

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
VALUATION, COMPENSATION & PLANNING LIST

Not Restricted

No. 8132 of 2009

FRIENDS OF MALLACOOTA INC
(ABN 45 982 850 453)

Plaintiff

v

MINISTER OF PLANNING and
MINISTER FOR ENVIRONMENT AND
CLIMATE CHANGE

Defendants

JUDGE: OSBORN J
WHERE HELD: Melbourne
DATE OF HEARING: 10 May 2010
DATE OF JUDGMENT: 27 May 2010
CASE MAY BE CITED AS: Friends of Mallacoota v Minister of Planning and Minister for Environment and Climate Change
MEDIUM NEUTRAL CITATION: [2010] VSC 222

PLANNING – Municipal council requires Ministerial permission and planning permit for replacement of ocean access ramp – *Environment Effects Act 1978* invoked as approvals required could have significant effect on the environment - Minister for Planning required Environmental Effects Statement to be completed - Submissions upon EES were predominantly opposed to construction of a new ramp - Panel appointed to conduct inquiry – Panel recommendations reject new ramp options – Minister did not accept the panel’s principal recommendation and took a different view with respect to safety benefits and disbenefits – No merits review by Court – Minister’s assessment only informs and assists the ultimate statutory decision makers – Whether the Minister’s assessment was an assessment within the meaning of the *Environment Effects Act 1978* – Whether the Minister took into account irrelevant considerations - Statutory definition of ‘environment’ a flexible concept - Environment includes social effects including water safety - Minister did not take irrelevant considerations into account – Whether the plaintiff entitled to a further hearing – No entitlement arising from the plaintiff’s interests – Statutory scheme with respect to hearing – Consequences of plaintiff’s interpretation of the statutory scheme – Procedural fairness in the circumstances of the case - If the validity of the assessment impugned, relief in the nature of *certiorari* potentially available - *Coastal Management Act 1995*, s 38 - *Environment Effects Act 1978*, ss 2, 3, 4, 5, 8, 9, 10 - *Environment Protection Act 1970*, ss 1B, 4,

39(1), 41(1), 48(1) - *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 528 –
Supreme Court (General Civil Procedure) Rules 2005, r 56 - *Planning and Environment Act 1987*.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr R Niall with
Ms E Porter

Environment Defenders
Offices (Vic) Ltd

For the Defendants

Mr G Garde QC with
Mr M Townsend

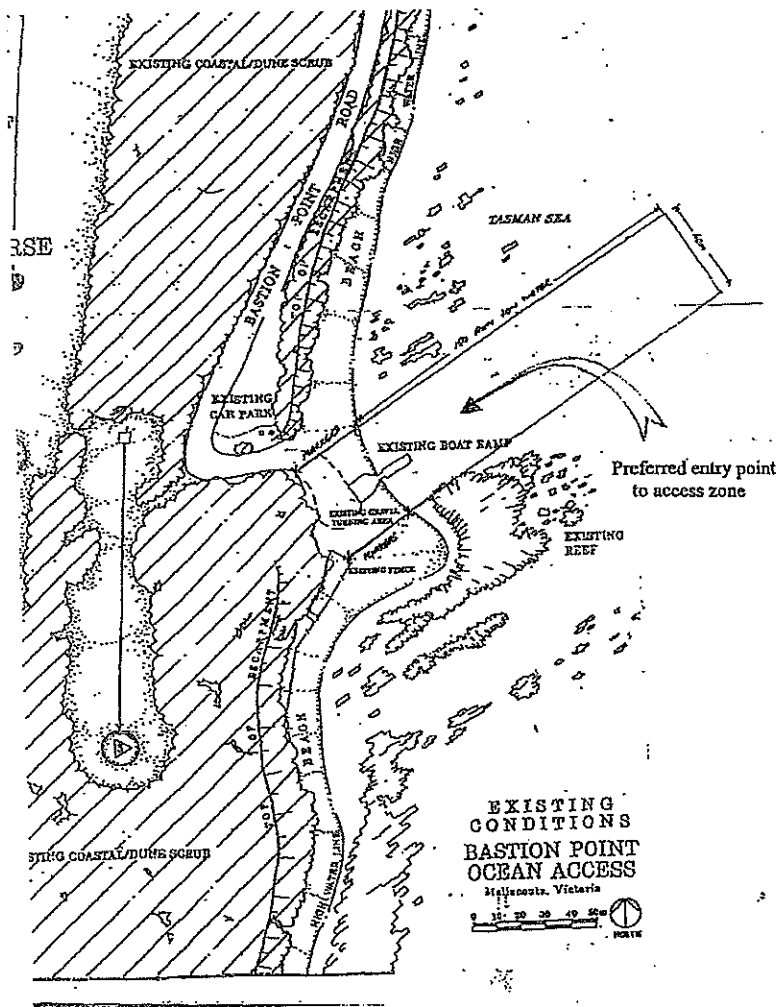
Victorian Government
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HIS HONOUR:

- 1 Mallacoota is a township situated at the mouth of the Mallacoota River in East Gippsland. Bastion Point extends south of the opening to the inlet of the Mallacoota River. An existing boat ramp provides ocean access adjacent to the beach which runs along the initial portion of that point south of the inlet.
- 2 The East Gippsland Shire Council ('the Council') wishes to replace this ramp because it does not provide safe and efficient launching and retrieval of boats under recurrent tidal and other sea conditions. It is estimated the operations of the ramp are adversely affected by these conditions some 75 per cent of the time.
- 3 The existing ramp is used by recreational fishers, commercial abalone divers and fishers, fisheries patrols and those servicing Gabo Island. It is used particularly heavily during the summer and Easter holiday periods.
- 4 The ramp is close to a popular swimming beach which is also heavily used during holiday periods. A ramp access zone some 40 m wide and 150 m in length has been created in the sea in order to separate water users from boat users so far as practicable.
- 5 The existing conditions are as shown on the following map.



- 6 The ramp also lies within a sequence of breaks along the point which are popular with surfers.
- 7 The Council's preferred project would create a new ramp at least 100 m further to the south (at one or other of two breaks in the reef running along the point). It would comprise a two lane boat ramp with a gradient of 1:8 protected by at least one breakwater approximately 130-140 m long and 2.8 m above the Australian

Height Datum. The ramp would be capable of launching craft up to 10 m in length. It would be complemented by upgraded car parking facilities.

8 In order to proceed with the project the Council requires the permission of the second defendant to construct and carry out works on coastal Crown land pursuant to s 38 of the *Coastal Management Act 1995* ('the CM Act').

9 The Council also requires a permit pursuant to the relevant planning scheme under the *Planning and Environment Act 1987* ('the P and E Act') for the removal of native vegetation incidental to the upgrade of the car park.

10 The proposal for a new boat ramp is, and has been, highly controversial. In August 2000 the then Minister for Planning required preparation of an Environment Effects Statement ('EES') in respect of the proposed works pursuant to the provisions of the *Environment Effects Act 1978* ('the EE Act'). I also note that in May 2007 the then Minister 'called in' the planning permit application and in effect took over the role of responsible authority from the Council with respect to the determination of that application.

11 The effect of the initial requirement for an EES was to bring into force s 8(1), (2), and (5) of the EE Act which then provided as follows:

(1) Where any person or body is required by any Act or law to make a decision which could have a significant effect upon the environment the person or body required to make the decision may and shall, if so requested by the Minister responsible for the administration of the Act or law, seek the advice and assistance of the Minister who may give such advice and assistance as he deems fit to enable that decision to be made.

(2) If the Minister advises the person or body that an Environment Effects Statement should be prepared the works shall be deemed to be works to which this Act applies and the works shall not proceed and no decision shall be made until the statement has been prepared and an assessment of the environmental effects of the works has been made and considered by that person or body.

...

(5) The Minister shall provide the assessment as soon as reasonably practicable in the circumstances of the case.

12 This section adopts EES procedures first contemplated by the EE Act as applicable to public works¹ and adapts them to apply to works requiring statutory approval. Public works are defined by the Act to mean works undertaken by or on behalf of the Crown or for public statutory bodies but do not include works undertaken by or on behalf of municipal councils.²

13 The EE Act applies in the first instance to works that are declared to be public works for the purposes of the Act by order of the Minister published in the Government Gazette.³ The Minister must not make such an order unless he or she is satisfied that the works could reasonably be considered to have or be capable of having a significant effect on the environment.⁴ Likewise s 8(1) applies only to decisions which could have a significant effect on the environment.

14 In the present case the EE Act was invoked because the approvals required under the CM Act and the P and E Act could have a significant effect on the environment. The then Minister stated:

In determining the need for assessment of this proposal under the *Environment Effect Act*, I have considered whether another suitable statutory process is available. Since a planning permit is not required for this development, and the *Coastal Management Act 1995* does not provide a suitable alternative assessment process, I have determined that an Environmental Effects Statement (EES) is needed to ensure a rigorous and transparent examination of the issues...⁵

15 The primary mechanism for the assessment of environmental effects which the EE Act adopts is the preparation of an EES which is then assessed by the Minister.

(1) Before commencing any public works to which this Act applies, the proponent must cause an Environment Effects Statement to be prepared and submit it to the Minister for the Minister's assessment of

1 EE Act ss 3 and 4.

2 EE Act s 2 (version incorporating amendments as at 25 May 1999).

3 EE Act s 3(1) (version incorporating amendments as at 25 May 1999).

4 EE Act s 3(2) (version incorporating amendments as at 25 May 1999).

5 Letter from the then Minister for Planning, John Thwaites to EGSC, 17 August 2000.

the environmental effects of the works.

- (2) A copy of the statement shall be submitted to the relevant Minister by the proponent.
- (3) A statement under this Act shall be prepared and submitted at the expense of the proponent of the works.
- (4) The Secretary shall, if requested by a proponent, give such advice and assistance (including technical advice and assistance) as he deems fit to enable a proper preparation of a statement.⁶

16 The Minister may at any time call for a supplementary EES containing such additional information as he considers necessary for the making of his or her assessment.⁷

17 In the present case assessment guidelines for the EES were formulated with the assistance of a committee representing relevant government agencies and following public consultation as to the appropriate issues.

