FEDERAL COURT OF AUSTRALIA

Carter and Others v Minister for Aboriginal Affairs and Another

[2005] FCA 667

Ryan J

23 May 2005

Administrative Law — Judicial Review — Determination on decision-maker's own motion — Minister declining to exercise a power on own motion under Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) — Whether decision to make determination on decision-maker's own motion is a decision to which the Administrative Decisions (Judicial Review) Act 1977 (Cth) applies — Whether a conclusion reached on the way to a substantive and operative decision is a decision of an administrative character — Whether Minister under a duty to make a decision to which the Administrative Decisions (Judicial Review) Act 1977 (Cth) applies — Whether making a decision as to whether or not to make a determination under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) constitutes conduct for the purposes of the Administrative Decisions (Judicial Review) Act 1977 (Cth) — Administrative Decisions (Judicial Review) Act 1977 (Cth), ss 3, 5, 6 and 7 — Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), ss 21D and 21E.

The applicants were elders of the Dja Dja Wurrung people for whom certain objects had special cultural significance. Those objects had been lent to the second respondent for the purposes of an exhibition. The applicants applied to the first respondent (the Minister) to make a declaration for preservation of the objects under s 21E of the *Aboriginal and Torres Straight Islanders Heritage Protection Act 1984* (Cth) (the Heritage Protection Act). Section 21E(1) provided that a "local Aboriginal community" (as defined in the Heritage Protection Act) could advise the Minister that a declaration of preservation should be made. Section 21E(2) provided that the Minister could also decide, on his or her own motion, that a declaration of preservation should be made. The remainder of s 21E(2) provided for public consultation and hearing of affected persons before a final decision was made.

The Minister advised the applicants that he did not consider the letter to be an advice under s 21E(1) because the applicants were not representatives of a local Aboriginal community under the Heritage Protection Act. However, he advised that he was considering whether to make a determination on his own motion, pursuant to s 21E(2). At the time of the hearing, the Minister had declined to exercise his "own motion" powers to decide to make a temporary declaration of preservation under s 21D(2) or a permanent declaration under s 21E(2).

The applicants made an application under s 5 of the *Administration Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) for review of the decision of the Minister to decline to make a temporary declaration of preservation under s 21D(2); under s 6(1) of the ADJR Act to review the conduct engaged in by the Minister for the purpose of making a decision under s 21D of the Heritage Protection Act; under s 7(1) of the ADJR Act to review the failure of the Minister to make a permanent declaration under s 21E; and an application under the *Judiciary Act 1903* (Cth) for a writ of mandamus compelling the Minister to determine on his own motion that a declaration of preservation should be made.

The respondents contended that the Minister had made no decision to which the ADJR Act applied because declining to exercise the Minister's own motion was not an act of an administrative character, as required by s 3(1) of the ADJR Act. The Minister also contended that the application under s 7(1) of the ADJR Act was incompetent because s 7(1) afforded a right of review where a person had failed to make a decision where that person had a duty to make a decision — and the Minister here did not have a duty.

Held, dismissing the application (1): A decision of an administrative character, for the purposes of s 3(1) of the ADJR Act, is a decision which a statute requires or authorises rather than merely a step taken in the course of reasoning on the way to the making of the ultimate decision. A decision whether or not to exercise the Minister's own motion to make a determination that a temporary or permanent declaration of preservation be made, is an act done preparatory to the making of that decision and so is not to be regarded as constituting a decision for the purposes of the ADJR Act. [14]

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, applied.

(2) The decision to make or not to make a determination on the Minister's own motion is not a decision which the Minister is under a duty to make for the purposes of s 7(1) of the ADJR Act. [25]

(3) Mandamus will only go to compel the performance of a duty owed by the respondent to the applicant and so a writ of mandamus could not be issued because the Minister is under no duty to decide whether or not to make a determination under s 21E(2) of the Heritage Protection Act. [30]

Leisure & Entertainment Pty Ltd v Willis (1996) 64 FCR 205; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, applied.

(4) The making of a decision as to whether or not to make a determination under s 21D or s 21E of the Heritage Protection Act does not constitute conduct for the purposes of s 6(1) of the ADJR Act. [35]

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, applied.

Cases Cited

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321.

Brownsville Nominees Pty Ltd v Commissioner of Taxation (Cth) (1988) 19 FCR 169.

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379.

Eastman v Miles (2004) 181 FLR 418.

Immigration and Ethnic Affairs, Minister for v Kurtovic (1990) 21 FCR 193.

Immigration and Multicultural Affairs, Minister for v Ozmanian (1996) 71 FCR 1.

Immigration and Multicultural and Indigenous Affairs, Re Minister for; Ex parte Applicants S134/2002 (2003) 211 CLR 441.

Johns v Australian Securities Commission (1993) 178 CLR 408.

Leisure & Entertainment Pty Ltd v Willis (1996) 64 FCR 205.

