INNER WEST COUNCIL – WESTCONNEX

SECOND MEMORANDUM OF ADVICE

Introduction

1. I have been briefed to advise on whether there is any basis upon which the approvals for WestConnex can be challenged. There are three relevant approvals, currently. On 21 December 2014, the then Minister for Planning approved the State significant infrastructure (**SSI**) application for widening and upgrading the M4 motorway between Parramatta and Homebush West. The approved works commenced in 2015 and are ongoing. On 11 February 2016, the Minister for Planning approved the SSI application for the M4 East Project comprising a new multilane road link from Homebush to Parramatta Road and Wattle Street at Haberfield. Those works have also commenced. On 20 April 2016, the Minister for Planning approved a SSI application for the New M5 Project, duplicating the existing M5 by a separate tunnel from King George's Road to St Peters. Each Project was approved as "critical State significant infrastructure", a category of development under Part 5.1 of the *Environmental Planning and Assessment Act 1979* (**EPA Act**) which enjoys immunity from the constraints that normally control decision-making about development under the Act. The progenitor of Part 5.1 was former Part 3A, with which it shares some unique characteristics designed to impede or prevent judicial review, and to increase the scope of discretionary decision-making. Any legal analysis of the validity of Part 5.1 approvals requires close consideration of these characteristics.

2. The descriptions that I have given to the respective Projects have been simplified to identify them, and do not disclose their complexity or the extent of their reach. So far as works are concerned, the most significant impacts will be caused by aboveground works, either ancillary to the tunnel Projects or in creating connections to existing or future road systems. However, once constructed, the Projects will redistribute Sydney's traffic, both public and

private and whether freight, passenger or commercial, and pollutants from vehicle exhausts and pavements will be concentrated, and then dispersed through ventilation stacks constructed, in some cases, in residential areas. The construction of the M4 East in particular will directly impact established inner City suburbs. That is not so much the case for the New M5, whose northern portals will be constructed on existing industrial land and whose other works will in large part be constructed on adjacent existing arterial roads or on land set aside for "Country roads", reserved for regional road corridors under the County of Cumberland Planning Scheme in 1951: see *RMS v Rockdale City Council* [2015] NSWSC 1844 at [4], [9]-[10].. However, that Project has the potential to create new traffic impacts through residential areas to the north, west and east of the northern portal, and the mitigation of these impacts (if adverse) has been deferred either to Local Traffic Management Schemes or, pending the approval, construction and operation of what has become known as the "missing link", to a further tunnel-based motorway linking the M4 with the M5 with a possible further link to a western harbour crossing tunnel for through traffic to the north. The missing link and subsequent northern works have not been approved, and it is unclear whether sufficient funds will be available for their construction in time to remove the additional traffic which would otherwise discharge onto arterial and local roads of the inner west and south.

No invalidity without jurisdictional error

3. My first task is therefore to consider whether any of the three approvals are vulnerable to legal challenge and, if so, whether any such challenge is likely to succeed. No challenge will succeed unless there is a jurisdictional defect in the decision or the decision-making process. This is a consequence of the privative provisions of Part 5.1, which, when properly construed, limit the scope of judicial review. An error of fact is not a jurisdictional error, except in unusual circumstances such as where the validity of the decision depends upon the existence or non-existence of a fact. If judicial review of these decisions is available (itself a contested question), then it will only be

available for a jurisdictional error, factual errors are unlikely to be of any legal significance and, most importantly, if the decision is judicially reviewed, the Court will not entertain argument concerning the merits of the decision. There is no merit review for these decisions. That is a fundamental difficulty because of the way in which the environmental assessment of each Project has been compiled. Later, I explain in detail the adequacy test that has been developed for determining whether a requirement for environmental assessment has been fulfilled, but speaking generally, few if any cases have succeeded for inadequate consideration of environmental factors. The Courts have generally treated disputes as to adequacy as entering the merits of the project. Rather, it is where environmental assessment has completely omitted to consider an important factor, or has deferred consideration of that factor for later decision-making that judicial intervention has occurred.

The effect of delay on the discretion to decline to grant relief

4. Even if a jurisdictional error is uncovered, that will not necessarily produce invalidity. These proceedings would be taken in the Land and Environment Court, whose statutory jurisdiction includes a wide discretion not to grant relief: *F Hannan Pty Ltd v Electricity Commission of NSW [No 3]* (1985) 66 LGRA 306 at 311, 313 per Street CJ; at 327 per McHugh JA. That discretion was exercised in favour of the Government after its approval of the earlier construction of the western portion of the first M5 had been challenged. Despite a jurisdictional error in environmental assessment, the Court declined to grant relief, in that case to Liverpool City Council, because it had delayed taking proceedings: *Liverpool City Council v RTA* (1991) 74 LGRA 265. Delay is a potent reason for declining to grant relief in the case of major infrastructure, because of the losses incurred once contracts are entered into and project works commence if an injunction restrains further work, or a declaration of invalidity has the practical effect of causing further work to cease. Generally speaking, proceedings should be commenced within a few weeks of the approval to be immune from the argument that relief should be refused in the Court's discretion on account of delay.

5. Even if there was a jurisdictional error in granting the first two approvals, a challenge is unlikely to succeed if it would result in setting aside the approval. Conceivably, there could be a more limited challenge; for example, the challenge could be aimed at severing a condition of approval, which would not necessarily undermine the approval because of the presumption that the partial invalidity of an instrument does not necessarily cause its residue to be invalid: see s.32(2), *Interpretation Act 1987.* Absent that circumstance, contracts have been entered into and works have commenced (indeed, in the case of the M4 road widening, some works have been completed). The Court is most unlikely to set aside the first two approvals, for this reason. Although some limited works have commenced on the third approval, these works appear to have been approved by an earlier decision using a different process, and it is not clear to me whether those works are referrable to the New M5 approval or the earlier consent, or both. In any event, the argument in favour of discretionary refusal of relief on account of delay is less potent in the case of the New M5. However, as the environmental assessments proceeded, gaps in earlier assessments were filled and the discussion of contested issues became better informed, making the M5 East approval more difficult to challenge.

Privative clauses

6. Before addressing the prospects for challenging the approvals, it is necessary first to consider the various privative provisions contained within Part 5.1, which are designed to limit (or even exclude) the entitlement pursuant to ss.123 and 124 of the EPA Act to bring proceedings in the Land and Environment Court (**LEC**) for breach of the Act.

7. The relevant provisions are ss.115ZJ and 115ZK, which are in the following terms:

> "***115ZJ Validity of action under this Part***
>
> *(1) The validity of an approval or other decision under this Part cannot be questioned in any legal proceedings in which the decision may*

be challenged except those commenced in the Court within 3 months after public notice of the decision was given.

(2) The only requirement of this Part that is mandatory in connection with the validity of an approval of State significant infrastructure is a requirement that an environmental impact statement with respect to the infrastructure is made publicly available under this Part.

(3) Any infrastructure that has been approved (or purports to be approved) by the Minister under this Part is taken to be State significant infrastructure to which this Part applies, and to have been such infrastructure for the purposes of any application or other matter under this Part in relation to the infrastructure.

115ZK Third-party appeals and judicial review—critical State significant infrastructure

(1) In this section:

***breach** has the meaning given by Division 3 of Part 6.*

***the judicial review jurisdiction** of the Court means the jurisdiction conferred on the Court under section 20 (2) of the Land and Environment Court Act 1979.*

***the third-party appeal provisions** means Division 3 of Part 6 of this Act and sections 252 and 253 of the Protection of the Environment Operations Act 1997.*

(2) The third-party appeal provisions do not apply in relation to the following (except in relation to an application to the Court made or approved by the Minister):

(a) a breach of this Act arising under this Part in respect of critical State significant infrastructure, including the declaration of the development as State significant infrastructure (and as critical State significant infrastructure) and any approval or other requirement under this Part for the infrastructure,

(b) a breach of any conditions of an approval under this Part for critical State significant infrastructure,

(c) a breach of this or any other Act arising in respect of the giving of an authorisation of a kind referred to in section 115ZH (1) for critical State significant infrastructure (or in respect of the conditions of such an authorisation).

(3) The conditions of approval under this Part for critical State significant infrastructure are conditions that may only be enforced

by or with the approval of the Minister (whether under the third-party appeal provisions, the judicial review jurisdiction of the Court or in any other proceedings).

(4) The third-party appeal provisions and the judicial review jurisdiction of the Court are subject to the provisions of section 115ZJ."

8. As the approval relates to critical State significant infrastructure, in broad terms there are four provisions which are relevant:

a. section 115ZJ(1) provides that the validity of an approval cannot be questioned in any legal proceedings in which the decision may be challenged except those commenced in the LEC within 3 months after public notice of the decision was given, operating in a similar way to ss.35 and 101 of the Act, and former s.75X(4) (which related to Part 3A approvals);

b. section 115ZJ(2), which purports to make mandatory the requirement that an EIS be made publicly available, in a similar way to former s.75X(5);

c. section 115ZK(2)(a), which purports to disapply the "third-party appeal provisions" (i.e. ss.122-124A of the Act) - except in relation to an application to the LEC made or approved by the Minister - in relation to (relevantly) a breach of the Act arising under Part 5.1 in respect of critical State significant infrastructure, including the declaration of the development as State significant infrastructure (and as critical State significant infrastructure) and any approval or other requirement under Part 5.1 for the infrastructure. This provision is similar to, but more extensive than, former s.75T of the Act (which applied to critical infrastructure projects under Part 3A); and

d. section 115ZK(4), which makes clear that the third-party appeal provisions and the judicial review jurisdiction of the LEC are subject to the provisions of s.115ZJ.

9. In *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, the High Court addressed the question of the Constitutional constraints upon State legislative power insofar as legislation sought to deprive a right to recourse to the courts by the enactment of privative provisions such as s.179 of the *Industrial Relations Act* 1996 (NSW). Following a review of authorities such as *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 and *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, it held that the supervisory jurisdiction of the Supreme Courts was at Federation, and remained, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court, with the consequence that the jurisdiction of those courts to grant *certiorari* for jurisdictional error was not denied by a statutory privative provision (at [97]-[98]). Their Honours concluded as follows (at [100]):

> *".. the observations made about the constitutional significance of the advisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian Constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability for relief for non-jurisdictional error of law appearing on the face of the record is not beyond power".*

10. In *Brown v Randwick City Council* (2011) 183 LGERA 382, Preston CJ held that after the decision of the High Court in *Kirk*, the full range of jurisdictional error remains subject to judicial review, notwithstanding a privative clause such as s.101 of the EPA Act (at [37]-[40]). Although that conclusion was doubted in the subsequent Court of Appeal decision in *Trives v Hornsby Shire Council* (2015) 89 NSWLR 268 at [46]-[50], the reservations expressed by the Court were obiter, and mainly directed to the difference between the "strong form" of privative clause in *Kirk* and s.101 of the EPA Act, which is arguably merely a time limitation provision. In *Mosman Municipal Council v IPM Pty Ltd* [2016] NSWLEC 26, the Court considered the possible conflict between *Brown* and *Trives,* but decided to follow *Brown:* [70]. That has the effect of

subsuming the time limitation provision into the general category of privative clauses which invalidly deny judicial review for constitutional reasons. It follows that, as the law presently stands, the three month limitation on the commencement of proceedings purportedly imposed by s.115ZJ(1) will not prevent a challenge to the approvals. There is, however, a possibility that an appellate court might in the future find that the time limitation is unaffected by the constitutional principle preserving judicial review. If so, the limitation provision may still be ineffective if the jurisdictional error is manifest: *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615.

