Land and Environment Court of New South Wales

Anderson & Anor v Director-General of the Department of Environment and Climate Change & Anor [2008] NSWLEC 182 (3 June 2008)

Last Updated: 4 June 2008

NEW SOUTH WALES LAND AND ENVIRONMENT COURTCITATION: Anderson & Anor v Director-General of the Department of Environment and Climate Change & Anor [2008] NSWLEC 182PARTIES: APPLICANTS:Douglas and Susan Anderson on behalf of the Nambahjung Clan within the Bundjalung NationFIRST RESPONDENT:Director-General of the Department of Environment and Climate ChangeSECOND RESPONDENT:Christopher Condon on behalf of North Angels Beach Development (Ballina) Pty LtdFILE NUMBER(S): 40257 of 2008CATCHWORDS: Judicial Review :- consent to destroy, deface and damage Aboriginal objects - alleged failure to take into account a relevant considerations - alleged failure to make inquiries - cultural significance - intergenerational equity - biasLEGISLATION CITED: Environmental Planning and Assessment Act 1979 s 79CInterpretation Act 1987 s 33National Parks and Wildlife Act 1974 (NSW) ss 2A, 5, 87, 90, Pt 6State Environmental Policy No. 71 - Coastal ProtectionCASES CITED: Anderson & Anor v Director-General of the Environment and Conservation & Ors (2006) 144 LGERA 43Anderson v Minister of Infrastructure Planning and Natural Resources & Ors [2006] NSWLEC 725; (2006) 151 LGERA 229Anderson v Minister for Planning & Ors

[2008] NSWLEC 120Attorney General (NSW) v Quin (1990) 170 CLR 1Azriel v NSW Land and Housing Corporation [2006] NSWCA 372Blue Wedges Inc v Minister for Environment, Heritage and the Arts [2008] FCA 399; (2008) 157 LGERA 428 Henry v Director-General of the Department of Environment and Conservation & Anor [2007] NSWLEC 722Kindimindi Investments Pty Ltd v Lane Cove Council [2006] NSWCA 23; (2006) 143 LGERA 277 Luu v Renevier (1989) 91 ALR 39 Sean Investment Pty Ltd v MacKellor (1981) 38 ALR 363Weal v Bathurst City Council [2000] NSWCA 88; (2000) 111 LGERA 181 CORAM: Lloyd JDATES OF HEARING: 21 April 2008; 22 April 2008 & 23 April 2008 JUDGMENT DATE: 3 June 2008LEGAL REPRESENTATIVESAPPLICANTS:B Nolan (barrister)SOLICITORS:Environmental Defenders Office (Northern Rivers)FIRST RESPONDENT:M H Baird (barrister)SOLICITORS:Department of Environment and Climate ChangeSECOND RESPONDENT:A M Mitchelmore (barrister)SOLICITORS:Bourke Love McCartney YoungJUDGMENT:

IN THE LAND AND ENVIRONMENT COURTOF NEW SOUTH WALESLloyd J Tuesday, 3 June 2008LEC No. 40257 of 2008DOUGLAS AND SUSAN ANDERSON ON BEHLAF OF NUMBAHJING CLAN WITHIN THE BUNDAJALUNG NATION v DIRECTOR-GENERAL OF THE DEPARTMENT OF ENVIRONMENT AND CLIMATE CHANGE & ANOR [2008] NSWLEC 182JUDGMENT1 **HIS HONOUR:** This is an application for judicial review of a permit issued by the Director-General of the Department of Environment and Climate Change to disturb or move Aboriginal objects on land and a consent to destroy, deface or damage Aboriginal objects pursuant to ss 87 and 90 of the *National Parks and Wildlife Act 1974* (NSW). The subject land comprises an area of about 10.52 hectares on the northern side of Angels Beach Drive at Ballina and also known as lot 208 in deposited plan 851318. The land is currently owned by the second respondent, North Angels Beach Development (Ballina) Pty Limited.2 The applicants, Douglas and Susan Anderson, are Aboriginal elders of the Nunbahjing Clan within the Bundjalung Nation. They seek a declaration of invalidity of the permit and consent together

with consequential relief. They rely upon five grounds, which may be shortly stated and reformulated as follows:(a) *Grounds 1, 2 and 5* allege that the Director-General failed to give proper, genuine and realistic consideration to the cultural significance of the land and Aboriginal objects, to intergenerational equity and to the opinions of the Andersons.(b) *Ground 3* alleges that the Director-General's decision is manifestly unreasonable and/or illogical and/or irrational due to the failure to make inquiries about reviews undertaken by the Department of Planning into the matter.(c) *Ground* 4 alleges that the Director-General's decision was affected by bias.**Consideration of the application**3 The second respondent purchased the land in 2002 for the purpose of developing it for a residential subdivision. On 29 May 2003, a delegate of the Director-General of National Parks and Wildlife issued a consent under s 90 of the *National Parks and Wildlife Act 1974* to destroy, deface or damage Aboriginal objects on the land for the purpose of constructing the residential subdivision. On 17 January 2006, Pain J declared the consent to be invalid on two grounds: (i) the failure of the delegate to consider a final report of Dr James Weiner; and (ii) a lack of consideration of the cumulative impacts of the development on Aboriginal objects in the region as required under the ecologically sustainable principle of intergenerational equity: *Anderson & Anor v Director-General of the Environment and Conservation & Ors* (2006) 144 LGERA 43.4 The Andersons also brought proceedings challenging the validity of a development consent for the subdivision which had been granted on 20 December 2005. On 20 November 2006, Biscoe J declared the consent void on the ground that the consent authority failed to give proper, genuine and realistic consideration of the reasons why the land was of high cultural significance to Aboriginal people and as a consequence failed to give proper, genuine and realistic consideration to the matters of relevance to the development under *State Environmental Policy No. 71 - Coastal Protection* in accordance with s 79C(1)(a) of the *Environmental Planning and Assessment Act 1979*: *Anderson v Minister of Infrastructure Planning and Natural Resources & Ors* [2006] NSWLEC 725; (2006) 151 LGERA 229.5 On 16 October 2006, the Director-General of the Department of Environment and Conservation reconsidered the application for a consent to carry out the destruction of Aboriginal objects under s 90 and issued a fresh consent. In light of the decision of Biscoe J, on 28 November 2006, the second consent was declared to be void and of no effect by this court at