Museums Board of Victoria v Carter [2005] FCA 645.

New South Wales Aboriginal Land Council v Aboriginal and Torres Strait Islander Commission (1995) 59 FCR 369.

Park Oh Ho v Minister for Immigration and Ethnic Affairs (1989) 167 CLR 637.

R v Murray; Ex parte Commonwealth (1916) 22 CLR 437.

Visy Board Pty Ltd v Attorney-General (Cth) (1983) 72 FLR 458.

Williams v Minister for Environment and Heritage (2003) 199 ALR 352.

Williams v Minister for Environment and Heritage (2003) 74 ALD 124.

Williams v Minister for Environment and Heritage (2004) 132 LGERA 368.

Application

C Gunst QC with *R Orr*, for the applicant.

ME Kennedy SC with *L De Ferrari*, for the first respondent.

JI Fajgenbaum QC with *C Horan*, for the second respondent.

Ex tempore

23 May 2005

Ryan J.

1 The applicants have by their further amended application in proceedings instituted on 20 April 2005 made the following applications:

(a) application under s 5 of the *Administration Decisions (Judicial Review) Act 1977* (Cth) (the AD(JR) Act) to review the decision of the first respondent made on or about 8 March 2005 (the Temporary Declaration decision) to decline to determine on his own motion that a Temporary Declaration of Preservation should be made under s 21D(2) of the *Aboriginal And Torres Strait Islander Heritage Protection Act 1984* (Cth) (the Heritage Protection Act) in relation to certain cultural objects, namely two barks and one carved emu figure (the cultural objects);

(aa) in the alternative application under s 6(1) of the AD(JR) Act to review the conduct engaged in by the Minister for the purpose of making a decision under s 21D of the Heritage Protection Act in relation to each of the cultural objects;

(b) application under s 7(1) of the AD(JR) Act to review the failure of the first respondent to determine on his own motion that a Declaration of Preservation should be made under s 21E(2) of the Heritage Protection Act in relation to certain cultural objects, namely two barks and one carved emu figure (the cultural objects);

(c) application under s 39B(1) and (1A)(c) of the *Judiciary Act 1903* (Cth) for a writ of mandamus compelling the first respondent to determine on his own motion that a Declaration of Preservation should be made under s 21E(2) of the Heritage Protection Act in relation to each of the cultural objects; and

(d) in the alternative, application under s 6(1) of the AD(JR) Act to review the conduct engaged in by the Minister for the purpose of making a decision under s 21E of the Heritage Protection Act in relation to each of the cultural objects.

2 The applicants are all elders of the Dja Dja Wurrung people for whom the two bark etchings and the ceremonial piece, as (the objects) referred to in my reasons for judgment published on 20 May 2005 in *Museums Board of Victoria v Carter* [2005] FCA 645 have special cultural significance. As recounted in my earlier reasons, the objects were brought to Victoria by the second respondent, the Museums Board of Victoria (the Museum) pursuant to loan arrangements with the British Museum and the Royal Botanic Gardens, Kew in the United Kingdom.

3 Although the objects are no longer on public exhibition in Victoria. I have been informed that the loan arrangements have been extended to permit the Museum to retain custody of the objects until June this year. On 12 July 2004, the applicants applied by letter to the first respondent, (the Minister), to make in respect of the objects, a declaration of preservation under the Heritage Protection Act. Section 21E provides:

> (1) If a local Aboriginal community decides, whether after an application is made to it or on its own motion, that:
>
> (a) a place or object in the community area is an Aboriginal place or Aboriginal object; and
>
> (b) it is appropriate, having regard to the importance of maintaining the relationship between Aboriginals and that place or object, that a declaration of preservation should be made in relation to that place or object;
>
> the community may advise the Minister that it considers a declaration of preservation should be made.
>
> (2) On receiving advice under subsection (1) or determining on his or her own motion that a declaration of preservation should be made, the Minister:
>
> (a) shall within 14 days cause notice of the advice or determination to be given to any person who is likely to be affected by the making of a declaration; and
>
> (b) shall give any such person an opportunity to be heard.
>
> (3) After notice is given under subsection (2) and any objections are heard and the Minister has consulted with any State Minister whose responsibility may be affected by the making of a declaration, the Minister shall:
>
> (a) if the Minister considers that, in all the circumstances of the case, it is reasonable and appropriate that a declaration be made for the preservation of the place or object — make the declaration and, in the declaration, specify the terms of the declaration and the manner of preservation to be adopted in relation to the place or object, including prohibition of access to, or interference with, the place or object; or
>
> (b) refuse to make the declaration.
>
> (4) The Minister may, at any time, on the application of the local Aboriginal community or on his or her own motion, vary or revoke a declaration or any matters specified in it.
>
> (5) A person likely to be affected by the making, variation or revocation of a declaration of preservation may request the Minister to appoint an arbitrator to review the Minister's decision.

