SUPREME COURT OF QUEENSLAND

CITATION:	*Mirvac Queensland Pty Ltd v Chief Executive, Department of Aboriginal and Torres Strait Islander Partnerships* [2018] QSC 248
PARTIES:	**MIRVAC QUEENSLAND PTY LTD** ACN 060 411 207 (applicant) **v** **CHIEF EXECUTIVE OF THE DEPARTMENT OF ABORIGINAL AND TORRES STRAIT ISLANDER PARTNERSHIPS** (respondent)
FILE NO/S:	SC No 12267 of 2017
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	31 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2018
JUDGE:	Bond J
ORDER:	**The orders of the Court are:** **1. The respondent's decision of 30 October 2017 refusing to approve the applicant's cultural heritage management plan is set aside.** **2. The matter to which the decision relates is referred back to the respondent with a direction that the respondent must approve the applicant's cultural heritage management plan pursuant to s 107(3) of the *Aboriginal Cultural Heritage Act* 2003 (Qld).**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where the applicant is developing a residential subdivision development project – where the *Aboriginal Cultural Heritage Act* 2003 (Qld) (**ACHA**) imposes on the applicant a cultural heritage duty of care – where the applicant developed and sought approval of a cultural heritage management plan under the Act – where the applicant identified an Aboriginal party (referred to as the applicant to the former Jagera #2 Claim) and an Aboriginal cultural heritage body for the area in respect of which it proposed to developed its cultural heritage management plan – where the applicant to the former Jagera #2 Claim was endorsed by the applicant to take part in developing the cultural heritage management plan – where, as

at 1 May 2013, the applicant to the former Jagera #2 Claim was no longer a registered native title claimant under the *Native Title Act* 1993 (Cth) and no longer an Aboriginal party (as defined in the ACHA) – where the applicant entered into a cultural heritage management plan with the applicant to the former Jagera #2 Claim and the Aboriginal cultural heritage body – where, on 6 September 2017, the applicant submitted the cultural heritage management plan to the respondent for approval under s 107(1)(b) of the ACHA – where two other native title parties were registered for the area (one registered prior to the submission of the cultural heritage management plan and the other subsequent to the submission of the plan but prior to the respondent's decision) – where the respondent decided that the cultural heritage management plan could not be approved under s 107(1)(b) of the ACHA because the applicant to the former Jagera #2 Claim could no longer be regarded as an endorsed party – where the respondent decided that the cultural heritage management plan also could not be approved under s 107(2) of the ACHA – where the applicant applies for judicial review of the respondent's decision on the grounds that it involved a number of errors of law – whether the respondent erred in law – whether the respondent's decision should be quashed or set aside – whether the respondent should be required to approve the applicant's cultural heritage management plan pursuant to s 107(3) of the ACHA

Aboriginal Cultural Heritage Act 2003 (Qld) s 5, s 6, s 7, s 23, s 34, s 35, s 36, s 37, s 91, s 92, s 93, s 94, s 96, s 97, s 98, s 99, 100, s 101, s 102, s 103, s 104, s 105, s 107, s 108, s 109

Judicial Review Act 1991 (Qld) s 20(1)

Darling Casino Limited v New South Wales Casino Control Authority (1997) 191 CLR 602, cited

Kemppi v State of Queensland [2017] FCA 902, cited

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, cited

COUNSEL: M Stunden for the applicant
M McKechnie for the respondent

SOLICITORS: HWL Ebsworth for the applicant
Crown Law for the respondent

Introduction

[1] The applicant, Mirvac, is developing a residential subdivision development project within the Logan City Council local authority area. It intends to create approximately 3,300 residential lots and associated infrastructure such as roads, parks, community facilities, open spaces and a school.

[2] Mirvac is concerned to ensure that it complies with the cultural heritage duty of care imposed on it by the *Aboriginal Cultural Heritage Act* 2003 (Qld) (**ACHA**). In order to do that, Mirvac voluntarily developed, and sought approval of, a cultural heritage management plan (**CHMP**) under the ACHA.

[3] The respondent chief executive was the administrative decision-maker responsible for exercising the power to approve or to refuse to approve Mirvac's CHMP. The chief executive, by a duly appointed delegate, refused to approve Mirvac's CHMP. For present purposes, nothing turns on the fact that the decision was made by a delegate, and the decision may be treated as if it was made by the chief executive personally.

[4] Mirvac now applies under s 20(1) of the *Judicial Review Act* 1991 (Qld) for a statutory order of review of the chief executive's decision on the grounds that it involved a number of errors of law, and that, in one respect, it involved taking into account an irrelevant consideration. Mirvac seeks an order quashing or setting aside the decision and an order remitting the matter back to the chief executive with a direction that the chief executive should approve Mirvac's CHMP.

[5] In order to understand the issues which arise it is necessary first to explain the statutory framework within which the chief executive exercised power to decide. Then it will be necessary to examine the relevant factual background and the course of events leading up to the chief executive's decision. Finally, it will be necessary to examine and to rule upon the alleged legal errors.

The relevant framework of the ACHA

[6] Section 4 of the ACHA provides that the main purpose of the ACHA is to provide effective recognition, protection and conservation of Aboriginal cultural heritage.

