Land and Environment Court of New South Wales

Kennedy v NSW Minister for Planning [2010] NSWLEC 129 (26 July 2010)

Last Updated: 28 July 2010

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Kennedy v NSW Minister for Planning [2010] NSWLEC 129

PARTIES: APPLICANT:Roy "Dootch" Kennedy on behalf of the Sandon Point Aboriginal Tent Embassy

FIRST RESPONDENT:NSW Minister for Planning

SECOND RESPONDENT:Stockland Developments Pty Ltd

FILE NUMBER(S): 40129 of 2010

CATCHWORDS: JUDICIAL REVIEW :- major project approval - whether ultra vires - whether Minister failed to consider mandatory relevant considerations - whether Minister erred in other respects - whether Minister's decision was manifestly unreasonable

LEGISLATION CITED: Election Funding and Disclosures Act 1981, ss 84, 85, 86 and 88.Environmental Planning and Assessment Act 1979, ss 23, 23D, 75F, 75I, 75J, 75JA, 75O, 75P and 147.Interpretation Act 1987, s 49(9).National Parks and Wildlife Act 1974, s 90.State Environmental Planning Policy (Major Development) 2005

CASES CITED: Akers v Minister for Immigration and Ethnic Affairs [1988] FCA 459; (1988) 20 FCR 363Aldous v Greater Taree City Council [2009] NSWLEC 17, 167 LGERA 13Anderson v Director-General Department of Environment and Climate Change [2008] NSWCA 337, 163 LGERA 400Attorney-General (NSW) v Quin [1990] HCA 21, 170 CLR 1Belmorgan Property Development Pty Ltd v GPT Re Ltd [2007] NSWCA 171, 153 LGERA 450Bruce v Cole (1998) 45 NSWLR 163Gray v Minister for Planning [2006] NSWLEC 720, 152 LGERA 258Gwandalan Summerland Point Action Group Inc v Minister for Planning [2009] NSWLEC 140, 168 LGERA 269Khan v Minister for Immigration and Ethnic Affairs [1987] FCA 457; (1987) 14 ALD 291Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40, 162 CLR 24Minister for Immigration and Citizenship v SZMDS [2010] HCA 16Minister for Immigration and Ethnic Affairs v Haj-Ismail [1982] FCA 51; (1982) 40 ALR 341Minister for Planning v Walker [2008] NSWCA 224, 161 LGERA 423Notaras v Waverley Council [2007] NSWCA 333, 161 LGERA 230Pongrass Group Operations Pty Ltd v Minister for Planning [2007] NSWLEC 638, 156 LGERA 250Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28, 194 CLR 355Sezdirmezoglu v Acting Minister for Immigration and Ethnic Affairs (No 2) (1983) 51 ALR 561Tugun Cobaki Alliance Inc v Minister for Planning [2006] NSWLEC 396Ulan Coal Mines v Minister for Planning [2008] NSWLEC 185, 160 LGERA 20Walker v Minister for Planning [2007] NSWLEC 741, 157 LGERA 124 Walsh v Parramatta City Council [2007] NSWLEC 255, 161 LGERA 118Williams v Minister for the Environment and Heritage [2003] FCA 535

CORAM: Biscoe J

DATES OF HEARING: 8-10 June 2010

JUDGMENT DATE: 26 July 2010

LEGAL REPRESENTATIVES

APPLICANT:Mr Alan Oshlack (agent)SOLICITORS:n/a

FIRST RESPONDENT:Dr J G RenwickSOLICITORS:Department of Planning

SECOND RESPONDENT:Mr J Robson SC with Mr H El-HageSOLICITORS:Herbert Geer

JUDGMENT:

THE LAND AND

ENVIRONMENT COURT

OF NEW SOUTH WALES

Biscoe J

26 July 2010

40129 of 2010

ROY 'DOOTCH' KENNEDY ON BEHALF OF THE SANDON POINT ABORIGINAL TENT EMBASSY V NEW SOUTH WALES MINISTER FOR PLANNING AND ANOR

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JUDGMENTINTRODUCTION

1. **HIS HONOUR**: The applicant, Roy "Dootch" Kennedy, on behalf of the Sandon Point Aboriginal Tent Embassy, challenges the validity of a major project approval granted subject to conditions on 29 November 2009 by the first respondent, the NSW Minister for Planning (**Minister**), to the proponent and second respondent, Stockland Developments Pty Ltd (**Stockland**), under s 75J of the *Environmental Planning and Assessment Act* 1979 (**EPA Act**).
2. The major project is at Sandon Point, a coastal plain north of Wollongong. It comprises a 181 lot subdivision, the creation of a super lot for future residential flat building development, and the construction of a display village and various infrastructure work necessary to support the development.
3. The challenge to validity, as pressed at the hearing, was on four grounds:

(a) the Minister's decision was outside power (ultra vires);

(b) the Minister failed to consider several mandatory relevant considerations;

(c) the Minister erred in two other respects;

(d) the Minister's decision was manifestly unreasonable.

1. Judicial review proceedings such as these are limited to consideration of the legality of an administrative decision and do not permit review of its merits. The well-known general principle is as stated in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16 at [19] quoting Brennan J in *Attorney-General (NSW) v Quin* [1990] HCA 21, 170 CLR 1 at 35-36.

"The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power

and, subject to political control, for the repository alone."

1. In my opinion, none of the grounds of challenge should be upheld and the application must be dismissed.

THE STATUTORY CONTEXT

1. Part 3A (ss 75A-75ZA) of the *EPA Act* contains the regime for approval of major infrastructure and other projects.
2. The Director-General of the Department of Planning (**Director-General)** is obliged to prepare, and notify the proponent, of environmental assessment requirements (**EARS**) for the purpose of the Minister approving a project: s 75F.
3. The proponent is obliged to submit to the Director-General the environmental assessment required for approval to carry out the project: s 75H(1).
4. After the Director-General accepts the environmental assessment, the Director-General must make it publicly available for at least 30 days: s 75H(3). During that time anyone may make a submission to the Director-General who must notify it to the proponent and may require the proponent to submit a response: s 75H(5) and (6).
5. The Director-General is to give a report on the project to the Minister for the purposes of the Minister's consideration of the application. The report has to include, among other things, a copy of the proponent's environmental assessment and "a statement relating to compliance with" the EARS: s 75I(2).
6. It has been held that under s 75H(3) the Director-General has to decide whether the proponent's environmental assessment is adequate in order to accept it and place it on public exhibition: *Gray v Minister for Planning* [2006] NSWLEC 720, 152 LGERA 258 at [72].
7. Section 75J provides for the Minister's approval to carry out the project:

"**75J Giving of approval by Minister to carry out project**

(1) If:

(a) the proponent makes an application for the approval of the Minister under this Part to carry out a project, and

(b) the Director-General has given his or her report on the project to the Minister,

the Minister may approve or disapprove of the carrying out of the project.

(2) The Minister, when deciding whether or not to approve the carrying out of a project, is to consider:

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

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

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

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

(4) A project may be approved under this Part with such modifications of the project or on such conditions as the Minister may determine.

(5) The conditions of approval for the carrying out of a project may require the proponent to comply with any obligations in a statement of commitments made by the proponent (including by entering into a planning agreement referred to in section 93F)."