the request of the Director-General.6 On 29 December 2006, the Andersons advised the Department that they withdrew their objections to the application. On 23 April 2007, the Director-General again reconsidered the application and issued a new consent. The Andersons, however, then changed their minds, withdrew their support for the application and reinstated their objections. On 15 August 2007, this Court made orders by consent allowing the Director General to withdraw the third consent.7 On 31 March 2008, Biscoe J dismissed the Anderson's challenge to the validity of a second development consent for the subdivision which had been granted on 18 November 2007: *Anderson v Minister for Planning & Ors* [2008] NSWLEC 120.8 On 3 October 2007, the delegate of the Director-General of the Department of Environment and Climate Change issued a permit under Pt 6 of the *National Parks and Wildlife Act 1974* to disturb or move Aboriginal objects on the land and granted consent to destroy, deface or damage Aboriginal objects subject to conditions and in doing so took into consideration the matters identified by Pain J which led to her Honour's finding of invalidity. This fourth consent is the subject of the present challenge by the Andersons in these proceedings.9 In making the decision now under challenge, the delegate of the Director-General stated:· I have read the determination report, including the list of attachments, prepared by Michael Hood and its attachments.· I have met with Michael Hood and he has explained the application and has discussed further with me the basis for his recommendations.· I have reviewed the following documents in making my decision:o The applicationo The Cumulative Impact Assessment report (Davies 2006:48-56)o Weiner 2003c (the final Weiner report)o Ainsworth (1922) extractso Video of Elders from Cabbage Tree Islando Letters from the Andersons to DECC [Department of Environment and Climate Change] dated 30/08/06 and 11/10/06o Affidavits of Susan Anderson and Douglas Anderson for the Land and Environment Court No. 41006 of 2006o Haglund (1991:i-vi)o Reibe (2000:43-47)o DECC 2006 - the submission relating to the Aboriginal place nomination· I endorse the recommendations in Part 3 of the determination report, including that the AHIP [Aboriginal Heritage Impact Permit] application be granted and an AHIP issued subject to conditions· I have read the draft AHIP and endorse the issue of an AHIP subject to the proposed conditions**Decision maker** [Signature][Name and Title]10 As noted by the decision-maker, the decision was made after considering the determination report of Mr Michael Hood. This was a

fresh consideration of the application by Mr Hood, an officer who had no previous involvement in the matter. Mr Hood's explanation in Pt 1 of the Determination Report is important (pp 3 & 4 of the report):**Fresh consideration and determination of the application**· This determination report is a fresh consideration and determination of the original application made on 4 March 2003. I am based in a different Branch to the officers involved in previous determinations and have not been involved in any previous consideration of this matter by DECC [Department of Environment and Climate Change] or its predecessor agencies.· In my consideration of the application, I have been assisted by Harvey Johnston, Archaeologist, South Branch, CCEPG [Climate Change and Environment Protection Group], and Steve Free, Senior Aboriginal Heritage Officer, South Branch, CCEPG. Both of these officers have not had any role in previous considerations of the application.· On 3 September 2007 I travelled to Ballina for the purpose of inspecting the site and meeting with the applicant's representatives and some key members of the Aboriginal community interested in the application at Lot 208. The aim of meeting the applicant and members of the Aboriginal community was to ensure I understood their respective positions, and to give them an opportunity to raise any matters of concern with me.· I firstly visited the North Angels Beach site in the company of the applicant's director Mr Chris Condon, of North Angels Beach Development (Ballina) Pty Ltd. Mr Condon described to me the nature of his proposal and showed me around Lot 208. We were later joined by the Jali LALC [Local Aboriginal Land Council] Cultural Heritage Officer, Mr Artie Ferguson, and the former Chairperson of the Jali LALC Mr Des Bolt. Both Mr Ferguson and Mr Bolt made it very clear to me that they supported the issuing of a s.90 consent for the site. A copy of my notes from the meeting is at Attachment C.· I then inspected the East Ballina locality on my own before driving to Cabbage Tree Island where I met with Mr Douglas Anderson, Ms Susan Anderson, Ms Sally Anderson, Ms Marcia Anderson and Mr Al Oshlack. They outlined their view that the application should be refused on the basis of the significance of the site, particularly in terms of the massacre. Again, a copy of my notes from the meeting is attached (Attachment D).11 The determination report then sets out the extensive documentary material that was considered (pp 4 - 6 of the report)**Documents provided with the application that were considered:**· Attachments to the application (Davies 2003b):o 1 - Description of objectso 2 - List of reportso 3 - Condition of objects o 4 -