11. As Preston CJ held in *Brown* at [39], the reasoning in *Kirk* is equally applicable to the LEC, given that the "supervisory jurisdiction of the State of New South Wales' Supreme Court is divided between the Supreme Court and the LEC, depending on the statutes under which powers and functions have been exercised and are subject to review". Craig J analysed those statutory provisions (including ss.5(1), 9(2), 20(2), 58 and 71 of the *Land and Environment Court Act* 1979 (NSW) (**LEC Act**)) in *Haughton v Minister for Planning* (2011) 185 LGERA 373 at [47]-[51]. His Honour concluded that s.75T of the EPA Act had to be read down in order to be consistent with the Constitutional constraints identified by the High Court in *Kirk*, having regard to the statutory mandate to construe s.75T so as not exceed the legislative power of Parliament: see s.31 of the *Interpretation Act* 1987 (NSW). His Honour's ultimate conclusion was that the Court would not read down s.75T so as to deprive a person upon whom standing had been conferred by statute (EPA Act, s.123) to challenge a ministerial decision on the basis of jurisdictional error (at [80]).

12. The particular privative clauses within Part 5.1 must be considered against that background. The first of those is s.115ZJ(1). If proceedings in the LEC were brought expeditiously, the time limitation in s.115ZJ(1) will not apply. If not, the present state of authority is that it does not apply in any event.

13. Nor should s.115ZJ(2) constrain the grounds of review in any judicial review proceedings. Section 115ZJ(2) does not preclude a challenge to the validity

of an approval under Part 5.1 on grounds generally available for challenging administrative decisions, including manifest unreasonableness, failure to take into account relevant considerations and taking into account irrelevant considerations: *Minister for Planning v Walker* (2008) 161 LGERA 423 at [35]; *Community Action for Windsor Bridge Inc v NSW Roads and Maritime Services* [2015] NSWLEC 167 at [101].

14. Section 115ZK falls into a different category. It purports to oust the judicial review jurisdiction of the LEC pursuant to s.20(2) of the LEC Act, as well as disapplying ss.122-124 of the Act, unless the application to the court is made or approved by the Minister. A similar provision, former s.75T of the EPA Act, was the subject of detailed consideration by Craig J in *Haughton*. His Honour concluded that s.75T should not be construed so as to deprive a person upon whom standing had been conferred by statute of the right to challenge a ministerial decision on the basis of jurisdictional error: at [80]. The fact that the Minister was both the decision-maker and the "gatekeeper" to the commencement of judicial review proceedings under s.75T did not have the consequence that the jurisdiction of the LEC was ousted, as a consequence of the holding of the High Court in *Kirk*. Craig J held that the Minister's discretion to deny jurisdiction to review his substantive decision for jurisdictional error, even at the suit of an applicant having standing at general law, would require a reading of s.75T that contravened the decision in *Kirk* (at [99]).

15. The primary difference between former s.75T and s.115ZK(2) is that the latter provision not only purports to oust the jurisdiction of the Court to judicially review a determination by the Minister unless the application to the Court is approved by him or her, but it also purports to disapply ss.123 and 124 of the Act. Consistently with the reasoning in *Kirk*, s.115ZK would not be construed so as to deny to the Court the power to review the Minister's determination for jurisdictional error. Rather, I consider that, at its highest, its effect would be to restrict the jurisdiction of the LEC to proceedings for jurisdictional error commenced by those persons who have standing at general law. That

conclusion follows from the notional setting aside of the open standing provision in s.123 of the Act, pursuant to s.115ZK(2).

16. It is therefore necessary to consider the standing of the Council to commence judicial review proceedings in the Court. The relevant principles governing standing at general law were discussed in *Haughton* at [81]–[95]. Of relevance for present purposes is the basal principle that it is necessary for an applicant to demonstrate a "special interest" in the subject of the matter, as distinct from a "mere intellectual or emotional concern". In addition, it has been said that there is broader scope for standing to invoke equitable remedies to secure compliance with obligations imposed upon public officials: see at [83], [87].

17. The Council is the local government authority with responsibility for upholding and enforcing the EPA Act, including ensuring that development is carried out in accordance with the Act: see *Bankstown City Council v Ramahi* [2015] NSWLEC 75 at [75]. In *Botany Bay City Council v Minister for Transport* (1996) 66 FCR 537, Lehane J found that the local councils in that case had standing under the *Administrative Decisions (Judicial Review)* Act 1977 (Cth) to apply for review of the Minister's decision to exempt certain Commonwealth actions at the Sydney Airport from complying with administrative procedures established under the *Environment Protection (Impact of Proposals) Act* 1974 (Cth). The basis for the decision was that the councils were responsible for areas whose environment might well suffer at least as an indirect consequence of the Minister's decision, and that the councils' interest in enhancing and conserving the environment of its area was considerably greater than that of an ordinary member of the public.

18. In this case, the Council has legitimate concerns about the impact of the Project on the traffic within its local government area, as well as numerous other issues which its predecessor Councils have raised, which impact on its ratepayers and residents. These issues include air quality, noise, the loss of heritage and traffic impacts. I regard the Council's interest in relation to the

Project as being sufficient to enable proceedings to be commenced in the LEC, notwithstanding the privative provisions contained in s.115ZK.

Jurisdictional error

19. As referred to above, in order to succeed in a challenge to the approval, Council must demonstrate that the Minister committed a jurisdictional error of law. The label "jurisdictional error" as it has come to be understood in Australian legal discourse is a statement of conclusion in relation to the identification of errors for which nullity is the usual consequence: see *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 43 at [27]; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [39]. A decision infected by jurisdictional error is "regarded, in law, as no decision at all": *Plaintiff S157/2002* at [76].

20. In *Kirk*, the High Court held that its earlier decision in *Craig v South Australia* (1995) 184 CLR 163 did not provide a "rigid taxonomy" of jurisdictional error (at [73]). In *Craig*, the High Court had identified a number of errors which might be made by an administrative tribunal which were said to be "jurisdictional", in the following passage (at 179):

> *"If... an administrative tribunal falls into an error of law which causes it identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the Tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the Tribunal which reflects it."*

21. Although there are different species of error regarded as jurisdictional, the unifying theme is that the error is of such a type that the "decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it": *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]. In a passage endorsed by the High Court in *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [28], jurisdictional error was held by the plurality in *Yusuf* to include "ignoring

relevant material ... in a way that affects the exercise of power" (at [82]). Their Honours further explained at [84] that where a decision-maker:

> *"... ignores relevant material ... in such a way that affects the exercise of its powers, that will very often reveal that it has made an error in its understanding of the applicable law or has failed to apply that law correctly to the facts it found."*

No merits review

22. The clear distinction between merits review and judicial review should be emphasised. As Jagôt J pointed out in *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349 at [124], "the court may not trespass on the merits or impugn a decision made within the necessary legal boundaries". In particular, the Court will be careful to ensure that the material considerations and irrationality grounds of review are not converted de facto into a review of the merits of the decision.

Widening the M4

23. The M4 widening Project stands in a different position to the other proposals. First, it involves widening or replicating existing infrastructure. Second, it will relieve existing congestion on the M4 and enable free-flowing traffic in 2031, when without the Project congestion is likely to add significantly to travel time. Third, it enjoys the support of most statutory authorities, including many Councils. Fourth, the assessment of the impacts of the proposal identified adverse impacts from both construction and operation (principally noise, vibration and visual amenity), which were then addressed in the Secretary's Environmental Assessment Report and by the Minister in imposing conditions of approval. Whether the resolution of those issues was satisfactory is a merits matter, which for reasons already explained is not subject to judicial review. I have been unable to identify any legal error in the environmental assessment or the Minister's determination.

24. However, even if such an error could have been identified, it is now far too late to challenge the approval. As I have explained, delay in challenging approvals of major infrastructure projects is usually fatal, if substantial works

have commenced. That is plainly the case with the M4 widening Project and in my opinion, even if a legal error was identified, the Court would not grant relief: *Liverpool City Council.*

M4 East and the New M5

25. It is convenient to discuss these Projects together. Although delay will be a potent reason for refusing relief in both cases, that answer is not so clear as to prevent consideration of the decision-making process. If a significant breach of the requirement of the Act for environmental assessment or public participation can be identified, then it may be arguable that the Court should grant some relief. It is possible that the Minister has imposed an unlawful condition which can be set aside without destroying the approval as a whole.

26. There are four possible steps where a legal flaw could emerge:

a. the declaration of the development as State significant infrastructure;

b. the environmental assessment process;

c. the Minister's decision to approve the project; and

d. the conditions of approval.

The State Significant Infrastructure declaration

27. The Projects were assessed and approved under Part 5.1 of the EPA Act. This whole process would be a legal nullity if the Project was not in fact SSI within the meaning of s.115U of the EPA Act.

28. Section 115U provides as follows:

> ***"115U Development that is State significant infrastructure***
>
> *(1) For the purposes of this Act,* ***State significant infrastructure*** *is development that is declared under this section to be State significant infrastructure.*

(2) A State environmental planning policy may declare any development, or any class or description of development, to be State significant infrastructure.

(3) Development that may be so declared to be State significant infrastructure is development of the following kind that a State environmental planning policy permits to be carried out without development consent under Part 4:

a. Infrastructure,

b. other development that (but for this Part and within the meaning of Part 5) would be an activity for which the proponent is also the determining authority and would, in the opinion of the proponent, require an environmental impact statement to be obtained under Part 5 …"

(4) Specified development on specified land is State significant infrastructure despite anything to the contrary in this section if it is specifically declared to be State significant infrastructure. Any such declaration may be made by a State environmental planning policy or by an order of the Minister (published on the NSW legislation website) that amends a State environmental planning policy for that purpose.

…

(7) If, but for this subsection, development is both State significant infrastructure because if a declaration under subsection (4) and State significant development, it is not State significant development despite any declaration under Division 45.1 of Part 4."

Section 115V provides:

"Any State significant infrastructure may also be declared to be critical State significant infrastructure if it is of a category that, in the opinion of the Minister, is essential for the State for economic, environmental or social reasons. Any such declaration may be made by the instrument that declared the development to be State significant infrastructure or by a subsequent such instrument."

29. Clause 16 of the SRD SEPP provides:

"16 Declaration of development as critical State significant infrastructure: section 115V

Development specified in Schedule 5:

(a) may be carried out without development consent under Part 4 of the Act; and

(b) is declared to be State significant infrastructure for the purposes of the Act if it is not otherwise so declared, and

(c) is declared to be critical State significant infrastructure for the purposes of the Act."

30. In 2014 and 2015, the Minister for Planning amended Schedule 5 to the SEPP (State and Regional Development) 2011 (**SEPP(SRD)**) by Orders made under s.115V of the Act declaring development for the purposes of the M4 Road Widening, the M4 East and the New M5 Projects to be State significant infrastructure and critical State significant infrastructure.

31. After correctly describing those Projects, Sch.5.4 of SEPP(SRD) then provides:

*(6) "**Ancillary development***

Development that is ancillary to any other development in this clause, including construction compounds, utilities infrastructure (including adjustments to, or relocation of, existing utilities infrastructure), electronic tolling facilities, signage, ventilation systems, emergency systems, systems for the control and management of roads, and tunnel control centre facilities.

(7) in this clause:

***development** does not include the following:*

(a) surveys, test drilling, test excavations, geotechnical investigations or other tests, surveys, sampling or investigation for the purposes of the design or assessment of a project,

...

