Supreme Court of New South Wales – Court of Appeal

Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council & Anor [2009] NSWCA 352 (11 December 2009)

Last Updated: 11 December 2009

NEW SOUTH WALES COURT OF APPEALCITATION: Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council & Anor [2009] NSWCA 352FILE NUMBER(S): 40429/08HEARING DATE(S): 30 July 2009JUDGMENT DATE: 11 December 2009PARTIES: Minister Administering the Crown Lands Act (Appellant)New South Wales Aboriginal Land Council (First Respondent)Metropolitan Local Aboriginal Land Council (Second Respondent)JUDGMENT OF: Hodgson JA Basten JA Macfarlan JA LOWER COURT JURISDICTION: Land & Environment CourtLOWER COURT FILE NUMBER(S): 31513; 31514; 31515; 31516 of 2005LOWER COURT JUDICIAL OFFICER: Sheahan J - Davis ACLOWER COURT DATE OF DECISION: 29 August 2008LOWER COURT MEDIUM NEUTRAL CITATION: New South Wales Aboriginal Land Council & Another v Minister Administering the Crown Lands [2008] NSWLEC 241COUNSEL: C E Adamson SC/C Lenehan/J Clark (Appellant)J E Griffiths SC/S Pritchard (Respondents)SOLICITORS: Crown Solicitor’s Office (Appellant)Chalk & Fitzgerald Lawyers (Respondents)CATCHWORDS: ABORIGINALS – land rights under legislation – claim to Crown land – whether lands needed or likely to be

needed as residential lands or for essential public purpose of nature conservation – whether lands lawfully used or occupied – Aboriginal Land Rights Act 1983 (NSW), s 36(1)ADMINISTRATIVE LAW – judicial review – jurisdictional error – conclusive certificates issued by Crown Lands Minister – decision based on briefing note – whether wrong question asked – whether mandatory relevant considerations taken into account – whether certificates void – Aboriginal Land Rights Act 1983 (NSW), s 36(8)LEGISLATION CITED: Aboriginal Land Rights Act 1983Aboriginal Land Rights (Amendment) Act 1986Crown Lands Act 1989Crown Lands Consolidation Act 1913Crown Lands (Continued Tenures) Act 1989Housing Act 1985Land and Environment Court Act 1979Landcom Corporation Act 1985Lands Act 1989Migration Act 1958 (Cth)National Parks and Wildlife Act 1974CATEGORY: Principal judgmentCASES CITED: Attorney General (Cth) v Foster [1999] FCA 81; (1999) 84 FCR 582; (1999) 161 ALR 232Bostik Australia Pty Ltd v Liddiard (No 2) [2009] NSWCA 304Carltona Ltd v Commissioners of Works and Others [1943] 2 All ER 560Craig v South Australia [1995] HCA 58; (1995) 184 CLR 163Darling Casino Ltd v NSW Casino Control Authority [1997] HCA 11; (1997) 191 CLR 602Gerlach v Clifton Bricks Pty Limited [2002] HCA 22; (2002) 209 CLR 478Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act [2007] NSWLEC 577; (2007) 156 LGERA 65Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council [2009] NSWCA 138; (2009) 166 LGERA 379Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (1998) 43 NSWLR 249; (1998) 98 LGERA 99Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2) [2001] NSWCA 28; (2001) 50 NSWLR 665Minister Administering the Crown Land Act v Illawarra Local Aboriginal Land Council [2009] NSWCA 289Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council [2009] NSWCA 151Minister Administering the Crown Lands Act v NSW Aboriginal Land Council [2008] HCA 48; (2008) 237 CLR 285Minister for Aboriginal Affairs v Peko-Wallsend Limited [1986] HCA 40; (1985-1986) 162 CLR 24Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323Minister for Local Government v South Sydney City Council [2002] NSWCA 288; (2002) 55 NSWLR 381New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2008]

NSWLEC 241NSW Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2) [2008] NSWLEC 13New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act (1988) 14 NSWLR 685NSW Aboriginal Land Council v Minister Administering the Crown Lands Act [2008] NSWLEC 35O'Reilly v The Commissioners of the State Bank of Victoria [1983] HCA 47; (1983) 153 CLR 1Plaintiff S157/2002 v Commonwealth [2003] HCA 2; (2003) 211 CLR 476Re Patterson; Ex parte Taylor [2001] HCA 51; (2001) 207 CLR 391Saville v Health Care Complaints Commission [2006] NSWCA 298SDAV v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 129; (2003) 199 ALR 43Woolworths Ltd v Pallas Newco Pty Ltd [2004] NSWCA 422; (2004) 61 NSWLR 707 TEXTS CITED: DECISION: (1) Appeal allowed in part. (2) Direct the parties within fourteen days of the date of this judgment to submit agreed Short Minutes of Order or, if agreement cannot be reached, competing forms of Short Minutes of Order together with short submissions in support thereof, identifying the variations which should be made to the orders below to give effect to these reasons.(3) No order as to the costs of the appeal.JUDGMENT:

IN THE SUPREME COURTOF NEW SOUTH WALESCOURT OF APPEAL

CA 40429/08

LEC 31513-31516/2005

HODGSON JA

BASTEN JA

MACFARLAN JA

11 DECEMBER 2009

MINISTER ADMINISTERING THE CROWN LANDS ACT v NEW SOUTH WALES ABORIGINAL LAND COUNCIL & ANOR

Headnote

This case concerned land claims made under the *Aboriginal Land Rights Act* 1983 (the "Act"). The claims were rejected by the relevant Minister, who was the appellant in these proceedings, on the grounds that the Crown lands the subject of the claims were required in part as residential lands or for nature conservation, and were in part already lawfully used or occupied.

The Court has concluded that the primary judge was correct in holding that the Minister did not establish that the first and third of these grounds were proper grounds for rejection (see [1, 70 and 134] as to the first ground and [1, 40 and 170] as to the third ground) but that he was incorrect in holding that the second ground was not established.

As to the second ground, the Court has held (by majority; Basten JA dissenting) that the requirement of certain parts of the land for nature conservation was established by conclusive certificates issued by the Minister under the Act (see [33, 164; compare 86]). Contrary to the conclusions of the primary judge, these were not void under administrative law principles.**IN THE SUPREME COURTOF NEW SOUTH WALESCOURT OF APPEAL**

CA 40429/08

LEC 31513-31516/2005

HODGSON JA

BASTEN JA

MACFARLAN JA

11 DECEMBER 2009

MINISTER ADMINISTERING THE CROWN LANDS ACT v NEW SOUTH WALES ABORIGINAL LAND COUNCIL & ANOR

Judgment

1 **HODGSON JA**: I agree with Basten JA and Macfarlan JA that the appeal should be dismissed, so far as concerns the question as to whether part of the lands in question was excluded on the basis of need or likely need as residential land, and whether part was excluded on the basis that it was lawfully used or occupied. I substantially agree with their reasons applicable to those questions.

2 As regards the question whether part of the lands in question was excluded on the basis of need or likely need for the essential public purpose of nature conservation, I agree with Macfarlan JA that the appeal should be allowed. I will give my reasons for this conclusion.

Judicial review and question of law

3 Crucial to the primary judge's conclusion on this aspect of the case was his exclusion from evidence of certificates issued by the appellant (the Minister) purportedly pursuant to s 36(8) of the *Aboriginal Land Rights Act* 1983 (the *Land Rights Act*). Section 36 of the *Land Rights Act* is set out in the judgment of Macfarlan JA.

4 The Minister did not contend that the privative provision in s 36(8), that such certificates not be "called into question" or "liable to ... review on any grounds whatever", precluded judicial review on the ground of jurisdictional error.

5 It might be arguable that the primary judge's decision to exclude the certificates was an exercise of the power of judicial review given by s 20(2) of the *Land and Environment Court Act* 1979 (*LEC* Act), so that if leave to appeal from that interlocutory decision had been sought and granted, it may be that that appeal would have been under s 58 of the *LEC* Act and thus not limited to questions of law. However, since the appeal has been brought from the final decision (in accordance with *Gerlach v Clifton Bricks Pty Limited* [2002] HCA 22; (2002) 209 CLR 478), the appeal is under s 57 of the *LEC* Act, and thus limited to an appeal against an order or decision on a question of law.

6 I need to say a little about the requirements for judicial review, and about appeals against orders or decisions on a question of law.

7 As indicated above, the Minister did not contend that the privative provision precluded judicial review on the ground of jurisdictional error; but to some extent that begs the question, because in my opinion what is a jurisdictional error does depend on the legislative scheme granting the relevant jurisdiction, including any privative provision.

8 The range of errors that can be jurisdictional errors is quite wide. In *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [82], McHugh, Gummow and Hayne JJ said this in relation to the Refugee Review Tribunal constituted under the *Migration Act* 1958 (Cth) (omitting footnotes):

[82] It is necessary, however, to understand what is meant by "jurisdictional error" under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia* [[1995] HCA 58; [1995] HCA 58; (1995) 184 CLR 163 at 179], if an administrative tribunal (like the Tribunal)

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

"Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively

determine questions of law or to make a decision otherwise than in accordance with the law.

9 However, in my opinion, their Honours cannot be understood as saying that all of the errors they have identified will necessarily be jurisdictional errors in all cases, without regard to the actual terms of the particular legislation which grants the jurisdiction under consideration. In order to decide what will be invalidating jurisdictional errors in the case of particular administrative actions or decisions, it is necessary to consider what requirements or limitations for the carrying out of those actions or decisions have been provided by the legislature, and if there is a privative provision, to reconcile the requirements or limitations with the privative provision: *Darling Casino Ltd v NSW Casino Control Authority* [1997] HCA 11; (1997) 191 CLR 602 at 633-634 per Gaudron and Gummow JJ; *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476; *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 129; (2003) 199 ALR 43 at [33]; and *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422; (2004) 61 NSWLR 707 at [70] and [81] per Spigelman CJ. .

10 In the case of certificates under s 36(8)(b) of the *Land Rights Act*, there are no requirements or limitations expressly specified, other than the requirement for consultation with the Minister administering the *Land Rights Act*. There are in my opinion implicit requirements that the Minister take into account the views of the Minister administering the *Land Rights Act*; that he conscientiously address the question whether the land in question was at the time of the claim needed or likely to be needed for an essential public purpose within the meaning of s 36(1)(c) of the *Land Rights Act* and thereby be satisfied that it was so needed or likely to be needed; and that he afford appropriate natural justice to applicants.

11 The respondent relied on the statement of principles by Jagot J in *Jerrinja Local Aboriginal Land Council v Minister Administering the*

Crown Lands Act [2007] NSWLEC 577; (2007) 156 LGERA 65 at [95], to which what her Honour said at pars [84] and [89]-[91] is also relevant:

[84] Four general observations should be made. First, the person authorised to issue a certificate under s 36(8)(b) is the Minister. Secondly, there is no avoiding the fact that the admission of a certificate into evidence makes the appeal right valueless. It does so in the context of a statute which expressly identifies one of its purposes as vesting land in land councils in recognition of the facts recorded in the long title to the Act, including that as "a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation". Recognising these matters does not involve any departure from the text of the ALR Act by reference to generalised ideas about the legislation being beneficial and remedial. They are clearly spelt out in the statutory provisions. Thirdly, s 36(8) of the ALR Act provides few direct and obvious clues about how it relates to the overall statutory scheme. Nevertheless, a certificate under s 36(8)(b) is not devoid of content. A certificate may contain a particular statement under that section. The final and conclusive effect provision operates by reference to "the matters set out in the certificate". In other words, in issuing a certificate the Minister makes a substantive statement about the status of the land. Fourthly, and as noted above, for a certificate to be relevant to any issue in an appeal the statement within the certificate must relate to the date when the claim was made (see the terms of s 36(7)).

.....

[89] Section 36(8) has been described as "conceptually hostile" to the broader statutory scheme (*Darkinjung Local Aboriginal Land Council v Minister* (1985) 58 LGRA 298 at 392–303 and *Darkinjung Local Aboriginal Land Council v Minister for Natural Resources (No 2)* (1987) 61 LGRA 218 at 231). Nevertheless, a "legislative instrument must be construed on the prima facie basis that its provisions are intended to give

effect to harmonious goals" and the relevant provision must be construed so "that it is consistent with the language and purpose of all the provisions of the statute" (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] and [69] respectively).

[90] Sections 36(5) and (7) of the ALR Act do not vest discretion in either the Minister or the court on appeal. The ALR Act confers a right on a land council to have land transferred to it if the Minister, having made the inquiry required by the definition of claimable Crown lands in s 36(1), is satisfied that the claimed land is claimable Crown lands or if, on appeal, the Minister fails to satisfy the court that the claimed land is not claimable Crown lands. As Hope JA observed in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and The Western Lands Acts* (1988) 14 NSWLR 685 at 692B the Minister "might make a wrong decision, but no question of discretion would be involved". Similarly, Hope JA confirmed that the use of the word "may" to describe the power of the court on appeal in s 36(7) did not involve a discretion, but vested in the court a power it would not otherwise have, the power being one the court "is bound to exercise in favour of the claimant in the circumstances specified in" s 36(7) (at 693C).

[91] The provisions of s 36 follow a "logical and chronological sequence for the processing of land claims by the Minister and the court on appeal" (*Worimi Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1991) 72 LGRA 149 at 154). The Minister's power in s 36(8) to issue a certificate does not relate to claimable Crown lands generally or to each and every element of the definition of claimable Crown lands in s 36(1). Only two elements of the definition of claimable Crown lands may be the subject of a certificate. A certificate may state that land is needed or is likely to be needed as residential land (s 36(8)(a), which relates to s 36(1)(b1)) or that land is needed or likely to be needed for an essential public purpose (s 36(8)(b), which relates to s 36(1)(c)). The statement within the certificate, when the certificate is tendered in an appeal, operates as final and conclusive evidence of the matter stated (*Minister for Agriculture, Lands and Forests v New South Wales*

Aboriginal Land Council (1987) 62 LGRA 27 at 31).

.....