[7] Aboriginal cultural heritage is defined by s 8 as anything that is (1) a significant Aboriginal area in Queensland; (2) a significant Aboriginal object; or (3) evidence, of archaeological or historic significance, of Aboriginal occupation of an area of Queensland. The meaning of each of those three things is elaborated upon in ss 9 to 11 of the ACHA.

[8] Section 5 relevantly provides:

> The following fundamental principles underlie this Act's main purpose—
>
> (a) the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices;
>
> (b) Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;
>
> (c) it is important to respect, preserve and maintain knowledge, innovations and practices of Aboriginal communities and to promote understanding of Aboriginal cultural heritage;
>
> (d) activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to 'law and country';
>
> (e) there is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage.

[9] Section 6 provides for a number of matters by which the main purpose of the ACHA may be achieved, including:

> …
>
> (d) establishing a duty of care for activities that may harm Aboriginal cultural heritage;
>
> …
>
> (g) ensuring Aboriginal people are involved in processes for managing the recognition, protection and conservation of Aboriginal cultural heritage;

…

(i) establishing processes for the timely and efficient management activities to avoid or minimise harm to Aboriginal cultural heritage.

[10] Section 23(1) creates the "cultural heritage duty of care" and provides as follows:

> A person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage (the ***cultural heritage duty of care***).

[11] Section 23(2) provides the following non-exhaustive list of matters which may be considered by any court required to decide whether a person has complied with the duty when carrying out an activity:

(a) the nature of the activity, and the likelihood of its causing harm to Aboriginal cultural heritage;

(b) the nature of the Aboriginal cultural heritage likely to be harmed by the activity;

(c) the extent to which the person consulted with Aboriginal parties about the carrying out of the activity, and the results of the consultation;

(d) whether the person carried out a study or survey, of any type, of the area affected by the activity to find out the location and extent of Aboriginal cultural heritage, and the extent of the study or survey;

(e) whether the person searched the database and register for information about the area affected by the activity;

(f) the extent to which the person has complied with cultural heritage duty of care guidelines;

(g) the nature and extent of past uses in the area affected by the activity.

[12] The statute recognizes that its goals concerning Aboriginal cultural heritage will best be met by requiring persons seeking to comply with the cultural heritage duty of care to consult with an appropriate Aboriginal person or group of persons, namely the person or persons falling within the definition of "Aboriginal party".

[13] The "Aboriginal party" for an area is found by the application of ss 34 and 35 of the ACHA. Those sections contemplate an interaction with relevant provisions of the *Native Title Act* 1993 (Cth). For example, if there is a registered native title claimant under the *Native Title Act* for an area, that claimant will be a "native title party" (as that term is defined in s 34 of the ACHA) for the area and, accordingly, an "Aboriginal party" (as defined in s 35 of the ACHA) for the area. Indeed, if there was a registered native title claimant, and that claimant's claim has failed, that person will continue as the native title party and Aboriginal party for the purposes of the ACHA, at least until some other registered native title claimant's claim is accepted under the *Native Title Act* in respect of the area: s 34(1)(b)(i) of the ACHA. If there is no "native title party" for an area, a person will only be an "Aboriginal party" for the area if they have the requisite traditional knowledge or responsibility for the area as set out in s 35(7) of the ACHA.

[14] An "Aboriginal cultural heritage body" is a corporation registered by the Minister as such for an area, as provided for in s 36 of the ACHA. The function of that body is to identify for the benefit of a person who needs to know under the ACHA the Aboriginal party or parties for a relevant area: s 37. In order that a corporation be so registered, the Minister must be satisfied that the corporation is an appropriate body to carry out that function and that it has the capacity so to do: s 36(4).

[15] Obviously enough, the identification by a person subject to the cultural heritage duty of care of what steps might have to be taken to ensure compliance with the duty could well be unclear in any particular case, particularly if the person did not personally have the requisite knowledge concerning Aboriginal cultural heritage matters. Such a person could obtain some clarity if they could fit within the deeming provisions of s 23(3) of the ACHA. Relevantly for present purposes, pursuant to s 23(3)(a)(ii) a person who carries out an

activity is taken to have complied with the cultural heritage duty of care in relation to Aboriginal cultural heritage if the person is acting under an "approved cultural heritage management plan" that applies to the Aboriginal cultural heritage.

[16] An "approved cultural heritage management plan" is a CHMP that has been approved by the chief executive or the Minister under Part 7 of the ACHA: s 7 and schedule 2. Approval can only take place after –

(a) notices are given and responded to, so that relevant persons are identified as "endorsed parties" as provided for in Part 7 Division 3 of the ACHA "Preparing to develop cultural heritage management plan"; and

(b) to the extent that one or more endorsed parties have been identified, a process of consultation has taken place with the sponsor of the CHMP and the endorsed party or parties with a view to reaching agreement on a CHMP as provided for in Part 7 Division 4 of the ACHA "Development of cultural heritage management plan".

[17] The process by which persons are identified as endorsed parties involves these steps:

(a) The sponsor for a CHMP must give a "written notice (proposed plan)" to the chief executive; to owners or occupiers of any part of the area; and to any entity which is an Aboriginal cultural heritage body for any part of the plan area (or, if there is none, each Aboriginal party that is a native title party for the area): s 91.[1] All of the notices are to be given simultaneously, to the greatest extent practicable.

