SUPREME COURT OF QUEENSLAND

CITATION:	*Waratah Coal Pty Ltd v Coordinator-General, Department of State Development, Infrastructure and Planning* [2014] QSC 036
PARTIES:	**WARATAH COAL PTY LTD (ACN 114 165 669)** (applicant) **v** **COORDINATOR-GENERAL, DEPARTMENT OF STATE DEVELOPMENT, INFRASTRUCTURE AND PLANNING** (respondent)
FILE NO:	BS 8797 of 2012
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2014
JUDGE:	Applegarth J
ORDER:	**1. The proceeding is dismissed** **2. The applicant pay the respondent's costs of and incidental to the proceeding to be assessed on the standard basis**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – PRIVATIVE CLAUSES – PARTICULAR CASES – where *Judicial Review Act 1991* (Qld) is excluded – where applicant seeks relief based on supervisory jurisdiction of the court in respect of an administrative decision not to declare a proposed development to be a "significant project" ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where applicant contends that ministerial statements were not "policy frameworks" within the meaning of s 27(b) of the *State Development and Public Works Organisation Act* 1971 (Qld) – whether the respondent made an error of law in treating ministerial statements as a policy framework ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – FETTERING DISCRETION – where applicant contends that decision-maker merely applied government policy – where applicant contends decision-

maker did not undertake genuine and realistic consideration of the application

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – OTHER CASES – where applicant contends the decision-maker acted irrationally in deciding an application rather than delaying for awaited recommendation of a party appointed to facilitate planning of port development - where applicant contends no evidence to support findings of fact

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – where applicant contends that decision-maker failed to have regard to relevant considerations

State Development and Public Works Organisation Act 1971 (Qld), s 26, 27

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, cited
Barro Group Pty Ltd v Brimbank City Council [2012] VSC 154, cited
Boddington v British Transport Police [1998] 2 All ER 203 at 229, [1999] 2 AC 143, cited
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190, considered
Craig v South Australia (1995) 184 CLR 163; [1995] HCA 58, applied
Cuzack v Queensland Parole Board [2010] QSC 264, cited
Director of Liquor Licensing v Kordister Pty Ltd [2011] VSC 207, cited
Gough v Southern Queensland Regional Parole Board [2008] QSC 222, cited
Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2) (2009) 26 VR 172; [2009] VSC 426, cited
Hunter Resources Ltd v Melville (1988) 164 CLR 234; [1998] HCA 5, cited
Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291; [1987] FCA 457, cited
Kirk v Industrial Court (NSW) (2011) 239 CLR 531; [2010] HCA 1, considered
Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390; [2010] HCA 32, cited
Meridian AB Pty Ltd v Jackson [2013] QCA 121, cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40, cited
Minister for Immigration and Citizenship v Li (2013) 87 ALJR 618; [2013] HCA 18, considered
Minister for Immigration and Citizenship v SZIAI (2009) 259 ALR 429; [2009] HCA 39, considered
Minister for Immigration v SZJSS (2010) 243 CLR 164;

[2010] HCA 48.
Minister for Immigration, Local Government and Ethnic Affairs v Gray (1994) 50 FCR 189; [1994] FCA 1052, cited
Northbuild Constructions Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 22, considered
NT Power Generation Pty Ltd v Power and Water Authority (2004) 219 CLR 90; [2004] HCA 48, cited
Origin Energy Electricity Pty Ltd v Queensland Competition Authority [2012] QSC 414
Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155; [1985] FCA 47, considered
Public Service Association and Professional officers' Association Amalgamated (NSW) v Director of Public Employment (2012) 87 ALJR 162; [2012] HCA 58, cited
R v Electricity Commissioners; ex parte London Electricity Joint Committee Co (1920) Ltd [1924] 1 K.B. 171, cited
Ramsgrove P/L v Beaudesert Shire Council [2006] 1 Qd R 477; [2005] QCA 434, cited
Re W (an infant) [1971] AC 682, cited
Waratah Coal Pty Ltd v Nicholls and Anor [2013] QSC 68, cited
Younan v Crime Reference Committee [2014] QSC 24, cited

COUNSEL: S Doyle QC with S McLeod and A Stumer for the applicant
M D Hinson QC with J M Horton for the respondent

SOLICITORS: Hopgood Ganim for the applicant
Clayton Utz for the respondent

[1] Waratah applied to the Coordinator-General for a proposed Stand Alone Jetty Project at Abbot Point to be declared as a "significant project". The Coordinator-General had regard to a number of matters, including State government policy and studies about the future use of land in the Abbot Point State Development Area, and declined the application. Waratah challenges the legality of that decision. The court is not concerned with the merits of the decision. The issue is whether Waratah has established any of the grounds upon which it relies in seeking a declaration that the decision was not a valid exercise of a statutory power.

Background

[2] The Port of Abbot Point is a strategic State asset. The Abbot Point State Development Area is intended to foster the further development of regions between Mount Isa, Townsville and Bowen by way of industrial development and mineral processing.

[3] Abbot Point is an important coal port. The expansion of its capacity to export coal has been a contentious and complex issue, due to its cost, environmental impact and uncertainty over required future capacity. The previous State government proposed new Terminals 4 to 9 and a multi-cargo facility. Soon after coming to office, the present State government withdrew its support for such a large-scale expansion.[1] It

[1] Waratah was informed about this on or about 21 May 2012. The communication of this policy to Waratah is also noted in *Waratah Coal Pty Ltd v Nicholls and Anor* [2013] QSC 68 at [23] - [24].

described the previous government's proposals as unrealistic and not deliverable. On 31 May 2012 the Deputy Premier and Minister for State Development, Infrastructure and Planning made a Ministerial Statement to the Queensland Parliament. It stated that the government would involve industry in developing plans to build the capacity at Abbot Point in a "more measured way, that would provide greater development certainty and better process control". A "measured, incremental and staged approach" to development at Abbot Point was said to provide a better growth solution to miners. The government's policy was to obtain the remaining approvals to proceed quickly with the T0, T2 and T3 terminals and to discuss with industry what additional capacity was needed at Abbot Point beyond that.

[4] On 2 August 2012 the Deputy Premier made a further Ministerial Statement and also a public statement. The statement to Parliament reiterated the government's plan "to ensure that the vital coal port of Abbot Point can grow and expand in a sensible and balanced incremental way". The government announced that its preference was for multi-user terminals as a way to meet short to medium term development for as many participants as possible, and that it wanted to see port capacity built up incrementally in a scaled way to meet actual demand from miners. The Ministerial Statement identified new opportunities to site stockpiles and other port-related infrastructure beside the existing T1 and the planned T0 to T3 terminals**.** The Minister also announced the appointment by the government and the North Queensland Bulk Ports Corporation of a facilitator to test coal companies' demand for new coal handling facilities at Abbot Point and to establish the basis on which that investment would be attractive to industry. The facilitator had great experience on the mining industry and infrastructure development. He was to meet with coal companies to discuss their immediate and longer term capacity requirements.

[5] A public statement issued by the Minister on 2 August 2012 expressed the government's clear preference for any future port infrastructure to be developed in a way "that ensured that port infrastructure does not compromise the objectives of the [State Development Area] by using land in a precinct set aside for industry". Some proponents proposed developing coal stockpiles and conveyer systems in such areas, and the Minister identified this as one of the key issues that the facilitator would address during his considerations and discussions. The facilitator was to report back to the government later in 2012 about options about how to best expand Abbot Point's coal handling facilities.

Waratah and its plans

[6] Waratah proposes to develop, in conjunction with various Chinese State-owned Enterprises, the "China First Coal Project". This is the name by which a project, once described as the Galilee Coal Project, has been rebranded. The project involves the development of a thermal coalmine; a heavy haul standard gauge railway line to transport coal; and a coal export facility at the Port of Abbot Point.

[7] Between 2008 and 2010, Waratah had intended that the Galilee Coal Project would use stockyard and berthing facilities at the proposed Terminals 4 to 9 and the proposed multi-cargo facility at Abbot Point. In July 2008 the Galilee Coal Project was granted "significant project" status by the Coordinator-General, and in November 2008 a revised version of the project with port facilities was granted

"significant project" status. After learning, in 2011, that Terminals 4 to 9 may not proceed, Waratah began planning its own facility at the port in a project named the "Abbot Point Stand Alone Jetty Project".

[8] In January 2012 Waratah submitted an application to the Coordinator-General to declare the Stand Alone Jetty Project a "significant project" pursuant to s 26(1)(a) of the *State Development and Public Work Organisation Act* 1971 (Qld) ("the Act").

[9] In May 2012 Waratah was advised by the Director-General of the Department of State Development, Infrastructure and Planning that the State Government would no longer support the development of the proposed Terminals 4 to 9 and multi-cargo facility. Following this advice and public statements by the Minister in late May 2012, the Coordinator-General corresponded with Waratah about the impact of these announcements on the application for "significant project" status for the Stand Alone Jetty Project. In mid-July 2012 Waratah responded to these questions and provided a revised initial advice statement. This was followed by the government's announcement of the appointment of the independent facilitator and correspondence by the Director-General to Waratah referring to that appointment.