1. Thus, the Minister is bound to consider the Director-General's report (and the reports, advice and recommendations contained in that report), including the statement relating to compliance with the EARS: ss 75J(2)(a), 75I(2); *Tugun Cobaki Alliance Inc v Minister*

for Planning [2006] NSWLEC 396 at [124], [136]; *Gwandalan Summerland Point Action Group Inc v Minister for Planning* [2009] NSWLEC 140, 168 LGERA 269 at [140].

2. The Minister may approve a concept plan for a project if the proponent makes an application for approval and the Director-General has given a report on the project to the Minister: s 75O.
3. Section 75U(1)(d) provides:

"**75U Approvals etc legislation that does not apply**

(1) The following authorisations are not required for an approved project (and accordingly the provisions of any Act that prohibit an activity without such an authority do not apply):

...

(d) a permit under section 87 or a consent under section 90 of the National Parks and Wildlife Act 1974,"

1. The only matter that Part 3A expressly provides is mandatory in connection with the validity of an approval is that specified in s 75X(5):

"**75X Miscellaneous provisions relating to approvals under this Part**

...

(5) The only requirement of this Part that is mandatory in connection with the validity of an approval of a project or of a concept plan for a project is a requirement that an environmental assessment with respect to the project is made publicly available under section 75H (or under that section as applied by section 75N). This subsection does not affect the operation of section 75T in relation to a critical infrastructure project."

1. However, s 75X(5) does not provide the only ground of invalidity, and the question of validity must be determined by construing the statute as a whole, in accordance with the principles in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, 194 CLR 355: see *Minister for Planning v Walker* [2008] NSWCA 224,

161 LGERA 423 at [29]–[33]. In the latter case the Court of Appeal proceeded, as did the parties before me, on the basis that validity of a Part 3A approval can be challenged on grounds generally available for challenging administrative decisions, including failure to take into account considerations which the decision-maker is bound to take into account and manifest unreasonableness. In *Project Blue Sky* at [91], the joint judgment held (omitting citations):

"An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue."

and at [93]:

"In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'."

1. The question of what factors a decision-maker is bound to consider was authoritatively addressed in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40, 162 CLR 24 at 39-41 by Mason J as follows (omitting citations):

"(b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors - and in this context I use this expression to refer to the factors which the decision-maker is bound to consider - are not expressly stated, they must be determined by implication from the subject-matter, scope and

purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard. By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act.

(c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision.

(d) The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power."

1. The mandatory relevant consideration ground of judicial review was analysed as follows (omitting citations) in *Walsh v Parramatta City Council* [2007] NSWLEC 255, 161 LGERA 118 at [56]–[63] by Preston CJ, approved by the Court of Appeal in *Minister for Planning v Walker* at [35] and *Notaras v Waverley Council* [2007] NSWCA 333, 161 LGERA 230 at [120]:

"56 An applicant dissatisfied with the merit assessment and outcome of an exercise of discretionary power by a consent authority make [sic] seek to disguise a challenge on those merits in terms of recognised grounds of judicial review, such as the relevant considerations grounds. A court should see through the disguise. The court must avoid the temptation to express the conclusion in terms of a recognised ground of review while in truth making a decision on the merits.

1. 57 The formulation of "proper genuine and realistic consideration", invoked by Mr Walsh to describe the consideration required from the Council in his submission, has been criticised by the courts. Too ready an employment of the test causes the category of judicial review of failure to consider relevant matters to elide into a review on the merits or an appeal on the facts.
2. 58 It is not for a party affected by a decision, or a reviewing court to make an exhaustive list of the matters which a decision maker might conceivably regard as relevant then attack the decision on the ground that a particular one of them was not specifically taken into account.
3. 59 The considerations that are relevant are to be identified "primarily, perhaps even entirely", by reference to the statute imposing the power on the decision maker rather than the particular facts of the case that the decision maker is called on to consider.
4. 60 The level of particularity with which a matter is identified in the statute may be significant where the failure complained of is not a failure to consider a certain subject matter, but a failure to make some enquiry about facts said to be relevant to that subject matter. For the applicant to succeed, the statute must expressly or impliedly oblige the decision maker to enquire and consider the subject matter at the level of particularity involved in the applicant's submission.
5. 61 The relevant considerations ground is concerned essentially with whether the decision maker has properly applied the law. It is not a ground that is essentially concerned with the process of making the particular findings of facts upon which the decision maker acts.
6. 62 An applicant who undertakes to establish that an administrative decision maker improperly exercised power should not be permitted under colour of doing so to enter upon an examination of the correctness of the decision, or of the sufficiency of the evidence

supporting it, or of the weight of the evidence against it, or the regularity or irregularity of the manner in which the decision maker has proceeded. The correctness or incorrectness of the conclusion reached by the decision maker is entirely beside the question.

7. 63 Proper consideration of a relevant matter does not demand factual correctness. It is wrong to equate relevancy with factual correctness. A wrong assessment of the consideration the decision maker takes into account is not a reviewable error of law."

8. The need for proper consideration has been pointed out in many cases collected in the reasons for judgment of Spigelman CJ in *Bruce v Cole* (1998) 45 NSWLR 163 at 185-186. It was expressed by Gummow J in *Khan v Minister for Immigration and Ethnic Affairs* [1987] FCA 457; (1987) 14 ALD 291 as follows:

"[W]hat was required of the decision maker...was that in considering all relevant material placed before him he give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy...The assertion by a decision maker that he has acted in this fashion will not necessarily conclude the matter; the question will remain whether the merits have been given consideration in any real sense."

1. It became conventional to say that mandatory consideration of a relevant matter must be "proper, genuine and realistic", accompanied by a caution that those epithets had to be applied cautiously lest they encourage a slide into impermissible merit review. More recently, however, the Court of Appeal has said that it is preferable to avoid using the formula "proper, genuine and realistic", or similar descriptive formulae, because their use is fraught with the danger of a slide into impermissible merit review; but that the relevant matter must be more than merely adverted to or given mere lip service: *Anderson v Director-General Department of Environment and Climate Change* [2008] NSWCA 337, 163 LGERA 400 at [51]–[58].

2. Manifest unreasonableness as a ground of judicial review conveys the idea that a court should not lightly interfere with administrative decision-making. The test is not whether the Court considers the administrative decision is unreasonable. The test is whether the Court considers the decision is so unreasonable that no reasonable body

could have come to it: *Notaras* at [124]; *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16 at [123]. To give grossly inadequate weight to a matter of some importance can only qualify as a ground of judicial review if it satisfies the test of manifest unreasonableness as applied to the exercise of power: *Minister for Planning v Walker* at [35] quoting *Notaras* at [119] which cited *Belmorgan Property Development Pty Ltd v GPT Re Ltd* [2007] NSWCA 171, 153 LGERA 450 at [76]–[78].

3. There may be occasions when failure to take into account a relevant consideration overlaps with manifest unreasonableness: *Williams v Minister for the Environment and Heritage* [2003] FCA 535 at [32] (Wilcox J).

BACKGROUND

1. Sandon Point comprises 53 hectares of coastal plain located approximately 14 kilometres north of Wollongong City. The development site is located on the western side of Sandon Point and covers approximately 23.35 hectares.