***tunnel control centre facility** means premises under for the purposes of a tunnel control centre together with any associated facilities, including car parks."*

32. "Infrastructure" is defined as follows in s.115T:

> *"**infrastructure** means development for the purposes of infrastructure, including (without limitation) development for the purposes of railways, roads, electricity transmission or distribution networks, pipelines, ports, wharf or boating facilities, telecommunications, sewerage systems, stormwater management systems, water supply systems, waterway or foreshore management activities, flood mitigation works, public parks or reserves management, soil conservation works or other purposes prescribed by the regulations".*

The Projects are clearly infrastructure.

33. It is unnecessary to consider whether the M5 East and the New M5 Projects are permissible without consent under cl.94 of *State Environmental Planning Policy (Infrastructure) 2007* ("the Infrastructure SEPP"), which would involve the question whether the Sydney Motorway Corporation Pty Ltd, which is to build and operate the motorways, is a public authority and, if not, whether it is the agent or representative of the RMS. The Minister has availed himself of the route via s.115V, presumably to avoid these questions. By dint of the Orders, the Projects have now been declared both SSI and critical SSI. The Minister's opinion that the Projects are essential for economic environmental or social reasons (the criterion for the declaration under s.115V) is evidenced by the Orders, and any challenge to the validity of the Orders on the ground that the opinion was not formed would fail. Equally, I do not consider that there are any grounds to challenge the formation of the opinion as illogical or manifestly unreasonable, or made for an improper purpose or by reference to irrelevant matters. No criteria is stated for the formation of the opinion, major transport systems in Sydney are undeniably of State significance on economic grounds alone, the Projects reflect a long-standing planning policy for linear infrastructure corridors to connect regional centres (as evidenced by the County roads reserved by the County of Cumberland Planning Scheme in 1951) and a desire to gain planning control of a site because of its significance is not an improper purpose or irrelevant consideration: *Leichhardt Municipal Council v Minister for Planning* (1992) 78 LGERA 306 at 330-31.

34. The RMS, the Secretary of the Department of Planning and the Minister were therefore correct to treat each Project as an activity requiring approval under Part 5.1.

Environmental assessment procedures for State Significant Infrastructure (SSI)

35. Part 5.1 and Schedule 2 of the Environmental Planning and Assessment Regulation (**EPAR**) contained the procedures for the environment assessment of SSI. "Infrastructure" is used in lieu of "development", or "activity", which comprise the works or land uses that engage Parts 4 and 5 of the EPA Act. Part 5.1 is self contained, and none of the procedures applicable to Part 4 (development) or Part 5 (activities) govern the process for approval or the carrying out of Part 5.1 infrastructure, except in cases presently irrelevant. Environmental planning instruments, including relevantly the Council's LEPs and applicable State Environmental Planning Policies (**SEPP**), do not apply either, except to the extent that they declare infrastructure to be SSI or Critical SSI (s.115ZF(2)), or where it is necessary to override a covenant, agreement or other law to enable infrastructure to be carried out in accordance with a Part 5.1 approval: s.115ZF(2)(v); s.28, EPA Act.

36. As with former Part 3A, Part 5.1 also disapplies the obligation to obtain other regulatory approvals (s.115ZG) with, in this case, the limited exceptions of an environment protection licence under the *Protection of the Environment Operations Act 1997* and a s.138 *Roads Act 1993* consent, but neither authorisation can be refused if it is necessary to carry out approved infrastructure. These approvals must be substantially consistent with the infrastructure approval under Part 5.1: s.115ZH.

37. Approved infrastructure is therefore immune from or protected against inroads on the Project which would otherwise apply to the development or activities under Part 4 and Part 5 of the EPA Act. For Council, the significance is that its approval powers as a local roads authority under the *Roads Act* cannot be used to frustrate the Project. An attempt to do so, initially successful, when

geotechnical work was restrained as part of the former M4 East proposal, but overridden on appeal, is not an option available to Council: *cf RTA v Ashfield Municipal Council* (2005) 141 LGERA 278.

38. The decision-maker for infrastructure is the Minister: s.115W. The application for approval is, however, addressed to the Secretary of the Department of Planning. This reflects the bifurcation of the procedures for approval of infrastructure. The first part of those procedures involves the making by the Secretary of environmental assessment requirements (**EARs**) for the preparation of a mandatory environmental impact statement, and the application of both the form and contents requirements of Schedules 2.6 and 2.7 of the EPAR, by dint of s.115Y(2). The EIS once prepared is to be placed on public exhibition for a minimum period of thirty days and submissions can be made to the Secretary of the Department, who must provide them to the proponent and some statutory authorities, and who decides whether to require the proponent to address the matters raised in the submissions and to prepare a Preferred Infrastructure Report (**PIR**), if any proposed changes to the infrastructure are made to minimise its environmental impact or to deal with other issues raised during its assessment: s.115Z(6). Then the Secretary is to give a report on the infrastructure to the Minister, known as the Secretary's Environmental Assessment Report (**the Report**): s.115ZA(1). The Report is to include the EIS and any PIR, advice from statutory authorities and any environmental assessment undertaken by the Secretary or other matter he or she considers appropriate: s.115ZA(2). It should be noted that there is no obligation on the Secretary to undertake an environmental assessment, but he did so in these cases. That completes the first part of the procedures. Once the Minister receives the Report, the Minister may approve or disapprove of the carrying out of the infrastructure, but in doing so must consider the Secretary's report and the reports, advice and recommendations contained in it, any advice provided by the portfolio Minister and other presently irrelevant matters: s.115ZB(2). The Minister may approve the

infrastructure with such modifications or on such conditions as he or she may determine: s.115ZB(1), (3).

39. It will be apparent that there are five important steps involved in this decision-making process. First, the Secretary must prepare environmental assessment requirements upon the making of an application for approval of SSI. Next, the proponent must prepare an EIS in accordance with those requirements and the relevant provisions of Schedule 2. I will say more about those in a moment. Third, the EIS must be exhibited, submissions must be provided to the proponent and relevantly the OEH (as the infrastructure will require an EPL: s.115Z(5)(b)) and, if required by the Secretary, the proponent must respond to the issues raised in those submissions and prepare a PIR. This is the public participation step in the process. Fourth, the Secretary must prepare and submit to the Minister a Report and finally the Minister must decide the application taking into account the Report and the portfolio Minister's advice. In determining the application, the Minister must consider whether to modify the infrastructure or impose conditions.

40. Although there are legal requirements at each step in this process, s.115ZJ(2) provides that the only requirement that is mandatory in connection with the validity of an approval is "a requirement that an EIS with respect to the infrastructure is made publicly available under this Part". An EIS that fails to comply with the requirements for its preparation is not one which is made "with respect to the infrastructure" or which can be made publicly available "under this Part". Although in form a document called an EIS may have been exhibited, if it did not meet the detailed requirements of these provisions, its exhibition could not have fulfilled the only requirement that is made mandatory in connection with the validity of the approval (and see para 53 below). For this reason, I shall assume that this provision also makes mandatory the preparation of the EIS in accordance with such requirements of the Act as are essential to its validity. I now turn to those requirements.

Legal principles concerning the preparation and exhibition of the EIS

41. The proponent must submit to the Secretary "the environmental impact statement required under this Division for approval to carry out the SSI": s.115Z(1). It is that EIS which must be made publicly available under subsection (3). The Report, which the Minister must take into account before approving the infrastructure, must include a copy of "the proponent's EIS": s.115ZA(2)(a). It seems inevitable that, for these procedures to work, the EIS which is exhibited and included within the Report, whether or not it must be considered by the Minister, is the EIS which is required to be submitted to the Secretary.

42. That then brings me to the heart of the EIS preparation obligation, which is contained in s.115Y. As I have observed, once an application is made, the Secretary must prepare EARs. Subsection (3) provides that in doing so, the Secretary must consult "relevant public authorities and have regard to the need for the requirements to assess any key issues raised by those public authorities". Although this does not in terms require the Secretary to adopt those key issues, regard must be had to them when preparing the EARs. If key issues are identified, "because the EIS must be completed in accordance with the [Secretary's] requirement, it necessarily must address the 'key issues' with regard to which they must be prepared [and] in this way, the key issues so identified attract statutory significance": *Community Action for Windsor Bridge Inc v RMS* [2015] NSWLEC 167 at [107]. In that case, the key issue of heritage was the reason for classification of the Project as SSI. That was an additional reason for identifying it as a mandatory consideration for the Minister to take into account when determining whether to approve the Project. However, as a key issue, as Brereton J pointed out, it is required to be addressed by the EARs, the EIS must consider it, the EIS must be included within the Report, and the Report must be considered by the Minister. In that way, the key issues identified by the Secretary in the EARs for the project

become matters which the Minister must take into account in approving the Project. However, as his Honour observed:

> *"But that is not to say that heritage became a decisive or paramount consideration. While it had to be taken properly taken into account, the weight to be attributed to it as against other permissible considerations was a matter for the Minister. The Minister is not obliged to regard any particular matter as critical, central or fundamental. If, as the Court of Appeal explained in* Warkworth, *that is so in respect of a Director-General's recommendation which is explicitly mentioned in s.115Z(b)(2), it is all the more so in respect of a relevant consideration which is found to be mandatory by implication"* [108].

43. The corollary of this conclusion is that a failure to properly assess a key issue in the EIS must be an important or serious deficiency having legal consequences. That may be so, even if the deficiency is later cured by the proponent in the PIR, the Report to the Minister or by the Minister in considering the key issue before approving the infrastructure. While recognising that any relief is necessarily discretionary, and it would be open to the Court to consider the assessment process as a whole in determining whether the key issue has been addressed, that approach may give too little weight to the importance of public participation both as an object of the Act (s.5) and as a purpose to be served by exhibition of the EIS and consideration of public submissions. It is at this juncture that a distinction between the omission to assess an issue, and an inadequate assessment, may become important. On one view, if the inadequacy is cured in the course of the assessment (eg in the PIR or by the Secretary's Report), then the purpose of assessment has been served, as a deficiency has been highlighted in the course of public participation but then addressed, whereas an omission deprives the public of the right to consider whether to make a submission, or to make intelligible and well-informed submissions. The former error may be cured but the latter may arguably be fatal. Although there is no requirement imposed directly by the Act to consider public submissions, it is necessarily implicit that the Secretary in preparing the Report must consider those submissions. The only express requirement to do so is if the Secretary

requests the proponent to report on them under s.115Z(6), and this might be thought to rebut any implicit duty to consider them, but this gives too little weight to s.115Z(5), which requires the Secretary to provide the submissions or a report of the issues raised in those submissions to the proponent, the OEH and other public authorities considered appropriate. What is the point of empowering any person during the exhibition period to make a written submission to the Secretary (s.115Z(4)), other than that the obligation to consider those submissions goes without saying, or in this case, without expressly stating that obligation. Section 115Z is headed "Environmental assessment and public consultation", making it clear, in my opinion, that considering the outcome of public consultation was an essential component of environmental assessment of the infrastructure. If there was no obligation on the Secretary to include consideration of public submissions in the Report to the Minister, how else was the Minister to learn of the issues raised by those submissions, if the Secretary decided not to require the proponent to prepare a response to them or a PIR under s.115Z(6)?