18 The EES was then prepared and public comment was invited upon it. It attracted a large number of submissions including submissions from the plaintiff. The submissions were predominantly opposed to the construction of a new ramp at Bastion Point.

19 In September 2007 a three-person panel was appointed to conduct an inquiry into the environment effects of the proposed works. The panel was chaired by Nick Wimbush and also comprised two other members with relevant expertise. The panel conducted a series of directions hearings and further reports were commissioned by the Department of Sustainability and Environment and the Council. The panel then conducted hearings in July and August 2008 both in Mallacoota and in Melbourne. The plaintiff was represented by counsel at those hearings and made submissions and called expert evidence from a number of witnesses.

⁶ EE Act s 4 (version incorporating amendments as at 25 May 1999).

⁷ EE Act s 5 (version incorporating amendments as at 25 May 1999).

20 The panel recorded that it was confronted with two contrasting visions for the future of Mallacoota.⁸ The first took the view that a new ramp would underpin the promotion of increased recreational fishing, ocean game fishing, and the development of nature-based tourism associated with Gabo Island, whale watching and the marine park. The second took the view that development of a new ramp with breakwater protection would be incompatible with sustainable development, ecotourism, and the existing values of most residents and visitors to Mallacoota who prize the wilderness experience of the surrounding landscape.

21 In October 2008 the panel delivered a written report recommending that each of the options put forward for a new boat ramp be rejected and that the existing ramp be upgraded. The report comprised some 171 pages and contained a detailed analysis of the issues canvassed before the panel and the evidence presented to it.

22 The executive summary of the panel's conclusions states:

1. Executive summary

The Mallacoota Ocean Access Boat Ramp is proposed at Bastion Point, approximately 1.5 km south of Mallacoota in East Gippsland and 520 km east of Melbourne. In 2000 the Minister for Planning determined that an Environment Effects Statement was required to provide a framework for considering potential impacts of the proposal. A planning permit application for removing native vegetation associated with the project was called in by the Minister for Planning.

An existing boat ramp at Bastion Point is approximately 40 years old and is used by recreational fishers, commercial Abalone divers and fishers and for other uses such as fisheries patrols and servicing Gabo Island. The ramp is intensively used during the summer and Easter holiday periods by recreational fishermen.

The existing ramp has a number of issues related to traffic and parking, ramp slope, ramp width, general ramp condition and weather protection. According to estimates it is currently usable for about 25% of the time.

Ocean access via the Mallacoota Inlet mouth occurs at times but this is reliant on the inlet mouth being open and can be a hazardous transit due to inlet and sea conditions.

⁸ Ocean Access Boat Ramp, Bastion Point, Mallacoota, Environmental Effects Statement East Gippsland Planning Scheme, Permit Application 162/2007/P Panel Report, (October 2008) ('Panel Report'), 67.

The debate regarding improved ocean access at Mallacoota has been under way since at least the 1980s, and possibly longer. It is a divisive issue that has caused considerable angst at times in town between those who support larger development proposals at Bastion Point and those who would prefer a minimal upgrade of the current ramp or no change at all.

The East Gippsland Shire Council is the proponent for the proposals in the EES. The exhibited options in the EES included; an upgraded ramp with breakwaters at the current ramp site; a new ramp about 100 m further south with one breakwater, and a new ramp about 150 m south of the existing ramp with one breakwater. Following exhibition of the EES, further options were presented to move the access roads to the new ramp proposals from the top of the embankment down on to the beach front to reduce impacts on vegetation and Aboriginal heritage.

The Council's preferred option is a new ramp at the Option 3 site, 150 m south of the existing ramp.

As a result of the exhibition of the EES, 482 submissions were received, with 87% objecting to the new ramp proposals and/or supporting an upgrade of the current ramp. As a result of exhibition of later options, a further 75 submissions were received (supplementary submissions from some of the original submitters).

The major issues raised in submissions (not necessarily in order of significance) were:

- Aboriginal heritage;
- Landscape values;
- Character and amenity;
- Coastal processes;
- Social impacts;
- Economic issues;
- Recreational use;
- Safety (relating to the current ramp and new proposals);
- Native vegetation removal; and
- Policy support for proposals.

The Panel appointed by the Minister for Planning sat for 14 days in Mallacoota and Melbourne and heard from approximately 70 submitters and a large number of expert witnesses.

The Panel has considered all the material put before it and assessed it against the evaluation objectives in the Assessment Guidelines developed for the EES.

On these issues the Panel concludes as follows.

Policy framework

The Panel does not consider the policy framework is as supportive of the development proposals as put in the Hearing by the Proponent. The Panel considers that the key, relevant parts of the policies stress boating safety (including not providing facilities where inexperienced people may get into difficulty) and environmental sustainability.

Safety and efficiency

The new ramp proposals would provide a better facility at the actual launch and retrieval point but the Panel has serious concerns in relation to the safety of all the new proposals in relation to facility entry and exit.

Coastal processes

The Panel considers there is unlikely to be significant impacts on Mallacoota Inlet but the Panel has serious concerns in relation to sediment movement affecting the safety and usability of the Option 3 proposals.

Marine Ecology

The Panel considers that impacts on marine ecology could be managed during project development.

Character and amenity

The Panel considers that the impact of the breakwaters in the new proposals will have considerable impact on the wilderness and landscape values of Bastion Point and an overall net detriment to tourism.

The social impacts in Mallacoota are dependent on which option is chosen and whichever group feels disaffected is likely to experience ongoing social impact.

Cultural heritage

The Panel has concluded that the 'beach road' options will significantly reduce impacts on Aboriginal sites but that impacts on other cultural heritage values (such as Aboriginal 'sense of place') will remain.

Terrestrial ecology

Vegetation removal for the beach road options is significantly less than for the cliff top road options and could be managed within the Native Vegetation Management Framework.

Economic impacts

The economic case for the project is very weak and likely to have a benefit cost ratio well below 1. There are a number of significant remaining

uncertainties in the assumptions that further undermine the economic case.

On the issue of overall societal benefit, the Panel has concluded that the case for the development options is not strong. Weighing up all the different issues and considerations for ocean access at Mallacoota, the Panel has concluded that on balance the development proposals should not proceed. This is not a case where National, State or regional imperatives demand that the proposal proceed for the greater good of the community. This is a local issue where the balance and weighting is much finer and the Panel concludes that refinement and improvement of the existing boat ramp at Bastion Point provides a much better environmental, economic and social outcome.

The Panel recommends:

The environment effects of Options 1, 2 and 3 as exhibited, Options 3a and 3b, and Option LS1 are such that there is no overall societal benefit in progressing these options further and they should be discarded.

The Panel considers that 'Do nothing' is not an acceptable option and, within its terms of reference, has suggested that an upgrade of the existing ramp and parking be undertaken, and it has provided a suggested scope for such works.⁹

23 In June 2009 the first defendant ('the Minister') completed an assessment of the proposal and concluded in part as follows:

The overarching evaluation objective adopted here (viz. "To provide a clear overall societal benefit, taking into account economic impacts, social outcomes and residual environment impacts") encapsulates relevant legislative and policy considerations, including the objectives of the two Acts above¹⁰ and the specific issues captured by the preceding evaluation objectives.

In this context it is my assessment that:

- All of the OABR options considered by the Inquiry Panel would have degrees of environmental effects and these have been documented by the Inquiry Panel.
- Mallacoota is an existing town on the Victorian coast that supports a mix of recreational and other marine uses and has been identified in the Victorian Coastal Strategy 2008 as a regional boating destination. In this respect Mallacoota is like other similar towns along the Victorian coast that provide a range of coastal infrastructure and other services that support overall community use and enjoyment of the coast.
- Current safety concerns that have been identified during the Inquiry process are such that 'do nothing' is not an option.

⁹ Panel Report, 1-4.

¹⁰ Which refers to the CM Act and the P and E Act.

- Investment in a new facility would provide a practical solution to the long term issues of swimmers and boating in close proximity by allowing deliberate separation of incompatible uses for the long term.
- All options considered do present their own challenges in terms of boater use of any facilities. The risks associated with boaters of differing levels of competence and experience using facilities that provide access to open ocean conditions, that are often very changeable, will require implementation of effective management arrangements to mitigate risks to boaters from their own behaviour.
- Of the options considered, option 3B, including an access provided along the base of the headland, via the existing access track leading off an expanded existing car park is preferable in terms of minimising overall impact.
- Accordingly, should any new ramp be provided, it will be essential for a full safety audit to be conducted to inform detailed design, including the potential provision of user operational guidelines and associated search and rescue capacity. Marine Safety Victoria should take a lead role in that detailed assessment.
- Should EGSC, as the proponent, seek to implement a new OABR, EGSC should develop construction design in consultation with MSV and DSE, AAV and Gippsland Ports with the objective of establishing a breakwater design that is as visually unobtrusive as possible, considers and includes specific provisions to be identified by MSV in relation to design and operational safety considerations, advice from DSE in relation to car park design, native vegetation offsets, management of car park runoff, waste treatment, traffic management between pedestrians and vehicles and design for climate change, and consultation with AAV in relation to cultural heritage.¹¹

24 In turn the Minister did not accept the panel's principal recommendation.

Inquiry recommendation

The environment effects of Options 1, 2 and 3 as exhibited, Options 3a and 3b, and Option LS1 are such that there is no overall societal benefit in progressing these options further and they should be discarded.