[10] Waratah's proposed new coal terminal includes a new rail spur, new coal stockyards, conveyers, a trestle jetty, ship loaders and berth arrangements. The proposed project was to be located on land within the Abbot Point State Development Area, which is administered by the Coordinator-General. Part of this land is administered by the North Queensland Bulk Ports Corporation. The Coordinator-General is the landholding entity and assessment manager for development within the Abbot Point State Development Area. His consent, as landowner, is required to use the land within that area for the project. His consent is also required prior to an assessment of a material change of use in respect of land uses under the APSDA Development Scheme.

[11] The land proposed to be used for the project included Indicative Development Parcel #6 as identified by the APSDA Development Scheme. This land was described in the 'Land and Infrastructure Planning Study for the Central Portion of the Abbot Point State Development Area' as 'the best, most valuable industrial land within the APSDA'. That study concluded that the land should only be used for the 'highest value industrial development of regional, State and national significance'.

The Coordinator-General

[12] The person appointed as the Coordinator-General constitutes a corporation sole and, for the purposes of the Act, represents the Crown.[2] The Coordinator-General is assigned functions and powers by the Act and other legislation.[3] These include broad powers to secure the proper planning, preparation, execution, coordination and enforcement of a program of works, planned developments and environmental coordination for the State of Queensland.[4] Part 4 of the Act gives the Coordinator-General specific responsibility for environmental coordination. Under s 26 the Coordinator-General has a discretion to declare a project to be "a significant

---

2 The Act, ss 8 and 9. The Crown in this sense means the Executive Government: *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at 149 [163].

3 The Act, s 10.

4 The Act, s 10(2).

project".[5] If the discretion is exercised the Coordinator General may either; (a) declare a project to be a significant project for which an EIS is required; or (b) declare a project to be a significant project for which an EIS is not required. An application for a declaration under s 26(1) must include an initial advice statement that contains detailed information about the project and enough information about the project to allow the Coordinator-General to consider the matters mentioned in s 27.

[13] At the relevant time s 27 provided:

> "In considering whether the project should be declared a significant project, the Coordinator-General must have regard to 1 or more of the following -
>
> (a) detailed information about the project given by the proponent in an initial advice statement;
>
> (b) relevant planning schemes or policy frameworks, including those of a relevant local government or of the State or the Commonwealth;
>
> (c) the project's potential effect on relevant infrastructure;
>
> (d) the employment opportunities that will be provided by the project;
>
> (e) the potential environmental effects of the project;
>
> (f) the complexity of local, State and Commonwealth requirements for the project;
>
> (g) the level of investment necessary for the proponent to carry out the project;
>
> (h) the strategic significance of the project to the locality, region of the State."

The Act does not define a "significant project", and does not indicate the weight, if any, to be given to any of the matters to which regard must be had under s 27.

[14] If "significant project" status is declared, then the Coordinator-General has extensive powers to coordinate approvals for the project. For example, if a project involves a development requiring an application for development approval under the *Sustainable Planning Act* 2009 (Qld) then the Coordinator-General may exercise any power of the entity that would have been the concurrence agency for the application.[6] In short, in the event of a declaration under s 26 the Coordinator-General's process of evaluation either displaces or modifies the operation of approval processes that would otherwise apply to the activities constituting the project.

---

5 References are to the Act in the form in which it appears at the relevant time (Reprint 7). Section 26 now refers to a "coordinated project".

6 The Act, 37(d)(ii).

[15] A decision not to declare a project as a significant project does not prevent it proceeding and progressing through the ordinary approval process.

The decision

[16] By letter dated 24 August 2012 the Coordinator-General advised Waratah that he had assessed its application seeking a declaration against the criteria set out in s 27 of the Act and had decided not to declare the project as a significant project for which an environmental impact statement was required. In accordance with s 27(AC)(3) of the Act, a statement of reasons for the decision was attached. The statement includes identification of the evidence on which findings were based, identification of the State Government Policy Framework (consisting of a summary of the statements made by the Deputy Premier in May and August 2012), findings about material questions of fact by reference to each subsection of s 27 and a statement of reasons. The document is 15 pages long and it is unnecessary to refer to all of its contents. It included substantial consideration of matters such as potential environmental effects. In various sections the document accepted the accuracy of statements made by Waratah about matters such as employment opportunities and environmental effects.

[17] Two areas of findings contained in the statement of reasons assume particular importance for present purposes. They addressed the matters to which regard was required to be had pursuant to s 27(b) and (h). It is appropriate to quote them in full:

> "**5.2 Relevant planning schemes or policy frameworks, including those of a relevant local government or of the State or the Commonwealth (SDPWO Act s.27(b))**
>
> The State Government's policy is to appoint an independent facilitator to coordinate consultation with stakeholders to plan the future development of Abbot Point. To implement the State Government's policy, an independent facilitator has been appointed. The preferred State Government position is that the proponent participates as a stakeholder in the facilitated port planning process rather than pursuing significant project declaration for its stand-alone proposal. The State Government's clear preference is to refocus the discussion with industry around locating future port infrastructure in the vicinity of the existing T1 and the planned proposals for T0, T2 and T3. The State Government wishes to see port capacity built up incrementally in a scaled way to meet the actual demand of miners. I consider that the project is not consistent with the State Government's policy.
>
> The revised IAS dismisses as 'no longer relevant', since the State Government's decision not to progress development of the MCF and T4-T9 proposals, the following technical planning studies endorsed by the Coordinator-General as relevant to the decision-making for the [Abbott Point State Development Area]:
>
> - The Abbot Point State Development Area Multi-user Infrastructure Corridor Study (Coordinator-General, November 2010)

- The Land and Infrastructure Planning Study for the Central Portion of the Abbot Point State Development Area (Coordinator-General, November 2010).

I consider that these technical planning studies are still relevant, as statements of policy, to inform the opportunities and constraints to detailed site planning for future development of Abbot Point.

In particular, I note that the location proposed by the proponent for its coal stockyard on Figure 2 of the revised IAS, largely in the area designated as Industry Precinct within the APSDA Development Scheme, is identified as Indicative Development Parcel #6 (276 hectares) (Figures 5.5 and 5.6) in the 'Land and Infrastructure Planning Study for the Central Portion of the Abbot Point State Development Area, (Coordinator-General, November 2010).'

This detailed planning study (Section 8.2 Development parcels, page 154) concluded that:

- Development parcels six and seven are considered to be the best, most valuable industrial land within the APSDA. They are located on the least constrained land, with the best geotechnical conditions in the study area, are large in size and provide the most direct connections to the proposed MCF through the selected infrastructure corridor. Therefore, only the highest value industrial development of regional, State and national significance should be approved on development parcels six and seven.

- The indicative development parcels will inform the Department's precinct planning, infrastructure coordination and investment attraction for the APSDA, as well as advice to potential future proponents.

Therefore, I do not consider that the use of development parcel six for use as a coal stockpile represents 'the highest value industrial development of regional, State and national significance' for that area of land.

The revised IAS does not identify or explain the processes and/or statutory approvals required to secure consent from the landholder to access and use the land within the APSDA (i.e. landowner's consent) for the components of the project within the APSDA and, similarly, consent to access and use marine and terrestrial areas within the PoAP.

As the landholding entity and assessment manager for development with the APSDA, I am required to issue landowner's consent to the proponent prior to commencing an assessment of material change of use development against the APSDA Development Scheme.

Due to the State Government's policy and the implementation of the policy through the appointment of an independent facilitator to coordinate strategic planning for the future development of Abbot Point, I am not prepared to allocate land to the proponent within the APSDA for a proposal that is potentially inconsistent with the outcomes of the independent facilitator process for the development of Abbot Point.

...

5.8 The strategic significance of the project to the locality, region or the State (SDPWO Act s.27(h)

According to the revised ISA, the project is of strategic significance in that it would:

- entail an estimated construction expenditure of AU$2.5 billion;
- create approximately 1000 construction jobs and 250 operational jobs;
- establish new coal terminal facilities to support additional coal export form the Galilee Basin and northern Bowen Basin;
- provide a significant boost to the Queensland economy.

In implementation of the State Government's policy, an independent facilitator has been appointed to coordinate strategic planning for the future development of Abbot Point. As it is presently unknown what recommendations the facilitator will make, delivery of the anticipated strategic benefits by the project is uncertain. I am not prepared to declare a project as a significant project where the project is not only inconsistent with existing planning for development of the APSDA but also potentially inconsistent with the outcomes of the independent facilitator process in relation to future development of additional port infrastructure in a timely, coordinated and efficient way.

In the circumstances, I am of the view that any benefits from the project would arise at the expense of alienation of the best industrial area in parcel six and the project otherwise jeopardises the orderly, timely and efficient development of the port and the APSDA."

