

**IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
PLANNING AND ENVIRONMENT LIST**

**VCAT Reference Nos. P1816/2011; P1818/2011; P1820/2011;
P1822/2011; P1829/2011; P1846/2011**

BETWEEN

DUAL GAS PTY LTD

Applicant/Respondent

and

ENVIRONMENT PROTECTION AUTHORITY

The Authority

and

ENVIRONMENT VICTORIA INC.

LOCALS INTO VICTORIA'S ENVIRONMENT INC.

DOCTORS FOR THE ENVIRONMENT INC.

MARTIN SHIELD

The Objectors

OUTLINE OF SUBMISSIONS

DUAL GAS PTY LTD

INTRODUCTION

1. This outline has been prepared on behalf of Dual Gas Pty Ltd ("Dual Gas") in accordance with the Orders of the Tribunal made on 18 July 2011.¹ It outlines, in broad terms, the position of Dual Gas with respect to:

¹ See, more particularly, order 23 of the Orders of the Tribunal made 18 July 2011.

- a. the various applications for review made by the Objectors pursuant to section 33B of the *Environment Protection Act 1970* (Vic) (the “EP Act”) (referred to herein as the “Objector Applications”):
 - i. Proceeding P1820/2011 (commenced by Environment Victoria Inc.);
 - ii. Proceeding P1822/2011 (commenced by L.I.V.E. Inc.);
 - iii. Proceeding P1818/2011 (commenced by the Doctors for the Environment Inc.);
 - iv. Proceeding P1816/2011 (commenced by Martin Shield); and
- b. the two applications for review made by Dual Gas pursuant to section 33 of the EP Act (referred to herein as the “Dual Gas Applications”):
 - i. Proceeding P1829/2011 (commenced pursuant to section 33(3) of the EP Act with respect to a number of conditions of the Works Approval issued by the Authority) (the “Conditions Review”);
 - ii. Proceeding P1846/2011 (commenced pursuant to section 33(1)(b) of the EP Act with respect to the failure on the part of the Authority to determine the application for Works Approval) (the “Failure Review”).

2. This outline does not address the various preliminary matters identified by the Tribunal as being suitable for consideration at the commencement of the hearing.²

PART 1: WORKS APPROVAL - THE LEGISLATIVE FRAMEWORK

3. Part 1 of this outline briefly describes the key provisions of Division 2 of Part III of the EP Act, which concerns the issue of works approvals by the Authority, so as to provide context to each of the Objector Applications and Dual Gas Applications.
4. As a starting point, however, it is noted that pursuant to the terms of Part II of the EP Act – which pertains to the creation of environment protection bodies – a specific function of the Authority is to issue *inter alia* works approvals:³

² In accordance with the orders of the Tribunal made on 14 October 2011 written submissions with respect to these matters will be provided at the commencement of the hearing on 24 October 2011.

³ Section 13(d) of the EP Act.

... to control the environmental impacts of activities which create a state of potential danger to the environment and to control the volume, types, constituents and effects of waste discharges, emissions, deposits, or other sources of pollutants and of substances which are a danger or a potential danger to the quality of the environment or any segment of the environment and the generation, storage, reprocessing, treatment, transport, containment and disposal of waste and to control the volume, intensity and quality of noise.

5. Pursuant to the terms of Division 2 of Part III of the EP Act, a person must obtain a works approval prior to performing *inter alia* any “act or thing” which would convert a “premises” (defined broadly under the EP Act to include “any buildings or lands”⁴) into a scheduled premises.⁵ A “scheduled premises”, in turn, is defined as any premises prescribed as such by regulation or any premises which is of a class of premises prescribed as such by regulation.⁶
6. Relevantly for present purposes the *Environment Protection (Scheduled Premises and Exemptions) Regulations 2007* specify “power stations” – being “[p]remises which generate electrical power from the consumption of a fuel at a rated capacity of at least 5 megawatts of electrical power”⁷ – as being a class of scheduled premises for the purposes of the EP Act.
7. A works approval – which in broad terms governs the construction of scheduled premises – can be distinguished from:
 - a. a licence issued under Division 3 of Part III of the EP Act – which in broad terms governs the operation of scheduled premises;⁸ and
 - b. a research, development and demonstration approval – which in broad terms governs the construction of any “research, development and demonstration project” which would otherwise require a works approval.⁹
8. Division 2 of Part III of the EP Act sets out a multi-staged process for the issuing of works approvals by the Authority (the terms of which need not be outlined in detail

⁴ Section 4.

⁵ Section 19A(3).

⁶ Section 4.

⁷ Schedule 1.

⁸ Division 3 of Part III.

⁹ Sections 19D – 19G.

for the purposes of this outline).¹⁰ Specific mechanisms exist within the EP Act with respect to the amendment¹¹ and ending¹² of works approvals.

9. In considering an application for the issue of *inter alia* a works approval the Authority “must have regard to policy” so that the works approval and any condition in, or relating to, the works approval “is consistent with” *inter alia* all applicable Statements of Environment Protection Policy (“SEPPs”).¹³ Of particular relevance to the various applications before the Tribunal are:

- a. SEPP (Air Quality Management) (“SEPP (AQM)”);
- b. SEPP (Ambient Air Quality) (“SEPP (AAQ)”); and
- c. SEPP (Control of Noise from Commerce Industry and Trade) No. N-1 (“SEPP N-1”).

10. The EP Act goes on to specify that the Authority “may refuse to issue, transfer or amend” a works approval if (in its opinion) *inter alia* the issue would:¹⁴

- a. be contrary to, or inconsistent with, any applicable SEPP;
- b. be likely to cause, or contribute to, pollution; or
- c. be likely to cause an environmental hazard.

11. Furthermore, pursuant to the (newly operative) *Climate Change Act 2010* (Vic) (the “CC Act”), the Authority is also required to have regard (when considering applications for works approvals) to:¹⁵

- a. the potential impacts of “climate change”¹⁶ relevant to the decision or action;
- b. the potential contribution to Victoria’s “greenhouse gas”¹⁷ emissions of the decision or action; and

¹⁰ See section 19B.

¹¹ Section 19C.

¹² Section 19CA.

¹³ Section 20C(2).

¹⁴ Section 20C(3).

¹⁵ Section 14(2) of the CC Act.