Minister's response

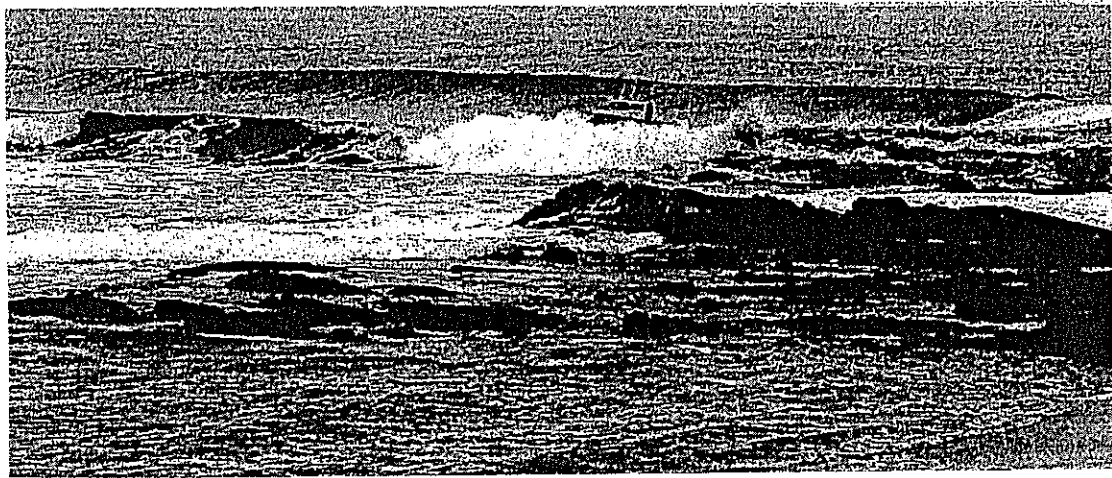
It is my assessment that the above recommendation fails to consider the issue of inherent risks associated with swimmers and other beach users in close proximity to boating traffic near the current launch ramp location and that to do nothing is not an acceptable long term option. It is my assessment that insufficient weight was placed on the advice from the relevant local port

¹¹ Victorian Minister for Planning *Bastion Point Ocean Access Boat Ramp Assessment under Environment Effects Act 1978* (June 2009) ('The Assessment'), 10-11.

manager in relation to the current risks of boaters and other water users.¹²

25 The terms of this response are somewhat surprising given that it is plain that the panel did very carefully consider the separation risk to which the Minister refers,¹³ and that it specifically found that to do nothing is not an acceptable long term option, and specifically referred to the advice the panel received from Gippsland Ports.¹⁴ It addressed both ramp operations and waterway hazards.¹⁵

26 In its view the benefits to be derived from separating a new ramp from the beach were outweighed by the safety hazards inherent in the proposal to direct boats in and out of a relatively narrow channel between the proposed breakwater and the reef at an angle parallel with potentially dangerous swell. It regarded this proposal as constituting a death trap. The scenario which concerned the panel was repeatedly described in submission and evidence before it. It is illustrated by a photograph taken by R M Perry, retired Harbour Master for the Ports of Melbourne, Port Phillip and all ports eastward to Mallacoota, illustrating sea conditions at the entry point to the proposed facility and the conditions in which craft entering it would have to make a very sharp left turn across the direction of the swell.



16

¹² Ibid, 12.

¹³ Panel Report, 32-41.

¹⁴ Ibid, 33-4.

¹⁵ Ibid, 43-50.

¹⁶ Letter from Mr R M Perry (Retired Director of Ports and Harbors) to the Honourable Justin Madden, Minister for Planning (18 September 2008).

27 The panel was assisted by a wide range of submissions from individuals with extensive experience of local conditions relating to the risks boats would face when exiting the new facility.

Many submitters described the expected safety hazard of boats exiting from the proposed facility by having to turn immediately after exiting into moderate to large swells and possibly into breaking waves. The submitters claimed that, if this manoeuvre is not made well, the boat would be side on to the swell and could be swamped throwing the operator and passengers into the sea.

A large proportion of these submissions were from experienced fishermen or from people whose jobs are closely associated with the conditions around Bastion Point. For example in Hearing Submission 32, Mr Symes who has worked as Light Station Caretaker on nearby Gabo Island and accessed the Island by boat from Bastion Point in many varied sea conditions, said that '...the 2.4 metre high breakwall will prevent visibility on the ocean beyond the breakwall. Exiting in any swell is going to be damn right dangerous, departing a harbour broadside to oncoming waves blindfolded by a manmade rock barrier – what a frightful prospect'.

Describing the concept of a minor upgrade to the existing ramp, Mr Symes said that the natural rock formations dissipate the swells but still allow good visibility which is imperative to be able to observe and calculate until you are safely beyond the break.

Mr Les Mason (Submission 354) stated with respect to it being '...dangerous for boat operators entering and exiting the entrance of the boat harbour' that this was the strongest point made by him and the Mallacoota Surf Riders during their discussions with EGSC and its consultants, including the designer of the 3 Options.

Mr Bruce Pascoe (Submission 79) who has worked on professional fishing boats, fishes around Gabo Island and uses the existing boat ramp said, 'I believe, along with many professional boat users in Mallacoota, that it is a recipe for disaster to encourage amateur boatmen to exit a ramp facility blind to the oncoming sea. An inexperienced sailor will panic when entering the sea broadside to oncoming waves which he hasn't been able to assess'.

The Mallacoota Surf Life Saving Club (Submission 84) made the point that, even at the existing ramp where visibility of the oncoming swells is good, that boating accidents have occurred at the present site as a result of boats capsizing due to waves when entering and leaving the harbour. The submission comments that the Option 3 boat ramp would not have changed this potentially fatal situation as the exit to the harbour would still be inside the surf zone. In fact it would be potentially far more dangerous as the boat operator would have no ability to wait for any lulls in the (swell) sets.

Mr John Frazer (Submission 421) who drove the tractor launching boats at

Bastion Point for seven years said that boaters leaving the 'safety' of the (proposed) ramp will be unable to see over the 2.8 m wall to judge the swell which stands up at Broken Board (the area of surf immediately outside the facility).¹⁷

28 Similar submissions were made in relation to the risks on entry into the proposed facility.

Mr Allan, with professional fishing experience and long local knowledge working from the Bastion Point boat ramp in the Abalone industry, commented that entry to the proposed development will be more dangerous. He said that the entry being 20 m wide, however clearly marked, will be difficult to find in strong winds or heavy swell. It will be necessary to execute a 90 degree turn across the prevailing swell direction – a dangerous manoeuvre, especially for those who do not have the knowledge and experience of professional fishermen.

Mr Perry, Harbour Master for the Ports of Melbourne, Port Phillip and all ports eastward to Mallacoota until 1988 (HS 107), made the point that there can be serious risk to small craft from breaking seas outside the end of the proposed breakwater. He said that inward bound craft will probably need to be at speed to outrun breaking waves (or out of habit) and will then turn hard left in a most hazardous situation in order to enter a narrow 20 metre wide rock and reef channel. Until the last moment they will be unable to see a craft outward bound or craft awaiting retrieval, if there was congestion. Further he noted that any disabled craft and crew are likely to be thrown onto the rocks. Mr Perry provided a photograph of an experienced skipper waiting outside the line of the swells (he estimated 2-3 m) to pick the best time to come in, saying that sometimes 10 to 15 minutes will be spent doing this.

Mr Watts (Submission 50) said that the existing ramp allows boats in trouble to end up on the beach whereas at the proposed new facility boats in trouble would end up on the rocks.¹⁸

29 The panel concluded:

The overwhelming weight of information provided to the Panel was the high likelihood of a boat capsizing due to impact of side-on, moderate to large swells when exiting Option 3 and that the consequences for the operator and passengers thrown out of the boat, such as drowning, could be either major or catastrophic.

Similar to the situation of boats exiting Option 3, the overwhelming weight of information provided to the Panel is the high likelihood of a boat capsizing due to the impact of side-on moderate to large swells when entering the proposed facility. This capsizing could result in the boat hitting the breakwater or the rocks on the other side of the channel causing passengers to

¹⁷ Panel Report, 35-6.

¹⁸ Panel Report, 37-8.

be thrown out of the boat with catastrophic consequences.

A further hazard is the possibility of a returning boat misjudging its entry into the 20 metre wide slot of the proposed boat ramp, and striking the intertidal reef. At the existing boat ramp, there can be also be a sand bar but boats have more room to manoeuvre to avoid it.

As discussed further in Chapter 5, a bar may also form across the entrance to the channel of the new facility, making sea conditions more unpredictable and navigation more difficult.

The Panel believes that the hazard of boats entering and leaving the ramp area protected by the breakwater at Option 3 must be rated as A5 (Extreme). The Panel has little doubt that the risks to inexperienced users in difficult sea conditions would indeed be at the upper level of Extreme. The Panel considers that this particular hazard is one of the two that differentiate the existing ramp from Option 3 by introducing a level of risk that is unacceptable.

...

The overwhelming weight of information received during the Panel is that the Option 3 is likely to lead to more inexperienced boat operators putting to sea in unsuitable conditions. They may be lulled into a false sense of security behind the breakwater and then experience the frequent moderate to high winds and confused seas experienced particularly in this part of the ocean, leading to catastrophic loss of life from drowning. This is particularly so given that there are unsuitable rescue boats available for this type of ocean rescue at Mallacoota.

While the same consequence is present for boat operators and their passengers putting to sea from the existing facility, there is a much greater opportunity for the boat operator to observe the state of the ocean from the unimpeded view from the launch site (the beach). In addition, the Panel believes that the difficulty of launching from the existing ramp in moderate to rough seas dissuades many inexperienced boat operators from using the ramp. No reported drownings from boats using the existing ramp were brought to the Panel's attention. For these reasons, the Panel considers that the level of risk reported by Pryor Knowledge¹⁹ resulting from use of the Existing ramp is overstated (Extreme (C5)), and the Panel assigns a rating of Extreme (D5). The Panel considers that the level of risk reported for Option 3 is considerably understated, and the Panel assigns a rating of Extreme (B5).

Overall, the Panel believes the risk of catastrophic accidents in the open ocean would be significantly increased if Option 3 was implemented. This is the second area where the Panel has differed in its assessment of risk to the assessment provided by Pryor Knowledge, and where the Panel believes that

¹⁹ Pryor Knowledge were independent consultants who conducted a detailed risk analysis by reference to a tabulated matrix.