Part 3A of the EPA Act Applies

1. In 2002, the (then) Minister issued a direction under the *EPA Act* for a Commission of Inquiry (**COI**) to be held into the preferred use of land at Sandon Point, including land within the development site. The COI 2003 report made 80 findings and recommendations concerning the development of land within the area considered.
2. In 2005, the (then) Minister appointed Charles Hill of Planning Workshop Australia to provide an independent review of the COI's findings and recommendations. In his 2005 report, Mr Hill recommended "a larger development footprint" and "that rezoning for development should be allowed on terms that more than 60 per cent should be left as open space and brought mostly into public ownership; and that some hectares towards the western boundary should be deemed suitable for medium density residential development, including aged care facilities": *Walker* at [18].
3. On 12 December 2005, the Department of Planning advised Wollongong City Council that the Minister had agreed to consider Sandon Point as a potential State Significant Site under the *State Environmental Planning Policy (Major Development) 2005* (**Major**

Projects SEPP) and that it was expected a concept plan would be lodged under Pt 3A of the *EPA Act*.

4. On 2 March 2006, HLA Envirosciences Pty Ltd, on behalf of Stockland and Anglican Retirement Villages, wrote to the Department of Planning requesting the Minister to declare that the proposed development at Sandon Point was a "major project" within cl 13 of Schedule 1 to the Major Projects SEPP, to which Part 3A applied: s 75B. That clause, as it then stood, concerned residential, commercial or retail projects with a capital investment value of more than $50 million.
5. On 2 April 2006 the Minister made a declaration, having formed the opinion for the purposes of cl 6 of the Major Projects SEPP that the proposed development fell within cl 13 of Schedule 1. As a result, the Minister became the approval authority: s 75D.
6. The Minister authorised Stockland and Anglican Retirement Villages to submit a concept plan for the site, in accordance with s 75M. In turn, the Director-General directed Stockland and Anglican Retirement Villages to prepare a study to justify the inclusion of Sandon Point as a State Significant Site under the Major Projects SEPP.

Concept Plan Approval

1. On 19 June 2006 Stockland and Anglican Retirement Villages submitted a concept plan for residential subdivision and the development of a residential facility. On 21 December 2006 the Minister approved this concept plan under s 75O of the *EPA Act*.
2. A challenge to the Minister's approval of the concept plan succeeded at first instance in *Walker v Minister for Planning* [2007] NSWLEC 741, 157 LGERA 124 (November 2007). I held that the approval was invalid as the Minister failed to have regard to the principles of ecologically sustainable development by failing to consider whether the impacts of climate change would lead to an increased flood risk on this flood-constrained coastal plain project. This decision was successfully appealed in *Minister for Planning v Walker* [2008] NSWCA 224, 161 LGERA 423 (September 2008). However, the Court of Appeal supported much of my reasoning and conclusions, as I discussed in *Aldous v Greater Taree City Council* [2009] NSWLEC 17, 167 LGERA 13 at [25]- [32]. The Court of Appeal

held that it is mandatory that the Minister consider the public interest when determining a concept plan approval application under Pt 3A: at [39], [65], [66]. The majority (the third member of the court expressing no opinion) held:

(a) if the concept plan approval had not been given in 2006 but at some later time, there would be a strong prospect that failure to consider the principles of ecologically sustainable development would invalidate the decision because of a growing public perception that ecologically sustainable development is plainly an element of the public interest: at [56];

(b) the Minister had failed to consider the principles of ecologically sustainable development. Such consideration in relation to this project would have required consideration of long term threats of serious or irreversible environmental damage, not inhibited by lack of full scientific certainty, and this almost inevitably would have involved consideration of the effect of climate change flood risk: at [60];

(c) it was surprising and disturbing that the Director-General's report to the Minister did not address this aspect of ecologically sustainable development and that the Minister did not postpone his decision until he had a report that did: at [62];

(d) since the Minster did not consider these aspects at the concept plan approval stage, the Minister or consent authority was bound to consider them at the development approval stage and must not regard approval of the concept plan as carrying any weight in that consideration. Failure to do so could be considered as evidence of failure to take into account the public interest: at [62]-[63].

Project Approval

1. In May 2007 the Director-General's EARS for the project were notified to Stockland pursuant to s 75F(3). One of the EARS was that Stockland's environmental assessment include a draft statement of commitments outlining environmental management, mitigation and monitoring measures. EARS 19 and 21 concerned consultation with relevant Aboriginal community groups: see [55] below.
2. On 30 July 2007 Stockland submitted its major project application

for the site in accordance with s 75E. The application included proposed modifications of the concept plan for which approval was sought under s 75W.

3. In September 2007 Stockland submitted its environmental assessment to the Director-General, as required by s 75H. It attached a number of reports and other documents.
4. In November 2007 the project application was publicly exhibited. In mid 2008 an amended project application and amended concept plan were publicly exhibited (incorporating additional climate change information).
5. In August 2009 the Director-General made a report to the Minister in accordance with s 75I. The Director-General recommended that the Minister approve the carrying out of the project under s 75J (subject to appended conditions and commitments) and approve a modification to the concept plan.
6. The report appended a copy of the EARS and stated that the Department of Planning was satisfied that the EARS had been adequately addressed by the proponent's environmental assessment, which was also appended.
7. On 14 September 2009 the Minister requested the Planning Assessment Commission (**PAC**) to review the reasonableness of the Director-General's recommendation. Such a review was a function of the PAC under s 23D(1)(b)(ii). In its report dated 16 October 2009, the PAC concluded that the Department had carried out a thorough assessment of key issues and that its recommendation in the Director-General's report was reasonable.
8. On 29 November 2009 the Minister granted approval to the major project subject to the attached conditions and proponent's statement of commitments.

GROUND 1: ULTRA VIRES

1. The first ground is that the Minister's determination was outside her power because Stockland had made political donations to the Australian Labor Party and, in those circumstances, the Minister had delegated her power to determine the application to the PAC.
2. Section 147 relating to reportable political donations was inserted into the *EPA Act* with effect from 1 October 2007 and provides:

"**147 Disclosure of political donations and gifts**

(1) The object of this section is to require the disclosure of relevant political donations or gifts when planning applications are made to minimise any perception of undue influence by:

(a) requiring public disclosure of the political donations or gifts at the time planning applications (or public submissions relating to them) are made, and

(b) providing the opportunity for appropriate decisions to be made about the persons who will determine or advise on the determination of the planning applications.

Political donations or gifts are not relevant to the determination of any such planning application, and the making of political donations or gifts does not provide grounds for challenging the determination of any such planning application.

(2) In this section:

..

relevant planning application means:

...

(c) an application for approval of a concept plan or project under Part 3A (or for the modification of a concept plan or of the approval for a project), or

...

relevant public submission means a written submission made by a person objecting to or supporting a relevant planning application or any development that would be authorised by the granting of the application.

reportable political donation means a reportable political donation within the meaning of Part 6 of the Election Funding and Disclosures Act 1981 that is required to be disclosed under that Part.

(3) A person:

(a) who makes a relevant planning application to the Minister or the Director-General is required to disclose all reportable political donations (if any) made within the relevant period to anyone by any person with a financial interest in the application, or

(b) who makes a relevant public submission to the Minister or the Director-General in relation to the application is required to disclose all reportable political donations (if any) made within the relevant period to anyone by the person making the submission or any associate of that person.