¹⁶ Section 3 of the CC Act defines “climate change” as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”

¹⁷ Section 3 of the CC Act defines “greenhouse gas emissions” as:

... emissions of –

- c. any guidelines issued by the Minister under section 15 of the CC Act.
12. In issuing a works approval the Authority may impose conditions that require the observance of standards that are more stringent than what would be required by any applicable SEPP if it is satisfied that either:¹⁸
- a. the local environment conditions require a higher level of protection than would otherwise be provided; or
 - b. the pollution control technology required to achieve more stringent standards is commonly available in the industry.
13. The EP Act also specifically provides that the Authority may require, by way of condition to a works approval, that an occupier of a scheduled premises *inter alia*:¹⁹
- a. install pollution control equipment of a type specified by the Authority provided that such equipment is reasonably available;
 - b. install and operate pollution control equipment in a manner specified by the Authority;
 - c. take the measures specified by the Authority for the purpose of minimising the possibility of pollution occurring as a result of any activity conducted or proposed to be conducted in any part of the premises;
 - d. provide monitoring equipment specified by the Authority; and
 - e. do any other act or thing specified by the Authority which the Authority considers necessary for the purpose of the protection of the environment or the prevention, control, or abatement of pollution.
14. It should also be noted that it is the stated purpose of the EP Act, as set out in Part 1 of the EP Act, that regard be had to the various principles of environment protection in the administration of the EP Act.²⁰ These include:²¹

-
- (a) *carbon dioxide, methane, nitrous oxide or sulphur hexafluoride; or*
(b) *a hydrofluorocarbon or a perfluorocarbon that is specified in regulations made under the National Greenhouse and Energy Reporting Act 2007 of the Commonwealth.*

¹⁸ Section 20C(3A).

¹⁹ Section 21(1).

²⁰ Section 1A(3).

²¹ Section 1A.

- a. The principle of integration of economic, social and environment considerations;²²
- b. The precautionary principle;²³
- c. The principle of intergenerational equity;²⁴
- d. The principle of improved valuation, pricing and incentive mechanisms;²⁵
- e. The principle of shared responsibility;²⁶ and
- f. The principle of wastes hierarchy.²⁷

15. It is of particular significance to the positions advanced by Dual Gas in respect of both the Dual Gas Applications and Objector Applications that the original iteration of the EP Act – which did not include the various principles of environment protection²⁸ – had been perceived as “draconian”²⁹ in operation insofar as it had been “single-minded ... in its promotion of environmental protection.”³⁰

16. In *Phosphate Co-operative Co. of Australia v Environment Protection Authority*³¹, for instance, Stephen J. of the High Court (with whom Mason J. agreed) held that the “economic consequences” of a condition imposed on a licence issued pursuant to the EP Act was not a matter with respect to which the Authority (nor the then Environment Protection Appeals Board on appeal) could properly have regard in its deliberation of the works approval application or works approval conditions.³² His Honour’s conclusion in this respect was premised, in large part, on the absence from the EP Act (as it was then framed) “of anything in the nature of a positive direction that economic consequences or general considerations of the public interest are to be taken into account.”³³

²² Section 1B.

²³ Section 1C.

²⁴ Section 1D.

²⁵ Section 1F.

²⁶ Section 1G.

²⁷ Section 1I.

²⁸ By passage of the *Environment Protection (liveable Neighbourhoods) Bill* in 2001.

²⁹ *Phosphate Co-operative Co of Australia v Environment Protection Authority* (1977) 138 CLR 134 at 141-143 per Stephen J, 146-147 per Aickin J (dissenting).

³⁰ *Thirteenth Beach Coast Watch Inc. v The Environment Protection Authority & Anor* [2009] VSC 53 at [14].

³¹ (1977) 138 CLR 134.

³² At 137.

³³ *Id.*

17. The introduction of section 1B of the EP Act – which sets out the “principle of integration of economic, social and environmental considerations” as the first of the various principles of environment protection – unambiguously recalibrated the various decision-making processes under the EP Act.³⁴ It requires, amongst other things, that:

- a. the integration of economic, social and environmental considerations be undertaken in decision making processes under the EP Act;³⁵ and
- b. “measures adopted should be cost-effective” and “in proportion to the significance of the environmental problems being addressed.”³⁶

PART 2: THE OBJECTOR APPLICATIONS

INTRODUCTION TO PART 2

18. It is not proposed to set out in any detail the background to the Objector Applications.

Instead, this part of the outline is to be read in conjunction with:

- a. the Works Approval Application dated 1 September 2010 (the “Works Approval Application”): which describes in detail the proposed configuration and operation of the Dual Gas Demonstration Plant (the “DGDP”);
- b. the Works Approval: which sets out the conditions pursuant to which the Authority would require that the works be undertaken; and
- c. the various statements of grounds and further and better particulars filed on behalf of the Objectors (which set out the bases upon which the Objectors seek review of the decision of the Authority to issue the Works Approval).³⁷

19. By way of broad overview, however, it is noted that (with the exception of Mr Shield), each of the Objectors purportedly limit their grounds of review to the terms of section 33B(2)(b) of the EP Act. That is to say, each of the Objectors (with the

³⁴ Section 1A.

³⁵ See section 1B(1) and (2).

³⁶ See section 1B(3).

³⁷ Given recent modifications to the hearing timetable by Order of the Tribunal made on 14 October 2011 this outline has been prepared in advance of the circulation of any of the witness statements prepared at the request of the Objectors. This has necessarily inhibited the ability of Dual Gas to articulate its position in response to each of the Objector Applications.

exception of Mr Shield) seek review of the decision of the Authority to issue the Works Approval, only on the basis that if works are completed in accordance with the Works Approval the use of the DGDP will result in the emission of different substances at rates or volumes inconsistent with the terms of SEPP (AQM).

20. Whereas the applications of Environment Victoria and L.I.V.E (which are drawn on identical terms) and Mr Shield appear to relate predominantly (if not exclusively) to the emission of greenhouse gases from the DGDP, the application of the Doctors for the Environment relates also to the emission of other “air quality indicators”³⁸ from the DGDP (namely sulphur dioxide, particulate matter and nitrous oxides).
21. The regime established under SEPP (AQM) distinguishes between the management of global issues (including the management of emissions of greenhouse gases) and the management of other more localised issues (including the management of emissions of sulphur dioxide, particulate matter and nitrous oxides). This outline will accordingly address each in turn.