Option 3 introduces an unacceptable risk.²⁰

30 On the other hand it expressly acknowledged current problems:

Hazards to swimmers and surfers at the existing ramp entail both the area where boats are launched, and the route that they take to access open water. Credible information was provided to the Panel that there have been some incidents and near misses. On the other hand, there is little systematic record available as to the number of incidents or the consequences. To try to overcome this safety risk the Special Use Zone to separate boats from swimmers and surfers was introduced. This may have the potential to reduce the number of incidents but in the absence of a management regime to oversee its implementation, the risk would not appear to be greatly reduced. While Pryor Knowledge has assessed these risks as Extreme (A3), the Panel is concerned that the potential consequences could involve brain injury or death, making the assessment Extreme (A4). Again the accident history over 40 years suggests that while there is the potential for serious accidents, they have not actually eventuated, indicating that a rating of High (D4) would better accord with the historical data for this hazard.

Option 3 will separate swimmers from boats and the likelihood of boats hitting swimmers is unlikely. However the possibility of hitting surfers while making the right hand turn at the exit exists. With regard to Option 3, the Panel notes the rating given by Pryor Knowledge – Medium (D3) for swimmers, High (B3) for surfers.

The Panel has some concern that the likely severity of injury is only rated at 3 by Pryor Knowledge, when a collision between a boat and a swimmer or surfer could well result in major brain damage or death. However Pryor Knowledge has been consistent in applying a Consequence level of 3 to injuries to swimmers and surfers at both the existing ramp and Option 3. In view of this (and the fact that increasing the Consequence level would not further differentiate the options), the Panel has not departed from the rating provided by Pryor Knowledge.

Overall the risk to swimmers is improved by the separation at the ramp for Option 3 to Medium (D3), while the risk to surfers remains High (B3).²¹

31 The panel's conclusions thus weighed safety benefits against disbenefits.

The Panel finds that while the advantages for safety arising from Option 3 are considerable, they are more than offset by the unacceptable risks introduced by Option 3. These unacceptable risks are firstly to boats entering and leaving the ramp in a confined space bounded by the intertidal reef on one side and the breakwater on the other, in the presence of breaking waves side on to the direction of travel of the boat; and secondly through Option 3 being attractive to inexperienced boaters and leading them to put to sea in conditions that are, or may become,

²⁰ Panel Report, 46-8.

²¹ Panel Report, 46-7.

dangerous.²²

32 There is nothing in the material before the Court which supports the view that the panel's assessment was other than a careful, fair and balanced evaluation of all the material before it. The panel's report accorded with the weight of the evidence presented to it and identified a serious risk to public safety as determinative of its conclusions. This said, it is plain that the panel accepted it was ultimately confronted with safety considerations which counted both for and against the proposed works.

33 In essence the Minister's assessment took a different view of the balance potentially achievable by the proposal with respect to safety benefits and disbenefits. He did so after considering the EES, the submissions received and the panel's report. He also undertook a view of Bastion Point and consulted with the local port authority.

34 It is not this Court's task to review the merits of the Minister's assessment. More particularly it is not open to the Court to review the weight of the evidence favouring the panel's opinion on the one hand and the Minister's assessment on the other.

35 The plaintiff however challenges the validity of the Minister's assessment at law. It contends that:

- (a) the Minister failed to exercise the jurisdiction conferred by the EE Act in that he purported to consider the merits of and approve the undertaking of works, rather than assessing the environmental effects of the proposed works ('the approval argument');
- (b) the Minister took into account irrelevant considerations in making his assessment and in particular:
 - the safety of water users including swimmers and boat users;

²² Panel Report, 50. Emphasis as in original.

- the need to separate swimmers and users of boats;
- commercial considerations including those relating to tourism;

(‘the irrelevant considerations argument’); and

- (c) the Minister denied the plaintiff procedural fairness by making an assessment departing from the recommendations of the panel without first giving the plaintiff the opportunity to be further heard in respect of his intention to do so (‘the procedural fairness argument’).

The approval argument

36 It is submitted in effect that the Minister’s task in making an assessment is ‘... to verify, instruct yourself or inform curiosity, or carry report’.²³ It is submitted that it is not the Minister’s function under the EE Act to approve or reject the proposal.

37 I do not accept that the Minister’s written assessment purports to be a final or effective approval of the proposed works.

38 It is entitled ‘Assessment’ and is divided into two parts. The first is headed ‘Integrated Assessment’. After setting out background matters and recording consideration of the panel’s report, together with the viewing of the site and its surrounds by the Minister prior to making his assessment, it goes on to state:

My assessment following consideration of the Inquiry Report and from my inspection of the site is that ‘do nothing’ is not an option and that a new boat ramp is required that provides, to the extent possible, for mitigation of risks. My conclusion from observing the existing site is that physical separation of swimmers and other beach users from the process of boat launching and retrieval represents a long term solution to mitigating risk. Any contemporary new facility would need to be designed consistent with a full safety audit and in accordance with relevant design standards and considerations. Operational requirements, commensurate with the conditions and practical marine risks that are present in any open ocean launching and retrieval, may need to be established by Marine Safety Victoria and

²³ TS Elliot *Little Gidding* (1942).

39 The assessment then assesses the proposal against a series of objectives:

1.2 Inquiry Panel Evaluation Objectives

The Inquiry Panel adopted a framework for its assessment based on the set of "evaluation objectives" included in the Assessment Guidelines that were issued to guide preparation of the EES. These objectives, with some simplifications and refinement, provide an appropriate framework to provide an integrated assessment of the OABR proposal and the likely impacts of different options considered. These objectives reflect relevant considerations under the legislation and related policy to which the project is subject, in particular (see Table 1):

- *Coastal Management Act 1995* (CM Act) and the Victorian Coastal Strategy and relevant Coastal Action Plans
- *Environment Protection Act 1970* (EP Act) and the State Environment Protection Policy (Waters of Victoria)
- *Planning and Environment Act 1987* (PE Act) and the East Gippsland Planning Scheme
- *Flora and Fauna Guarantee Act 1988* (FFG Act) and Victoria's Biodiversity Strategy
- *Aboriginal Heritage Act 2006* (AH Act).

The objectives also reflect the principles and objectives of ecologically sustainable development, as a relevant consideration required under the 2006 *Ministerial Guidelines for Assessment of Environmental Effects under the Environment Effects Act 1978*.

Table 1: Evaluation Objectives and Legislative Sources

Evaluation Objective	Key legislation
1. To provide efficient, safe infrastructure for the launching and retrieval of commercial and recreational boats under all tides at Mallacoota	CM Act PE Act Marine Act 1988
2. To avoid significant interference with coastal processes related to local patterns of sediment movement	CM Act
3. To avoid significant adverse impacts on marine ecology and water quality during	CM Act EP Act

²⁴ The Assessment, 3.

both project construction and operations	PE Act
4. To avoid significant adverse ecological impacts on native vegetation and habitats of terrestrial fauna or flora and ensure suitable offsets are available	PE Act
5. To minimise detrimental impacts on the character and amenity of Bastion Point, including its attractiveness for recreation, education and tourism	CM Act PE Act
6. To avoid to the maximum extent practicable, adverse impacts on Aboriginal and post-settlement cultural heritage	AH Act
7. To provide a clear overall societal benefit, taking into account economic impacts, social outcomes and residual environmental impacts	CM Act PE Act

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In my view (whatever be its merits) the assessment undertaken by the Minister was just that, namely an assessment of the evidence available with respect to the potential environmental effects of the proposed works. The assessment by reference to objectives commenced as follows:

1.2 Assessment Response to Evaluation Objectives

I now provide my findings in the context of the evaluation objectives introduced above, before turning to respond to the latter's recommendations.

Objective 1: To provide efficient, safe infrastructure for the launching and retrieval of commercial and recreational boats under all tides at Mallacoota

This objective reflects the basis purpose of the OABR project. The efficiency and safety of the infrastructure options during different seasons and weather conditions need to be taken into account for both commercial and recreational users boating users, and other beach and water users. In terms of prospective commercial users, the needs of abalone and other commercial fishers as well as tourism operators warrant consideration. Efficiency encompasses both functional and cost aspects, while the safety of both users and other parties needs to be considered. I note the advice provided to the Inquiry by the East Gippsland Shire Council, which is the Committee of Management for the foreshore, that concerns with current operational risks at the existing

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The Assessment, 3-4.

launching ramp may necessitate its closure.

It is clear from the EES and the Inquiry Report that safety is a significant overall consideration in assessing alternatives. I have seen the ramp in operation and concur with the general observations made to the inquiry by a number of parties on this issue. I note particularly the advice of Gippsland Ports, who are responsible for management of marine issues in the special use zone identified around the existing launch ramp site, that past practices to minimise interaction between boat traffic and other water users has not been successful and that a preferable outcome would be to increase the physical separation between conflicting user groups to minimise long term risks of recreational water users and boats impacting each other. This advice matches my observations.

Practical operating safety is a serious issue that has received considerable attention in both submission and by the Inquiry Panel and in this context it is disappointing to note that a comprehensive safety audit of both the current ramp and future options was not effectively undertaken to inform the process and the Inquiry. In this respect I note that whilst a written submission was made by Marine Safety Victoria that raised relevant design considerations, neither Marine Safety Victoria nor Gippsland Ports appeared at the Inquiry to expand upon their written submissions.

