SUPREME COURT OF QUEENSLAND

CITATION:	*Alliance to Save Hinchinbrook v The Chief Executive* [2006] QSC 084
PARTIES:	**ALLIANCE TO SAVE HINCHINBROOK (ASSOCIATIONS NO. 1A18380)** (Applicant) v **CLIVE COOK, DIRECTOR, QPWS, NORTHERN REGION AS DELEGATE OF THE CHIEF EXECUTIVE, ENVIRONMENTAL PROTECTION AGENCY** (First Respondent) **BARRY JAMES, ACTING OPERATIONS MANAGER, ENVIRONMENTAL OPERATIONS, NORTHERN REGION AS DELEGATE OF THE CHIEF EXECUTIVE, ENVIRONMENTAL PROTECTON AGENCY** (Second Respondent) **PORT HINCHINBROOK SERVICES LIMITED ACN 081 055 414** (Third Respondent) **CARDWELL PROPERTIES PTY LTD ACN 058 737 643** (Fourth Respondent)
FILE NO/S:	341 of 2005
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	6 April 2006
DELIVERED AT:	Cairns
HEARING DATE:	9 February 2006
JUDGE:	Jones J
ORDER:	**The application is dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – JURISDICTION AND GENERALLY – PERSON AGGRIEVED – where applicant sought a statutory order of review of a decision made pursuant to the *Queensland Marine Parks Act* 1982 - where applicant an incorporated

organisation for the purposes of conservation – whether an aggrieved person for the purposes of the *Judicial Review Act* (Qld)

ADMINISTRATIVE LAW – JUDICIAL LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY - GROUNDS FOR REVIEW OF DECISION – CONDUCT RELATING TO MAKING OF THE DECISION – IMPROPER EXERCISE OF POWER – RELEVANT AND IRRELEVANT CONSIDERATIONS – where decision made pursuant to the *Marine Parks Act 1982* – where decision-maker gave reasons for decision – whether decision-maker failed to comply with a procedure in the Regulations – whether decision-maker failed to take into account a relevant consideration

Judicial Review Act 1991, s 20
Marine Parks Act 1982
Marine Parks Act 2004
Marine Parks Regulation 1990, s 9AB, s 10

Allan v Transurban City Link Ltd (2001) 208 CLR 167
Attorney-General (NSW) v Quin (1990) 170 CLR 1
Australian Conservation Foundation v The Commonwealth (1980) 146 CLR 493
BGP Properties Pty Ltd v Lake Macquarie City Council [2004] NSWLEC 399
Project Blue Sky Inc. v Australian Broadcasting Authority (1998) 194 CLR 355
Department of Defence v Fox (1997) 24 AAR 171
Friends of Hinchinbrook Society Inc v Minister for the Environment (1997) 142 ALR 632
Greenpeace Australia Ltd v Redbank Power Co Pty Ltd (1994) 86 LGERA 143
Leatch v National Parks and Wildlife Services (1993) 81 LGERA 270
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
NAIS v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 77
North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Services [2000] QSC 172
Onus v Alcoa of Australia Ltd (1981) 149 CLR 27
Save Bell Park v Kennedy [2002] QSC 174
The Queen v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327
Visa International Services Association v The Reserve Bank of Australia (2003) 131 FCR 300

COUNSEL: Mr S Keim SC for the applicant
Mr M Plunkett for the first and second respondents

Mr D J S Jackson QC with Mr Litster for the third and fourth respondents

SOLICITORS: Environmental Defender's Office of North Queensland for the applicant
Crown Law for the first and second respondents
Hopgood Ganim Lawyers for the third and fourth respondents

[1] The applicant is an incorporated association. It seeks, pursuant to s 20 of the *Judicial Review Act 1991* ("JRA"), a statutory order to review a decision made by the first respondent on 18 May 2005. The decision was to issue a Marine Parks Permit for the construction of two breakwaters which were to intrude into the Great Barrier Reef Coast Marine Park, Hinchinbrook Channel at Cardwell in the State of Queensland.

[2] The first and second respondents are delegates of the Chief Executive of the Environmental Protection Agency. The first respondent was the relevant decision-maker whose decision is challenged in this proceeding. The second respondent was the decision-maker granting a related development approval which is not renewable in this proceeding.