2.1: GREENHOUSE GAS EMISSIONS

2.1.1: The Terms of SEPP (AQM)

22. SEPP (AQM), as it was originally drafted, did not address the management of greenhouse gas emissions (nor for that matter any other “global pollutants” such as ozone depleting substances).
23. It was the Victorian Greenhouse Strategy Discussion Paper (released in August 2000) which first proposed that SEPP (AQM) introduce a requirement for greenhouse and energy issues to be considered as part of applications for works approvals.³⁹ Indeed, that “Victorian enterprises subject to the [EP Act] works approvals and licensing system ... be required [pursuant to SEPP (AQM)] to implement cost-effective opportunities for improving energy efficiency and reducing greenhouse gas emissions”, was a key “action” component of the *Victorian Greenhouse Strategy (2002)*.⁴⁰
24. Pursuant to amendments to SEPP (AQM) affected in 2001:

³⁸ As defined in Schedule A to SEPP (AQM).

³⁹ See page 75 of the Policy Impact Assessment prepared with respect to the 2001 revisions to SEPP (AQM).

⁴⁰ At page 52.

- a. the preamble of the SEPP was revised to recognise that the policy contains “principles, approaches and measures for ... addressing global environmental issues”;
 - b. the aims of the SEPP were expanded to include the “support [of] Victorian and national measures to address the enhanced greenhouse effect”;⁴¹
 - c. the intent of the SEPP was amended such that “[a]ctions to manage emissions to the air environment will be co-ordinated and integrated with other activity where appropriate so that ... global atmospheric issues are addressed”;⁴² and
 - d. the beneficial uses to be protected under the SEPP were expanded to include “climate systems that are consistent with human development, the life, health and well-being of humans, and the protection of ecosystems and biodiversity”.⁴³
25. The 2001 amendments also introduced clause 33 into SEPP (AQM) which remains the key operative provision relating to the management of greenhouse gases. It provides, *inter alia*, “that generators of emissions of greenhouse gases must manage their emissions in accordance with the provisions of clauses 18 and 19.”⁴⁴
26. For present purposes it is noted that:
- a. Clause 19 provides *inter alia* that a generator of a new or substantially modified source of emissions must apply best practice to the management of those emissions; and
 - b. Clause 18(3)(a) provides that generators of emissions must “manage their activities and emissions in accordance with the aims, principles and intent of the policy.”
27. Clause 33 also foreshadowed the creation,⁴⁵ by the Authority, of a specific protocol for environment management (“PEM”) with respect to the management of greenhouse gas emissions.⁴⁶ That PEM – entitled “Greenhouse Gas Emissions and Energy Efficiency in Industry” (“PEM (GHG)”) – was tabled before the Parliament at the

⁴¹ Clause 6.

⁴² Clause 8.

⁴³ Clause 9(1)(f).

⁴⁴ Clause 33(1).

⁴⁵ Created pursuant to clause 15 of SEPP (AQM).

⁴⁶ See clause 33(2) and (3).

same time as the 2001 amendments to SEPP (AQM).⁴⁷ Its objective is to ensure that Victorian businesses subject to the EP Act works approval and licensing regimes:⁴⁸

- *Take up cost-effective opportunities for greenhouse gas mitigation, noting that in many cases they will achieve cost savings through greater efficiency; and*
- *Integrate consideration of greenhouse and energy issues within existing environmental management procedures and programs.*

28. The specific terms of the PEM, as they relate to the obligation to manage greenhouse gas emissions according to best practice, are examined in further detail in Part 2.1.3 below.

29. It is noted, finally, that pursuant to recent amendments to the EP Act,⁴⁹ the Authority now has the express power to specifically recommend the making of a SEPP and regulations:⁵⁰

- (i) *To regulate the emission of greenhouse gas substances to contribute to Victoria's greenhouse emissions target under the Climate Change Act 2010; and*
- (ii) *To regulate the emission and discharge of greenhouse gas substances to reduce harm to the environment.*

30. The Authority has not yet, as far as Dual Gas is aware, recommended the making of a SEPP on these terms.

2.1.2: The Objectors' Grounds Relating to Greenhouse Gas Emissions

31. Both Environment Victoria and L.I.V.E. assert, in broad terms, that the rate and quantity of greenhouse gas emissions from the DGDP will be inconsistent with a number of provisions of SEPP (AQM). More particularly, it is asserted that:

- a. The proposed facility does not accord with the requirement that generators of new sources of greenhouse gas emissions apply best practice in the management of those emissions;⁵¹

⁴⁷ *Id.*

⁴⁸ Page 1.

⁴⁹ Which came into effect on 1 July 2011 upon the commencement of the *Climate Change Act 2010* (Vic).

⁵⁰ Section 13(1)(ga).

⁵¹ Ground 1(c) in their respective amended statements of grounds.

- b. The level of greenhouse gas emissions is inconsistent with SEPP (AQM)'s policy aim of supporting Victorian and national measures to address the enhanced greenhouse gas effect;⁵²
- c. The level of greenhouse gas emissions is inconsistent with SEPP (AQM)'s policy intent that emissions to the air environment will be managed so that beneficial uses of the air environment are protected;⁵³ and
- d. The level of greenhouse gas emissions is inconsistent with a number of the principles of environment protection.⁵⁴

32. Mr Shield's position appears to be that, with the exception of part of his first ground of review, his application is identical to that of Environment Victoria and L.I.V.E. (with respect to the application of best practice and the consistency of the works with the aims, principles and intent of SEPP(AQM)).⁵⁵ Mr Shield's application differs from that of Environment Victoria and L.I.V.E. only insofar as he also asserts that emissions of greenhouse gases attributable to the DGDP will adversely affect his interests.⁵⁶

33. The primary position advanced by the Doctors for the Environment with respect to greenhouse gas emissions is that the DGDP does not constitute best practice in the management of emissions.⁵⁷ The Doctors for the Environment also raise concern with respect to the human health effects of climate change and its consequences with respect to the principle of intergenerational equity.⁵⁸

34. Based on the above, it is evident that with the exception of Mr Shield's first ground of review, each of the Objectors' various grounds of review as they relate to the emission of greenhouse gases from the DGDP fall within one of the following two broad categories:

- a. The alleged inconsistency of greenhouse gas emissions from the DGDP with a requirement to apply best practice to the management of those emissions; and

⁵² Ground 1(a) in their respective amended statements of grounds.

⁵³ Ground 1(b) in their respective amended statements of grounds.

⁵⁴ Ground 1(d) in their respective amended statements of grounds.

⁵⁵ See the further and better particulars filed by Mr Shield with the Tribunal (undated).

⁵⁶ See paragraph 1.2 of the further and better particulars filed by Mr Shield with the Tribunal (undated).