(6) If the Minister refuses to make, or revokes, a declaration of preservation or makes or varies a declaration, the local Aboriginal community may request the Minister to appoint an arbitrator to review the Minister's decision.

(7) The Minister shall, after receiving a request under subsection (5) or (6), appoint an arbitrator, being a person whom the Minister considers to be in a position to deal with the matter impartially.

(8) The making, variation or revocation of a declaration under this section:

(a) shall be done by notice published in the Gazette; and

(b) comes into operation on the date of publication or such later date as is specified in the notice.

4 The same letter of 12 July 2004 requested that the Minister compulsorily acquire the objects pursuant to s 21L of the Heritage Protection Act, which provides:

(1) The Minister may, in accordance with the regulations, compulsorily acquire any Aboriginal cultural property if the Minister is satisfied, whether on the advice of a local Aboriginal community or otherwise, that:

(a) the property is of such religious, historical or cultural significance that it is irreplaceable; and

(b) no other arrangements can be made to ensure its proper continuing preservation and maintenance.

(2) Property acquired under this section is, upon acquisition, vested in the local Aboriginal community of the area where the property is found to be held on trust for it or, if there is no such community, in the Minister on trust for Aboriginals in Victoria.

5 The letter of 12 July 2004 elicited the following response from the Minister:

> I refer to your letter of 12 July 2004 co-signed by Miss Fay Carter and Ms Lilian Tamiru. You have requested a declaration of preservation under section 21E of [the Act] in respect of two bark etchings and one carved emu figure on loan to Museum Victoria from the Royal Botanic Gardens Kew and the British Museum.
> …
>
> Although I do not consider your letter of 12 July 2004 to be an "advice" under section 21E(1) of the Act, I am treating your letter as a request that I exercise my power under section 21E(2) of the Act to make a determination on my own "own motion" that a declaration of preservation should be made in relation to the specified object. I have reached this conclusion on the basis that the Dja Dja Wurrung Native Title Group is not the relevant "local Aboriginal community" within the meaning of the Act because it has not been specified in the Schedule to the Act.
>
> I wish to inform you that I am currently considering your request to exercise my power under section 21E(2) of the Act.
>
> You have also requested that I exercise my power to compulsorily acquire the three objects under section 21L of the Act and that they be vested in the Dja Dja Wurrung Peoples. That request is also under consideration. In the meantime I encourage the Dja Dja Wurrung Native Title Group to continue negotiations with Museum Victoria in order to reach an amicable solution in this matter. To this end, I am supportive of any agreement that will result in maximum access by Victoria's Aboriginal people to these objects and to other cultural artefacts from Victoria that are held within British Institutions.

6 Thereafter there were communications between the applicants' solicitors and other representatives of the Dja Dja Wurrung People on the one hand and representatives of the Victorian Department of Aboriginal Affairs and solicitors for the Minister on the other. In the course of those communications it was

indicated on behalf of the Minister that he was treating the letter of 12 July 2004 as a request for him to exercise his power under s 21E(2) to make a determination on his own motion that a declaration of preservation should be made.

7 It was further indicated that the Minister had not yet decided whether this was an appropriate case in which to consider exercise of his powers under s 21L of the Heritage Protection Act. The matter was complicated by inconclusive references to attempts to formulate an "advice" by the Wurundjeri Tribe Land Compensation and Cultural Heritage Council Inc, (the Wurundjeri Council), a local Aboriginal community organisation named in the schedule to the Heritage Protection Act.

8 As the objects have, since their arrival in Australia, been located in Melbourne, it seems to be accepted that they are in the community area of the Wurundjeri Council. Accordingly, the Wurundjeri Council is the body entitled to advise the Minister in terms of ss 21D(1), 21E(1) and 21L of the Heritage Protection Act. However, it has not been suggested that the Wurundjeri Council has given effective advice to the Minister under any of those provisions. Against that background, it was reiterated on behalf of the Minister that he was "considering" the exercise of his powers, presumably on his own motion, under ss 21E(2) and 21L in response to the request from the Dja Dja Wurrung People but had again declined to exercise his power to make a temporary declaration under s 21D.

9 On 13 April 2005, the Minister's solicitors explained his position by saying that he did not wish to pre-empt any decision of this Court in *Museums Board of Victoria v Carter* and had declined to exercise his "own motion" powers at this stage. It was further indicated that the position would be reviewed after judgment had been delivered in *Museums Board of Victoria v Carter*.

The objection to competency

10 The Minister, by a notice of objection to the competency of the application, has contended, first, that it is not open to the applicants to seek a review under the AD(JR) Act of the Minister's so-called decision to decline to determine on his own motion that a declaration of preservation should be made under s 21D(2) of the Heritage Protection Act in relation to the objects.