History of consultationo 5 - Significance assessmento 6 & 7 - Impacts to Aboriginal objectso 8 - Need for impact/Consideration of alternativeso 9 - Mitigation measureso 10 - Summary of previous archaeological studies· Weiner, JF (2003c). Anthropological Assessment of Aboriginal Significance of Angels Beach Area: Supplement. Report to NPWS and North Angels Beach Pty Ltd· Weiner, JF (2003b). North Angels Beach Lot 208: Provisional Conclusions and Recommendations.· Weiner, JF (2003a). Anthropological Assessment of Aboriginal Significance of Lot 208, North Angels Beach Development Area. February 2003 Draft· Letter from Sue Davies to Maxine Naden (DEC) in response to issues raised by Jali LALC, Environment [sic] Defenders Office and Douglas and Susan Anderson in relation to the s.90 redetermination for Lot 208, dated 12 September 2006.· Davies, S (2006). Cumulative Impact Assessment Lot 208 DP 851318 Angels Beach Drive East Ballina Northern NSW, for North Angels Beach Development (Ballina) Pty Ltd. 12 September 2006. Report Reference JD271· Cultural Heritage Management Plan for Lot 208 (DP851318), Angels Beach Drive, East Ballina, Northern NSW. April 2007 (draft).**Other documents that were taken into consideration:**· Ainsworth (1922?) Reminiscences: Ballina in the Early Days, pages 42-47, extracted from Hagland [sic] (1991: Appendix C)· Davies, S (2002). Documentation in relation to a Preliminary Research Permit for Lot 208 (DP 851318), Angels Beach Drive, East Ballina.· Davies, S (2003a). Archaeological Test excavations at Lot 208 (DP 851318) Angels Beach Drive, East Ballina, Northern NSW. Report for North Angels Beach Development (Ballina) Pty Ltd.· Davies, S (2004) A cultural heritage assessment of the proposed Angels Beach Cycleway/Pedestrian Walkway, Ballina Northern NSW.· DEC (2006) Aboriginal Place Nominations, submission dated 18 August 2006, TRIM reference DOC06/15894· Haglund, L (1991). Angels Beach Development Areas, Traditional and Contemporary Aboriginal Significance. Unpublished report for the Jali Local Aboriginal Land Council and the Ballina Shire Council.· Medcalf, M (1989). Rivers of Blood - Massacres of the Northern Rivers Aborigines and their resistance to the white occupation 1838-1870.· Piper, A (2000). An archaeological survey at Lot 400 and lot 425 Manly Street, East Ballina. Unpublished report for Kavolan Pty Ltd Ballina.· Riebe, I (2000) Assessment of Significance for Aboriginal Place Declaration - Blackhead, Angels Beach and Flat Rock. A report for the NSW NPWS.· Sullivan, ME (1980) Investigation of damage to shell midden sites at Ballina, NSW, A

report to National Parks and Wildlife Service NSW, February 1980· White, E (2001). North Angels Beach Estate, Ballina NSW: Options for heritage management. Unpublished report prepared for the Ballina Shire Council· Anderson & Anor v Director-General of the Department of Environment and Conservation & Ors [2006] NSWLEC 12· Anderson v Ballina Shire Council [2006] NSWLEC 76· Anderson v Minister for Infrastructure Planning and Natural Resources [2006] NSWLEC 725· Affidavits of Susan Anderson and Douglas Anderson, prepared for previous Land and Environment Court proceedings No. 41006 of 2006.· Video of Elders from Cabbage Tree island (Louise and Winnifred Anderson) discussing East Ballina and the massacre site (copied to DVD)· Far North Coast Regional Strategy, Department of Planning· Ballina Urban Land Release Strategy - 2000· Zoning maps within Ballina Local Environment Plan 1987· The documents in the index at Attachment E**Written submissions received and considered by DECC in relation to the Application:**· Correspondence included and summarised in the application (summary at Attachment 4 of the s.90 application)· Correspondence included and summarised in the Cumulative Impact Assessment (Chapter 3 and Attachment 2 of Davies 2006)· Letter from Jali LALC (signed by Coordinator Frances Paden) to the Manager Northern Aboriginal Heritage Unit NPWS dated 12 May 2003.· Letter from Jali LALC (signed by Administrator BC Jameson) to the Acting Manager Planning and Aboriginal Heritage (North East) DEC dated 7 August 2006.· Letter from Douglas Anderson and Susan Anderson to Manager Planning and Aboriginal Heritage (North East) DEC dated 30 August 2006.· File note of phone discussion between Brendan Diacono (DEC) and Barry Jamison of Jali LALC dated 31 August 2006.· Letter from Ballina Shire Council to Manager Planning and Aboriginal Heritage (North East) DEC dated 4 October 2006.· Letter from Douglas Anderson and Susan Anderson to Director-General of DEC dated 11 October 2006.· Letter from Douglas Anderson and Susan Anderson to Manager Planning and Aboriginal Heritage (North East) DEC dated 29 December 2006.· Letter from Susan Anderson to Manager Planning and Aboriginal Heritage (North East) DEC dated 18 January 2007.· Letter from Jali LALC (signed by Chairperson Des Bolt) to North Angels Beach Development (Ballina) Pty Ltd dated 24 May 2007.12 Part 2 of the determination report sets out Mr Hood's evaluation of the application and Pt 3 sets out his summary of the considerations and his recommendation for approval.**The relevant**