⁵⁷ Ground 1 of the Doctors for the Environment's statement of grounds.

⁵⁸ Grounds 1 and 2 of the Doctors for the Environment's statement of grounds.

- b. The alleged inconsistency of greenhouse gas emissions from the DGDP with a requirement to manage those emissions in accordance with the aims, principles, and intent of SEPP (AQM).

2.1.3: Best Practice

35. As noted above, clause 19 of SEPP (AQM) provides *inter alia* that a new or substantially modified source of emissions must apply best practice to the management of those emissions.
36. “Best practice” is defined, for the purposes of SEPP (AQM), as “the best combination of eco-efficient techniques, methods, processes or technology used in an industry sector or activity that demonstrably minimises the environmental impact of a generator of emissions in that industry sector or activity.”⁵⁹
37. Other definitions relevant to the operation of clause 19 are:
 - a. “Eco-efficient”: “producing more goods with less energy and fewer natural resources, resulting in less waste and pollution”,⁶⁰
 - b. “the management of emissions”:⁶¹
 - a. *Avoiding and minimising emissions in accordance with the preference established in the principle of the wastes hierarchy; and*
 - b. *The assessment, monitoring, control, reduction or prohibition of emissions for air quality management purposes.*
38. Specific guidance concerning how the requirement of best practice in the management of emissions operates with respect to the emission of greenhouse gases is contained in PEM (GHG). It specifies, amongst other things, “the steps that will need to be taken by businesses to demonstrate compliance with the policy principles and provisions of SEPP(AQM) relating to energy efficiency and greenhouse gas emissions.”⁶²
39. The operative provisions of the PEM go on to distinguish between new applicants and existing licence holders. The PEM requires, with respect to new applicants (for both works approvals and licenses), that an Environment Improvement Plan (“EIP”) be prepared and submitted as a component of the application. The applicant must

⁵⁹ Part IV.

⁶⁰ *Id.*

⁶¹ Clause 18(1).

⁶² Page 1.

demonstrate, in the EIP, that “they have identified, and will be implementing, best practice in relation to energy use and greenhouse gas emissions associated with the works/activities/processes that are the subject of the application.”⁶³

40. Pertinently, the PEM specifies that:

- a. “Expectations with respect to the adoption of best practice by individual businesses will depend on technical, logistical and financial considerations”;⁶⁴
- b. “Technical and logistical considerations include a wide range of issues that will influence the practicability of different technologies and practices”;⁶⁵
- c. The “financial feasibility” of “non-energy related greenhouse gas emissions” (as opposed to greenhouse gas emissions generated by energy use) “will be considered on a case-by-case basis through discussions with the [Applicant] and [the Authority]”;⁶⁶ and
- d. “In assessing best practice, a range of environmental issues, in addition to greenhouse gas emissions and energy efficiency, will often also need to be considered.”⁶⁷

41. Dual Gas intends to call evidence from Dr Terry Bellair, Mr Alex Blatchford and Mr David Walton relevant to the question of what constitutes best practice to the management of emissions (including greenhouse gas emissions) from the DGDP.

42. It would appear, however, that none of the Objectors take issue with the levels of greenhouse gas emissions modelled with respect to the DGDP as a component of the Works Approval Application. Instead, notwithstanding the fact that the DGDP will operate at a considerably lower greenhouse gas emissions intensity than any other brown coal fired power station in Australia, the central tenet of each of the Objectors’ various grounds of review would appear to be that the DGDP cannot be considered best practice by virtue of the greenhouse gas emissions intensities of other forms of power generation (including renewable energy facilities and natural gas fired power stations).

⁶³ Page 5.

⁶⁴ Page 2.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

43. This position, in Dual Gas' submission, is misconceived insofar as:
- a. The relevant "industry sector or activity" (if indeed one exists), for the purposes of determining what constitutes best practice to the management of emissions from the DGDP, is the brown coal fired electricity generation industry sector (and not the renewable energy industry sector or the natural gas fired electricity generation industry sector);
 - b. The requirement to apply best practice in the management of emissions should not be equated with a requirement to achieve a certain level of emissions intensity with respect to particular environmental performance indicators; and
 - c. The requirement to apply best practice in the management of emissions calls for an integrated assessment of the environmental performance of the DGDP as a whole.
44. It is Dual Gas' position, instead, that the DGDP does apply best practice to the management of emissions (including greenhouse gas emissions).

2.1.4: The Aims, Principles and Intent of the Policy

45. As noted above clause 18(3)(a) of SEPP (AQM) provides *inter alia* that generators of emissions must "manage their activities and emissions in accordance with the aims, principles and intent of the policy."
46. Whereas clause 19 relates to generators of new sources of emissions, of which the DGDP would clearly qualify, clause 18(3) appears to relate to existing generators of emissions.
47. Relevantly for present purposes:
- a. the aims of SEPP (AQM) are set out at clause 6;
 - b. the principles of SEPP (AQM) – being the principles of environment protection – are set out at clause 7; and
 - c. the policy intent of SEPP (AQM) is set out at clause 8.
48. The Objectors, taking their various applications as a whole, assert that the DGDP:

- a. Is contrary to one of the stated aims of the policy – to “support Victorian and national measures to address the enhanced greenhouse effect” – insofar as it would compromise the achievement of the Victorian Government’s policy of reducing Victoria’s emissions to 20% below 2000 levels by 2020;⁶⁸
- b. Is contrary to part of the stated “intent” of SEPP (AQM) – namely, that “[e]missions to the air environment will be managed so that the beneficial uses of the air environment are protected” – insofar as it will contribute to human induced climate change (which carries with it a threat to human health); and
- c. Is contrary to a number of the principles of environmental protection including:
 - i. the integration of economic, social and environmental considerations;
 - ii. the precautionary principle;
 - iii. intergenerational equity;
 - iv. the conservation of biological diversity and ecological integrity;
 - v. the wastes hierarchy; and
 - vi. accountability.

49. The relative greenhouse gas emissions intensities of the DGDP and of other forms of electricity generation again appears to be central to the contentions made by the Objectors with respect to each of these alleged grounds of inconsistency.