(b) The written notice must contain certain prescribed details: s 92.

(c) If the notice is given to an Aboriginal cultural heritage body, it must give certain additional information, including an identification of the time by which the recipient must identify for the sponsor an Aboriginal party to take part in developing the plan: s 93.

(d) If the notice is given to an Aboriginal party that is a native title party for the area, it must give certain additional information, including an identification of the time by which the recipient must inform the sponsor that they wish to take part in developing the plan: s 94.

(e) Provision is made for the giving of public notice of the proposed plan in certain circumstances, again with a view to informing relevant persons about the plan and eliciting from them within a specified time frame whether they wish to take part in developing the plan: s 96.

(f) If responses are received from relevant recipients within the time frame specified in the requisite notices which identify an Aboriginal party or parties as persons who wish to take part in developing the plan, then a duty is imposed on the sponsor to "endorse" each such Aboriginal party to take part in developing the CHMP: ss 97 to 99. Only a person who falls within the definition of Aboriginal party may be endorsed. Once such a person is endorsed then they will fall within the definition of "endorsed party" in schedule 2, namely "'endorsed party' means … for a cultural heritage management plan—an Aboriginal party endorsed under section 97, 98, 99, 100 or 101 to take part in developing the plan".

(g) In certain circumstances the sponsor is obliged to give a similar notice to a party who becomes an Aboriginal party after the date the first round of notices are given, and any such notice must itself advise the deadline within which a response must be

[1] There are other potential recipients not presently relevant to identify, where there is neither an Aboriginal cultural heritage body nor an Aboriginal party that is a native title party.

given to the sponsor indicating that the recipient wishes to take part in developing the plan: s 100. If the sponsor receives such an indication within time, the sponsor is required to endorse the Aboriginal party to take part in developing the plan: s 100(5).

(h) The sponsor is not required to endorse an Aboriginal party to take part in developing the plan if a response provided for by the statute identifying the person has not been given to the sponsor or has not been given to the sponsor within time: s 101(1). The sponsor may nevertheless do so, if the sponsor so chooses: s 101(2).

[18] Where the process just described has resulted in one or more endorsed parties, the consultation process takes place over a defined "consultation period" between the sponsor of the plan and persons who have become endorsed parties. The relevant roles and the tasks to be performed are set out in ss 102 to 105 as follows:

> **102 Role of endorsed party**
>
> (1) An endorsed party for the cultural heritage management plan has the role of—
>
> (a) seeking agreement with the sponsor for the plan about how the project is to be managed—
>
> (i) to avoid harm to Aboriginal cultural heritage; and
>
> (ii) to the extent that harm cannot reasonably be avoided, to minimise harm to Aboriginal cultural heritage; and
>
> (b) consulting and negotiating with the sponsor, and with other endorsed parties for the plan, about issues needing to be addressed in the development of the plan, and about the final content of the plan; and
>
> (c) generally, giving help and advice in a way directed at maximising the suitability of the plan for the effective protection and conservation of Aboriginal cultural heritage.
>
> (2) The endorsed party's role may be performed on the party's behalf by a nominee.
>
> **103 Role of sponsor**
>
> The sponsor for the cultural heritage management plan has the role of—
>
> (a) seeking agreement with the endorsed parties for the plan about how the project is to be managed—
>
> (i) to avoid harm to Aboriginal cultural heritage; and
>
> (ii) to the extent that harm cannot reasonably be avoided, to minimise harm to Aboriginal cultural heritage; and
>
> (b) developing the plan—
>
> (i) in consultation and negotiation with the endorsed parties for the plan; and
>
> (ii) in a way directed at maximising the suitability of the plan for the effective protection and conservation of Aboriginal cultural heritage.
>
> **104 Consultation**
>
> (1) Subjects for consultation may include, but are not limited to, the following—
>
> (a) the nature and extent of known Aboriginal cultural heritage in the plan area;
>
> (b) the reasonable requirements for the carrying out of a site survey of Aboriginal cultural heritage in the plan area, and the results of the survey if it is carried out;
>
> (c) reasonable travel and accommodation requirements for endorsed parties;
>
> (d) workplace health and safety issues arising out of any site survey or investigation carried out in developing the plan;
>
> (e) the number of endorsed parties, or nominees of endorsed parties, who can reasonably be involved in any site survey.
>
> (2) Consultation may include reasonable use of any of the following ways of consulting—

(a) face to face meetings;

(b) telephone conferences;

(c) use of the internet;

(d) exchanges of correspondence.

(3) This division does not require a survey of Aboriginal cultural heritage carried out for the purposes of consultation to be carried out as a cultural heritage study under part 6.

105 Reaching agreement

(1) The sponsor and each endorsed party for the cultural heritage management plan must negotiate, and make every reasonable effort to reach agreement, about the provisions of the plan.

