



## HIGH COURT OF AUSTRALIA

### NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 23 Oct 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

#### Details of Filing

File Number: D14/2025  
File Title: Mpwerempwer Aboriginal Corporation RNTBC (ICN 7316) v.  
Registry: Darwin  
Document filed: Appellant's submissions  
Filing party: Appellant  
Date filed: 23 Oct 2025

#### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

**IN THE HIGH COURT OF AUSTRALIA  
DARWIN REGISTRY**

BETWEEN:

**MPWEREMPWER ABORIGINAL  
CORPORATION RNTBC (ICN 7316)**

Appellant

and

**MINISTER FOR TERRITORY FAMILIES  
AND URBAN HOUSING as delegate of the  
MINISTER FOR THE ENVIRONMENT**

First Respondent

**FORTUNE AGRIBUSINESS FUNDS  
MANAGEMENT PTY LTD (ACN 607 474 251)**

Second Respondent

**APPELLANT'S SUBMISSIONS**

## APPELLANT'S SUBMISSIONS

### Part I: Certification

1. This submission is in a form suitable for publication on the internet.

### Part II: Concise statement of issues

2. The following issues arise.
  - (a) Where reasons are required for a Minister's opinion on a policy matter that is a pre-condition to a statutory power, but none are given, can a reviewing court infer the Minister was aware of the need to form an opinion, and did form an opinion, or does that intrude into merits review?
  - (b) Were the inferences drawn the more probable inferences?
  - (c) Where a Minister has current but not comprehensive information about a relevant consideration, can she fail to form a view on the significance of that information in making her decision and instead impose conditions about the matter?
  - (d) Was MAC,<sup>1</sup> whose members as native title holders held the Aboriginal cultural values the subject of a proposed licence condition, and which values are integral to the traditional laws and customs that underpin their native title rights and interests, entitled to the same opportunity to be heard on the proposed condition as was given to Fortune?

### Part III: *Judiciary Act 1903*, s 78B

3. Notices under s 78B of the *Judiciary Act 1903* are not required.

### Part IV: Reports of reasons for judgment

4. *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families & Urban Housing as Delegate of the Minister for Environment & Anor and Arid Lands Environment Centre Inc v Minister for Environment & Anor* [2024] NTSC 4; (2024) 384 FLR 234 (Barr J) (**PJ**).<sup>2</sup>
5. *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families & Urban Housing as delegate of the Minister for the Environment & Anor* [2025] NTCA 6; (2025) 263 LGERA 128 (Kelly, Huntingford and Burns JJ) (**AJ**).<sup>3</sup>

---

<sup>1</sup> Mpwerempwer Aboriginal Corporation RNTBC (ICN 7316) (**MAC**). The phonetic pronunciation of Mpwerempwer is: Mm-bwore-mm-bwore.

<sup>2</sup> CAB 5-153.

<sup>3</sup> CAB 166-280.

## Part V: Narrative statement of relevant facts

6. The second respondent (**Fortune**) is the lessee of the Singleton Station pastoral lease.<sup>4</sup> Fortune proposes to develop about 3,500 ha of Singleton Station for irrigated horticulture, and has identified the most suitable crops as including mandarins, table grapes, avocados, muskmelons and jujube.<sup>5</sup> Fortune requires up to 40,000 megalitres (**ML**) (40 gegalitres<sup>6</sup>) of water every year, once the project is fully developed.<sup>7</sup> The only water available is groundwater held in an underground aquifer, which can be accessed by a bore or bores on the property.<sup>8</sup>

7. Singleton Station is a 2,949 km<sup>2</sup> property in the Western Davenport region of the Northern Territory, about 380 km north of Alice Springs, and 120 km south of Tennant Creek.<sup>9</sup>

8. Water, and sites traditionally associated with access to or use of water, have significance for the traditional occupants of arid lands, and critical importance to society as a whole.<sup>10</sup> The traditional owners, and native title holders, of Singleton Station are Kaytetye people, and members of four landholding groups: Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen.<sup>11</sup> MAC is the prescribed body corporate for the native title holders of the Singleton Station pastoral lease,<sup>12</sup> and has a statutory role to act as their agent.<sup>13</sup> The native title holders hold proprietary rights and interests that co-exist with Fortune's rights as lessee, including the right of access for the purpose of maintaining and protecting areas of importance, and the right to take and use the natural resources (including natural water resources) of the land and waters.<sup>14</sup>

9. On **2 July 2009**, the Western Davenport Water Control District was declared under s 22 of the *Water Act 1992* (NT).<sup>15</sup> Singleton Station is within it. On **22 December 2018**, the Western Davenport Water Allocation **Plan 2018-2021** was declared under s 22B of the Act.<sup>16</sup> An objective of the Plan was to "protect Aboriginal cultural values associated with water".<sup>17</sup>

<sup>4</sup> CAB 170, AJ [2]; CAB 12, PJ [1], CAB 13, PJ [3].

