams (2009) 74 NSWLR 733; [2009] NSWCA 275

	CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384; [1997] HCA 2
	Coffs Harbour City Council v Minister for Planning and Infrastructure (2013) 193 LGERA 203; [2013] NSWCA 44
	Meriton Property Services Pty Ltd v Minister for Planning and Infrastructure [2013] NSWLEC 1260
	Nguyen v Minister for Health & Ageing (2002) 71 ALD 529; [2002] FCA 1241
	Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28
	SM v R (2013) 46 VR 464; [2013] VSCA 342
	Ulan Coal Mines Limited v Minister for Planning and Moolarben Coal Mines Pty Limited (2008) 160 LGERA 20; [2008] NSWLEC 185
	Williams v Minister for Planning (2009) 164 LGERA 204; [2009] NSWLEC 5
	Williams v Minister for Planning (No 3) [2010] NSWLEC 204
	Williams v Minister for Planning (No 2) [2011] NSWLEC 62
Texts Cited:	Macquarie Dictionary
Category:	Principal judgment
Parties:	Billinudgel Property Pty Ltd (Applicant) Minister for Planning (Respondent)
Representation:	Counsel: N Eastman (Applicant) L F Sims (solicitor) (Respondent) Solicitors: McCartney Young Lawyers (Applicant) Department of Planning and Environment (Respondent)
File Number(s):	2016/00155218
Publication Restriction:	N/A

JUDGMENT

1 The applicant, Billinudgel Property Pty Ltd, seeks a declaration that the respondent, the Minister for Planning ('Minister'), has the power to assess, determine and approve its application seeking to modify concept plan approval MP09_0028 given under the now repealed Pt 3A of the *Environmental Planning and Assessment Act 1979* (NSW) *('EPA Act')*. This concept plan approval relates to a "cultural events site" known as North Byron Parklands, which is situated on land located near the intersection of Tweed Valley Way and Jones Road, Yelgun, approximately 25km north of Byron Bay ('subject site').

2 The original concept plan application, which was submitted with a project application, sought approval to host outdoor events, including large music festivals, at the subject site with a maximum of 50,000 patrons. The original proposal was declared a major project on 23 July 2009. The Planning and Assessment Commission ('PAC'), as the Minister's delegate, gave approval to the concept plan (and the associated project application) on 24 April 2012, subject to certain modifications pursuant to s 75O(4) of the *EPA Act*.

3 For present purposes, the PAC's modifications effectively created a "trial period" in relation to the operation of the subject site, and required that:

(1) the concept plan approval terminate at the end of 2017, and that any outdoor events after this date be the subject of assessment under Pt 4 of the *EPA Act*;

(2) the number of outdoor events and total number of event days in a calendar year be restricted during the trial period; and

(3) during the trial period, the number of patrons at the largest outdoor event of the calendar year be restricted to 25,000 persons in the first year of operation, and increase by 2,500 persons each year (if key performance indicators were met), until it reached 35,000 in its final year of operation.

4 The applicant now seeks to host outdoor events at the subject site in the manner for which it originally sought approval. In particular, the applicant seeks perpetual approval for an increased number of outdoor events over an increased number of event days, with the largest outdoor events catering for a maximum of 50,000 people, without being subject to further assessment under Pt 4 of the *EPA Act*. Accordingly, the applicant has lodged an application with the Minister pursuant to s 75W of the *EPA Act* for the modification of the approval granted by the PAC ('subject application'). The Minister's position is that some of the proposed modifications cannot be made under the *EPA Act*, as they would go beyond what constitutes a 'modification'.

Issues in dispute

5 During the course of the hearing it became apparent that further narrowing of the real issue to be determined was required, and the parties provided to the Court at a later date separate documents containing their interpretations of that issue. By so doing the applicant abandoned its application with respect to the modification of the project approval and sought the following declaration:

> Declare that the Concept Approval MP_0028 including the determination made under s 75P may be modified by the deletion of Part C-C1 of Concept Approval either under s 75W and/or by implied or ancillary administrative powers (described in *Nguyen v Minister for Health & Ageing* (2002) 71 ALD 529 at [64]ff.

6 The Minister's revised real issue for determination is:

> Whether it is within the Minister's power to modify the determination or determinations under Division 3A, either under section 75W or otherwise, to:
> - remove the determination or term of the determination that the stage of the project involving the carrying out of events after 2017 is to be subject to Part 4 of the Act (under section 75P(1)(b));
> - remove the determination or term of the determination for further environmental assessment requirements for that stage (under section 75P(2)(c)); and
> - add a determination or term of the determination that no further environmental assessment is required for that stage (under section 75P(1)(c)).

7 I consider that the applicant's articulation of the relief it now seeks subsumes the issue contended for by the Minister. Conversely, I consider that the

Minister's version is unclear, and does not consider the full gambit of arguments that were presented to the Court. As such, I adopt the applicant's contended real issue for determination, amended as follows:

> Declare that the concept plan approval MP09_0028, as amended and including the determination made under s 75P of the *EPA Act*, may be modified by the deletion of Condition C1 pursuant to either the operation of s 75W of the *EPA Act* and/or by implied or ancillary administrative powers as described in *Nguyen v Minister for Health & Ageing* (2002) 71 ALD 529; [2002] FCA 1241.

8 Importantly, no merit assessment of the modification application has yet occurred, and the parties were in agreement that there is utility in first determining whether or not the Minister has the power to modify the approval as sought. As such, I do not engage in any assessment of the merits of the application.

9 For the reasons given below, I decline to grant the relief sought by the applicant.

Background

10 On 23 July 2009, the North Byron Parklands project was declared a major project to which Pt 3A of the *EPA Act* applied, pursuant to cl 6 of the *State Environmental Planning Policy (Major Development) 2005* (NSW). Whilst Pt 3A of the *EPA Act* was repealed on 1 October 2011, the project became a transitional Pt 3A project pursuant to cl 2 of Sch 6A of the *EPA Act*. Part 3A (as modified by the transitional provisions in Sch 6A) therefore continues to operate with respect to the project.

11 The PAC granted approval to the concept plan pursuant to s 75O of the *EPA Act*, subject to modifications, on 24 April 2012. The project application was similarly approved on the same date pursuant to s 75J of the *EPA Act*. These approvals involved granting consent for stages 1 and 2 of the project, which involved developing the subject site to host outdoor events and constructing onsite water facilities respectively. An assessment of stage 3, which involves

the development of a conference centre and associated accommodation, has not yet been undertaken.