11 It is said that, by so declining, the Minister had made no decision to which the AD(JR) Act applies, as required by s 5(1) of that Act. The expression "decision to which this Act applies" is defined in s 3(1) of the AD(JR) Act as meaning:

> a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):
>
> (a) under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of enactment; or
>
> (b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of enactment; other than;
>
> (c) a decision by the Governor-General; or
>
> (d) a decision included in any of the classes of decisions set out in Schedule 1.

12 It is not disputed that the Heritage Protection Act is an enactment referred to

in para (a) of the definition of "enactment" in s 3(1) of the AD(JR) Act. However, the inquiry does not end there because what is relied on to found a right of review under s 5(1) must be "of an administrative character".

13 As Mason CJ pointed out in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 336:

> the reference in the definition in s 3(1) to "a decision of an administrative character made … under an enactment" indicates that a reviewable decision is a decision which a statute requires or authorises rather than merely a step taken in the course of reasoning on the way to the making of the ultimate decision. Secondly, the examples of decision listed in the extended definition contained in s 3(2) are also indicative of a decision having the character or quality of finality, an outcome reflecting something in the nature of a determination of an application, inquiry or dispute or, in the words of Deane J, "a determination effectively resolving an actual substantive issue". Thirdly, s 3(3), in extending the concept of "decision" to include "the making of a report or recommendation before a decision is made in the exercise of a power", to that extent qualifies the characteristic of finality. Such a provision would have been unnecessary had the Parliament intended that "decision" comprehend every decision, or every substantive decision, made in the course of reaching a conclusive determination. Finally, s 3(5) suggests that acts done preparatory to the making of a "decision" are not to be regarded as constituting "decisions" for, if they were, there would be little, if any, point in providing for judicial review of "conduct" as well as of a "decision".

14 In the present case I assume, for the purposes of the argument, that the Minister's determining "on his own motion that a temporary declaration should be made" which is provided for by s 21D(2) of the Heritage Protection Act is a decision of an administrative character. However, a decision whether or not to so determine is an act done prepatory to the making of that decision and so, on Mason CJ's analysis, is not to be regarded as constituting a "decision" in the requisite sense.

15 Another approach which leads to the same conclusion is that a decision by the Minister as to whether or not to determine on his or her own motion that a temporary declaration of preservation should be made is a conclusion reached as a step on the way to an ultimate decision. On the assumption which I have made for the purposes of the present argument, the ultimate decision in the context of s 21D(2) is the determination that a temporary declaration of preservation should be made. Section 21D(2) provides:

> On receiving advice under subsection (1) or determining on his or her own motion that a temporary declaration of preservation should be made, the Minister:
>
> (a) shall, within 14 days, cause notice of the advice or determination to be given to any person who is likely to be affected by the making of a declaration; and
>
> (b) shall give any such person an opportunity to be heard.

16 As Mason CJ held in *Australian Broadcasting Tribunal v Bond* at 337:

> A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.

17 There can be no suggestion that the Heritage Protection Act provides for the

making of a finding or ruling on whether the Minister has decided to make a determination on his or her own motion under s 21D(2). I also doubt that a decision whether or not to make an "own motion" determination under s 21D(2) is substantive in character in the sense explained by Mason CJ in *Bond* at 337-338. The substantive decision provided for by s 21D(2) is the determination itself that a temporary declaration of preservation should be made. It is a substantive decision in the sense that it resolves an important substantive issue to be determined before the ultimate decision can be made under s 21D(3) whether to make or refuse to make a temporary declaration of preservation.

18 Subsection (3) of s 21D of the Heritage Protection Act provides:

> After notice is given under subsection (2) and any objections are heard and the Minister has consulted with any State Minister whose responsibility may be affected by the making of a declaration, the Minister shall:
>
> (a) if the Minister considers that, in all the circumstances of the case, it is reasonable and appropriate that a temporary declaration be made for the preservation of the place or object — make the declaration in writing, and, in the declaration, specify the terms of the declaration and the manner of preservation to be adopted in relation to the place or object, including prohibition of access to, or interference with, the place or object; or
>
> (b) refuse to make the declaration.

19 As Mason CJ acknowledged in the passage from *Bond* to which I last referred, a review of the ultimate or operative decision can expose for consideration the antecedent conclusions or findings which contributed to the ultimate decision. In the present case that would include conclusions which had led the Minister to determine under s 21D(2) that a temporary declaration of preservation should be made. However, for reasons which will become apparent, a decision not to make, or to defer making, an "own motion" determination will never be exposed for consideration unless the substantive determination is eventually made.

20 Mr Gunst QC, who appeared with Ms Orr for the applicants, submitted that, in making a determination under s 21D(2) the Minister is required to consider the matters enumerated in s 21D(1), namely whether the object is under threat of injury or desecration. No such requirement is apparent from the terms of s 21D(2). Be that as it may, Counsel went on to submit that, if the Minister decides to make such a determination "specific consequences flow — he is obliged, pursuant to s 21D(2) to cause notice of the determination to be given to certain persons and give those persons an opportunity to be heard".