44. There is a complex argument that Jagôt J adopted in *Tugun Cobaki Alliance Inc v Minister for Planning and RTA* [2006] NSWLEC 396 under the equivalent provisions of former Part 3A that the Minister was not required to consider the EIS and PIR, despite the fact that the Report was to include a copy of those documents, and the Minister was obliged to consider the Report "and the report's advice and recommendations contained in the report". If that conclusion is correct, then the purpose of the EIS is not to inform the ultimate decision-making on the Project, as is assumed to be the case in the decisions concerning the test for its adequacy (for which see para 80 and following below). Rather, if it is to inform anyone other than the public, it must inform the Secretary in preparing the Report on the infrastructure, a document which is not a decision but merely advice and recommendations to the Minister. If that is the case, then it elevates the importance of the EIS, in the sense that it is primarily designed to inform environmental assessment anterior to the making of the decision, and deficiencies in the EIS cannot therefore be cured

at the later stage as its function by then has concluded. It is true that Jagôt J recognised that the Minister may have regard to the EIS (or the environmental assessment, as it was called under Part 3A), but the lack of any obligation to do so makes its role in the ultimate decision-making process a matter entirely for the discretion of the Minister. The Minister may have regard to a wide variety of documents other than the EIS, but its function as a mandatory matter for consideration is exhausted once the Secretary reports. Indeed, on one view the Secretary is not obliged to have regard to the EIS, although it must be "included" in the Report. In a practical sense, it would be difficult if not impossible for the Secretary to report on the infrastructure, as is his or her obligation, without considering the proponent's environmental assessment of it. In this sense, consideration of the EIS is probably an implicit mandatory factor governing the Secretary's functions, but as the Act is expressly cast, its primary role is to inform the public. In my view, this makes it on the one hand more difficult to cure any deficiency in the EIS by subsequent investigation in which the public are not involved, and on the other hand elevates the significance of the EIS as a document not directed to a decision-making end but to enabling the public to make informed submissions (and of course to decide whether or not to make a submission in the first place) on the Project.

45. Although s.115Y(2) requires the EIS to be prepared in "the form prescribed by the regulations," in prescribing the form, the EPAR requires the EIS to contain "an assessment ... of the environmental impact of the ... infrastructure to which the statement relates, dealing with the matters referred to in this Schedule": Schedule 2.6(e). That provision picks up Schedule 2.7 which prescribes the content of the EIS, and in that way the obligation in s.115Y(2) should be taken to extend to matters of content, not in contradistinction to the form of the EIS but simply as part of the form which the EIS must take. Schedule 2.7 is in a familiar format, but is made expressly subject to the EARs that relate to the EIS. In other words, the Secretary's EARs contain the overriding obligations for preparation of the EIS, but do not exhaust those obligations. In addition to them, in Schedule 2.7(1) requires:

"(a) a summary of the EIS

(b) a statement of the objectives of the infrastructure

(c) an analysis of any feasible alternatives to the carrying out of the infrastructure, having regard to its objectives, including the consequences of not carrying out the infrastructure

(d) an analysis of the infrastructure, including

(i) a full description of the infrastructure, and

(ii) a general description of the environment likely to be affected by the infrastructure, together with a detailed description of those aspects of the environment that are likely to be significantly affected, and

(iii) the likely impact on the environment of the infrastructure, and

(iv) a full description of the measures proposed to mitigate any adverse affects of the infrastructure on the environment, and

(v) a list of any approvals that must be obtained under any other Act or law before the infrastructure may be lawfully carried out.

(e) a compilation (in a single section of the EIS) of the measures referred to in (d)

(f) the reasons justifying the carrying out of the infrastructure and the manner proposed, having regard to biophysical, economic and social considerations, including ESD principles.

A note to this provision provides that a cost benefit analysis may be submitted or referred to in the reasons justifying the carrying out of the infrastructure. Schedule 2.9(1) provides that a document adopted or referred to by the EIS is taken to form part of it.

46. Several observations may be made about Schedule 2.7 in the context of these Projects, which share their wider objectives.

47. First, the analysis of feasible alternatives is framed by reference to the statement of the objectives of the infrastructure. If the objective is to provide transportation generally, then feasible alternatives must consider different

modes of transportation. If on the other hand the objective is transportation by road, there is no obligation to consider alternative modes of transportation, because that would ignore the objectives of the Project. The way in which the objectives are framed can therefore constrain and limit the examination of feasible alternatives.

48. Project objectives are set out at pp.3-16 to 3-17 of the M4 East and pp.3-20 to 3-21 of the New M5 EIS. Primarily, they relate to relieving road congestion by providing improved motorway access and connections linking Sydney's port and airport, western Sydney and places of business across the City. The objective is to cater for the travel demands "that are best met by road infrastructure". Subsidiary objectives each relate to these primary purposes. There is no doubt at all that both EISs comprehensively discuss feasible alternatives in the context of this objective, ie the provision of road infrastructure to relieve congestion and facilitate east-west linkages in the general location of Parramatta Road, the M4 and the M5 corridors. That the pursuit of that objective and the discussion of alternatives to it exclude public transportation otherwise than by motorway or more generally road infrastructure, is a consequence of the statutory restriction to which I have referred. Nonetheless, both EISs discuss Alternative 3, which is investment only in public transport and rail freight improvements (M4 East EIS, pp.4-7 to 4-10; New M5 EIS, pp.4-10 to 4-16).

49. Second, the EIS must state the reasons justifying the carrying out of the infrastructure "in the manner proposed". This does not require a discussion of the impact on the environment of alternatives. It accepts the Project as it is described and requires justification of it having regard to biophysical, economic and social considerations including ESD principles.

50. Chapters 3, 26 and 28 to 30 of the M4 East EIS and Chs.3, 28, 29 and 31 of the New M5 EIS are directed to this end, and comprehensively justify the carrying out of the infrastructure in the manner proposed (putting to one side whether the justification is correct).

51. Third, the incorporation of the principles of ESD in justifying the infrastructure is important, but those principles operate at a high level of generality and do not mandate any particular method of analysis of a potentially relevant subject matter or outcome: *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349 at [132], unless anchored by the EARs: [130]; *Gray v Minister for Planning* (2006) 152 LGERA 258 at [114]; *Minister for Planning v Walker* (2008) 161 LGERA 423 at [39], [56], [59].

52. Both EISs discuss ESD principles in particular contexts but Ch.27 of the M4 East and Ch.28 of the New M5 EIS explain how they have been incorporated in particular aspects of the Projects. For example, the Projects involve an imposition of tolls not merely on the new infrastructure but on the existing M5 which supports the polluter pays and user pays criteria, both important ESD principles. It would be difficult to conclude that the EIS failed to address ESD.

53. After the public participation step had concluded, the key issues were addressed by the proponent in the responses to submissions and the PIRs (several volumes), and by the Secretary in the Reports to the Minister. The Secretary obtained further expert reports on critical issues, which had been criticised by Council's expert consultants. If a purpose of environmental assessment is to inform the decision-maker, then the additional information obtained by the Secretary or made available in the PIR must be considered in deciding whether that purpose was not achieved in this case because of a deficiency in the EIS. Another way of approaching the problem is to ask whether a deficiency in an EIS could be cured by subsequent consideration. If the only purpose of an EIS was to improve Government decision-making *(AGC (Advances) Pty Ltd v RTA* (1993) 30 NSWLR 391 at 401), then an adequate assessment of a matter in an EIS which is cured in the course of the decision-making process may suffice to discharge the statutory obligation of environmental assessment: *Leatch v NPWS* (1993) 81 LGERA 270 at 278-280. That, however, may give too little weight to the central role of public

participation in the decision-making process, and to the arguably limited role played by the EIS in the Minister's decision (see paras 43 to 44 above). In *Lester v NSW Minister for Planning and Ashton Coal Operations Pty Ltd* (2013) 193 LGERA 97, an argument was advanced that the failure to make public the environment assessment for an application to modify a Part 3A approval was a breach of the Act, which vitiated the modification decision. After noting that the statutory scheme for modification of an approval does not make compliance with the requirement to make publicly available the environmental assessment a condition regulating the exercise of a power to modify an approval because that power was not expressly or inferentially made conditional upon the request for modification being made publicly available, Preston CJ said:

> *"... the scheme for modification of an approval stands in stark contrast to the scheme for approval to carry out a project ... before the Minister can give those approvals, there must be a period of public consultation in which the environmental assessment is made publicly available and the public may make a written submission ... Consideration and various responses to the issues raised in the public submissions, including a preferred project report that outlines any proposed changes to the project ... The giving to the Minister of the Director-General's report that includes the environmental assessment and any preferred project report ... and consideration by the Minister, when deciding whether or not to give approval to the carrying out of the project ... of the Director-General's report. The making publicly available of the environmental assessment for an application for approval to carry out a project or for a concept plan can be seen in the scheme to be critical and regulate the exercise of the powers to approve the carrying out of a project ... or to approve a concept plan for a project ..."* [55].

Tobias AJA and Young AJA agreed: [1], [2]. In most respects, Part 5.1 assessment and approval procedures are substantially the same as former Part 3A procedures, and these observations by the Court of Appeal are directly transferrable to Part 5.1. For this reason, I consider that compliance with the environment assessment requirements is a predicate for the exercise of the power to approve the Projects. I do not think that an important or substantial breach can be forgiven simply because the Secretary did not exercise his or her power to refuse to accept the EIS for exhibition. There is a

statement by Preston CJ in *Coffs Harbour City Council v Minister for Planning and Infrastructure* (2013) 193 LGERA 203 at [55]-[56] that suggests that the Director-General could cure a procedural or administrative deficiency by accepting an environmental assessment for exhibition and hence waiving compliance with that administrative requirement: in that case, stale EARs. I do not think that there is anything in Preston CJ's reasoning that would suggest that the Secretary could cure a more fundamental deficiency, and his Honour's reasons in *Lester* which I have quoted above would militate against that conclusion.

54. In light of these observations, it is now necessary to consider the principles concerning the adequacy of the EISs.

Legal principles concerning EIS adequacy

55. The principles concerning EIS adequacy have been settled for some years. Those principles will, however, give way to specific provisions of particular statutory schemes for environmental assessment. One important change is in the extent to which Departmental requirements override regulatory provisions, which had previously been treated as subservient and readily capable of waiver by the Department: *Prineas v Forestry Commission* (1984) 53 LGERA 160 at 167; *Guthega Developments Pty Ltd v Minister* (1986) 7 NSWLR 353 at 365-366.

56. The test for adequacy of an EIS was developed initially in *Prineas v Forestry Commission* (1983) 49 LGERA 402, where Cripps J said:

> *"An obvious purpose of the EIS is to bring matters to the attention of members of the public, the Department of Environment and Planning and to the determining authority in order that the environmental consequences of a proposed activity can be properly understood. In order to secure these objects the EIS must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of the carrying out or not carrying out of that activity. It should be written in understandable language and should contain material which would alert lay persons and specialists to problems inherent in the carrying out of the activity.*

> *... Clearly enough, the legislature wished to eliminate the possibility of a superficial, subjective or non-informative EIS and any statement meeting that description would not comply with the provisions of the Act ... but, in my opinion, provided an EIS is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision-maker and members of the public and the Department ... to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out the activity, it meets the standards imposed by the regulations. The fact that the EIS does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute ... In matters of scientific assessment it must be doubtful whether an EIS, as a matter of practical reality, would ever address every aspect of a problem ... Had the EIS failed substantially to comply with the regulations, that relevantly would have been a breach of the Act. It was conceded that if no EIS were prepared, that would be a breach of the Act. I can see no difference in principle between the failure to prepare an EIS at all and the failure to prepare one which substantially complies"* (at 417-418).

57. In *Liverpool City Council v RTA* (1991) 74 LGERA 265, Cripps CJ returned to the question, in the context of a motorway project which had omitted to consider the impact of a toll plaza on the environment. His Honour said:

> *"The Regulation does not require a standard of perfection. There must be some flexibility. What is required, however, is a standard of substantial compliance. The question is not whether it is reasonably open for a determining authority to conclude that the EIS complies (or substantially complies) with the provisions of the Regulation. It does or it does not. In the present case, at its highest, the 1985 EIS contained a full description of the existing environment and the effect of an untolled freeway in 1985. There was no mention in it of any alternative proposal such as, for example, a toll freeway. ... The 1985 EIS did not comply with the provisions of cl.57(2) of the Regulation with respect to the* [later] *proposal ... I am of the opinion that it has been established that the failure to prepare, exhibit and examine an EIS in the circumstances established was relatively a breach of Part 5 of the Act"* (at 274).