[18] Page 15 of the statement of reasons summarised the reasons for the decision as follows:

"**6 THE REASONS FOR THE DECISION**

I have decided not to declare the Abbot Point Stand Alone Jetty project to be a significant project for which an EIS is required for the following reasons:

- On 2 August 2012, the Deputy-Premier announced the State Government's policy to appoint an independent facilitator to coordinate consultation with stakeholders to plan the future development of the Abbot Point coal port and the APSDA. In implementation of the State Government's policy, an independent facilitator has been appointed.

- The preferred State Government position is that proponents participate as stakeholders in the facilitated port planning process rather than pursuing significant project declarations for independent proposals. As it is presently unknown what recommendations the facilitator will make, I am not prepared to declare a project as a significant project where it is potentially inconsistent with the outcomes of the independent facilitator process in relation to future development of additional port infrastructure in a timely, coordinated and efficient way.

- The State Government's policy is to plan for incremental expansion of port capacity at Abbot Point, with a preference for multi-user terminals, as a way to meet short to medium term development for as many proponents as possible. The State Government's policy preference to site coal stockpiles and other port-related infrastructure in the vicinity of the existing T1 and the planned T0 to T3 port terminals. The project is inconsistent with the State Government's policy preference for development at Abbot Point.

- The State Government's policy preference is for future port infrastructure at Abbot Point to be developed in a way that ensures that port infrastructure does not compromise the objectives of the APSDA by using land in a precinct set aside for industry. The location of the proposed coal stockpile and associated conveyor system is not compatible with the following technical planning studies endorsed by the Coordinator-General as relevant to decision-making for the APSDA:

    - the Abbot Point State Development Area Multi-user Infrastructure Corridor Study (Coordinator-General, November 2010);

    - the Land and Infrastructure Planning Study for the Central Portion of the Abbot point State Development Area (Coordinator-General, November 2010).

- In considering the recommendations of the abovementioned studies, I am not prepared to declare a project as a significant project when it is inconsistent with existing planning for development of the APSDA.

- As it is presently unknown what recommendations the independent facilitator will make, delivery of the anticipated strategic benefits by the project is uncertain. In the circumstances, I am of the view that any benefits from the project would arise at the expense of alienation of the best industrial area in parcel six and the project otherwise jeopardises the orderly, timely and efficient development of the port and the APSDA."

Waratah's challenge to the decision

[19] Waratah's Originating Application advanced numerous grounds in support of its application for a declaration that the decision to reject the application was not a valid exercise of power. Its written submissions revised and refined those grounds, and did not advance all of the grounds initially raised. The grounds advanced by Waratah in its written submissions are as follows:

"(a) The Coordinator-General erred in law by identifying ministerial statements and correspondence as 'policy frameworks' to which he was entitled to have regard under section 27(b) of the SDPWO Act;

(b) The Coordinator-General erred in law by identifying two study documents as relevant 'policies' to which he was entitled to have regard under section 27(b) of the SDPWO Act;

(c) The Coordinator-General erred in law by allowing his decision to be dictated by the announced 'policy' of the government, rather than exercising the power under section 26 of the SDPWO Act in accordance with the criteria in the SDPWO Act;

(d) The decision of the Coordinator-General to reject the application on the ground that the recommendations of the independent facilitator were 'unknown' was irrational in circumstances where a decision in relation to the application could have been delayed until after the release of the recommendations;

(e) The Coordinator-General acted without evidence in reaching certain factual conclusions which were material to his decision;

(f) The Coordinator-General failed to take into account a range of relevant considerations."

The jurisdiction of the Court

[20] Section 27AD of the Act provides that Parts 3 and 5, other than s 41(1), of the *Judicial Review Act* 1991 do not apply to a decision, action or conduct of the Coordinator-General under Part 4 of the Act (which includes a decision under s 26). Part 3 of the *Judicial Review Act* relates to statutory orders of review. Part 5 relates to prerogative orders and injunctions. Section 41(1) states that the prerogative writs of mandamus, prohibition or certiorari are no longer to be issued by the Court.

[21] Waratah seeks a declaration of invalidity under the inherent jurisdiction of the Supreme Court, or pursuant to s 10 of the *Civil Proceedings Act* 2011 (Qld). The respondent did not contest the Court's jurisdiction to make a declaration of the kind sought if, for example, Waratah established one of the errors of law alleged by it. Section 10 of the *Civil Proceedings Act* 2011 empowers the Court to make a declaratory order without granting any relief as a result of the making of the order.

[22] As to the Court's jurisdiction to declare a purported exercise of State executive power invalid, Waratah cites a leading authority about the Court's supervisory jurisdiction: *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*[7] which applied the decision of the High Court in *Kirk v Industrial Court* (NSW)[8]. Neither *Kirk* nor *Northbuild* was concerned with the Court's supervisory jurisdiction over an administrative decision. *Kirk* was concerned with alleged jurisdictional error by the Industrial Court of New South Wales. In that context it referred to the defining characteristic of State Supreme Courts, being "the power to confine inferior courts and tribunals within the limits of their authority to decide to granting relief in the nature of prohibition and mandamus, and…also certiorari, directed to inferior courts and tribunals on grounds of jurisdictional error". [9] It concluded that:

> "A privative provision in State legislation, which purports to strip the Supreme Court of the State of its authority to confine *inferior courts* within the limits of their jurisdiction by granting relief on the ground of jurisdictional error, is beyond the powers of the State legislature."[10] (emphasis added)

[23] The Court identified the two principal grounds for grant of relief in the nature of certiorari are usually described as "error of law on the face of the record" and "jurisdictional error".[11] The drawing of a distinction between errors within jurisdiction and errors outside jurisdiction applied to both inferior courts and other tribunals exercising governmental powers that are amenable to the writ of certiorari.[12] The Court confirmed the continuing utility of maintaining a distinction between certiorari for error of law on the face of the record and certiorari for jurisdictional error.[13]

---

7 [2012] 1 Qd R 525 ("*Northbuild*").
8 (2011) 239 CLR 531 (*Kirk*).
9 *Kirk* at 566 [55].
10 *Kirk* at 566 [55].
11 At 567 [56].
12 Ibid at 572-573 [67] – [70].
13 At 576 [80].

[24] The supervisory jurisdiction of the Supreme Courts was at Federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court.[14] The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed by principles established as part of the common law of Australia. The High Court concluded that to deprive a State Supreme Court of its supervisory jurisdiction "enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint".[15]

[25] The Court in *Kirk* was not directly concerned with the circumstances in which the exercise of State executive power is amenable to the supervisory jurisdiction of a State Supreme Court. If regard is had to the state of the law at the time of Federation[16] the Court's supervisory jurisdiction by writ of certiorari over State executive power was limited to a decision-maker who was under a duty to act judicially.[17] But that formulation has long since been superseded by the development of administrative law.[18] In *Chase Oyster Bar*, Spigelman CJ, with whom Basten JA and McDougall J agreed, identified the critical issue as whether the relevant decision-maker is exercising public power. His Honour stated that there is no longer a requirement that there be an identifiable, additional element that the relevant decision-maker has a duty to act judicially before that decision-maker is amenable to the prerogative writs.[19] This conclusion was not essential since, as Basten JA observed, there was little doubt that the adjudicator, in exercising a statutory function of determining the amount of a progress payment and the date on which such amount became payable, would fall within the scope of such a requirement. The New South Wales Court of Appeal concluded that determinations by adjudicators were amenable to orders in the nature of certiorari.[20]

[26] The Queensland Court of Appeal in *Northbuild* followed *Chase Oyster Bar* in a case which also concerned alleged jurisdictional error by an adjudicator. McMurdo P noted that the High Court in *Kirk* made clear that the legislature cannot exclude the power of a State Supreme Court to exercise its supervisory jurisdiction as to jurisdictional error in executive and judicial decision-making[21]. It was not necessary to explore the type of executive decision-making which is amenable to the supervisory jurisdiction of the Supreme Court.

[27] Chesterman JA also concluded that *Kirk* dictated the view that adjudication decisions under the *Building and Construction Industry Payments Act* 2004 (Qld) were subject to the Court's supervisory jurisdiction.[22] The Court's pre-existing jurisdiction to control the unlawful exercise of power by inferior courts and

---

14 At 580 [98].

15 At 581 [99].

16 which pre-dated the development in the second half of the twentieth century of what has become known as administrative law.

17 *R v Electricity Commissioners; ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 at 205.