21 However, those consequences flow from the determination under s 21D(2) itself, not from the decision whether to make the determination. It is a truism to say, as counsel did in the same submission, that "if the Minister decides not to exercise the power to make such a determination, no further action can be taken and no form of protection can be extended to the object in question". But that is only true unless and until the Minister changes his mind. The so-called decision need never be communicated to anybody and creates no estoppel against the Minister: see *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193.

22 The Minister's second attack was on the competency of the application under s 7(1) of the AD(JR) Act for review of his alleged failure to determine on his own motion that a declaration of preservation should be made under s 21E(2) of the Heritage Protection Act. Section 21E(2), it will be recalled, provides:

> On receiving advice under subsection (1) or determining on his or her own motion that a declaration of preservation should be made, the Minister:
>
> (a) shall within 14 days cause notice of the advice or determination to be given to any person who is likely to be affected by the making of a declaration; and
>
> (b) shall give any such person an opportunity to be heard.

23 Section 7(1) of the AD(JR) Act affords a right of review where:

> a person has a duty to make a decision to which this Act applies —

and the person has failed to make that decision. A decision whether or not to determine that a declaration of preservation should be made under s 21E is an act prepatory to the making of that determination. It is the determination that a declaration of preservation should be made that is the decision under the Heritage Protection Act provided for by s 21E(2).

24 I can discern no difference between the nature of a decision to make that determination and that of the corresponding decision whether or not to determine under s 21D(2) that a temporary declaration of preservation should be made. As I have already explained, both decisions are steps on the way to an ultimate decision, which is the determination that a declaration of temporary preservation or a declaration of preservation, as the case may be, should be made. Neither of the two anterior decisions is substantive in character. Section 21E(3) corresponds almost exactly with s 21D(3) in providing for the ultimate decision to make or refuse to make an indefinite or open-ended declaration of preservation.

25 Even if I be wrong in holding that a decision whether or not to make a determination of the Minister's own motion under s 21E(2) of the Heritage Protection Act is not a decision to which the AD(JR) Act applies, I am unable to hold that the Minister has a duty to make that decision as required by s 7(1)(a) of the AD(JR) Act. Gray J by implication held in *Eastman v Miles* (2004) 181 FLR 418 at [39] that there was no such duty when a power was expressed to be exercisable on the decision-maker's own motion. His Honour there referred to *Brownsville Nominees Pty Ltd v Commissioner of Taxation (Cth)* (1988) 19 FCR 169. In that case Northrop J observed at 173:

> The construction and effect of section 170(6) [of the *Income Tax Assessment Act 1936* (Cth)] is to be understood in this context. That subsection preserves the power of the Commissioner to make an amended assessment reducing the liability of a taxpayer where the provisions of s 170(6) apply. It does not create any duty on the Commissioner. The whole purpose of s 170 is to confer a power on the Commissioner. Sections 170 (2), (3) and (4) impose restrictions on the exercise of that power. Apart from s 170(6) reference need not be made to the other subsections of s 170. What is important is that s 170 does not impose any duty or obligation on the Commissioner to make an amended assessment. The Commissioner does not come within the requirements of s 7(1)(a) of the Judicial Review Act. Section 170 may be contrasted in this respect with s 200B which imposes a duty on the Commissioner to make an amended assessment in the circumstances therein specified.
>
> On this analysis of s 170, and in particular s 170(6), it cannot be said that a decision under s 170(6) is a decision required to be made under an enactment. The use of the word "required" illustrates that the decision-maker must be under a duty or obligation to make a decision. The duty or obligation imposed upon the Commissioner by s 200B is an illustration of a case where the Commissioner is required to make a decision under an enactment.

26 In the present case the contrasting illustration is to be found within the four corners of s 21E(2) itself. The requirement to make a decision is imposed when the local Aboriginal community decides that it is appropriate that a declaration of preservation should be made in respect of an Aboriginal object and advises the Minister to that effect. On receiving that advice, the Minister is required to make a decision to give the notice and afford the opportunity to be heard provided for by s 21E(2) (a) and (b). The advice from the local Aboriginal community triggers a power coupled with a duty. By contrast, the decision to make or not to make a determination on the Minister's own motion that a declaration of preservation should be made is the exercise of a bare power. It is not a decision which the Minister is under a duty to make of the kind required by s 7(1)(a) of the AD(JR) Act.

27 That conclusion is also fatal to the applicants' invocation of s 39B(1) and (1A)(c) of the *Judiciary Act* in aid of the issue of a writ of mandamus compelling the Minister to determine on his own motion that a declaration of preservation should be made under s 21E(2) of the Heritage Protection Act. Mandamus will only go to compel the performance of a duty owed by the respondent to the applicant: see, eg, *Leisure & Entertainment Pty Ltd v Willis* (1996) 64 FCR 205 at 216. For the reasons already explained, the Minister is under no duty to the applicants or anybody else to decide whether or not to make a determination under s 21E(2) that a declaration of preservation should be made.