12 The approved stages of the North Byron Parklands project allowed the subject site to be used for cultural, educational and outdoor events with ancillary camping and car parking for three outdoor events per calendar year over a five year trial period concluding at the end of 2017. A total of 10 event days per calendar year were originally permitted, and could include a "large", "medium", and "small" trial outdoor event. The "large" outdoor event in the first year of operation could consist of a maximum of 25,000 patrons in the first year of operation, and this was to progressively increase up to a maximum of 35,000 patrons by the fifth year of operation, which was final year of the trial period.

13 Importantly for present purposes and as noted above, the concept plan approval was granted subject to modifications pursuant to s 75O(4) of the *EPA Act*. Amongst these modifications is Condition C1, which forms part of Part 4 of the concept plan approval and provides as follows:

> **PART C – REQUIREMENTS FOR FUTURE APPLICATIONS**
>
> Pursuant to sections [sic] 75P(2)(c) of the Act the following requirements apply, as relevant, with respect to future stages of the project to be assessed under Part 4 of the Act:
>
> **C1 Outdoor events after 2017**
>
> 1) The performance of trial outdoor events must be addressed as part of any development application under Part 4 for outdoor events after 2017.
> 2) Any development application for outdoor events after 2017 must be accompanied by an environmental management and monitoring plan that details the management strategies, monitoring regimes and regular reporting on the following matters:
>   - noise
>   - traffic and transport
>   - flora and fauna
>   - bushfire
>   - flood
>   - surface water
>   - event management.
> 3) The Stage 2 works must be completed before any outdoor events are held after 2017.

14 The effect of this provision was to establish a 5 year limited trial period for the project at the subject site, and that any outdoor events beyond 2017 would require a further development application to be made, considered and approved under Pt 4 of the *EPA Act*. It is noted that whilst the phrase "outdoor events" is not defined, the term is used synonymously with "events" throughout the concept plan approval.

15 Since April 2012, the concept plan approval has been modified pursuant to s 75W of the *EPA Act* on three occasions, being:

(1) on 3 December 2012, the Minister's delegate approved a modification of the approved concept plan to rectify a number of minor typographical errors ('Mod 1');

(2) on 29 January 2013, the Minister's delegate approved a modification of the approved concept plan to rectify a further typographical error ('Mod 2'); and

(3) on 22 April 2016, the Minister's delegate approved a modification of the approved concept plan to amend noise management measures, allow small community events and make various administrative amendments ('Mod 3').

16 Each of these modifications was the subject of an environmental impact report commissioned by the Director General, and none of these modifications involved making any amendments to Condition C1.

17 The subject application was submitted to the Minister for consideration on 28 April 2016 and seeks, amongst other things, the removal of Condition C1 in order to allow future outdoor events to be held at the subject site without the requirement for further development assessment pursuant to Pt 4 of the *EPA Act*. As a result of the narrowing of the issues following the hearing, the other aspects of the subject application are no longer the subject of these proceedings.

18 The parties agree, and I find, that Condition C1 is properly characterised as a "determination" (of the Minister) under s 75P(1)(b) of the *EPA Act*, being a determination that future stages of the development are to be assessed under other provisions of the Act ('(1)(b) determination'). This is different to a determination under s 75P(1)(c) of the *EPA Act*, which involves a determination that no further environmental assessment is required for the project ('(1)(c) determination').

19 On the applicant's case, this (1)(b) determination can be modified by the Minister pursuant to s 75W of the *EPA Act* to become a (1)(c) determination. The Minister does not agree.

Legislative framework

20 It is not in dispute that the concept plan approval forms part of a transitional Part 3A project pursuant to cl 2 of Sch 6A of the *EPA Act*. As such, given that the application to remove Condition C1 has been brought since the repeal of Part 3A on 1 October 2011, the relevant version of the *EPA Act* is that which existed immediately prior to its repeal pursuant to cl 3 of Sch 6A of the *EPA Act*.

21 Approvals for concept plans are granted under s 75O of the *EPA Act*, which provided as follows:

> **75O Giving of approval for concept plan**
>
> (1) If:
>
> (a) the proponent makes an application for the approval of the Minister under this Part of a concept plan for a project, and
>
> (b) the Director-General has given his or her report on the project to the Minister,
>
> the Minister may give or refuse to give approval for the concept plan for the project.
>
> (2) The Minister, when deciding whether or not to give approval for the concept plan, is to consider:

(a) the Director-General's report on the project and the reports and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report, and

(b) if the proponent is a public authority—any advice provided by the Minister having portfolio responsibility for the proponent, and

(c) any findings or recommendations of the Planning Assessment Commission following a review in respect of the project.

(3) In deciding whether or not to give approval for the concept plan for a project, the Minister may (but is not required to) take into account the provisions of any environmental planning instrument that would not (because of section 75R) apply to the project if approved. However, the regulations may preclude approval for a concept plan for the carrying out of a class of project (other than a critical infrastructure project) that such an instrument would otherwise prohibit.

(4) Approval for a concept plan may be given under this Division with such modifications of the concept plan as the Minister may determine.

(5) Approval for the concept plan may be given under this Division subject to satisfactory arrangements being made, before final approval is given for the project or any stage of the project under this Part or under the other provisions of this Act, for the purpose of fulfilling the obligations in a statement of commitments made by the proponent (including by entering into a planning agreement referred to in section 93F).

22 Section 75P of the *EPA Act* provided as follows:

75P Determinations with respect to project for which concept plan approved

(1) When giving an approval for the concept plan for a project, the Minister may make any (or any combination) of the following determinations:

(a) the Minister may determine the further environmental assessment requirements for approval to carry out the project or any particular stage of the project under this Part (in which case those requirements have effect for the purposes of Division 2),

(b) the Minister may determine that approval to carry out the project or any particular stage of the project is to be subject to the other provisions of this Act (in which case the project or that stage of the project ceases to be a project to which this Part applies),

(c) the Minister may determine that no further environmental assessment is required for the project or any particular stage

of the project (in which case the Minister may, under section 75J, approve or disapprove of the carrying out of the project or that stage of the project without further application, environmental assessment or report under Division 2).

(1A) The further requirements for approval to carry out the project or any part of the project that the Minister may determine under subsection (1) (a) are not limited to matters that the Director-General may require under Division 2.