50. The evidence of Dr Bellair, Mr Blatchford and Mr Walton is accordingly pertinent to these grounds of review.

51. It is the position of Dual Gas, in response, that (to the extent that clause 18(3) is relevant):

- a. The DGDP, simply by virtue of it emitting greenhouse gases into the environment at the rates or intensities proposed, cannot in and of itself be taken to compromise the achievement of any state or national measures to

⁶⁸ As enshrined by section 5(1) of the CC Act.

address the enhanced greenhouse effect. To the contrary, the widespread application of the IDGCC technology, and the potential for that technology to facilitate carbon capture and sequestration, are wholly supportive of both state and national measures. The DGDP is also consistent with the aims of the policy when read as a whole including the aim of “driv[ing] continuous improvement in air quality and achieving the cleanest air possible having regard to the social and economic development of Victoria.”⁶⁹

- b. The DGDP, simply by virtue of it emitting greenhouse gases into the environment at the rates or intensities proposed, cannot in and of itself be taken to compromise the achievement of the intent of the policy to protect beneficial uses of the air environment. To the contrary, the widespread application of the IDGCC technology, and the potential for that technology to facilitate carbon capture and sequestration, are consistent with the protection of the beneficial uses identified under the SEPP. The DGDP is also consistent with the policy intent when read as a whole including that emissions to the air environment be managed so that “... we achieve the cleanest air possible, having regard to the State’s social and economic development.”⁷⁰
- c. The DGDP is consistent with the principles of environment protection when properly construed and when read as a whole.

2.2: SULPHUR DIOXIDE EMISSIONS, PARTICULATE MATTER EMISSIONS AND THE EMISSION OF NITROUS OXIDES.

2.2.1: The Terms of SEPP (AQM)

52. The Doctors for the Environment, in addition to advancing grounds with respect to greenhouse gas emissions from the DGDP, advance grounds with respect to sulphur dioxide emissions, particulate matter emissions, and the emission of nitrous oxides from the DGDP.

⁶⁹ Clause 6(b).

⁷⁰ Clause 8.

53. As noted above, the SEPP (AQM) regime operates differently with respect to the emission of these air quality indicators than it does with respect to the emission of greenhouse gases.
54. First, as in the case of greenhouse gas emissions, the emission of these air quality indicators should be managed in accordance with clause 19 of SEPP (AQM) (the terms of which are set out above). By virtue of the Latrobe Valley being designated an Air Quality Control Region,⁷¹ however, the Authority may require emission generators to reduce their emissions to a greater extent than required by clause 19.⁷²
55. Second, and again by virtue of the Latrobe Valley being designated an Air Quality Control Region, emissions from stationary sources within the Latrobe Valley must comply with the emissions limits set out in Schedule E to the SEPP (unless the Authority exempts that source from the need to comply).⁷³ This provision is of particular relevance to the emission of nitrous oxides from the DGDP (being the only one of the three relevant air quality indicators for which an emissions limit is specified with respect to power generation facilities).
56. Third, in assessing an application for a new development that might have impacts on local air quality, the Authority must have regard to *inter alia* the use of design criteria and dispersion modelling for assessing emissions.⁷⁴ Schedule A to SEPP (AQM) identifies design criteria with respect to each of the relevant air quality indicators. Schedule C to SEPP (AQM) sets out the protocols for conducting dispersion modelling for the purpose of estimating the impact of a proposal.
57. It is noted, furthermore, that there is provision for the Authority to prepare *inter alia* an Air Quality Improvement Plan with respect to the Latrobe Valley (given its designation as an Air Quality Control Region).⁷⁵ A plan of this type may identify priorities and strategies for reducing emissions from particular sources for the purpose of air quality management in the region.⁷⁶ No such plan has been prepared with respect to the Latrobe Valley.

⁷¹ Pursuant to clause 29(1) and Schedule F to SEPP (AQM).

⁷² Clause 30.

⁷³ Clause 22.

⁷⁴ Clause 27.

⁷⁵ Clause 31.

⁷⁶ Clause 30(2).

2.2.2: Sulphur Dioxide Emissions

58. With respect to the emission of sulphur dioxide from the DGDP the Doctors for the Environment are understood to assert that:

- a. the DGDP does not “apply best practice to the management of its emissions of ... sulphur dioxide” (insofar as best practice has been assessed having regard to other coal fired power plants);⁷⁷
- b. the modelled levels of sulphur dioxide is contrary to the precautionary principle as it relates to human health (on the basis that adverse health effects from sulphur dioxide can occur at levels below the design criterion specified in Schedule A);⁷⁸ and
- c. the modelling of sulphur dioxide emissions undertaken on behalf of Dual Gas is not adequate to assess the impact of the DGDP on human health (on the basis that modelling of sulphur dioxide has not been conducted over 24 hour average or annual average periods).⁷⁹

59. The evidence of both Dr Bellair and Mr Blatchford are relevant to these issues.

60. It is the position of Dual Gas in response that:

- a. The contentions advanced by the Doctors for the Environment with respect to the application of best practice in the management of sulphur dioxide emissions is misconceived for the same reasons as set out at paragraph 43 above (with respect to the application of best practice in the management of greenhouse gas emissions).
- b. The DGDP makes a negligible contribution to the ground level concentration of sulphur dioxide at those locations within the Latrobe Valley that fail to comply with the Schedule A design criterion. The locations at which sulphur dioxide emissions from the DGDP will make a material difference to the ground level concentrations of sulphur dioxide will, however, comfortably comply with the Schedule A design criterion. Accordingly, the amount and

⁷⁷ See ground 1 of the Doctor for the Environment’s amended statement of grounds dated 5 August 2011 (the “Amended Grounds”).

⁷⁸ See ground 2 of the Amended Grounds.

⁷⁹ See ground 4 of the Amended Grounds.

levels of emissions of sulphur dioxide are wholly in keeping with the terms of SEPP (AQM) and are consistent with *inter alia* the precautionary principle.

- c. The modelling undertaken on behalf of Dual Gas with respect to the emission of sulphur dioxide has been undertaken in accordance with the Schedule C modelling protocols and is adequate to allow an assessment of the DGDP pursuant to the terms of SEPP (AQM).

2.2.3: Nitrous Oxide Emissions

61. With respect to the emission of nitrous oxides from the DGDP the Doctors for the Environment are understood to assert that:

- a. the DGDP does not “apply best practice to the management of its emissions of ... oxides of nitrogen” (insofar as best practice has been assessed having regard to other coal fired power plants);⁸⁰
- b. the modelled levels of nitrogen oxide are contrary to the precautionary principle as they relate to human health (on the basis that adverse health effects from nitrous oxides can occur at levels below the design criterion specified in Schedule A);⁸¹
- c. the discharge of nitrous oxides from the DGDP exceeds emissions limits specified in Schedule E of SEPP (AQM);⁸² and
- d. the modelling of the emission of nitrous oxides is not adequate to assess the impact of the DGDP on human health (on the basis that modelling has not been conducted over 24 hour average or annual average periods).⁸³

62. The evidence of both Dr Bellair and Mr Blatchford is again relevant to these issues.

63. It is the position of Dual Gas in response that:

- a. The contentions advanced by the Doctors for the Environment with respect to the application of best practice in the management of the emission of nitrous oxides is misconceived for the same reasons as set out at paragraph 43 above

⁸⁰ See ground 1 of the Amended Grounds.