[3] The third and fourth respondents are corporations for whose benefit the construction project was undertaken and which have now been given leave to contest this application.

[4] The respondents oppose the application on the grounds that the applicant does not have standing as "an aggrieved person" and further, that there has been no breach of any requirements of valid decision-making.

Background facts

[5] By an application dated 28 July 2004[1], the Cardwell Shire Council sought a permit pursuant to the Queensland *Marine Parks Act* 1982 and *Marine Parks Regulation* 1990 ("the Regulation") for the construction of two breakwaters which would intrude into the Great Barrier Reef Coast Marine Park.

[6] The application was made at the behest of the third and fourth respondents who had applied to the Cardwell Shire Council for approval of certain development works which incorporated the construction of the breakwaters. The application was supported by reports of consulting engineers, Cardno Pty Ltd and further expert reports commissioned by them. The required public advertising of the proposal resulted in 25 submissions being received[2] including one from the applicant.[3] Reports were also received from various government departments and agencies.

[7] The public submissions and other documents were assessed by Mr Mattocks, Senior Conservation Officer of the Environmental Protection Agency.[4] He identified some 30 matters of concern or "themes" raised in those submissions.[5] He formed an

---

1 Ex 1 Tab 1
2 Ex 1 Tab 10
3 Ex 1 pp 157-169
4 Ex 1 Tab 28
5 Ex 1 p 1443

opinion that the permit should not issue and communicated this and his reasons to the first respondent.

[8] On 18 May 2005 the respondent issued the permit (QN05/08)[6] for the construction of the two breakwaters subject to certain conditions.

[9] On 8 July 2005 the first respondent provided a Statement of Reasons which was later supplemented by further and better particulars.[7]

[10] In his Statement of Reasons the first respondent made general findings to the effect that the majority of submissions did not support the granting of the permit; that 80% of public submissions cited significant impacts on scenic amenity and wilderness values and aesthetics; and that the existing amenity of the area was already diminished by a marina, residential development, dredges, pipelines and markers.[8] He then dealt separately with each of the matters required to be considered by s 9AB(2)[9] of the Regulation and set out his conclusions. In summary, these conclusions were to the effect that the proposed breakwaters will have impacts on the environment which could be managed and mitigated through the imposition of conditions; the breakwater construction was within the footprint area already affected by maintenance dredging[10]; the adverse impacts on natural and cultural resources will be short term and/or manageable[11]; the impacts were acceptable because of the reduction in dredging requirements.[12]

[11] I turn now to the first of the issues raised for my determination.

Standing

[12] The applicant was incorporated in August 1997. Its principle objects include: -

> "To protect and promote the conservation of biodiversity generally and to do so specifically in the area approximately bounded to the east by the Great Barrier Reef from approximately Dunk Island in the north southward to the Palm Group of Islands, and to the west by the Cardwell and Kirrama Ranges from approximately Tully in the north southwards to Ingham.[13]
>
> To protect the ecological, aesthetic and wilderness integrity and values of Hinchinbrook Island, Hinchinbrook Passage, the Family and Brook Groups of Islands, Garden and Gould Islands, other nearby islands and the marine area described above."

[13] The applicant's right to seek this review is challenged by the respondents. On behalf of the first respondent, Mr. Plunkett of Counsel, argued the starting point on this issue is an examination of the legislation "by reference to subject, scope and purpose of the statute rather than by any application of concepts derived from decisions under the general law respecting what has come to be known as

---

6 Ex 1 Tab 31
7 Ex 1 Tabs 32 and 34
8 Ex 1 Tab 32 para 3.4
9 Ibid paras 3.5-3.17
10 Ibid para 4.2
11 Ibid para 4.3
12 Ibid para 4.5
13 Ex "MM1" Affidavit of Margaret Moorhouse sworn 8 August 2005

'standing'." *Allan v Transurban City Link Ltd.*[14] It is in that context that one has to determine whether a person's interests "are adversely affected" for the purpose of s 7 of *Judicial Review Act.* He contended that the applicant's interest was no different to that of a member of the general public. Further, the applicant has failed to show that it is affected over and above the ordinary member of the public by identifying that it has a "special interest". See *Australian Conservation Foundation v The Commonwealth*[15]*; Onus v Alcoa of Australia Ltd.*[16]