(2) If the Minister determines that approval to carry out the project or any particular stage of the project is to be subject to the other provisions of this Act, the following provisions apply:

(a) the determination of a development application for the project or that stage of the project under Part 4 is to be generally consistent with the terms of the approval of the concept plan,

(a1) any consent granted for the project or that stage of the project under Part 4 is to be subject to such conditions as the Minister directs for the purpose of fulfilling the obligations in a statement of commitments submitted by the proponent (in which case those conditions cannot be modified without the approval of the Minister and a person cannot appeal to the Court under this Act in respect of the direction or any such conditions imposed by the consent authority),

(b) the project or that stage of the project is not integrated development for the purposes of Part 4,

(c) any further environmental assessment of the project or that stage of the project under Part 4 or Part 5 is to be undertaken in accordance with the requirements determined by the Minister when approving the concept plan (despite anything to the contrary in that Part),

(c1) a provision of an environmental planning instrument prohibiting or restricting the carrying out of the project or that stage of the project under Part 4 (other than a project of a class prescribed by the regulations) does not have effect if the Minister so directs,

(d) the Minister may, by order, declare that that stage of the project (or any part of it) is exempt or complying development for the purposes of this Act,

(e) the Minister may, by order, declare that that stage of the project (or any part of it) is not designated development for the purposes of this Act,

(f) the Minister may, by order, revoke or amend (as the case requires) the declaration of the project under this Part.

An order under paragraph (d), (e) or (f) is to be published in the Gazette and has effect according to its tenor.

23 Section 75W of the *EPA Act*, which allows for modifications of these approvals, provided as follows:

75W Modification of Minister's approval

(1) In this section:

Minister's approval means an approval to carry out a project under this Part, and includes an approval of a concept plan.

modification of approval means changing the terms of a Minister's approval, including:

(a) revoking or varying a condition of the approval or imposing an additional condition of the approval, and

(b) changing the terms of any determination made by the Minister under Division 3 in connection with the approval.

(2) The proponent may request the Minister to modify the Minister's approval for a project. The Minister's approval for a modification is not required if the project as modified will be consistent with the existing approval under this Part.

(3) The request for the Minister's approval is to be lodged with the Director-General. The Director-General may notify the proponent of environmental assessment requirements with respect to the proposed modification that the proponent must comply with before the matter will be considered by the Minister.

(4) The Minister may modify the approval (with or without conditions) or disapprove of the modification.

(5) The proponent of a project to which section 75K applies who is dissatisfied with the determination of a request under this section with respect to the project (or with the failure of the Minister to determine the request within 40 days after it is made) may, within the time prescribed by the regulations, appeal to the Court. The Court may determine any such appeal.

(6) Subsection (5) does not apply to a request to modify:

(a) an approval granted by or as directed by the Court on appeal, or

(b) a determination made by the Minister under Division 3 in connection with the approval of a concept plan.

(7) This section does not limit the circumstances in which the Minister may modify a determination made by the Minister under Division 3 in connection with the approval of a concept plan.

24 Before proceeding, I note that because the original concept plan approval was the result of a "determination made by the Minister under Division 3" for the purposes of s 75W(6)(b) of the *EPA Act*, s 75W(5) could not be triggered if the applicant was dissatisfied with the Minister's determination, or if the Minister failed to make a determination.

Evidence

25 Whilst no oral evidence was called, there were a number of documents before the Court. In particular, the agreed bundle of documents contained a range of documents including:

(1) the Director-General's Environmental Assessment Report dated November 2011, which was relied upon by the applicant only for background information;

(2) the PAC's original determination of the concept plan, and stages 1 and 2 of the project application;

(3) various approved plans relating to the subject site;

(4) correspondence and memoranda of advice relating to the subject application; and

(5) the earlier modification applications and approvals in relation to the project, being Mod 1, Mod 2 and Mod 3.

26 A document entitled "Modification Application in relation to Concept and Project Approval MP 09_0028", which is in effect the subject application, was also tendered. This document included an appendix that contained the terms of approval in mark-up form, showing the various amendments made to the original concept plan approval and project approval as a result of Mods 1, 2 and 3, and the proposed amendments sought in the subject application.

Submissions

Applicant's submissions

27 The applicant submitted that the Minister has the power under s 75W of the *EPA Act* to consider and either disapprove or approve the subject application insofar as it relates to the removal of Condition C1.

28 The applicant's primary submission related to how the term "modification of approval", which is defined in s 75W(1) of the *EPA Act*, should be construed. The applicant submitted that this phrase should be construed broadly, and that the removal of Condition C1 was clearly a 'modification' for the purposes of this section.

29 The applicant sought to rely on the two "tests" it considered may be available on existing authority.

30 One test was submitted to be that outlined by Basten JA in *Barrick Australia Ltd v Williams* (2009) 74 NSWLR 733; [2009] NSWCA 275 ('*Barrick*'), where his Honour stated at [53] that:

> the modification of an approval was something intended to have limited environmental consequences beyond those which had been the subject of assessment.

31 It was submitted that the removal of Condition C1 involved only amendments to the concept plan that had already been subject to assessment during the consideration of the original application, and that the potential impacts of the amendments were therefore known to the relevant parties. It was submitted that whether the modification should be granted would still involve an assessment on its merits, and that data collected during the trial period would assist the Minister to determine whether the modification would go beyond "limited environmental consequences".

32 The applicant submitted that the present factual situation was the converse to that which was considered in *Barrick*, as that case involved unknown consequences that had not been assessed. It was therefore submitted that

because the removal of Condition C1 would have no environmental consequences beyond those that had already been assessed, it met what the applicant termed the "test" set by Basten JA in *Barrick*.

33 The applicant further submitted that the other "test" was that noted by Biscoe J in *Williams v Minister for Planning (No 3)* [2010] NSWLEC 204 ('*Williams (No 3)*'), which was related to *Barrick* insofar as it involved the same project, but different proposed modifications. His Honour, referring to his earlier decision in *Williams v Minister for Planning* (2009) 164 LGERA 204; [2009] NSWLEC 5 (which was overturned on appeal in *Barrick*) ('*Williams (No 1)*'), notes at [23] that the appropriateness of his earlier expressed test of "radical transformation" had not been explicitly addressed by the Court of Appeal.

34 Adopting the dicta of Biscoe J in *Williams (No 1)*, the applicant submitted that the removal of Condition C1 was not a "radical transformation" of the project for two reasons. The first reason involved a comparison of the subject application insofar as it related to the removal of Condition C1 with the PAC's approval. The applicant noted that the PAC had, when approving the concept plan, modified it to include a trial period by operation of Condition C1. This, it was submitted, was not a "radical transformation", and was within the PAC's authority pursuant to the decision of Preston CJ in LEC in *Ulan Coal Mines Limited v Minister for Planning and Moolarben Coal Mines Pty Limited* (2008) 160 LGERA 20; [2008] NSWLEC 185. The applicant then noted that it was only seeking to remove Condition C1, which had been introduced by way of the PAC's modification. Thus, it submitted that the removal of Condition C1 could not be a "radical transformation", as it was only seeking to modify the concept plan approval by removing what had been a reasonable modification.