⁸¹ See ground 2 of the Amended Grounds.

⁸² See ground 3 of the Amended Grounds.

⁸³ See ground 4 of the Amended Grounds.

(with respect to the application of best practice in the management of greenhouse gas emissions).

- b. The modelled levels of nitrous oxides are consistent with the Schedule A design criterion and are wholly in keeping with the terms of SEPP (AQM) and *inter alia* the precautionary principle.
- c. The exemption granted by the Authority with respect to the noncompliance of the DGPD with the Schedule E emissions limits applicable to nitrous oxides emitted by gas fired power stations is wholly appropriate, if indeed it is required, given that those limits were derived with respect to natural gas which contains relatively few nitrogenous compounds.
- d. The modelling undertaken by Dual Gas with respect to the emission of nitrous oxides has been undertaken in accordance with the Schedule C protocols and is adequate to allow an assessment of the DGDP pursuant to the terms of SEPP (AQM).

2.2.4: Particulate Matter Emissions

64. With respect to the emission of particulate matter from the DGDP the Doctors for the Environment are understood to assert that:

- a. the DGDP does not “apply best practice to the management of its emissions of ... particulate matter” (insofar as best practice has been assessed having regard to other coal fired power plants);⁸⁴ and
- b. the modelled levels of particulate matter emissions are contrary to the precautionary principle and to the principle of intergenerational equity (on the basis that there may be no safe level of exposure to particulate matter).⁸⁵

65. The evidence of both Dr Bellair and Mr Blatchford are again relevant to these issues.

66. It is the position of Dual Gas in response that:

- a. The contentions advanced by the Doctors for the Environment with respect to the application of best practice in the management of particulate matter

⁸⁴ See ground 1 of the Amended Grounds.

⁸⁵ See ground 5 of the Amended Grounds.

emissions is misconceived for the same reasons as set out at paragraph 43 above (with respect to the application of best practice in the management of greenhouse gas emissions).

- b. The modelled levels of nitrous oxides are consistent with the Schedule A design criterion and are wholly in keeping with the terms of SEPP (AQM) and *inter alia* the precautionary principle.

PART 3: THE DUAL GAS APPLICATIONS

INTRODUCTION TO PART 3

67. As in the case of the Objector Applications, it is not proposed to set out in any detail the background to the Dual Gas Applications. Instead, this part of the outline is to be read in conjunction with:

- a. the Works Approval Application;
- b. the Works Approval; and
- c. the statements of grounds and further and better particulars filed on behalf of Dual Gas with the Tribunal (which set out the bases upon which Dual Gas seeks review of the conditions of the Works Approval and the failure on the part of the Authority to properly determine the Works Approval Application).⁸⁶

⁸⁶ The statements of grounds were filed with the Tribunal on 10 June 2011 as a component of each of the Dual Gas Applications. The responses to the requests for further and better particulars made by the Authority were filed with the Tribunal on 25 August 2011.

3.1: THE CONDITIONS REVIEW

68. Section 33(3) of the EP Act allows an applicant for works approval whose interests are affected by any condition to the issue of the work approval to apply to the Tribunal for review of that condition.⁸⁷

69. Dual Gas seeks review of conditions of the Works Approval which relate to:

- a. the installed electricity generating capacity of the DGDP;
- b. the installation of sulphur capture equipment (sufficient to “reduce uncontrolled emissions from the facility by at least 90%”); and
- c. the design targets prescribed with respect to noise emissions from the DGDP.

3.1.1: The Capacity of the Approved Facility

70. The Works Approval Application submitted by Dual Gas to the Authority sought permission for a 600MW integrated drying and gasification combined cycle (“IDGCC”) power plant – that is, an IDGCC power plant with a ‘sent out’⁸⁸ electricity capacity of not more than 600MW. The Works Approval issued by the Authority allows for only a 300MW IDGCC power plant. More particularly:

- a. The works description at the commencement of the Works Approval specifies that the Works Approval allows the construction of IDGCC power station “with a maximum ‘sent out’ electricity generating capacity of 300MW_e”; and

⁸⁷ As noted by a former President of the Tribunal in *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 at [312]:

When exercising the review jurisdiction under its legislation, the tribunal stands in the shoes of the decision-maker. Its function is to make the correct or preferable decision on the merits in the circumstances of the individual case. The tribunal’s review jurisdiction is substitutionary not appellate and includes a full power of fact-finding. The character of the jurisdiction is derivative. It is to be ascertained by reference to the jurisdiction of the original decision-maker. In this case, that was the board and its jurisdiction was administrative. That will be the usual case in the review jurisdiction.

⁸⁸ The ‘sent out’ capacity of the DGDP relates to the amount of electricity which will be capable of being fed into the transmission grid for sale on the National Electricity Market. It can be contrasted with the ‘generated’ capacity of the plant which relates to the amount of electricity generated by the DGDP as a whole (including both the electricity that can be fed into the transmission grid and the electricity consumed by the operation of the DGDP).

b. Condition 1.2 provides that the Works Approval allows the construction of only:

- i. one integrated coal dryer / gasifier; and*
- ii. one E class combined cycle gas turbine;*
- *With a sent out electricity capacity of not more than 300 MW_e.*

71. The witness statement prepared by Mr Blatchford sets out in detail the proposed configuration of both the proposed 600MW facility and the approved 300MW facility.⁸⁹

72. For present purposes, however, it is simply noted that Dual Gas proposes that the 600MW facility be constructed over two stages:

- a. Stage 1 would involve the construction of the combined cycle power plant (including two “E-Class” gas turbines and one steam turbine) and the first Integrated Drying and Gasification (IDG) Plant; and
- b. Stage 2 would involve the construction of the second IDG Plant (which would then feed into the Stage 1 plant).

73. It is estimated that the construction of Stage 1 would be complete within two years of the date of the commencement of the works. The construction of Stage 2, in turn, would commence approximately 12 months after the commencement of the operation of the Stage 1 plant.