In this context, and having regard to the Inquiry Panel's report, it is my assessment that:

- All proposed options for a new boat ramp with breakwaters would significantly enhance the functional efficiency of boat launch and retrieval activities, as well as the safety of boats within the area enclosed by the breakwater structures. The combination of a dual lane boat ramp together with a formed road and increased parking capacity would increase the efficiency of the movement of vehicles and parking, particularly at peak times over the Christmas-New Year period, and would enable improved pedestrian and vehicular management to be implemented.*
- The options for a new boat ramp at a new location at Bastion Point is likely to raise operational safety considerations that will need to be addressed potentially including overall safety of boat users transiting the area enclosed by the breakwater structures either to or from open water, because of the hazards respectively associated with: (a) exiting boats encountering waves side on in a situation of constrained visibility because of the breakwater walls themselves; and (b) timing the movement of returning boats to access the safety of the breakwaters.*
- The greatest increase in risk exposure would occur for inexperienced recreational boat users who might be encouraged to utilise the new facility because of its apparent safety, but who lack the level of local knowledge and boat-handling skill acquired by local commercial users. Accordingly operational conditions may need to be established to manage the practical use of any new ramp, and these conditions may need to vary with prevailing conditions.*
- A comprehensive safety and risk audit should be undertaken by Marine Safety Victoria to inform detailed design of any open ocean access ramp option,*

including associated search and rescue capacity and requirements.

- *Surfers are unlikely to be exposed to any increase in risk as the likely practical impact of construction of a breakwater at the sites considered is likely to physically prevent surfing in the immediate vicinity of the breakwater.*

I note that the Victorian Coastal Strategy 2008 (VCS) prepared under the CM Act establishes an overall framework for planning and management of the coast and this strategy identifies Mallacoota as a Regional Boating Facility. In relation to future investment in boating facilities, the strategy requires that safety considerations be addressed along with visual, cultural, coastal processes and other considerations. *Having regard to these policy statements, as well as the identification of risks through the inquiry, it is my assessment that priority be given to minimise risk to swimmers and to boat users through physical separation of activities in the first instance.* Secondly, the appropriate design of any infrastructure and the establishment and enforcement of appropriate operating conditions including safety services and equipment, should be commensurate with assessments undertaken by Marine Safety Victoria.²⁶

41 Likewise the assessment of each of the subsequent objectives is both expressed as an assessment and in fact constitutes an assessment.

42 I have already quoted above the ultimate assessment of the Minister with respect to the overarching objective 7. That assessment is followed by the statement:

This assessment will be made available to decision makers under Victorian law, in particular the Minister for Environment and Climate Change, who must consider this assessment before deciding whether to allow the proposal to proceed under the CM Act.²⁷

43 This statement expressly acknowledges the fact that the assessment does no more than inform and seek to assist the ultimate statutory decision makers.

44 The second part of the assessment document responds to the panel's recommendations. I have again already set out the response to the panel's principal recommendation. The response to each recommendation takes the form of an assessment. It is explicitly expressed as an assessment and comprises an opinion which responds directly to the inquiry's recommendations.

45 When the assessment document is read as a whole it is thus properly characterisable

²⁶ The Assessment, 4-6. Emphasis added.

²⁷ The Assessment, 12.

as an assessment.

46 Ultimately the word 'assessment' is an ordinary English word. It is a question of fact for the Minister to determine in each case what such an assessment should comprise. This Court could only interfere with the Minister's judgment in this regard if it were not open to regard the purported assessment as an assessment as a matter of fact.²⁸ This is not such a case.

47 The plaintiff also relies on the terms of a letter concerning the assessment sent by the Minister on 10 June 2009 to the Executive Director of Aboriginal Affairs Victoria:

[Formal parts omitted]

I am pleased to provide you with my Assessment of the Bastion Point Ocean Access Boat Ramp under the *Environment Effects Act 1978*.

My Assessment notes the recommendations of the Inquiry Panel that I appointed under both the *Environment Effects Act 1978* and the *Planning and Environment Act 1987* to respectively consider the exhibited Environment Effects Statement and Planning Permit Application for the project, together with public submissions.

My assessment is that a 'do nothing' option is not a viable long term solution to this complex and controversial local issue. After observing the existing site earlier this year it seems clear the physical separation of swimmers and other beach users from the process of boat launching and retrieval represents the only long term solution to mitigating risk. Any contemporary new facility would need to be designed consistent with a full safety audit and in accordance with relevant design standards and considerations.

As a result of my decision I have asked the East Gippsland Shire Council to work directly with Aboriginal Affairs Victoria given the likely impacts of my decision for Aboriginal cultural values. I have also requested Marine Safety Victoria, the Department of Sustainability and Environment, and Gippsland Ports develop actual construction proposals generally in accordance with what was presented to the Inquiry Panel as option 3b.²⁹

48 The letter enclosed the assessment itself. Once again I do not accept that this letter evidences a decision other than by way of assessment. Its terms do not transform the character of the assessment document itself.

²⁸ Cf *Franceschini v Melbourne & Metropolitan Board of Works* (1980) 57 LGRA 284, 289-90.

²⁹ Letter from Justin Madden MLC Minister for Planning to Mr Ian Hamm, Executive Director Aboriginal Affairs Australia, 10 June 2009.

49 The plaintiff next points to a media release dated 11 June 2009 from the Minister which states:

SAFETY FIRST FOR NEW BASTION POINT BOAT RAMP

Thursday, 11 June 2009

Planning Minister Justin Madden today released his assessment of the Panel Report into an ocean access boat ramp at Bastion Point, Mallacoota, which will allow council to design and construct a breakwater and boat ramp.

Mr Madden said the Brumby Labor Government was taking action to support delivery [of] necessary infrastructure required for safe commercial, fishing and recreational boating needs.

"After an extensive Environmental Effects Study (EES), which included public hearings, I have disagreed with the panel report and conclude that doing nothing or a minor upgrade at the existing site would only increase the risk of swimmers and beach users sharing the ocean where boat launching occurs," Mr Madden said.

"There is currently a dangerous mix of swimmers, beach users and boating traffic in a confined area of water at the boat ramp location and this is not acceptable.

"Therefore I have approved the option presented to the panel which best minimises the problem of swimmers and boat users in the same space and provides the necessary approvals for further work on the more detailed design and construction."

The East Gippsland Shire will now work with the Department of Sustainability and Environment, Marine Safety Victoria, Aboriginal Affairs Victoria and Gippsland Ports to develop a more detailed design.

Mr Madden said boat access to the ocean was an important requirement for Mallacoota given the emerging growth in marine tourism, the existing commercial fishery and increasing recreational boating demands.

Any contemporary new facility requested by the East Gippsland Shire Council, would need to be designed consistent with a full safety audit conducted by Marine Safety Victoria, and in accordance with relevant Australian design standards.

"Striking the right balance between the needs of beach users and boat access is important," he said.

The existing car park will also be expanded giving access to the beach via the existing access track, creating additional access along the base of the headland and creation of a new two-lane ramp protected by a breakwater where boats can launch into a naturally occurring fissure in the rock platform.

Mr Madden said the design must include provision for sand bypass, safety and management arrangements and enhancement of car parking and

pedestrian safety considerations.

Consent of the Minister for Environment and Climate Change is also required for any works on Coastal Crown Land.

The Inquiry Panel report will be published at www.dpcd.vic.gov.au/planning³⁰

50 I accept that the first sentence of the media release misstates the nature of the required assessment under the statutory scheme. In particular it refers to the assessment of the panel report and not to the assessment of the environmental effects of the proposal. Nevertheless this misstatement does not change the underlying character of the assessment when it is read properly and as a whole. In part the assessment did respond to the panel's recommendations and in this sense assesses the panel's report, but in fact it did more than this. The response to the panel's recommendations is part only of the assessment of the environmental effects.

51 The further statement that the Minister has 'approved' a particular option, is also to be understood in the context of the explicit recognition of the need for more detailed design work to be undertaken and for the consent of the Minister for Environment and Climate Change to be obtained.

52 In my view the terms of the assessment itself are the best evidence of its character.³¹ As I have said these terms evidence an assessment and do not evidence a purported final approval. The content of the assessment comprises matters which it was open to the Minister to consider were appropriate.

53 The plaintiff submits:

As a consequence of the Minister misconstruing his statutory function under the Act, the Purported Assessment contains virtually no information as to the environmental effects of the works. Indeed, the Purported Assessment defers to the environmental effects 'documented by the Inquiry Panel' in the Panel

³⁰ Victorian Minister for Planning Department, *Safety First for New Bastion Point Boat Ramp* Media release (11 June 2009) Premier of Victoria, <http://www.premier.vic.gov.au/component/content/article/7195.html>.

³¹ The contents of media releases must be treated with caution: see *East Melbourne Group Inc v Minister for Planning* (2008) 166 LGERA 1, 71 [276] per Ashley and Redlich JJA.

report, although the Minister had rejected the recommendation of that Panel. The Purported Assessment therefore fails to fulfil its statutory purpose, in that it does not provide environmental information for the ultimate decision-makers in order to inform their decision making processes.

The reader is left uninformed about the precise environmental impacts that the works might have. To the extent that the Minister has expressed his view about the desirability of the project being undertaken (and what form the development should take) it distracts the reader from understanding the environmental impacts. Even where environmental issues are discussed squarely (as in the Minister's discussion on objectives 3 and 4 on pp. 7-8), the articulation of the environmental impacts is obscured by the conclusion that the effects are not such as to preclude development of the boat ramp.³²

54 There is nothing in my view prohibiting a Minister from accepting either parts of an EES or parts of the report of a panel as accurately identifying relevant environmental impacts. It was open to the Minister as part of his assessment to express his conclusions by reference to and partial adoption of the panel report. Likewise there is nothing inherent in the notion of 'assessment' as such, which precludes the Minister from expressing a view as to the ultimate significance in relative terms of particular environmental impacts. There is also nothing in the EE Act which suggests the Minister's assessment of the environmental effects of works (whether public works or works the subject of a s 8 requirement) should be confined and not address the question of the significance of particular environmental impacts. Sections 3(2) and 8(1) tend rather to support the view that it is entirely proper for the Minister to do so. Section 3(2) of the EE Act requires the Minister to form a view as to whether works could reasonably be considered to have or be capable of having a significant effect on the environment when considering whether the EE Act should be applied to public works. Section 8(1) also requires an initial assessment of significance.

55 The purpose of the assessment is to assist the ultimate decision maker. There is nothing in that function which suggests that the Minister's assessment cannot assess facts of the type identified and evaluated by the panel within a framework of

³² Outline of submissions on behalf of the Plaintiff.