The relevant period is the period commencing 2 years before the application or submission is made and ending when the application is determined.

...

(13) This section applies to relevant planning applications or submissions made after the commencement of this section and, in relation to any such application or submission, extends to political donations or gifts made before that commencement."

1. Between 2003 and 2008 Stockland made regular and substantial donations to the Australian Labor Party and to the Liberal Party.
2. Sections 23 and 23D of the *EPA Act* provide:

"**23 Delegation**

(1) The Minister, corporation or Director-General may, by instrument in writing, under seal (in the case of the corporation), delegate any of the Minister's, the corporation's or the Director-General's functions conferred or imposed by or under this or any other Act as are specified in the instrument to:

...

(f) the Planning Assessment Commission

...

and may, by such an instrument, revoke wholly or in part any such delegation.

...

(4) Notwithstanding any delegation under this section, the Minister...may continue to exercise all or any of the functions delegated.

(7) The Director-General shall cause to be published in the Gazette a notice setting out the details of any instrument referred to in subsection (1), but this subsection does not affect the provisions of subsection (1).

...

23D Functions of Commission

(1) The Commission has the following functions:

(a) to determine applications for the approval of projects and concept plans under Part 3A, if those matters are delegated to it by the Minister."

1. On 6 November 2008, in a media release, the (then) Minister stated her intention to delegate power to the PAC to "stand in the shoes of the Minister...and determine all development applications where a developer has made a political donation...The Commission will play a significant role in depoliticising the planning system by 'standing in the shoes of the Minister'. The Commission's role as a determining body in these cases builds on the Government's legislation, already in force, which requires proponents of development applications to declare political donations over $1,000 which have been made at any point in the two years prior to lodging."
2. On 18 November 2008 the Minister executed an Instrument of Delegation in which she delegated to the PAC her powers and functions under ss 75J and 75JA of the *EPA Act* in relation to project applications lodged before or after the date of that Instrument "in relation to which a statement has been made disclosing a reportable political donation". "Statement" is defined in Schedule 3 to the

Instrument as a statement of disclosure required to be made under s 147(3)(a) of the *EPA* Act required to be made in accordance with s 147(6). A "reportable political donation" is one that falls within Part 6 of the *Election Funding and Disclosures Act* 1981 (NSW) (see especially ss 84, 85, 86 and 88).

3. On 5 December 2008 the Instrument of Delegation was published in the NSW Government Gazette.
4. I do not accept the ultra vires ground of challenge for the following reasons.
5. First, s 147 did not apply because the subject application predated the coming into force of s 147: s 147(13).
6. Secondly, in any event, notwithstanding the delegation of power, the Minister remained empowered to exercise any of the functions delegated: s 23(4) *EPA Act*, which is to the same effect as s 49(9) of the *Interpretation Act* 1987 (NSW); *Pongrass Group Operations Pty Ltd v Minister for Planning* [2007] NSWLEC 638, 156 LGERA 250 at [40] (a decision in the context of delegation by the Director-General).
7. Finally, political donations per se do not provide any ground for challenging an approval under s 75J: s 147(1).

GROUND 2: FAILURE TO CONSIDER MANDATORY RELEVANT CONSIDERATIONS

1. The applicant contends that the Minister failed to consider several mandatory relevant considerations.

Ground 2(a): Failure to Consult with Aboriginal Community Groups

1. The applicant submits that the Minister failed to consider that there had been no consultation with relevant Aboriginal community groups in relation to Aboriginal cultural heritage as required by the Director-General's EARS 19.1 and 21.1.
2. The respondents submit that if EARS 19.1 and 21.1 imposed an Aboriginal consultation requirement (which they dispute), it was satisfied, and it was reasonably open to the Director-General to conclude it was satisfied, having regard to conditions B 51 and E 31 of the approval, Stockland's commitment in relation to cultural heritage in its Statement of Commitments (to which the approval was subject), and the level of earlier consultation in relation to the

concept plan and to the Keeping Place on adjoining Stockland land.

3. EARS 19.1 and 21.1 provided:

"**19. Heritage**

19.1 Aboriginal cultural heritage sites were identified across the site during the assessment of the Concept Plan and in further studies undertaken by Council and the Department of Environment and Conservation. Provide mechanisms to protect and actively manage these sites (refer to draft Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation).

...

21. Consultation

21.1 Undertake an appropriate and justified level of consultation with the following agencies during the preparation of the EA:

Agencies or other authorities:

...

• Relevant Aboriginal community groups;

Public:

• Document all community consultation undertaken to date or discuss the proposed strategy for community consultation.

The consultation process and the issues raised should be described in the EA."

1. The guidelines referred to in paragraph 19.1 (**Aboriginal Cultural Heritage Guidelines**) were concerned with mechanisms for assessment of the impact of a project on Aboriginal cultural heritage, primarily by consultation with Aboriginal communities. They included the following provisions:

"2. FACTORS TO CONSIDER WHEN PREPARING A PROJECT APPLICATION

All project applications must state whether or not the project is likely to

have an impact on Aboriginal cultural heritage and must include information about how this assessment was made.

This assessment must demonstrate that input by affected Aboriginal communities has been considered, when determining and assessing impacts, developing options, and finalising the application.

The earlier that Aboriginal cultural heritage issues are addressed in planning and development approval processes and conservation solutions determined, the less likely it will be those same issues will come back during later stages of the development. The impact assessment steps below include a number of **mechanisms** that will enable Aboriginal cultural heritage issues to be dealt with "up-front" in the planning process.

3. STEPS IN THE ASSESSMENT PROCESS

This section provides an outline of the assessment process and should be read in conjunction with the DEC's Aboriginal Cultural Heritage Standards and Guidelines Kit.

The Aboriginal cultural heritage assessment process is outlined in the following steps and includes:

Undertaking a preliminary assessment to determine if the project is likely to have an impact on Aboriginal cultural heritage;

Identifying the Aboriginal cultural heritage values associated with the area through **consulting** with Aboriginal people with cultural knowledge or responsibilities for country in which the proposed project occurs, written and oral research and field investigations;

Understanding the significance of the identified Aboriginal cultural heritage values;

Assessing the impact of the proposed development on Aboriginal objects and Aboriginal places;

Describing and justifying the proposed outcomes and alternatives; and

Documenting the Aboriginal cultural heritage impact assessment and the

conclusion and recommendations to afford appropriate protection of Aboriginal cultural heritage.

The close and on-going involvement and participation of Aboriginal people will be needed during the collection of the information and the development of management outcomes. The assessment requirements are described in the following steps and illustrated in the Attached Flow Chart. Further details on each of these steps can be obtained from the DEC.

STEP 1 Preliminary assessment

The main purpose of a preliminary assessment is to identify whether there are Aboriginal cultural heritage values associated with the subject site. The preliminary assessment is primarily a desktop exercise that involves examination and collation of the information required for understanding the cultural landscape.

...

There will be situations where it could be anticipated that an Aboriginal cultural heritage assessment would not be necessary, for example:

redevelopment of a site where objects are not previously found or have been removed or damaged;

excavation of a site has previously occurred and there is little likelihood of objects remaining.