74. Both the approved 300MW facility, and the proposed 600MW facility if ultimately approved, are to be fuelled in part by syngas (produced in the IDG plants) and in part by natural gas. It is proposed, with respect to the 600MW facility, that a greater proportion of natural gas be used during Stage 1 pending completion of the Stage 2 works (and, more particularly, the second IDG Plant). If the IDGCC technology proves ineffective under either scenario then it is proposed that the DGDP operate entirely on natural gas.

75. As is evident from condition 1.2 of the Works Approval, whereas two E-Class gas turbines are proposed as component parts of the integrated 600MW facility, only one

⁸⁹ At section 2.

E-Class gas turbine is to be incorporated within the approved 300MW facility. Whilst it appears to be generally agreed that E-Class gas turbines represent the most efficient gas turbine capable of being fuelled by syngas,⁹⁰ it is recognised that other more efficient turbines exist with respect to natural gas.

76. The Authority seeks to justify the reduction in the capacity of the DGDP, at least in part, on the basis that the approved facility (harnessing only one E-Class gas turbine) would have lesser downside (in terms of greenhouse gas emissions) in the event that the IDGCC technology did not prove either viable or effective (in which case it would be operated solely as a natural gas fired power plant).⁹¹ The Authority asserts, further, that if the IDGCC technology proves effective, it would be open for Dual Gas to seek further permission to later expand the capacity of the DGDP (at which time advances in technology may allow for a more efficient F-Class turbine to be incorporated within the facility).⁹² Finally, the Authority contends that a 300MW facility would be sufficient to demonstrate the operation of the IDGCC technology at a commercial scale.

77. There are a number of reasons, each pertinent to the exercise of the Tribunal's discretion, why the proposed 600MW facility should be considered superior to the approved 300MW facility.

78. First, whilst the overall capital cost of constructing the proposed 600MW facility would exceed that of the approved 300MW facility, the economies of scale pertaining to the larger plant would give rise to a considerable reduction in the cost of capacity installed.⁹³ This not only bolsters the economic viability of the facility but reduces the ultimate unit cost of electricity produced by the DGDP.

79. Second, the "2 plus 1" modular configuration of the proposed 600MW facility,⁹⁴ as opposed to the "1 plus 1" modular configuration of the approved 300MW facility,⁹⁵

⁹⁰ It would appear that only Mr Costa Tsesmelis, at paragraph [81] of his witness statement, asserts anything to the contrary.

⁹¹ See part 6.3 of the EPA Assessment Report.

⁹² *Id.*

⁹³ The cost of capacity installed measures the cost of installing the capital of a plant relative to the generating capacity of the plant. It is a key measure of project viability.

⁹⁴ A "2 plus 1" modular configuration relates to a combined cycle plant harnessing two gas turbines and one steam turbine.

⁹⁵ A "1 plus 1" modular configuration relates to a combined cycle plant harnessing one gas turbine and one steam turbine.

constitutes the most beneficial application of gas turbine combined cycle power generation. In addition to maximising the efficiency of the DGDP this modular configuration would considerably enhance the reliability and performance of the facility. It is noted, in this respect, that it would not be feasible to convert the approved 300MW facility – which adopts a “1 plus 1” modular configuration – to that of the proposed 600MW facility (even if the decision was made to enhance the capacity of the DGDP at a later date).

80. Third, the environmental performance of the proposed 600MW facility, in terms of rates of emission of air pollutants, would be superior to that of the approved 300MW facility (albeit to a modest degree).
81. Fourth, the potential for the DGDP to contribute toward the displacement of existing (high emissions intensity) sources of base-load power generation, would be curtailed by the approval of the approved 300MW facility in the place of the proposed 600MW facility. In this respect it is noted that the Greenhouse Gas Assessment forming part of the Works Approval Application describes the extent to which the widespread application of IDGCC technology in the generation of base-load power in Victoria and Australia would reduce greenhouse gas emissions.
82. Fifth, the proposed 600MW facility would redress the anticipated shortfall in electricity generation in the National Electricity Market to a greater degree than the approved 300MW facility. It is noted, in this respect, that the anticipated shortfall in generation would be exacerbated were the potential closure of up to 2000MW of coal-fired generation capacity – contemplated as a component of the Federal Government’s Clean Energy Future Plan – to come to fruition.
83. The evidence of Dr Bellair, Mr Blatchford and Mr Walton is relevant to these grounds of the Conditions Review.

3.1.2: Sulphur Dioxide Capture

84. Condition 3.1(a) of the Works Approval requires the installation of sulphur dioxide reduction equipment that will “reduce uncontrolled emissions from the facility by at least 90% (based on the average sulphur level in the coal feedstock)”.

85. As is evident from the terms of its Assessment Report prepared with respect to the Works Approval Application,⁹⁶ the Authority originally sought to justify condition 3.1 of the Works Approval on the basis that it constitutes best practice in the management of sulphur dioxide emissions. Having regard to the witness statements filed on behalf of the Authority with respect to this matter, however, it is not evident whether the Authority maintains this position (or whether it seeks to justify the installation of the sulphur capture equipment on a different basis).

86. It is Dual Gas' primary position, in any event, that the terms of condition 3.1(a) of the Works Approval are neither cost-effective nor consistent with the provisions of SEPP (AQM). This position rests on the following three broad contentions:

- a. First, that the cost of constructing and operating plant and/or equipment of the type contemplated by condition 3.1(a) of the Works Approval, would be considerable. Not only would it markedly diminish the economic performance of the facility but it would also result in material increases in the ultimate unit cost of electricity produced by the facility.
- b. Second, that when measured pursuant to the terms of SEPP(AQM), compliance with condition 3.1(a) of the Works Approval would not give rise to an environmental benefit commensurate to the cost of compliance. Indeed, the modelling conducted as a component of the Works Approval Application in accordance with the Schedule C protocols, demonstrates that:
 - i. The reduction in the level of sulphur dioxide emissions from the DGDP would have no material impact whatsoever on the ground level concentration of sulphur dioxide at those locations within the Latrobe Valley which do not comply with the relevant design criterion specified with respect to sulphur dioxide; and
 - ii. The locations at which the reduction in the ground level sulphur dioxide concentrations would be most marked as a consequence of the successful implementation of the plant and/or equipment – being those locations in close proximity to the DGDP – are locations at which the

⁹⁶ See part 6.4.1(a) of the EPA Assessment Report.

modelled ground level sulphur dioxide concentrations (both existing and predicted) comfortably comply with the relevant design criterion.