35 The second reason related to prior assessments of the project. Similar to its submissions summarised in paragraphs 31 and 32 above, the applicant submitted that the removal of Condition C1 did not impact the fundamental nature of the proposal because the proposed alterations had been extensively assessed from an environmental viewpoint and were generally consistent with

the project as it presently operates. As such, it was further submitted that the removal of Condition C1 does not constitute a "radical transformation".

Minister's submissions

36 The Minister contended that he did not have the power to modify the approved concept plan.

37 The Minister's primary position involved the construction of s 75W of the *EPA Act*, and in particular it interaction with s 75P(1) of the *EPA Act*. The Minister submitted that:

(1) the original concept plan approval was a (1)(b) determination, as Condition C1 (and the chapeau to Part C which contains Condition C1) required that the concept plan "be subject to other provisions of [the *EPA Act*]", namely Pt 4; and

(2) the subject application, insofar as it relates to the removal of Condition C1, seeks to amend the original concept plan approval to delete the (1)(b) determination, and by implication substitute it for a (1)(c) determination, as no environmental assessment pursuant to other provisions of the *EPA Act*, such as those contained in Pt 4, would be required.

38 The Minister then noted that the power under s 75W(1) of the *EPA Act* allows the Minister to modify "the terms of any determination made by the Minister". The Minister submitted that this allowed him only to change the *terms* of the original concept plan approval, such as increasing the number of attendees, but did not permit him to change the actual determination that was originally made. As such, it was submitted that the original (1)(b) determination could not be substituted with a (1)(c) determination.

39 The Minister submitted that this narrow construction was appropriate because it provided a level of certainty to applicants as it precluded consent authorities from subsequently amending the "legal pathway" that apply to a project. It

was also submitted that the determination in *Barrick* was of limited present relevance, as that matter concerned the modification of a project approval rather than a concept plan approval, and that the criteria for amending a concept plan approval would be different to those espoused by Basten JA at [53].

Applicant's submissions in reply

40 The applicant took the position that the interaction between ss 75P and 75W of the *EPA Act* did not prevent the Minister from assessing the subject application insofar as it relates to Condition C1. It submitted that the phrase "changing the terms of the determination" should not be construed in a narrow fashion that did not allow the Minister to amend previous determinations. Relying on principles of statutory construction outlined in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; [1997] HCA 2 and *SM v R* (2013) 46 VR 464; [2013] VSCA 342, the applicant submitted that:

(1) the natural and ordinary interpretation of the word "terms" includes the content of any determination under s 75P(1) of the *EPA Act*, which is reflected in the fact that a combination of determinations relating to a single approval can be made under that provision; and

(2) section 75W of the *EPA Act* should be construed in a facultative and beneficial fashion with the widest possible ambit that the language permits, as it also provides the Minister with the power to modify approvals under s 75O of the *EPA Act*.

Legal context

41 The proper construction and ambit of s 75W of the *EPA Act* has not in circumstances such as the present been closely considered.

42 The section was first considered by Biscoe J in *Williams (No 1)*. This matter involved a modification to a development consent relating to a mine which, amongst other things, sought to add 11 years to the life of the mine. His Honour made the following relevant observations in relation to s 75W of the *EPA Act*:

> [6] Curiously, the defined phrase "modification of approval" in s 75W is not used. Nevertheless, the definition is of some utility because "If an Act or instrument defines a word or expression, other parts of speech and grammatical forms of the word or expression have corresponding meanings": s 7 *Interpretation Act 1987*.
>
> ...
>
> [53] ...A request to "modify" may be classified as a "jurisdictional fact", an expression generally "used to identify a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question": *Gedeon v Cmr of the New South Wales Crime Commission* [2008] HCA 43; (2008) 249 ALR 398 at [43] ...
>
> [54] The first question is whether "modification" in s 75W means to change without radical alteration (or similar). There is no considered authority on the meaning of s 75W. It is clear that "the approval" referred to in s 75W that may be modified is the approval, with any earlier modifications, as it stood at the time of the modification request...
>
> [55] The applicant's reference to "radical alteration" picks up similar judicial comments about the meaning of "modification" elsewhere in the EPA Act, not in the context of Pt 3A: for example, *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* [1999] NSWCA 196 ; (1999) 46 NSWLR 598 at [76], [84], [105] per Mason P, at [163] per Sheller JA; and *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 at 474 per Mason P. In those cases, the word "modify" was given its ordinary meaning of "to alter without radical transformation" ...
>
> ...
>
> [57] ...Having regard to that consequence and the objects of the Act to encourage protection of the environment, ecologically sustainable development, and "proper" development of natural resources (s 5(a)), the court should be specially careful to ascertain whether that is what the legislature intended. A modified approval must of necessity change its predecessor in some respects. However, I do not consider that the words "changing the terms" in the s 75W definition go so far as to contemplate a radical transformation. Accordingly, in my opinion, a modification of approval in s 75W means changing the terms of an existing approval without radical transformation.

43 Although the Court of Appeal set aside the judgment in *Barrick*, this was not done on the basis that the judgment of Biscoe J in *Williams (No 1)* was incorrect. Rather, Basten JA found at [38]:

> The preferred construction of s 75W is that it confers on the Minister an implicit obligation to be satisfied that the request falls within the scope of the section ...

44 As such, the decision of Biscoe J in *Williams (No 1)* was set aside on the basis that there was no jurisdictional fact that could be determined by the Court. Justice Basten noted in *Barrick* at [32] that submissions on this point were not made before Biscoe J in the primary proceedings.