legislation13 Section 2A (1) of the *National Parks and Wildlife Act 1974* (NSW) contains a statement of the objects of the Act, which relevantly include:(b) the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to: (i) places, objects and features of significance to Aboriginal people, and(ii) places of social value to the people of New South Wales, and(iii) places of historic, architectural or scientific significance,....14 The term "*Aboriginal object*" is defined in s 5 of that Act to mean:any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.15 Section 2A (2) states: "*The objects of this Act are to be achieved by applying the principles of ecologically sustainable development*".16 Section 2A (3) states that in carrying out functions under the Act, the Minister, the Director-General and the Service are to give effect to the objects of the Act. This provision appears to be complementary to s 33 of the *Interpretation Act 1987* which states that in the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule shall be preferred to a construction that would not promote that purpose or object.17 Section 90(1) states:(1) A person who, without first obtaining the consent of the Director-General, knowingly destroys defaces or damages, or knowingly causes or permits the destruction or defacement of or damage to, an Aboriginal object or Aboriginal place is guilty of an offence against this Act.18 Finally, s 90(2) states:(2) The Director-General may give consent for the purposes of subsection (1) subject to such conditions and restrictions as are specified therein.19 I now turn to the grounds upon which the Andersons rely.**Ground 1, 2 and 5 – The Director-General properly considered all relevant matters**20 As noted in par [2] above, the Andersons assert that the decision-maker failed to take into account relevant considerations by not giving proper, genuine and realistic consideration to three matters: (i) the cultural significance of the land and Aboriginal objects; (ii) intergenerational equity; and (iii) the opinions of the Andersons.***Cultural significance***21 The Andersons rely upon a number of studies which identify the cultural significance of the site as a place where Aborigines had permanent camps, where they conducted food gathering and ceremonial activities and its association with

a massacre of Aborigines which occurred in about 1854. The studies identify the presence on the land of archaeological remains including middens, stone tools and fragments of human bone. Reliance is placed on the judgment of Preston J in *Henry v Director-General of the Department of Environment and Conservation & Anor* [2007] NSWLEC 722 at [91] – [92] to the effect that: *firstly*, land may provide a context to understand and evaluate the significance of an Aboriginal object, including its value as evidence of Aboriginal habitation of the area; and *secondly*, the presence of an Aboriginal object in a particular place may give that place significance for Aboriginal culture. Where there is a relationship between the Aboriginal object and the land, the cultural significance of the land would be a relevant consideration (*Henry* at [92]). As I understand the submission, the decision-maker dismissed the evidence supporting a finding of cultural significance of the land uncritically and did not consider what significance and weight it deserved and thereby failed to give proper, genuine and realistic consideration to the cultural significance of Aboriginal objects on the land.22 As pointed out by counsel for the second respondent, however, the epithet "*proper, genuine and realistic consideration*" has been the subject of guarded judicial comment. As Basten JA acknowledged in *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23; (2006) 143 LGERA 277 at [79]...the danger is that adoption of the epithets such as "proper, genuine and realistic" consideration, may be understood to qualify the statutory terminology in a manner inconsistent with accepted principles in relation to judicial review. As noted in *Bruce v Cole*, they risk an assessment of the nature of the consideration which will encourage a slide into impermissible merit review.23 An observation to a similar effect was made by Basten JA in *Azriel v NSW Land and Housing Corporation* [2006] NSWCA 372 at [51]At least in relation to findings of primary fact, the weight to be given to any particular matter is for the decision-maker and is not reviewable by the Court. As Spigelman CJ noted in *Bruce v Cole* (1998) 45 NSWLR 163 at 186D-E, the scope for assessing whether the decision-maker has given proper, genuine and realistic consideration to a mandatory matter must be approached with caution, so as to avoid the Court impermissibly reconsidering the merits of the decision.24 The studies upon which the Andersons rely as demonstrating the cultural significance of the land were all before the decision-maker, as noted in par [10] above. The Andersons submit that given the volume of evidence supporting a finding of cultural

significance of the land the decision-maker dismissed that material uncritically and did not consider what significance and weight it deserved, thereby failing to give it proper, genuine and realistic consideration. I find, however, that the Andersons' submission is a thinly veiled attack on the merits of the decision. I have come to this view for the following reasons.25 In the determination report, under the heading "*Archaeological significance"* in Pt 2, reference is made to the report prepared by Ms S Davies that accompanied the original s 90 application and her conclusion that the significance of the Aboriginal objects was medium, based upon a research potential rating of low (due to the integrity of the archaeological material being significantly compromised by clearing) and that their representativeness rating was medium to high. The determination report also refers, under the same heading, to the further consideration by Ms Davies of this issue in her cumulative impact assessment of 12 September 2006, in which she studied an area much larger than lot 208 and examined a much larger sample of sites, in which she concluded that it is "*unlikely that the archaeological material on lot 208 has high representative value*", that "*it is not a good example of this particular type of site*" and that "*there are at least 21 (and possibly more) of 47 potentially similar sites that are better examples of this particular site type*". In the light of these findings the author of the determination report, Mr Hood, cannot be criticised for concluding as follows (at p 9 of the report) :The results of the CIA [Cumulative Impact Assessment] are based on a much larger sample of sites than the s. 90 application and demonstrate that the sites in Lot 208 are not unique and are represented elsewhere in the study area. On this basis I would consider the archaeological significance of the Aboriginal objects at lot 208 to be of low-medium at best.26 The determination report, under the heading "*Cultural significance*" in Pt 2, refers to the report of Dr James Weiner (May 2003), the report of Ms Inge Riebe (June 2000), the submissions and affidavits of the Andersons, and the letter from Jali Local Aboriginal Land Council of 24 May 2007 which states: "*JALC doesn't not consider the site of your proposed development as an area of high cultural significance to our people. It is common knowledge that the site has been root-racked (sic) and highly disturbed over the years*".27 In his evaluation of the question of cultural significance, the author of the determination report states (p 10 of the report):· There are clearly different and irreconcilable positions within the Aboriginal community as to the significance of Lot 208. While I consider that much of the material on