[14] The question of whether an organisation such as the applicant in this case has a "special interest" has been considered in a number of cases. I agree with the remarks of Chesterman J that a comparison of a particular interest is a "barren exercise".[17] But his consideration of a number of cases leads to the following statement: –

> "The purpose of the proceedings is to test the lawfulness of the decision. They will not directly affect any legal rights or proprietary interests… Another point of significance is that if [the applicant] does not have standing to test the validity of the permit no-one else will have and the decision, which may be quite unlawful, will go uncorrected. [the applicant] has an interest in efficient government but it has an equal interest in lawful government."[18]

[15] In *Save Bell Park v Kennedy*[19] Dutney J discussed the above remarks and the decision of the High Court in *Allan v Transurban City Link Limited*[20] and said:-

> "The applicant, despite its short existence, appears on the evidence to be the recognised body in the Emu Park community involved in the preservation and protection of Bell Park and its surroundings. It is difficult to imagine any other group or other individual having standing if the applicant is denied the right to pursue this matter. The applicant has, in my view, a genuine desire to test the validity of decisions affecting its area of specific community activity. It thus, cannot in my view, be said to have an interest which is merely intellectual or emotional as such interests are now understood nor is the proceeding an abuse of process."[21]

[16] The fact that a particular group of individuals or an incorporated association takes up a cause does not mean there will automatically be standing. Much depends on the circumstances of the case. As Stephen J said in *Onus* (supra) –

> "As the law now stands it seems rather to involve in each case a curial assessment of the importance of the concern which the plaintiff has with the particular subject matter and the closeness of that plaintiff's relationship with the subject matter."[22]

---

14 (2001) 208 CLR 167 at [15]
15 (1980) 146 CLR 493 at 530
16 (1981) 149 CLR 27
17 *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172
18 Ibid at para 35
19 [2002] QSC 174
20 Supra
21 Ibid at para 14
22 Ibid at p 42

[17] As to that curial assessment, I note that *The Marine Parks Act* 1982 provides for public consultation when defining a marine park (s 13) and Regulation 9AA, in certain circumstances, requires public notification of requests for permission to use the parks and a consideration of public submissions before permission is granted. Consequently the legislature's contemplation of public involvement in the process gives some indication of the breadth of interests which would be considered.

[18] The applicant has, since its incorporation, actively campaigned to protect the environment of the Hinchinbrook area of the Marine Park. Even before that incorporation, the members of the organisation were personally involved in similar activities.[23] I am satisfied that the persons with concerns about the effects of the proposed development have rallied to support the applicant. The applicant is the peak organisation to raise concerns and it does so with a genuine desire to ensure protection of the environment. It has contributed significantly to the public debate on issues relating to the environment in this area. This has included making submissions in relation to Management Plans for Hinchinbrook Island National Park, Hinchinbrook Plan of Management (GBRMPA), Hinchinbrook Channel Management (EPA).[24] The applicant and individual persons associated with its aims, made quite substantial submissions to the decision-maker. By reason of those facts, the applicant is entitled to test the validity of that decision. No other group or individual is identified as having an equivalent position to do so. The local authority is directly involved in facilitating the project and cannot independently represent the public interest.

[19] The standing of persons who show a genuine concern with the environment and play a role in its protection has, in legislation enacted since the institution of these proceedings, been recognised in the *Marine Parks Act* 2004. Section 140 provides:-

> "**140(2)** An individual is taken to be a person aggrieved by the decision, failure, or conduct if –
>
> (a) The individual is –
>
> (i) an Australian citizen; or
>
> (ii) ordinarily a resident of Australia, and
>
> (b) at any time in the 2 years immediately before the decision, failure or conduct, the individual engaged in a series of activities in Australia for the protection or conservation of, or research into, the environment."

[20] Whilst no similar provision is present in the *Marine Parks Act* 1982 pursuant to which this project was considered, I take the view that the new enactment is an affirmation of the fact that a person genuinely engaged in activities of the kind mentioned ought to be seen as a "person aggrieved" for the purpose of that statute.