45 Despite this finding, Basten JA still considered the scope of s 75W of the *EPA Act*, although he noted that "it is strictly unnecessary to embark upon the anterior question as to the proper construction of "modification of approval" in s 75W": *Barrick* at [43]. For present purposes, his Honour made the following comments:

> [51] There was force in these criticisms...of the language adopted by the primary judge of "radical transformation"...*Such difficulties are likely to arise with any descriptive phrase proffered by way of exegesis with respect to the statutory language.*
>
> [52] There are two related reasons why this is so. First, the very concept of a project is amorphous in a sense which is not true of an object, such as a car. Although there will be circumstances in which it is not clear which descriptor applies, it is usually possible to distinguish between a modified vehicle and a replacement vehicle. By contrast, a project is, at least in part, a process and may be characterised or described from a variety of different perspectives. Secondly, because there are many varying uses of land, it is difficult to identify precise terminology which will apply across the broad range of potential projects. For these reasons, the Court should be wary of invitations to explain the statutory language.
>
> [53] The absence of precision in relation to what might constitute a modification of an approval has formed part of the reasoning for considering that the legislature did not intend that it be the subject of conclusive determination only by a court. As noted, the defined phrase means "changing the terms of an approval to carry out a project under this Part". Although that is defined to include changing a condition of the approval, *there is no clear dividing line between that which may constitute a condition and that which may constitute an element of the underlying project.* All that can usefully be said in the abstract is that the requirement for approval of a modification must be understood in the context of three factors. The first is that the subject

> matter of Pt 3A is defined by reference to major infrastructure developments, as identified by the Minister (or by a State environmental planning policy), as having State or regional environmental planning significance: s 75B. Secondly, the project is required to undergo environmental assessment and public consultation, of a kind not required of a modification. Construing s 75W in its context, it is clear that the modification of an approval was something intended to have limited environmental consequences beyond those which had been the subject of assessment. (Given the powers of the Director-General, it cannot be said, of course, that only modifications which properly required no further environmental assessment were envisaged.) Thirdly, the "consent authority" was to be the Minister. Conferring authority on a Minister may have a number of purposes. One such purpose may be to permit the decision-making authority to have regard to matters such as State and regional planning significance, being matters which stand above and beyond developments having limited local impact or insignificant impact at a regional or State level.
>
> [54] These considerations inform the content of the definition of "modification of approval" and the scope within which the terms of an approval to carry out a project may properly be sought to be changed. Beyond these general remarks, it is neither helpful nor appropriate for this court to go in this case. [Emphasis added.]

46 Justice Sackville, who agreed with the orders of Basten JA for different reasons, stated at [64] that he would "prefer not to express a view as to the proper construction of the expression "modification of approval" used in s 75W". However, his Honour did note at [64] that:

> The precise meaning of the statutory expression may have a bearing on the scope of the powers entrusted to the Minister. In particular, it may bear on the question whether any approval by the Minister must comply with objective standards in order to be lawful or whether it is sufficient for the Minister to be satisfied of certain matters (and, if so, what matters).

47 The scope of s 75W of the *EPA Act* was again considered by Biscoe J in *Williams (No 3)*. Whilst those proceedings related to the same development as *Williams (No 1)* and *Barrick*, they were brought in relation to a different proposed modification under s 96 of the *EPA Act*, rather than s 75W of the *EPA Act*. However, Biscoe J nonetheless made the observation at [23] that:

> The Court of Appeal did not decide what "modification of an approval" in s 75W means or does not mean; in particular, whether it does not include a radical transformation of an existing development consent (as I had held). Basten JA (McColl JA agreeing) noted the absence of a definition, commented on the context in which the expression must be understood, and concluded that the court should be wary of invitations to explain the meaning of the statutory language.

48 In *Williams v Minister for Planning (No 2)* [2011] NSWLEC 62 ('*Williams (No 2)*'), another matter involving the same mine but again different modifications, Pain J noted at [56] that:

> The power to modify provided in s 75W does not require a comparison with the development for which consent was originally granted, unlike s 96 of the EPA Act; see *[Williams No 1]* at [54]. Basten JA observed in *Barrick* at [53] that the requirement for approval of a modification in s 75W must be understood in the context of three factors. Firstly, the subject matter of Pt 3A is defined by reference to major infrastructure developments, secondly that the modification of an approval was something intended to have limited environmental consequences beyond those which had been the subject of assessment, and thirdly the Minister was the consent authority and was to have regard to matters such as State and regional planning significance.

49 Her Honour continued at [80] to note that the conclusions of Basten JA at [53] in *Barrick* "[do] not identify definitively any limit on the power to modify under s 75W". Her Honour nonetheless found that the proposed modification to increase both ore production and the lifespan of the mine was:

(1) at [57], "not a radical change to the existing project"; and

(2) at [81], "not a substantially different development".

50 Section 75W of the *EPA Act* was also considered by Senior Commissioner Moore (as his Honour then was) in *Meriton Property Services Pty Ltd v Minister for Planning and Infrastructure* [2013] NSWLEC 1260 ('*Meriton*'). This matter involved an application to increase the number of stories and apartments in a high density residential development.

51 Relevantly, Senior Commissioner Moore (sitting with Commissioner Pearson) made the following comments in relation to the definition of "modification of approval" in s 75W of the *EPA Act*:

> [32] We accept that we should have regard to s 75W(1) and the inclusive definition. However...the definition is essentially, from the naked face of the words, an inclusive one and not intended to be confined or in any way narrowed by the elements that are specifically brought within it by ensuring that the nominated terms are left as inclusions without there being any ambiguity as to them forming part of the matter.

> [33] Thus, as a consequence, we are satisfied that the revoking or varying of a condition or imposing additional conditions or the changing of determinations made by the Minister under Div 3 do not act to narrow the words "Changing the terms of a Minister's approval."
>
> [34] In passing, we note that the terms of the Minister's approval include a listing of all of the matters that are relevant including identification of the plans and, that if we have the power and the Minister were to have the power (as he would) to vary the terms, that can vary any term that incorporates the numbers of the plans-that being the effective way that the modifications are incorporated in the conditions of consent.

52 The Senior Commissioner, after noting some further submissions of the Minister, continued:

> [40] We note that in, *Barrick*, the various members of the court adopted the position that it was not appropriate to adopt some prescriptive formulation consistent, for example, with the sort of formulation that is in s 96 of the Environmental Planning and Assessment Act to set out a characterisation test for modification applications under s 75W. We accept that some changes to a proposal, using a neutral word, might be so extreme as to fall outside the concept of modification. For example, to give an instance that is quite clearly fanciful (as well as being entirely unrelated to the present proposal) if there were to be an application for an Olympic swimming pool in the upper Hunter Valley granted consent pursuant to Pt 3A, it would be quite clearly absurd to deal with an approval modification application to turn it into an open cut coal mine.
>
> [41] However, here we are satisfied that there is a sufficient linear descent from [the approval as it then existed] to revised Modification 6 to be certain that this is, as a matter of fact, a series of modifications that is proposed. We do not, however, propose that the "sufficient linear descent" description is some sort of test, it is merely the appropriate term to apply to the application for which we have been given the responsibility of determination.