which the claim of significance by the Andersons to be inaccurate (particularly with respect to the location of the massacre), it is clear they view the site to be of high significance. However, it is equally clear that other members of the community, including people who grew up alongside the Andersons on Cabbage Tree island and, in the case of Artie Ferguson, someone who has been a sites officer for the Jali LALC for many years, do not consider the site to be of significance.· I consider that Weiner's conclusion of high significance is difficult to justify given that his report suggests strong doubt as to the validity of the Goanna Increase site at Angels Beach, the apparent distance of Lot 208 from the actual massacre site, and the lack of any clear evidence for the presence of a burial at Lot 208. Each of these issues are considered in more detail in (h) below. It is further noted that the Minister for the Environment has declined to declare the Angel Beach area an Aboriginal place, because it was found there was no evidence that the area was directly associated with the East Ballina massacre of Aboriginal people in 1853-54, and nor was there any justification on the basis of traditional Aboriginal culture.· That said, I accept the position of Weiner that artefacts and remains are evidence of "*footprints of the ancestors*". This must be balanced by the reality that Aboriginal objects are found across the NSW landscape.· Likewise, I consider the conclusion of Riebe (that the area is of significance primarily for its links to the massacre) to be not particularly robust, and I again note the decision of the Minister for the Environment with respect to the Aboriginal place nomination.· Whilst the investigations of Lot 208 have not uncovered any evidence of human remains at Lot 208, to address the possibility that such remains may be present it is recommended that conditions preventing the disturbance of any human remains be included in the AHIP. It is further noted that the location of the conservation area was original [sic] proposed by local Aboriginal groups during consultation prior to the submission of the application and has been included in the application on the basis that this area is considered the area most likely to contain human remains.28 It can be seen that while the author of the determination report considered Dr Weiner's conclusion of high significance difficult to justify, he accepted the position that artefacts and remains are evidence of footprints of ancestors. At the same time, however, the author of the report notes that this view must be balanced by the reality that Aboriginal objects are found across the New South Wales landscape. Similar weight is given to the view of Ms Reibe, whose report

was commissioned in 2001 in the context of an application to declare an area including North Angels Beach to be an Aboriginal place. The author of the determination report acknowledges Ms Reibe's conclusion that lot 208 was of importance to the Aboriginal community because its commemorative and heritage value was still intact despite some damage to its scientific value. It cannot be said, therefore, that neither of these reports were not independently reviewed by the author of the determination report.29 It can also be seen that, at the same time as referring to the analysis by these experts of the cultural significance of the land, the author of the determination report refers to material including correspondence and affidavits, which had been submitted by the Andersons. I have previously noted that Mr Hood has also interviewed the Andersons on his visit to the area. The determination report notes that the Andersons consider the land to be of significance, one of their reasons being that it was "*one of the last areas remaining in East Ballina where the massacre of our Old People took place in 1845 (sic)*". Against the view of the applicants the determination report notes the views of the Jali Local Aboriginal Land Council that lot 208 is not an area of high cultural significance. The author of the determination report freely acknowledges that there were clearly different and irreconcilable positions within the Aboriginal community as to the significance of lot 208.30 A significant part of the determination report is directed to the question of whether the massacre of 1854 extended over lot 208. Attachment "H" to the report summarises a review that was undertaken of the documentary evidence on the location of the massacre. On the basis of that review, the report states (at p 17):· It is my conclusion that the balance of the evidence points to the location of the massacre being well to the south (1.5 – 2 km) of Lot 208, in the vicinity of the Crown land east of Links Ave.31 The legal requirement of consideration is not satisfied by formalistic reference. Taking matters into consideration calls for more than simply adverting to them. There has to be an understanding of the matters and of the significance of the decision to be made about them: *Weal v Bathurst City Council* [2000] NSWCA 88; (2000) 111 LGERA 181 at [80] per Priestly JA (Giles JA concurring), *Azriel v NSW Land & Housing Corporation* [2006] NSWCA 372 at [49] per Basten JA (Santow and Ipp JJA concurring). In the present case the author of the determination report has clearly satisfied these tests, thereby satisfying the formation of a proper, genuine and realistic consideration on the merits, and in particular, of the cultural significance of the land: *Weal*