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considerations such as those adopted by the panel. It will be for the ultimate decision maker to decide whether the basis disclosed for the opinion contained in the assessment should be accepted. It follows that the first ground of attack upon the assessment fails.

Environmental effects – the irrelevant considerations argument

56 The plaintiff submits that the assessment of environmental effects under the EE Act is limited to the assessment of effects on the physical environment. It is submitted that the concept of environment is to be relevantly understood in the sense defined in s 4 of the *Environment Protection Act 1970* ('the EP Act'):

environment means the physical factors of the surroundings of human beings including the land, waters, atmosphere, climate, sound, odours, tastes, the biological factors of animals and plants and the social factor of aesthetics;

57 If this be so it follows that the entire EES process including the content of the EES itself, the subject matter of the panel inquiry, the submissions made by the plaintiff and other submitters to the panel, the evidence adduced by the plaintiff and other submitters before the panel, the panel report, and the assessment have all addressed extraneous considerations. Most significantly, in terms of the conclusions reached in the Minister's assessment they have addressed social effects including water safety considerations.

58 The Minister's assessment of whether the proposal would provide a clear overall societal benefit, taking into account economic impacts, social outcomes and residual environmental impacts is quoted above. It does not in terms refer to economic benefits but makes clear (as does the Minister's response to the panel's principal recommendation) that the considerations founding the differences between the Minister's assessment and that of the panel are ones of water safety.

59 It is true that both the assessment and the Minister's press release refer to the importance to Mallacoota of small boat access given the growth in marine tourism,

the existing commercial fishing, and growing recreational boating demands. But the determinative facts identified in the assessment are social factors, namely water safety considerations. The references to the nature of boat ramp use are contextual. It follows that if the assessment is to be regarded as attended by vitiating error, it is the analysis of social factors and in particular water safety considerations, not the description of the economic component of existing and potential future boat ramp use which is critical.

60 It is accordingly unnecessary to determine in the present case the extent to which economic effects may be regarded as environmental effects. I accept that that issue may not be entirely free from difficulty.³³ In particular it may raise issues of remoteness in respect of what economic effects may be regarded as environmental effects of a particular proposal. In the present case however the matters which were determinative of the Minister's assessment were physical operational factors affecting both commercial and recreational activity. If those factors are to be regarded as having an economic dimension, they are economic factors in a limited sense. They inform the understanding of the manner in which the use of the boat ramp might fairly be regarded as socially beneficial. Thus the economic effects in issue here are subsidiary aspects of the social factors inherent in providing a safe environment for swimmers, surfers, and boat users at Bastion Point.

61 The EE Act does not define 'environment'. I am not however persuaded that the assessment of environmental effects of proposed works required by ss 4 and 8 of the EE Act is intended to exclude social effects (including economic effects in the sense I have identified).

62 First, as a matter of ordinary language the word 'environment' extends beyond the physical features of the surroundings of proposed works to include the social environment.

³³ Cf the decision of the Full Court of the Supreme Court of Western Australia in *Coastal Waters Alliance of Western Australian Inc v Environmental Protection Authority* (1996) 90 LGERA 136.

63 As the defendant's submission points out, the plaintiff has instanced one definition out of eight contained in the *Macquarie Dictionary*. Those definitions include the following:

1. the aggregate of surrounding things, conditions or influences.
2. the particular influences on personal development as work conditions, home situation etc...
3. the biological conditions in which an organism lives, especially a balance system.
4. the totality of the surrounding conditions, physical and social, of a particular area.
5. a situation involving a specified factor or factors: *the work environment*.
6. the acting of enviroing.
7. ...
8. the environment, the broad natural surrounding conditions, such as the bush, the rivers, the air, the sea, in which human beings live: *the burning of fossil fuels harms the environment*.
9. the *built environment*. The environment created by human beings, especially in cities ...³⁴

64 In *Queensland v Murphy and Anor*,³⁵ the High Court observed:

In its ordinary meaning "environment" signifies that which surrounds and has long been understood to include "the conditions under which any person or thing lives": The latter usage dates from 1827 when Thomas Carlyle used the word to mean "the aggregate of external circumstances, conditions, and things that affect the existence and development of an individual, organism, or group".

What constitutes the relevant environment must be ascertained by reference to the person, object or group surrounded or affected.³⁶

65 It follows that as a matter of ordinary meaning the notion of environment comprehended by the EE Act includes the conditions under which local people and visitors would use Bastion Point.

³⁴ Outline of submissions on behalf of the first and second defendants dated 16 February 2010, [82].

³⁵ (1990) 95 ALR 493.

³⁶ *Ibid*, 498 (citations omitted).

66 Secondly, the choice not to define 'environment' in the EE Act was made after the commencement of the EP Act, which has since its inception specifically confined the meaning of the word in that Act.³⁷ The choice made in the EE Act should be understood as one which embraced a flexible concept facilitating the assessment of potential harm to the environment in a broad sense. The second reading speech to which the plaintiff referred confirms the intent to adopt a 'flexible approach'.³⁸ In my view, it does not otherwise materially assist in interpreting the word 'environment'.

67 Thirdly, the phrase 'environmental effects' is itself potentially wider than the noun 'environment'. This may be illustrated by recognising that despite a narrow definition of 'environment', the EP Act also utilises the concept of 'beneficial use' which is defined as follows:

beneficial use means a use of the environment or any element or segment of the environment which—

- (a) is conducive to public benefit, welfare, safety, health or aesthetic enjoyment and which requires protection from the effects of waste discharges, emissions or deposits or of the emission of noise; or
- (b) is declared in State environment protection policy to be a beneficial use;³⁹

68 One of the ways pollution is in turn proscribed by the Act is by reference to impact upon beneficial use.⁴⁰

69 It would be proper to consider issues of beneficial use of the environment in determining whether works could reasonably be considered to be capable of having a 'significant' effect on the environment under ss 3(2) and 8(1) of the EE Act. To do

³⁷ It was also made after the decision of the High Court in *Phosphate Co-operative Co Australia Ltd v EPA* (1977) 138 CLR 134 in which Stephen and Mason JJ held that economic consequences were not relevant to the considerations governing the appropriateness of licence conditions imposed under the EP Act.

³⁸ Victoria, Second Reading Speech Environmental Effects Bill, Legislative Assembly, 5 April 1978, 1018-1021, 1018 (Mr Borthwick).

³⁹ EP Act s 4.

⁴⁰ See EP Act ss 39(1), 41(1) and 48(1).

otherwise would seriously diminish the potential ambit of the criteria of what is to be regarded as 'significant'. Likewise, the ultimate assessment of the environmental effects of proposed works must sensibly enable assessment of effects upon beneficial use of the environment if it is to inform the ultimate decision maker of the effects of works as they impact upon the living organisms inhabiting the environment.

70 In 1991 the Australia and New Zealand Environment and Conservation Council ('ANZECC') produced a paper '*A national approach to environmental impact assessment*' which stated principles of environmental impact assessment which illustrate this concept of environmental effects.

3.3 SPECIFICS OF THE EIA PROCESS

TERMINOLOGY

The following terms are explained to increase understanding and appreciation for their usage within this documentation. In general, the interpretations are those commonly understood by professional practitioners in the EIA⁴¹ process.

Environment

As used in EIA, this term is inclusive of consideration of biological, physical, social, cultural and economic considerations. Therefore, the documentation, analysis and evaluation leading to environmental advice for decision-makers will generally incorporate these factors although their relevance and significance will vary considerably between proposals.

For example the assessment of an industrial project proposed to be located in a planned, managed, zoned and buffered industrial estate could be expected to be orientated around management of emissions whereas a large mining project in a remote site away from established social infrastructure could be expected to include a far wider range of factors in its environmental assessment. Health, aesthetics, risks and hazards, heritage and quality of life are all relevant components of environmental assessment.⁴²

71 Fourthly, since May 2001 the EP Act (upon which the plaintiff relies) has also stated principles of environment protection which tend to support the view that a broader

⁴¹ Environmental Impact Assessment.

⁴² Australian and New Zealand Environment and Conservation Council *A national approach to environmental impact assessment in Australia*, Background Paper of the Working Group (October 1991), 4.

rather than narrower view of 'environmental effects' should be adopted if the consequences of these effects are to be properly understood. Section 1B of the EP Act 1970 states the first of a series of principles of environment protection:

Principle of integration of economic, social and environmental considerations

- (1) Sound environmental practices and procedures should be adopted as a basis for ecologically sustainable development for the benefit of all human beings and the environment.
- (2) This requires the effective integration of economic, social and environmental considerations in decision making processes with the need to improve community well-being and the benefit of future generations.
- (3) The measures adopted should be cost-effective and in proportion to the significance of the environmental problems being addressed.

72 Fifthly, if (as the plaintiff submits) reference is to be had to legislation other than the EE Act itself to illuminate the concept of 'environmental effects', then the parallel Commonwealth legislation does not support the plaintiff's contention. The relationship between Commonwealth and State legislation relating to the assessment of environmental effects is in part governed by the Intergovernmental Agreement on the Environment entered into by the Australian State and Federal governments on 1 May 1992.

73 The following clauses form part of that agreement:

"SECTION 3 – PRINCIPLES OF ENVIRONMENTAL POLICY

- 3.1 The parties agree that the development and implementation of environmental policy and programs by all levels of Government should be guided by the following considerations and principles.
- 3.2 The parties consider that the adoption of sound environmental practices and procedures, as a basis for ecologically sustainable development, will benefit both the Australian people and environment, and the international community and environment. *This requires the effective integration of economic and environmental considerations in decision-making processes, in order to improve community well-being and to benefit future generations.*
- 3.3 The parties consider that strong, growing and diversified economies

(committed to the principles of ecologically sustainable development) can enhance the capacity for environmental protection. In order to achieve sustainable economic development, there is a need for a country's international competitiveness to be maintained and enhanced in an environmentally sound manner.