[95] These considerations support the conclusion that there are two layers to the Minister's function under s 36(8)(b). The first layer concerns the substantive statement a certificate may contain. To issue a certificate under s 36(8)(b) the Minister, in the exercise of the function under s 36(8), must decide that the relevant statement can be made in accordance with that part of the statutory definition to which the statement relates, being s 36(1)(c). This first layer of the function under s 36(8)(b), like the Minister's function under s 36(5), does not involve any discretion. It is a decision of the kind considered in *Avon Downs Proprietary Ltd v The Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353 at 360 and *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 at [130]–[139]). Given that the statement relates to a specific statutory description (s 36(1)(c)) this aspect of the function does not involve a mere matter of "opinion or policy or taste" (*Buck v Bavone* [1976] HCA 24; (1976) 135 CLR 110 at 119). It is analogous to the circumstances considered in *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* [1944] HCA 42; (1944) 69 CLR 407 where the power was conditioned on the existence of an opinion. Here the power is implicitly conditioned on the Minister being satisfied that a statement in a certificate (to the effect of that part of the definition of claimable Crown lands in s 36(1)(c)) can be made. Judicial decisions about the meaning and operation of s 36(1)(c), but not mere judicial resolution of the facts of a particular case, thus also must be applied by the Minister when deciding to issue a certificate under s 36(8)(b) (*Federal Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* [2007] FCAFC 16; (2007) 158 FCR 325 at [2]–[6] per Allsop J, with whom Edmonds and Stone JJ agreed at [1] and [48] respectively). Accordingly, I do not accept the Minister's submission that there is no opportunity or occasion for the Minister to consider whether land is claimable Crown lands in exercising the function under s 36(8). In issuing the certificate the Minister makes a substantive statement to the effect of either s 36(1)(b1) or (c). The Minister may do so whether or not those grounds were relied on under s 36(5). The content of the statement a certificate may contain means that the Minister

must consider the substantive question in exercising that specific function, as explained above.

12 As indicated above, I agree that the power to issue a certificate under s 36(8) is implicitly conditioned on the Minister being satisfied that the statement in the certificate is true; and while I accept that the Minister is bound by law, I do not agree with Jagot J insofar as she may be taken to have suggested that the validity of the certificate is conditioned on the law being correctly applied in all respects in the course of reaching that satisfaction. In my opinion, so long as any error of law is not such as to justify a conclusion that the Minister did not consider the question whether the land was at the time of the claim needed or likely to be needed for an essential public purpose within the meaning of s 36(1)(c), or did not do so conscientiously, or did not become satisfied that it was, such an error would not result in invalidity. In the context of the *Land Rights Act*, it would not be a jurisdictional error.

13 The respondent also relied on *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; (1986) 162 CLR 24, and particularly on the statement by Gibbs CJ (at 45) that "if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, ... he will have failed to take that material fact into account and not have formed his satisfaction according to law". However, in this case there is in my opinion no basis for identifying material facts which the Minister is bound to consider, other than the requirements referred to above that the Minister conscientiously consider whether the land was at the time of the claim needed or likely to be needed for an essential public purpose within the meaning of s 36(1)(c), and be satisfied that it was.

14 In my opinion, this view is confirmed by the privative provision within s 36(8). In my opinion, the effect of this provision is that the certificate is

not to be challenged on the basis of errors of fact or law, except to the extent that it does not satisfy the requirements for it to be a certificate, which will only be the case if the explicit and implicit requirements I have discussed are not met.

15 As regards what is a decision on a question of law, against which an appeal may be brought under s 57 of the *Land and Environment Court Act*, I note that in *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* [2009] NSWCA 138; (2009) 166 LGERA 379, at [204], Basten JA said this:

[204] In this case it will be necessary to consider whether the challenges to aspects of her Honour's reasoning involved any decision on a question of law. Because the statutory phrase "not lawfully used or occupied" gains meaning from its statutory context, the proper construction of that phrase involves a question of law, despite the fact that each word, taken individually, may be treated as an ordinary English word and not as a term of art: see, eg, *Hope v Bathurst City Council* [1980] HCA 16 ; 144 CLR 1 at 8 and 10 (Mason J); *Industry Research and Development Board v Bridgestone Australia Ltd* [2001] FCA 954; 109 FCR 564 at [49]–[62] (Lindgren J). Nevertheless, to describe the word "use", and by inference the phrase as a whole, as "protean" or adaptable to changing circumstances, is to concede the existence of a broad evaluative judgment to be made according to the facts of the particular case. The formation of such a judgment can involve an error of law, but the circumstances in which it will do so are limited. Such an error may arise where the facts as found are reasonably open to only one conclusion in application of the statutory language; see *Australian Gas Light Co v Valuer-General* (1940) 40 SR(NSW) 126 at 138 (Jordan CJ), or where relevant facts as found have been disregarded or accorded legally inappropriate weight: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 ; 162 CLR 24 at 40–41 (Mason J); *Attorney-General (NSW) v X* [2000] NSWCA 199; 49 NSWLR 653 at [56]–[63] and [120]–[128] (Spigelman CJ, Mason P and Priestley JA agreeing); *B & L Linings Pty Ltd v Chief Cmr of State Revenue* [2008] NSWCA 187 at [133] referring to Mason JA (in this

court) in *Williams v Bill Williams Pty Ltd* [1971] 1 NSWLR 547. Care must be taken not to allow disagreement with an outcome in the court below to be transformed into an inference that, despite accurately and correctly expressing the legal test, and identifying the facts, the primary judge failed to apply the test as identified. Such an exercise may involve the use of an outcome which was reasonably open on the facts, to contradict an earlier statement as to the principles applied. It would be an unusual case in which this form of reverse engineering of the judgment below would be legitimate.

16 In this paragraph, Basten JA makes the point that a misapplication of a statutory provision may not involve an error of law. Certainly, if the decision in question can be understood as a mere error in fact-finding, there will be no error of law.

17 However, in my opinion the challenges made in this case to the primary judge's decision that the certificates were invalid are, at least in part, challenges to decisions on questions of law.

18 To the extent that the challenge is to the primary judge's decision that the Minister asked the wrong question, an erroneous decision on a question of law will be made out if the Court of Appeal considers that the primary judge erred in identifying what would amount to asking the wrong question, so as to contravene implied requirements for validity (although, if the Court of Appeal found there was no error in that respect but merely factual error in identifying what question the Minister in fact asked himself, that would not be an error of law).

19 To the extent that the challenge is to the primary judge's decision that the Minister failed to take into account mandatory relevant considerations, an erroneous decision on a question of law will be made out if the Court of

Appeal considers the primary judge erred in identifying what were mandatory relevant considerations or in deciding that, although such considerations were considered, the consideration which did occur was not of a sufficient degree (although, if the Court of Appeal found no error in those respects, but merely factual error in identifying what considerations the Minister did actually take into account, that would not be an error of law).

Was an error of law shown?

20 The grounds relied on before the primary judge in relation to invalidity of the certificate concerning need or likely need for an essential public purpose, which the primary judge upheld, were Grounds 1 and 3 set out in par [11] of the primary judge's judgment:

GROUND 1

3. Each of the Nature Conservation Certificates is void for jurisdictional error on the ground that the Minister asked the wrong question in determining that the claimed land was, at the date of claim, needed or likely to be needed for an essential public purpose, namely the following questions contained in the Brief to the Minister (LANDS 07/614/A) and which the Minister signed on 16 January 2008 and acted upon:

(a) 'To the extent the Minister is considering issuing a certificate or certificates stating that land is 'needed' for an essential public purpose, is there a **decision of, or** some other **manifestation of political will** by or on behalf of, the government of New South Wales (including a decision maker with relevant authority within the Government of New South Wales) **that the claimed land be used** for an essential public purpose.' (emphasis added)

(b) 'To the extent the Minister is considering issuing a certificate or certificates stating that land is 'likely to be needed' for an essential public purpose, was there a real and not remote chance at the date the claim was made that there would be **such a decision of or manifestation of political will** by or on behalf of the government of New South Wales (including by a decision maker with relevant authority within the Government of New South Wales).' (emphasis added)

.....

GROUND 3

5. Each of the Nature Conservation Certificates is void for jurisdictional error on the ground that the Minister failed to consider the following mandatory relevant considerations in determining that the claimed land was, at the date of the claim, needed or likely to be needed for an essential public purpose:

a. the relevant requirements in the *Crown Lands Act* 1989 (NSW) and the *National Parks and Wildlife Act* 1974 (NSW) in relation to the dedication and reservation of Crown land in New South Wales;

b. that there was no decision of the Executive Government or other expression of political will that the claimed land was needed or likely to be needed for the essential public purpose of nature conservation;

c. that the Deputy Premier Dr Refshauge on 9 February 2004 expressly clarified that ‘there was no decision of the Executive Government before eight Aboriginal land claims were made to the effect that the lands claimed were needed for nature conservation’;

d. that Mr Sean O’Toole of Landcom had no relevant authority to make a decision to ‘preserve the areas recommended in the ESD study for nature conservation’, or to otherwise make a decision on or behalf of the Government of New South Wales that the claimed land was needed or likely to be needed for nature conservation;

e. that, in any event, Mr Sean O’Toole of Landcom did not make any relevant decision that the claimed land be used for nature conservation, or was needed or likely to be needed for the essential public purpose of nature conservation;

f. that the ESD study of Crown land in the Hornsby area had been commissioned without reference to the Department of Land and Water Conservation, and without regard to the land assessment provisions of the *Crown Lands Act* 1989 (NSW); and/or

g. that the National Parks and Wildlife Service had no current proposal in relation to the claimed land, and did not object to the granting of the Aboriginal land claims.

21 As regards Ground 3, I see no basis for holding that any of the considerations referred to were mandatory, except to the extent that failure to consider them may support a finding that the Minister did not consider the right question, that is, did not consider the question whether or not the lands in question were needed or likely to be needed for an essential public

purpose, within the meaning of s 36(1)(c) of the *Land Rights Act*.

22 As regards Ground 1, in my opinion, the reasoning of the primary judge does indicate that he erred in law in identifying what would amount to asking the wrong question.

23 The question whether land is needed or likely to be needed for an essential public purpose, as at the date of the claim, is a question of fact: *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act* (1988) 14 NSWLR 685 at 691-692. However, what precisely is meant by the words as used in s 36(1)(c) of the *Land Rights Act* does involve questions of law.

24 One question of law which has been clearly resolved is the meaning of "likely"; namely, that there be a real and not remote chance: *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2)* [2001] NSWCA 28; (2001) 50 NSWLR 665.

25 A further and perhaps more difficult question relates to what is meant by "needed" (and by "likely to be needed" insofar as this is affected by the meaning of "needed"). It was held in *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council* (1998) 43 NSWLR 249 (*Deerubbin*) that "needed" means required or wanted by the executive government; and it was made clear in *Deerubbin (No 2*) at [50] that for land to be needed, as opposed to likely to be needed, there should be an actual decision concerning use at the level of executive government.

26 In *Deerubbin (No 2)* consideration was given to a submission that, on the question of whether land was "likely to be needed", it was sufficient that the proposal was seriously in play in the executive process and there

was a real and not remote chance that it would come to fruition; and that submission was rejected (at [63]) on the basis that this was not a finding of fact which the primary judge was obliged to make.

27 The question whether, in order to satisfy the test of "likely to be needed", there had to be an expression of political will at the level of executive government at the time of the claim, was considered in *Minister Administering the Crown Land Act v Illawarra Local Aboriginal Land Council* [2009] NSWCA 289, where at [35], with the agreement of McColl JA, I said this:

[35] First, it shows that the primary judge considered that any "trajectory" that might support a finding that the land was likely to be needed had to be "at the appropriate government level". In my opinion, this is a misapplication of what was said in [*Deerubbin (No 2)*]. The question of whether land was needed must be decided with reference to what the Government requires, and that of course means a requirement at the level of executive Government. However, where the question is whether the land is likely to be needed, it is a question as to whether it is likely that there will in the future be a Government requirement; and if this is addressed by considering whether there is a trajectory at the relevant time, this need not then be a trajectory existing at the appropriate Government level, but only a trajectory towards a requirement at the appropriate Government level.

28 Thus, if there is at the time of the claim a "trajectory" which does make it likely that there will in due course be the appropriate requirement at the appropriate government level, then it is not relevant that this trajectory is not itself at the appropriate government level at the time of the claim. The reference to the irrelevance of this matter at par [39] of that judgment should be understood in that limited sense, having regard to what appears at par [35].

29 The reasons given by the primary judge for upholding Ground 1 are stated at par [131] of his judgment:

[131] As with the residential lands certificates, the questions put to the Minister in the nature conservation brief (at para 7.12) are the wrong questions, directing his attention to whether the claimed land can be *used* for an essential public purpose, rather than whether the land was *needed or likely to be needed* for an essential public purpose. The error is compounded by the failure to consider several relevant mandatory considerations, which lead to the finding that the nature conservation certificates are void for jurisdictional error.

In my opinion this manifests two errors of law.

30 Paragraph 7.12 of the brief was as follows:

7.12. In light of the above, the Minister is required to ask himself the following questions in relation to any parcel of claimed land in respect of which the Minister is considering issuing a certificate:

(a) To the extent the Minister is considering issuing a certificate or certificates stating that land is "needed" for an essential public purpose, is there a decision of, or some other manifestation of political will by or on behalf of, the government of New South Wales (including by a decision maker with relevant authority within the government of New South Wales) that the claimed land be used for an essential public purpose when the claim was made?

(b) To the extent the Minister is considering issuing a certificate or certificates stating that land is "likely to be needed" for an essential public purpose, was there a real and not remote chance at the date the claim was made that there would be such a decision of or manifestation of political will by or on behalf of the government of New South Wales (including by a decision maker with relevant authority within the government of New South Wales)?

31 The first error of law by the primary judge was that he implicitly held that this paragraph was itself erroneous. It is to be noted that the paragraph does not say that the two questions identified were the only questions that the Minister was required to ask himself; and *Deerubbin (No 2)* makes it clear that they are relevant questions. But even if the paragraph were read as saying that a positive answer to either question was sufficient to justify a decision that the land was needed or likely to be needed for an essential public purpose, in my opinion the combined effect of *Deerubbin* and *Deerubbin (No 2)* is that it would be sufficient. Since "needed for a purpose" is to be understood as "required or wanted by the executive government for that purpose", a decision by the executive government that the land in question be used for that purpose must amount to a decision that it is required for that purpose and accordingly needed for that purpose.

32 The second error of law is that the primary judge took one supposed misstatement of legal principle concerning the construction of s 36(1)(c) as amounting to putting the wrong question to the Minister. The brief had earlier referred to par [95] of the judgment of Jagot J in *Jerrinja*, set out above, and went on in par [7.3] to identify a question in terms of considering whether it was possible to make a substantive statement to the effect of s 36(1)(c) (which was set out), and there then followed a quite extensive reference to authorities. In order to decide whether the brief put the wrong question to the Minister, it was necessary to consider all the material in the brief which bore on that issue. Individual misstatements of law would not necessarily mean that the wrong question was being put to

the Minister: it was necessary to consider any suggested misstatements of the law, in the light of the whole brief, in order to decide if these misstatements were sufficient to justify a conclusion that the wrong question was put to the Minister. The primary judge did not do this.

33 In my opinion, the primary judge made errors of law in rejecting the certificates; and in my opinion a finding that the certificates were issued without consideration of mandatory relevant considerations or as a result of the wrong question being considered, was not justified.