18 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 399 [9] ("*Chase Oyster Bar*")

19 At 399 [9] – [400], [19], [413] – [414], [82] – [84].

20 Ibid at 413 [84] per Basten JA; McDougall J 445 [261].

21 At 537-538 [6].

22 At 542-543 [32] – [35].

tribunals was not affected by s 18(2) of the *Judicial Review Act*, and s 41 of the *Judicial Review Act* did not purport to abolish or remove the Court's pre-existing jurisdiction to supervise inferior tribunals and decision-makers.[23] An application could be made for relief on the grounds of error of law on the face of the record or jurisdictional error.[24] White JA also was of the opinion that it was open to Northbuild to seek declaratory and injunctive relief in relation to an adjudication decision infected by jurisdictional error.[25]

[28] In this proceeding the respondent did not raise any issue that the supervisory jurisdiction of the kind discussed in *Kirk* and *Northbuild* did not apply to a decision made under s 26 of the Act because the Coordinator-General is not under a duty to "act judicially". I am content to proceed on the assumption that the exercise of the power under s 26 of the Act is amenable to the Court's supervisory jurisdiction over executive decision-making. Whilst the abolition of the "superadded duty to act judicially" as a requirement for certiorari may not have been authoritatively announced, the trend of authority supports its abolition. The abolition of such a requirement has been described as a "tectonic shift".[26] Although learned authors in the past have expressed some doubt whether the superadded duty has been authoritatively rejected in Australia, in the light of recent authority, particularly *Chase Oyster Bar*, it appears that common law certiorari is no longer limited to respondents under a duty to act judicially.[27] Although not essential to the decision in *Chase Oyster Bar*, I respectfully follow the view that there is no longer a requirement that there be an identifiable, additional element that the relevant decision-maker has a duty to act judicially before a decision is subject to relief in the exercise of the Court's supervisory jurisdiction.

[29] The test to determine whether a body is exercising governmental powers is whether it has authority conferred by legislation to determine, or affect, the common law or statutory rights or obligations of individuals or groups of individuals.[28] The respondent did not argue that a decision to refuse to make a declaration under s 26(1) of the Act did not sufficiently affect legal rights to be not amenable to relief in the exercise of the Court's supervisory jurisdiction. I proceed on the basis the challenged decision is amenable to the supervisory jurisdiction of the Supreme Court.

[30] In the present context, no issue of an error of law on the face of the record arises for consideration. Engagement of the Court's supervisory jurisdiction depends upon proof of a jurisdictional error. Not every error of law by either a judicial or administrative decision-maker is a "jurisdictional error". The distinction between jurisdictional and non-jurisdictional error has been discussed in *Craig v South Australia*[29] and *Kirk* in the case of an inferior court. The joint judgment in *Kirk* stated that it was neither necessary nor possible to mark the "metes and bounds of

---

23 At 543 [35].
24 At 544 [37].
25 At 555-556 [78].
26 *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172 at 183 [44]; [2009] VSC 426 at [44].
27 Aronson & Groves "*Judicial Review of Administrative Action*" (5th ed) Law Book Company, 2013 [12160].
28 *Chase Oyster Bar* at 444 [251] – 445 [260].
29 (1995) 184 CLR 163 ("Craig").

jurisdictional error".[30] Waratah cites the following passage in *Craig*[31] in respect of an administrative tribunal:

> "If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

This passage does not suggest that every error of law by an administrative tribunal or administrative decision-maker constitutes a jurisdictional error. I adopt it as a useful guide to the kinds of error of law which may lead to a jurisdictional error being established.

Alleged error of law: Ministerial Statements

[31] Waratah submits that the respondent wrongly assumed that a relevant "policy framework" could be derived from Ministerial Statements to Parliament, Ministerial Media Statements and correspondence. The various Ministerial Statements from May and August 2012 have previously been summarised and were summarised by the respondent in part 4 of the reasons for decision. The respondent is alleged to have committed an error of law in relying on statements by the Deputy Premier as the source of a "policy framework" within the meaning of s 27(b). Waratah submits that, on its proper construction, the term "policy framework" within s 27(b) refers to a formally adopted policy which can be described as a framework. The Ministerial Statements are said to not constitute a policy framework. Two arguments are advanced as to why, on a proper construction of the section, the term "policy framework" should be taken to refer to formal policy documents.

[32] The first is that an indication of a formal policy framework is apparent from the use of the term "planning schemes" which also appears in s 27(b). Just as "planning schemes" take the form of formal documents, "policy frameworks" which may not have an express statutory foundation should take the form of formal policy documents rather than an announcement by a Minister.

[33] The second is that, a degree of formality in the adoption of a policy framework is necessary so that the Coordinator-General is able to identify what matters relevantly constitute a policy framework. Waratah submits that unless the policy has been formally adopted, the Coordinator-General would have no basis on which to conclude that any particular statement was a relevant "policy framework".

[34] These contentions raise two issues:

(a) Does the term "policy frameworks" require the formality contended for by Waratah?

(b) If so, do the Ministerial Statements lack that formality?

---

30 *Kirk* at 573 [71].

31 *Craig* at 179.

The meaning of "policy frameworks"

[35] The Act does not define "policy frameworks". It is not a term which is commonly used. The ordinary meaning of the words "policy" and "frameworks" should be considered, having regard to the statutory context in which the term "policy frameworks" is used.

[36] An ordinary meaning of the word "policy" is "a course or principle of action adopted or proposed by a government, party, business or individual".[32]

[37] The word "framework" ordinarily means "a structure composed of parts framed together; a frame or skeleton".[33] The first two senses in which the *Macquarie Dictionary* defines framework are "1. a structure composed of parts fitted and united together. 2. a structure designed to support or enclose something; frame or skeleton".[34] The *Oxford English Dictionary* includes the meaning "an essential or underlying structure; a provisional design, an outline; a conceptual scheme or system".[35] The *Australian Oxford Dictionary*[36] defines framework as:

> "1. an essential supporting structure.
> "2. a basic system".

[38] Waratah points to the fact that s 27(b) also uses the term "planning schemes" as bearing upon the meaning of "policy frameworks" and as indicating that a formal policy framework is required. The term "planning schemes" is not defined in the Act, but it may be taken to refer to planning schemes made by a local government or a State planning instrument made under the *Integrated Planning Act* 1997, the *Sustainable Planning Act* 2009 and an approved development scheme for a State development under s 80 of the Act. Such a planning scheme is concerned with the use of land. Waratah does not explain why the term "policy frameworks" in s 27(b) should be influenced by the nature and requirements of a planning scheme.

[39] Section 27(b) is concerned with two different things: planning schemes and policy frameworks. The reference to "planning schemes" in the subsection provides the immediate context in which the term "policy frameworks" appears. However, the ordinary meaning of "policy frameworks" does not need to be read down by reference to "planning schemes". A policy framework does not have to be something akin to a planning scheme. The terms of the section do not create a genus having the features of a planning scheme.[37] I conclude that a policy framework does not require the formality required of a planning scheme. Such a policy framework does not need to have the formality of an instrument which has the force of law such as a planning scheme.

[40] Policy documents that constitute a planning scheme may also constitute a policy framework. But neither the ordinary meaning of "policy frameworks" nor the

---

32 *The Australian Oxford Dictionary* (1999) cited in *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at 172 [39]; [2012] HCA 58 at [39].

33 *The Shorter Oxford English Dictionary* Clarendon Press

34 *The Macquarie Dictionary* 3rd ed (Macquarie Library 1998).

35 *Oxford English Dictionary Online* 2nd ed.

36 *Australian Oxford Dictionary* 2nd ed (Oxford University Press, 2004).

37 As to the approach taken to construing statutory terms where no genus is established, see Pearce and Geddes "*Statutory Interpretation in Australia*" (7th ed) LexisNexis, 2011 [4.27].

location of that term in s 27(b) requires a policy framework to have all of the features of a planning scheme.

[41] As to Waratah's contention that the term should be taken to refer to "formal policy documents", the statute does not refer to a document. A policy framework often may to be contained in a document, and in this case the statements were recorded in the Parliamentary record[38] and in publicly accessible documents. Not every utterance by a Minister about government policy may amount to a policy framework. However, a Ministerial Statement made to the Legislative Assembly which otherwise qualified as a "policy framework" would not cease to be a policy framework within the meaning of s 27(b) because it was delivered orally and recorded in Hansard, rather than tabled as a document.

[42] According to the ordinary meaning of the words "policy" and "framework" when used in conjunction, a policy framework need not be a fully-formulated and comprehensive policy statement.

[43] Waratah's argument that a degree of formality in the adoption of a policy is necessary begs the question of what degree is required, and how the requisite degree of formality is to be assessed. Such a test of indeterminate reference would introduce "a distinctly inconvenient level of uncertainty" in determining what constitutes a policy framework, and counts against the adoption of such a construction.[39] For example, would it be necessary for the policy framework to be adopted by Cabinet or embodied in a White Paper? The Act does not require such a degree of formality in the terms of s 27(b). Nor does the statutory context. The statute requires the Coordinator-General to have regard to even a basic policy framework. There is no reason apparent in the terms or purpose of the Act as to why such a basic, but possibly important, policy framework should be disregarded by the Coordinator-General in making a decision under s 26.

[44] Less weight might be attached to an embryonic policy framework stated by a Minister than a more comprehensive, fully-developed policy framework which has been formally adopted by Cabinet. But that goes to the weight which might be given to such a policy framework, not the meaning of the statutory term.

Did the Ministerial Statements lack any required formality?