<sup>5</sup> CAB 170, AJ [3]; CAB 12, PJ [2].

<sup>6</sup> One gegalitre is equivalent to 400 Olympic sized swimming pools: CAB 172, AJ [6].

<sup>7</sup> CAB 171, AJ [4]; CAB 12, PJ [2].

<sup>8</sup> CAB 171, AJ [3].

<sup>9</sup> CAB 170, AJ [2]; CAB 12, PJ [1].

<sup>10</sup> *ICM Agriculture Pty Ltd v Commonwealth of Australia* (2009) 240 CLR 140 at [90] (Hayne, Kiefel and Bell JJ); CAB 169-170, AJ [1]. See also *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, 241 at [69] (Kirby J).

<sup>11</sup> *Rex v Northern Territory* [2010] FCA 911 at [9] (Collier J).

<sup>12</sup> CAB 172, AJ [8]; CAB 13, PJ [3].

<sup>13</sup> CAB 13, PJ [3]; pursuant to *Native Title Act 1993* (Cth), s 57(2)-(3) and *Rex v Northern Territory* [2010] FCA 911 as varied by orders made by Charlesworth J on 19 August 2020 in *Mpwerempwer Aboriginal Corporation RNTBC (ICN 7316) v Northern Territory of Australia & Ors* NTD42/2018: Appellant's Book of Further Material (**ABFM**), Tab 4, page 92-101 (Varied determination).

<sup>14</sup> CAB 172, AJ [8]; CAB 13, PJ [3].

<sup>15</sup> ABFM, Tab 1, page 8.

<sup>16</sup> ABFM, Tab 2, page 10.

<sup>17</sup> ABFM, Tab 3, pages 26, 53.

Groundwater modelling (based on the cumulative consideration of all approved extraction) should be undertaken to determine if proposed groundwater extraction will unacceptably impact on groundwater dependent Aboriginal cultural values. The proposed extraction should not result in a change to groundwater conditions that would result in the loss or decline of cultural values, as demonstrated through modelling.

10. On **18 August 2020**, Fortune applied to the **Controller** of Water Resources for a licence to take groundwater, pursuant to s 60 of the *Water Act 1992* (NT).<sup>18</sup> That was a “water extraction licence decision” and so ss 71A-71D of the Act applied. Section 90 of the Act identified the “relevant factors” (s 71C(3)(b), s 71E(4)(b)) the Controller must “take into account”. At that time, ss 60(3) and (4) limited the licence period to 10 years, unless in the opinion of the Minister “special circumstances” justified granting a licence for a particular longer period. It provided:

- (3) Subject to subsection (4), a licence shall be granted for such period, not exceeding 10 years, as is specified in the licence document.
- (4) The Controller may, where in the opinion of the Minister there are special circumstances that justify so granting the licence, grant a licence for such period exceeding 10 years as is specified in the licence document.

11. Fortune’s application was described by the **Department** of Environment in a ministerial briefing about whether there were “special circumstances” to justify a 30-year licence, as being “unique in the NT with respect to its volume and the *[sic]* possibly the largest volume application in a single water resource by a single entity in Australia.”<sup>19</sup>

12. On **15 February 2021**, the Minister for Environment provided her opinion to the Controller that there were special circumstances justifying the grant of a licence to Fortune for 30 years.<sup>20</sup> On **8 April 2021**, the Controller granted Fortune licence WDPCC10000, for a period of 30 years.<sup>21</sup> The licence had eight conditions precedent and various staging conditions,<sup>22</sup> culminating in an entitlement to take 40,000 ML per year once the project was established.<sup>23</sup>

13. MAC and others applied to the Minister for Environment for statutory review of the Controller’s decision (Act, s 30(1)).<sup>24</sup> On **26 July 2021**, the Minister for Environment referred the matter to the Water Resources **Review Panel** (Act, s 30(3)(b)), which was required to “advise the Minister accordingly” (Act, s 30(4)).<sup>25</sup>

<sup>18</sup> CAB 12, PJ [2]; CAB 15 PJ [9]; CAB 171, AJ [4].

<sup>19</sup> ABFM Tab 5, page 104.

<sup>20</sup> CAB 184, AJ [31], CAB 210, AJ [84]; CAB 130, PJ [220], CAB 131 PJ [222].

<sup>21</sup> CAB 171, AJ [4]; CAB 15, PJ [10].

<sup>22</sup> CAB 171, AJ [5]; CAB 15, PJ [10].

<sup>23</sup> CAB 172, AJ [5].

<sup>24</sup> CAB 172, AJ [7]; CAB 16, PJ [12].

<sup>25</sup> CAB 173, AJ [10]; CAB 18, PJ [16].