3.4 *Accordingly, the parties agree that environmental considerations will be integrated into Government decision-making processes at all levels by, among other things:*

- i. ensuring that environmental issues associated with a proposed project, program or policy will be taken into consideration in the decision making process;
- ii. ensuring that there is a proper examination of matters which significantly affect the environment; and
- iii. *ensuring that measures adopted should be cost-effective and not be disproportionate to the significance of the environmental problems being addressed.*

3.5 The parties further agree that, in order to promote the above approach, the principles set out below should inform policy making and program implementation.

3.5.1 precautionary principle –

Where there are threats of a serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

- i. careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- ii. *an assessment of the risk-weighted consequences of various options.*

...

SCHEDULE 3

ENVIRONMENTAL IMPACT ASSESSMENT ['EIA']

2. *The parties agree that impact assessment in relation to a project, program or policy should include, where appropriate, assessment of environmental, cultural, economic, social and health factors.*

...

SCHEDULE 4

NATIONAL ENVIRONMENT PROTECTION MEASURES

*Any proposed measures must be examined to identify economic and social impacts and to ensure simplicity, efficiency and effectiveness in administration.*⁴³

74 'Environment' is defined in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') in the following way:

environment includes:

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) natural and physical resources; and
- (c) the qualities and characteristics of locations, places and areas; and
- (d) heritage values of places; and
- (e) *the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).*⁴⁴

75 In the case of the EPBC Act, 'environment' includes social and economic matters, and as the defendants point out, as a matter of practice, where controlled actions are referred to the Commonwealth Minister under the EPBC Act, it is common for an EES under the EE Act and Environmental Impact Assessment under the EPBC Act to be prepared and assessed by the same inquiry.

76 Sixthly, the view for which the plaintiff contends would materially reduce the potential utility of the Act. In the present case, the evidence indicates an EES was originally required precisely because there was, in the then Minister's view, no other statutory mechanism to ensure a rigorous and transparent examination of issues which included impacts on other uses of Bastion Point, and the safety of boat users. There is nothing in the subject matter, scope and purpose of the EE Act that suggests Parliament intended a limitation of the type contended for.⁴⁵ The EE Act is fundamentally concerned with fully informing the primary decision maker of the

⁴³ Australian Government *Intergovernmental Agreement on the Environment* 1 May 1992. *National Environment Protection Council Act 1994* (Cth) Schedule (emphasis added).

⁴⁴ EPBC Act s 528 (emphasis added).

⁴⁵ Cf *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1985) 162 CLR 24, per Mason J, 39-40.

environmental implications of proposed works in appropriate cases.

77 Seventhly, s 8(1) of the EE Act enables the Minister to give such advice and assistance as he or she deems fit to enable a decision to be made by the primary decision maker. The breadth of this provision also tends to encourage the view that the Minister's assessment is principally to be formulated by reference to what appears to him or her to be of assistance in the particular case and not by an artificial limitation of the notion of environmental effects.

78 Eighthly, the Act provides by s 10 for the Minister to publish guidelines with respect to the matters which should be contained in an EES. For many years now guidelines have been published which embrace the assessment of potential effects upon the social environment. The 1995 guidelines (which were in force when the EES process commenced in this case) provided:

For the purposes of environmental impact assessment, the meaning of environment incorporates physical, biological, cultural, economic and social factors. This definition was agreed by the Australia and New Zealand Conservation Council in 1991.

79 Although I accept the ambit of the Act cannot be altered by a subordinate instrument such as the guidelines,⁴⁶ the longstanding implementation of the Act has nevertheless taken a broader rather than a narrower view of its ambit. The Court should not interfere with a longstanding understanding of legislation which operates generally for the public benefit, unless there is a clear mandate to do so.

80 Ninthly, it should be recorded that the Minister's assessment did in fact address the impacts on the physical environment of the proposed works which were identified by the EES process. If other parts of the assessment were infected by irrelevant considerations it does not follow that these core assessments should be disregarded. They include assessments of the risk of significant interference with coastal processes

⁴⁶ *Queensland v Murphy and Anor* (1990) 95 ALR 493, 497-8. See also *Maroondah City Council v Fletcher and Anor* (2009) 169 LGERA 407, [76] – [78] (Warren CJ and Osborn AJA).

related to local patterns of sediment movement, the need to avoid significant adverse impacts on marine ecology and water quality during both project construction and operations, and the need to avoid significant adverse ecological impacts on native vegetation and habits of terrestrial fauna or flora and ensure suitable offsets are available. In my view, even if the plaintiff were correct, the assessment contains a core which is severable from the balance.

81 For the above reasons the plaintiff's case with respect to the meaning of 'environmental effects' fails.

Procedural fairness

82 Section 9 of the EE Act provides:

- (1) The Minister may, with the approval of the Governor in Council, appoint one or more persons to hold an inquiry (whether in public or in private as he sees fit) into the environmental effects of any works or proposed works to which this Act applies.
- (2) The Minister may at any time invite and receive comments on the environmental effect of any works or proposed works from the public in general or from such sections of the public as are determined by him.
- (3) If the Minister appoints one or more persons under sub-section (1) to hold an inquiry into any works or proposed works, the Minister may ask the proponent of those works to contribute an amount specified by the Minister to the costs of the inquiry.

83 The effect of this provision is that subject to the approval of the Governor in Council, it is within the Minister's discretion to determine whether any inquiry be held in respect of the environmental effects of proposed works.

84 It is further in the Minister's discretion alone as to whether such inquiry is public or private and whether comments be invited and received at any time from the public or a sector of the public.

85 Section 9 enables an inquisitorial process to take place in the form that the Minister determines appropriate having regard to the circumstances of the case.

86 It was in turn for the Minister to determine in the present case whether it was appropriate to seek further comments from the public or a sector of the public (including the plaintiff) after undertaking a view of Bastion Point.

87 It cannot be said it was not open to him to reach the view that further comments were not necessary. The EES process in issue had progressed over the previous nine years. The effects of the proposed works had been the subject of extensive and detailed public submissions. In turn those submissions, and the evidence as a whole, had been carefully addressed by the panel.

88 The matters upon which the Minister based his assessment were not novel. He essentially gave different weight than the panel did to factors which were the subject of the EES itself, evidence and submissions before the panel, and the panel report. In so doing he expressed a different incidental assessment of the potential to address safety issues associated with the proposal by way of developing further design and operational measures. In my view it was open to the Minister to decide to proceed without inviting and receiving further comments pursuant to s 9(2).

89 The plaintiff contends that once the Minister determined that his assessment would differ from the panel's recommendations in a manner adverse to the case put forward on behalf of the plaintiff, the Minister should have given the plaintiff a further hearing. It submits the underlying principles to be applied were stated by Mason J in *Kioa v West*:⁴⁷

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention. It seems that as early as 1911 Lord Loreburn LC understood that this was the law when he spoke of the obligation to "fairly listen to both sides" being "a duty lying upon every one who decides anything" (*Board of Education v Rice* [1911] AC 179, 182). But the duty does not attach to every decision of an administrative character. Many such decisions do not affect the rights, interests and expectations of the individual citizen in

⁴⁷ (1985) 159 CLR 550.

a direct and immediate way. Thus a decision to impose a rate or a decision to impose a general charge for services rendered to ratepayers, each of which indirectly affects the rights, interests or expectations of citizens generally does not attract this duty to act fairly. This is because the act or decision which attracts the duty is an act or decision:

" ... which directly affects the person (or corporation) individually and not simply as a member of the public or a class of the public. An executive or administrative decision of the latter kind is truly a 'policy' or 'political' decision and is not subject to judicial review." *Salemi v Minister for Immigration and Foreign Affairs [No2]* (1977) 137 CLR 396, 452 per Jacobs J)

Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. In *Mobil Oil Australia Pty. Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 503-504, Kitto J pointed out that the obligation to give a fair opportunity to parties in controversy to correct or contradict statements prejudicial to their view depends on "the particular statutory framework". What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting.

In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.⁴⁸

90 There are four reasons why a right to a hearing should not be implied in the present case:

- (a) the presumption of statutory interpretation relied on by the plaintiff does not apply in this case having regard to the nature of the plaintiff's interest in the Minister's assessment;
- (b) the statutory scheme is inconsistent with the right asserted;

⁴⁸ (1985) 159 CLR 550, 584-5; cf *Salemi v Minister for Immigration and Foreign Affairs [No2]* (1977) 137 CLR 396, 451 (Jacobs J). See also *Annetts v McCann* (1990) 170 CLR 596, 598-599 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 575 (Mason CJ, Dawson, Toohey and Gaudron JJ).

- (c) the suggested interpretation would give rise to a potentially unworkable system; and
- (d) the plaintiff has in any event received procedural fairness.

The plaintiff's interest

91 As Lehane J observed in *Botany Bay City Council v Minister for Transport and Regional Development*,⁴⁹

There is a clear distinction, and authorities binding on me treat it as an important distinction for these purposes, between decisions affecting the rights or interests of particular individuals and those affecting the interests, indiscriminately, of the members of the public at large or the members of a section of the public.⁵⁰

92 After referring to the judgment of Mason J in *Kioa* which I have quoted in part above, his Honour also referred to the judgment of Brennan J who stated:

The legislature is not likely to intend that a statutory power of a strictly legislative nature be conditioned on the observance of the principles of natural justice for the interests of all members of the public are affected in the same way by the exercise of such a power ... But the legislature is more likely to intend the exercise of a statutory power of an executive, administrative or quasi-judicial nature to be so conditioned if an exercise of the power singles out individuals by affecting their interests in a manner substantially different from the manner in which the interests of the public at large are affected.⁵¹

93 Lehane J then referred to the decision of Gummow J in *Queensland Medical Laboratory v Blewett*,⁵² and to the decision of the Full Federal Court in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1)*.⁵³

94 Ultimately Lehane J concluded that the interest of the plaintiff councils in the case before him were those of a section of the public who would be affected by a proposed change to the airport runway arrangements at Botany Bay. As such they did not give rise to a right to procedural fairness:

⁴⁹ (1996) 66 FCR 537

⁵⁰ (1996) 66 FCR 537, 553.