...

Social/cultural information

The social and cultural information leading to the establishment of social and cultural values includes the spiritual, traditional, historical or contemporary associations and attachments which the place or area has for the present-day Aboriginal community. Places of social significance have associations with contemporary community identity. **These places can have associations with tragic or warmly remembered experiences, periods or events. Communities can experience a sense of loss should a place of social significance be damaged or destroyed.**

This information will be obtained primarily from the Aboriginal community based on a process of community consultation and will involve a range of methodologies, such as cultural mapping, oral histories, archival documentation, and specific information provided by the Aboriginal community for the purposes of the study.

A description of the **consultation process** and documentation from the Aboriginal community must be included in the final assessment report. **Guidance on consultation with Aboriginal people and communities can be found in the interim Aboriginal Community Consultation Guidelines at**

http://www3.environment.nsw.gov.au/npws.nsf/Content/Protecting+Aboriginal+objects+and+places."

(emphasis added)

1. The Aboriginal Community Consultation Guidelines incorporated by reference at the end of the above quotation state that they are to guide persons seeking an approval under Part 6 of the *National Parks and Wildlife Act* 1974 and that they were developed by the Department of Environment and Conservation (NSW) to clarify and reaffirm the intent of its policies regarding the requirements for consultation by proponents with members and representatives of Aboriginal communities. They contain the following consultation provisions:

"PART B: Consultation requirements

In reviewing applications for consents and permits, DEC will look to see that the following consultation requirements have been met.

1: Notification and registration of interests

The proponent or their consultant (referred to as 'the proponent' below) must actively seek to identify stakeholder groups or people wishing to be **consulted** about the project and invite them to register their interest.

To this end, it will be sufficient for the proponent to provide written

notification to:

(a) the bodies listed below -

Local Aboriginal Land council(s)

Registrar of Aboriginal Owners

Native Title Services

Local council(s)

Department of Environment and Conservation, and

(b) via an advertisement in the local print media.

The notification must set out details of the proposal and invite registrations from interested groups or individuals. A closing date for registration of interest must also be included. The time allowed should reflect consideration of the project's size and complexity, but must in all cases allow at least 10 working days to respond.

The proponent must record all registrations received in writing before the closing date. DEC requires the proponent to include all parties that have registered their interest in Step 2 below. Respondents that do not register by the due date may still participate in the consultation process in Step 3.

2: Preparation for the assessment (design)

Proponents are required to undertake a cultural assessment and a scientific/archaeological assessment. These assessments are then to be integrated into a single Cultural Heritage Assessment Report. The proponent must present and/or provide the proposed methodology for the cultural and archaeological assessment to the registered stakeholders. The stakeholders are then provided with a reasonable time (at least 21 days) to review and provide feedback to the proponent, including identification of issues/areas of cultural significance that might affect, inform or refine the methodology. Comments should be provided in writing, or may be sought verbally in a meeting with the registered respondents. In either case they should be documented in the proponent's assessment report."

(emphasis added)

1. The EARS relating to Aboriginal consultation were consistent with the object of the *EPA Act* to provide increased opportunity for public involvement and participation in environmental planning and assessment: s 5(c).
2. EARS 21.1 required "an appropriate and justified level of consultation with relevant Aboriginal community groups during the preparation of" the environmental assessment. EARS 19.1 directed attention to the Aboriginal Cultural Heritage Guidelines and the Aboriginal Consultation Guidelines (incorporated by reference) but did not require them to be strictly followed. They were just that: guidelines. The former Guidelines stated that guidance on consultation with aboriginal communities can be found in the latter Guidelines, which relevantly indicated that it was sufficient to provide written notification to (among others) Local Aboriginal Land Councils and via an advertisement in the local print media.
3. The Director-General's Report (at p 16), under the heading "Director-General's Environmental Assessment Requirements", stated that "the Department is satisfied that the DGRs have been adequately addressed by the Proponent's Environmental Assessment (Appendix B), its accompanying reports from professional consultants, the proponent's 'Consolidated Response to Agency and Public Submissions' (Appendix D) and the Proponent's letter titled 'Sandon Point Project Application Consolidated Response to Agency Submissions' (dated 21 May 2009) and their revised Statement of Commitments (Appendix E)". Appendix F to the Director-General's Report included a "Statement of Compliance" which stated: "The Department is satisfied that the environmental assessment requirements have been complied with (see table below)." The ensuing table sets out the criteria in s 75I(2) of the *EPA Act* and the Department's response:

Section 75I(2) criteria	Response
A statement relating to compliance with the environmental assessment requirements under this Division with respect to the project.	The environmental assessment of the project application is this report in its entirety.

1. The proponent's environmental assessment of September 2007, which was attached to the Director-General's Report, addressed consultation with Aboriginal community groups as follows (at p 56):

"**6.14 Community and Aboriginal Community**

Extensive consultation has been undertaken with State and local agencies, and the community in association with the Local Environmental Study, rezoning of the site, development applications for 'The Point", Commission of Inquiry, Charles Hill review and most recently the Concept Plan application. These steps have guided the planning framework for the site as reflected in the Project Plan application.

There has also been extensive consultation with Aboriginal community groups at these stages as well as more specific and targeted consultation in the Stuart Huy's Aboriginal Cultural Heritage Assessment, Final Report 2006. Stuart Huy's methodology included consultation with seven Indigenous Aboriginal Stakeholder Groups including individual site inspections with representatives of each group. These recommendations as are of relevance to the site have been reviewed and incorporated into the Project Plan application.

In light of the past extensive consultation, the community and aboriginal community groups have not been directly consulted in this preparation of the Project Plan application. However the consultation strategy below outlines Stockland's strategy for **further consultation**.

6.15 Consultation Strategy

Further consultation with State and local agencies, **Aboriginal community groups** and the general community **is proposed** to be undertaken as follows:-

Exhibition of the Project Plan application will provide further opportunity for all interested parties to comment upon the proposal;

Issues raised in agency and public submissions will be reviewed and addressed by Stockland following the exhibition of the proposal in their preferred Project report, if necessary; and

The **Aboriginal community** will be **further consulted** with test excavation proposed to occur with the participation of the Aboriginal community, as detailed in Section 7.15 and the Statement of Commitments."

(emphasis added)

1. The last of the three proposals referred to in the above-quoted consultation strategy translated not to consultation before approval but to a condition of approval: see [66] below.
2. Attached to the proponent's environmental assessment was a report dated July 2007 by Stockland's heritage consultant Dr Susan McIntyre-Tamwoy. Her report reviewed the available documentation on the known and likely archaeological evidence relating to the Aboriginal and non-Indigenous history of occupation of the Sandon Point area generally and, in particular, the subject site and included the following:

"This report aims to summarise the potential of the area to contain as yet undetected indigenous and non-indigenous archaeological sites, and to set out Stockland's proposed course of action to investigate and/or mitigate impact on these.

A separate report provides a Heritage Interpretation Plan based largely on an earlier report carried out by Godden Mackay Logan (GML2001) but updated to incorporate information identified since that time. The Heritage Interpretation Plan sets out actions to interpret the site and its range of heritage values to the public.

In developing the recommendations the report takes into account the outcomes and findings of all previous archaeological work on Aboriginal sites and the prediction of Aboriginal site locations.