(2) Without limiting how the plan may provide for the managing of project activities in relation to their impact on Aboriginal cultural heritage, the plan may provide for the following—

(a) when particular project activities are to happen;

(b) when particular activities under the plan are to happen;

(c) arrangements for access to land for carrying out activities under the plan, including details of arrangements entered into with owners or occupiers of land;

(d) identification of known Aboriginal cultural heritage, noting, if appropriate, any reference to the cultural heritage in the database or register;

(e) the way Aboriginal cultural heritage is to be assessed;

(f) whether Aboriginal cultural heritage is to be damaged, relocated or taken away, and how this is to be managed;

(g) contingency planning for disputes, unforeseen delays and other foreseeable and unforeseeable obstacles to carrying out activities under the plan;

(h) other matters reasonably necessary for successfully carrying out activities under the plan.

[19] The provisions governing the approval by the chief executive are then contained in ss 107 to 109, in these terms:

107 Chief executive approval of plan

(1) Whether or not the consultation period for the cultural heritage management plan has ended, the sponsor may give the plan, as developed under this part, to the chief executive for the chief executive's approval if—

(a) there is no endorsed party for the plan; or

(b) there is at least 1 endorsed party for the plan, and all consultation parties for the plan agree that the chief executive may approve the plan.

(2) If the circumstance mentioned in subsection (1)(a) applies, the chief executive must, under this part—

(a) approve the plan; or

(b) refuse to approve the plan.

(3) If the circumstances mentioned in subsection (1)(b) apply, the chief executive must approve the plan.

108 Consideration of plan before approval if no endorsed party

(1) This section applies if there is no endorsed party for the cultural heritage management plan.

(2) To approve the plan, the chief executive must be satisfied the plan makes enough provision for how the project is to be managed—

(a) to avoid harm to Aboriginal cultural heritage; and

(b) to the extent that harm cannot reasonably be avoided, to minimise harm to Aboriginal cultural heritage.

(3) If the plan is not a cultural heritage management plan developed voluntarily, the chief executive must also be satisfied the plan includes agreement for effective alternate dispute resolution arrangements to deal with issues that may arise in the operation of the plan.

109 Approving or refusing to approve plan if no endorsed party

(1) This section also applies if there is no endorsed party for the cultural heritage management plan.

(2) When the chief executive approves, or refuses to approve, the plan, the chief executive must give written notice of the approval, or refusal to approve, to the sponsor for the plan.

(3) The approval or refusal to approve is not ineffective only because the sponsor does not receive the notice under subsection (2).

(4) If the chief executive refuses to approve the plan, the chief executive must include in the written notice given under subsection (2) a written statement of the chief executive's reasons for refusing to approve the plan.

(5) The chief executive is not required to accept, but may accept, for the chief executive's further consideration, the plan in form amended to take account of the matters mentioned in the chief executive's statement of reasons.

The factual background

[20] There was no controversy about any of the matters recorded under this heading.

[21] Mirvac undertook searches with the chief executive which established that the applicant to the former Jagera #2 Native Title Determination Application QUD 6014/2003 ("**former Jagera #2 Claim**") was the Aboriginal party and Jagera Daran Pty Ltd ("**Jagera Daran**") was the Aboriginal cultural heritage body for the area in respect of which Mirvac proposed to develop its CHMP. It is convenient to refer to that area as **the Plan Area**.

[22] The applicant to the former Jagera #2 Claim was the Aboriginal party (as that term is defined under the ACHA) because:

(a) Prior to 1 May 2013, the applicant to the Jagera #2 Claim had been the registered native title claimant under the *Native Title Act* for an area which incorporated the whole of the Plan Area. Accordingly, pursuant to s 34(1)(a) of the ACHA, that applicant was a native title party for the Plan Area and, by operation of s 35(1), an Aboriginal party for the Plan Area.

(b) On 1 May 2013, the Jagera #2 Claim under the *Native Title Act* was discontinued and the applicant was no longer a registered native title claimant for the Plan Area. However s 34(1)(b)(i)(A) of the ACHA operates such that if a person whose native title claim has failed was a registered native title claimant; that person's claim was the last claim registered and if no other relevant native title claimant exists (or has existed), that person continues as the native title party under the ACHA for the area. In that way, even though the claim of the applicant to the Jagera #2 Claim had failed,[2] that applicant continued as the native title party and an Aboriginal party.

[23] On 24 November 2016 Mirvac met with officers and representatives of Jagera Daran and informed them of Mirvac's intention to issue a notice under Part 7 of the ACHA to develop a CHMP for the project. Jagera Daran provided Mirvac with its template CHMP and Mirvac used that document as a base document from which it developed its CHMP.

[24] As at 24 February 2017:

(a) Jagera Daran was the Aboriginal cultural heritage body (as that term is defined in the ACHA) for the Plan Area; and

(b) the applicant to the former Jagera #2 Claim was the sole native title party and Aboriginal party (as those terms are defined in the ACHA) for the Plan Area.

[2] It was common ground in this proceeding that the claim should be regarded as having failed.

[25] On 24 February 2017, Mirvac, as the sponsor (as that term is defined in the ACHA), caused a written notice (proposed plan) under s 91(1)(d) of the ACHA, for the development of a CHMP for the Plan Area, to be sent to Jagera Daran. On the same day, Mirvac also caused:

(a) a written notice (proposed plan) under s 91(1)(a) of the ACHA to be sent to the chief executive; and

(b) a written notice (proposed plan) under s 91(1)(b) of the ACHA to be sent to the owners and occupiers of parts of the Plan Area.