[21] The history of the applicant's activities, the extensive nature of the submissions made by the applicant and its members and its recognition as a peak organisation, persuades me that the applicant does have standing to bring these proceedings. The applicant's involvement in this specific project goes beyond a 'mere emotional or intellectual concern'. It is the appropriate organisation to ensure the accountability of the decision-maker. I am satisfied therefore that the applicant is 'an aggrieved person' within the meaning of the term for the purposes of the JRA.

---

23 Affidavit Margaret Moorhouse sworn 8 August 2005

24 Affidavit Margaret Thorsborne sworn 8 August 2005

[22] There is no argument that the decision was made under an enactment, that it was of an administrative character and was thus reviewable under the JRA. Also there was agreement that the enactment applied to the area of the proposed development.[25]

Statutory provisions

[23] The decision in question was made pursuant to s 10(1) of the Regulation. In arriving at the decision the Executive Officer, or in this case the delegate, must act in accordance with s 9AB which provides:-

> "(1) In considering an application for a permission, the chief executive may consider any relevant matter for the application.
> (2) Without limiting subsection (1), the chief executive must have regard to the following –
> (a) the objectives of the zone or the marine park for which the application is made;
> (b) the orderly and proper management of the marine park for which the application is made;
> (c) the conservation of the natural or cultural resources of the marine park for which the application is made;
> (d) Any management plan for the marine park, for which the application is made, that is approved by the Minister under section 17;
> (e) the existing use and amenity, and the future or desirable use and amenity, of the location, and areas adjacent to the location, for which the application is made;
> (f) the size, extent and location of any proposed use in relation to the way the location, and the areas adjacent to the location, are being used;
> (g) the likely effects of any proposed use in the location for which the application is made on –
> (i) the areas adjacent to the location; and
> (ii) the environment;
> (h) the proposed means of access to and egress from the marine park;
> (i) the use and adequacy of provisions for mooring, landing, parking, loading and unloading a vehicle, vessel or aircraft;
> (j) the nature of the equipment to be used for the proposed use;
> (k) the arrangements for the removal, upon the expiration of the permission, of the structure, landing area, farming facility or vessel or any other thing that is to be built, assembled, constructed or fixed in position for the proposed use;
> (l) the arrangements for making good any damage caused by the proposed activity to the marine park for which the application is made;'
> (m) Any fee or other amount that is overdue for payment by the applicant as the holder of a permission for which the fee or amount is payable;
> (n) if the application relates to an undeveloped project, the cost of which will be large – the capacity of the applicant to satisfactorily develop the project."

It is to be noted that the terms of subsection (1) are permissive and those in subsection (2) are mandatory but subject to the principles discussed in *Project Blue Sky v Australian Broadcasting Authority*[26].

Grounds for review

[24] The grounds for review are set out in paragraph 3 of the Application as follows:-

---

25 Transcript 71-2, see exs 3 and 5

26 (1998) 194 CLR 355

"3. The decision of the first respondent made on 18 May 2005 pursuant to s 10(1) of the regulation to grant permission to the council to construct two breakwaters within the zone is flawed and invalid for the following reasons:

(a) The first respondent failed to comply with a procedure required by s 9AA(4) of the regulation, namely, to consider the written submissions received by the chief executive in response to the public notice of the application, in that the first respondent did not take into account the substantive matters arising from submissions but, rather, noted their *in globo* opposition to the approval and the fact that, *inter alia*, the submissions dealt with issues of scenic amenity, wilderness values and aesthetics and that some other influences on amenity in the Oyster Point area exist.

(b) The first respondent failed to comply with a procedure required by s 9AB(2)(g) of the regulation, namely, to have regard to the likely effects of any proposed use in the location for which the application is made on the areas adjacent to the location and the environment in that:

  (i) In determining the effects of the proposed breakwaters on net dredging in the vicinity, the first respondent purported to make conclusions on likely effects of the proposal when the information on which the purported conclusion was made was indicative only and did not allow a conclusion as to what were the likely effects;

  (ii) In determining such likely effects, the first respondent failed to apply the precautionary principle which was a requirement arising by application of the common law and/or as a matter of statutory construction;

(c) The first respondent failed to take into account an important and relevant consideration, namely, the downstream impacts of the construction of the breakwaters, namely the increased use of boats in the areas adjacent to the location and the resultant impact of that increased boat use on those areas and the environment, including through resultant increased boat strikes on dugong and snubfish dolphin, and, by failing to take into account this consideration, failed to comply with procedures required by each of paragraphs (a) – (j) of ss 9AB(2) of the regulation.