This desktop study has not included consultation with the Illawarra Aboriginal community groups involved in previous work at Sandon Point, Consultation with these groups has been ongoing in relation to works at Sandon Point and DECC has been independently undertaking consultation in relation to specific claims relating to areas of significance in the COI area as part of their assessments relating to the boundaries of

the Aboriginal Place. Recommendations for future archaeological investigation in this area are consistent with and follow on from those made in the COI and the subsequent investigation led by Charles Hill (see McIntyre-Tamwoy 2003 and AASC2006 in particular) which process included extensive consultation with the Aboriginal community. It is expected that some additional consultation may occur during the exhibition phase of the project Plan Application however the primary consultation will occur during the archaeological testing program particularly if Aboriginal Objects are identified. Representatives of the Aboriginal community will have the opportunity to be involved in all field investigations."

(emphasis added)

1. There was close consultation by Dr McIntyre-Tamwoy with Aboriginals and Aboriginal groups in relation to the design of a Keeping Place on adjoining Stockland land. Responses from Aboriginal groups or persons, including the applicant, were fed into the design of the Keeping Place.
2. In November 2007 the project application was publicly exhibited and in mid 2008 the amended project application and amended concept plan were publicly exhibited. Among the responsive public submissions were submissions from several Aboriginal groups: the Illawarra Local Aboriginal Land Council, the Wadi Wadi Coomaditchie Aboriginal Corporation and the North Illawarra Reconciliation and Treaty Group. Relevant issues raised in public submissions were addressed in the proponent's Consolidated Response to Agency and Public Submissions dated November 2008 and an addendum thereto accompanying a letter dated May 2009, both of which were attached to the Director-General's Report. The Director-General's Report expressed satisfaction that all relevant issues raised by the public submissions had been addressed.
3. Conditions B 51 and E 31 of the Minister's project approval of November 2009 are in the following terms:

"**B 51 Archaeological Investigations**

Sample test excavation shall be carried out in the areas identified in Figure 6 of the 'Desktop Assessment of Archaeological Potential', prepared by

Susan McIntyre-Tamwoy Heritage Consultant April 2007, prior to commencement of works in those areas. In this regard, test excavation does not need to be carried out prior to commencement of works in Stage 5 of this subdivision.

All Archaeological Investigations must be done in consultation with the Aboriginal community as outlined in the Statement of Commitments."

E 31 Impact of Below Ground (Sub-surface) Works – Aboriginal Objects

In the event that future works during any stage of the project disturb Aboriginal cultural materials, works at or adjacent to the material must stop immediately. Temporary fencing must be erected around the site and the material must be identified by an independent and appropriately qualified archaeological consultant. The Regional Archaeologist of the Cultural Heritage Unit of the Department of Environment and Climate Change, the Northern Illawarra Aboriginal Collective, the Illawarra Local Aboriginal Land Council (LALC), the Wadi Wadi Coomaditchie Aboriginal Corporation, the Korewal Eloura Jerrungurah Tribal Elders Aboriginal Corporation, and the Wodi Wodi Elders Corporation must be informed. These groups will advise on the most appropriate course of action to follow. Works must not resume at the location without the prior written consent of the Department of Environment and Climate Change, the Illawarra LALC and Aboriginal Corporations."

1. Condition B51 refers to Stockland's Statement of Commitments which included the following in relation to cultural heritage:

"A Voluntary Conservation Agreement (VCA) will be provided with the implementation of the Project Plan approval, if required.

Stockland commits to carrying out archaeological testing of the Woodlands Cottage site for artefacts relating to both Woodlands Cottage and Aboriginal artefacts.

Stockland commits to sample test excavation in areas identified in Figure 6 of the Desktop Assessment of Archaeological Assessment prepared by Susan McIntyre-Tamwoy Heritage Consultant, April 2007, with test

excavation carried out with the participation of the Aboriginal community.

Stockland commits to establishing the Aboriginal Keeping Place as part of the Sandon Point Stages 1-6 for the keeping of recovered Aboriginal Objects and copies of reports and documents relating to them."

1. The Minister's consideration of the Director-General's Report, which had to include a statement "relating to" compliance with the EARS, was a jurisdictional fact upon which the Minister's exercise of power was conditioned: ss 75I(2)(g), 75J(2)(a) *EPA Act*. There is no submission that that jurisdictional fact was absent nor that the Director-General's Report did not include such a statement. In fact it did include such a statement couched in terms of the Department's subjective assessment: see [60] above.
2. If the applicant's submission is that the Minister was under a misapprehension concerning consultation with Aboriginal people, then it should be acknowledged that there are cases in which administrative decisions have been held to be vitiated by the circumstance that the decision-maker made the decision under a misapprehension of material matters of fact: *Minister for Immigration and Ethnic Affairs v Haj-Ismail* [1982] FCA 51; (1982) 40 ALR 341 (FCAFC); followed in *Sezdirmezoglu v Acting Minister for Immigration and Ethnic Affairs (No 2)* (1983) 51 ALR 561 at 573 (Smithers J); *Akers v Minister for Immigration and Ethnic Affairs* [1988] FCA 459; (1988) 20 FCR 363 (Lee J); and *Williams v Minister for the Environment and Heritage* [2003] FCA 535 at [31]-[32] (Wilcox J). In *Minister for Immigration and Ethnic Affairs v Haj-Ismail* the Minister's deportation orders were based on a report to the Minister by the Department which did not fully or correctly state the true position. The Full Federal Court held that the deportation order was wrongly based and should be set aside. In *Akers* Lee J said at 373: "To proceed to a decision on a misapprehension of matters material to the decision may be described as an improper exercise of power". The leading case of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40, 162 CLR 24 may be regarded as falling into the same category. There the Minister made a decision based upon an Aboriginal Land

Commissioner's report in ignorance of the fact that the Minister's Department had received submissions indicating that the Commissioner had proceeded under a misapprehension of fact.

3. I am unable to conclude that the Minister was under a misapprehension concerning, or failed to consider, the EARS relating to Aboriginal consultation or the actual consultation that occurred. This is not a case where the Minister relied entirely on a Departmental summary which failed to bring to her attention a significant material fact which she was bound to consider: *Peko-Wallsend* at 30. The Director-General's Report informed the Minister of the EARS, the proponent's environmental assessment and the Aboriginal consultation that in fact occurred. It was apparent from the Report that there was notification to Aboriginal community groups through the public exhibition process and that a number of Aboriginal groups responded and made submissions, which the proponent addressed in a report appended to the Director-General's Report. It was also apparent from the Director-General's Report that, in view of earlier and related extensive consultation with Aboriginal people, consultation during the preparation of the environmental assessment of the project was to be through the public exhibition process and as provided for in conditions of development approval and in the proponent's statement of commitments: see [61]-[64] above. There was no mandatory requirement for more. Sensitivity to the special status of Aboriginal people may be thought to have warranted initiating more direct communication with them. But that goes to the merits of the decision which are irrelevant in these proceedings.