58. In *Schaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGERA 21, Pearlman CJ derived the following propositions concerning the content of EISs from those cases:

> *"1. An EIS must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible environmental consequences of the proposed development …*
>
> *2. The purpose of an EIS is to alert the decision-maker and the public to the inherent problems of the proposed development, to encourage public participation, and to ensure that the decision-maker takes a hard look at what is proposed …*
>
> *3. The EIS is not required to be perfect. It need not cover every topic or explore every avenue …*
>
> *4. The environmental impacts statement must not be superficial, subjective or non-informative …*
>
> *5. It should be comprehensive in its treatment of subject matter and object in its approach …*
>
> *6. Changes to the proposed development may be made between the exhibition of the EIS and the decision of the decision-maker but not so as to result in a completely different proposal …"*

59. It is against these general principles that compliance with the requirements of the EARs and Schedule 2 of the EPAR must be assessed.

Was there a breach of the public participation requirements?

60. The EARs require compliance with Schedule 2 of the EPAR but complement those provisions by detailing specific matters which must be assessed, such as strategic planning and transport policies, the environmental costs and benefits of the Proposal in comparison with alternatives, including not carrying it out at all, and the way in which the Proposal would interact with other elements of WestConnex. Both EARs identify traffic and transport, air quality, human health, noise and vibration, biodiversity, urban design and visual amenity, land use, social and economic, soil, water and hydrology, contaminated sites, heritage, and environmental risk analysis as key issues. Each issue has an inclusive but not exhaustive statement of matters that must be considered and information that must be provided in the EIS.

61. Each EIS is structured so that compliance with the key issues can be readily ascertained. At the start of most chapters, a compliance table is provided,

stating how and where in the EIS that particular key issue is addressed. Where necessary, further tables are provided to demonstrate how a subset of a particular key issue has been addressed. One example is Table 31-2 in the New M5 EIS, which sets out how the Project achieves its objectives (pp.31-3 to 31-5). The EARs require the proponent to demonstrate how the Project was justified against the objects of the EPA Act, and Table 31-3 answers that requirement (pp.31-6 to 31-8). Indeed, a criticism made of that EIS by Sydney City Council was that it was "compliance driven", in effect an admission that the EIS does comply with the EARs, even if it has missed the big picture issues which that Council raised in its submission.

62. Both EISs are similarly structured as compliance driven documents, which is by and large a consequence of the statutory provisions with which they must comply. However, the structure of each EIS makes it relatively easy to determine whether any particular matter required to be assessed has been ignored. That does not fully answer the compliance question, which includes the adequacy of assessment, but my experience over many years is that it is much easier to demonstrate a failure that has legal consequences if the EIS omits a matter it is required to consider than it is to establish that consideration has been less than adequate. Even when an important omission can be demonstrated, that deficiency does not necessarily lead to a finding of invalidity.

63. In *Bell v Minister for Urban Affairs and Planning* (1997) 95 LGERA 86, an EIS for the expansion of Kooragang Island Coal Terminal did not include an assessment of the noise impacts from additional rail movements which would be a consequence of the proposal on residences adjoining the main northern rail line. The author of the EIS was directed by the Department of Planning not to assess those impacts. The Court found that that was no justification for failing to provide an analysis of that indirect environmental impact of the development. The Court posed the question whether that omission rendered the whole of the EIS invalid when there was no criticism of any other part of it.

The Court decided that the omission, though significant in itself, was not so significant in relation to the content of the EIS and its function in the decision-making process for designated development under Part 4 of the EPA Act as to invalidate the EIS. I think that both the reasoning process and the conclusion are unsound. Indeed, after Bell appealed to the Court of Appeal, the Minister's representatives provided assurances which were sufficient for him to withdraw the appeal. I understand that the Minister took that action because of advice that the appeal would be successful. In any event, there is no doubt that the impact of rail noise on residences adjoining the railway line as a consequence of the project was a significant (arguably the most significant) impact of the project and an omission of that nature would be sufficient to invalidate any decision to approve the project. The relationship between the EIS and the Report under Part 5.1 was not the same as the relationship between the EIS and the decision to proceed in the context in which *Bell* was decided. Nonetheless, *Bell* stands as authority for the necessity to consider indirect impacts, and has been applied by the Court of Appeal in that context in *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 81 NSWLR 638 at [47].

64. Each EIS comprises many volumes, including annexures. There are further volumes comprising the response to submissions and PIR which the proponent was required to prepare, after the public exhibition period had closed. They contain further expert assessments designed to address inadequacies or further data and methodologies not available for or not deployed in the original assessments. The exhibition of the M4 East EIS elicited about 4,500 submissions, while there were over 10,000 submissions to the New M5 EIS. The EISs were publicly exhibited for about 60 days and the proponent and its consultants engaged in a variety of activities designed to publicise each EIS and invite submissions. The exhibitions were widely advertised and each EIS and supporting materials were made available on the Project website and at many locations comprising public libraries and Councils within the M4 and M5 corridors. The administrative requirements for public

consultation under Part 5.1 have been met: the advertisements and notices were accurate in their description of the Projects and accurately stated the dates of and location for exhibition, and the address where submissions could be sent.

65. I have considered whether the sheer volume of information provided in the EISs and their appendices would have deprived the public exhibition of its function as notification of the Project. The provision of sufficient information for the community to understand the project and lodge intelligible objections to it is fundamental to discharging the public consultation obligation: see *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213 at [108]. One of the tests for EIS adequacy is the intelligibility of the document: *Princeas v Forestry Commission* (1983) 49 LGRA 402 at 417. Had the minimum notice period of 30 days been deployed, I may have advised that an inadequate period had been set aside for public consultation. Although it would have been preferable to have exhibited each EIS for three months, I would have difficulty persuading the Court that the public and statutory authorities were unable to make intelligible submissions in light of the fact that about 4,500 and 10,000 submissions were respectively made, many of which are not form documents or, if they are, have made individual commentary expressing specific objections. Moreover, the Councils within the corridors made detailed submissions, sometimes with the assistance of expert reports on the critical issues. I tested this proposition by examining some of the public submissions to both Projects. For the New M5 EIS, I looked at submissions by persons most directly affected by the traffic leaving the St Peters interchange in an northerly direction: essentially, Euston Road. Muna Zarka and her family lived at Unit 1, 125 Euston Road, Alexandria. They were on the ground floor. Their bedroom windows were on street level facing the roundabout intersecting Sydney Park Road. The proposed road will be widened at this point, consuming a substantial nature strip within a few metres of Ms Zarka's child's bedroom. She observed in her submission, correctly, that seven lanes of traffic were proposed with virtually no buffer

zone between the unit and the widened road. I have inspected Euston Road and Ms Zarka's building and observed that the building would probably never have been designed with bedrooms facing Euston Road had it been thought that the road design and the traffic volume described in the EIS would have occurred. Ms Zarka was one of the most seriously affected residents. She was nonetheless able to make a persuasive submission on 7 December 2015 which demonstrated her accurate knowledge of what was proposed and she was able to explain the noise, safety and pollution concerns that arose from it. She annexed photographs of the rooms in her unit most affected by traffic noise. Although many submissions to the M4 East followed a common format, with a catalogue of general complaints about the proposal, many other submissions addressed specific problems or made proposals for changes that demonstrated a high level of awareness of potential impacts. For example, Mr Liberatore challenged the accuracy of the artist's impression of the eastern portal, complained about the timing of the noise mitigation proposals for 98 Chandos Street and the mitigation criterion, which excluded the upper floors of flat buildings, objected to the location of a noise wall and objected to the proposal as a whole. His objections were illustrated by figures from the EIS. There are many other examples of well-informed submissions. The evidence of such submissions would assist the Court in reaching a conclusion that the time set aside for public exhibition was not inadequate and the persons who took the opportunity to inform themselves of the Project were able to make responsive and intelligible submissions, demonstrating a high degree of awareness of the impacts of the Project.

66. Although each EIS is daunting in its sheer volume, and to a certain extent in its complexity, it was possible for the public, concerned about the impact upon them, to disaggregate the document relatively simply and read the information that addresses the impact on the area in which they live. To take those affected by the St Peters interchange as an example, more than two-thirds of the document is irrelevant to the assessment of impact on them. Although it may have been better to provide a ready reckoner where residents could have

found immediately the pages of the EIS referrable to their particular location, that can be achieved by interrogating the table of contents, or by examining the subheadings within the document itself. Apart from traffic generation data, the impacts of the St Peters interchange are discrete from the other areas within the corridor. One of the more significant impacts of the M4 East is on the suburb of Haberfield, and its heritage significance. I have reviewed aspects of the assessment in my earlier advice. However, the role of the EIS is to state explicitly those impacts and propose mitigation measures, or explore alternatives to avoid them. There is no doubt that the EIS did explain the consequences of the proposed Haberfield works, discussed mitigation strategies and, in other chapters, considered alternatives to the Wattle Street works. That the consequence of these works would have a devastating impact on Haberfield is not evidence of any legal deficiency in the EIS, but rather a criticism of the merits of the proposal. The EIS served its purpose by exposing these consequences for debate and consideration by the public, the proponent, the Secretary and the Minister.

67. The discussion of air quality was comprehensive and well informed, and took into account errors that had been made in the assessment of tunnel air quality in the existing M5. That and other concerns about in-tunnel air quality led to the formation of an Advisory Committee on Tunnel Air Quality, whose experts considered that the operational air quality assessment in the M4 East EIS was "a thorough review of high quality" but criticised the qualitative nature of construction air quality impacts. I do not think air quality issues relating to the tunnel or exhausts have misdescribed the problems or failed to assess them, and independent reports endorsed the EIS approach, once technical correlation issues within the EIS modelling had been resolved. Air quality goals will be met by the New M5 Project, and mostly by the M4 East Project, and the conditions of approval build in monitoring, review and a capacity to retrofit the ventilation stacks with filtration systems if the air quality modelling is inaccurate and dispersion standards are exceeded. Over time, air quality will improve with the application of Australian Design Rules to more vehicles

and the addition of electric vehicles to the fleet. The majority of truck traffic, whose diesel emissions are of most concern, will continue to use the existing M5 because it feeds directly into the airport and the port. I do not think that a significant portion of this truck traffic will switch to the New M5, although a wide variety of trucks will be induced to use the tunnel instead of the Princes Highway and other routes. Truck traffic will increase once the connections beyond the New M5 are constructed. Induced traffic is also a problem with the M4 East, but some existing traffic will be lost or deterred by toll avoidance practices. Although air quality issues involve considerable technicality, the EIS does its best to explain the consequences of the technical analysis in clear language readily understandable by a layperson. Using this as an example, there does not appear to be a deficiency arising from the language of the document or its arrangement of information which might fail the test of intelligibility and defeat the purpose of public participation. Technical issues arising from model validation are endemic to air quality assessments, and were raised by both the EPA and Department of Health as well as by independent experts, such as Katestone and Todorovski (for the M4 East), but subsequently resolved. An adaptive management approach for construction impacts was recommended, and the Minister imposed such a condition requiring a Construction Air Quality Management Plan to adopt the detailed mitigation measures set out in Ch.8 of the PIR, and specifically AQ1 to AQ45 (pp.8-7 to 8-11). No one could suggest that this was not a real attempt to deal with the impacts of dust deposition from demolition, stockpiles, earthworks and construction vehicles and machinery.