at [9] per Mason P. The Andersons are not happy with the outcome of the determination on its merits. The Court is neither required nor permitted to review the merits of the determination.***The opinions of the Andersons***32 The allegation is that the decision-maker failed to take into account a relevant consideration, namely, that proper, genuine and realistic consideration was not given to the opinions of the Andersons as local Aboriginal people. The Andersons concede that the decision-maker adverted to the concerns of the local Aboriginal community, including the Andersons themselves, but say that he dismissed them entirely. They submit that the decision-maker simply mentioned their opinions without giving real consideration to them.33 I am unable to accept these assertions. The evidence is to the contrary. The applicants were consulted by the relevant experts, including Dr Weiner and Ms Davies, in the preparation of their respective reports. The author of the determination report states that he considered the documents which I have listed in par [11] above, which include those documents submitted by the Andersons (including the affidavits which they filed in the proceedings before Pain J), the video of the elders from Cabbage Tree Island discussing East Ballina and the massacre site, and the Andersons' letters of 30 August 2006, 11 October 2006 and 18 January 2007 (the last one from Susan Anderson only). Mr Hood also travelled to Ballina and interviewed the Andersons before preparing the determination report. The issues raised by the Andersons are specifically mentioned in the determination report as follows (at p 16):o The relationship of the site to the massacre of Aboriginal people in East Ballina in 1853-1854.o The cumulative impacts of development in the locality upon Aboriginal heritage.o The presence of a burial on lot 208.o The presence of a bora ring on lot 208.o The site forms part of their dreaming stories.o Concerns about the manner in which consultation was undertaken.o "Poor quality" information relied on by Sue Davies.34 The determination report then sets out a comprehensive discussion of each of these issues raised by the Andersons seriatim. The discussion is not simply a case of adverting to them, but a true process of evaluation. As to the concerns about the manner in which consultation was undertaken, I have set out in par [10] above a description in the determination report of that consultation. In the discussion of the issue of consultation raised by the Andersons the determination report notes (at p 19):[T]he consultation processes associated with the application have been comprehensive; in particular Davies has been able to demonstrate extensive efforts to engage

with relevant groups including the Andersons. 35 The determination report also states (at p 19) :I consider the Andersons (and other stakeholders) have been given ample opportunity to provide input to the assessment process and comment on draft documents. When I visited the Andersons on Cabbage Tree Island I was told that their concerns about the proposal were all in the affidavits and letters to Brendan Diacono, which I have referred to and considered in this report.36 This is a complete answer to issue of the manner in which consultation was undertaken.37 The fact that the decision-maker did not ultimately agree with the views of the Andersons does not give rise to reviewable error. It is important to note the observations of Brennan J in *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 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. ***Intergenerational equity***38 The lack of explicit consideration of this issue was one of the reasons for the finding of invalidity by Pain J in the earlier case of *Anderson v Director-General* and was relied again in submissions by the Andersons. The concept of intergenerational equity was considered by her Honour to be part of the need to consider the principles of ecologically sustainable development. Her Honour held that this requirement arose under s 2A (2) of the Act in achieving the objects of the Act (at [199]):One of the principles of ESD is that of intergenerational equity... Intergenerational equity is the principle whereby the present generation should ensure that the health, diversity and productivity of the environment be maintained or enhanced for the benefit of future generations (*Protection of the Environment Administration Act 1991* s 6(2)). A key matter attested to in the applicants' affidavits and evidence in the case is the importance to Aboriginal people of sites where their ancestors have been present demonstrated by, inter alia, the presence of objects which they consider significant by virtue of that association. Obviously the fewer of these sites that remain the less opportunity there will be for future generations of Aboriginal people to enjoy the cultural benefits of those sites.39 Pain J went on to hold that (at [200]):...a

consideration of the cumulative impact of destruction of Aboriginal objects of significance to Aboriginal traditional owners is relevant to the assessment of significance of particular objects in any s 90 consent application.40 As I have noted, it was the failure to expressly consider this matter which was one of the reasons for the finding of invalidity by Pain J, a fact which is acknowledged in the present determination report. Accordingly the topic is given detailed consideration by the author of the present determination report in Pt 2 under the heading "*Principles of ecologically sustainable development*".41 Moreover, the report states that following the *Andersons'* case determined by Pain J, the Department requested the applicant for consent to provide additional information with respect to the cumulative impact of development in the area. On this basis, Davies Heritage Consultants Pty Ltd prepared a cumulative impact assessment, the final version of which is dated 12 September 2006.42 The findings of the cumulative impact assessment are summarised in the determination report (at p 13). The cumulative impact assessment examined 128 sites, at least 54 of which are in a similar setting (dune and/or sand ridge) to that of lot 208. Seventeen of the 128 have been the subject to a s 90 consent. The assessment also identified an additional six sites that have been subject to disturbance. The net result is that there are 41 recorded sites in the study area – a 1 km wide strip along the coastline for a distance of about 55 kms – in a similar environmental setting that have not been subject to a s 90 consent nor any recorded disturbance.43 After summarising the findings of the cumulative impact assessment, the determination report then set out a detailed evaluation of it, including the following:· When examining inter-generational equity and the objects proposed for destruction on Lot 208, it is also appropriate to give consideration to their condition. Numerous reports attest to the extent of disturbance on Lot 208, and the impact that this has had on the objects at the site. Davies (2003a) states "... the integrity of the archaeological material has been highly compromised by prior clearance activities. It is considered that more than 30% and most likely 100% of the area in which the archaeological material is distributed is disturbed".· It is my opinion that the inclusion of sites within the formal reserve system in the region, and to a lesser extent the existence of other sites on land zoned for environmental protection, provides explicitly for inter-generational equity, and should be factored in to the decision regarding Lot 208. ....44 The determination report also addresses the issue of the massacre site,