14. MAC provided written submissions to the Review Panel, made representations at a hearing, and presented an Aboriginal **Cultural Values Assessment** report to it.<sup>26</sup> Before the Review Panel, some of the reviewing parties raised a concern about the Minister for Environment's suitability to make a decision, on account of apprehended bias.<sup>27</sup>

15. On **29 September 2021**, amendments to s 60 of the Act commenced. By these amendments, the Controller had to be personally satisfied that special circumstances justified the longer period, as opposed to that being an opinion of the Minister for Environment.<sup>28</sup> As amended, s 60(4) provided:

- (4) A licence may be granted under subsection (1) for a period exceeding 10 years if:
  - (a) the licence is for a purpose, or meets criteria, that the Minister, by *Gazette* notice, specifies as justifying a longer period; or
  - (b) the Controller is satisfied that special circumstances justify the longer period.

16. It was s 60(4) as amended that applied to the Minister's decision on review, with the Minister standing in the shoes of the Controller, pursuant to s 30(3)(a)(ii).<sup>29</sup>

17. On **15 October 2021**, the Review Panel reported to the Minister for Environment.<sup>30</sup> It offered its own "view" that a "licence term of greater than 10 years" "is appropriate",<sup>31</sup> but made no recommendation about "the longer period"<sup>32</sup> of a term of 30 years.

18. The Review Panel noted the Cultural Values Assessment, but said it was "not able to form a view" on the significance of it, concluded that "a comprehensive cultural impact assessment is required prior to the extraction of any significant volumes of water",<sup>33</sup> and recommended that a comprehensive assessment be added as a condition precedent to the licence<sup>34</sup> (but without expressing a view on the lawfulness of so doing<sup>35</sup>).

<sup>26</sup> CAB 269-270, AJ [217], [220]. ABFM, Tab 9, page 275 (Index of materials before Review Panel); Tab 6, pages 105-201.

<sup>27</sup> CAB 149-150, PJ [261].

<sup>28</sup> CAB 176, AJ [19]-[20]; CAB 213-214, AJ [91]; CAB 130, PJ [220]. The purpose of the amendment was to require the Minister to give notice of criteria that would justify a longer period, to "provide transparency in the decision-making process" and remove the previous ministerial discretion on the matter: Explanatory Statement, Statute Law Amendment (Territory Economic Reconstruction) Bill 2021, Serial No 26, p 45. See also Legislative Assembly of the Northern Territory, 14<sup>th</sup> Assembly, Parliamentary Record Debates and Questions, Second Reading Speech of the Statute Law Amendment (Territory Economic Reconstruction) Bill (Ms Uiibo), 13 May 2021, p 1829.

<sup>29</sup> CAB 207-209, AJ [78]-[81].

<sup>30</sup> CAB 173, AJ [11]; CAB 19, PJ [18]. ABFM, Tab 7, pages 202-224 (Review Panel Report).

<sup>31</sup> ABFM, Tab 7, page 220 (Review Panel Report at [84]).

<sup>32</sup> Act as at 29 September 2021, s 60(4)(b). See CAB 146-147, PJ [255].

<sup>33</sup> CAB 261, AJ[199]; ABFM, Tab 7, pages 211-212 (Review Panel Report at [39]).

<sup>34</sup> ABFM, Tab 7, page 221 (Review Panel Report at [92]).

<sup>35</sup> ABFM, Tab 7, page 217 (Review Panel Report at [66]).

19. On **2 November 2021**, the Department sought clarification from the Review Panel's Chair about the recommended cultural values impact assessment, including "whose responsibility it is to undertake this assessment".<sup>36</sup> The Chair responded, giving "the Panel's view" that "it is now either up to the Department (in partnership with the CLC)" to undertake the assessment, "or it is up to the proponent to facilitate that work".<sup>37</sup>

20. On **10 November 2021**, the Department invited Fortune to comment on the terms of proposed additional and amended licence conditions on the basis that they "may adversely impact Fortune".<sup>38</sup> One additional condition precedent was in the following terms (**CP10**):

The licence holder must develop and submit to the Controller a groundwater dependant [*sic*] Aboriginal cultural values impact assessment. The assessment must:

- (a) be prepared by a suitably qualified professional;
- (b) identify, map and document (as appropriate) the cultural values of Aboriginal people that will be impacted by groundwater extraction under this licence;
- (c) identify reference points to be used in modelling the impacts of groundwater extraction under this licence on the identified Aboriginal cultural values; and
- (d) specify monitoring parameters, trigger values and limits for the reference points which can be used to initiate actions under an adaptive management framework.

21. Fortune responded, accepting CP10 as written.<sup>39</sup>

22. On **11 November 2021**, the Minister for Environment delegated her powers under s 30 of the Water Act in relation to the decision to the first respondent (**Delegate Minister**).<sup>40</sup>

23. On Friday, **12 November 2021**, the Department sent two ministerial briefs to the Delegate Minister (at about 1.00pm and 5.46pm),<sup>41</sup> totalling over 1,660 pages.<sup>42</sup> Annexed to the first brief were limited extracts from the Act, but not s 60 (either the former or amended version).<sup>43</sup> There was no reference in the briefs to the Delegate Minister's need to find special circumstances to justify a 30-year licence term.<sup>44</sup>

---

<sup>36</sup> CAB 261, AJ [200].