(d) The first respondent failed to take into account an important and relevant consideration, namely, advice that and the fact that the proposed length of the breakwater walls are very significantly shorter than previous proposals for a breakwater at Oyster Point with the resultant likelihood that the breakwater will fail to function effectively for its purpose of providing protection to boats using the access channel with a further result that a need will arise to approve an extension of the current proposed breakwater such extension giving rise to S 9AB impacts that have not been considered on this application and might lead to a different decision were they part of this application which failure, *inter alia*, also amounts to a failure to comply with procedures required by ss 9AB(2)(b), namely, the requirement to have regard to the proper and orderly management of the park.

(e) Each of the matters dealt with in sub-paragraphs (a)-(d) of this paragraph also involve errors of law in that the first respondent failed to comprehend the nature of the task required of him by the relevant provisions of the regulation."

[25] After hearing the evidence of the first respondent, Mr Keim SC for the applicant quite properly abandoned the allegations set out in paragraph 3(a) above[27] but pursued the point whether the quality of the consideration failed to meet the requirements of s 9AB.

---

[27] Transcript 73/1

Legal principles

[26] It is appropriate before embarking upon a consideration of these further grounds to recall the general principles which must guide a review of this kind. The remaining grounds are premised upon the decision-maker failing to take into account relevant considerations. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[28] Mason J identified the principles which touch upon such a ground. Those principles are summarised in the following excerpts[29]:-

> "(a) the ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is *bound* to take into account in making that decision…a person entrusted with a discretion "must call his own attention to the matters which he is bound to consider".
>
> (b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive…
>
> (c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision…
>
> (d) The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.
>
> It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to taken into account in exercising the statutory power…
>
> …So too in the context of administrative law, a court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits.
>
> (e) The principles stated above apply to an administrative decision made by a Minister of the Crown…"

---

28 (1986) 162 CLR 24

29 Ibid at 39-42

[27] In *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs,*[30] Gummow J said:-

> "14. It is of the first importance for this appeal to recall several well-settled principles in this field. The first is that maladministration is not to be confused with the illegality which founds judicial review. The second is, that the adoption of the paradigm of judicial processes of decision-making at trial and on appeal is rarely helpful because it is apt to blur the constitutionally entrenched distinctions between judicial and executive power.
>
> 15. These fundamental principles inform the following statement by Brennan J in *Attorney-General (NSW) v Quin*[31]:
>
> > "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."
>
> > "[T]he scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case."

[28] Mr Keim SC particularly invited my attention to cases referring to the expression "have regard to", in particular the remarks of O'Loughlin J in *Department of Defence v Fox*[32] who relied particularly on the comments of Gibbs CJ in *The Queen v Toohey; Ex parte Meneling Station Pty Ltd*[33]. I will set out in full the relevant parts of the latter:-

> "However, the section draws a clear distinction between those matters to which the commissioner "shall have regard" and those

---

30 [2005] HCA 77
31 (1990) 170 CLR 1 at pp 35, 36
32 (1997) 24 AAR 171
33 (1982) 158 CLR 327 at 333-4

> upon which he "shall comment". When the section directs the Commissioner to "have regard to" the strength or otherwise of the traditional attachment by the claimants to the land claimed (subsection 3), and to the principles set out in subsection 4, it requires him to take those matters into account and to give weight to them as a fundamental element in making his recommendation: cf *Reg v Hunt: Ex parte Sean Investments Pty Ltd*. When the section directs him to comment on the matters mentioned in pars. (a) to (d) of subsection (3), it requires him to remark upon those matters and to express his views upon them…
>
> …The Commissioner must, in making his recommendation, have regard to this general principle, and to the strength or otherwise of the traditional attachment of the claimants to the land claimed in the particular case. If he recommends that an area be granted to a Land Trust it then becomes a matter for the Minister, acting under s 11, to decide whether or not he is satisfied that the land or any part of it should be so granted. The Minister is in no sense bound by the recommendation of the Commissioner, and in making his decision may wish to consider the matters mentioned in pars (a) to (d), including the detrimental effect of acceding to the claims…But the ultimate weight to be given to these matters is for the Minister to decide."