[45] If, however, some degree of formality is implicit in the requirement for a policy framework in order to enable the Coordinator-General (and perhaps others) to ascertain it, then the Ministerial Statements relied upon by the respondent had such a quality. They were not off the cuff remarks. Each statement was a matter of public record. Each had the authority of the Minister responsible for administering the Act and related to a matter within the Minister's responsibilities of State Development, Infrastructure and Planning. The fact that some of the statements were in the form of Media Statements does not alter their status as statements having the authority of the relevant Minister and to reflect State government policy.

---

38 The making of a Ministerial Statement in the Legislative Assembly is a recognised means of communicating government policy, with Standing Order 62 of the Standing Rules and Orders of the Legislative Assembly providing for a Minister to make a statement relating to matters of government policy or public affairs.

39 cf *Ramsgrove Pty Ltd v Beaudesert Shire Council* [2006] 1 Qd R 466 at 477 [30]; [2005] QCA 438 at [30].

The Media Statements reflected and amplified to some extent the contents of the Ministerial Statements made at about the same time. The August 2012 statements supplemented the May 2012 statements.

[46] By the time he came to make his decision, the respondent was required to have regard to all of the statements to ascertain if they constituted a policy framework and, if so, to have regard to the policy framework. It was not a matter of interpreting each statement in isolation to see if each separately constituted a policy framework. The statements were of government policy made by a very senior member of the Executive government with responsibility for the framing of policy in relation to the subject matter addressed in the statements. The statements were sufficient to enable the respondent to identify a policy framework, and the respondent did so.

[47] There is no obvious inconsistency between the statements. They complemented and supplemented each other. In general terms, the statements related to:

- the proposed expansion of Abbot Point;
- government policy in relation to Abbot Point infrastructure;
- government policy in relation to the development of the Abbot Point State Development Area;
- the opportunity to site stockpiles and other port related infrastructure beside the existing T1 and the planned T0 and T3 terminals; and
- the process by which the appointed facilitator was to advance those policies, including a policy that any future port infrastructure be developed in a way that ensured that it did not compromise the objectives of the State Development Area by using land in a precinct set aside for industry.

Such statements were capable of constituting a policy framework within the meaning of s 27(b). The respondent was entitled to treat those statements as "policy framework". I am not persuaded by Waratah's argument that he committed an error of law in doing so.

[48] I should add that Waratah has not proven that the respondent misconstrued the meaning of "policy frameworks" in s 27 and thereby committed an error of law. Nor has it been shown that, in applying a correct interpretation of that statutory term, he misconstrued the relevant statements in concluding that they amounted to a policy framework. Had he done so, it is questionable whether such a misconstruction of documents would have amounted to an error of law, as distinct from an error of fact which might be made by an official in making a decision without the decision being invalidated. However, I do not find that the respondent made any error in considering the Ministerial Statements. It was open to the respondent to conclude that the Ministerial Statements constituted a policy framework and he did not commit an error of law in doing so.

[49] I should also add that amendments to the Act in 2012 offer little assistance in the interpretation of the term "policy frameworks" in the Act. Those amendments were intended to "clarify and improve the powers of the Coordinator-General to fast-track projects, better reflect Government policies and priorities, streamline assessment

and prevent proponents from misusing the intent of the Coordinator-General's statutory powers to promote their individual projects, diverting limited Government resources and causing confusion for landowners and industry."[40]

[50] The enactment of a new s 27(1)(c), which refers to "relevant State policies and Government priorities" does not require a different view to be taken of the meaning of "policy frameworks" in s 27(1)(b) or s 27(b) of the unamended Act. The new law requires regard to be had not only to "policy frameworks" but actual policies (detailed or otherwise) and priorities (including priorities between different policies).

[51] Regard can be had to an amending Act in the interpretation of prior legislation, at least to avoid a result that would render the amending legislation unnecessary or futile.[41] Care must be exercised that the amendments were not made out of an abundance of caution in order to remove doubt.[42]

[52] The amendments do not suggest that the words "policy frameworks" in the unamended Act had the meaning for which Waratah contends. The amendments are consistent with those words having the meaning which I have adopted, and imposing additional matters to which the Coordinator-General must have regard. They clarify that regard must be had not only to policy frameworks but also policies which may be developed in accordance with such a framework.

Alleged error of law: studies

[53] In his reasons, the respondent addressed two study documents in the course of making findings of fact about the application of relevant policy frameworks. Waratah alleges that it was an error of law to do so as neither study was a "planning scheme" or a "policy framework". Instead, each was a source of information.

[54] I do not accept that the respondent treated either study as a "planning scheme" or as a "policy framework". They were not referred to in part 4 of the reasons where the State government policy framework was described. Instead, in the course of applying that policy framework and making findings of fact in respect of it, the respondent referred to each study in part 5.2 of his reasons. It is unnecessary to detail the contents of each study. Shortly stated, the Infrastructure Corridor Study was to identify the alignment, profile and land area requirements of a multi-user infrastructure corridor and to assist with the planning of infrastructure and the future siting of potential industry and infrastructure development within the Abbot Point State Development Area. The Infrastructure Planning Study was intended to inform the Department's Precinct Planning, Infrastructure Coordination and Investment Attraction for the central part of the State Development Area.

[55] I am not persuaded that the respondent relied upon either study as constituting a "planning scheme" or "policy framework". Instead, each statement was relied upon as an important source of information. The studies identified opportunities for and constraints upon the future development of Abbot Point. In particular, the statements informed the respondent that the location proposed by Waratah for its coal stockyard was largely in the area designated as "Industry Precinct" within the

---

40 *Economic Development Bill* 2012 Explanatory Memorandum.

41 *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 254-255.

42 *Meridian AB Pty Ltd v Jackson* [2013] QCA 121 at [48].

Abbot Point State Development Area Development Scheme. The planning study concluded that development parcels 6 and 7 were considered to be the 'best most valuable industrial land' within the State Development Area. They are located on the least constrained land, with the best geotechnical conditions in the study area. They are large in size and provide the most direct connections to the proposed Multi Cargo Facility.

[56] If these studies were erroneously, and in passing, referred to as statements of policy, then, on a fair reading of part 5.2 of the reasons and the reasons as a whole, they were not described as amounting to "policy frameworks". The policy framework was that described in part 4 of the reasons which do not contain reference to the studies. Having identified the relevant policy framework in section 4 of the reasons and having briefly summarised it at the start of section 5.2 of the report, the respondent had regard to it and in doing so he made appropriate reference to studies which were relevant to infrastructure planning in connection with a policy framework which sought to ensure that port infrastructure did not compromise the objectives of the State Development Area by using land in a precinct that was best used for industrial development, rather than stockpiling coal.

[57] The relevant policy framework was to build up port capacity incrementally and to develop opportunities to site stockpiles and other port related infrastructure beside T0 - T3, and to not compromise the development of land planned for industrial development. Reference to the studies was relevant to the respondent's task in having regard to whether a project was consistent with that policy framework.

[58] Because the respondent's findings and reasons did not identify the studies as constituting a "policy framework" (as distinct from being sources of information and statements of policy about future planning), it is unnecessary to consider whether each of the studies, when viewed in isolation, was a "policy framework".

[59] In conclusion, the studies were not elevated by the respondent to the status of a planning scheme or policy framework. Waratah has not established the error of law alleged by it.

Did the respondent allow policy to fetter his discretion?

[60] Waratah contends that the respondent merely applied government policy rather than exercised his power under s 26 in accordance with matters made relevant under that section and having regard to the merits of the application. In doing so, he is said to have fettered his own decision-making by applying policy without regard to the merits of the application. The respondent rejects this argument and submits that there is no error in treating the policy frameworks as having decisive weight, particularly where the decision to declare or not to declare a project involves a value judgment made by reference to imprecise criteria and the decision-maker represents the executive government. In reply, Waratah submits that, even assuming the application was incompatible with policy frameworks, it would nonetheless be an error to treat a policy framework as having decisive weight without the decision-maker conducting a genuine assessment of the merits of the application.

[61] It is well-established that an administrative decision-maker must decide an application on its merits considering the relevant material. It cannot simply apply

government policy.[43] In *Kahn v Minister for Immigration and Ethnic Affairs*,[44] Gummow J stated that in considering all relevant material in respect of an application, the decision-maker must give "proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy". This formulation has been adopted by decisions of this Court in the context of the *Judicial Review Act* 1991.[45] The statement of Gummow J was not purporting to lay down a new principle of administrative law[46] and has been followed in other jurisdictions.[47] The High Court in *Minister for Immigration v SZJSS* explained the reference in *Khan* to a "proper, genuine and realistic consideration to the merits of the case". It was not to encourage a slide into impermissible merits review where the court emphatically disagrees with the decision-maker's assessment of matters.[48] The principle is not one which has its origins in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) or the *Judicial Review Act* 1991 (Qld). That legislation contains a ground for judicial review in respect of an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case.[49] The same principle about the inflexible following of policy without regard to the merits in exercising a discretion can be found in general doctrines about the conditions for the lawful exercise of statutory powers.[50]

[62] The issue, then is whether the respondent gave proper, genuine and realistic consideration to the merits of the application and was ready to depart from government policy if the merits of the application justified such a course.