68. The approval conditions concerning air quality for the M4 East Project are detailed and prescriptive. There is, however, an error in them which should be corrected. Conditions E2-E4 set the in-tunnel air quality limits, which are designed to protect motorists from acute rather than chronic exposures to pollutants for brief periods. They are quite different to the ambient air quality goals fixed by Condition E9, which relate to chronic, long-term exposures to both point source pollution from the stacks and ground-level emissions from

the roads. Conditions E10 to E12 operate when those goals are exceeded. An Ambient Air Quality Goal Protocol must be prepared, which is enlivened when a Notification of Above-Goal recording is made. However, such a notification is only to be made, according to Condition E11, when the ambient monitoring records an exceedance of the goals in Conditions E2, E3 and E4. That confuses acute, in-tunnel exceedances, which is the subject matter of those conditions, with ambient limits, addressed in Condition E9. In fact, that condition makes it clear that Conditions E10 to E12 will apply if the ambient goal is exceeded. When a breach of the limits in E2 to E4 occurs, Conditions E6 to E7 apply, providing for a separate reporting regime which has nothing to do with ambient limits. Nor is there any logical relationship between in-tunnel and ambient air quality: indeed, on one view, a failure of ventilation in the tunnel should capture and retain pollutants in the tunnel and reduce the loads vented to atmosphere through the stack (although it may increase portal emissions). In any event, the reference to Conditions E2 to E4 in Condition E11 is a mistake, and should be corrected as soon as possible.

69. There is a second matter which may not be an error but which detracts from the force of the air quality conditions in the M4 East approval. Ambient monitoring should be continuous throughout the life of the Project, and only reset once it is clear, as a result of changes to the emissions profile of the fleet, that there is no likelihood of exceedances of ambient air quality goals as a result of the Project. Condition E8 requires the proponent to review the need for ambient monitoring stations two years after commencement, but the default position is that monitoring continues for the Project life. The public will have access to the results: Conditions E8 and E21. Despite that default position, the Air Quality Community Consultative Committee (**the Committee**) established to consult the community about these results must only continue for two years after the opening of the tunnels, unless otherwise approved by the Secretary of the Department of Planning: B9. The purpose of the Committee is to review and provide advice on air quality monitoring results and audits: B9(c), (d); E24. That purpose would be entirely frustrated if the

Committee was to dissolve (as required by B9, subject to the Secretary's discretion to continue it). For example, how could the results of air quality monitoring on the second anniversary of the tunnel opening be the subject of consultation, review and discussion, if the mechanism in the approval for doing so was, on that same day, dissolved? Of course, there are other audit and review procedures for air quality (eg B3, B7, E1, E6, E7, E8, E10(c), E12, E13, E15, E16, E21, E22-E25 and E46), which in many respects are best practice, but that does not diminish the significance or replace the function of the Committee, which itself is to consider the outcome of air quality audits (E24). If the tunnel operates as predicted, then the Committee will engender public confidence in the Project. If it does not, then the Committee should ensure that deficiencies are addressed rather than covered up. Council membership of the Committee is also important, because it is likely to be the only non-RMS body with the resources to interpret and if necessary challenge its results.

70. I do not think that these errors and inconsistencies in the M4 East approval can be elevated to the point where the approval of the Project is jeopardised. To some extent, they are the result of an excess of enthusiasm, are probably unintentional and could be corrected by a modification to the approval which could be effected in a matter of weeks, without public involvement: *Barrick Australia Ltd v Williams* (2009) 168 LGERA 43; s.115Z. The errors do not disclose any antecedent failure of consideration, and in my opinion, do not render the M4 East consent invalid.

71. Although the key issues in the EARs are not ranked, an important one is traffic and transport. This has two aspects, construction and operation. For the M4 East Project, the traffic issues were not complex. The Project involved the continuation of the M4 from its Concord termination to Haberfield, both bypassing Parramatta Road and tunnelling under the inner west suburbs. That had two consequences. First, widespread dislocation caused by surface works was avoided, but the tunnel off-ramps and ancillary works would disrupt

suburban communities. Second, the congestion at peak on Parramatta Road would be relieved, although it was possible that the choke points would simply be shifted further to the east, especially if the missing link and the northern extensions were not constructed, or if their construction was significantly delayed. One disappointing feature of the Project was that it did not seek to integrate the Parramatta Road Urban Renewal Strategy, or parallel public transport improvements, but this was a policy decision that sounded only in the merits assessment of the Project, and could reveal no conceivable jurisdictional error. In any event, the RMS response (PIR, p.4-110) was that it facilitated surface improvements to both the Parramatta Road corridor and public (bus) transport along that corridor. The Secretary agreed: Report, p.47. He recommended that two lanes along Parramatta Road be dedicated for public transport (p.48). Condition B34 was accordingly imposed on the approval. Whether this outcome was facilitated by the Project or not is a merits question, and irrelevant for present purposes. Apart from the failure to include a draft strategy for population growth in the Parramatta region in the future traffic volumes (which is not an accurate criticism of the traffic model in any event – see PIR, p.4-111), there is no other failure or deficiency in the traffic assessment which gives rise to any error of law.

72. I have considered the adequacy of the New M5 EIS in the context of its impact on inner city residential areas: essentially, the St Peters interchange and traffic flowing north from the interchange into arterial roads which adjoin local residential areas, as well as commercial and industrial estates. The understandable concern of residents is that, by funnelling flows into these streets, the impact of the Project will extend well beyond the study area. That study area was essentially defined by reference to the road works necessary to relieve the existing road infrastructure so that it was able to carry the additional traffic from the New M5. For example, in the case of Euston Road, it did not consider in any rigorous sense impacts beyond Maddox Street, which was the furthest north of the road widening works in Euston Road. A similar observation can be made concerning King Street, Edgeware Road and

so on. The EIS adopted an engineer's view of impacts: that they were coextensive with the works which would be necessary to relieve the additional traffic: where no works were required, it was assumed that the Project was not responsible for any additional impacts that were necessary to mitigate. This was a somewhat circular approach to the problem, but no doubt represented the proponent's genuine opinion, and the basis for marking out the study area was explained in the EIS. That is not to say that it ignored impacts beyond the study area: for example, it considered the impact on heritage buildings and sensitive land uses in King Street and in other locations beyond the study area, and much of the information in the EIS can be applied to those areas so that a resident of them could ascertain in a general way the impact on his or her home of additional traffic, noise, pollution and so on. Nevertheless, the critical tables which numerated traffic volumes on local roads around the St Peters interchange selected areas generally described as north or south or east or west of major intersections (Table 9-17, 9-19, 9-23, 9-24, 9-45 to 9-51) which excluded local roads. Although the discussion of impacts to the local road network are of a generalised nature (see pp.9-134 to 9-147), the EIS proposed a system of adaptive management to deal with unexpected or unmodelled impacts. As I understand the reasoning process, the traffic model took into account planned or necessary changes to the road network when modelling traffic volume without the Project and included proposed changes to road infrastructure when modelling with the Project. However, the modelling was necessarily at a level of generality because the response of motorists to tolling and other changes to the road network could not be predicted with precision, and could be modulated by making small changes in traffic infrastructure to discourage driver behaviour. Accordingly, the EIS recognised that additional measures might need to be undertaken once the New M5 was in operation:

> *"Roads and Maritime would monitor the traffic movements at these locations closely upon opening of the New M5 and, if required and subject to the successful outcome of further consultation with the local*

Councils, stakeholders and community, plan to implement localised schemes, subject to separate assessment and approval" (at p.9-138).

For example, by prohibiting right-hand turn movements at intersections, additional traffic through local areas could be limited. No doubt local road closures or speed limit measures could also be implemented to deter rat-running, a common cause of concern to residents of the area. The point is that the power of the regional traffic model was insufficient to predict with accuracy these behaviours.

73. The Minister imposed a condition on the New M5 approval to require the preparation of a road network performance review plan to analyse the impacts on local roads and rat-running, to make further detailed investigations at the major intersections (including Euston Road between Sydney Park and Botany Roads and King Street between Sydney Park and Enmore Roads) to identify traffic performance deficiencies and to develop potential mitigation measures to remove or limit adverse impacts: Condition E40. Similar problems with the power of the traffic model affected the M4 East, and the Minister imposed Condition E36, which required a Road Network Performance Review Plan to mitigate unforeseen impacts and to improve the performance of the traffic network. Council and other transport agencies are to be involved in this process: E36, E37.

74. Adaptive management conditions are common responses to complex problems that arise in the case of major infrastructure, and attacks on them for deferring consideration of impacts have always failed when challenged in litigation arising from Part 3A, Part 5 or Part 5.1 projects. The Courts have rejected the doctrine under Part 4 of the EPA Act that prohibits the deferral of major issues to post-consent decision-making. In *Community Action for Windsor Bridge,* it was argued that a Part 5.1 approval which required heritage conservation issues to be dealt with in a conservation management plan to mitigate the impact on Thompson's Square at Windsor of a major road project was unlawful because the Minister had not approved mitigation measures but had left it to a subsequent process and to others to determine

potentially material modifications and the final location, appearance and form of the development. It was argued that an approval which was not final and certain exceeded the statutory limits of the Minister's power so that there was no valid approval of the project: [50]. The doctrine under Part 4 impugned consents that left open the possibility of a significantly different development from that described in the application [52]. Under Part 5.1, the Minister's power to approve or disapprove the carrying out of infrastructure differs in some respects from the power of a consent authority in Part 4: [55]. In particular, the circumstance that modifications are explicitly authorised by s.115ZB(3) meant that it could be no objection to an approval that what is approved was different and even significantly different from what was proposed so long as the differences are within the scope of "modification": [57]. Brereton J pointed to a number of features of Part 5.1 and the context in which it operates that suggested that infrastructure may be described and approved with considerable generality and flexibility: [64]. The description in the *Transport Action Group* case of Part 5 extending to "projects of vast magnitude and complexity" so that aspects of them "may require attention over a lengthy time span during which the ground rules may change, and the only certainty may be that there will be uncertainty" was endorsed. That made it both impossible and impractical to define the project with complete finality and specificity and hence there was nothing objectionable in deferring to the greater expertise of an appropriate authority particular issues if they arose: [65]. His Honour concluded:

> *"So long as it defines the outer parameters of what is permissible, an approval under s.115ZB may be given at a relatively high level of generality, so as to admit variations of detailed design within the scope of the approval. Variations of detailed design within the boundaries of what is approved are not modifications of the SSI within s.115ZB, but within the scope of the approved SSI. While the power of modification under s.115ZB must be exercised, if at all by the Minister in the course of the approval, it may be exercised by stating an outcome or objective to be achieved, to the satisfaction of another official or agency"* [74].

Because of the nature of large, complex and long-term projects, requiring every aspect to be determined in the approval would be impracticable: [75]. This conclusion was clearly correct and was supported by other cases about comparable provisions: *Ulan Coal Mines Ltd v Minister for Planning* (2008) 160 LGERA 20 at [34]-[40]; *Rivers SOS Inc v Minister for Planning* (2009) 178 LGERA 347; *Coffs Harbour City Council v Minister for Planning* (2013) 193 LGERA 203; *Pittwater Council v Minister for Planning* (2011) 184 LGERA 419 at [69]; *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 215 FCR 301 at [199]-[225].