[29] Mr Plunkett and Mr Jackson QC each referred to the remarks of Tamberlin J in *Visa International Service Association v The Reserve Bank of Australia*[34] as follows:-

> "Where the question is one as to weight or degree of importance to be attached to particular factors, then that is usually solely for the determination of the decision-maker, subject to the observations of Mason J in relation to *Wednesbury* unreasonableness. If it can be shown that the decision-maker has misconstrued the statutory language, this may also constitute a failure to take into account a relevant consideration and may be sufficient to invalidate the decision depending on the circumstances and statutory context."

Further, at p 431 of the report his Honour made reference to Aaronson and Dyer in "*Judicial Review of Administrative Action*" 2nd ed, 2000 at 229, pointing out that-

> "The argument that decision-makers are under an implied obligation to make inquiries before coming to their decision rarely succeeds and that the normal rule is to allow decision-makers to do no more than react to material provided to them. The normal rule is of course subject to exceptions."

The able research of Counsel identified a number of other cases which considered the scope of the above general principles but I do not find it necessary to refer to each of them. In this case there is nothing submitted that would take this case outside the application of regular principles.

Precautionary principle – 3(b)

---

34 (2003) 131 FCR 300 at p 429

[30] Turning then to paragraph 3(b), the allegations centre on a lack of evidence about the effects the breakwaters would have on the need for maintenance dredging and on the failure to apply the "precautionary principle". The justification for the construction of the breakwaters is to reduce the incidence of maintenance dredging and the harmful impacts associated with it. These impacts fall to be considered generally under subsection (1) of the Regulation but also more specifically in subsections 2(b), (c), (e), (f) and (g).

[31] It is convenient to deal with the claim concerning the precautionary principle first. The applicant asserts that the precautionary principle applies to a consideration of this case as a matter of general law. There is no specific requirement in the applicable Act or Regulations to have regard to any such principle, although in subsequent legislation such a requirement has been inserted and the scope of the principle is defined.[35] The applicant relied particularly on the remarks of Stein J in *Leatch v National Parks and Wildlife Services*[36] as follows:-

> "In my opinion the precautionary principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. In its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious."

To similar effects are the remarks of Pearlman J in *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd*[37] and of McClellan CJ in *BGP Properties Pty Ltd v Lake Macquarie City Council*[38]. In each of those cases the court was considering statutory provisions for which the precautionary principle was defined and the consideration of it required. However, the applicant submits that the principle applies generally in circumstances where the decision will impact on a sensitive environment and that it applies here in consideration of "any relevant matter" for the purpose of s 9AB(1).

[32] The respondents argue that the precautionary principle has no application, save when a statute expressly provides for it and certainly has no application in this case where Regulation 9AB expressly identifies the relevant considerations. They argue that to overlay these statutory requirements with a consideration of precautionary principle would give rise to an irrelevant consideration. They argue that the cases relied upon by the applicant do not establish that there was a general obligation to apply the principle. Reference is made to *Friends of Hinchinbrook Society Inc v Minister for the Environment*[39] in which Sackville J reviewed the initial consent to the Port Hinchinbrook Development and said:-

> "There is nothing to suggest that in 1983 any particular formulation of the precautionary principle commanded international approval, let alone endorsement by the parliament. It may be that the "common sense principle" identified by Stein J is one to which the Minister must have regard. But this would flow from the proper construction of the relevant legislation and of its scope and purpose, rather than

---

35 *Marine Parks Act* 2004 – Definition sch ;
36 (1993) 81 LGERA 270
37 (1994) 86 LGERA 143
38 [2004] NSWLEC 399
39 (1997) 142 ALR 632

> the adoption by representatives of Australian governments of policies and objectives relevant to a national strategy on the environment...It would be difficult, for example, for the Minister to have regard only to the protection, conservation and presentation of particular property, as required by s 13(1) of the *World Heritage Act*, unless he or she takes account of the prospect of serious and irreversible harm to the property in circumstances where scientific opinion is uncertain or in conflict."

[33] The third and fourth respondents further submit that any application of such a principle was not justified in circumstances where (as here) it was the beneficial, rather than the harmful, consequences which could not be evaluated with certainty.