34 Before concluding, I note that Basten JA has decided that the appeal on this aspect should be dismissed; and in the interests of clarity, I will indicate briefly why I do not agree with his reasons for this result.

35 Basten JA identified two legally erroneous bases on which the Minister had approached the exercise of his function: the first concerned the authority of a Mr O'Toole with respect to the formation of a specific statutory opinion, and the second concerned failure to consider legal requirements or processes for the reservation of land for nature conservation.

36 In my opinion, neither of these matters were mandatory considerations that the Minister was required to have regard to: there is nothing in the statutory scheme to suggest they are. And in my opinion neither of them is sufficient to justify a conclusion that the Minister did not address the correct question or did not do so conscientiously or did not arrive at the necessary satisfaction. I accept that sufficiently important errors or omissions could justify a conclusion that the Minister did not consider the correct question; but the primary judge did not conclude that these matters had that effect, and I would not do so. In these circumstances, these would in my opinion be matters for a merits review, if such a review were

available.

37 Basten JA relied on *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 178 for the proposition that, for an administrative decision-maker to approach the exercise of a statutory function on a legally erroneous basis is to commit a reviewable error. I have already given my understanding of the effect of *Craig* (as explained in *Yusuf*), which is that it indicates what may be jurisdictional errors, but does not avoid the need to consider particular statutory regimes, including any privative clause, in order to decide what would amount to jurisdictional errors in particular cases.

38 BASTEN JA: On 16 December 2008 the Land and Environment Court (constituted by Sheahan J and Acting Commissioner Davis) ordered that certain land in the Berowra area, on the northern boundaries of Sydney, be surveyed and transferred in fee simple to the Metropolitan Local Aboriginal Land Council: *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 241. The Minister seeks to appeal from certain aspects of the judgment below.

Issues

39 The statutory framework pursuant to which land may be claimed by an Aboriginal Land Council in New South Wales is to be found in s 36 of the *Aboriginal Land Rights Act 1983* (NSW) ("the *Land Rights Act*"). Claims may be made in relation to Crown lands, being lands vested in the State and which, when the claim is made, are able to be lawfully sold or leased, or are reserved or dedicated for any purpose: s 36(1)(a). In qualification of that permissive provision, there are exclusions set out in s 36(1)(b)-(e), three of which are relevant for present purposes, namely those requiring that, to be claimable, the lands:

"(b) are not lawfully used or occupied,
(b1) do not comprise lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands,
(c) are not needed, nor likely to be needed, for an essential public purpose ...."

40 Parts of the land under claim were said by the Minister to be "lawfully used" at the time of claim: s 36(1)(b). A challenge is brought to the finding of the Land and Environment Court that the Minister had not demonstrated to the satisfaction of the Court that the lands in question were "lawfully used". Given the limitations on the available grounds of appeal in this Court, that challenge must be dismissed for the reasons given by Macfarlan JA at [165]-[172] below.

41 In relation to the other two exclusions, specific factual issues were raised as to whether particular parts of the lands were needed or likely to be needed as residential land, or, separately, were needed or likely to be needed for the essential public purpose of nature conservation. However, pursuant to the statutory right of appeal there is little scope for challenge in relation to such findings.

42 There is power in the *Land Rights Act* for a Crown Lands Minister to issue a certificate which must be accepted as final and conclusive evidence of matters relating to those two exceptions. In the present case, the Minister did seek to issue certificates which, if accepted, would have foreclosed the factual inquiries otherwise required to be undertaken by the Land and Environment Court. In that Court, the Land Councils challenged those certificates, each of which was found to be invalid. Accordingly, that Court was required to address and determine the factual issues raised in respect of the needs and likely needs for the lands, as relied on by the Minister.

43 In his notice of appeal, the Minister challenged the rejection of the certificates, both in relation to residential lands and in relation to the nature conservation lands. At the hearing of the appeal, the Minister abandoned the challenge in respect of the certificates with respect to residential lands. There remained, however, in relation to those lands an issue as to whether the Court below was correct in refusing to accept that an opinion held by

an officer of the Land Commission of New South Wales ("Landcom") constituted an opinion of the Crown Lands Minister for the purposes of s 36(1)(b1). Reliance upon the conclusive certificate having been abandoned, the challenge on appeal to that conclusion must be addressed. I agree with Macfarlan JA that the ground of appeal should be rejected, although I propose to explain my reasons for that conclusion.

44 The remaining issues concerned the lands said by the Minister to be needed, or likely to be needed, for the essential public purpose of nature conservation. The Land and Environment Court held that the certificates issued in respect of those lands were also invalid. The Minister maintained his challenge on appeal to that finding of the Court below. In the event that he was unsuccessful on that ground, he also maintained a separate challenge based on an alleged failure of the Land and Environment Court to give "full force and effect" to the words of s 36(1)(c). Because Macfarlan JA would uphold the ground relating to the certificate, the latter falls away and is not dealt with by his Honour. In my view the challenge in respect of the certificate must be rejected and, accordingly, it is necessary to address the latter ground as well.

45 Before turning to the specific issues raised on the appeal, it is desirable to restate briefly relevant aspects of the principles governing the exercise of this Court's appellate jurisdiction in this case.

Nature of this Court's appellate jurisdiction

46 The source of the appeal to this Court depends upon the classification of the proceedings in the Land and Environment Court: see, generally, *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* [2009] NSWCA 138 at [194] ("the *Bathurst Land Claim* case"). As explained there, an appeal under s 36(6) of the *Land Rights Act* in the Land and Environment Court, falls within the class 3 jurisdiction of that Court. The Minister having failed to satisfy that Court that the lands were not "claimable Crown lands", the appeal brought by the Minister to the Court came within s 57 of the *Land and Environment Court Act 1979* (NSW) ("the LEC Act"). The jurisdiction of such an appeal is limited to "an order or decision (including an interlocutory order or decision) of the [Land and Environment] Court on a question of law": s 57(1). The scope

of such an appeal is identified in the *Bathurst Land Claim* case at [195]-[209].

47 The appeal granted to the Land Council under s 36(6), was an appeal against "a refusal under subsection (5)(b) of a claim made by it". The challenge noted above to the validity of the Minister's conclusive certificates, issued under s 36(8), was brought by way of notice of motion within the Land Council's statutory appeal. The propriety of that course was not in issue either in the Court below or in this Court. Further, the parties were on common ground in accepting that the relevant principles to be applied by the Land and Environment Court in determining whether the certificates were or were not valid were those applicable to judicial review of an administrative decision. Thus, the matter having been raised on an interlocutory basis, within the class 3 jurisdiction by a form of collateral review, it was accepted that the statutory basis of appeal in relation to the findings that the certificates were invalid also fell within s 57 of the LEC Act.

48 The fact that the matter was dealt with on that basis is of some significance in respect of the appeal. If the certificates had been separately challenged by way of judicial review proceedings, the class 4 jurisdiction of the Land and Environment Court would appear to have been engaged: LEC Act, s 20(2) and (3). In that event, the appeal to this Court would have lain under s 58 of the LEC Act and would not have been limited to decisions of the Court on questions of law. While judicial review proceedings require legal error (or jurisdictional error, being a particular form of legal error), factual issues may also require to be determined. For example, to establish the jurisdictional error of procedural unfairness, it will usually be necessary to make findings of fact which, under s 58, could be the subject of appeal in this Court. However, that section not having been invoked, the Minister's appeal is limited to the subject matter of an identifiable order or decision of the Land and Environment Court on a question of law.

49 There is no doubt that the Minister is entitled to raise on the appeal a challenge to questions of statutory construction which arose in the course of the proceedings below and which were determined by the Land and Environment Court. However, a statement that the Court below "erred in law in finding ... that the certificates issues by the Minister under s 36(8)(b) of the Act were void" does not in terms identify any error of law. Similarly, a ground asserting that the Court below "erred in law in failing to give the words in s 36(1)(c) of the Act ... their full force and effect" does not in clear terms identify any decision on a question of law. Indeed, it implies that the language was correctly construed, but that the complaint lay in the application of the correct construction. Whether or not that involved a decision of the Court on a question of law might be doubted.

50 As explained by Macfarlan JA at [142] and [150], the primary judge upheld the challenge to the conclusive certificates with respect to the nature conservation lands on the grounds that the Minister had:

(a) asked himself the wrong questions, and
(b) failed to take into account certain mandatory relevant considerations.

51 In relation to the second matter, the grounds of appeal were particularised by the Minister in his written submissions (at paragraph 23) in the following terms:

"Two issues arise regarding the findings of the Court below concerning mandatory considerations:

(a) whether the matters identified by the Court below were 'mandatory', as opposed to permissive, considerations;
(b) whether, in any event, each of the matters identified was taken into account and whether the Court below impermissibly strayed into merits review."

52 The first of these particulars raises a question of law which was

determined by the Court below. Whether a consideration is indeed a mandatory consideration is a question (at least in the context of the exercise of a statutory function) of statutory interpretation: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 40 (Mason J); *Saville v Health Care Complaints Commission* [2006] NSWCA 298 at [57]- [58]; *Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council* [2009] NSWCA 289; 168 LGERA 71 ("the *Illawarra Land Claim* case") at [40].

53 The second particular involved two limbs. The first asked whether the identified matters were taken into account. That was a question of fact for the primary judge, not reviewable on an appeal limited to a decision of the judge on a question of law. The second limb asserted that the Court below strayed into merits review: that is a characterisation of the process of reasoning below which may or may not involve a decision on a question of law. In the present case it appears to have been no more than a colourful description of the point that arose under the first particular, namely that the Court assessed the manner in which the Minister considered the issue of the certificates, without limiting that assessment to identification of mandatory considerations which were not taken into account.

54 In the *Illawarra Land Claim* case at [41] Hodgson JA (McColl JA agreeing) accepted that "a finding that a judge has taken into account irrelevant considerations may in some circumstances not involve an erroneous decision on a question of law, but may merely be an error in reasoning on a question of fact". That statement must be understood in the light of the preceding statement of principles, namely that identification of a prohibited (irrelevant) consideration, involving a question of statutory construction, will constitute a decision on a question of law, but that the question whether the decision-maker actually took the matter into account, generally will not.

55 The decision in the *Illawarra Land Claim* case did not involve an appeal from the review of a certificate, but merely an appeal from the decision of the Land and Environment Court on a question of law. If the primary judge had in fact taken into account an irrelevant consideration, that would have indicated that he had misconstrued the statute, rather than "misapplying the statutory description". Misapplication of a legal

principle, correctly identified, will not usually constitute an erroneous decision on a question of law: see the *Bathurst Land Claim* case at [204].

Residential lands, opinion of Minister

56 In the Land and Environment Court, the Minister, in reliance upon s 36(1)(b1) needed to establish that the claimed lands (or part thereof) comprised lands which "in the opinion of a Crown Lands Minister, are needed or likely to be needed as residential lands", as at the date of claim. The primary judge found as a fact that the Crown Lands Minister of the day was not involved in relation to the lands until after the land claims were made and did not personally hold any relevant opinion: at [141]. The Minister's case was run, both in the Court below and on appeal in this Court, on the basis that Mr O'Toole, the Managing Director of Landcom, held the relevant opinion as to the need for certain lands, as at the time of the claim, and that his opinion was properly attributable to the Crown Lands Minister. There was no suggestion that Mr O'Toole was a delegate of the Minister appointed pursuant to any statutory power, for the purpose of forming an opinion under the *Land Rights Act*. Rather, the Minister relied upon the proposition that Mr O'Toole was an authorised agent.

57 Whether a person is an authorised agent may involve issues of fact and law. In the present case, there was no specific act or conduct relied upon to confer authority on Mr O'Toole. Rather the question was whether the existence of authority for a statutory purpose arose by implication from the governmental arrangements and the proper construction of the statute. It may be accepted for present purposes that his Honour's decision that it did not, constituted a decision on a point of law.

58 In support of the argument that Mr O'Toole had an implied authority to act on behalf of the Minister in this regard, the Minister relied upon what is known as the "*Carltona* principle" after the English case of *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. In *Carltona,* Lord Greene MR stated at 563:

“It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible.”

59 The principle itself has been accepted in Australia and has been applied not merely to a Minister, but to a statutory officeholder, namely the Deputy Commissioner of Taxation: see *O’Reilly v The Commissioners of the State Bank of Victoria* [1983] HCA 47; 153 CLR 1.

60 The principle may operate in different ways in different contexts. For example, in the present case there was no suggestion that, in issuing the conclusive certificates under s 36(8), the Minister read any material beyond that provided in the briefing note. In practical terms, the Minister made the final decision, but had delegated to officers within his department the function of reviewing the relevant material and presenting matters to him in an appropriate form. That course may have involved a de facto delegation of aspects of the obligation to take matters into account and to accord procedural fairness to the Land Councils. No issue was taken with that approach. Indeed, as will be seen below, the Land Councils relied upon the circumstance to support the factual inference that the Minister had not taken into account any matters other than those presented in the briefing note (discussed further below). A similar approach is referred to in *Peko-Wallsend*, 162 CLR at 37-38 (Mason J). After referring to *Carltona* and *O’Reilly*, Mason J stated at 38:

“The cases in which the principle has been applied are cases in which the nature, scope and purpose of the function vested in the repository made it unlikely that Parliament intended that it was to be exercised by the

repository personally because administrative necessity indicated that it was impractical for him to act otherwise than through his officers or officers responsible to him."

61 As appears from the passage from *Peko-Wallsend* and from similar statements in *O'Reilly* in relation to a statutory function, the legitimacy of a Minister or head of department acting through officers or other agents will depend upon a question of statutory construction. Matters such as "administrative necessity" will inform that exercise.

62 As noted by Macfarlan JA below at [129], the cases to which this Court was referred did not involve situations in which any person who was not an officer within the Minister's department had been found to have implied authority to act for the Minister. Furthermore, where an express statutory power of delegation is provided, as is common in modern legislation, the implication that some broader informal delegation of authority is permitted will less readily be drawn, though it "does not necessarily exclude the existence of an implied power of a Minister to act through the agency of others": *Re Patterson; Ex parte Taylor* [2001] HCA 51; 207 CLR 391 at [176] (Gummow and Hayne JJ). Furthermore, there may well be circumstances in which a Minister may authorise inquiries to be made by external consultants, whether with or without statutory authority to take such a step: *Minister for Local Government v South Sydney City Council* [2002] NSWCA 288; 55 NSWLR 381 at [211] (Mason P, Spigelman CJ and Ipp JA agreeing).