[26] On 7 March 2017, Jagera Daran requested that Mirvac, as the sponsor, endorse the applicant to the former Jagera #2 Claim to take part in developing the CHMP for the Plan Area. By reply on the same day, Mirvac endorsed the applicant to the former Jagera #2 Claim under s 97(2) of the ACHA to take part in developing the CHMP for the Plan Area.

[27] It followed that on and from 7 March 2017 the applicant to the former Jagera #2 Claim was an endorsed party (as that term is defined in the ACHA) to take part in developing the CHMP.

[28] On 27 March 2017, being the end of the notification period for the written notice (proposed plan), the applicant to the former Jagera #2 Claim was:

(a) the sole native title party and Aboriginal party for the Plan Area; and

(b) the only Aboriginal party endorsed by Mirvac, as the sponsor, as an endorsed party for the development of the CHMP.

[29] On 18 June 2017:

(a) the consultation period (as that term is defined in the ACHA) for the CHMP ended; and

(b) the applicant to the former Jagera #2 Claim was the sole native title party and Aboriginal party for the Plan Area.

[30] However, on 4 August 2017, a step occurred under the *Native Title Act*, in that the Yuggera Ugarapul Claim (which had been filed in the Federal Court on 7 April 2017) was accepted for registration by a delegate of the Native Title Registrar and entered on the Register of Native Title Claims. On the registration of the Yuggera Ugarapul Claim on the Register of Native Title Claims, there were two consequences for the purposes of the ACHA, namely:

(a) the applicant to the Yuggera Ugarapul Claim became a native title party and an Aboriginal party for a very small part of the Plan Area;[3] and

(b) the applicant to the former Jagera #2 Claim ceased to be a native title party and an Aboriginal party for that same part of the Plan Area.[4]

[31] On 6 September 2017, Mirvac:

(a) entered into the CHMP with the applicant to the former Jagera #2 Claim and Jagera Daran; and

(b) gave the CHMP to the chief executive for approval under s 107(1)(b) of the ACHA.

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[3] Notably, given the timing of when the applicant to the Yuggera Ugarapul Claim had become a native title party and an Aboriginal party, the ACHA did not require Mirvac to give notice to it was a view to permitting it to become an endorsed party.

[4] This result obtained because once there was another registered native title claimant under the *Native Title Act* for part of the Plan Area, the applicant could not be regarded as falling within s 34(1)(b)(i)(A) and could no longer be regarded as a native title party and an Aboriginal party for that part of the Plan Area.

[32] As at 6 September 2017:

(a) the applicant to the former Jagera #2 Claim was a native title party and an Aboriginal party for the majority of the Plan Area and the applicant to the Yuggera Ugarapul claim was a native title party and an Aboriginal party for a very small part of the Plan Area;

(b) however –

(i) the applicant to the former Jagera #2 Claim was the sole endorsed party for the development of the CHMP;

(ii) Mirvac (as the sponsor) and the applicant to the former Jagera #2 Claim were the only consultation parties (as that term is defined in the ACHA) for the CHMP; and

(iii) there was at least one endorsed party for the CHMP, and all consultation parties for the CHMP agreed that the chief executive may approve the CHMP.

[33] Accordingly, it may be observed, as at 6 September 2017, there was no obstacle to the chief executive approving the CHMP. If the CHMP had been immediately considered by the chief executive, because there was at least one endorsed party for the CHMP, and all consultation parties for the CHMP had agreed that the chief executive may approve the CHMP, the provisions of s 107(3) of the ACHA would have obliged the chief executive to approve the CHMP.

[34] However on 14 September 2017, and before the chief executive had done anything in response to receiving the CHMP, a further relevant step occurred under the *Native Title Act*, in that the Danggan Balun Claim (which had been filed in the Federal Court on 27 June 2017) was accepted for registration by a delegate of the Native Title Registrar and entered on the Register of Native Title Claims. That Claim covered the balance of the Plan Area. On the registration of the Danggan Balun Claim on the Register of Native Title Claims, there were two consequences for the purposes of the ACHA, namely:

(a) the applicant to the Danggan Balun Claim became a native title party and an Aboriginal party for the balance of the Plan Area;[5] and

(b) the applicant to the former Jagera #2 Claim ceased to be a native title party and an Aboriginal party for the balance of the Plan Area.[6]

[35] On 30 October 2017, the delegate of the chief executive made a decision that he was unable to approve the CHMP under s 107(1)(b) of the ACHA and that he decided to refuse to approve the CHMP under s 107(2) of the ACHA.

The reasoning for the chief executive's decision

[36] The delegate acknowledged that the applicant to the former Jagera #2 Claim –

(a) was the only Aboriginal party under the ACHA –

(i) at the time the development of Mirvac's CHMP was notified;

(ii) at the time the applicant to the former Jagera #2 Claim became the endorsed party; and

(iii) at the conclusion of the notification period and the consultation period under the ACHA; and

[5] Notably, given the timing of when the applicant to the Danggan Balun Claim had become a native title party and an Aboriginal party, the ACHA did not require Mirvac to give notice to it was a view to permitting it to become an endorsed party.