concluding that the evidence points to the location of the massacre being well to the south (1.5 – 2 km) of lot 208.45 The author of the determination report concludes that he does not believe that the development of lot 208 will have any real impact on the ability of future generations to visit, see, experience and/or research locations associated with the massacre in East Ballina in 1853-1854. Reference is made to the conservation area – to be set aside as a condition of the consent – which will be public land and able to be accessed by the community. That is, the section of the land which is subject to the least disturbance and thus most likely to have intact archaeological deposits is to be conserved, allowing for permanent protection of the Aboriginal objects, access to the Aboriginal community and opportunities for education. The author of the determination report also states (at p 16 of the report):· Overall, I consider that while CIA [cumulative impact assessment] demonstrates that while there has been a considerable impact on the known sites in the study area (including sites in a similar environment setting) a larger number remain intact, including a range of sites in areas subject to protection under the parks reserve system and there would be additional as yet unrecorded sites also within the study area. The archaeological material in lot 208 is likely to extend into lands to the north and east where further opportunities for conservation exist. Further the proposed conservation area provides for the long term protection of some of the Aboriginal heritage values on lot 208, and ongoing access for the community.46 It follows that the allegation that the decision-maker failed to give proper, genuine and realistic consideration to the relevant question of intergenerational equity must be rejected. The significance of the land to the Bundjalung people was fully considered and their overall interests were both taken into account and protected.**Ground 3 - Failure to make inquiries**47 This issue arises in the following way. Mr Douglas Anderson had contended that archaeological test pits on the land should have gone deeper than one metre. He contends that they should have gone down to three metres in depth because fill had been placed on the site. The author of the determination report considered Mr Anderson's contention in his report under the heading "*Depth of archaeological investigation test pits*", as follows (at p 7):· Douglas Anderson states in his affidavit prepared in relation to previous proceedings that the test pitting should have gone deeper than 1m, and when I met with him on 3 September 2007 he stated they should have gone down to 3m, because fill had been placed on the site during the South

Angels beach development.· The test pitting process described in Davies (2003a) provides a clear analysis and description of the sub surface cultural horizons at Lot 208. 191 test pits were excavated and recorded. The test pitting extended beyond the depth of the soil horizons containing cultural material, and in most cases to 1m, twice the depth of recorded archaeological material, to the A horizon of the Pleistocene sands. Based on these investigations, DECC agrees with the views of Davies that there is no indication that archaeological materials would be expected to occur at depths below 1m.· This is further corroborated by the comments of Artie Ferguson, who was a sites officer with the Jali LALC and worked on the South Angels Beach development. Mr Ferguson told me in a phone conversation on 12 September 2007 that fill was not dumped on Lot 208, it was dumped elsewhere ("*the new fields back towards Ballina*"). It is my view that there is no evidence to support the view of Mr Anderson that fill was dumped on the Angels beach site.· I consider that the number of test pits and the depth to which they were dug was adequate to assess the Aboriginal heritage values of Lot 208.48 I have referred in par [5] above to the fact that on 20 November 2006 Biscoe J declared that the development consent that had been granted to the second respondent was of no effect on the basis of inadequate assessment and consideration of Aboriginal cultural significance: *Anderson v The Minister of Infrastructure Planning and Natural Resources* (2006) 151 LGERA 229; [2006] NSWLEC 725. As a consequence, the Department of Planning commissioned Umwelt (Australia) Pty Ltd, a firm of environmental consultants, to review existing documentation relating to the Aboriginal cultural significance of the land. The Umwelt report dated June 2007 is entitled "*Review of Aboriginal Cultural Heritage Documentation, Lot 208, Angels Beach, East Ballina*". It is a review of substantially the same material that was before the author of the present determination report. An issue which emerged in the review was the testing methodology that had been undertaken. The Umwelt report states (at 3.14.1):The testing methodology upon which the assessment of the archaeological significance of the project area is largely based did not adequately explore the archaeological potential of the project area. The possibility that archaeological deposits (potentially dating to the Pleistocene) may be present in relatively undisturbed soil horizons below the depth of the majority test pits was not considered or tested.49 The Andersons submit that this issue was materially relevant to the decision; that although the

Umwelt review had been commissioned by the Department of Planning for a different consent authority, the Minister for Planning, nevertheless the Department of Environment and Climate Change either knew or ought to have known of its existence and taken it into account; and that if the Umwelt review was not in the possession of the Department of Environment and Climate Change, it should have made inquiries about reviews undertaken by the Department of Planning, which was known to be involved in the assessment of the development application for the proposed subdivision. There is some evidence that suggests that an officer or officers of the Department of Environment and Climate Change were told of the existence of the Umwelt review, but did not obtain or attempt to obtain a copy of it.50 The Andersons submit that the author of the determination report thus unreasonably failed to make inquiries and to ascertain facts which were material to the decision and readily available so that the determination is therefore manifestly unreasonable and/or illogical and irrational.51 I am prepared to assume that the existence of the Umwelt review was known to the Department of Environment and Climate Change. I have described in par [10] above the vast amount of material which was taken into consideration. The Umwelt review was a merely desktop review of the same material that was before the author of the determination report - it did not include any further consideration of the issues raised by the Andersons, it did not involve any sub-surface testing, it did not include any further consultation with the Andersons, it did not include a site visit. In these circumstances, the views expressed in the Umwelt review were not centrally relevant to the Director-General's decision, but on the contrary, the Umwelt review was of, at most, marginal relevance.52 In particular, the suggestion by the Umwelt that the test pits should have gone deeper flies in the face of the field work that had been undertaken by others, and, in particular, by Ms Elizabeth White of November 2001 and Ms Sue Davies. Ms White notes in her report at 3.1.2 (p 7) that: Geomorphologically, the area is located atop Pleistocene-age sand dunes, probably dating to the last Interglacial period and c. 120,000 years old. The sand dunes, have formed high ridges and hills interspersed with low swales and flats....53 Ms White describes the soil profile on the opposite side of Angels Beach Drive to lot 208 as consisting of a bleached white sand 0.5 cm thick over grey sand, 3.5 cm thick over black humic sand, c.10 cm thick with a dark grey gradational boundary over mid-grey sand c.45 cm thick. She identifies the Pleistocene era dune at a depth of