75. In short, the impact on local roads and the probability of rat-running was envisaged in both EISs but could not be solved until after that Project had commenced and the experience of actual traffic and driver behaviour could be applied to a new model to determine appropriate responses, whether by direction notices, signalling, intersection modifications, traffic calming, direction of flow changes or other local traffic management measures. Many submissions were directed to this problem, which was already prevalent in the corridor between Concord and Haberfield, both north and south of Parramatta Road, so it could not be said that either EIS failed to notify the issue or provide an information base upon which it could be addressed by those most affected by the problem. In that sense, each EIS served its statutory purpose as a decision-making tool, both by enabling public participation and by assisting the decision maker to mitigate the problem.

76. It is also relevant to consider how this key issue was addressed in the New M5 PIR. The problem is discussed in numerous places, and it is easiest to look at the response to the TTM Consulting report. TTM was engaged by three Councils to prepare a report on traffic-related components of the EIS. TTM advised that the New M5 EIS did not satisfy the EARs in three respects:

> "• *The strategic traffic modelling is inconsistent. In particular, the traffic forecast for average weekday traffic in the New M5 are excessively high when compared to the morning peak period*

flows. These overly high daily forecasts adversely affect the economic and financial assessment of the Project.

- *The traffic forecasts appear to include the assumption that the M5 East is tolled. This is an un-tolled road and is not part of the Project presented to the Government. The toll assumed for the M5 East has not been stated in the EIS report.*
- *The upgrade of Campbell Street and Euston Road results in significant diversions of traffic from the Princes Highway to Euston Road. The implications of this have not been addressed in the EIS"* (TTM report, p.15).

77. TTM's criticism of the EIS is answered in the PIR (para 4.17, p.4-431 to 4-451). The second point is incorrect. The EIS does assume that the existing M5 would be tolled (see Ch.5 and Ch.9 of the updated Strategic Business Case). The first point about the ratio of peak to daily traffic flows is within the available range for several toll roads in Sydney, and the criticism may be the result of a difference between data used for the models (PIR, p.4-433).

78. The last point concerns the diversions of traffic and the increased volume of traffic on local roads, and was a problem recognised in the New M5 EIS (toll avoidance was a recognised consequence of the M4 East proposal, but the impact on Parramatta Road was negligible, given the traffic relief from opening the M5 East). The New M5 PIR states:

> *"To ensure that this redistribution does not lead to unacceptable outcomes for the surrounding road network, an independent operational traffic review will be commissioned and carried out twelve months following the commencement of operation of the Project (refer to environmental management measure Aptto2, amended in Chapter 8 in this report). This report would include an assessment of the level of service of major intersections on local roads around the St Peters interchange (among other things). In the event that unacceptable outcomes are identified from this review, consideration will be given to additional feasible and reasonable measures to address these outcomes"* (p.4-434, PIR).

Later in the submission, TTM compare traffic forecasts with and without the New M5 Project, which generally show an increase in traffic to unacceptable levels without the Project in King Street and in the other local and arterial

roads to the north of the study area. The Project will provide some relief but flows were directed to Campbell and Euston Roads because they were the industrial edge of Sydney Park. The independent operational traffic review would provide an opportunity for additional feasible and reasonable measures to address these problems (p.4-437).

79. It is useful to consider each PIR's response to the criticism of deficiencies in the respective EISs, as it demonstrates that those criticisms were made because of data provided in the EIS: in other words, the EIS performed one of its functions by alerting the public and decision-makers to critical issues that might need mitigation measures or project alterations. These are not deficiencies of the EIS but of the Project itself and the difference between them must be steadily borne in mind. An attack on the adequacy of an EIS is not an opportunity to argue the merits of the Proposal. I accept that the power of regional traffic modelling is rarely sufficient to show impacts on local roads which are not part of the design structure of the traffic model nor intended to accept additional traffic volume. That was a problem for both traffic models, although the model used for the M4 East included 38 intersections and had sufficient detail for former Leichhardt Council to adapt it for local roads: see PIR, p.4-206. The approach of deferring consideration of local traffic management to the operation of a development is both practical and lawful. On the most important of the key issues, both EISs in my opinion pass the test of adequacy.

80. Although air quality and traffic and transport impacts were no doubt the most important of the key issues, several others were significant and an important deficiency of analysis in any of those issues may have affected the validity of each EIS.

81. Biodiversity issues were significant for the New M5 Project. The EIS was criticised for its assessment of biodiversity because it failed to have regard to Council records of occurrence of vegetation and species of concern, did not consider the impact of the Project on common (that is non-threatened)

species and, in particular, failed to have regard to remnant vegetation on the Alexandria landfill site and in Sydney Park. While to some extent this criticism is correct, it does not, in my opinion, have any legal consequences. First, the biodiversity assessment was prepared in response to the Secretary's EARs, which promoted the use of State Government developed tools and policies which are widely applied in assessing major road and other infrastructure projects, as well as smaller developments. Those tools of necessity concentrate upon significant impacts on flora and fauna, which are directed at studying the impacts on species and vegetation communities which are given statutory protection under the *Threatened Species Conservation Act 1995* and (by dint of the Project being a controlled action) under the *Environmental Protection and Biodiversity Conservation Act 1999* (Commonwealth). Several species and vegetation groups are identified as of particular concern, and the biodiversity assessment concentrated on the Project's impacts on them. There were important biodiversity impacts on threatened species and communities in the central and southern gateways for the New M5, which were correctly identified and comprehensively discussed. Considerable disquiet has been expressed because the Minister dealt with these impacts by offsetting, without requiring the offset to be implemented before commencement of the works. That raised no legal issue, however, because there was no legal requirement to offset or secure the offset land in the first place. In my opinion, its discussion of those matters was adequate, and certainly sufficient to inform public participation, as a result of which further assessments were undertaken and included in the PIR. That in turn precipitated additional conditions of approval imposed by the Minister to ensure that expected impacts were mitigated or offset using well-known policies and methods applied throughout the State to development in threatened species habitats. For the M4 East, none of the 15ha of clearing was likely to have any significant direct impact on biodiversity. Indirect hydrological impacts on the Mason Park Wetland were found to be unlikely. Even if that conclusion was wrong, it would amount to an error of fact and not a failure of consideration.

82. In the case of the Green and Golden Bell Frog, a target species of the biodiversity assessment, it had been affected by the first M5 project, and was known to breed in created habitat. The question whether it could persist in such habitat through several lifecycles was not clearly answered on the evidence available, and hence detailed conditions were imposed to ensure that in the worse case, translocation would take place. That is not a favoured solution for any species, but the obligation to translocate was imposed because the New M5 environmental assessment had adequately discussed the potential for local extinction of this very rare and cryptic species.

83. Despite survey efforts being directed to the northern area of the New M5 Project that would be directly affected by works, no similar species were discovered and none are known to occupy habitat, although the possibility that one or more bat species might visit some areas of remnant vegetation or even shelter in buildings, pipes and tunnels within the northern Project area was recognised, but not considered to be of significance. Once again, even if that conclusion was incorrect, it would be an error of fact, and criticism of the conclusion would amount to an attack on the merits rather than the legal adequacy of the assessment.

84. Complaint was also made of the failure to interrogate Council databases concerning species. Generally speaking, biodiversity surveyors are expected to use the Atlas of NSW Wildlife, initially developed by the NPWS, but which contains species records by licensed fauna surveyors, as well as records submitted by members of the public and local Government. The surveyors for the New M5 Project utilised this database together with several other sources of Information concerning both vegetation and the occurrence of species of concern. I think that this was appropriate, and although it may not have been completely comprehensive, it was more than likely to disclose the presence (or absence) of species of concern within the Project area. Once vegetation communities have been classified, it becomes a relatively simple exercise to identify likely occurrences of species known to inhabit those communities. To

that extent, records of presence and absence may be a starting point, but does not drive the assessment. The assessment tools assume, conservatively, the presence of species of concern in vegetation communities which they are known to inhabit, for the purposes of assessing likely impacts. The absence of discussion of such likely occurrences in the northern part of the Project area in the EIS simply reflected the outcome of this exercise.

85. Finally, criticism was directed at the absence of discussion of Sydney Park in this context (although it is discussed in many other parts of the New M5 EIS). Sydney Park is created habitat, and although species obviously inhabit it, they will not be directly affected by the development. Sydney Park is not the subject of any works, with the possible exception of road widening (now under re-consideration) where some street trees might be lost. I have inspected Sydney Park and its environs, and, although not a biodiversity expert, consider that the EIS adequately explained the extent of surrounding works sufficient for the public (and Council) to make intelligible submissions about potential impacts. I do not think that any more intensive assessment was required of the impacts on the biodiversity significance of Sydney Park. Most species that were not considered are common, and are not usually the subject of assessment or statutory protection, except to a limited extent, at a regional level. It is threatened species and endangered ecological communities which engage the obligation for heightened scrutiny at a local population level in environmental assessment: see, eg, s.5A of the EPA Act. That policy can be criticised, but I do not think that the authors of the New M5 EIS can be criticised for applying it, as it is applied in environmental assessment throughout New South Wales.

86. The next matter I have considered is the assessment of noise impacts. As might be expected of a statutory authority that has developed or contributed to the development of the leading road noise standards in Australia, the discussion of both construction and operation noise in both EISs is comprehensive. The St Peters interchange is to be constructed within an

existing industrial area. The principal impact on residents will be from road widening, tree removal and additional construction traffic. These impacts are clearly described in the New M5 EIS and assessed, by reference to the area around the St Peters interchange. Figure 12-1 in the EIS (p.12-5) depicts the noise and vibration study area for both construction and operational assessment. Although the assessment is not limited to areas adjacent works but includes, for example, the whole of Sydney Park and the residential area between the Princes Highway and Euston Road, it does not include areas north and east of the proposed widening of Euston Road, despite the fact that additional traffic will be funnelled into those areas. However, these are arterial roads designed to carry heavy vehicle traffic from the surrounding industrial and commercial areas and do not need further works to expand the existing function of the roads. As well, the data shows quite clearly that additional traffic without the Project will increase noise impacts significantly by 2031. The EIS justifies its study area on the ground that it extended to where noise levels were dominated by the roads that are not being assessed as part of the Project, which was up to a maximum distance of 600m from the Project works for urban areas (p.12-44).

87. To a significant extent, the relative increase in road traffic noise between the present day and 2031 would be experienced, with or without the New M5 Project. The EIS summarises this information, but in the technical working paper on noise and vibration (Appendix J) there is a detailed assessment of noise exposure of particular locations and whether they are such as to trigger an obligation to mitigate, according to RMS policy. Table 90 (p.157) lists receivers eligible for consideration of additional mitigation measures around the St Peters interchange and local road works, assessing the increase in relative noise levels between the no build and build cases as at 2021. To use 125 Euston Road, Alexandria as an example, the increase in noise level is only 1.7dB(A). An increase in noise 2dB(A) is generally considered barely perceptible (p.224). Beyond the study area, the introduction of a toll on both the existing and the New M5 would lead to a maximum increase of 1.9dB(A)

on parallel routes which might be used for toll avoidance (p.224). More significant increases in noise will be experienced on other roads such as Campbell Road and Campbell Street, but impacts are clearly set out in both the EIS and the technical appendix (see p.223, both in tabular form and in the road traffic maps where individual buildings are selected and coloured according to noise levels expected to be received at 2021 and 2031) for both operational and construction noise (Appendices L and M to Appendix J). Although considerable detail is contained within these documents not directly relevant to most residents, and it is not easy to navigate this information, I have difficulty in concluding that on this ground alone the EIS is not intelligible. It clearly is, and sets out in summary the noise impacts of both construction and operation within the north-eastern part of the Project area. So far as I am aware, no attack on the inadequacy of an EIS has succeeded on the ground of providing too much information. I conclude that there is no basis for invalidity to be found in the discussion of noise and vibration impacts. Noise is also assessed in a chapter dealing with health impacts, albeit at a high level of generality. There is nothing in that discussion which alters my view about the adequacy of the treatment of noise.