28 Counsel for the applicants sought to argue that the power to make such a decision was translated into a duty by the making of a request by persons in the position of the applicants. They called in aid these observations of Woodward J in *Visy Board Pty Ltd v Attorney-General (Cth)* (1983) 72 FLR 458 where his Honour said at 467:

> The translation of his undoubted power to decide into a duty to decide (attracting the jurisdiction of the court under s 7 of the ADJR Act) may, for example, turn upon such considerations as the nature of the breach or threatened breach of the Act alleged, the apparent availability of alternative remedies, the identity of the person seeking a decision and, in particular, the apparent cogency of any supporting material supplied.

29 However, those observations are clearly obiter because his Honour held that the impugned decision was proper in any event. Moreover, if his Honour is to be taken to have indicated that a duty, which is not imposed on the proper construction of the relevant Act, comes into existence according to the identity of the persons making the request for the exercise of a power, the cogency of the request and the availability of alternative remedies, I am unable, with respect, to accept the proposition as correct.

30 The amenability of the Minister to mandamus is bound up with whether his so-called "decision" not to make or to defer making a determination under s 21D(2) or s 21E(2) can be set aside under the AD(JR) Act. If it cannot, the claim for mandamus gives rise to the conundrum identified by Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at [48]. Their Honours there said:

> On the footing that prohibition or injunction and certiorari issue, directed to the Minister, the prosecutors seek mandamus requiring the Minister to reconsider the exercise of his power under s 417(1). However, s 417(7) states in terms that the

> Minister does not have a duty to consider whether to exercise the power conferred by s 417(1). That gives rise to a fatal conundrum. In the express absence of a duty, mandamus would not issue without an order that the earlier decision of the minister be set aside. Further, in that regard, there would be no utility in granting relief to set aside that earlier decision where mandamus could not then issue.

31 Counsel for the Minister also contended that he was not an "officer of the Commonwealth" within the meaning of s 39B(1) of the *Judiciary Act*. However, I have not been immediately attracted to the proposition that a delegate of an officer of the Commonwealth pursuant to a delegation expressly provided for in a Commonwealth Act and performing a duty imposed by the same Commonwealth Act can never be, while performing the duty, an officer of the Commonwealth. I consider that *R v Murray; Ex parte Commonwealth* (1916) 22 CLR 437 and the other cases to which Ms Kennedy SC who appeared with Ms De Ferrari for the Minister, referred me may not now have the same force as they had when they were decided in the application of a less elastic concept of "officer". If this were the only ground on which the attack on the application for mandamus could succeed, I would not uphold the objection to the competency of that part of the application.

32 The applicants by their further amended application sought to attack, under s 6 of the AD(JR) Act, the conduct of the Minister — "for the purpose of making a decision under each of s 21D(2) and s 21E(2) of the Act".

33 It is said that the making of the proposed decision, which I take to be the decision not to make, for the time being, a determination under those respective subsections, would be an improper exercise within the meaning of s 6(1)(e) of the AD(JR) Act, of the power conferred by the Heritage Protection Act in pursuance of which the decision is proposed to be made. The decision, it is to be remembered, is a decision whether or not to make a determination under either s 21D(2) or s 21E(2) that a declaration of preservation should be made. The improper exercise of the power, it is said, would be constituted by taking an irrelevant consideration, or failing to take a relevant consideration, into account as contemplated by s 6(2) (a) and (b) of the AD(JR) Act.

34 Assuming in the applicants' favour that they can demonstrate considerations which are capable of attracting the application of s 6(1) (e) of the AD(JR) Act as amplified by paras (a) and (b) of s 6(2), they must still establish that the Minister has engaged, is engaging or proposes to engage in, that conduct for the purpose of making a decision to which the AD(JR) Act applies. As Mason CJ said in *Australian Broadcasting Tribunal v Bond* at 341:

> The distinction between reviewable decisions and conduct engaged in for the purpose of making such a decision is somewhat elusive. However, once it is accepted that "decision" connotes a determination for which provision is made by or under a statute, one that generally is substantive, final and operative, the place of "conduct" in the statutory scheme of things becomes reasonably clear. In its setting in s 6 the word "conduct" points to action taken, rather than a decision made, for the purpose of making a reviewable decision. In other words, the concept of conduct looks to the way in which the proceedings have been conducted, the conduct of the proceedings, rather than decisions made along the way with a view to the making of a final determination. Thus, conduct is essentially procedural and not substantive in character. Accordingly, s 3(5) refers to two examples of conduct which are clearly of that class, namely, "the taking of