one metre, and only the upper four centimetres of white grey sand was recently deposited material. 54 Ms Davies conducted extensive archaeological test excavations on lot 208, as described in her report of February 2003. Ms Davies excavated 191 test pits on lot 208. She reports that the average depth of shell material was 24.59 cm within the study area (at 5.3.3). The average depth of stone artefacts within the test pits was 34.12 cm (at 5.3.3). The undisturbed portion of the Pleistocene A horizon was encountered from 80 cm to one metre. As I understand it, the Pleistocene epoch covers the Earth's most recent period of widespread glaciation. In light of these findings the question of the sufficiency of the test pitting that had been done was a matter for the decision maker, who had all the relevant field testing results before him and considered them.55 A decision may be unreasonable in the relevant sense, and therefore, an improper exercise of the power, where to the knowledge of the decision-maker, there is readily available to him or her other *factual* material, likely to be of critical importance in relation to a *central* issue for determination, and which has not been obtained: *Luu v Renevier* (1989) 91 ALR 39 at 50, (emphasis added). The Umwelt review does not add any *factual* material to that which was already before the decision-maker, neither, for the reasons I have discussed, was it of critical importance. The cautionary observation of Basten JA in *Kindimindi*, noted in par [22] above, is directly on point.56 Moreover, as Deane J stated in *Sean Investment Pty Ltd v MacKellor* (1981) 38 ALR 363 (affirmed on appeal: (1982) 42 ALR 676), the duty of a decision-maker to pay regard to relevant matters does not mean that a party affected by a decision is entitled to make an exhaustive list of *all* the matters which the decision-maker might conceivably regard as relevant and then attack the decision on the ground that one of them was not specifically taken into account.57 In my opinion, the allegation that the Director-General's decision was manifestly unreasonable, or irrational, or illogical on this ground must be dismissed.**Ground 4 - Bias**58 The allegation that the Director-General's decision was affected by bias is based on extremely thin evidence. It is that scant attention was given to the opinions of the objectors as represented Mr Anderson, in particular regarding the issue of land fill; the decision-maker made no real attempt to test Mr Anderson's proposition, thereby demonstrating an apprehension of a possibility of predisposition toward a result, other than a result reached by an evaluation of the material before the decision-maker in a fair way with a mind that was open to persuasion;

and preference was given to the views of Mr Ferguson on the land fill issues, which was an unreliable finding of the state of satisfaction on that issue. In this way, the Andersons submit that a hypothetical fair-minded observer would reasonably apprehend bias on the part of the decision-maker.59 There is no evidence of bias. As appears from the discussion in the determination report that I have set out in par [47] above, the decision-maker preferred the views of Mr Ferguson to those of Mr Anderson for the reason stated, namely, the depth at which the undisturbed portion of the Pleistocene A horizon was encountered. It cannot be suggested that this conclusion was not reasonably open to the decision-maker.60 Moreover, the assessment and the determination report was undertaken by a departmental officer, Mr Hood, who had no involvement in previous assessments of the land, who was based in a different branch of the Department to those who had been previously involved, who was assisted by an archaeologist and a senior aboriginal heritage officer neither of whom had any involvement in previous assessments of the land, and who had travelled to Ballina and interviewed the Andersons (and others) before preparing the determination report.61 The allegation that the Director-General decision was affected by bias is rejected. It amounts to nothing more than dissatisfaction with the decision-maker's acceptance of opinions, based on material which is compelling, and which are contrary to those of the Andersons.**Conclusion**62 The Andersons have failed to establish any of the grounds relied upon to challenge the Director-General's decision to approve the application for consent under s 90 of the Act. It is important to emphasise that the Court was not called upon to decide whether it would have granted the application for consent. The Court has a limited function. It can only consider challenges to the process by which the Director-General's decision was made and whether the Director-General acted in accordance with the law: *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* [2008] FCA 399; (2008) 157 LGERA 428 at [129] - [131]. That is, the Court is not permitted to review the merits of the Director-General's decision.63 The application must be dismissed. It would normally follow that there should be an order for costs in favour of the Director-General, but in case the Andersons wish to submit that some other order should be made the question of costs is reserved.**Orders**64 The formal orders of the Court are as follows:1. The application is dismissed2. The question of costs is reserved.3. The exhibits may be returned.I hereby certify that the preceding 64 paragraphs are a

true copy of the reasons for judgment herein of the Honourable Mr Justice D H Lloyd.AssociateDated: 3 June 2008