Consideration

Approach

53 As is clear from the above extracts, there is no established "test" available to determine whether the subject application, insofar as it relates to the removal of Condition C1, should be considered a request for "modification of approval" for the purposes of s 75W of the *EPA Act*.

54 In particular, I note the words of Basten JA in *Barrick*, where his Honour states at [53] that "there is no clear dividing line between that which may constitute a condition and that which may constitute an element of the

underlying project". As such, I do not propose to present a "test" that seeks to create a "clear dividing line". Rather, I adopt a two-step approach which I consider to be appropriate to undertake when considering whether an application to amend an approval constitutes a modification pursuant to s 75W of the *EPA Act*.

55 The first step in this approach involves determining what was actually approved by the Minister. This is consistent with the wording of s 75W of the *EPA Act*, and is the implicit (and sometimes explicit) starting point for the investigations undertaken in the above authorities. At least with regard to concept plans, this will be the concept plan approval as it existed at the date the request was made for the subject modification, rather than the concept plan approval as it was originally granted: *Williams (No 1)* at [54] (Biscoe J); *Williams (No 2)* at [56] (Pain J).

56 Importantly, an approved project is often going to be different to that sought in an application. Within bounds, this is the prerogative of the consent authority, as it generally has a discretion (such as that contained in s 75O(4) of the *EPA Act*) to modify an application as it sees fit. Once a consent authority grants approval for what it considers appropriate, the actual application generally ceases to be of relevance to that development or concept plan, and is effectively subsumed into the approval. It is therefore the approval that is modified pursuant to provisions such as s 75W of the *EPA Act*.

57 Once it is determined what precisely forms the approval, the second step is to consider whether an application seeks a modification of that approval.

58 Whilst there is limited guidance from previous cases on this point, the following can be surmised from the above authorities:

(1) the making of a modification pursuant to s 75W of the *EPA Act* is constrained in at least to some degree: *Barrick* at [53] (Basten JA); *Williams (No 1)* at [55] (Biscoe J); *Meriton* at [40] (Senior Commissioner Moore);

(2) there is no clear dividing line between what is a modification and what is not a modification: *Barrick* at [51] and [53] (Basten JA); *Meriton* at [40] (Senior Commissioner Moore);

(3) whether a proposed change constitutes a modification has generally been negatively defined as not being something else, whether that be:

(a) a change to "an element of the underlying project": *Barrick* at [53] (Basten JA);

(b) a "radical transformation": *Williams (No 1)* at [57] (Biscoe J);

(c) a "radical change to the existing project" or a change that meant that the modified development was "substantially different": *Williams (No 2)* at [57] and [81] (Pain J), and

(4) it is possible to determine whether a change is a modification without recourse to what does not constitute a modification, such as whether that change can be described as having "sufficient linear descent" from the approval: *Meriton* at [41] (Senior Commissioner Moore).

59 Further to this, I consider it appropriate to look at two further matters. The first is the natural meaning of the word "modification". Whilst the Macquarie Dictionary provides a number of unhelpful definitions of this word, it does construe it as referring to a "partial alteration". The word "modify", which is separately defined, is given the primary definition of "to change somewhat the form or quantities of; alter somewhat". Both these definitions support the proposition that a modification refers to a limited change.

60 The second is the meaning of the phrase "changing the terms", which is found twice in the definition of "modification of approval" in s 75W(1) of the *EPA Act*. The Macquarie Dictionary relevantly defines "terms" as being "conditions or stipulations limiting what is proposed to be granted or done". Further, to "change" something is relevantly defined as "to make something different;

alter in condition, appearance etc." or "to substitute another or others for; exchange for something else". Therefore, given its natural meaning, a modification is restricted to substituting the limiting conditions or stipulations that form part of an approval, rather than changing an underlying and essential part of the approval itself.

61 There is no clear way of determining whether an application to change an approval constitutes a modification. As such, this second step requires a consideration of whether any such application is a modification in light of the above considerations.

Application

First step

62 Given the limited scope of the issue for determination, I am only presently concerned with the operation of Condition C1. Condition C1 expressly limits the lifespan of the concept plan approval, and has not been amended by any prior modification. This, in effect, created the trial period which allowed the applicant to host outdoor events at the subject site until the end of 2017. Further outdoor events after this date cannot be conducted under this concept plan approval. Condition C1 requires that any further outdoor events be approved pursuant to Pt 4 of the *EPA Act* alongside a "management and monitoring plan". This is the approval to which regard should be had when determining whether the Minister has the power to modify.

63 Condition C1 places a limitation that was not sought in the original application, and places a restriction on the operation of the concept plan that did not form part of that application. Whilst the original application is not in evidence, its contents are extensively summarised in the Environmental Assessment Report prepared by the Director-General ('EAR'). The EAR notes that the applicant proposed to hold increasingly large outdoor events at the subject site pursuant to it meeting certain key performance indicators, and would reach its full capacity in its fifth year. The EAR makes no reference to any proposed condition that requires further concept plan approval, nor does it

provide any mechanism which allows the relevant consent authority to refuse the continuance of the concept plan after 2017.

64 However, despite these differences between the approval and what was sought in the application, the two conceptually merged upon approval being granted and cannot be dissociated. It is the approval to which the Minister should have regard when determining whether a modification can be made pursuant to s 75W of the *EPA Act*.

Second Step

65 As noted above, the second step involves a consideration of whether the subject application, insofar as it involves the removal of Condition C1, seeks to modify a term of the original concept plan approval, or seeks to make some greater change to the original concept plan approval.

66 The subject application seeks, amongst other things, to delete Condition C1 in its entirety. On its face, Condition C1 is a *term* of the concept plan approval, and its removal could theoretically constitute the "changing of terms" as one set of terms are substituted with another set of terms that exclude Condition C1.

67 However, I do not consider that this sufficiently reflects the role that Condition C1 plays in relation to the concept plan approval. Condition C1 constitutes a fundamental part of the concept plan approval. If it continues to operate, the consent granted to host outdoor events pursuant to the concept plan approval will cease on 31 December 2017, regardless of whether any 'conditions' are met. If there are to be any further outdoor events, they will be undertaken pursuant to a new approval granted under Pt 4 of the *EPA*. To this extent, Condition C1 should not be considered a "term" of the concept plan approval. It does not simply limit what can be done after 2017, but rather provides that nothing can be done under the concept plan approval. I therefore find that its removal goes beyond what would constitute a "modification of approval", as it involves something more than "changing the terms" of the concept plan approval.