63 There are two factors which might be thought to militate against the conclusion reached in the Court below. The first is that it has been accepted in other cases that the Minister did not need to hold the opinion personally: it would be sufficient if a relevant officer within the Minister's department, having an appropriate degree of seniority, held the relevant opinion: see *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2)* [2008] NSWLEC 13 (Jagot J) ("the *Nambucca Land Claim* case"), at [65]. Accepting that to be correct in law, that

approach does not diminish the proposition that, as a matter of statutory construction, it should not be inferred that the Minister can act through the agency of persons outside his or her own department. This is not, of course, a question of the Minister obtaining advice; it is a question of the identification of a lawful agent through whom the Minister acts.

64 The second factor arises from the power of delegation. With respect to the Crown Lands Minister, the power of delegation does not arise under the *Lands Rights Act*, because the Crown Lands Minister is not the Minister administering the *Land Rights Act*. Rather, it is to be found in the *Crown Lands Act 1989* (NSW), s 180. That provision allows that the Minister may delegate "to a person" the exercise of any of the Minister's functions: s 180(1). The term "person", it could be argued, extends beyond officers within the Minister's department. That being so, there is no reason to restrict the implied grant of authority to act through an agent to officers within the department.

65 This argument could give rise to a question of the construction of s 180(1) which was not debated in this Court. The question does not arise, however, because pursuant to s 180(5) the reference in the section to "functions" is a reference to functions conferred or imposed by or under the *Crown Lands Act* or the *Crown Lands (Continued Tenures) Act 1989* (NSW). No power of delegation is conferred on the Minister with respect to the holding of an opinion under the *Land Rights Act*. Accordingly, the scope of s 180 does not arise in the present case and provides no basis for drawing a broader inference as to the scope of the *Carltona* principle in respect of the Minister.

66 Further, there were three factors which supported the conclusion that the opinion of Mr O'Toole was not a relevant opinion for the purposes of s 36(1)(b1) of the *Land Rights Act*. The first, noted by the primary judge, was that in accordance with a Cabinet decision made on 4 October 1977, Landcom (then apparently a division within the New South Wales

Department of Urban Affairs and Planning) had been given a function, "in the interest of co-ordinated urban development and marketing strategies," identified as "the oversight of the development and production of home sites on the Government's behalf in major urban centres": at [44]. The *Housing Act 1985* (NSW), s 6, established Landcom as a statutory corporation and it remained in that form until the dates on which the claims were made in 2000. (It later became a statutory state-owned corporation under the *Landcom Corporation Act 2001* (NSW), which commenced on 1 January 2002.) Landcom did not come, even before its creation as a statutory corporation, within the responsibility of the Crown Lands Minister. It is therefore unlikely that Parliament expected the Crown Lands Minister to exercise his or her statutory powers under the *Land Rights Act* through the agency of Landcom.

67 Secondly, the establishment of Landcom as a statutory corporation under the Housing Act 1985 pre-dated the introduction of cl (b1) into the *Land Rights Act* by the *Aboriginal Land Rights (Amendment) Act 1986* (NSW). Accordingly, the requirement based upon the opinion of a Crown Lands Minister was introduced at a time when the distinct functions of Landcom and the Crown Lands Minister were known. This circumstance weakens considerably any inference that the Parliament anticipated that the views of Landcom would be sufficient to satisfy the terms of paragraph (b1).

68 Thirdly, the form of paragraph (b1) is different, in a respect which must be taken as deliberate, from the form of the succeeding paragraph (c). If the Parliament had intended merely to replicate a need identified by the executive government of the day, it would not have expressed the need as one requiring the formulation of an opinion by the relevant Crown Lands Minister. Had the need been one of the executive government generally, an opinion held by Landcom (within the sphere of its specified functions) might have been of immediate application. The identification of a specific Minister (not being the Minister responsible for Landcom) speaks in favour of a different approach. As explained in the *Nambucca Land Claim* case, it is the opinion, rather than the underlying circumstances, which

constitute the criterion for the exclusion of certain Crown lands: [2009] NSWCA 151 at [33].

69 The reason for adopting a constrained approach to the power of a Minister to act through the agency of someone outside his or her department derives in part from the concept of "practical administrative necessity", in part from the nature of the power and in part from the position of the Minister. In relation to the first element, where the purpose is to protect intended courses of action of the executive government taken at a policy level, the practical necessity to identify opinions as those of departmental officers is diminished. In relation to the second element, the fact that the power involves a discretionary element with a policy content limits the appropriateness of an implied agency: see *O'Reilly* at 18-19 (Mason J, albeit in dissent). In relation to the third element, the fact that the agent is within the Minister's department and hence in a position where the Minister can exercise a substantial degree of control provides a fundamental justification, within the system of responsible government, for permitting an agency in such circumstances, but not where that element of control is missing: see *O'Reilly* at 19.

70 It follows that the primary judge was correct in rejecting, as a matter of law, the availability of an opinion held by the Managing Director of Landcom as constituting the opinion of the Crown Lands Minister for the purposes of s 36(1)(b1).

Challenge to certificates: Minister's briefing note

71 Although the Minister gave written notification to the Land Councils that he was considering, and in due course had issued, conclusive certificates under s 36(8), he did not give reasons for the issue of the certificates. Nor was there any statutory requirement that he do so. That gave rise to an evidential problem for the Land Councils, which bore the onus of proving the necessary factual elements of their challenge to the

validity of the certificates.

72 They sought to meet that burden by obtaining, and relying upon, a briefing note prepared by departmental officers and provided to the Minister for the purposes of his determination as to whether or not to issue the relevant certificates. Given the circumstances likely to attend Ministerial decision-making, it was open to the primary judge to find as a fact that the matters given consideration by the Minister were limited to those identified in the briefing note. (A similar approach was adopted in *Peko-Wallsend*, 162 CLR at 36 (Mason J)).

73 It may be added that there was no suggestion in the present case that the Minister had delegated his statutory functions in relation to the certificates to any departmental officer: cf *Peko-Wallsend* at 37-38. It was clear from the language of the briefing note, which raised matters for consideration without determining them, that no such delegation or authorisation had taken place. If it had, quite separate legal questions might have arisen as to whether such a delegation or conferral of authority on others was permissible as a matter of statutory construction of the *Land Rights Act*: see *Land Rights Act*, s 243.

Erroneous consideration of certificates: authority of agent

74 There are two respects in which his Honour determined that the certificates were legally erroneous, both of which should be upheld. As each was a material consideration, it is not necessary to consider other bases on which his Honour held that the process by which the certificates were issued was invalid.

75 The first matter concerned the authority of Mr O'Toole with respect to the formation of a specific statutory opinion.

76 As explained by Macfarlan JA at [113]-[116] a study had been undertaken of lands which might be capable of use for residential purposes in the Hornsby Shire which was carried out by the Total Environment Centre. The study was presented to Mr O'Toole, the Managing Director of Landcom. The study recommended that of 540 potential building lots, 58 were capable of development as home sites and the remainder of the land should be added to the Muogamarra Nature Reserve, the Berowra Valley Bushland Park or should be reserved under the *Crown Lands Act* as local bushland reserve.

77 The question relevant for present purposes was not whether the acceptance of the study by Mr O'Toole demonstrated that the lands recommended to be set apart for conservation purposes were indeed needed or likely to be needed for such purposes, but whether, in granting a final and conclusive certificate, the Minister considered the correct legal question and the considerations relevant to it. As noted above, that was approached on the factual basis that his Honour considered the matters, and only the matters, set out in the briefing note.

78 The whole briefing note was lengthy and contained a large amount of non-specific discussion of the operation of the *Land Rights Act*. It set out the relevant factual background in much detail, but without focus on the real issues. Over 16 closely typed pages it:

(i) dealt concurrently with residential lands and lands needed for nature conservation;
(ii) dealt indiscriminately with events which occurred before and after the claims were lodged;
(iii) noted four different processes for reserving land having conservation value;
(iv) failed to identify the government authorities responsible for reserving

land for nature conservation under one or more of those processes;
(v) failed to identify the mechanism by which the land could be reserved, and how that mechanism would vary depending upon the process;
(vi) referred to the "decision" taken by Mr O'Toole (Managing Director of Landcom) without identifying any role which Landcom might have in reserving land for nature conservation, or the lack of such a role: at [7.16];
(vii) referred to Mr O'Toole's claim as to his own authority "to make that decision" without identifying the source of the authority, or whether it might operate differentially with respect to different elements of the decision: at [7.17], and
(viii) failed to identify the legal question requiring resolution with respect to the claim to authority.

The relevant paragraphs for present purposes, were at 7.12 and 7.15–7.17, set out at [140] below.

79 In written submissions, the Minister asserted that the question of Mr O'Toole's authority was a factual matter to be determined by the Minister. There are three problems with that proposition. First, if it were a matter of evidence, it was left to the Minister on the basis that the only relevant evidence was Mr O'Toole's assertion of his own authority. Secondly, the matter was not a question of fact, but one of law, dependent upon whether, absent any relevant delegation, there was power to confer authority on an officer of Landcom to make such a decision: see [57]-[61] above. Thirdly, given that Landcom was a statutory authority which fell within the Ministerial responsibility of the Minister for Housing or the Minister for Planning, but not within the responsibility of the Minister for the Environment, there was a legal question as to whether the scope of its authority was to be answered in the same way, or by reference to the same matters, with respect to a decision in relation to residential lands and a decision in relation to nature conservation.

80 The second factor his Honour accepted had not been considered were the legal questions relevant to the decision to set aside lands for conservation purposes. The considerations relevant to the ultimate issue as to whether particular land was at a particular time needed or likely to be needed for the essential public purpose of nature conservation have been addressed in a number of cases in the Land and Environment Court and in

this Court, including *Minister Administering the Aboriginal Crown Lands Act v Deerubbin Local Aboriginal Land Council [No 2]* [2001] NSWCA 28; 50 NSWLR 665 ("the *Deerubbin Land Claim* case") and, recently, the *Illawarra Land Claim* case (above at [52]).

81 As the primary judge correctly noted at [127], the *National Parks and Wildlife Act 1974* (NSW), being the primary legislative regime for the reservation of lands having conservation value in the State, provides several regimes for the declaration or dedication of such lands, depending upon the status they are to be accorded. Some forms of reservation demonstrate a higher level of conservation value than others. If a lower status reservation were proposed, separate questions might arise as to whether the values were sufficient to constitute an essential public purpose. The mere fact that land has capacity for use or reservation for a particular purpose may not be sufficient to render the purpose an essential public purpose and the question of capacity may not rise to one of need or likely need.

82 In this context, the reasoning with respect to the authority of the Managing Director of Landcom in respect of residential lands applies with greater force. If, as has been suggested, it was erroneous to hold that the Crown Lands Minister could act through the agency of an officer in a statutory corporation not within his area of responsibility, it follows that any view held by Mr O'Toole as to the need for lands for conservation purposes would not be the opinion of the relevant Minister, being the Minister for the Environment, or of any officer within the relevant authority, being the National Parks and Wildlife Service. While it is true that consideration of a need or likely need under paragraph (c) is not limited to an opinion of a specific Minister or department, the holding of an opinion by an officer in a statutory corporation who has no authority to make any decision with respect to use of the land for conservation purposes can only be of limited relevance to the question of whether the land was, at the relevant time, needed or likely to be needed for that essential public purpose. The materiality of the distinction is demonstrated by the fact that neither the Minister for the Environment, nor the National Parks and Wildlife Service, expressed any interest in the land at the relevant time, a circumstance which, if its significance had been properly understood would have provided a substantial, if not overwhelming,

consideration against the existence of such a need. However, it is not that fact but the absence of consideration of its legal context, which is presently significant.

83 The primary judge correctly identified that matter of legal significance at [128]:

"None of these various statutory requirements or processes for the reservation of land for nature conservation were brought to the attention of the Minister in the brief. This is a significant omission, which is compounded by the fact that Mr O'Toole is put forward as the person with the authority to make decisions on nature conservation, which bind the NSW Government, with little more evidence than his subjective belief that he has that authority, and no comment made about the distinction between his real function as the Government's land developer, and the responsibility to make land conservation decisions on behalf of the government. Whether or not O'Toole had authority to deal with land under the *NPW Act* is centrally important to the consideration as to whether the subject land was needed or likely to be needed for nature conservation, and I have concluded that he did not."

84 The Minister's submission that the challenge on this ground should have failed because it was sufficient that his attention was drawn to the question whether Mr O'Toole had authority to make a nature conservation decision and the relevant issue was not whether he reached the correct conclusion on the point, would be correct if the issue were one of fact, rather than one of law: see [159]-[160] below. However, the proposition that it is a question of fact is inconsistent with the earlier consideration of whether or not Mr O'Toole had such authority in relation to the opinion of the Crown Lands Minister with respect to residential lands: that question could not arise for determination in this Court unless it were a question of law. Accordingly, in relation to the certificates, the Minister's decision would have been infected by an error of law if he relied upon the views of Mr O'Toole to support the grant of the certificate.

85 As the opinion of Mr O'Toole was the primary material in the briefing

note which supported the view that the lands, at the time of the claim, were needed or were likely to be needed for nature conservation in the view of the government of the day, the Minister was invited to approach the matter on a legally flawed basis. The primary judge relied upon the briefing note as demonstrating the basis upon which the certificates were granted. That was a factual finding which was open to him. It must follow that the Minister granted the certificates on the basis that Mr O'Toole's opinion was a relevant opinion for the purposes of his determination, an approach which was legally erroneous.

86 For an administrative decision-maker to approach the exercise of a statutory function on a legally erroneous basis is to commit reviewable error: *Craig v South Australia* [1995] HCA 58; 184 CLR 163 at 179. Accordingly, the primary judge was correct in upholding the challenge to the nature conservation certificates.

Other matters

87 It is sufficient that his Honour's decision was correct on a particular material basis; other grounds do not need to be considered. Accordingly it is not necessary to consider whether his Honour was correct in upholding the submission that the Minister asked himself the wrong question because he treated the question of need as satisfied by evidence that the land was to be "used" for the relevant essential public purpose: at [112] and [132]. Without determining whether his Honour was right in applying the distinction in the present case, I would not reject the distinction as being necessarily without substance. In particular, the correctness of the views expressed by Jagot J in *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2)* [2008] NSWLEC 13 were not debated in this appeal. A number of different questions can arise in respect of land claims. These include:

(a) whether the land in question has characteristics which fit it for a

particular purpose or use;

(b) whether the land has been identified as being available for a particular use, for example by zoning;

(c) whether, if the land requires expenditure to be capable of a particular use, the government is able or willing to expend the necessary resources, and

(d) whether the government has identified land which it needs, requires or wants to devote to a particular use, or has merely identified the land as worthy of investigation.

These are matters, some of which arose in the *Nambucca Land Claim* case, which may need to be properly considered in an appropriate case.