[34] The scope of the prescribed considerations here are quite wide. In their terms they allow for a consideration of threat of serious or irreversible damage to the environment. The level of scientific certainty about measures to prevent harm would ordinarily be a factor in the overall consideration of the prescribed matters.

[35] In the circumstances before me where there is no statutory definition of the precautionary principle and no express obligation to apply any such principle (I take the view that the adoption of the decision-maker of such a principle was likely to result in an additional consideration beyond those authorised by the Regulation and could thus amount to an irrelevant consideration). I find no basis for the suggestion that there was a procedural error because of any failure to apply the precautionary principle.

Dredging issue – 3(b)

[36] On the topic of dredging, the first respondent's findings about the past impacts of this activity were limited by the lack of information about the quantity of material previously removed. However, as is seen from the Further and Better Particulars, the first respondent had a detailed personal knowledge of the history of dredging of the existing channel and of spoil disposal. Because of this he found that "estimates on the reduction in maintenance dredging requirements are indicative only". He went on to find that "although the actual reduction is not calculable, based on expert opinion there will be a reduction of the material required to be disposed of" and concluded that construction of the breakwaters "should provide a net environmental gain". He acted upon expert opinion in finding that likely reduction would be "from 40,000 m^3/year to 15,000-20,000 m^3/year.[40]

[37] These statements were challenged by the applicant as being "non-findings" because of the uncertainty which attended their making. The applicant identifies the assessment as to the benefits of the reduction of maintenance dredging as being fundamental to the decision-maker's consideration of paras (b), (e), (f) and (g) of s 9AB(2). The applicant makes reference to various statements in the materials placed before the first respondent and pointed to the lack of comment upon those statements as showing that he failed to "have regard to" relevant matters. Mr Keim SC cited in support the remarks of O'Loughlin J in *Department of Defence v Fox*[41] and Gibbs CJ in *The Queen v Toohey; Ex parte Meneling Station Pty Ltd*[42].

---

40 Ex 1 at p 1494 para 3.6

41 Supra

42 Supra

[38] It is the case that there was only limited data available from which to form estimates as to the quantity of dredging material that had been removed in the past. There were no means by which accurate data about any future activity could be assessed. However using the limited information available, some expert reports did make qualified projections about the reduction in dredging activity. It is evident that serious attention was given to this issue by the exchange of correspondence between Cardno and EPA.[43]

[39] The respondents contend that none of the applicant's analyses of the evidence shows any reviewable error. These were questions of fact and conclusions which were solely for the decision-maker. In the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power. (Per Mason J in *Minister for Aboriginal Affairs v Peko Wallsend Ltd*[44]*).* Notwithstanding this submission on reviewing merits Mr Jackson QC points to evidentiary support for the first respondent's finding in the opinions expressed by the consultants to the third and fourth respondent and of Dr Ridd, an expert in tropical coast and oceanography "there will be a significant reduction in the saltation due to breakwater construction.[45] The quantitative estimates used by the first respondent appear to come from the report of WBM Oceanics.[46]

[40] Having regard to the legal principles stated above, I am not persuaded that there has been an error or breach of duty arising from the respondent's consideration of the material placed before him on the dredging issue. Moreover, I am satisfied that he has given due consideration to those matters referred to in s9AB(2) which are touched by the assessment of the benefits in the reduction of maintenance dredging when compared with the adverse impacts of the proposal under consideration.

Increased boating activity – Ground 3(c)

[41] The next issue in respect to which the applicant alleges the first respondent did not have any, or any proper, regard, was the likely effects of the breakwaters on the adjacent areas and the environment. The particular effects raised in the public submissions emphasise the prospect of increased dugong and turtle strikes and the degradation of their habitats by reason of increased boating activity.

[42] In his Statement of Reasons, the first respondent made findings identifying various impacts in relation to water currents, changed deposition and erosion characteristics, sediment dynamics, impact on seagrass, effects on habitat and the movement of marine fauna and displacement of soft marine sediments.[47] In the first respondent's affidavit filed on 21 November 2005 he advanced a further opinion that "there was no evidence to support a finding that the construction of two breakwaters would increase boating activity".[48]

---

43 Ex 1 pp 95-123
44 (1986) 162 CLR 24/41
45 Ex 1 Tab 6 at pp 101 and 108
46 Ex 1 at p 374
47 Ex 1 Tab 32 paras 3.10.1 - 12
48 Affidavit Clive Cook filed 21 November 2005 at para 13

[43] The applicant argues that such a statement is at odds with the assessment made by the departmental officer Mr Mattocks and is an attempt at reconstruction after the decision was made.