> evidence or the holding of an inquiry or investigation". It would be strange indeed if "conduct" were to extend generally to unreviewable decisions which are in themselves no more than steps in the deliberative or reasoning process.
>
> Accordingly, there is a clear distinction between a "decision" and "conduct" engaged in for the purpose of making a decision. A challenge to conduct is an attack upon the proceedings engaged in before the making of the decision. It is not a challenge to decisions made as part of the decision-making process except in the sense that if the decisions are procedural in character they will precede the conduct which is under challenge.
>
> In relation to conduct, the complaint is that the process of decision-making was flawed; in relation to a decision, the complaint is that the actual decision was erroneous. To give an example, the continuation of proceedings in such a way as to involve a denial of natural justice would amount to "conduct". That is not to deny that the final determination of the proceedings would constitute a decision reviewable for denial of natural justice.
>
> So, in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, it was possible to review the decision of the delegate for error of law on the basis either that it was a reviewable decision or that the inquiry preceding the making of the decision was reviewable conduct. But it was not precise in that case to describe the decision of the delegate as reviewable conduct, because the decision was not a matter of procedure. Further, in truth it was the decision, not the conduct engaged in for the purpose of making the decision, which was the subject of challenge, and the decision of the delegate can have been reviewable as an improper exercise of power only because the decision itself was reviewable; s 6(1)(e) would not permit the review of conduct as an improper exercise of power.

35 Those observations can be paraphrased to apply with equal force to the present case. In truth, it is the decision of the Minister not to make or to defer making on his own motion a determination under s 21D(2) or s 21E(2) of the Heritage Protection Act which is the subject of challenge. Neither of those decisions was a matter of procedure. Accordingly, the decision of the Minister could have been reviewable as an improper exercise of power only if the decision itself were reviewable. For the reasons already explained, the decision which I have identified is not so reviewable. Therefore s 6(1) (e) of the AD(JR) Act does not permit the review of any conduct by the Minister as an improper exercise of power.

36 Support for this conclusion is also to be found in s 16(2) of the AD(JR) Act, to which I was referred by Ms Kennedy. By contrast with s 16(1), which is related to an order of review in respect of a decision, subs (2) does not empower the court to quash the impugned conduct. It enables only the making of either or both of the following orders:

> (a) an order declaring the rights of the parties in respect of any matter to which the conduct relates;
>
> (b) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.

37 I find nothing in the reasoning of Sackville J in *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FCR 1 to which I was referred by Counsel for the applicants which detracts from the conclusion which I have just reached. That case concerned the question of whether a decision under the *Migration Act 1958* (Cth) protected by a privative clause could nevertheless be

impugned by an attack under s 6(1) of the AD(JR) Act on conduct leading to the making of the decision. Indeed, Kiefel J, the other member of the Full Court to give extensive reasons in that case said at 348:

> I also agree with [Sackville J's] observations concerning the apparent lack of relevance of conduct, to which s 6 of the Administrative Decisions (Judicial Review) Act might refer, when it is overtaken by a final decision. In areas such as judicial review the courts often express reluctance to confine provisions providing for review or to foreclose the possibility of its application to circumstances which cannot presently be envisaged. Nevertheless it can be said that s 6 does appear to have regard to the circumstance where a decision has not yet been made, as Hill J observed in *New South Wales Aboriginal Land Council v Aboriginal and Torres Strait Islander Commission* (1995) 59 FCR 369 at 380. And this is, to an extent, reinforced by the relief provided, with respect to conduct, by section 16(2) … The remedies provided for would have the effect of adjusting the parties' positions and setting the process on a correct course towards a conclusion which has not yet occurred.

38 Since the Minister's attack on each of the five limbs of the applicants' application has been sustained, it follows that the objection to competency must be upheld. That makes it unnecessary to rule on the Museum's motion under O 20, r 2 of the *Federal Court Rules 1979* (Cth) that the claim for relief against it be dismissed. However, out of deference to the careful arguments addressed to that motion, and in case my present decision be the subject of appeal, I can indicate my view that the applicants' inability in the present proceeding to identify any cause of action against the Museum is fatal to their invocation of jurisdiction in this Court to grant interlocutory or final injunctive relief against the second respondent.

The availability of relief against the Museum

39 I consider that *Johns v Australian Securities Commission* (1993) 178 CLR 408 compels the conclusion which I have just indicated. In that case Brennan J (with whom Dawson and Gaudron JJ expressly agreed) said, at 433:

> The relief which may be ordered under s 16(1)(d) of the AD(JR) Act is not so much at large that the Court may make an order against a party to litigation even though no ground for relief under the general law is established against that party. Section 16(1)(d) does not set the Court on an uncharted course without legal reference points by which to steer. Some observations in *Park Oh Ho v Minister for Immigration and Ethnic Affairs* [(1989) 167 CLR 637 at 644-645] were relied on in support of an argument that the recipient of information was within the purview of that paragraph if the information was received in consequence of a reviewable and void decision. In that case this Court said
>
> > The legislative purpose to be discerned in the conferral by s 16(1)(c) and (d) of power to grant declaratory and injunctive relief in addition to the power to quash or set aside with effect from a specified date an impugned decision is clear. It is to allow flexibility in the framing of orders so that the issues properly raised in the review proceedings can be disposed of in a way which will achieve what is "necessary to do justice between the parties" (s 16(1)(d)) and which will avoid unnecessary re-litigation between the parties of those issues. The scope of the powers to make orders which the sub-section confers should not, in the context of that legislative purpose, be constricted by undue technicality.
>
> However, s 16(1)(d) applies only when the making of an order is "necessary to do justice between the parties". That means justice according to law. It may be

> that a person who acquires information knowing that the information is imparted to him in breach of a statutory duty is in the same position as he would have been if the duty were an equitable obligation of confidence … But HWT and the ABC received the transcripts from the Royal Commission, not from the ASC, and it does not appear that either of them had knowledge of any breach of duty on the part of the ASC in permitting publication of the transcripts by the Royal Commission.
>
> If there be no right to relief against a person under the general law, that person does not become liable to have an adverse order made under s 16(1)(d) merely by reason of being joined as a respondent in an application to the Federal Court under the AD(JR) Act.

40 I also adopt, with respect, the application of that principle by Wilcox J in *Williams v Minister for Environment and Heritage* (2003) 74 ALD 124 at 135-136, and by Lindgren J in the case of the same name reported at *Williams v Minister for Environment and Heritage* (2003) 199 ALR 352. In the latter case, his Honour said at 362 [40]-[42]:

> In sum, the judgments of Brennan, Dawson and Toohey JJ [*in Johns' case*] are express authority for the view that a party seeking an injunction under s 16(1)(d) of the AD(JR) Act must establish a "right" to it under general law principles. Gaudron and McHugh JJ implicitly shared that view. That they did so is shown by their discussion of the question of the availability of injunctive relief against an innocent recipient of confidential information, and their inquiry into the question whether the information contained in the transcripts remained confidential when it was received by HWT and ABC, or whether confidentiality had been lost by reason of the information having entered the public domain …
>
> But it is important to read in context what Gaudron J said in *Johns*. Her Honour was making it clear that the positions of HWT and ABC were at the outer limits. It does not follow that her Honour meant to say that any person in any way closer to the decision-maker than HWT and ABC were in *Johns*, is in a position to invoke s 16(1)(d). Although Barrick made a submission to the minister, it was a "stranger to the decision under review" (cf. *Johns* at CLR 459 per Gaudron J) because it was not an applicant before the minister and the decision was not one to grant it rights such as a decision which it needed in order to carry out lawfully its activity on the specified area. The decision was not, for example, a decision to grant Barrick a mining lease or an exploration licence.
>
> I think it clear that Gaudron J did not disagree at all with the statement made by Brennan J that s 16(1)(d) does not enlarge the scope for a person placed as Mr Williams is to obtain an injunction. In substance, all members of the court were saying that a person placed as Mr Williams is is in no better position to obtain an order under s 16(1)(d) by reason only of the fact that Barrick is joined as a party. What one must ask is whether Mr Williams would otherwise be entitled to injunctive relief against Barrick.

41 With respect, I prefer that reasoning to the obiter dicta of Gray J (with whom Tamberlin J agreed) when *Williams v Minister for Environment and Heritage* went on appeal limited to the question of costs to a Full Court of this Court — see *Williams v Minister for Environment and Heritage* (2004) 132 LGERA 368 at [27] and [28].

42 I consider to be inapt the analogy invoked on behalf of the applicants between the Aboriginal objects to which the presumptive declarations of preservation in the present case would relate, and an applicant asserting refugee status under the *Migration Act 1958* (Cth) who seeks an injunction restraining his or her deportation pending judicial review of a decision by the Minister or

the Refugee Review Tribunal. That is because the subject matter of the application for review in the latter case is the propriety of a decision as to the right of the applicant to remain in Australia. The matter of the present application is the propriety of the Minister's decision whether or not to make, for the time being, a determination under s 21D(2) or s 21E(2). That decision has no direct or immediate effect on an Aboriginal object which is affected only by the making of a declaration of preservation under s 21D(3)(a) or s 21E(3)(a) as the case may be.

Conclusion

43 In the result the orders of the Court must be that:

1. The objection to competency be upheld.
2. The application be dismissed.
3. The injunction granted on 20 May 2005 restraining the Museum from removing or permitting the removal of the object from Victoria be dissolved.

44 I shall hear Counsel on the question of costs.

Orders accordingly

Solicitors for the applicant: *Holding Redlich.*

Solicitor for the first respondent: Victorian Government Solicitor.

Solicitors for the second respondent: *Arnold Bloch Leibler*.

KATE FENNESSEY