[6] This occurred for the reasons explained in footnote 4 above.

(b) was an Aboriginal party under the ACHA on 6 September 2017 when Mirvac's CHMP was given to the chief executive for approval (although the applicant for the Yuggera Ugarapul claim was also an Aboriginal party for the Plan Area at that time).

[37] Nevertheless, the delegate thought that the time for assessing the circumstances referred to in s 107 was not 6 September 2017, but was the time after 14 September 2017 when, as decision-maker, the delegate in fact considered whether to approve or to refuse to approve the CHMP under s 107. Because, as at that time, the applicant to the former Jagera #2 Claim was no longer an Aboriginal party under the ACHA, in his view it followed that the applicant to the former Jagera #2 Claim could no longer be regarded as an endorsed party under the ACHA. Accordingly he was unable to approve Mirvac's CHMP under s 107(1)(b).

[38] The delegate, having formed the view that he was unable to approve Mirvac's CHMP under s 107(1)(b), proceeded to consider the plan under s 107(1)(a) on the basis that there was no "endorsed party" under the ACHA. He noted that s 108 applied and determined that he refused to approve Mirvac's CHMP under s 107(2) because he was not satisfied that the CHMP made enough provision for how the project is to be managed to avoid harm to Aboriginal cultural heritage and, to the extent that harm could not reasonably be avoided, to minimise harm to Aboriginal cultural heritage. He did so because he thought that key aspects of the protection procedures under the plan required the involvement of a party that was not an Aboriginal party for the Plan Area, the key aspects including –

(a) advising whether a cultural heritage survey was required and undertaking such a survey;

(b) advising on and engaging in management recommendations and early works clearances; and

(c) engaging a consultant and cultural heritage officers.

Mirvac's grounds for review

[39] As amended, Mirvac's application identified the following alleged errors of law made by the chief executive, by her delegate.

[40] First, the chief executive erred in law by:

(a) finding that the endorsed party had lost its endorsed party status when there was no power under the ACHA for that to occur;

(b) proceeding to consider the CHMP under s 107(1)(a) of the ACHA on the basis that there was no endorsed party for the CHMP, instead of s 107(1)(b) of the ACHA;

(c) considering that the time for assessing whether to refuse or approve the CHMP when s 107(3) of the ACHA required the chief executive to only approve the CHMP; and

(d) considering that the time for assessing whether to refuse or approve the CHMP was on 30 October 2017 when any determination should have been on the basis of facts and circumstances as at the date the CHMP was submitted for approval (6 September 2017).

[41] Second, the decision of the chief executive to refuse to approve the CHMP was not authorized under the ACHA, in that under s 107(3) the chief executive was only able to approve the CHMP; the chief executive was not authorised to assess the approval of the CHMP under s 107(1)(a) of the Act as if there was no endorsed party.

[42] Third, further or alternatively, the finding that the CHMP did not make enough provision for the matters in s 108(2) of the ACHA by reason only of the fact that there was no

involvement of a party that was not then an Aboriginal party for the Plan Area involved an error of law.

[43] Finally, further or alternatively, the finding that the CHMP did not make enough provision for the matters in s 108(2) of the ACHA because key aspects of the protection procedures under the CHMP required the involvement of a party that was not an Aboriginal party for the plan area involved an improper exercise of power and was an irrelevant consideration to take into account in the exercise of the power.

Discussion

[44] It is convenient to deal first with Mirvac's third and fourth grounds for review.

[45] If, in the events which happened and on the proper construction of the ACHA, the chief executive by her delegate was correct to conclude that the chief executive was required to exercise the decision-making power conferred by s 107(2), the effect of s 108 was to require the chief executive by her delegate to evaluate the matters referred to by s 108(2) to consider whether the requisite state of satisfaction could be formed.

[46] On that hypothesis, it would undoubtedly be the proper approach to conclude that the decision and corresponding evaluation should be made on the basis of material available to the decision-maker at the time they were made: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 per Mason J at 45 and *Darling Casino Limited v New South Wales Casino Control Authority* (1997) 191 CLR 602 per Gaudron and Gummow JJ at 624. The result would be that the chief executive, by her delegate, was required to consider whether the requisite state of satisfaction could be formed having regard to the events which had happened by the time the decision came to be made, including the fact that by that time the events under the *Native Title Act* had happened.

[47] The delegate's reasons reveal that he determined to refuse to approve the plan because he thought that key aspects of the protection procedures under the plan required the involvement of a party that was not an Aboriginal party for the Plan Area, the key aspects including –

(a) advising whether a cultural heritage survey was required and undertaking such a survey;

(b) advising on and engaging in management recommendations and early works clearances; and

(c) engaging a consultant and cultural heritage officers.

[48] The delegate's task required him to determine whether he could be satisfied that the CHMP made "enough" provision for how the project was to be managed, bearing in mind the considerations identified by s 108(2). That language is very broad. In my view, it is sufficiently broad to permit the delegate to form the view that "enough" provision would require the involvement of someone who was a current Aboriginal party for the Plan Area. If the delegate was satisfied that the plan was adequate except for that consideration, then it would be appropriate for the delegate to express his reasoning in the way which he did. Mirvac's criticism of the delegate's approach is not a legal criticism, but is a criticism of the merits of the decision. No error of law is demonstrated.