[44] These issues were explored in the cross-examination of the first applicant where he explained that his reasons for not including a reference to increased boating activity in his Statement of Reasons was that, "there was no specific evidence…that directly made the link between the construction of the two break walls and increased boating activity".[49] In evidence he referred to the volume of the boating traffic in Hinchinbrook Channel, the position of boat ramps in the area, the fact that the boat ramp within the Port Hinchinbrook Resort replaced an existing boat ramp and he relied on his own experience of the boating activities in this area.[50]

[45] The exploration of this issue, as raised in the application, descended again into an impermissible consideration of the merits of the material on which the decision was based. The evidence of Mr Cook, both in his affidavit and in oral testimony, establish that he did have regard to the relevant consideration required by subsection (2)(g). I am satisfied that there is no failure to consider nor any error arising from his consideration of this issue.

Length of breakwaters – Ground 3(d)

[46] The applicant alleges that the first respondent's lack of consideration of the prospect of the breakwaters failing because of inadequate length, and of the further prospect of their being lengthened, constitute a failure to have regard to the proper and orderly management of the marine park as required by s 9AB(2)(b).

[47] The prospect of inadequacy in the breakwater was raised in the Cardno report, and in the reports of Winders Barlow & Morrison.[51] Concerns about the incremental extension of the breakwaters was raised in the public submissions as well, particularly by Mr Rob Hunt, Mr Paul Sutton, James Crawford, Margaret Thorsborne and Vita Napoli.[52]

[48] The first respondent's Statement of Reasons makes no reference to these concerns or to the prospect of the designated breakwater failing to achieve the reduction in maintenance dredging.

[49] The respondents argue that the first respondent acted appropriately on expert opinion which supported the construction of the breakwaters in the configuration applied for by Cardwell Shire Council.

[50] The third and fourth respondents made reference to earlier applications for breakwaters of greater length which applications were never finally determined. The first respondent referred to this fact in his Statement of Reasons paras 1.6-1.10. It is unlikely therefore that the length of the breakwater would have escaped his attention.

[51] I accept the respondent's submission that it would amount to irrelevant speculation for the first respondent to consider the prospect of an unquantified extension, at

---

49 Transcript 66/30
50 Transcript pp 65/40-66/10
51 Ex 1 at pp 345-5; p 273
52 Ex 1 at pp 226, 229, 176, 188, 222 respectively

some indeterminate point of time, of breakwaters which may or may not give rise to additional impacts. It is difficult to know how such an assessment could be made.

[52] The first respondent was required to consider the application before him on its merits. The statutory requirement to have regard to "orderly and proper management" does not call for speculative prognostications about the effects of a development proposal but rather a weighing up of the foreseeable benefits and foreseeable impacts. It is in this regard the first respondent has evidently relied upon expert assessment as well as his own consideration experience. I can find no failure on his part to give due consideration to the statutory requirement.

Failure to comprehend the nature of the task – Ground 3(e)

[53] In Ground 3(e) the application raises a further matter that the respondent failed to comprehend the nature of his task. This allegation appears to be based on there having been a successful outcome of at least some of the earlier grounds.

[54] The allegation was not pressed in argument before me and, in the light of my remarks on the other grounds, it does not require specific determination now. I am satisfied that the first respondent was aware of the statutorily required considerations and what was relevant to his determination of the application.

Conclusion

[55] The first respondent appears to have accepted that there would be adverse impacts associated with the breakwaters of the kind identified in the quite detailed public submissions and analysed in Mr Mattock's assessment. He emphasised the fact that the amenity of the area was already diminished amenity by reason of the well established and visually intrusive facilities of the Port Hinchinbrook development. He clearly had regard to the statutory requirements, expert reports, public submissions and departmental assessments. Guided by the legal principles set out above, I am not persuaded that there is any basis for an order to review the first respondent's decision on the issuing of the subject permit. The application will therefore be dismissed.

Order

[56] 1. The application is dismissed.