<sup>37</sup> CAB 261-262, AJ [200].

<sup>38</sup> CAB 262, AJ [201]; ABFM, Tab 10, pages 280-282 (Letter from Department to Fortune dated 10 November 2021).

<sup>39</sup> CAB 262-263, AJ [202]. ABFM, Tab 10, pages 283-285 (Letter from Fortune to Department dated 12 November 2021).

<sup>40</sup> CAB 174, AJ [12]; CAB 20, PJ [21].

<sup>41</sup> CAB 21, PJ [22].

<sup>42</sup> CAB 90, PJ [141]. ABFM, Tabs 9 (full suite of annexures not reproduced) and 10.

<sup>43</sup> CAB 214, AJ [92]; ABFM, Tab 9, pages 234-237.

<sup>44</sup> ABFM, Tabs 9, and 10.

24. On Monday, **15 November 2021**, “less than one business day after she was provided with the briefing materials”, the Delegate Minister granted licence number WDCP10358 to Fortune (the **Licence**), which included CP10 and had a term of 30 years (ss 71E, 30(3)(a)(ii)).<sup>45</sup>

25. The Delegate Minister’s statutory reasons<sup>46</sup> did not refer to s 60(4), or to the need to find special circumstances, and nor did she make any finding of “special circumstances”.<sup>47</sup>

26. MAC sought judicial review on nine grounds,<sup>48</sup> including the Minister’s failure to comply with s 60(4) as in force when the decision was made (ground 9), failure to consider the protection of Aboriginal cultural values (ground 5) and denial of procedural fairness concerning proposed CP10 (ground 8).

27. The primary judge (Barr J) dismissed all grounds, holding the Minister’s decision was to be made according to s 60(4) as in force at the time of the Controller’s earlier decision (PJ [234]), but that if he was wrong, the Minister had failed to comply with s 60(4) at the time of her decision (PJ [263]), and to infer that the Minister was satisfied that special circumstances justified the licence period of 30 years would require “conjecture” (PJ [258]). His Honour also held the protection of Aboriginal cultural values was not a mandatory relevant consideration, but that the Minister did consider it because she added CP10 (PJ [176]). His Honour did not address the procedural fairness ground as it concerned CP10.

28. The Court of Appeal (NTCA) held Barr J erred in requiring compliance with s 60(4) as in force at the time of the Controller’s decision (AJ [82]), but that it could be inferred the Minister complied with the section at the time of her decision, upholding the Minister’s notice of contention on that point (AJ [94]-[96]). The NTCA held the Minister was not obliged to have before her sufficient information about the protection of Aboriginal cultural values to consider how they would be affected by the grant of the Licence (AJ [192]) and that her decision to impose CP10 showed she did consider the matter (AJ [193]). The NTCA held the fact MAC was alive to the possibility the Minister might require the preparation of a cultural values impact assessment meant it had no right to make further submissions (AJ [236]). MAC’s appeal was dismissed.

---

<sup>45</sup> CAB 174, AJ [13]; CAB 21, PJ [24], CAB 90, PJ [141].

<sup>46</sup> ABFM, Tab 11, pages 287-299.

<sup>47</sup> CAB 148-151 PJ [258]-[263]. Cf CAB 214-216, AJ [92]-[95]. There was no relevant *Gazette* notice pursuant to s 60(4)(a) of the Act: CAB 138, PJ [238].

<sup>48</sup> CAB 30-33, PJ [37].

## Part VI: Argument

### ***Ground 1: wrongly inferring matters about the Minister’s state of satisfaction which forms a precondition to the exercise of a statutory power***

29. The NTCA erred by holding it was permitted by *MZAPC*<sup>49</sup> to infer two critical matters about the Delegate Minister’s state of mind, which was a statutory precondition on the exercise of a power, into her statutory reasons, being (a) she was aware of the need to find “special circumstances” under s 60(4)(b) of the Act (AJ [94]); and (b) she determined there were “special circumstances” (AJ [95]).

30. To be clear, MAC accepts as a matter of principle that there are situations in which inferences can be drawn in judicial review cases about what happened as a matter of objective fact<sup>50</sup> in the making of a decision (including for the purposes of a counterfactual inquiry).<sup>51</sup> MAC also accepts that in cases alleging actual bias,<sup>52</sup> or unreasonableness,<sup>53</sup> inferences about a decision-maker’s state of mind can be drawn. In each case, the court’s task is a familiar one, and analogies can be drawn with appellate review of a judicial discretion. But the nature and subject-matter of the power in s 60(4)(b) of the Act stands apart from those cases. The present issue is whether inferences about the decision-maker’s state of mind can be drawn when reasons are required, the reasons given are silent about the decision-maker’s state of mind, and the positive state of mind is a pre-condition to a statutory power concerning a matter of policy about which reasonable minds might differ. Contrary to the conclusions of the NTCA (AJ [83]), *MZAPC* is not authority permitting an inference to be drawn in such circumstances.

