GREEN LITIGATION—THE NEW WAVE

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The NSW Land and Environment Court recently rejected a last–ditch challenge to the $800 million re–development of the former CUB site on Sydney's CBD fringe. The challenge, brought by Sydney law student Matthew Drake–Brockman, was jointly funded by the NSW Legal Aid and the Sydney City Council.

Mr Drake–Brockman instituted proceedings against the Planning Minister and the proponent, alleging that the development was not environmentally sustainable. He claimed procedural irregularities invalidated the environmental assessment, concept plan approval and future assessment determinations and that the minister failed to take into account the principles of ecologically sustainable development in approving the re–development.

The second argument echoed that successfully raised in Gray v Minister for Planning that Centennial Coal's environmental assessment of the Anvil Hill coal mine was flawed because it did not address the impact of the mine on climate change.

Mr Drake–Brockman claimed that the re–development would increase climate change pollution by its use of energy and by increasing the number of cars on the road. He argued that the minister should have carried out a quantitative analysis of greenhouse gas emissions caused by the re–development.

He also insisted that the re–development should use solar power, recycle water and sewerage and restrict car spaces.

The proponents argued that the re–development incorporated rain and stormwater collection for irrigation and toilet flushing, glazed and shaded windows to reduce air conditioning and met current environmental standards.

The court rejected the argument that the minister was bound to 'consider (only) one aspect of the complex of matters that might inform the concept of ecologically sustainable development (greenhouse gas emissions)'. Rather, it said that principles of ecologically sustainable development applied in combination with the other objects of the Environmental Planning and Assessment Act 1979 (NSW) Act, namely, development and conservation of natural and artificial resources and the orderly and economic use of land.

Accordingly, the court said that the 'unifying theme of ecologically sustainable development explains the ubiquity of the concept in development decisions and discloses the level of generality, at which it is capable of operating.' In granting the approval it said that the minister had considered the principles of ecologically sustainable development, including the precautionary principle and inter–generational equity.

In particular, it referred to the proponent's commitments to ABGR and Green Star ratings and a high modal split way from private vehicles to assist in reducing greenhouse gas emissions. Specifically, the court held that 'the idea that the minister can only consider ecologically sustainable development by considering a quantitative analysis of greenhouse gas emissions, finds no support in the statutory scheme enacted by parliament.' Accordingly, Mr. Drake–Brockman had not established any breach of Part 3A of the Environmental Planning and Assessment Act 1979 (NSW).

The significance of the decision is that the concept of ecologically sustainable development is broad and can be characterised in different ways. However, while the court rejected the challenge, it is one of the first ripples of the coming wave of green litigation.

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