4. The applicant also submits that the Minister failed to consider that other significant Aboriginal sites or objects will be impacted by the development. I do not accept the submission. There was no specific mandatory requirement to consider other significant Aboriginal sites or objects outside the area the subject of the decision under challenge. In any event, the Minister considered the question of Aboriginal cultural heritage including the existence of significant Aboriginal sites. Conditions of approval B50, B51, E30, E31 and E32 as well as the commitments in the Statement of Commitments (at pp 9-10) include requirements to carry out archaeological investigations on specific areas within the site and to protect

Aboriginal cultural materials within the site.

5. For these reasons, I reject this ground.

Ground 2(b): Failure to Consider the Non-Establishment of an Aboriginal Keeping Place

1. On 30 January 2002 Stockland was granted two consents under s 90 of the *National Parks and Wildlife Act* 1974 to destroy various items of Aboriginal heritage in relation to a neighbouring development project, Sandon Point Stages 1 to 6. Stockland was granted a further s 90 consent on 2 March 2005. The 2002 and 2005 consents were conditional upon Stockland establishing a Keeping Place to store Aboriginal artefacts discovered during excavation works. Special conditions 2 and 3 of the 2005 consent provided:

"2. The Aboriginal Keeping Place must be operative within twelve months of the issuing of this consent, and the Keeping Place must be made available for any Aboriginal objects collected or salvaged from the area of Sandon Point Stages 1 to 6.

3. The form and location of the Aboriginal Keeping Place and a plan for its management must be negotiated with the Aboriginal community groups listed in Schedule C."

1. The concept plan approval for the major project was also conditional upon a commitment by Stockland to establish a Keeping Place. The later project approval was conditional upon a similar but more extensive commitment (in that it extended to reports and documents) including a timing requirement, expressed as follows: "Stockland commits to establishing the Aboriginal Keeping Place as part of the Sandon Point stages 1 to 6 for the keeping of recovered Aboriginal Objects and copies of reports and documents relating to them. Timing: the Keeping Place will be established in conjunction with the requirements for stages 2 to 6 of 'The Point' development".
2. To date, no Keeping Place has been established.
3. In response to public exhibition of the major project application, a submission was received from the Wadi Wadi Coomaditchie Aboriginal Corporation which stated:

"As Stockland has yet to honour its obligation under stages 2-6 to enter into a Voluntary Conservation Agreement (VCA) and to establish a

Keeping Place it is imperative that in relation to this project that Stockland be required to enter into a VCA prior to any development work being undertaken".

1. In a report before the Minister entitled "Consolidated Response to Agency and Public Submissions" prepared on behalf of Stockland, Stockland responded to this submission by stating: "A DA for an Aboriginal Keeping Place was lodged with Wollongong City Council on 23 July 2008".
2. The applicant contends that Stockland misled the Minister with this statement as no development application was ever lodged.
3. At the hearing it was proved that such a development application was lodged with Wollongong City Council on 23 July 2008. Therefore, the Minister was not misled in this regard.
4. However, the development application for the Keeping Place was not approved. By letter dated 19 November 2008, Wollongong City Council informed Stockland that it found the "Keeping Place application unacceptable on safety grounds" and, as a consequence, decided to withhold its consent as land owner.
5. The applicant submits that when making her determination the Minister did not have regard to the fact that Stockland had still failed to provide an Aboriginal Keeping Place.
6. I do not accept the submission. The Director-General's Report, which was before the Minister, noted that the concept plan approval for the site included several commitments, including the establishment of a Keeping Place. The report stated that "these commitments have yet to be implemented" as they are contingent on the outcomes of further consultation "which is ongoing". In granting approval to the major project the Minister conditioned that approval upon a commitment by Stockland to establish a Keeping Place as part of the Sandon point Stages 1 to 6 development. In these circumstances it is impossible to conclude that the Minister was not aware of or failed to take into account the fact that a Keeping Place had not yet been established.

Ground 2(c): Failure to Consider Flooding Impacts

1. The applicant submits that "the Minister failed to consider impacts of

filling the western half of Sandon Point floodplain to channel a 'one in 100 storm flood event' with resultant flooding downstream onto the eastern area of Sandon Point, together with a potential 30% rainfall intensity and expected sea-level rise from climate change".

2. The submission raises two issues. First, whether the Minister was required to consider climate change flood risk and sea-level rise when deciding whether to approve a project under s 75J of the *EPA Act*. Secondly, if so, whether the Minister did in fact consider these matters. I leave to one side that it is not open to the court in these judicial review proceedings to make findings as to the submission's factual assumptions including the assumption that flooding will occur.

3. As analysed above at [32], the decision of the Court of Appeal in *Minister for Planning v Walker* [2008] NSWCA 224, 161 LGERA 423 in relation to the approval of a concept plan for this same project highlights that it was mandatory for the Minister to consider the public interest including relevant aspects of ecologically sustainable development, in particular the effect of climate change flood risk, at the project approval stage, and that failure to do so could provide evidence of failure to consider the public interest.

4. In fact, the Court of Appeal's comments were taken into consideration in the subsequent Director-General's Report and the Minister did consider these matters. At the time of making her determination the Minister had before her numerous documents addressing the issue of climate change and flooding. They included the proponent's environmental assessment, the Director-General's Report, the PAC Report and a Departmental briefing note dated 30 August 2009. They also included expert reports and reviews containing detailed analysis of flood risk and impact including the stability of creek designs for Hewitt's Creek and Woodland Creek and the effects of climate change.

5. The proponent's environmental assessment contained a section on "Flooding Issues" and another section on "Ecologically Sustainable Development" which stated:

"Flooding impacts and creek design have been further examined and the design of the creek corridors has met the performance criteria set in the Concept Plan Approval to contain flood waters...Meeting these design or performance criteria provides creek systems linked with the surround [sic]

environment to create a sustainable system that once established will substantially and acceptably manage flood risk for future generations".

1. The Director-General's Report stated:

"Consistent with comments made in the Court of Appeal, **the assessment of this current proposal has included consideration of the effects of climate change, including climate change flood risk, in addition to other relevant principles of ecologically sustainable development**."

(emphasis added)

1. The Director-General's Report contained an entire section entitled "Flooding and Climate Change Impacts" which relevantly concluded:

"Based on the independent advice, the Department is satisfied that the amended creek designs and mitigation measures are considered appropriate to ensure the development is unlikely to be adversely affected by flooding or impacts of climate change on sea level rise or rainfall intensity during the design 100 year ARI flood event. The development is also unlikely to adversely affect surrounding properties in regards to these matters".

1. The Departmental briefing note dated 30 August 2009 under the heading "Key Assessment Issues" contained a section on "Flooding and Climate Change Impacts". It concluded that the proposed mitigation measures are appropriate "to ensure the development and surrounding properties are unlikely to be adversely affected by flooding or impacts of climate change on sea level rise or rainfall intensity". Similarly, the PAC report contained a section entitled "whether rainfall intensity assessment was adequate to cope with the possible impacts of climate change on flooding". The section concluded with the statement: "PAC accepts that this issue has been dealt with adequately".
2. Given the numerous documents before the Minister dealing with the issue of climate change and flooding impacts, the applicant has not discharged his onus of proving that the Minister failed to take these

matters into account. Accordingly, I reject this ground.