Consideration of essential public purpose

88 Absent valid certificates in respect of the nature conservation lands, the burden lay on the Minister to establish to the satisfaction of the Court below that certain of the lands were, as at the date of claim, needed or likely to be needed for the essential public purpose of nature conservation. He failed to discharge that burden. The challenge to that conclusion was that the Court below failed to give s 36(1)(c) its “full force and effect”: ground 5. The ground failed to identify a decision of the Court below on a question of law, said to be erroneously decided.

89 As it emerged from the written submissions for the Minister, the complaint was that the Land and Environment Court failed to consider likely need, focusing its attention solely upon the question of need: written submissions, par 83. The test of likely need, as explained by Spigelman CJ

in the *Deerubbin Land Claim* case at [57], is satisfied if there is a real or not remote chance that the land will be so required, whether or not a decision concerning the use of the land has in fact been made.

90 The primary judge was conscious of the relevant test and set it out expressly in his discussion of legal principles at [35]. After rejecting the tender of the conclusive certificates, his Honour correctly stated the statutory test at [137]. He continued at [138]:

“Much of the relevant evidence and all of the relevant authorities and principles have been surveyed above, and I need not repeat myself.”

91 He noted that, after the land claims had been lodged, the Deputy Premier made a public statement about the nature conservation values of certain lands but that he later clarified his statement, indicating that it was “no government decision at all”: at [140]. His Honour further noted that although Landcom was committed not to develop any home sites beyond those identified as suitable by the study, and had decided that it was only practical to develop 23 lots, leaving the balance of the lands available for non-residential purposes such as nature conservation, his Honour continued:

“Those purposes could not be achieved without proactive steps by other arms of government ....”

92 He continued at [142]:

“The relevant lands having either conservation values or realistic residential potential is not sufficient. Nor is some expression of political will or public desire for land to be conserved or developed for housing.

Referencing land as of interest to, eg, NPWS does not establish '*need*' for a relevant purpose."

93 The Minister's complaint is that there was, in this passage, no reference to "likely need", from which it was inferred that his Honour only considered a firm decision as to need and not a future contingency.

94 There is no justification for drawing the inference that his Honour had determined the matter according to a wrong legal test. He had referred on more than one occasion to the correct test during the course of his reasons and it is hardly conceivable that he abandoned it at the point of application. At that point in his reasons, his Honour was concerned with the concept of "need" rather than identifying whether there had been an actual decision requiring that the lands be reserved for that purpose or whether such a decision was likely.

95 In this Court, the Minister sought to re-evaluate the evidence to show that reservation for conservation purposes was likely. There are two difficulties with that submission. First, it seeks to address factual issues; secondly, it is without a sound foundation.

96 Although it is not necessary to address the second difficulty, it is appropriate to refer to the factual discussion in the judgment, particularly at [61], [66] and [96], relied upon by the Minister. None of that material directly addressed the question relevant to nature conservation purposes. Rather, the evidence being discussed concerned the authority of Mr O'Toole, as an officer of Landcom, to bind the government to development of particular lands and not others. At no point was there any suggestion in the evidence of Mr O'Toole that Landcom had any role to play in respect of the reservation of land for nature conservation purposes.

97 Further, if factual matters were relevant, reference would need to be made to his Honour's findings that the National Parks and Wildlife Service had stated, in response to the land claims in July–October 2001, either that it was not interested in the land or had no objection to the claims being granted: at [76].

98 Leaving factual matters to one side, the Minister's challenge asserted that the Land and Environment Court failed to consider whether, even if there had been no decision at the relevant date as to need for the lands, for the purpose of nature conservation, nevertheless such a requirement was likely in the sense that there was a real and not remote chance of the lands being so required. For the reasons given, that reading of the judgment of the Court below is implausible. Further, the challenge so formulated does not identify a decision, explicit or implicit, with respect to a question of law erroneously answered. This ground of appeal should be rejected.

Conclusion

99 I would dismiss the appeal and order the Minister to pay the costs of the respondents in this Court.

100 MACFARLAN JA:

Nature of Case and Conclusions

101 This case concerns land claims made under the *Aboriginal Land Rights Act* 1983 (the "Act"). The claims were rejected by the relevant Minister, who is the appellant in these proceedings, on the grounds that the Crown lands the subject of the claims were required in part as residential lands or for nature conservation, and were in part already lawfully used or

occupied.

102 I have concluded that the primary judge was correct in holding that the Minister did not establish that the first and third of these grounds were proper grounds for rejection (see [134] and [170, 172] below) but that he was incorrect in holding that the second ground was not established (see [164] below).

103 As to the second ground, the requirement of certain parts of the land for nature conservation was in my view established by conclusive certificates issued by the Minister under the Act (see [164] below). Contrary to the conclusions of the primary judge, these were not void under administrative law principles.

The Land Claims

104 On 22 February 2000, the New South Wales Aboriginal Land Council ("NSWALC") lodged Aboriginal Land Claims ("ALCs") 6323, 6324 and 6326 relating to land in the Berowra area of Hornsby Shire, New South Wales. On 19 May 2000, the Metropolitan Local Aboriginal Land Council ("MLALC") lodged ALC 6465, also relating to land in the Berowra area.

105 On 25 October 2005, the Minister administering the *Crown Lands Consolidation Act* 1913 ("the Crown Lands Minister" or "the Minister") refused each of the claims for the reasons described below.

106 ALC 6465 related to the largest area of land, being part of Berowra Reserve, known as Berowra Park. Parts of the land were used by the public

for recreational activities such as bushwalking. So far as is relevant to this appeal, the claim was refused because part of the land was “needed or likely to be needed for the essential public purpose of nature conservation”, part was “needed or likely to be needed as residential lands” and the whole of the land was “lawfully used and occupied” by Hornsby Shire Council, or alternatively by the general public, “for the purpose of public recreation and bush regeneration”.

107 The Minister refused claims ALC 6323 and 6324 upon the bases that part was “needed, or likely to be needed, for the essential public purpose of nature conservation” and part was “needed or likely to be needed, as residential lands”. Claim ALC 6326 was refused in relation to part of the land the subject of the claim which was said to be “needed, or likely to be needed for the essential public purpose of nature conservation”.

The Statutory Framework

108 The four claims were made pursuant to s 36 of the Act, which so far as is presently relevant is in the following terms:

“**36 Claims to Crown lands**

(1) In this section, except in so far as the context or subject-matter otherwise indicates or requires:

claimable Crown lands means lands vested in Her Majesty that, when a claim is made for the lands under this Division:

(a) are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the *Crown Lands Consolidation Act 1913* or the

Western Lands Act 1901,

(b) are not lawfully used or occupied,

(b1) do not comprise lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands,

(c) are not needed, nor likely to be needed, for an essential public purpose, and

(d) do not comprise lands that are the subject of an application for a determination of native title (other than a non-claimant application that is an unopposed application) that has been registered in accordance with the Commonwealth Native Title Act, and

(e) do not comprise lands that are the subject of an approved determination of native title (within the meaning of the Commonwealth Native Title Act) (other than an approved determination that no native title exists in the lands).

Crown Lands Minister means the Minister for the time being administering any provisions of the *Crown Lands Consolidation Act 1913* or the *Western Lands Act 1901* under which lands are able to be sold or leased.

(2) The New South Wales Aboriginal Land Council may make a claim for

land on its own behalf or on behalf of one or more Local Aboriginal Land Councils.

(3) One or more Local Aboriginal Land Councils may make a claim for land within its or their area or, with the approval of the Registrar, outside its or their area.

(4) A claim under subsection (2) or (3):

(a) shall be in writing and, if a form for making such a claim has been prescribed, shall be in or to the effect of that form,

(b) shall describe or specify the lands in respect of which it is made,

(b1) (Repealed)

(c) shall be lodged with the Registrar, who shall refer a copy thereof (together with a copy of any approval necessary under subsection (3)) to the Crown Lands Minister or, if there is more than one Crown Lands Minister, to each of them.

(5) A Crown Lands Minister to whom a claim for lands (being lands which are, or, but for any restriction on their sale or lease, would be, able to be sold or leased under a provision of an Act administered by the Crown Lands Minister) has been referred under subsection (4) shall:

(a) if the Crown Lands Minister is satisfied that:

(i) the whole of the lands claimed is claimable Crown lands, or

(ii) part only of the lands claimed is claimable Crown lands,

grant the claim by transferring to the claimant Aboriginal Land Council (or, where the claim is made by the New South Wales Aboriginal Land Council, to a Local Aboriginal Land Council (if any) nominated by the New South Wales Aboriginal Land Council) the whole or that part of the lands claimed, as the case may be, or

(b) if the Crown Lands Minister is satisfied that:

(i) the whole of the lands claimed is not claimable Crown lands, or

(ii) part of the lands claimed is not claimable Crown lands,

refuse the claim or refuse the claim to the extent that it applies to that part, as the case may require.

(5A) Where, under subsection (5), a Crown Lands Minister is not satisfied that the whole or part of the lands claimed is claimable Crown lands because the lands are needed, or likely to be needed, for an essential public

purpose, but that the need for the lands for the public purpose would be met if the claim were to be granted in whole or in part subject to the imposition of a condition (whether by way of covenant or easement or in any other form) relating to the use of the lands, the Crown Lands Minister may, notwithstanding that subsection, where the condition is agreed to by the Aboriginal Land Council making the claim, grant the claim under that subsection subject to the imposition of the condition.

(6) An Aboriginal Land Council may appeal to the Court against a refusal under subsection (5) (b) of a claim made by it.

(7) The Court shall hear and determine any appeal made to it under subsection (6) in respect of any lands claimed and may, if the relevant Crown Lands Minister fails to satisfy the Court that the lands or a part thereof are not or is not claimable Crown lands, order that the lands or the part, as the case may be, be transferred to the claimant Aboriginal Land Council or, where the claim is made by the New South Wales Aboriginal Land Council, to a Local Aboriginal Land Council (if any) nominated by the New South Wales Aboriginal Land Council.

(8) A certificate being:

(a) a certificate issued by a Crown Lands Minister stating that any land the subject of a claim under this section and specified in the certificate is needed or is likely to be needed as residential land, or

(b) a certificate issued by a Crown Lands Minister, after consultation with the Minister administering this Act, stating that any land the subject of a claim under this section and specified in the certificate is needed or likely to be needed for an essential public purpose,

shall be accepted as final and conclusive evidence of the matters set out in the certificate and shall not be called into question in any proceedings nor liable to appeal or review on any grounds whatever."

The Proceedings at First Instance

109 Following the rejection of the land claims, the Land Councils exercised the right given to them by s 36(6) of the Act to appeal to the Land and Environment Court. Section 36(7) places on the Crown Lands Minister the burden of satisfying that Court that the lands the subject of the claims were not "claimable Crown lands" under s 36(1).

110 The Minister relied before the Land and Environment Court on certificates issued by him pursuant to s 36(8) of the Act. Sheahan J of the Land and Environment Court, who heard the appeal, rejected the tender in evidence of each of the certificates. Only his decision in relation to such of the certificates as dealt with the "essential public purpose" of nature conservation is challenged on the appeal to this Court. Those certificates related to each parcel of land said by the Minister to be required for nature conservation. Formal parts aside, the certificates simply stated that the relevant land "was on the date when [the claims were] made needed or likely to be needed for an essential public purpose". The relevant public purpose was not identified in the certificates but was revealed by the evidence to be "nature conservation".

The Government and its Ministers

111 The primary judge said the following in relation to this topic:

“3 For the purposes of this complex matter I need to make clear that when I use the term ‘*the Minister*’ in these reasons I will be referring to the Crown Lands Minister of the day (unless I specifically indicate otherwise). Each Act of Parliament and each government agency has an identified Minister responsible for it, and senior public sector decision-makers are accountable to at least one particular identifiable Minister. The [Act] actually comes within the portfolio responsibility of the Minister for Aboriginal Affairs (except when the Premier was personally responsible for that Act between 25 March 1988 and 26 May 1993), but s.36 of the Act is very specific about which Minister deals with ALCs, namely the **Crown Lands Minister**. The Crown Lands responsibilities of government are discharged by the Minister for Lands (with his/her portfolio sometimes called Natural Resources, or Land and Water Conservation, or Conservation and Land Management).

4 The government agency established in 1976 as the Land Commission of New South Wales has always been known as ‘Landcom’ It originally came within the Housing portfolio, but later (including the most relevant period – 1997-2003) the Planning portfolio (sometimes “*Urban Affairs and Planning*”). The National Parks and Wildlife Service (“NPWS”) has generally been the responsibility of the Minister for Environment. ‘*Central agency*’ departments like Premier/Cabinet and Treasury closely liaise across the government. Complexities arise when one person holds more than one ministerial portfolio at a time, and during part of the relevant period one Minister was Minister for both Planning and Aboriginal Affairs. However, the above distinctions are important to the facts of this case, in which issues have arisen about authority of one particular public official within one particular portfolio (not being a Minister) to bind ‘*the government*’ or express its ‘*political will*’”.

112 The judge also said the following in relation to the role of Landcom:

“43 A Cabinet Minute dated 5 April 1977 submitted by the then Minister for Housing (Mr Mulock) provided the charter for the relationship between the then Land Commission of New South Wales (known as “*Landcom*”), which came within his portfolio, and the Department of Lands that had

responsibility for Crown Lands (*Exhibit M4,* tab 12).

44 Cabinet considered the Minute at a meeting held on 4 October 1977 (*Exhibit M4,* tab 11). A comprehensive decision was made, including that '*in the interest of co-ordinated urban development and marketing strategies, the oversight of the development and production of home sites on the Government's behalf in major urban centres*' should be the responsibility of one authority, the Land Commission. Crown lands in those regions available for home site development were to be transferred to the Land Commission as and when it required them. The Land Commission was to pay compensation once the home sites were disposed of. In organising the development and disposal programme, the Land Commission was to have regard to, and consult with the Treasury in regard to, '*the need for maintaining an appropriate flow of revenue to the Consolidated Revenue fund*'.

45 On or about 7 October 1977 (actual date unclear) Premier Wran issued that Cabinet decision formally, and there is evidence before the Court on this appeal that that decision largely remained operative in 2005 (if not later). (See *Exhibit M4*). The *Housing Act* 1985 established 'Landcom' as a statutory corporation, and the *Landcom Corporation Act* 2001 made it a statutory state owned corporation from 1 July 2001".