31. MAC contends that, in such a case, a reviewing court cannot draw any “reasonable and definite”<sup>54</sup> inference, as to do so will impermissibly involve the court in the decision-maker’s opinion on the merits. Absent reasons, it is not possible for a reviewing court to independently determine whether the Delegate Minister was positively satisfied that “special circumstances” justified a grant of a licence for a period exceeding 10 years, and for a period of 30 years. To draw inferences about what were the “special circumstances”, whether there were countervailing circumstances, whether the circumstances “justified” a longer period and if so what period, involves the reviewing court substituting its opinion for the decision-maker’s.

---

<sup>49</sup> *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at [38] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

<sup>50</sup> *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594.

<sup>51</sup> *MZAPC* (2021) 273 CLR 506.

<sup>52</sup> *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507.

<sup>53</sup> *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353.

<sup>54</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1, 6 (Dixon, Williams, Webb, Fullagar and Kitto JJ); *Luxton v Vines* (1952) 85 CLR 352, 358 (Dixon, Fullagar and Kitto JJ).

32. Further, in the circumstances of this case, the inferences could not properly be drawn as they conflicted with four factual matters and three orthodox inferences, which meant there was, at the least, an equal probability of conflicting inferences.

*No inferences can be drawn where reasons are silent about the Minister's state of mind on a matter of policy that is a pre-condition on the exercise of a power*

33. A reviewing court cannot draw inferences in situations where reasons must be given, but those reasons are silent on the Minister's state of satisfaction which forms a pre-condition to an exercise of statutory power,<sup>55</sup> where the matter of which the Minister is required to be satisfied is a polycentric matter involving weighing the interests of competing users of a public resource.<sup>56</sup> The Minister's "very wide discretion"<sup>57</sup> precludes a reviewing court drawing inferences about unstated subjective matters, as to do so must involve the court in the task of merits review.

34. Section 60(4)(b) confers a power on the Minister, conditioned by a state of satisfaction, where the matter for the Minister's satisfaction concerns the period of a licence to take water, a public resource in which the Act recognises competing uses and users.<sup>58</sup>

35. The power conferred by s 60(4)(b) is discretionary ("may"). It concerns a definite "longer period" ("the" longer period). It is conditional ("if"). It is enlivened where the Minister (standing in the Controller's shoes) actually has the identified subjective mental state ("is satisfied"). The special circumstances must relate to the specified longer period (here, 30 years) for the taking of a public resource. And, there is a standard the circumstances must reach: "justify".

36. This last point matters. The power is not enlivened simply on the *existence* of special circumstances, but where the Minister is positively satisfied that those special circumstances *justify* the longer period. Accepting that special circumstances are those that are unusual or uncommon, the text contemplates some special circumstances *may not* justify the longer period. What are special circumstances, and whether or not they justify a longer period, in the context of the taking of a public resource, is an evaluative judgment on which reasonable minds might differ. The Minister must turn her mind not only to what the section requires, but to the special circumstances, how they relate to

<sup>55</sup> Compare *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [111] (Gageler J); *Buck v Bavone* (1976) 135 CLR 110, 118-119 (Gibbs J).

<sup>56</sup> *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510 at [64]-[65] (Kiefel CJ, Bell, Gageler and Keane JJ) "when a statute ... provides for the disposition of interests in the resources of a State ... the public interest is not well served by allowing non-compliance with a legislative regime to be overlooked or excused by the officers of the executive government charged with its administration."

<sup>57</sup> *Buck v Bavone* (1976) 135 CLR 110, 118-119 (Gibbs J) quoted in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 275-276 (Brennan CJ, Toohey, McHugh, Gummow JJ).

<sup>58</sup> Act, ss 4(3), 10-11, 13-15, 22A-22C, 23, 34, Part 6A, s 90.

the licence period sought, and whether or not those circumstances justify that period, and then reach her opinion.

37. Further, it is clear from ss 71C(3) and 71E(4) that the Minister must give her reasons for the decision, which includes the licence period and thus the reasons for exercising the power under s 60(4). The Minister sought to excuse the breach of her statutory obligation by the self-serving claim it could be inferred she fulfilled her task.<sup>59</sup> She never provided the missing reasons.

38. Powers of this kind have been considered in the context of review for reasonableness. The cases recognise the difference between inferences about objective facts and inferences about states of mind. And inferences about states of mind on matters of policy involve additional problems, because of the “very wide discretion” conferred on the decision-maker, on which reasonable minds might differ and because the matter of which the decision maker is required to be satisfied “is a matter of opinion or policy or taste”.<sup>60</sup> And further problems arise in a case where, as here, the statutory power is enlivened on a state of mind *positively* being formed,<sup>61</sup> but the reasons are silent as to that requirement and the state of mind itself.