⁵¹ *Kioa v West* (1985) 159 CLR 550, 620.

⁵² (1988) 84 ALR 615.

⁵³ (1991) 32 FCR 219.

Counsel for the applicants argued that the decisions of the first and second respondents (and in this respect there is no relevant distinction between them) are not decisions of general application: they are decisions which have application in respect of the residents of areas surrounding the airport, particularly to the east and west; the applicants, in effect, represent the ratepayers and residents of their areas, whose interests are affected by the decisions and are not those of the public at large. Attractively as that submission was put, I cannot accept it. It is, I think, contrary to the authorities to which I have referred. No doubt it is possible to say that each person living or working under a flight path within an area for which one of the applicants is responsible is affected in a way which differs from the way "the public at large" -- including not just those who live to the north of the airport but also those out of earshot of any conceivable flight path -- are affected. But that is clearly not the distinction to which the authorities refer. Each applicant represents the interests of a section, or perhaps several sections, of the public; and, within each section, individuals are affected indiscriminately.

It remains to consider whether there are any particular circumstances relating to the decisions which should be held to have imposed on the decision-maker an obligation which might not otherwise exist. The effect of the decisions on the environment within the applicants' areas or, for that matter, their effect on "the health, comfort, amenity, convenience, safety, well-being or property values" of people within the areas, cannot make a difference: as I have held, people within the applicants' areas are not affected, in the terminology used in the authorities, in an individual capacity.⁵⁴

95 In *Geelong Community for Good Life v EPA* ('the Geelong case'),⁵⁵ Cavanough J applied these principles to the position of a community group claiming a right to a fair hearing in connection with a decision by the EPA to amend licence conditions controlling the discharge of waste from an oil refinery. His Honour ultimately concluded:

In the present case, the decision under review — the decision to amend Shell's licence — was not directed toward the plaintiff or to any distinct body of persons of which the plaintiff was a member, at all. Even if it could be said in law that the plaintiff, though a corporate body, had individual "interests" capable of being affected by the EPA's decision, there is no evidence that the EPA chose to take into account any such interests of the plaintiff. In law, and in substance, the decision was directed towards Shell alone. Indirectly, it may have had implications for others, such as the population in the nearby areas or, indeed, the community as a whole. But to the extent, if any, that the rights, interests or *substantive* expectations of the plaintiff were affected by the decision, they were not affected in a "direct or immediate way" nor in a manner "substantially different from the manner in which the interests of the

⁵⁴ *Botany Bay City Council v Minister for Transport and Regional Development* (1996) 66 FCR 537, 555.

⁵⁵ (2008) 20 VR 338.

public at large [were] affected".⁵⁶

96 In my view the present case is also one in which insofar as the interests of the plaintiff were affected by the Minister's assessment, they were not affected in a way substantially different from the manner in which the interests of the public at large were affected. Accordingly, the rights asserted should not be accepted for this threshold reason.

97 In both the *Botany Bay* case and the *Geelong* case the plaintiffs argued that because they had been party to prior consultation this gave them a legitimate expectation of a further hearing. However, as the decisions in those cases make clear, the mere fact of prior consultation cannot readily of itself generate a right to further hearing. First the underlying interests of the plaintiff either attract the legitimate expectation of a hearing or they do not. As Cavanough J stated in the *Geelong* case:

Counsel did not refer me to any case, nor have I been able to find any, in which it has been held that an established practice of consultation with, or an assurance of consultation given to, an environmental group, a representative group, any other kind of public interest group or any other kind of third party objector at all has been held to give rise to the *application* of the rules of natural justice or the principles of procedural fairness (whether by way of the doctrine of legitimate expectations or otherwise) where the substantive decision has not directly and specially affected the rights, interests or *substantive* expectations of particular individuals or of a small identifiable group or class of individuals. Such cases and academic writings as I have been able to find touching these issues — which mainly arise in the planning and environment areas — tend strongly to the contrary. The judgment of Lehane J in *Botany Bay City Council v Minister for Transport*, to which I have already referred, indicates strongly that cases favouring the plaintiff in this regard are unlikely to be found...⁵⁷

98 Further, on the facts in the present case there is no evidence of any representation by the Minister that a further hearing would be granted before his assessment or of any conduct by the Minister which might be argued of itself to give rise to a legitimate expectation of further hearing.

⁵⁶ *Geelong Community for Good Life v EPA* (2008) 20 VR 338, [22] (citations omitted; emphasis in original).

⁵⁷ *Geelong Community for Good Life v EPA* (2008) 20 VR 338, [28] (citations omitted; emphasis in original).

The statutory scheme

99 I have already summarised the relevant statutory scheme both generally and in respect of the provision for public hearings.

100 In my view, it is not possible to sensibly imply some right to a further hearing given the statutory context:

- (a) the effect of the Minister's assessment is not determinative of the ultimate decision;
- (b) the application of the Act to the decision making process is itself discretionary;
- (c) the primary mechanisms for assessment of environmental effects are the preparation of an EES and an assessment of environmental effects by the Minister;
- (d) the holding of any inquiry is discretionary and subject to the approval of the Governor in Council;
- (e) the nature of an inquiry, if held, is at the discretion of the Minister and the Act specifically contemplates that an inquiry need not be public; and
- (f) the discretion to invite public comment at any stage of the process is specifically vested in the Minister.

101 The net effect of this scheme is to directly invest the Minister with the power to control a very flexible process. In my view it was not Parliament's intention to encumber this flexibility with rights of the kind which the plaintiff asserts.

The consequences of the construction for which the plaintiff contends

102 There is a further practical consideration which tells against the plaintiff's case. The law does not require a Minister of the Crown under a duty to provide a hearing to a

citizen, to conduct that hearing personally.⁵⁸ There were a total of 557 submitters to the panel in the present case. If the Minister were to offer a further hearing in the present case (addressing what are in effect ultimate issues of net community benefit and sustainable development) but then having received a further report following that hearing, determined not to assess the environmental effects of the proposed works in accordance with the recommendations of that report (or alternatively in accordance with particular recommendations he had previously accepted from the first report) then on the plaintiff's case, any one of the 557 submitters could potentially have a further right to hearing. Given the range of factual matters canvassed in the panel's initial report on which conflicting submissions were taken from the submitters, it is entirely possible that the hearing process could never end. Although from the submitters' point of view the EES process may be perceived as involving adversary elements, from the Minister's point of view it is concerned with the making of an overall assessment which is informed by information obtained from a wide range of sources. The process cannot be understood as readily accommodating rights of the type for which the plaintiff contends.

The procedural fairness in fact accorded the plaintiff

103 In the present case the plaintiff has had a full hearing of its case as to the environmental effects of the proposed works. The panel addressed the case presented to it and in turn the Minister has addressed the panel's report. In my view the plaintiff has been accorded procedural fairness. The content of that concept must always be judged in the context of the decision making process in issue.⁵⁹ In the present case the concept of procedural fairness if applied to the plaintiff would not entitle it to a further hearing.

⁵⁸ *Twist v Randwick Municipal Council* (1976) 136 CLR 106; *FAI Insurances Ltd v Winneke* (1981) 151 CLR 342; *East Melbourne Group Inc v Minister for Planning* (2005) 12 VR 448.

⁵⁹ *Cf Kioa v West* (1977) 159 CLR 550, 585.

The procedural objection

104 The plaintiff's case fails for the above reasons but for the sake of completeness I shall deal with a further procedural objection taken by the defendants. It is submitted that relief in the nature of *certiorari* cannot be obtained pursuant to r 56 of the *Supreme Court (General Civil Procedure) Rules 2005* in respect of an assessment made under s 8 of the EE Act because that assessment is merely advisory. It is submitted that the assessment may or may not be acted on by the ultimate decision maker and does not decide any question affecting the rights of the plaintiff or any other person.

105 I do not accept this submission. In *Hot Holdings Pty Ltd v Creasy & Ors*,⁶⁰ the High Court held that a preliminary recommendation may attract *certiorari* if it is one which constitutes a condition precedent to an exercise of power that will affect legal rights. More particularly *certiorari* will lie where a preliminary decision *must* be taken into account by a body entrusted with the power to make a decision directly determining legal rights.⁶¹ Speaking of the Minister's powers there in issue with respect to the grant of mining tenements the majority judgment stated:

It is apparent that the Minister is bound to consider the information which the warden transmits under s 58(3) and s 75(3). The Minister may not exercise the discretion to grant or refuse applications until the warden's recommendation and report, expressing as it must the warden's decision on priority, is received and taken into account. The result of this statutory process is that, regardless of the content of the 'right in priority', the warden's decision has a discernible legal effect upon the Minister's exercise of discretion. That conclusion is not affected by those provisions which make clear that the Minister is no way bound by the recommendation of the warden (ss 59(4), 75(4)). These provisions are but a statutory indication that the weight of those considerations need not be decisive. They do not go to show that the consideration is other than one which the Minister is bound to consider.⁶²

106 Likewise in the present case the effect of s 8(2) is to provide that no decision can be made by the primary statutory decision maker until the EES has been prepared and an assessment of the environmental effects of the works in issue has been made by

⁶⁰ (1996) 185 CLR 149.

⁶¹ *Hot Holdings Pty Ltd v Creasy & Ors* (1996) 185 CLR 149, 164-5 per Brennan CJ, Gaudron and Gummow JJ.

⁶² *Hot Holdings Pty Ltd v Creasy & Ors* (1996) 185 CLR 149, 174-5. Citations omitted.

the Minister and considered by the primary decision maker. Accordingly, if the validity of the assessment were successfully impugned, relief in the nature of *certiorari* would potentially be available.

Conclusion

107 For the above reasons, the proceeding must be dismissed.

CERTIFICATE

I certify that this and the 44 preceding pages are a true copy of the reasons for Judgment of Justice Osborn of the Supreme Court of Victoria delivered on 27 May 2010.

DATED this twenty seventh day of May 2010.