GROUND 3: TWO OTHER ERRORS

1. The next ground is that the Minister erred by:

(a) making the determination before the completion of archaeological test excavations for potential archaeological deposits; and

(b) reaching a conclusion that the project and proposed zoning of Sandon Point was generally consistent with the recommendations in a report by Stuart Huys on Aboriginal Cultural Heritage (**Huys Report)** when this was not the case.

Ground 3(a): Archaeological Test Excavations

1. There is no specific requirement under the *EPA Act* that archaeological test excavations be carried out and it is not a mandatory consideration that the Minister was bound to take into account. Condition B 51 of the project approval (set out at [66] above) provided that sample test excavation shall be carried out in certain areas prior to the commencement of works. The applicant may be intending to assert that the approval lacked finality because archaeological testing was the subject of a condition of the approval rather than being fulfilled before the approval.
2. The issue of finality under Part 3A of the *EPA Act* was considered in *Ulan Coal Mines v Minister for Planning* [2008] NSWLEC 185, 160 LGERA 20 by Preston CJ who stated the relevant principles as follows (omitting citations):

"[49] At the outset, it should be noted that there is no common law principle that an exercise of statutory power must be certain or final in order to be valid.

[50] Rather, a condition will only be invalid, by lacking certainty or finality, if it falls outside the class of conditions which the statute expressly or impliedly permits...Where a condition does fall outside what the statute permits, the purported approval is not an approval under the statute at all (assuming the condition is not severable).

[51] The relevant question in this case, therefore, is whether Condition 29 falls outside the power to impose conditions that s 75J of the Act expressly

or impliedly permits. This involves construction of the section and its application to the circumstances of this particular Project."

1. Section 75J(4) of the EPA Act provides that "A project may be approved under this Part with such modifications of the project or on such conditions as the Minister may determine". In *Ulan* Preston CJ remarked at [75] that "clearly, the power to impose conditions on an approval under part 3A is wide".
2. It was within the Minister's power to impose a condition relating to archaeological test excavation. The timing of such excavations has no bearing on the validity of the determination. The statute did not require test excavations to be completed before the project was approved.
3. Accordingly, I reject this ground.

Ground 3(b): The Huys Report

1. The applicant submits that the Minister erred by reaching a conclusion that the project and proposed zoning of Sandon Point was generally consistent with recommendations in the Huys Report when this was not the case. The applicant's particulars are as follows:

"While the SEPP (Major Development) Amendment (Sandon Point) 2009 heritage map shows only the Turpentine Forest on the subject site, Huys noted that: 'The majority of Aboriginal representatives involved in this project have also identified within the CoI area [sic] that they believe are of high cultural significance.

These include:

The Turpentine Forest on Cookson's Land;

The 'women's Area' incorporating the Turpentine Forest, extending down to the McCauleys beach dune system.

An area on Ray Hannah land, just to the south of the Ray Hannah mound, where there are reported burials."

1. I reject this ground for four reasons. First, the Huys report was not a

mandatory relevant consideration in determining the project application. Secondly, even if it was, the Minister did consider the Huys report. The Director-General's Report, which was before the Minister, stated:

"The Department considered Aboriginal Heritage at the Concept Plan stage and commissioned an assessment of Aboriginal cultural heritage that resulted in the Huys Report' (Australian Archaeological Survey Consultants, *Sandon Point CoI Area: Aboriginal Cultural Heritage Assessment – A Report to DIPNR,* June 2006). The Huys Report outlined that Sandon Point was of high local significance and moderate regional significance but not of State or National significance in terms of Aboriginal heritage. The areas that were identified to be of significance were outside the area of the current project application site".

1. Thirdly, the Minister was not required to make a determination that was consistent with the Huys report. Finally, even if the Minister mistakenly concluded that the proposed development was consistent with the Huys report when this was not the case (which I do not accept has been established), this is not something that can be remedied by the Court.

GROUND 4: MANIFEST UNREASONABLENESS

1. The final ground of challenge is that the Minister's decision to approve the major project was manifestly unreasonable in two respects:

(a) the Minister approved development over land that is likely to be subject to potential extreme flooding events;

(b) the Minister approved development on a site that contains significant Aboriginal cultural heritage in circumstances where the proponent has failed to comply with previous commitments relating to Aboriginal heritage.

Ground 4(a): Approval of Development Over Land Subject to Flooding

1. The applicant contends that the Minister's decision was manifestly unreasonable because it risked public safety and ignored dire

warnings of government agencies, Wollongong Council and the State Emergency Service of the risk of serious harm from approving a project on flood prone land.

2. The respondents submit that the stringent test for invalidating an exercise of administrative power on the ground of manifest unreasonableness has not been met. The issue is whether the decision was so unreasonable that no reasonable Minister could have come to it: see [22] above. The Minister had numerous documents before her stating that flood risk had been considered in the design of the project and was adequately addressed: see [86]-[90] above. It was not manifestly unreasonable, in these circumstances, for the Minister to rely on these assurances and approve the project.

Ground 4(b): Aboriginal Heritage

1. The applicant submits that the proponent has failed to comply with previous commitments, court orders and conditions in previous development approvals and failed to provide land for an Aboriginal Keeping Place or a voluntary conservation area. In circumstances where the subject land contains significant Aboriginal cultural heritage the applicant contends that the Minister's decision to approve the project was manifestly unreasonable.
2. The background is that Stockland has not honoured its commitments, on the basis of which consents or approvals were granted in 2002, 2005 and 2006, to establish a Keeping Place to store Aboriginal artefacts discovered during excavation works: see [73]-[75] above. The Director-General's Report stated:

"These commitments have yet to be implemented as resolution is contingent on the outcomes of consultation and negotiation between Council, DECC and the local Aboriginal community, which is ongoing".

1. Stockland's consultant archaeologist, Dr Susan McIntyre-Tamwoy, was the primary person responsible for organising and undertaking consultations with Aboriginal community groups on behalf of Stockland in relation to the establishment of a Keeping Place. The issues included the form of the Keeping Place, how it should be managed and by whom, and any future plan of management. Between 2004 and 2010 she had much correspondence and many

discussions and meetings with, and has organised some meetings between, Aboriginal community groups, Wollongong City Council and the Department of Environment, Climate Change and Water which has statutory responsibilities in relation to Aboriginal objects. According to her evidence, which I accept, there has been no agreement amongst Aboriginal community groups as to the form of the Keeping Place and this has contributed to the delay in finalising the design and development. She gave evidence that Stockland engaged consultants to design the Keeping Place. The design was circulated by letter to Aboriginal groups that were involved in the consultation process including the applicant and feedback was sought from them as to the design. Responses were received from a number of such groups or persons, including the applicant, regarding the design. The feedback was fed into the final design of the Keeping Place and some changes were made to the design after the feedback was received.

2. It is most unfortunate that Stockland's commitments concerning a Keeping Place have yet to be honoured after so many years. Another decision maker may well have taken the view that approval should be granted on a condition which resolved the form, location and timing of the Keeping Place, such as by a dispute resolution mechanism. However, I am unable to conclude that the circumstances made the decision to approve the project manifestly unreasonable.

CONCLUSION

1. The applicant has been unsuccessful. The orders of the Court are as follows:

(1) The application is dismissed.

(2) Costs are reserved. Any application for costs is to be made by letter to the Registrar within 7 days otherwise there will be no order as to costs.

(3) The exhibits may be returned.