39. For a court to engage in inferring matters about the formation of a positive state of mind on matters of policy traverses the functional limits identified in *LPDT*:<sup>62</sup>

A reviewing court does not engage in a review of the merits of the decision, reconstruct a decision-making process, rework the apparent basis upon which a decision has been made, or rewrite the reasons for decision.

40. The NTCA held (AJ [95], emphasis added): “In our opinion, the only reasonable interpretation of the Minister’s decision, in the context to which we have referred, is that the Minister determined that there were special circumstances, *being those previously identified by the Minister for Environment*, which justified a 30-year lease [*sic*, licence].” Despite being framed as an “interpretation” of the Minister’s reasons,<sup>63</sup> the statement of principle identified by the NTCA concerned determining the facts by drawing inferences (AJ [83]).

<sup>59</sup> CAB 147-148, PJ [257]; 192-193 AJ [45]-[46].

<sup>60</sup> *Li* (2013) 249 CLR 332 at [111] (Gageler J); *Buck v Bavone* (1976) 135 CLR 110, 118-119 (Gibbs J); *Wu Shan Liang* (1996) 185 CLR 259, 275-276 (Brennan CJ, Toohey, McHugh, Gummow JJ).

<sup>61</sup> Unlike *Avon Downs* (1949) 78 CLR 353 where the Commissioner disallowed an objection because the taxpayer did not establish the relevant matter to the satisfaction of the Commissioner.

<sup>62</sup> *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at [29] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

<sup>63</sup> Strictly, the Minister’s reasons were a piece of evidence (*Minister for Immigration, Local Government and Ethnic Affairs v Taveli* (1990) 23 FCR 162 (Davies, French and Hill JJ)) and cannot be “interpreted” in the same way as a statute or contract. The reasons can be “scrutinised”, but the reviewing court must not turn a review of the reasons into a reconsideration of the merits: *Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

41. As to those “previously identified” circumstances, the NTCA said (at [31]) they were: “the scale of the proposed project, the level of investment in the project, the time required to develop the project and the potential economic benefits for the Northern Territory”.

42. But, after the Minister for Environment’s February 2021 opinion about “special circumstances”, there was a process before the Review Panel, which reported to the Minister in October 2021. Relevantly, as the Review Panel recorded in its advice, reviewing parties put on material disputing “special circumstances”.<sup>64</sup>

ECNT submit that the Controller should not have applied her discretion to grant the Licence for a period of 30-years given the scientific uncertainty underpinning the WAP [the Plan] and the risk of serious and irreversible harm.

CLC submits that the Controller should not have granted the Licence for a period greater than 10 years and maintains that the special circumstances referred to by the Minister do not exist in this case and refer to the circumstances included in section 5.2.1 of the *Guideline: Special Circumstances for water extraction terms of up to 30 years*.

The Panel is of the view that a licence term of greater than 10 years, with suitable conditions precedent and staged entitlements, is appropriate for a large-scale development such as that proposed.

43. The Review Panel could not, and did not, form an opinion on special circumstances. It did not advise the Minister what opinion she should form; that would have been inappropriate.

44. It should be obvious, but the Minister’s February 2021 opinion could not and did not take account of the subsequent materials and claims disputing “special circumstances”, or of the Review Panel’s “view”, that having been provided in October 2021.

45. But this presents substantial problems for the NTCA’s inference about the Delegate Minister’s November 2021 decision, which said the special circumstances were those previously identified by the Minister in February 2021. On the basis of that inference, did the Delegate Minister ignore the material and claims disputing “special circumstances” that were put before the Review Panel? That would be reviewable error. If not, how were those materials and claims treated by the Delegate Minister in reaching her opinion? Was it only the circumstance of a “large-scale development” she considered justified the period, or was it each of the matters identified in February 2021? Was the NTCA’s inference based on the existence of “suitable conditions precedent and staged entitlements”, or not? Was the NTCA’s inference on the basis of special circumstances justifying a 30-year licence, or a licence term of greater than 10 years?

<sup>64</sup> ABFM, Tab 7, pages 219-220 (Review Panel Report at [82]-[84]).

46. Recall that an inference is “a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence or some other fact or facts. The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience”.<sup>65</sup> None of the questions in the preceding paragraph can be answered without the court forming its own opinion about the “special circumstances” and what they justify.<sup>66</sup> But a reviewing court has no experience of, nor role in, making those policy matters and judgments, and so must either be engaging in merits review, reworking the apparent basis (as disclosed in the reasons) on which the decision was made, or rewriting the reasons for decision.<sup>67</sup>

*The asserted inferences are not the more probable*

47. Further, MAC contends that while the “more probable” standard applies,<sup>68</sup> it applies in the context of the nature and subject-matter of the power identified above. Noting the nature of an inference just discussed, another problem with a court drawing an inference of an *opinion* about a matter of *policy*, where the Minister’s reasons are silent, is that it is not possible to distinguish between permissible inference and conjecture.