Factual Material Relating to the Subject Land

113 The land the subject of the ALCs is Crown land. As a result of interest in the region shown by Landcom, and local resistance to additional development for residential purposes of Crown land in the Berowra area, an ecologically sustainable development study ("ESD Study") of most potential Crown land home sites in the Hornsby shire was commissioned from the Total Environment Centre (the "TEC") in 1997. The study was completed in October 1999 and the relevant development officer of Landcom, Mr Sarkis, reported to Mr Sean O'Toole, Managing Director of Landcom, that the "TEC review of the 563 potential lots produced a 'practically and economically developed' lot yield of 58, and Landcom's review of that lot yield resulted in a lot yield of 23 in three different

locations. This lot reduction of 540 represented a revenue loss to the Government of $99-100 M. The rest of the relevant land studied was recommended by the TEC (in the ESD Study report) to be added to Muogamarra Nature Reserve (ALC 6465) or [Berowra Valley Regional Park] (ALC 6326), or to be reserved under the [*Crown Lands Act* 1989] as local bushland reserve (ALCS 6323 and 6324)" (Judgment [57]). Mr Sarkis informed the Treasury Department on 4 November 1999 that Landcom "felt constrained to abide by TEC's recommendations" despite the significant loss of revenue involved.

114 The primary judge noted that the parties accepted that sometime between 5 and 19 November 1999 Mr O'Toole made a decision to accept the TEC's recommendations in the ESD Study (Judgment [59]). His Honour then said:

"61 Mr O'Toole sent a memorandum to senior Treasury officers on 18 November 1999, and a briefing note to his Minister on 19 November 1999. Mr O'Toole deposes (at par 34 of his 26 April 2007 affidavit) that he discussed the briefing note with Minister Refshauge [then Deputy Premier and Minister for Housing and Planning] at one of their regular meetings. He does not '*recall Dr Refshauge querying or disputing the contents*'. He also deposes (par 35) to a conversation at around that time with the Treasury officer Dr Gul Izmir where she attacked him for not consulting Treasury much earlier. '*You do not have authority to agree to a plan that effectively sterilises this land*' to which he responded '*this land cannot be developed due to its conservation value and the attitude of the local residents and council*'.

62 Mr O'Toole concedes that he should have consulted Treasury earlier, but thought that the decision to accept the recommendations of the ESD study '*would*' stand (par 36). He accepted that the Treasurer might override his decision, but he considered that that was highly unlikely, given the conservation value of the land.

...

65 In January or February 2000 Treasury suggested to O'Toole that there be a meeting between the Deputy Premier and the Treasurer, but that meeting did not take place until 29 March 2000 (see par 42 of the affidavit)."

115 It was at this point that the NSWALC lodged its three land claims (on 22 February 2000). The written record of the meeting of 29 March 2000 notes that "at the end of the discussion", which had been about the recommendations in the ESD Study, "the Treasurer indicated that he was happy".

116 On 31 March 2000, Mr O'Toole formally recommended to his Minister, Dr Refshauge (his portfolio Minister from 1999 to 2003), that he announce the results of the study. This led to a media announcement on 29 June 2000 that "the government would dedicate 60 hectares of land at Berowra as open space. No particulars were given as to how the land was to be dedicated. The value of the land (c.f. the revenue lost) was wrongly noted at $90M instead of $300M, and the statement contained some other inaccuracies" (Judgment [71]; citation omitted).

117 In the meantime, the MLALC had lodged its land claim on 19 May 2000 and on 25 May 2000 the Department of Land and Water Conservation ("DLWC") (the ministerial head of this department being responsible for administration of the *Crown Lands* Act) had advised the NPWS that:

"The ESD study of Crown land in the Hornsby area was commissioned without reference to this office and the inherent requirements of the Crown Lands Act 1989. The ESD Study does not appear to satisfy the land assessment provisions of the Crown Lands Act, a legislative pre-requisite before the land can be dealt with under the Crown Lands Act however the study will be of assistance should land assessment ultimately be required." (Judgment [70])

118 Later in 2000, the DLWC made it clear to Landcom that it would not, without making a land assessment pursuant to the *Crown Lands Act*,

accept a proposal made by Landcom as to land not required for residential allotments being dealt with under the *Crown Lands Act*.

119 In July 2001, NPWS indicated that it was not interested in the ALC 6323 land and had no objection to the grant of ALC's 6324 and 6465. In 2001 DLWC recommended the grant of ALC's 6323, 6326 and 6465. In December 2002, the then Minister for Land and Water Conservation (Mr Aquilina) wrote to Dr Refshauge, "indicating that DLWC needed to clarify 'one final matter' before making recommendations to him on the ALCs – the question of whether anything had occurred, which might represent a decision by the Executive Government relevant to the claimed lands, **before** the claims were made" (Judgment [79]). The judge referred to Dr Refshauge's response (by which time he was no longer concerned with the Housing and Planning portfolios but remained Deputy Premier and Minister for Aboriginal Affairs) as follows:

"80 On 12 December 2002 Dr Refshauge replied that he was seeking detailed advice about '*any consideration given to the ... Claims within my portfolio areas*' (note his use of the plural). Counsel (Mr Michael Wright) provided the Deputy Premier with an opinion regarding the status of his 29 June 2000 public statement on 23 September 2003. Dr Refshauge eventually replied to Mr Aquilina's letter on 9 February 2004:
'At the time I made the public statements I had not been advised of the existence of the seven Aboriginal land claims that had been lodged with the Registrar ... I have investigated the matter in response to the letter from your predecessor of 2 December 2002 and I have taken appropriate advice. I am now able to inform you that public statements do not have any bearing on your capacity to determine these land claims and confirm there was no decision of the Executive Government before the eight Aboriginal land claims were made to the effect that the lands claimed were needed for nature conservation'." (Exhibit A4, fol 106-107) (Judgment [80]).

120 The primary judge records that in early 2005 DLWC had reached the

point where it was preparing recommendations for the granting of each of the four land claims. On 24 October 2005, it however recommended refusal of each of them. The judge said that, “[t]he relevant brief written by DLWC refers to the Deputy Premier’s 29 June 2000 media release. It makes no reference to Dr Refshauge’s letter of 9 February 2004 ...” (Judgment [85]).

Mr O’Toole’s Evidence

121 Mr O’Toole’s evidence in the Land and Environment Court was that “at one of his regular meetings with Minister Knowles [his portfolio Minister from 1995 to 1999] they would have discussed his committing ‘the NSW Government to accept and implement the recommendations made in the ESD Study’” (Judgment [94]). The primary judge said in relation to this evidence that “[t]here is no evidence that Mr Knowles was empowered by the Government to so authorise him, or even that he did in fact so authorise him, and no evidence that such authority came from elsewhere in the Government” (Judgment [95]). Whilst Mr O’Toole conceded that “it would have been wiser to have spoken to Treasury with regard to the undertaking, given he was effectively an agent of Treasury and that he was ‘answerable and accountable’ both to his Minister and Treasury”, he asserted that he had authority on behalf of the Government to accept the recommendations in the ESD Study and did not need to get the approval of Treasury (Judgment [96]).

Residential Lands

The decision at first instance

122 In so far as it was contended that parts of the land claimed were

needed for residential purposes, it was necessary for the Minister to satisfy the Land and Environment Court that those lands were ones “which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential land” (s 36(1)(b1)). The opening words of s 36(1) (“when a claim is made”) make it clear that it is necessary for the Minister to show that this opinion was held at the date the claims were made in 2000.

123 The primary judge’s conclusion as to this was expressed as follows:

“141 The Minister’s case on these ALCs is based on the ESD study and the surrounding and subsequent events I have described. The evidence repeatedly demonstrates that the relevant Minister (ie the Crown Lands Minister) was not involved until after the ALCs were made, and there is no relevant link established between him/her and Landcom’s ongoing role through Mr O’Toole. So much has been admitted by the Minister during the proceedings (see *Exhibit A3*). This contrasts with the position confronting Pain J in *Griffith* (see pars [95] and [107] of Her Honour’s judgment, where a formal written delegation was proven, albeit by inference). I find it impossible to impute to the Minister the relevant opinion, when neither he nor any officers to whom he can delegate some of his functions under the *CLA* were on notice of TEC’s work. As Dr Griffiths submitted (T28.03.08, p184, L24-27), ‘*the court should conclude that there is no evidence that any such opinion existed and no satisfactory basis for inferring that such an opinion existed on the part of the Minister or any lawful delegate*’” (Judgment [141]).

Submissions and conclusion

124 The appellant contended at first instance and on appeal that the views and opinions held by Mr O’Toole, as managing director of Landcom, were properly attributable to the Crown Lands Minister. It said that the result was that Mr O’Toole’s opinion that, consequent on the ESD Study, certain

areas were appropriate for residential development, constituted an "opinion of a Crown Lands Minister" that the lands "are needed or are likely to be needed as residential lands" as contemplated by s 36(1)(b1) of the Act,

125 There was no evidence in the present case of any express conferral of authority by the Crown Lands Minister on Landcom, or on Mr O'Toole in particular. Indeed, the statutory powers of delegation were not available. First, the power in the Act (see s 243) does not relate to the Crown Lands Minister defined in s 36(1) but only to the Minister for the time being administering the Act. Further, the power of delegation in the *Crown Lands Act* 1989 (s 180)) is only applicable to functions conferred or imposed by or under that Act or the *Crown Lands (Continued Tenures) Act* 1989.

126 In these circumstances, the Minister relied upon the principle stated in *Carltona Ltd v Commissioners of Works and Others* [1943] 2 All ER 560. In that case it was held that an Assistant Secretary of a department of government was entitled to make a decision, on behalf of the Minister who was head of the Department, that certain property be requisitioned. Lord Greene MR said:

"In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministers. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of

such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them" (at 563).

127 This principle has been accepted as applicable in Australia (*O'Reilly v The Commissioners of the State Bank of Victoria* [1983] HCA 47; (1983) 153 CLR 1 at 30-1 per Wilson J; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1985-6) 162 CLR 24 at 37-9 per Mason J and *Re Patterson; Ex parte Taylor* [2001] HCA 51; (2001) 207 CLR 391 at 449 per Gummow and Hayne JJ).

128 The primary judge took the view that the *Carltona* principle was not applicable in the present case and that, as a result, Mr O'Toole's opinion could not be regarded as the opinion of the Minister. His Honour said that there was no evidence that the Crown Lands Minister had delegated the function of forming a relevant opinion to anyone and that "[a]n agency appointment by a minister, or a delegation by a Minister of a power, especially in favour of an officer of a department **outside** his/her ministerial portfolio should not be lightly inferred without firm evidence, probably written" and that "[a]n agency arrangement would not be sufficient to bind the Crown Lands Minister in his/her functions under the [Act] – only a proven delegation would suffice" (Judgment [121-2]; emphasis not added).

129 I agree with the judge's conclusion. There was no express delegation of authority to Mr O'Toole (see [125] above). A finding that Mr O'Toole acted on behalf of the Crown Lands Minister and that his opinion should

be attributed to the Minister would have to rest entirely on inference. If Mr O'Toole had been an officer in the Crown Lands Minister's Department the starting point for drawing such an inference would have existed, although a question of statutory construction would have remained as to whether the legislative intent was that the relevant opinion referred to in s 36(1)(b1) be formed by the Minister personally. In *Carltona* and cases applying that or like principles, the putative agent has been in a Department or other organisation subject to the authority of the Minister or other official referred to in the relevant legislation. The inference has been available in such cases that the Minister or other official is being assisted in the performance of his or her functions by persons responsible to him or her. No such inference is available here.

130 Reliance was placed by the Minister upon the 1977 Cabinet minute concerning Landcom (see [112] above). That minute referred to Landcom having "the oversight of the development and production of homesites on the Government's behalf in major urban centres". It did not suggest that Landcom would have the authority of the Government (or of any particular minister) to determine what land was required by the Government for residential lands. Assuming that the arrangements reflected in it were still operative at the time the ALCs were lodged, it does not establish that Landcom's opinions (and in particular those of Mr O'Toole) are to be attributed to the Crown Lands Minister for the purposes of s 36(1)(b1) of the Act.

131 The Minister pointed in submissions to *O'Reilly* where the *Carltona* principle was applied in connection with a notice issued on behalf of the Commissioner of Taxation. That case illustrates that the principle is not confined to Ministers but, as in that case, is capable of application to a permanent head of a public service department. Importantly however in that case the fact that the officer who caused the issue of the relevant notices was an officer of the department and ultimately responsible to the permanent head, the Commissioner of Taxation, was a basis for inferring authority to act on behalf of the Commissioner. That basis does not exist in the present case.

132 The Minister also relied upon *Minister for Local Government v South Sydney City Council* [2002] NSWCA 288; (2002) 55 NSWLR 381 where it was held that the Local Government Boundaries Commission was entitled to engage private consultants to assist in its decision making process. This decision does not assist the Minister in the present case because there was there an express conferral of authority on the private consultants to do the tasks in question.

133 Finally, the Minister relied upon *Attorney General (Cth) v Foster* [1999] FCA 81; (1999) 84 FCR 582; (1999) 161 ALR 232 at [36] where the Full Federal Court contemplated that one minister might act on behalf of another minister. There is nothing in that case however to suggest that it is unnecessary to find a conferral of authority for one minister to so act on behalf of another.

134 I would not go as far as the primary judge in his comments as to the evidence required to prove authority (see [128] above). There is not in my view any reason why the authority need take any particular form (such as, that it be in writing) to be effective. The point of significance to this case is that if the relevant Government officer is outside the minister's department, some basis for inferring or finding a conferral of authority, other than the departmental structure, must be found. None existed in the present case. As a result, the primary judge has not been shown to have erred in law in concluding that the Minister did not establish that at the date of the claims the Crown Lands Minister was of the opinion that parts of the lands the subject of the claims were "needed or [were] likely to be needed as residential lands".

The Essential Public Purpose of Nature Conservation

135 As indicated in paragraph [110] above, the Minister continued to rely on appeal, in connection with lands claimed to be required for an essential public purpose, upon certificates purported to be issued pursuant to s 36(8) of the Act (the “Nature Conservation certificates” or the “certificates”). These were issued on 17 January 2008. The Land Councils objected to the admission of the certificates into evidence upon the ground that they were not issued in conformity with the subsection and were accordingly void.

136 The Land Councils filed a Notice of Motion seeking, on this ground, to restrain the Minister from tendering the certificates. The Minister has not argued that the procedure adopted for challenging the certificates was an inappropriate one. For their part, the Land Councils accept that if the certificates are admitted into evidence, their conclusive effect pursuant to s 36(8) would lead to failure of their claims in respect of the relevant parts of the subject lands. Further, they have not argued that a certificate under s 36(8) may not certify as to the position as at the date which is relevant under s 36(1), namely, the date upon which a claim was made, and have not argued that the certificates are invalid because they do not identify the particular “essential public purpose” which is relied upon by the Minister, namely, nature conservation. All parties accept that the validity of the certificates is to be determined by the principles relating to judicial review of administrative decisions.