- c. Third, that the installation of equipment of the type contemplated by condition 3.1 of the Works Approval, could not be taken to be best practice for the power generation industry (or any segment of that industry) within Australia.

87. Further, it is noted that at no time in the planning or design of the DGDP, has Dual Gas contemplated stand-alone plant and/or equipment with respect to the capture of sulphur. Instead, the capture of sulphur from the DGDP had been contemplated by Dual Gas only as an integrated component of any carbon capture plant and/or equipment to be incorporated within the plant at a future time.

88. Clearly, whilst one of the virtues of the DGDP is its compatibility with carbon capture technology, it would be wholly premature to construct carbon capture plant and/or equipment as a component of the DGDP until such time as the state-wide infrastructure necessary to transport, inject and store carbon has been put in place. For reasons of cost and practicality, it would be similarly premature to construct stand-alone sulphur dioxide capture plant and/or equipment in advance of integrated carbon capture plant and/or equipment at the DGDP.

89. The evidence of Dr Bellair, Mr Blatchford and Mr Walton is again relevant to these grounds of the Conditions Review.

3.1.3: Noise Emissions

90. Dual Gas seeks review of conditions 2.6 and 2.7 of the Works Approval which impose noise design targets with respect to the DGDP. The two conditions are set out in full below:

2.6 *The noise design targets for the purpose of condition 3.1 are specified in Table 1 and are to be assessed in accordance with State Environment Protection Policy (Control of Noise from Commerce Industry and Trade) No. N-1.*

2.7 *Table 1: Noise Design Targets*

<i>Noise Modelling Location</i>	<i>Noise Design Targets</i>		
	<i>Day Period</i>	<i>Evening Period</i>	<i>Night Period</i>
<i>46 McLean St, Morwell</i>	<i>45 dB(A)</i>	<i>39 dB(A)</i>	<i>34 dB(A)</i>
<i>22 McMillan Street, Morwell</i>	<i>46 dB(A)</i>	<i>42 dB(A)</i>	<i>37 dB(A)</i>
<i>46 Wallace Street, Morwell</i>	<i>48 dB(A)</i>	<i>42 dB(A)</i>	<i>37 dB(A)</i>

91. In short, it is the submission of Dual Gas, that the noise design targets specified by the Authority have not been calculated in accordance with the terms of SEPP N-1 (Control of Noise from Commerce, Industry and Trade) (“SEPP N-1”).
92. The scope of the dispute between the parties is, however, relatively confined. It concerns the extent of the ‘penalty’ which should be applied to the noise design targets otherwise derived pursuant to the terms of SEPP N-1 on account of noise attributable to industrial sources in the vicinity of the DGDP being audible under certain weather conditions at locations at or near the periphery of Morwell.
93. The Authority, in determining the noise design targets specified in condition 2.7 of the Works Approval, applied a ‘penalty’ of 5 dBA to the noise design targets that would otherwise apply under SEPP N-1. This penalty was calculated having regard not only to existing industrial noise sources (presently audible within the “noise sensitive area”), but also having regard to potential new industrial noise sources which *may in the future* be established in the vicinity of the DGDP (and which may be audible in the “noise sensitive area”).
94. Clause 18 of SEPP N-1 is said to provide the policy basis for the imposition of a ‘penalty’ in the determination of noise design targets in circumstances where industrial noise sources are audible within a noise sensitive area. It provides that:

Where two or more premises contribute to the effective noise level in a noise sensitive area, each shall be controlled so that the contribution from each of the premises, when combined, will meet the noise limit at the sensitive receptor.

95. It is Dual Gas' position that, having regard to the express terms of clause 18 of SEPP N-1, it is only existing industrial noise sources that may properly be considered in determining the extent of the 'penalty' to be applied to the noise design targets derived pursuant to SEPP N-1. As a consequence it is submitted that the penalty adopted by the Authority with respect to the DGDP is not justified; or, at least, too great.

96. The evidence of Mr Broner is relevant to this ground of the Conditions Review.

3.2: THE FAILURE REVIEW

97. Section 33(1)(b) of the EP Act allows an applicant for works approval whose interests are affected by the failure of the Authority to determine an application for a works approval within the period of time allowed under the EP Act⁹⁷ to apply to the Tribunal for review of that failure.

98. The Failure Review (as opposed to the Conditions Review) rests on the premise that, notwithstanding the Works Approval purportedly issued with respect to the DGDP, the Authority failed to determine the Works Approval Application within the prescribed time.⁹⁸ Put differently, the Failure Review rests on the premise that the works with respect to which the Works Approval was granted, are not the same as those for which the Works Approval Application sought permission.

99. In this respect it is noted that there would be fundamental differences in the design, layout, construction and subsequent operation of the proposed 600MW facility and the approved 300MW facility. This outline has already noted the different configurations of plant and equipment that would need to be adopted. These differences, in turn, necessitate changes in the nature of the plant and equipment comprising the DGDP. Most notably, the steam turbine comprising a component of the proposed integrated 600MW facility would be of a different design and configuration to that which would form a component of the approved integrated 300MW facility. This would result in further consequential changes to the associated

⁹⁷ Section 19B(7) provides that the Authority must determine an application for works approval within 4 months after receiving the application for works approval.

⁹⁸ The works approval was lodged with the Authority on 2 September 2010. The time pursuant to which the application should have been determined, taking into account the requests made by the Authority for further information, was 19 April 2011.

plant including the air-cooled condensers, the auxiliary cooling tower and the High Voltage switchyards and the balancing of energy flow through the facility. These changes, as discussed above, would give rise to a significant increase in both capital and operating costs.

100. In determining the Failure Application the Tribunal must have regard to those matters set out in Part 1 of this outline as being relevant to the consideration of an application for works approval under Division 3 of Part III of the EP Act. They include *inter alia* the consistency of the proposed 600MW facility with the terms of all applicable SEPPs (including SEPP (AQM)).⁹⁹

101. The evidence of each of Dr Bellair, Mr Blatchford, Mr Walton and Mr Broner is relevant to the Failure Review.

102. It is Dual Gas' position, for each of those reasons identified above in the context of the other applications for review, that the Tribunal should direct that a works approval be issued with respect to the Works Approval Application granting approval for the construction of the DGDP with a sent out electricity capacity of not more than 600MW.

20 October 2011

Stuart Morris

Barnaby Chessell

⁹⁹ Section 20C(2) of the EP Act.