[63] There is no doubt that the respondent had regard to the relevant material placed before him. He accepted the accuracy of material placed before him by Waratah in respect of matters to which he was required to have regard. It has not been shown that the respondent gave only a perfunctory or cursory consideration of those matters and failed to give proper consideration to them in assessing the merits of the application.

[64] The respondent was entitled to conclude that declaring a project to be a significant project would create an approval process which was inconsistent with government policy to coordinate strategic planning for the future development of Abbot Point, including the process involving the facilitator who would consider a range of development proposals. The respondent also was entitled to conclude that Waratah's proposed Single Jetty Project was inconsistent with existing planning for

---

43 *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189 at 206.

44 (1987) 14 ALD 291.

45 *Gough v Southern Queensland Regional Parole Board* [2008] QSC 222; *Cuzack v Queensland Parole Board* [2010] QSC 264; *Wiggington v Queensland Parole Board* [2010] QSC 59; *Origin Energy Electricity Ltd v Queensland Competition Authority* [2012] QSC 414; *Younan v Crime Reference Committee* [2014] QSC 24 and see Billings and Cassmatis 'Twenty-one years of the Judicial Review Act 1991: Enhancing Access to Justice and Promoting Legal Accountability?'32 *University of Queensland Law Journal* 1.

46 *Origin Energy* (supra) at [93].

47 See for example *Barro Group Pty Ltd v Brimbank City Council* [2012] VSC 154 at [109]; *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207 at [229].

48 (2010) 243 CLR 164 at 174 [25] – 177 [34]

49 *Judicial Review Act* 1991, s 23(f); *Administrative Decisions (Judicial Review) Act* 1977 (Cth) s5(2)(f).

50 Aronson & Groves (Supra) [5.240-5.330]; H.W.R Wade & C. F. Forsyth *Administrative Law* 10th ed. (Oxford University Press 2009) 270-276.

development of the State Development Area and potentially inconsistent with the outcomes of the independent facilitator process.

[65] The respondent may have accorded decisive weight to government policy and other matters which persuaded him that any benefits from the Single Jetty Project would arise at the expense of the alienation of the best industrial area in the relevant parcel of land and that the project would otherwise jeopardise the "orderly, timely and efficient development of the port and the APSDA".

[66] It has not been shown that, in reaching that conclusion the respondent merely applied government policy and did not have regards to the merits of the application. Having considered the application and the assumed benefits of the project, the respondent concluded that competing considerations, including government policy, meant that he should not declare the project as a significant project under s 26(1)(a) of the Act. Waratah has not established an invalid exercise of power on the ground that the respondent allowed policy to fetter discretion.

Alleged unreasonableness

[67] The respondent's statement of reasons refer to the fact that it was "presently unknown" what recommendations the facilitator would make. The respondent stated that he was not prepared to declare the project as a significant project where it was "not only inconsistent with existing planning for development of the APSDA but also potentially inconsistent with the outcomes of the independent facilitator process in relation to future development of additional port infrastructure in a timely, coordinated and efficient way". This point was reiterated in the final paragraph of the statement of reasons.

[68] Waratah submits that rejecting their application on this ground was irrational. It argues that the rational course was to postpone the decision until after the recommendations were released. The respondent submits that it was open to him to either postpone making a decision or to reject the application. The choice fell within the area of "genuinely free discretion" left to him as a decision-maker.[51] The choice to decide the application, rather than delay making a decision, was not unreasonable or irrational in the legal sense of those terms.

[69] A decision that is so unreasonable that no reasonable person could reach it is liable to be set aside on the basis of the doctrine known as *Wednesbury* unreasonableness.[52]

[70] There is a presumption that a statutorily conferred power will be exercised reasonably.[53] Within the "bounds of legal reasonableness" there is a genuinely free discretion.[54] Courts are conscious to not exceed their supervisory role by undertaking a review of the merits of a decision, and the standard of legal reasonableness does not involve substituting a court's view for that of a decision-maker.[55] Chief Justice French in *Li* referred to an area of "decisional freedom"

---

51 *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [66], (2013) 87 ALJR 618. ("*Li*").

52 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229-230.

53 *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618; [2013] HCA 18

54 *Li* at [66].

55 Ibid.

within which "reasonable minds may reach different conclusions about the correct or preferable decision"[56]. His Honour continued:

> "The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker."[57]

[71] In *Li*, Gageler J reiterated that the test of *Wednesbury* unreasonableness is that the purported exercise of power is so unreasonable that no reasonable repository of the power could have so exercised the power.[58] The test is a stringent one.

[72] A requirement of reasonableness may affect both the process by which a decision is reached and a substantive outcome. Thus, in a case where it is obvious that material is readily available which is "centrally relevant to the decision to be made, to proceed to a decision without making any attempt to obtain that information may be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it."[59]

[73] In the United Kingdom a similar cautious test is applied, in determining unreasonableness in a legal sense, and it has been said that:

> "Two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting the title to be regarded as reasonable ... Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable. There is a band of decisions within which no court should seek to replace the individual's judgment with his own."[60]

It may be appropriate to ask whether the challenged decision was "within the range of reasonable decisions open to a decision-maker".[61]

[74] The distinction between merit review and legality, expressed in the frequently-cited judgment of Brennan J in *Attorney-General (NSW) v Quin*,[62] is concerned with the maintenance of the institutional integrity of courts, tribunals and administrative decision-makers. A cautious approach to the detection of unreasonableness in a legal sense is required in order to avoid a court being drawn into merits review rather than focusing upon the legality of the decision.

[75] Waratah submits that the respondent failed to make an obvious inquiry to ascertain an "unknown" fact which was "centrally relevant" to the decision. The respondent's duty to inquire into that fact is said to have compelled him to postpone

---

56 Ibid at [28].

57 Ibid at [30].

58 Ibid at [108].

59 *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-170 in the context of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). A question remains as to whether the same principle of reasonableness in the process of decision-making applies at common law: *Minister of Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 at 435 [21]. However, I shall assume that the requirement of unreasonableness applies to the process by which a decision is reached, and not merely the substantive outcome.

60 *Re W (an infant)* [1971] 2 All ER 49 at 56; [1971] AC 682.

61 *Boddington v British Transport Police* [1998] 2 All ER 203 at 229, [1999] 2 AC 143.

62 (1990) 170 CLR 1 at 35-36.

making the decision until after the recommendations were released, with any other course being irrational.

[76] The authorities do not establish that a decision-maker is under a general duty to inquire.[63] Judicial formulations of the duty to inquire concern an inquiry to ascertain a fact that is centrally relevant to the decision. In this matter, the future recommendations of the facilitator and the potential that they would be inconsistent with Waratah's proposal was not central to the decision and, it may be added, the recommendations were not a fact that was presently, and therefore readily, available. The potential inconsistency of the facilitator's recommendations was an additional reason as to why the project should not be declared as a significant project. The principal reasons were that the project was inconsistent with existing planning for development of the APSDA and inconsistent with State government policy for locating future port infrastructure in the vicinity of the existing T1 and the proposed T0, T2 and T3 developments. It was inconsistent with State government policy to not compromise the objectives of the State Development Area by using land in a precinct set aside for industry for coal storage. If the facilitator's recommendations accorded with these policies then the proposal would also be inconsistent with those recommendations.

[77] The facilitator's recommendations may have assumed greater importance and come closer to being centrally relevant if Waratah's proposal did not conflict with existing government policy and existing plans for development of the area. However, the recommendations of the facilitator were a future and an additional fact, not one which was centrally relevant to the decision to be made.

[78] To the extent that the potential inconsistency of those future recommendations played a subsidiary part in the respondent's decision, the potential for the facilitator's recommendations to be inconsistent with the proposal was a very real one. It would be unsurprising if the facilitator did not have regard to government policy and existing plans for the development of the APSDA, including land which had been identified as most suitable for future industrial development. The facilitator's recommendations would be unlikely to make recommendations for port infrastructure which compromised such plans and conflicted with government policy. But if they did, then a delay by the respondent in making a decision in order to ascertain the facilitator's recommendations would not necessarily resolve the matter because the respondent would then need to await a government decision to adopt or reject those recommendations.

[79] I conclude that because the facilitator's recommendations were not centrally relevant to the respondent's decision he did not have a duty to inquire into them before making a decision. It was sufficient to have regard to the potential that they would be inconsistent with the applicant's proposal.

[80] A preferable course for the respondent may have been to await the facilitator's recommendations, notwithstanding possible complications facing the facilitator in making his own recommendations when an application for a declaration in relation to the Stand Alone Jetty Project remained to be determined. It may have been reasonable, for the respondent to delay making a decision in order to see if the potential inconsistency was realised. The issue, however, is not whether it was

---

63 *Minister for Immigration v SZIAI* (2009) 259 ALR 429 at 434 [20] – 436 [25] see Aronson & Groves supra [5.220] - [5.230] and the cases cited therein.

reasonable to delay. The issue is whether making a decision without further delay and without waiting for the facilitator's recommendations was irrational in the sense that no reasonable decision-maker could have reached that conclusion. Expressed differently, was the choice to make a decision within the range of decisional freedom left open to the respondent?