[49] Moreover, in order to make good the proposition that the delegate erred by taking an irrelevant consideration into account, it would be necessary for Mirvac to give sufficient weight to what Jagot J described in *Kemppi v State of Queensland* [2017] FCA 902 at [14] as "the fundamental principle that an irrelevant consideration is one that, according to the relevant statute, a decision-maker must not take into account." There is nothing in the

scope, purposes or objects or provisions of the ACHA which would prohibit the delegate from taking into account the consideration which he did take into account.

[50] The result is that I reject Mirvac's third and fourth grounds for review, and turn to consider its first and second grounds.

[51] The chief executive contended that the delegate was obliged to assess the status of the applicant to the Jagera #2 Claim as at the date the delegate came to make the decision, by application of the authorities referred to at [46] above. The chief executive then contended that by the time the delegate came to make the decision, events under the *Native Title Act* had occurred such that the applicant to the Jagera #2 Claim could no longer be regarded as an Aboriginal party; in turn that justified the conclusion that the applicant to the Jagera #2 claim had lost its status as an endorsed party under the ACHA; and accordingly s 107(2) applied.

[52] In my view the chief executive's argument fails at the threshold because it involves a misconstruction of the operation of s 107 and of the tasks it requires of the chief executive.

[53] Section 107(1) permits a sponsor to do something (i.e. to give a CHMP to the chief executive for approval), but only in the event that either of two factual circumstances exist (i.e. the factual circumstances described at ss 107(1)(a) and 107(1)(b)). In other words, the existence of one or other of those circumstances is a factual prerequisite to the sponsor being permitted to give the CHMP to the chief executive for approval. It is not inevitable that one or other of those circumstances would exist. For example, if there was at least one endorsed party but all consultation parties did not agree, the sponsor would not be permitted to give the CHMP to the chief executive for approval. Instead the sponsor would have to take a different course, namely one involving mediation (s 106) and possibly prosecution of proceedings in the Land Court (s 112 *et seq*.).

[54] The time at which one or other of the factual circumstances must exist to permit the sponsor validly to give the CHMP to the chief executive must, logically, be the time the sponsor purports to do so. The text of s 107(1) suggests that conclusion: "the sponsor may give the plan … if (a) …; or (b) …". Thus, in determining whether the sponsor has validly submitted a CHMP for approval (and whether the chief executive is obliged to do anything at all), the chief executive must determine whether one or other of the factual circumstances described at ss 107(1)(a) and 107(1)(b) applies as at the time the sponsor gave the CHMP to the chief executive for approval.

[55] The chief executive must then determine which of two functions must be performed by the chief executive. As to this:

(a) Section 107(2) and 107(3) have different functions.

(b) Section 107(2) imposes a duty to make a decision between two alternatives. That function must be performed if the reason the sponsor was permitted to submit the CHMP was the circumstance mentioned in s 107(1)(a). Section 108 governs how that decision is to be made.

(c) But s 107(3) does not require any decision to be made. It simply imposes a duty to approve the CHMP which has been validly submitted, if the reason the sponsor was permitted to submit the plan was the circumstance mentioned in s 107(1)(b).

(d) True it is that the chief executive must determine which of the two functions should be performed. But that determination does not involve the making of a choice or the exercise of a discretion as between the two functions. The determination turns on the nature of the circumstances which were examined for the purpose of the determining whether the sponsor was permitted to engage s 107 in the first place.

(e) Whilst it is theoretically possible that the statute might have required the determination as to which of two functions must be done in relation to a plan submitted by a sponsor to be done as at a different and subsequent stage to the determination whether the sponsor has validly engaged s 107 at all, such a solution would seem illogical and would test whether the sponsor was permitted to give the plan to the chief executive and which function the chief executive was required to perform, as at two different times.

(f) A more logically coherent approach would be that there would be one determination, namely whether one or other of the two factual prerequisites operated to permit the sponsor to give the CHMP to the chief executive in the first place and, if so, which one so operated. Such a determination would both establish (1) that the sponsor has validly acted under s 107(1); and (2) which of the two different functions must be performed by the chief executive.

(g) The critical consideration is, however, what the text of s 107 supports. In my view the text supports the latter construct, but not the former. Section 107(1) permits a sponsor to engage s 107 if either of two types of circumstances exist. It uses the present tense to create that outcome. As I have indicated, that requires one or other of those two types of circumstances to exist (or to "apply") as at the time the sponsor gives the plan to the chief executive. Which of two different functions must then be performed by the chief executive, turns on which of the two types of circumstances "applies", and the text provides no reason to think that consideration is addressed to any subsequent time. To the contrary, the statute continues to use the present tense thereby suggesting that the determination must turn on the nature of the circumstances which exists as at the time the sponsor gives the plan to the chief executive.

(h) Because the text indicates that the findings which establish which of the two functions must be performed, must be done as at the date of the sponsor gives the CHMP to the chief executive, there is no room for the operation of the principle referred to at [46] above.