48. A reviewing court must apply a high degree of scrutiny to any self-serving claim by a Minister who did not give evidence and whose statutory reasons are silent on the topic, that the “more probable” inference is that she was aware of the need to form, and did form, an opinion.

49. The starting point is the Delegate Minister’s reasons did not refer to s 60(4), nor to the need to be satisfied of “special circumstances”, nor contain any finding about “special circumstances”. The reasons contained brief recitations of the Review Panel’s “views” about the licence period, but nothing about “special circumstances”.

50. The NTCA did not grapple with four factual matters and three orthodox inferences.

51. *First*, at the time of the decision, the law had recently changed. Before 29 September 2021, if the Delegate Minister were to have stood in the shoes of the Controller on review, with the Minister’s February 2021 opinion having been given, the Delegate Minister would not herself need to form an opinion, or a state of satisfaction, about “special circumstances”. But after 29 September 2021, standing in the shoes of the Controller, she did.

---

<sup>65</sup> *G v H* (1994) 181 CLR 387, 390 (Brennan and McHugh JJ).

<sup>66</sup> The inference must be “reasonable and definite”: *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 6 (Dixon, Williams, Webb, Fullagar and Kitto JJ); *Luxton v Vines* (1952) 85 CLR 352, 358 (Dixon, Fullagar and Kitto JJ).

<sup>67</sup> See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at [110] (Kirby J) (“The selection of the Minister’s ‘reasons’ is left to inference. They must be deduced from the terms of the brief. There are few clear indications of how that process is to be carried out.”)

<sup>68</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1, 6 (Dixon, Williams, Webb, Fullagar and Kitto JJ).

52. *Second*, the power to decide had been delegated. The Delegate Minister did not have responsibility for the Act, was given the power on Thursday, the briefs on Friday and decided on the Monday. It cannot be inferred she knew the Act or its requirements, beyond the matters in her brief.

53. *Third*, the briefs did not set out or refer to s 60(4) and did not identify to the Delegate Minister that she had to reach a state of satisfaction under the subsection.

54. *Fourth*, as already noted, the Minister's February 2021 opinion did not take account of matters later before the Review Panel. And the Review Panel did not itself resolve any dispute, or form any opinion about, special circumstances.

55. *Fifth*, having not given evidence, a *Jones v Dunkel* inference should be drawn that any evidence the Minister could have given about her state of mind would not have helped her case.

56. *Sixth*, the inference arises that the reasons are an accurate account of the findings and reasons actually made and held by the Minister.<sup>69</sup>

57. *Seventh*, the Minister's failure to address her opinion under s 60(4) raises a strong inference it was overlooked,<sup>70</sup> and special circumstances not considered.<sup>71</sup>

58. As to the NTCA's first inference (AJ [94]), the more probable inference is the Delegate Minister was not aware of the need to form an opinion under s 60(4). The more probable inference is the change in law was overlooked in the briefs.

59. As to the NTCA's second inference (AJ [95]), the more probable inference is that, being unaware, the Delegate Minister did not reach the state of satisfaction required by s 60(4)(b).

***Ground 2: failure to take into account the protection of Aboriginal cultural values***

60. The NTCA erred in holding the Delegate Minister took the protection of Aboriginal cultural values into account by imposing a condition on the Licence, even though she did not form a view about the only information before her on those values and even though the statutory scheme required those values to be taken into account *before* the Licence was granted, and not deferred to a licence condition.

61. Two matters arise from the subject-matter, scope and purpose of the Act.

62. *First*, the several matters in s 90 of the Act must be taken into account by the decision-maker *before* the decision is made. That is apparent from the language used in s 90(1): "*in making* a water

<sup>69</sup> *Minister for Immigration, Local Government and Ethnic Affairs v Taveli* (1990) 23 FCR 162, 179 (French J).

<sup>70</sup> *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 256 FCR 593 at [47] (French, Sackville and Hely JJ).

<sup>71</sup> *Yusuf* (2001) 206 CLR 323 at [69] (McHugh, Gummow and Hayne JJ); *DQM18 v Minister for Home Affairs* (2020) 278 FCR 529 at [28] (Bromberg and Mortimer JJ).

extraction licence decision, the Controller *must* take into account...” (emphasis added).<sup>72</sup> The language of “in making” mirrors the governing statements of principle from *Peko-Wallsend Ltd*.<sup>73</sup> Relevantly, the “factors” that had to be taken into account were:

- (ab) any water allocation plan applying to the area in question; ...
- (e) the designated beneficial uses of the water...; ...
- (k) other factors the Controller considers should be taken into account ...

63. These factors operated by reference to facts. The Plan, and receipt of the Cultural Values Assessment, made it mandatory for the Delegate Minister to consider the protection of Aboriginal cultural values. The ambulatory nature of s 90(1)(ab) and (k) was engaged.

