

Case Note

Anderson & Anor v Director-General, Department of Environment and Climate Change & Anor

There is a long history to this matter. The EDO acted for the Andersons in an earlier case challenging the validity of a consent issued by the Director-General of the Department of Environment and Conservation, allowing the destruction of Aboriginal cultural heritage for a residential subdivision. In that case (*Anderson & Anor v The Director-General of the Department of Environment and Conservation & Ors* [2006] NSWLEC 12) the EDO represented Douglas and Susan Anderson, traditional owners of land at Angels Beach, East Ballina, challenging the validity of a consent issued by the Director-General of the Department of Environment and Conservation, allowing the destruction of Aboriginal cultural heritage for a residential subdivision.

Justice Pain of the Land and Environment Court ruled that the consent was invalid, due to a failure to take into account certain relevant matters. In particular, she found that the decision to grant the consent failed to take into account a supplementary report in relation to the heritage significance of the subdivision site. Justice Pain also held that the Director-General had failed to adequately apply the principles of ecologically sustainable development, as required by section 2A(2) of the *National Parks and Wildlife Act 1974 (NSW)*. In particular, Justice Pain noted the failure of the Director-General to adequately consider the principle of intergenerational equity.

Subsequently, the Andersons successfully challenged two further re-determinations to grant the consent, and also successfully challenged the grant of development consent by the Minister for Planning. However, the re-determined development consent was upheld by the Court in separate proceedings.

The latest proceedings were an application for judicial review of a fourth permit issued by the Director-General of the Department of Environment and Climate Change to disturb or move Aboriginal objects on land and a consent to destroy, deface or damage Aboriginal objects pursuant to Sections 87 and 90 of the *National Parks and Wildlife Act 1974 (NSW)*. The decision to grant the permit was made after considering a determination report made by an officer who had no previous involvement in the matter. The EDO again acted for the Andersons who challenged the decision on 5 grounds.

Grounds 1, 2 and 5 alleged that the Director-General failed to give proper, genuine and realistic consideration to the cultural significance of the land and Aboriginal objects, to the principle of intergenerational equity and to the opinions of the Andersons.

The Andersons submitted that, given the volume of evidence supporting the finding of cultural significance of the land, the decision-maker dismissed the material uncritically and did not consider what significance and weight it deserved. Justice Lolyd held that the decision-maker had an understanding of the matters and the significance of the decision to be made about them and thus met the legal requirement of consideration (para 31). He held that while this made the Andersons unhappy with the outcome of the determination of cultural significance, the merits of the case were not able to be reviewed.

The Andersons also submitted that the decision-maker failed to take into account a relevant consideration, namely, that proper, genuine and realistic consideration was not given to the opinions of the Andersons. Justice Lloyd rejected this allegation on the basis that the Andersons gave their opinions to the experts and the decision-maker considered documents submitted by the Andersons expressing their opinion. Justice Lloyd noted that the fact that the opinions were not agreed with did not give rise to a reviewable error of law (para 37).

The Andersons further submitted that there was a lack of proper, genuine and realistic consideration of the issue of intergenerational equity. In the earlier case of *Anderson & Anor v The Director-General of the Department of Environment and Conservation & Ors* [2006] NSWLEC 12, Justice Pain held that this concept was part of the need to consider the principles of ecologically sustainable development. However, in this case Justice Lloyd held that intergenerational equity was considered in the determination report under the heading of 'ecologically sustainable development'.

Ground 3 alleged that the Director-General's decision was manifestly unreasonable due to the failure to make inquiries about a report commissioned by the Department of Planning into the cultural significance of the site. The significance of the report was that it put in question the adequacy of the archaeological testing on the site, an issue that had been raised by the Andersons. The issues were whether the report was readily available to the decision-maker and centrally relevant to the determination. Justice Lloyd was prepared to accept that the Department of Environment and Climate Change knew about the report. However, his Honour held that this report did not add any factual material to that which was already before the decision-maker and was only of marginal relevance, particularly given certain previous field work that had occurred on the site. Accordingly, Justice Lloyd dismissed this argument.

Ground 4 alleged that the Director-General's decision was affected by apprehended bias. It was alleged that little attention was given to Mr Anderson's opinion about the existence of landfill on the site and that preference was given to the views of Mr Ferguson in such a way as to suggest to a fair minded observer that the decision-maker's mind was not open to persuasion. Justice Lloyd found there to be no evidence of bias. His Honour held that preference was given to Mr Ferguson's opinions because of the decision-maker's reliance on "compelling" material that was contrary to the Andersons' opinions.

The history of this case and the final decision shows the limitations of judicial review. It was never open to the Andersons to attack the merits of the proposal to destroy the Aboriginal objects and cultural significance of the subject site in any forum. This has meant that the Andersons have been in and out of the Land and Environment Court over a period of 4 years trying to protect a site of significance to their clan by overturning government decisions on legal grounds. It may be that law reform is needed before Aboriginal custodians are able to properly protect sites of cultural significance.