137 Section 36(8) incorporates a privative provision; that certificates issued under the section “shall not be called into question in any proceedings nor liable to appeal or review on any grounds whatever”. The Minister has not contended that this provision precludes the Land Councils challenging the certificates upon the ground of jurisdictional error, this being the basis upon which the challenge was made.

Jurisdictional errors alleged

138 The errors alleged in the Land Councils' Notice of Motion in relation to the Nature Conservation Certificates, being that the Minister asked himself the wrong question and failed to take into account relevant mandatory considerations, were of a type which would constitute jurisdictional error, if established (*Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [82]). The errors alleged, as recorded in the judgment below, were as follows:

"GROUND 1
3. Each of the Nature Conservation Certificates is void for jurisdictional error on the ground that the Minister asked the wrong question in determining that the claimed land was, at the date of claim, needed or likely to be needed for an essential public purpose, namely the following questions contained in the Brief to the Minister (LANDS 07/614/A) and which the Minister signed on 16 January 2008 and acted upon:
(a) 'To the extent the Minister is considering issuing a certificate or certificates stating that land is 'needed' for an essential public purpose is there a decision of, or some other **manifestation of political will** by or on behalf of, the government of New South Wales (including a decision maker with relevant authority within the Government of New South Wales) **that the claimed land be used** for an essential public purpose.' (emphasis added)

(b) 'To the extent the Minister is considering issuing a certificate or certificates stating that the land is 'likely to be needed' for an essential public purpose, was there a real and not remote chance at the date the claim was made that there would be **such a decision of or manifestation of political will** by or on behalf of the government of New South Wales (including by a decision maker with relevant authority within the Government of New South Wales).' (emphasis added)

...

GROUND 3

5. Each of the Nature Conservation Certificates is void for jurisdictional error on the ground that the Minister failed to consider the following mandatory relevant considerations in determining that the claimed land was, at the date of the claim, needed or likely to be needed for an essential public purpose:

a. the relevant requirements in the Crown Lands Act 1989 (NSW) and the National Parks and Wildlife Act 1974 (NSW) in relation to the dedication and reservation of Crown land in New South Wales;

b. that there was no decision of the Executive Government or other expression of political will that the claimed land was needed or likely to be needed for the essential public purpose of nature conservation;

c. that the Deputy Premier Dr Refshauge on 9 February 2004 expressly clarified that 'there was no decision of the Executive Government before eight Aboriginal land claims were made to the effect that the lands claimed were needed for nature conservation';

d. that Mr Sean O'Toole of Landcom had no relevant authority to make a decision to 'preserve the areas recommended in the ESD study for nature conservation', or to otherwise make a decision on or behalf of the Government of New South Wales that the claimed land was needed or likely to be needed for nature conservation;

e. that, in any event, Mr Sean O'Toole of Landcom did not make any relevant decision that the claimed land be used for nature conservation, or was needed or likely to be needed for the essential public purpose of nature conservation;

f. that the ESD study of Crown land in the Hornsby area had been commissioned without reference to the Department of Land and Water Conservation, and without regard to the land assessment provisions of the Crown Lands Act 1989 (NSW); and/or

g. that the National Parks and Wildlife Service had no current proposal in relation to the claimed land, and did not object to the granting of the Aboriginal land claims" (Judgment [11]; emphasis not added).

139 Ground 1 refers to the Briefing Note which was before the Minister at the time he made the decision to issue the Certificates. With its substantial annexures, it was the only material before the Minister at that time (Judgment [116]). The parties argued the appeal upon the basis that it should be accepted that the Briefing Note reflected the basis of the Minister's decision to issue the certificates.

140 The Briefing Note was submitted to the Minister on 22 January 2008. It was a document of some 16 pages. It included a detailed summary of evidence, made observations as to the way in which the Minister should approach his decision-making role and provided draft certificates for signature. It included the following presently relevant paragraphs:

"7.12. In light of the above, the Minister is required to ask himself the following questions in relation to any parcel of claimed land in respect of which the Minister is considering issuing a certificate:

(a) To the extent the Minister is considering issuing a certificate or certificates stating that land is 'needed' for an essential public purpose, is there a decision of, or some other manifestation of political will by or on behalf of, the government of New South Wales (including by a decision maker with relevant authority within the government of New South Wales) that the claimed land be used for an essential public purpose when the claim was made?

(b) To the extent the Minister is considering issuing a certificate or certificates stating that land is 'likely to be needed' for an essential public purpose, was there a real and not remote chance at the date the claim was made that there would be such a decision of or manifestation of political will by or on behalf of the government of New South Wales (including by

a decision maker with relevant authority within the government of New South Wales)?

...

7.15. Mr O'Toole gives evidence as to his understanding of his authority in relation to the land. Mr O'Toole's evidence is that (although he should have consulted Treasury earlier) he did have authority to make decisions with respect to the land following his receipt of the recommendations made in the ESD Study, subject to the Treasurer's prerogative to override his position on such matters. The Minister may also have regard to the fact that Mr O'Toole was head of the division of the executive government which was 'the appointed agent for managing the development of the [relevant] sites' (see Mr O'Toole's memo to the Treasury officers dated 18 November 1999 and his briefing note to Dr Refshauge dated 19 November 1999).

7.16. It is open to the Minister to infer that Mr O'Toole took a decision to develop twenty-three lots (being the lots identified in orange hatching and yellow background at attachment O) and to preserve the areas recommended in the ESD study for nature conservation. He communicated that decision to Treasury officials (in the memo dated 18 November 1999) and to Dr Refshauge, his portfolio Minister (in the memo dated 19 November 1999) where he said:

'The NSW Government has 18 crown land sites currently zoned urban residential in the Hornsby LGA ... The Hornsby ESD Study was commissioned by Landcom as a result of escalating resistance from the local residents to further urban development in the area ... Given that the area in question is environmental (sic) sensitive bushland, more emphasis was put on the protection of biodiversity and precautionary principles ... After detailed analysis of the recommendations [made by the TEC], Landcom has concluded that 23 lots, in three different locations, can be practically and economically developed.'

7.17. It is also open to the Minister to conclude that Mr O'Toole had the authority to make that decision. It is true that the Treasury officers queried whether Mr O'Toole had authority to agree to a plan that effectively 'sterilised' those parts of the land which were not to be developed. However, as noted above, Mr O'Toole's evidence is to the effect that he did have such authority, subject to the Treasurer's prerogative to override his position on such matters. At no time did the Treasurer exercise that prerogative. Indeed, prior to claim 6465 being lodged, a meeting was held between Dr Refshauge, the Treasurer and Mr O'Toole on 29 March 2000. As noted above, a Ministerial Briefing note records the outcome of that meeting as being 'to develop only 23 lots in the area'."

141 In Paragraph 7.14 of the Briefing Note, the Minister's attention was drawn to a submission made by the Land Council. The following passage from those submissions was quoted:

" ... even as late as 30 March 2005 the Department of Lands prepared a document to be attached to a brief to the Minister which confirmed that the lands the subject of ALC 6465 were not needed for the essential public purpose of nature conservation.

...

Similar observations were made in the Department of Lands' assessments of the other land claims that were undertaken around that date.

The Department of Lands' contrary advice in October 2005 that the land was needed or likely to be needed for the essential public purpose relies upon Dr Refshauge's media release on 29 June 2000 but does not refer to Dr Refshauge's subsequent clarification by letter dated 9 February 2004. [In that letter Dr Refshauge stated 'I am now able to inform you that

public statements [made in a media release on 29 June 2000] do not have any bearing on your capacity to determine these land claims and confirm there was no decision of the Executive Government before the eight Aboriginal land claims were made to the effect that the lands claimed were needed for nature conservation'.] The omission of this critical fact from the advice to the Minister is significant."

Jurisdictional error – wrong question asked

142 The primary judge found that ground one in the Notice of Motion (see [138] above) had been established. In relation to the Nature Conservation certificates, his Honour adopted reasoning which he had given in relation to residential lands certificates which were not relied upon on appeal. This reasoning included the following:

"123 The questions put to the Minister (in the brief at par 6.16) are clearly directed to '*use*' rather than *'need'* or *'likely need*', and I have come to the conclusion that the Minister was directed to ask himself the wrong question. As Jagot J held in *Nambucca 2008,* the question whether claimed land was needed or likely to be needed for a specified purpose is not the same issue as whether there is a decision, or some other manifestation of political will, that the land '*be used*' for such purpose, or whether there is a real and not remote chance of such a decision or manifestation of political will. In searching for such '*use*', the Minister was directed to the decision of Mr O'Toole, who it was said, had the authority to bind the NSW Government, but the Minister was not directed, and could not be directed, to any evidence that established that Mr O'Toole actually had that authority." (Judgment [123])

143 In the summary at the conclusion of his Judgment, the judge said in relation to his finding that the Briefing Note directed the Minister to ask himself the wrong question:

"See *Nambucca 2008* ('use' rather than 'needed' or 'likely to be needed') and *Maroota* (manifestation of political will to establish need)" (Judgment [132]).

"*Nambucca 2008"* was a reference to the decision of Jagot J in *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2)* [2008] NSWLEC 13 and "*Maroota"* to the decision of this Court in *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2)* [2001] NSWCA 28; (2001) 50 NSWLR 665.

144 I do not agree that the Briefing Note's use of the word "used" rather than the statutory language of "need" indicates that the Minister was directed to ask himself a question (or questions) of a kind that would render his decision void. If there had been a decision to "use" the lands for nature conservation it would follow that they were "needed" for that purpose in light of the fact that "needed" in this context simply means "required or wanted" (*Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council* (1998) 43 NSWLR 249; (1998) 98 LGERA 99 *("Castlereagh Nature Reserve")* at 254D-E). I note however that the converse does not follow: A decision that lands are "needed" in the sense of "required or wanted" does not necessarily mean that there has been a decision that lands be "used".

145 As is apparent from [143] above, the primary judge relied upon the decision in *Nambucca 2008*. In that case, Jagot J found that a Briefing Note asking the Minister to consider "whether there had been or was a real and not remote chance of a decision or manifestation of political will that the land be used as residential land when the claim was made" erroneously invited the Minister to treat his view about "use" as "presumptively determining the issue of need or likely need as set out in s 36(8)(a)" (at [97-98]). It follows from what I have said above that I respectfully

disagree with her Honour's view to the extent that it suggests that the Minister would be in error if he concluded that because the land was likely to be "used" as residential land, it followed that there was a "need" for that land for that purpose. I note that this issue was not referred to on the appeal from her Honour's decision (*Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2009] NSWCA 151).

146 Some limited support for this approach can be obtained from the decision of this Court in *Maroota* where the terminology of "use" and "need" appears to have been treated as at least to some extent synonymous. That is, a decision to "use" was treated as determining whether there was "need" (see [46, 50, 60 - 62 and 68]).

147 The other matter relied upon by the primary judge (see [142] and [143] above) was concerned with what he referred to as "manifestation of political will to establish need". The judge was not suggesting that it was not appropriate for the Minister to consider whether there had been, or whether there was a real and not remote chance of, a decision or other manifestation of political will as to need, at the level of executive government. The relevance of this enquiry was made clear in *Castlereagh Nature Reserve* (at 252 and 254) and *Maroota* (at [62]), although it was pointed out by Hodgson JA (with whom McColl JA agreed) in *Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council* [2009] NSWCA 289 that in considering "likely need" it is not necessary that "any trajectory towards the existence of such need was itself at the appropriate government level" (at [35], [39]).

148 Rather, the primary judge was concerned that the Minister was "directed to" a decision, namely the one made by Mr O'Toole, which the judge considered was not one made by or with the authority of the executive government. However, the questions posed in the Briefing Note (see [140] above) did not themselves refer to such a decision. They asked

the Minister to consider whether a decision had been or might be made with the authority of the government. The narrative in the Briefing Note referred to Mr O'Toole's activities and said that it was open to the Minister to infer that Mr O'Toole made a relevant decision and had authority to do so (Paragraphs 7.15 and 7.17 referred to in [140] above). Whether that inference was to be drawn was a matter for the Minister in his consideration of the questions posed for him. Whether Mr O'Toole in fact made the decision and whether he in fact had authority to do so is, for present purposes, irrelevant. The Minister was in my view asked to consider matters which were relevant.

149 The contention that the Minister "asked the wrong question" as a result of the questions posed for his consideration in the Briefing Note accordingly fails. It follows that the primary's judge's conclusion that the Minister's certificates were, on this ground, void, was erroneous in point of law.

<u>Jurisdictional error – failure to take into account mandatory relevant considerations</u>

150 The primary judge's conclusion as to this contention was expressed as follows:

"133 I conclude that Ground 3 (re the nature conservation certificates) is also made out – the Minister failed to consider mandatory relevant matters, relying on Mr O'Toole's decision to adopt the ESD recommendations: (i) the *NPW* regime for conserving land; (ii) whether the Executive Government (ie at Ministerial level) had made a relevant decision or otherwise expressed political will that land is needed or likely to be needed for the essential public purpose of nature conservation; (iii) the *CLA* regime for the reservation of appropriate land; (iv) in the absence of

attention to Minister Refshauge's letter of 9 February 2004, whether it should properly be inferred that the Minister by his silence approved Mr O'Toole's decision on the ESD study; (v) whether Mr O'Toole had authority to make a nature conservation decision on behalf of the Crown Lands Minister or his department; (vi) whether Mr O'Toole made such a decision in any event; and (vii) whether the NPWS at the date of claim had any proposal for any of the land which would dictate an objection to the ALCs."

151 The first and third of these matters were considered together by the primary judge. As to those matters he said:

"127 The *NPW Act* establishes an exclusive statutory scheme for the establishment, *inter alia*, of nature reserves and regional parks (see *Nambucca 2008* at [78] and [106]). Some of the processes are quite specific and vest power to deal with the land in exclusive bodies, such as the Minister for Environment or the Governor (see ss.470 and 49 for examples relating to regional parks or nature reserves). The process for reservation or gazettal of land as a local reserve is contained in the *CLA*. I do not view any of these provisions as mere '*mechanical steps*', nor as requirements that can be otherwise circumvented.

128 None of these various statutory requirements or processes for the reservation of land for nature conservation were brought to the attention of the Minister in the brief. This is a significant omission, which is compounded by the fact that Mr O'Toole is put forward as the person with the authority to make decisions on nature conservation, which bind the NSW Government, with little more evidence than his subjective belief that he has that authority, and no comment made about the distinction between his real function as the Government's land developer, and the responsibility to make land conservation decisions on behalf of the government. Whether or not O'Toole had authority to deal with land under the *NPW Act* is centrally important to the consideration as to whether the subject land was needed or likely to be needed for nature conservation, and I have concluded that he did not."