[81] I conclude that it was. First, the potential inconsistency was not central to the decision. It provided an additional reason for reaching the conclusion which the respondent did. Second, the decision was substantially influenced by a government policy framework (to which Waratah says the respondent gave excessive weight) and existing planning for the development of the State Development Area. The proposal was inconsistent with both. Thirdly, it was reasonable to not make a declaration triggering an approval process under the Act in circumstances in which the respondent not unreasonably apprehended that government policy was for proponents to participate in the facilitated port planning process rather than pursue significant project declarations for their own proposals. Fourthly, the refusal of the application did not prevent Waratah from pursuing other processes for the approval of its project. Finally, once the facilitator's recommendations were known it was open to Waratah to apply again for a significant project declaration.

[82] As to the last matter, the making of a decision to not grant the application did not have irreparable consequences.[64] The decision did not preclude Waratah from making a further application in the possibly unlikely event of:

(a) the facilitator recommending a coal stockpile on land which existing development plans had identified as the most valuable industrial land within the State Development Area and the development of a Single Jetty Project in accordance with Waratah's proposal; and

(b) government acceptance of those recommendations, with appropriate adjustment of government policy and development schemes.

[83] In summary, it may have been unreasonable in the ordinary sense of the word for the respondent to not wait for the facilitator's recommendations. However, that is a contestable proposition in light of the factors that I have just noted. Whilst a decision-maker might reasonably have delayed making a decision so as to await the facilitator's recommendations, another decision-maker might reasonably have come to the conclusion that a decision on the application should be made in the circumstances. The choice to make a decision, as opposed to waiting, was not so unreasonable that no reasonable person could have made it. As a matter of process and timing, the choice to determine the application was within the range of decisions that was reasonably open to the respondent. It was not unreasonable to determine the application without further delay, leaving Waratah to make a further application in the possibly unlikely event that the facilitator's recommendations were consistent with Waratah's proposal, and the government chose to adopt those recommendations. Waratah has not established that the respondent's choice to not postpone making a decision was unreasonable in the legal sense. The choice was not an irrational one.

---

64 Compare the consequences for the applicant in *Li* of the unreasonable refusal to defer a determination.

Allegations of no evidence in support of certain findings of fact

[84] Waratah alleges that the respondent made a number of distinct findings of fact for which there was no evidence. Before turning to those four allegations, it is appropriate to introduce the topic of "no evidence" as an error of law at common law and the kind of findings of fact from which invalidity will flow if the finding is completely unsupported by evidence. Waratah submits that it is an error of law for an administrator to make a finding of fact where there is no evidence in support of that fact. It cites *Kostas v HIA Insurance Services Pty Ltd*[65]. That case was not concerned with judicial review of an administrative decision. It was concerned with the existence of a right of appeal in a case in which a tribunal decided a question "with respect to a matter of law". The High Court ruled that a tribunal that decides a question of fact when there is "no evidence" in support of the finding makes an error of law. Accordingly, it is an error of law to make a finding of fact for which there is no evidence or other factual material.

[85] To establish the "no evidence" ground for the purpose of judicial review of an administrative decision, there must be absolutely *no* evidence.[66] In addition, the finding in respect of which there is "no evidence" must be findings on primary or ultimate facts, or at least on material facts. Some authorities suggest that invalidity flows from a completely unsupported finding of fact only where the power to make the challenged decision "depended upon the prior establishment of a particular fact", where "particular fact" seems to be understood as something which the Act itself requires the decision-maker to find.[67] Some authorities go so far as to say that the fact must relate to a pre-condition to the exercise of jurisdiction or that the fact of which there must be "no evidence" must be a jurisdictional fact.[68] I shall assume that such a stringent test does not apply and that it is sufficient if the finding of fact in respect of which there was "no evidence" is a primary, or at least material fact. Such an approach is less demanding than equivalent "no evidence" grounds in the *Judicial Review Act* and its federal counterpart.

[86] For present purposes, it is sufficient to observe that not every finding of fact in respect of which an applicant succeeds in showing there was absolutely no supportive evidence or other factual material gives rise to a jurisdictional error. It is one thing to say that a decision-maker who decides a question of fact when there is "no evidence" in support of the finding makes an error of law. It is another to say that such an error of law is a basis to invalidate an administrative decision. Not all such errors are jurisdictional.

The first finding

[87] Waratah points to the respondent's observation or finding that:

> "The preferred State government position is that the proponent participates as a stakeholder in the facilitated port planning process rather than pursuing significant project declaration for its stand-alone proposal."

---

65 (2010) 241 CLR 390 at 418 [90] – [91]; [2013] HCA 32.

66 Aronson and Groves "*Judicial Review of Administrative Action*" (5th ed) [4.600].

67 Ibid at [4.620] and the authorities cited therein at footnote 432.

68 Ibid.

Waratah submits that there is nothing in any of the Ministerial Statements or correspondence that supports that proposition.

[88] In reaching the quoted conclusion or making a finding about that matter, the respondent was not confined to matters which were explicitly stated in the Ministerial Statements. Administrative decision-makers are entitled to draw on their own knowledge or experience, subject to the qualification that procedural fairness often will require a decision-maker to tell a person of potentially adverse material of which the person might be unaware. As a senior government officer concerned with the coordination and planning of industrial and other developments, the respondent could be expected to know about the State government's preference for parties to participate in the facilitated port planning process rather than pursue significant project declaration as a stand-alone proposal.

[89] Even if the respondent's finding was simply based upon the Ministerial Statements, it was a conclusion or inference that was open on a fair reading of the statements. The stated policy of the government was to establish a process for the orderly and efficient development of the port and the APSDA, including its industrial development. Part of that process was for the appointed facilitator to discuss with coal companies their plans and needs for future port capacity. The stated government policy was for port capacity to be built up incrementally and for the facilitator to discuss with industry proposals to site stockpiles and other port-related infrastructure beside the existing T1 and the planned T0–T3 terminals. As Waratah's submissions in reply note, if the respondent had granted significant project status to Waratah's Stand Alone Jetty Project, then any recommendations of the independent facilitator (which would have been non-binding) would have been subordinated to the statutory force of a declaration under s 26(1)(a).

[90] A fair reading by a party with the respondent's familiarity with government policy and planning processes of the relevant Ministerial Statements would have been that the government wished to avoid having individual parties, such as Waratah, pursuing one process by way of a significant project declaration for its own proposal; and another process by which the facilitator sought to coordinate the proposals of various participants.

[91] The finding or conclusion which the respondent made, and which I have quoted above, was one which was open to him to make, based upon his knowledge and experience, upon a fair interpretation of the Ministerial Statements. I am not persuaded that there was no evidence in support of that finding.

[92] In any event, if I had concluded that there was no evidence to support that finding, then it was not a finding of ultimate or primary fact. There is no sound reason to suppose that the finding in relation to the matters mentioned in respect of s 27(b) or that the ultimate decision would have been different if this finding had not been made. One way to test that proposition is to imagine the statement of reasons if the relevant sentence on p 5 and its counterpart on p 15 were not present.

[93] I conclude that Waratah has not established that the first finding pointed to was one for which there was no evidence.

The second finding

[94] The second finding about which Waratah complains is stated on page 6 of the reasons:

> "The revised IAS does not identify or explain the processes and/or statutory approvals required to secure consent from the landholder to access and use the land within the APSDA (i.e. landowner's consent) for the components of the project within the APSDA and, similarly, consent to access and use marine and terrestrial areas within the PoAP."

Waratah submits that there was no evidence to support that conclusion since the revised IAS addressed all of the legislative requirements of the Stand Alone Jetty Project. But that is a different matter. The subject of the sentence was not about what the revised IAS stated in 1.4.1 and 1.4.2 about legislation but what it stated (or did not state) in 4.3 about how Waratah proposed to obtain necessary landowner consents. The revised IAS addressed the issue of the land ownership within the APSDA and in a few sentences noted the need to obtain necessary permits and approvals. The point seemingly being made by the respondent in the relevant sentence was not the fact that the landowner's consent was required for components of the project, but the process by which the landholder's consent would be obtained in light of the government's policy preferences was unexplained.

[95] Statements of reasons should not be finally interpreted and read with an eye to detecting error or infelicity of expression.[69] A literal interpretation of the sentence in question indicates an error of fact. It is not an error of fact of a kind which constitutes a jurisdictional error. The revised IAS did not explain how it was likely that the landowner's consent would be granted to access and use the land in a manner which was inconsistent with its preferred use as industrial land under the existing Development Scheme and for a use which did not obviously accord with State government policy about the preferred sites for coal stockpiles. The land included parcels which a detailed planning study had identified as the most valuable industrial land within the APSDA. When read in its context, the sentence to which Waratah points concerns the absence of explanation about how it was to secure necessary approvals. And any error in the terms in which it was expressed does not fairly give rise to a "no evidence" case which would entitle Waratah to a declaration of invalidity.

