

Between:	<b>JOHN EDWARD MYTTON BARNES AND GEOFFREY FREDERICK COOK</b>	Applicants
And:	<b>SOUTHERN DOWNS REGIONAL COUNCIL</b>	Respondent
And:	<b>THE CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT</b>	Co- Respondent
And:	<b>MCCONAGHY GROUP PTY LTD ACN 108 353 199</b>	Second Co- Respondent

## RESPONDENT'S WRITTEN OUTLINE OF SUBMISSIONS

### A. INTRODUCTION

1. In this appeal the Appellants, who are submitters, have raised as a ground of appeal issues in relation to the adequacy (or otherwise) of a concurrence agency response given by the First Co-Respondent<sup>1</sup>.
2. The Second Co-Respondent disputes the Appellants' ability to do so and says "*...a concurrence agency decision (or conditions imposed by a concurrence agency) can never be the subject of a submitter appeal. That is the case regardless of whether the relevant development is code or impact assessable.*"<sup>2</sup>
3. Whilst the issue does not directly involve the Respondent, ultimately the relevant legal question turns upon a characterisation of the Respondent's

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<sup>1</sup> For articulation of the issue see paragraph 3 of the Appellant's Amended Grounds of Appeal

<sup>2</sup> Paragraph 18 Second Co-Respondent's Written Outline

statutory discretion and decision and the Respondent thinks it is appropriate in those circumstances, to draw to the Court's attention certain provisions of the relevant legislation, not mentioned by the other parties, so far, amongst other things.

4. It is accepted by the Respondent that as submitters the Appellant's right of appeal emerges from section 4.1.28(1)(a) of the IPA and then only about "...the part of the approval relating to the assessment manager's decision under section 3.5.14." (underlining added)

**B. Additional Statutory Provision**

5. The other statutory provisions which the Respondent would like to draw to the Court's attention are discussed below.
6. The assessment manager's decision under section 3.5.14 IPA is expressed this way:

***"3.5.14 Decision if application requires impact assessment***

(1) *This section applies to any part of the application requiring impact assessment.*

(2) *If the application is for development in a planning scheme area, the assessment manager's decision must not –*

(a) *compromise the achievement of the desired environmental outcomes for the planning scheme area; or*

*(b) conflict with the planning scheme, unless there are sufficient grounds to justify the decision despite the conflict.*

*(3) ...*

*(4) ...”*

(underlining added)

7. Section 3.5.14 of IPA operates in conjunction with section 3.5.5 IPA. Section 3.5.5 says:

***3.5.5 Impact Assessment***

*(1) This section applies to any part of the application requiring impact assessment.*

*(2) If the application is for development in a planning scheme area, the assessment manager must carry out the impact assessment having regard to the following -*

*(a) the common material;*

*(b) the planning scheme and any other relevant local planning instruments;*

*(c) if they are not identified in the planning scheme as being appropriately reflect in the planning scheme –*

*(i) State planning policies, or parts of State Planning policies; and*

*(ii) for the planning scheme of a local government in the relevant area for a State planning regulatory provision – the provision; and*

*(iii) for the planning scheme of a local government in a designated region – the region’s regional plan;*

*Note –*

*For declared master planing areas, see also section 2.5B.70 (Assessable development requiring impact assessment.*

*(d) any development approval for, and any lawful use of, premises the subject of the application or adjacent premises;*

*(e) if the assessment manager is not a local government – the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, the assessment manager and that are relevant to the application;*

*(f) the matters prescribed under a regulation (to the extent they apply to a particular proposal."*

(underlining added)

8. For the purposes of section 3.5.5(2)(a), the “*common material*” is defined as meaning “*all the material about the application the assessment manager has received in the first three stages of IDAS, including any concurrence agency requirement.*”<sup>3</sup> (emphasis added)
9. In deciding the application, the assessment manager’s decision must be based on the assessment in section 3.5.5<sup>4</sup>.
10. In addition, section 4.1.52(3) of IPA seems to be of relevance, when it says about the Court’s powers in a submitter appeal:

*“(3) To remove any doubt, it is declared that if the Appellant is the applicant or a submitter for a development application –*

*(a) the Court is not prevented from considering and making a decision about a ground of appeal (based on a concurrence agency response) merely because the Act required the assessment manager to refuse the application or approve the application subject to conditions;”*

(underlining added)

### **C. Alternative Construction**

11. Accordingly, an alternative construction open to the Court is that the assessment manager’s decision under section 3.5.14 IPA includes expressly and by necessary implication any concurrence agency response because:

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<sup>3</sup> See definition of “*common material*” in Schedule 10, IPA

<sup>4</sup> Section 3.5.11(2) IPA

- (a) the concurrence agency response is part of the things the assessment manager must have regard to in assessing the application under section 3.5.5 IPA;
- (b) that the assessment manager's decision pursuant to section 3.5.14 IPA must be based on the assessment it has undertaken under section 3.5.5 IPA;
- (c) the decision under section 3.5.14 applies "*to any part of the application requiring impact assessment*". Here all of the application requires impact assessment;
- (d) absent the assessment manager's decision the concurrence agency response is of no effect and, of itself, grants no legal rights or obligations. Ultimately, the assessment manager's decision, amongst other things, approves assessable development and the development permit granted as a consequence incorporates, as a matter of law, the concurrence agency response; and
- (e) such an approach sits comfortable with the provisions of section 4.1.52(3) IPA and gives the provision some work to do in a submitter appeal.

**D. Explanatory Memorandum**

12. Ultimately, the Court might conclude that the support the Second Respondent seeks to draw from the Explanatory Memorandum to IPOLA 2003 is misplaced. However, to the extent that that Explanatory

Memorandum is relevant, reference is made to the well established principle that explanatory memorandums cannot override the clear purpose of a statute as deduced from its own language<sup>5</sup>.

**MJ Connor**  
**Solicitor for the Respondent**

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<sup>5</sup> Re: *Bolton: Ex parte Beane* (1987) 162 CLR 514; *Walker v In Line Couriers Pty Ltd* (1999) 73 ALJR 1084; *Telstra Corp Limited v Australian Competition and Consumers Commission* (ACCC) 2008 FCA 1758