88. Traffic and construction noise issues are also comprehensively discussed in the M4 East EIS. I have already referred to the response by a member of the public who could precisely locate his property on the predictive noise figures, understand and criticise the criteria for noise mitigation and propose alternative locations for noise barriers. Ashfield Council retained Atkins Acoustics to review the EIS. Although it raises errors of fact and interpretation of noise data, and criticises the use of criteria, which exclude upper floors of flat buildings from assessment for mitigation measures, nothing in its analysis suggests that noise was not assessed – on the contrary, by exposing its results, Mr Atkins was able to propose alternatives or point to deficiencies in the EIS analysis. The PIR discussed this issue at 4-127 to 4-135 and it is evident that although many issues raised by him have caused more detailed assessment, there is no significant omission which is not explicable by a

policy choice or a decision (in the case of near arterial road noise loggers) based upon methodology directed to worst-case analysis. No legal issue arises from this debate.

89. There are numerous other key issues that the EIS addresses. However, those of most concern to Council, and the most direct impacts on residents have been discussed (I have reviewed heritage impacts for the M4 East in my earlier advice, for a different reason, but it did not reveal any failure by the EIS to engage with the heritage consequences of the Project). Nonetheless, I have reviewed the remainder of each EIS and where relevant the technical appendices to ascertain whether it meets its fundamental obligation to comply with the EARs and Schedule 2 of the EPAR. I consider that it does, and that it does so in an accountable manner by stating in a summary table at the commencement of each chapter and within the technical appendices the locations in the document where those key issues are discussed. I have also considered whether each EIS performs the function of informing public participation and decision-making. As I have observed above, I selected certain submissions to ascertain whether Project opponents were able to intelligibly discuss the Project and understand its impacts on them and on their community. It is apparent from the submissions that there was a high level of awareness of those impacts. In that sense, each EIS has performed its duty of informing the public not only by describing the Project accurately but by assessing its impacts in an intelligible manner sufficient to enable the public to participate.

90. One matter to which I should refer is the occasional criticism that neither EIS has adequately assessed its Project in light of other parts of the WestConnex's infrastructure. One reason why the impact will be so severe at the eastern portal of the M4 or the north-eastern end of the M5 tunnel is because, assessed alone, that is the outlet for the funnel of traffic which might otherwise have travelled on the existing M5 and the Princes Highway or Parramatta Road. However, the point of both roads is to link with additional

motorways, which would make each an effective transportation route to the north for traffic wishing to avoid the City and to the east for traffic to or from the airport and the industrial areas around the port. These additional links are yet to be approved, but stubs for them will be constructed as part of the interchange. The EARs require each EIS to assess impacts not only of the Project itself (that is, assuming it is stand alone and not connected to other parts of WestConnex) but cumulative upon the construction of the additional motorways. It must be acknowledged that this was a large task, which complicated and significantly lengthened each EIS. However, consideration of cumulative impacts was both appropriate and undertaken in sufficient detail for it to be a useful component of environmental assessment. It is obvious that the impacts upon the land to the north and east of the New M5 interchange and surrounding Parramatta Road and Wattle Street at the end of the M4 will be much less significant once these missing links are constructed, if they are constructed. That is an observation which does not bear upon the validity of the EISs but relates to the merits of the Projects. Most of the criticism of each EIS is in fact criticism of WestConnex rather than the quality and comprehensiveness of its environmental assessment. The Court will be astute to distinguish between the merits, which are not reviewable and compliance with obligatory requirements of the Act, which may be the subject of legal review.

Is the Minister's decision legally flawed?

91. The final question is whether the Minister's decisions are legally flawed. The Minister provided reasons for decision in the case of the New M5, which demonstrated his advertence to relevant matters. There is no obligation on the Minister to provide reasons but he endorsed a Minute from the Secretary of the Department recommending approval for particular reasons, and added some observations in handwriting to the Minute. It does not travel beyond the matters raised by the Secretary in his Report to the Minister and in the draft conditions annexed to the report. I do not have the Minute for the M4 East

decision, but I shall assume that the Minister likewise endorsed the Secretary's Report. If the Report discloses a legal error, or fails to consider an important matter, the Minister's decision, by adopting the Secretary's recommendations, might be equally flawed. If such an error in the M4 East decision is discovered, it will be necessary to obtain evidence that the Minister adopted the Report, before Council could challenge the Minister's decision, the onus of proof being on the applicant to show error. By making an error of law, the Secretary may have failed to perform his function in reporting to the Minister, but that is a more difficult argument. It is unnecessary to explore these difficulties further, as I have concluded that there is no evidence of any such error in the Reports.

92. Each Report follows a similar structure, and is supported by expert reports on key issues. The Reports briefly discuss the submissions and then address the key issues, by reference to the matters raised in submissions and the answers provided by the proponent in the PIR. Independent reviews of traffic, noise, air quality, groundwater and urban design are annexed to the Reports. The Minister was obliged to consider these reviews because they were contained in the Report: s.115ZB(2)(a). There is no evidence that he did not.

93. There are two questions of law which must be addressed concerning the Minister's decision. The first is what considerations must be taken into account by him and the second is whether his decision can be attacked as lacking any plausible justification on what is known as the manifest unreasonableness ground. There is no evidence of misconstruction of statutory provisions which are material to his decisions.

94. In *Community Action for Windsor Bridge,* Brereton J, after observing that the Act expressly required the Minister to consider the Report and other documents, found that a necessary implication arose from the statutory scheme that the Minister must consider the content of the Report which necessarily addresses the key issues with regard to which it has been prepared. In that way, his Honour said, the key issues attract statutory

significance. His Honour concluded that it was a condition of validity that the Minister had regard to the criteria that made the Project one that only he could approve, and the key issues identified pursuant to s.115Y(3): [107]. As each Report discusses those key issues, in sufficient detail for the Minister to appreciate the views of both the proponent and of objectors, there is no evidence that that duty was not discharged by the Minister. Of course, if there is evidence that the Minister did not read the Report the position might be different. In *Tugun,* the applicant established that the Minister did not read the EIS which was only made available to him electronically and not in a physical form. However, the Court decided that he was not obliged to do so, and there was no evidence that he did not read the Director-General's report before approving that project. It is at this point that the onus can be determinative, as it was in *Community Action for Windsor Bridge:* [109]. Council would bear the onus of establishing a failure to consider, to the extent required, a particular key issue. An inference is not lightly to be drawn that a decision-maker ignored such a matter, and there is no evidence at all that the Minister failed to inform himself by reading each Report before making his decision, and there is positive evidence that he did so in the case of the New M5. As the Reports are otherwise comprehensive, there are no inferences available to demonstrate that he ignored a key issue. For these reasons, I conclude that there is no basis for attacking the Minister's decisions on the failure to consider ground.

95. It is also open to challenge the Minister's decisions on the ground that no reasonable person in his position could have made it. This ground cannot be made out simply by proof that the Minister's decision was unreasonable. The fact that he has made an evaluative judgment with which a Court disagrees only engages this ground if the judgment was not rationally open to the Minister. Where reasonable minds may reach different conclusions about the correct or preferable decision, there is no ground for judicial intervention. The decision must be devoid of plausible justification so that no reasonable person could have made it. This ground is very confined, to avoid trespassing on the

merits of the decision, which Parliament has reposed in the Minister and not the Court. Once again, Council would bear the burden of showing that the decision was one which lacks any evident and intelligible justification (the authorities are summarised in *Community Action for Windsor Bridge* at [132]-[135]).

96. There is evident justification for the Minister's decision to approve the infrastructure. The existing motorways and arterial roads within the corridors are congested. If no action is taken to relieve that congestion, existing non-motorway routes across the northern section of the New M5 Project area will experience additional traffic generated from urban and residential development at Greens Square, Mascot and nearby suburbs which could not be accommodated in the existing road network. For example, in the AM peak at 2031, without the Project, traffic from King Street to Sydney Airport Domestic Terminal which in 2012 took 13 minutes, will take 44 minutes. In a PM peak the 2012 travel time is 15 minutes whereas in 2031 without the Project, it will be 45 minutes. To travel from the Princes Highway to north of Euston Road in the PM peak currently takes 8 minutes, whereas in 2031 it will be 38 minutes without the Project. These relatively short trips from west to east across the Project area demonstrate the degree to which congestion on major traffic routes such as the existing motorway can produce spill-over traffic which will congest local and arterial roads around the proposed St Peters interchange (see EIS, p.9-134). The position is similar, although not as dire, in the case of the M4 corridor. There, congestion will slow traffic along Parramatta Road and widen the peak periods significantly, but also compromise intersection performance for north-south traffic, because east-west movements will be preferred in the future to the detriment of north-south movements.

97. As I have observed, the objectives of both Projects concern relief of an existing congested road corridor. By limiting the objectives in this way, each Project can be readily justified. The criticism of the Minister is that public

transport and other options were sidelined by defining the scope of the Project so narrowly. To some extent, that criticism is incorrect, because public transport was considered as an alternative solution, and it was made clear in all the decision-making documents that WestConnex was a portion of a larger solution. Whether that is so or not, it could not be said that the Minister's decision lacked plausible justification within the context of the Project under consideration, nor would it be correct to say that other transportation modes were ignored. The rest is an argument about the merits of the decisions which cannot be the subject of legal challenge in this case.

98. Finally, I have reviewed in detail the conditions of approvals, to ascertain whether they reveal some deficiency of consideration, or wholesale deferral of an issue which the Minister was required to resolve before approving the Projects. I have already given detailed consideration to the heritage conditions of approval for the M4 East in my first advice, and have discussed some limitations of the air quality conditions for the M4 East.

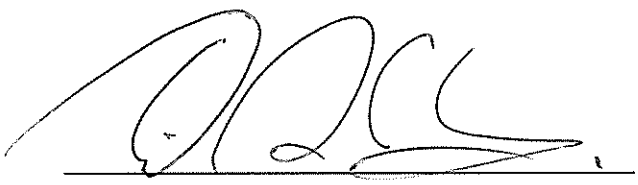
99. The approvals each apply, subject to the conditions, the mitigation measures detailed in Ch.8 of the PIR in each case. Those measures are part and parcel of the approved Project, and so it is necessary to read the approvals as incorporating them. Once that is done, it is evident that the key issues, and the leading criticisms by Council's predecessors and others, were to a large extent dealt with by specific conditions designed to mitigate the impacts of the Projects. Although the approvals give the impression of deferral to later management plans, in fact the content of these plans or at least the criteria for their preparation has been identified either by condition or in the tables of mitigation measures in the PIRs. To the extent that the criteria was qualitative, that may be imprecise, but criticism of that technique attacks the merits of rather than the legal basis for the decision to allow imprecision and flexibility in controlling the impacts of the Projects. As I have observed, a decision to impose flexible conditions does not exceed the Minister's powers if

it is in response to the Minister's view about the complexity of the Project and the need to apply adaptive management to mitigating its impacts.

100. There are no reasonable prospects of success to challenge the Minister's decisions to approve the New M5 and the M4 East on this ground.

Conclusion

101. Although the statutory restrictions on judicial review can be overcome, the decisions to approve the M4 widening, New M4 East and New M5 are, in my opinion, unassailable on legal grounds.



T F ROBERTSON SC

Frederick Jordan Chambers
Phone: 9229 7337
Fax: 9221 5747

12 September 2016