[56] In summary:

(a) Section 107 first requires of the chief executive who has been given a CHMP by a sponsor purporting to act under s 107(1), to determine whether one or other of the two factual prerequisites applies to permit the sponsor giving the CHMP to the chief executive in the first place and, if so, which one so applies.

(b) That determination must be done as at the time the CHMP was given to the chief executive, even though it might not be done as a matter of fact until sometime later. The determination will both establish (1) whether the sponsor has validly acted under s 107 and thus whether the chief executive is obliged to do anything at all; and, (2) which of the alternative functions identified in ss 107(2) and (3) must be performed by the chief executive.

(c) If the function which must be performed is that specified in s 107(2), then the chief executive must choose between alternatives, including by considering the matters referred to in s 108. That decision must be made on the basis of material available to the chief executive at the time the chief executive makes the decision between the two available options.

(d) But if the function which must be performed is that specified in s 107(3), there is no decision to be made. There is just a duty to be discharged. Events which occur after the duty comes into existence are irrelevant.

[57] There was no dispute between the parties that, as at the time Mirvac gave the CHMP to the chief executive (6 September 2017), the factual prerequisite which existed and which justified Mirvac giving the CHMP to the chief executive was that specified in s 107(1)(b). Once the chief executive had established that was so – by considering what position obtained as at 6 September 2017 – the chief executive must necessarily have realized that her obligation was to perform the function specified in s 107(3). The events which occurred after 6 September 2017 were immaterial to the existence of the duty and, because there was no option as to the way in which the duty must be performed, were immaterial to what the chief executive was obliged to do to discharge the duty.

[58] The result is that Mirvac is entitled to an order quashing the decision which was made and requiring the chief executive to discharge the duty imposed on her by s 107(3).

[59] It is only if I am wrong in that analysis, and it was necessary for the chief executive by her delegate to consider, as at some date after 14 September 2017, whether the circumstances referred to in ss 107(2) and (3) applied, that it becomes necessary to address the remaining substantive point raised by Mirvac.

[60] The relevant question is whether, on the proper construction of the ACHA, an Aboriginal party who was validly endorsed and became an "endorsed party" can lose its status as such when, consequent upon events after the endorsement occurred, it no longer falls within the definition of an Aboriginal party.

[61] It is common ground that after 14 September 2017 the applicant to the Jagera #2 Claim could no longer be regarded as a native title party or an Aboriginal party for the purposes of the ACHA.

[62] But, by that time the applicant to the Jagera #2 Claim had been made an endorsed party by steps validly taken under the provisions of the ACHA which enabled that to occur, and in fact, as the endorsed party, the applicant to the Jagera #2 Claim had performed all the steps contemplated during a consultation period up to and including agreeing upon the CHMP.

[63] Mirvac is correct when it submits there is no mechanism under the ACHA by which an endorsed party ceases to be an endorsed party, once the party has been endorsed as such.

[64] In response, the chief executive contends that there does not need to be any such mechanism. The chief executive points out that Schedule 2 to the ACHA provides that an "'endorsed party' means … for a cultural heritage management plan – an Aboriginal party endorsed under section 97, 98, 99, 100 or 101 to take part in developing the plan". The chief executive then submits that once a party (even one which was "endorsed" pursuant to the scheme of the ACHA) loses its status as an Aboriginal party, it no longer meets a critical element of the definition and accordingly ceases to be an "endorsed party".

[65] I think the chief executive's contention is correct. It must be pointed out that there is no mechanism by which an Aboriginal party can cease to be such, but it is common ground that the applicant to the Jagera #2 Claim did so cease. That occurred because the applicant no longer met the statutory definition of Aboriginal person, consequent upon events happening under the *Native Title Act*. The chief executive's contention simply extends the same logic to the definition of "endorsed party" and it does so in a way which is entirely consistent with the text of the definition. The definition does not say "a person endorsed" it says "an Aboriginal party endorsed" and I would read that as meaning, in effect, an Aboriginal party who possesses the quality of having been endorsed. The term "Aboriginal party" is a defined term and central to the operation of the whole structure of the ACHA. If a person has ceased to be an Aboriginal party for other purposes of the statute, the person has ceased to be an Aboriginal party for the purposes of the operation of the definition of endorsed party. Although such a person could be described as a person

who has been endorsed, they could no longer be described as an Aboriginal party who has been endorsed.

[66] The result is that if, contrary to my view, it was necessary for the chief executive by her delegate to consider, as at some date after 14 September 2017, whether the circumstances referred to in ss 107(2) and (3) applied, the chief executive by her delegate would not have made any error by concluding that there was no person who fell within the definition of "endorsed party" as at that time. It would follow that s 107(2) applied to require the chief executive to make the decision to approve or to refuse, by reference to the matters made relevant by s 108. Because I have concluded that Mirvac's third and fourth grounds fail, it would then follow that there is no basis on which the decision could be impugned.

Conclusion

[67] I have reached the view that the chief executive by her delegate did make an error of law in reaching the decision the subject of this application.

[68] The result is that Mirvac is entitled to an order quashing the decision which was made and requiring the chief executive to discharge the duty imposed on her by s 107(3).