152 The first question posed in the Briefing Note (see [7.12] quoted in [140] above) focused attention on whether a decision had been made or some other manifestation of political will had occurred. Reference was made in the paragraphs that followed to the possibility that what Mr O'Toole had done sufficed in this regard. The second question was however not concerned with what Mr O'Toole (or any minister or other officer) had done in the past, but whether a decision or other manifestation of political will was likely to occur in the future. The Briefing Note did not seek to guide or limit the Minister in his deliberation on this question. To address it, the Minister would necessarily have had to consider the processes of government and how and who might make such a decision or manifest relevant political will. He cannot have been unaware of the statutory scheme for reservation of land under the *Crown Lands Act* because he was the Minister administering that Act. Similarly, it defies common sense to suggest that the Minister was not aware of the existence of a role of the *National Parks and Wildlife Act* 1974 in relation to the reservation of Crown land as nature reserves and regional parks.

153 Because the Briefing Note does not profess to give detailed guidance, or indeed any significant guidance, as to how the Minister should form a view about whether there was a real and not remote chance of a relevant decision or manifestation of political will occurring in the future, no inference can be drawn that the Minister failed to consider the statutory schemes referred to by the judge.

154 The second of the matters which the primary judge found was mandatory to be taken into account, but which was not taken into account (see [150] above), was the question of whether a relevant decision or other expression of political will had been made at ministerial level. The decisions in *Castlereagh Nature Reserve* and *Maroota* support the view that it is a decision or other expression of political will of the "Executive Government" to which regard must be had (for example, *Maroota* at [62]). However, those decisions do not suggest that relevant decisions or manifestations of political will may not occur on behalf of the Executive Government through a duly authorised officer. The Briefing Note raised for consideration by the Minister the question of whether Mr O'Toole had taken a relevant decision and made it plain that his decision would only be relevant if he was regarded as having had authority on behalf of the

government (necessarily the Executive Government) to make the decision (see for example [7.17] quoted in [140] above). So far as a future decision or manifestation of political will was concerned, the Briefing Note did not suggest that what was relevant was other than the decision or political will of the Executive Government.

155 As a result, I do not consider that it has been established that there was any failure to consider the point numbered (ii) referred to in [133] of the judgment below (see [150] above).

156 The point numbered (iii) has been dealt with above. The point numbered (iv) related to Minister Refshauge's letter of 9 February 2004. That letter is referred to in [119] above. The primary judge said in relation to it:

"129 [The] brief does not draw the Minister's attention adequately to the letter of Minister Refshauge, dated 9 February 2004, which puts into context the press release of 29 June 2000. The press release is referred to in par 6.3(29). Paragraph 6.3 outlines "*the evidence filed by the respondent which the Minister may consider to be relevant*" to the task at hand. Unlike the residential lands brief, the letter is, on this occasion, mentioned in the text of the nature conservation brief, but, somewhat peripherally, in a section dealing with submissions made by the Land Councils (par 7.14, beginning "*[t]he Minister's attention is also drawn to the following submissions made by the applicants*"). It would appear that the Minister's attention is actually diverted away from Dr Refshauge's letter, in the briefs on issuing both classes of the certificates, but especially those regarding nature conservation, by the emphasis placed by the briefs on drawing the inference that Mr O'Toole had the government's authority (See T.p24 L44ff and T.86 L1ff)."

157 As indicated in [141] above, Paragraph 7.14 of the Briefing Note, in which the judge says that Dr Refshauge's letter is referred to "somewhat peripherally", quotes at length a submission made by the Land Councils in which they describe as significant the omission, from a Department of Lands advice of October 2005 to the Minister, of the "critical fact" of Dr Refshauge's statement in his letter of 9 February 2004 that:

I am now able to inform you that public statements [made in a media release on 29 June 2000] do not have any bearing on your capacity to determine these land claims and confirm there was no decision of the Executive Government before the eight Aboriginal land claims were made to the effect that the lands claimed were needed for nature conservation".

158 To embark, as in my opinion the primary judge did, upon an assessment of the adequacy of the prominence given to the terms of Dr Refshauge's letter, is in my view to travel outside the proper scope of judicial review of an administrative decision. As Mason J said in *Peko-Wallsend*, "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 for 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" (at 41). The qualification which his Honour stated was that there may be circumstances where errors as to weight may be of such degree that the decision is "manifestly unreasonable" (at 41). Even if there were some lack of prominence, or weight, given to Dr Refshauge's letter in the Briefing Note upon which the Minister acted (which I doubt), it was not so significant that it rendered the Minister's decision "manifestly unreasonable" in the sense referred to by Mason J, that is, "so unreasonable that no reasonable person could have come to it" (at 41).

159 The fifth matter referred to by the primary judge (see [150] above) was whether Mr O'Toole had authority to make a nature conservation decision on behalf of the Crown Lands Minister or his department. This complaint cannot be sustained as the Briefing Note specifically brought to the Minister's mind, not only the question of whether Mr O'Toole had made a relevant decision, but also whether he had authority to do so ([7.12, 7.15 – 7.17] of the Briefing Note: [140] above).

160 It should be emphasised that in considering the validity of the Nature

Conservation Certificates, the Court is not determining whether or not Mr O'Toole had relevant authority. It is dealing with an attack on those certificates based on administrative review principles. The presently relevant question is whether the Minister's mind was turned to the question of Mr O'Toole's authority, not whether the Minister reached the correct conclusion on the point.

161 The sixth matter was a failure of the Minister to consider whether Mr O'Toole made a relevant decision. As is pointed out in [159] above, the Briefing Note raised this as an issue ([7.16]). The issue was not therefore one which the Minister failed to consider. The submissions of the Land Councils as to this matter, as also with the fifth matter, amounted in effect to an attempt to challenge the merits of the Minister's decisions. That is something which is not permissible on judicial review except on the basis that the decisions were manifestly unreasonable (see *Saville v Health Care Complaints Commission* [2006] NSWCA 298 at [54] per Basten JA). An example of a submission in this category is the submission that "the documents to which the nature conservation brief referred the Minister provide no support for an inference that Mr O'Toole actually made a decision" (Orange Appeal Book 57H). Manifest unreasonableness was not a ground upon which the Minister's decision to issue the certificates was challenged (see the terms of the Notice of Motion set out in [138] above and the terms of the primary judge's findings set out in [150] above). Rather, apart from the contention that the Minister "asked the wrong question", the challenge was confined to a claim that the Minister failed to take into account mandatory relevant considerations.

162 The seventh and final matter referred to by the primary judge was a failure to consider whether the National Parks and Wildlife Service ("NPWS"), at the date of claim, had any proposal for any of the land "which would dictate an objection to the ALCs". The position of the NPWS in relation to the claims was described in a written submission dated 21 March 2007 lodged on behalf of the Land Councils with the Minister's Department as a response to a proposal to issue the subject certificates. The Briefing Note described as one of the Note's purposes, the

purpose of considering submissions made by the NSWALC and MLALC "on whether the Minister should issue certificates pursuant to s 36(8)(b)" of the Act ([2.2]). The Land Councils' submission of 21 March 2007 was described at [4.1] of the Briefing Note as an annexure. The submission was in fact annexure "D" to the Briefing Note. It said the following in relation to the NPWS position:

"7.9 [That there is no need for further nature reserves in the area] is supported by the position of the National Parks and Wildlife ('NPWS') in relation to the land claims, discussed further below.

7.10 In relation to ALC 6323, the NPWS confirmed it had no interest in the land. The NPWS did not object to the granting of ALC 6326 or 6465, and suggested that the conservation significance of these areas could be preserved through Voluntary Conservation Agreements negotiated between the Metropolitan LALC and the NPWS. The NPWS confirmed that the possible addition of the land subject to ALC 6326 to the Berowra Valley Regional park was not a priority, and therefore the NPWS did not dispute the granting of the claim".

163 Whether or not the attitude of NPWS could be described as a mandatory consideration that the Minister was required to take into account, it is apparent that the Briefing Note upon which he acted did bring that matter to his attention. Any question about the prominence given to that material in the Briefing Note would in my view be one outside the ambit of permissible judicial review (see [158] above).

164 For the above reasons, my view is that the primary judge was in error in finding that the Minister's decision to issue the certificates was vitiated by his failure to consider the matters identified by the judge. As a result, the judge's decision was in this respect erroneous in point of law. Accordingly, the certificates were admissible into evidence and, by reason of s 36(8), had conclusive effect. It is unnecessary in these circumstances

to consider the Minister's case that, even without the certificates, he was entitled to succeed in relation to the nature conservation issues.

Whether Part of the Lands Lawfully Used or Occupied

165 One of the issues for determination identified by the primary judge was whether "[a]t the date of claim ... any part of the subject land in ALC 6465 [was] not claimable Crown land within the meaning of s 36(1)(b) of the [Act], on the ground that it was lawfully used or occupied?"

166 The judge's conclusions on this issue were in the following terms:

"142 .... Occasional entry on to, and/or the existence and maintenance of fire trails on, vacant crown land, and/or the existence of Council or community sponsored generic '*plans of management*' dealing with '*bushcare*' and the like (*Exhibit M3*) – even if work is done on the land pursuant to them, and even if evident prior to the date of the claim – are similarly insufficient to establish lawful use and occupation or control by Hornsby Council.

143 The furthest the evidence rises is to show that Council is trustee for some lands subject to a generic plan of management; that some fire trails have been maintained; that there is sporadic bush walking by the public; and, that some weeding etc has occurred on the claimed land, including along the track covering the sewer line. Even though Council supplied the Gooraway Place Bushcare Group with equipment, it would appear that most of the group's work was done outside R77011. Many of the indicia that Clarke JA found determinative of *occupation* in *Tweed Byron* are not present here, where the situation resembles that in *Shoalhaven*. The evidence relating to the public use of R77011 amounts to no more than '*limited, casual, and sporadic*' activity by the public, insufficient to

engage the '*lawful use or occupation*' exception to claimability. In so far as it might be said there is authority contrary to the principles in *Tweed Byron* and/or *Shoalhaven* I believe they sit well together, and both remain preferable authority on these issues."

167 The Minister's contention as to the primary judge's error on this issue was expressed in the written submissions lodged on his behalf as follows:

"The Court below erred in failing to approach the matter on the basis that a comparatively lesser degree of immediate physical use will be sufficient to engage s 36(1)(b) than would be the case in relation to other uses: *Minister v NSWALC* (1993) 31 NSWLR 106 at 120E-F and *Crown Lands Act v NSW Aboriginal Land Council* [2008] HCA 48; (2008) 82 ALJR 1505 at 1518, [69] per Hayne, Heydon, Crennan and Kiefel JJ."

168 The passage relied upon in the first of the decisions referred to, is in the following terms:

"Moreover lands may for some purposes be used more directly or immediately than for other purposes. Thus lands used for sporting purposes such as a racecourse or a hockey field can be distinguished from lands left in their natural state as part of a park. Depending upon the purpose, use may or may not be synonymous with physical occupation and enjoyment." (at 120E-F).

169 The second decision referred to is the High Court decision in *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* [2008] HCA 48; (2008) 237 CLR 285. In the paragraph relied upon by the Minister, the plurality judgment gives as an example of land used or occupied by a hospital for its purposes, "land adjoining hospital grounds and purposely kept in its natural state to provide clean air and quiet undeveloped surroundings". The plurality emphasised that nothing that was said in the earlier decisions of the Court of Appeal (which include that relied upon by the Minister here, and referred to above), or in the

plurality's reasons, "should be understood as attempting some exhaustive definition of when land is not lawfully used or occupied or of what is the relevant use or occupation that will take lands outside the definition of claimable Crown lands" (at [69]).

170 It was submitted on behalf of the Minister that the primary judge had impermissibly used a proposition derived by him from the decision of Jagot J in *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 35 ("*Shoalhaven*") as a substitute for the statutory test. The proposition said to be derived from *Shoalhaven* was that "limited, casual and sporadic activity by the public" did not constitute "lawful use" within the meaning of s 36(1)(b). However, as I read the primary judge's decision, his Honour used that expression as an appropriate description of the facts before him which he regarded as, in all the circumstances, insufficient to amount to "lawful use or occupation". On that basis, the judge's conclusion was a conclusion on a question of fact which did not involve any error of law. In my view, the Minister has not established that the primary judge made an error of law in respect of this issue.

171 An alternative argument pursued by the Land Councils by way of their Notice of Contention is that even if there was "use" of the land in the relevant sense, that use was not "lawful" within the meaning of s 36(1)(b). This argument applied to such part of the land the subject of claim 6465 as was not also the subject of the Reserve for Public Recreation numbered R77011. The Land Councils submitted that such usage of the land as occurred outside R77011 was in contravention of s 6 of the *Crown Lands Act* which was in the following terms:

"Crown land shall not be occupied, used, sold, leased, licensed, dedicated or reserved or otherwise dealt with unless the occupation, use, sale, lease, license, reservation or dedication or other dealing is authorised by this Act or the *Crown Lands (Continued Tenures) Act* 1989".

172 As there does not appear to be any material distinction between the "use" to which this section adverts and that referred to in s 36(1)(b) of the Act, the submission must be upheld as an alternative basis for supporting the primary judge's decision in relation to the land to which the submission applies.

Orders

173 For the reasons I have given, the primary judge did not err in law in concluding that the Minister had not shown that, at the date of the claims, parts of the lands the subject of the claims were in the opinion of the Minister ones "needed or likely to be needed as residential lands".

174 However the primary judge did err in law in concluding that the certificates issued by the Minister in relation to the need or likely need of parts of the lands for "an essential public purpose", namely, nature conservation, were void for jurisdictional error. As it was accepted before this Court that if the certificates were not open to challenge and therefore admissible into evidence in the Land and Environment Court, the conclusive effect conferred upon them by s 36(8) of the Act would resolve the issue of whether parts of the subject lands were for this reason not claimable lands, this Court is able to make appropriate final orders and remission to the Land and Environment Court is unnecessary (compare the *Illawarra* case at [43]).

175 For the reasons I have given, the primary judge's decision on the "lawful use and occupation" issue has not been shown to be erroneous in point of law.

176 In these circumstances, it will be necessary for the parties to prepare short minutes of order in which the lands which were needed or likely to be needed "for an essential public purpose" are excised from the lands to be transferred pursuant to s 36(7) of the Act.

177 As both the appellant and the respondents have had success on discrete issues, which occupied significant time on the hearing of the appeal, my view is that it is appropriate that each party pay its own costs of the appeal (see *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38] as to the relevant principles).

178 The orders I propose are as follows:

(1) Appeal allowed in part.

(2) Direct the parties within fourteen days of the date of this judgment to submit agreed Short Minutes of Order or, if agreement cannot be reached, competing forms of Short Minutes of Order together with short submissions in support thereof, identifying the variations which should be made to the orders below to give effect to these reasons.

(3) No order as to the costs of the appeal.

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