The third finding

[96] The third finding of fact pointed to by Waratah, or more precisely, a statement of conclusion or opinion is the following:

> "I do not consider that the use of development parcel 6 for the use as a coal stockpile represents 'the highest value **industrial development** of regional, State and national significance' for that area of land" (emphasis added).

[97] Some authorities are to the effect that there must be no evidence of a fact, as opposed to an opinion.[70] The relevant statement is not a positive finding of fact.

---

69 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, 291

70 Aronson & Groves (supra) at [4.630].

Instead, it is a statement to the effect that the respondent is not persuaded that Waratah's proposed use of parcel 6 as a coal stockpile would amount to an industrial development (in the sense industrial development was used in the relevant study), let alone the highest value industrial development for that area of land.

[98] If it is a finding of fact, then it was one supported by evidence or other material. It was based upon a detailed planning study which concluded that the relevant parcel was "the best, most valuable industrial land within the APSDA". The relevant finding was not so much a valuation assessment of the land in terms of the land's highest and best use for valuation purposes. It was a recognition that a detailed study plan had identified the parcel as the most valuable *industrial land* within the APSDA. Government policy was for future industrial development within the State Development Area and the regions around it. The simple point being made by the respondent was use of the land as a coal stockpile did not reflect the preferred use of the site as industrial land and a policy that only the highest value industrial development of regional, State and national significance should be approved on those development parcels.

[99] Waratah's submission that it is not aware of any other current proposals to locate a development on the site which Waratah proposes to develop as a coal stockpile misses the point. Government policy is concerned with, among other things, future industrial development. Preserving land identified as suitable for a high value industrial use, rather than using it as a coal stockpile, would be consistent with that policy.

[100] In conclusion, there is evidence to support the relevant conclusion, opinion, or finding of fact.

The fourth finding

[101] In a passage previously quoted from part 5.8 of the reasons and in the reasons themselves, the respondent observed:

> "As it is presently unknown what recommendations the facilitator will make, delivery of the anticipated strategic benefits by the project is uncertain."

[102] The project to which reference was made was the Stand Alone Jetty Project. Waratah complains that this was a piece of speculation with no grounding in the evidence. It points to evidence that the Galilee Coal Project would have strategic and economic benefits for the locality, region and State. So much may be accepted. The position in relation to the strategic benefits of the Stand Alone Jetty Project is something different. As the respondent submits, the Jetty Project in respect of which a separate significant project was sought should not be equated with the Galilee Coal Project.

[103] The respondent did not find that the benefits of the Galilee Coal Project were uncertain. The uncertainty referred to in the reasons were what benefits would flow from the Stand Alone Jetty Project in circumstances in which the recommendations of the facilitator were unknown. If those recommendations favoured a development of the kind preferred by the State government, then it remained to be seen what use the Galilee Coal Project (rebadged China First) would make of facilities developed in accordance with State government policy and whether all of the identified benefits would flow. If, however, the Stand Alone Jetty Project proceeded then any

benefits from it would be at the expense of the alienation of the best industrial area and the orderly and efficient development of the port and the APSDA.

[104] The conclusion that the anticipated strategic benefits by the project were uncertain was a finding open to the respondent to make.

[105] I conclude that Waratah has not established its "no evidence" challenges to the validity of the decision.

Alleged failure to address relevant considerations

[106] Waratah submits that the respondent failed to have regard to three matters which were relevant to its decision:

(a) that the Jetty Project was intended to provide for incremental expansion;

(b) that the Jetty Project involved a multi-user terminal; and

(c) the impact on the Galilee Coal Project if no port facilities were made available.

[107] A decision may be invalid if it was made without regard to a relevant consideration. It will be invalid only if the matter was one which the decision-maker was required to take into account, and if on the proper construction of the Act in question, a failure to take the matter into account will result in the invalidity of the decision.[71] The identification of relevant matters involves a task of statutory construction. Section 27 of the Act specifies matters to which regard must be had. Waratah argues that in considering those matters, the respondent failed to have regard to the abovementioned three matters.

Incremental expansion and a multi-user terminal

[108] Waratah notes that the respondent's reasons refer to the government policy of planning for "incremental expansion of port capacity at Abbot Point, with a preference for multi-user terminals". The reasons went on to refer to the government's policy preference to site coal stockpiles and other port-related infrastructure in the vicinity of the existing T1 and the planned T0–T3 port terminals, and found that the project is inconsistent with the State government's policy preference for development at Abbot Point. That finding of inconsistency, in its context, refers to the findings made in part 5.2 of the reasons. This is apparent from the context in which the sentence appears. The preceding sentence and the paragraph which follows relates to matters discussed at Part 5.2 of the reasons. After referring to the recommendations of certain studies, the reasons conclude that the respondent is not prepared to declare a project as a significant project "when it is inconsistent with existing planning for development of the APSDA".

[109] Waratah claims that the respondent failed to have any regard to the fact that the proposed Stand Alone Jetty Project was intended to provide for incremental expansion and involved a multi-user terminal. It is not apparent that the respondent failed to do so. The material to which he had regard made clear that the revised IAS proposed a coal terminal that would be scaled and incrementally staged, as did

---

[71] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39.

Waratah's correspondence and answers to specific questions. The reasons certainly did not make any finding that the proposed Stand Alone Jetty Project did not allow for incremental expansion or include a multi-user terminal.

[110] I accept the respondent's submission that, properly understood, his concern was with the need to coordinate strategic planning for the development of Abbot Point, and also that the Waratah proposal was inconsistent with existing planning for the development. So far as the planning process itself was concerned, the concern was that planning for incremental expansion of port capacity, with a preference for multi-user terminals, take place through the facilitator's process. So far as matters of substance were concerned, the Waratah proposal was inconsistent with government plans to site coal stockpiles and other port infrastructure near T1 and the planned T0 to T3 terminals.

[111] I am not persuaded that the respondent disregarded the fact that Waratah's proposal intended to provide for incremental expansion and a multi-user terminal.

The development of port facilities for Waratah and others

[112] Next, Waratah complains that the respondent failed to consider the impact on the Galilee Coal Project if no port facilities were made available. His concerns were that Waratah's proposal was not part of the government's preferred process was inconsistent with government policy about the preferred location of such a coal facility and was inconsistent with development plans for land set aside for high value industrial development, not coal stockpiles.

[113] I leave to one side the question of whether the consequences of the decision was to deprive Waratah of port facilities and whether the availability of port facilities for a particular proponent was a "relevant consideration" in the sense earlier discussed. The process by which additional capacity to export coal was to be developed for Waratah and other parties requiring such capacity was the subject of the government policy. The need to develop capacity to meet the needs of Waratah and other proponents was at the heart of the policy, provided such coal export facilities accorded with other policies for planned development of the State Development Area and the port. The theoretical possibility existed that the Galilee Coal Project and other projects requiring coal exporting facilities would be adversely affected if no new coal facilities were made available. It is not shown that this was a realistic possibility, and the point of the policy appears to have been to plan additional port facilities to meet expected needs, and, at the same time, not to exceed them.

[114] The decision did not preclude Waratah from participating in the process which the government had established by which the facilitator was to assess the plans and needs of industry participants, including, if Waratah wished to advance it, its proposal for a Single Jetty. But if the Single Jetty did not commend itself to the facilitator then Waratah's needs would presumably be taken into account in the facilitator's recommendations and in future government policy for additional port facilities.

[115] The needs of Waratah and others for port facilities was taken into account in a general sense by the decision-maker. The possibility that no port facilities might become available to Waratah (or others) was a background fact and not a "relevant consideration" in the sense referred to in the authorities.

[116] Finally, it should be noted that a declaration that the Stand Alone Jetty Project was a "significant project" did not guarantee that subsequent approvals would be forthcoming for it, especially if granting such approvals conflicted with existing and future government plans for the development of the Abbot Point Special Development Area. Granting the requested declaration gave no guarantee that port facilities would be built and made available to Waratah. It would, however, have subordinated the planning process of which the independent facilitator was part, and which government policy supported, to the statutory force of a declaration under s 26(1)(a). It was open to the respondent to conclude that the process established by the government was a better process for the efficient development of the port and the Abbot Point Special Development Area, so as to meet the needs of Waratah and other proponents.

[117] I conclude that the respondent has not been shown to have failed to address relevant considerations.

Conclusion

[118] Waratah has failed to establish the grounds upon which it seeks a declaration that the decision of the respondent dated 24 August 2012 to reject the application for "significant project" status in respect of the Stand Alone Jetty Project was not a valid exercise of power.

[119] The proceeding is dismissed. I further order that the applicant pay the respondent's costs of and incidental to the proceeding to be assessed on the standard basis.