68 By way of illustration, it may be possible to change the terms of Condition C1. For example, amending the concept plan approval to allow for a maximum of 50,000 attendees rather than 35,000 attendees may constitute "changing the terms", as it does not amend something that is fundamental to how the concept plan approval functions. However, amending the concept plan approval so that it can continue in perpetuity when it was originally only approved for a five year trial period is something conceptually quite different.

69 Given this, I do not accept the applicant's submission that because an assessment was undertaken of the original application, and that the request to remove Condition C1 does not, in effect, seek anything further than what formed the original application, the proposed removal of Condition C1 should be considered a modification. As noted above, I find that the application and consent have merged, and that the assessments undertaken for the original application were only sufficient to obtain approval in the terms of the concept plan approval. The Minister clearly determined, by operation of Condition C1, that further assessment would need to be undertaken under Pt 4 of the *EPA Act* if outdoor events were to continue after 2017.

70 However, regardless of whether it is considered that further assessment pursuant to Pt 4 of the *EPA Act* was necessary, this submission would also fail to overcome the finding that the removal of Condition C1 would be something conceptually different to a "modification of approval", as this would still involve more than simply "changing the terms" of the concept plan approval.

71 I also do not accept the applicant's submissions regarding "radical transformation". As implied by Basten JA in *Barrick* at [51], I do not consider that this is an appropriate "test". However, to the extent that the applicant's two arguments on this point are of relevance, I shall consider them in turn.

72 The applicant's first argument was that the proposed removal of Condition C1 cannot be a "radical transformation" as its inclusion was itself a "modification" made by the Minister when granting approval under s 75O(1) of the *EPA Act*,

and that modification would not be a "radical transformation" of the concept plan as it was originally proposed.

73 I do not accept this argument for two reasons. The first reason is the word "modification" in s 75O(4) of the *EPA Act* is not constrained in the same manner as that in s 75W of the *EPA Act*, as it does not contain a limiting definition. This means that a modification undertaken by the Minister when approving a concept plan (under s 75O(4) of the *EPA Act*) could at least theoretically be a broader power than that possessed by the Minister when he or she is requested to modify an approved concept plan (under s 75W of the *EPA Act*).

74 The second reason is there is a conceptual difference between the PAC's modification, and the presently proposed removal of Condition C1. The modification undertaken by the PAC was to place a limit on a concept plan that would otherwise continue in perpetuity. The starting point was something unconstrained, and the PAC constrained it. This process rendered the unapproved concept plan redundant, as it merged with the approved concept plan.

75 Conversely, the modification presently sought by the applicant seeks to remove a limit from the approved concept plan, and allow it to continue in perpetuity. The starting point was something that was constrained, and the proposal is to remove that constraint. If granted, this would merge the presently approved concept plan (as amended by Mods 1, 2 and 3) with the presently proposed concept plan, and render the presently approved concept plan redundant.

76 The merging of the unapproved concept plan with the approved concept plan ('Change #1') and the merging of the presently approved concept plan with the proposed concept plan ('Change #2') are conceptually different because each have different starting points.

77 When undertaking Change #1, the PAC was considering an unapproved concept plan which sought approval for a larger project. When granting approval to the unapproved concept plan, it made modifications so that the approved concept plan would operate for five years, and would then be subject to further assessment pursuant to Pt 4 of the *EPA Act*. Importantly, Change #1 did not involve modifying the unapproved concept plan so that it could not continue in perpetuity. Rather, the PAC simply required that a further development application be approved for the project to continue after 2017. This condition did not amend an underlying element of the project, but rather placed certain conditions on it continuing in perpetuity.

78 This is a different starting point to that in Change #2. Before the Court is the approved concept plan, which will cease to allow outdoor events to be held at the subject site on 31 December 2017. Whilst the project may continue after this date, the approved concept plan will cease to operate on that date, and the project will need to be approved under Pt 4 of the *EPA Act* if it is to continue. As such, the concept of continuing in perpetuity does not form part of the approved concept plan, and I should not have regard to whether it was originally proposed that the project continue in perpetuity. Therefore, when considering whether Change #2 is a modification, the Court must consider only whether removing the requirement that the project be the subject of further assessment and approval pursuant to Pt 4 of the *EPA Act*, and allowing it to continue in perpetuity under Pt 3A of the *EPA Act*, constitutes a modification for the purposes of s 75W of the *EPA Act*.

79 Change #2 is therefore conceptually different to Change #1 as it involves a much greater change. Change #1 does modify the unapproved concept plan insofar as it places conditions on it continuing indefinitely, but does not rule out that it will continue indefinitely. On the other hand, Change #2 seeks to amend a concept plan which was intended to only operate for five years to allow it to operate in perpetuity. This is a far greater amendment than that which was made in Change #1.

80 With regard to the applicant's second argument, which related to the prior assessment of the project, this was effectively a restatement of the submission I rejected in paragraph 69 above, and I consider it inappropriate for the reasons given in that paragraph.

81 Finally, whilst I do not accept that the Minister's submissions outlined in paragraph 38 above (regarding the interaction between ss 75P and 75W of the *EPA Act*) is determinative, I do accept that it adds weight to my above findings. I find that the replacement of a (1)(b) determination for a (1)(c) determination is, in present circumstances, beyond the Minister's power to modify the concept plan approval as such an amendment goes beyond changing the concept plan approval's terms. However, I leave the question open as to whether the replacement of one determination made under s 75P of the *EPA Act* with another determination would necessarily go beyond what is a modification pursuant to s 75W of the *EPA Act*.

82 I therefore find that the concept plan approval may not be modified by the deletion of Condition C1 under s 75W of the *EPA Act*.

Implied and ancillary administrative powers

83 As an alternative to the applicant's primary position, it seeks a declaration that the concept plan approval may be modified by the removal of Condition C1 through an implied or ancillary administrative power, as described by Weinberg J in *Nguyen v Minister for Health & Ageing* (2002) 71 ALD 529; [2002] FCA 1241 ('*Nguyen*').

Applicant's submissions

84 The applicant submitted that an implied or ancillary administrative law power exists to allow the Minister to modify the concept plan approval in the manner sought by the subject application insofar as it relates to the removal of Condition C1. To the extent that s 75W(7) of the *EPA Act* does not operate to grant an express power to the Minister, it does serve to permit the operation of the administrative law principle that a power to grant an approval includes

the power to vary or revoke that approval. It was submitted that this was necessary in order to give s 75W(7) of the *EPA Act* meaning and was consistent with the reasoning of Weinberg J in *Nguyen* at [64] and [67].

Minister's submissions

85 The Minister submitted that an ancillary power only exists where it is reasonably necessary to make the express grant of power effective. It was submitted that to the extent that s 75W(7) of the *EPA Act* permits an implied power, that implied power is a power to modify. This, it was submitted, would not extend further than the express power provided to the Minister under s 75W(4) of the *EPA Act*.

Legal context

86 There is no considered authority on the meaning or application of s 75W(7) of the *EPA Act*, and as such the Court should have recourse to the underlying principles regarding implied and ancillary statutory powers.

87 As noted by the applicant, this issue was considered by Weinberg J in *Nguyen*. In particular, his Honour made the following comments:

> [64] The most obvious statutory power is an express power...As well as express powers, statutes often confer upon the designated Ministers or officials implied powers. Where a statute confers an express power it is implicit that it confers ancillary powers as well. These are powers to do any incidental thing which is reasonably necessary to make the express grant of power effective ...
>
> ...
>
> [67] I can see no reason, in principle, why the power to grant a permission or approval should not be construed as containing within it the implicit power to sever, or partially revoke that permission or approval. If an owner of particular premises grants permission to several persons to enter those premises, as bare licensees, it seems plain that he may revoke that permission in relation to one or more of those persons without revoking it in its entirety ...

88 This principle was more recently considered by the Court of Appeal in *Coffs Harbour City Council v Minister for Planning and Infrastructure* (2013) 193

LGERA 203; [2013] NSWCA 44 ('*Coffs Harbour*'). With regard to the question whether there was an ancillary power to impose time limits on environmental assessment requirements, Preston CJ in LEC, with Ward JA and Tobias AJA agreeing, stated at [51] that:

> [51] I also consider the statute did not confer an ancillary power to fix a time period for the operation and effectiveness of the environmental assessment requirements notified under s 75F(3). *It may be accepted that where a statute confers an express power, it is implicit that it also confers ancillary powers to do anything which is reasonably necessary to make the express grant of power effective: Nguyen v Minister for Health and Ageing* [2002] FCA 1241 at [64]. But here, it was not reasonably necessary, in order to make effective the express power of the Director-General under s 75F(3) to notify environmental assessment requirements, to confer an ancillary power to impose a time limit for the operation and effectiveness of the notified environmental assessment requirements, given the power to modify those requirements under that sub-section to reflect changed circumstances. Indeed, the Council did not contend to the contrary. Rather, it was said that the imposition of a time limit was incidental to the requirement under s 75H(1) that the proponent submit the environmental assessment required or to the requirement under s 75I(1) and (2) that the Director-General submit a report to the Minister, including a statement relating to compliance with the requirements. *However, neither was reasonably necessary to make the power under s 75F(2) effective and that is the test.* Moreover, there was power under s 75Z(a) to make a regulation prescribing the time limit within which the proponent had to submit the environmental assessment required or the Director-General had to submit a report to the Minister. It was therefore not reasonably necessary to confer an ancillary power to prescribe such time limits which had been provided for in the regulation making power. [Emphasis added.]

Consideration

89 As outlined in *Coffs Harbour* by Preston CJ in LEC at [51] and in *Nguyen* by Weinberg J at [64], the test as to whether an ancillary power should exist is whether that ancillary power is "reasonably necessary to make the express grant of power effective".

90 The applicant did not articulate precisely which "express grant of power" would give rise to this ancillary power to revoke Condition C1. Despite this, there are two express powers that are presently relevant. The first of these is the discretionary power granted by s 75O(1) of the *EPA Act* to "give or refuse to give approval for the concept plan for the project" if consideration was given to certain prescribed matters and particular conditions were met. This power runs concurrently with that under s 75P(1) of the *EPA Act* to make one or

more determinations when granting approval, and is consistent with the applicant's contention that "the implied power to grant includes with it the power to revoke, vary, remove etc". The second is the power granted pursuant to s 75W(4) of the *EPA Act* to "modify the approval (with or without conditions) or disapprove of the modification".

91 I find that the contended ancillary power is not necessary to give effect to any relevant express powers. The Minister is reasonably able to grant approvals under s 75O(1) of the *EPA Act* without recourse to an implied power to either revoke or vary that approval. Such a power, particularly if it were to be exercised either unilaterally or without the safeguards that are generally prescribed by legislation (such as those contained in s 96A of the *EPA Act* in relation to Pt 4 approvals), would be contrary the objects of the *EPA Act*, and in particular that contained in s 5(a)(ii) to encourage "the promotion and co-ordination of the orderly and economic use and development of the land". To allow such power to be exercised by the Minister would rather create an unpredictable system without sufficient order. Moreover, it would be inconsistent with the limiting provisions of s 75W of the *EPA Act*, and effectively render the modification process pointless. Similarly, I consider that the Minister is reasonably able to modify approvals pursuant to s 75W(4) of the *EPA Act* without recourse to a wider power to vary or revoke approvals altogether. Indeed, where there is an express power to vary or modify, such a power can inherently be exercised without recourse to any implied power.

92 The decision of Weinberg J in *Nguyen* can be distinguished from the present case. His Honour was asked to consider whether the power to revoke a licence pursuant to s 133 the *National Health Act 1953* (Cth) could be used to revoke a licence from one joint licence holder, and not the other. It was found that whilst that power was not expressed in the provision, it was reasonably necessary that the relevant Minister have the power to either sever licence holders or partially revoke a licence to give effect to the power to revoke more generally. This is an entirely separate proposition from that presently before me, where there is no express power to revoke, and that the power to vary is restricted only to modifications.

93 For this reason alone the contended ancillary power does not meet the test set out in *Nguyen* and *Coffs Harbour*. However, should I be incorrect on this point, there is a further reason why relief should not be granted.

94 Section 75W(7) of the *EPA Act* makes provision only in regards to the modification of a determination. Whilst this provision potentially has a wider meaning to that contained in the definition of "modification of approval" in s 75W(1) of the *EPA Act*, this would be of little consequence. If s 75W(7) of the *EPA Act* was to create or permit an implied power, which I do not consider to be the case, that implied power would still be limited to a power to modify. Given that I have found that the removal of Condition C1 would go beyond a power to modify under s 75W of the *EPA Act*, I do not consider that any such implied power would extend to varying the concept plan approval in the manner contended by the applicant.

95 As such, I decline to make the declaration sought by the applicant that the concept plan approval may be modified by the removal of Condition C1 through an implied or ancillary administrative power, as described by Weinberg J in *Nguyen*.

Conclusion

96 It follows from the above that the summons should be dismissed.

Orders

97 The Court orders that:

(1) The summons is dismissed.

(2) The applicant is to pay the respondent's costs.

(3) The exhibits are returned.

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