64. *Second*, the decision is to be made on the basis of the most current material available to the decision-maker.<sup>74</sup> Taking something into account requires bringing to mind “the salient facts which give shape and substance to the matter”.<sup>75</sup> As Mason J said in *Peko-Wallsend Ltd* (at 45):

It would be a strange result indeed to hold the Minister is entitled to ignore material of which he has actual or constructive knowledge and which may have a direct bearing on the justice of [the decision] ...

65. MAC provided the Cultural Values Assessment to the Review Panel.<sup>76</sup> It was not comprehensive. But it was the most current and accurate material available and contained the only salient facts before the Delegate Minister about the protection of cultural values.

66. The Cultural Values Assessment report identified 40 groundwater related sacred sites associated with 20 *Altyerre* (Dreaming) mythologies within the drawdown area.<sup>77</sup> It contained a map showing the bores, drawdown area, sacred sites and dreaming tracks and dreaming sites within that area (figure 7).<sup>78</sup> The report noted the risk to those sites from a reduction in groundwater levels.<sup>79</sup> The report said it was clear that traditional owners were concerned about their country getting sick, having their traditional rights and interests eroded and holding the psychological stress and guilt associated with knowing their descendants may lose important cultural values which have been sustained for

<sup>72</sup> Part 6A of the Act governs “water extraction licence decisions”, which relevantly includes a licence to take groundwater under s 60 of the Act.

<sup>73</sup> See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 37, 39 (Mason J).

<sup>74</sup> *Peko-Wallsend Ltd* (1986) 162 CLR 24, 44-45 (Mason J).

<sup>75</sup> *Peko-Wallsend Ltd* (1986) 162 CLR 24, 61 (Brennan J).

<sup>76</sup> ABFM, Tab 6, pages 105-201; ABFM, Tab 7, page 223 (Review Panel Report, Index, item 23).

<sup>77</sup> ABFM, Tab 6, page 115.

<sup>78</sup> ABFM, Tab 6, page 135; ABFM, Tab 14, page 323.

<sup>79</sup> ABFM, Tab 6, page 115-116.

thousands of years.<sup>80</sup> The report was not comprehensive, in that it acknowledged that additional sites within the drawdown area may be identified in the future.

67. The Cultural Values Assessment report had a direct bearing on the justice of granting a licence. Assuming the modelled drawdown occurred (which was the predictive exercise required by the Plan), would that result in a loss or decline of Aboriginal cultural values, and would that be acceptable, or not? It was the Minister's task to engage with the salient facts.

68. The Review Panel noted the report, but said it was "not able to form a view" on the significance of the information in that report (AJ [177]). It concluded it was "of the opinion that a comprehensive cultural impact assessment is required prior to the extraction of any significant volumes of water" (AJ [177]), but did not have a view on the "lawfulness" of using conditions precedent to do this.<sup>81</sup>

69. In her reasons, the Delegate Minister said she had considered the issues raised regarding impact on cultural values and accepted the views of the Review Panel in that regard. Those views included that the Review Panel "was not able to form a view" on the significance of the information in the Cultural Values Assessment report. Nothing in the Delegate Minister's reasons evinces any consideration of the content or significance of the information in the Cultural Values Assessment. And that is confirmed by the Delegate Minister's acceptance of proposed CP10.

70. In deciding whether to grant the Licence, the Delegate Minister was obliged to take into account several factors, including "factors the [Delegate Minister] considers should be taken into account": Act, s 90(1)(k).<sup>82</sup> The protection of Aboriginal cultural values associated with water were identified by the Review Panel, and accepted by the Delegate Minister, as relevant to the grant of the Licence.<sup>83</sup> Those cultural values were also relevant under s 90(1)(ab) (as one of the objectives in the Plan was to "protect Aboriginal cultural values associated with water")<sup>84</sup> and s 90(1)(e) (as one of the designated beneficial uses under s 22A(2)(a) was the environment, which was defined in s 4(1) to include "cultural and social aspects").

71. The Delegate Minister was empowered to grant the Licence with conditions,<sup>85</sup> but that does not answer the question of whether the imposition of CP10 amounted to "[taking] into account" the protection of Aboriginal cultural values. The grant of, and the conditions on a licence, have to be responsive to, not a substitute for, the consideration given. To take something "into account" requires,

---

<sup>80</sup> ABFM, Tab 6, pages 115 and 117.

<sup>81</sup> ABFM, Tab 7, page 217 (Review Panel Report at [66]).

<sup>82</sup> CAB 259, AJ [193]; and see CAB 108-109, PJ [175]-[177].

<sup>83</sup> CAB 253-254, AJ [176]-[177]; CAB 261, AJ [199]-[200]; and see ABFM, Tab 7, pages 211-212 (Review Panel Report at [35]-[40]).

<sup>84</sup> ABFM, Tab 3, page 16 (Western Davenport Water Allocation Plan 2018-2021).

<sup>85</sup> Act, s 60(2).

at the minimum a decision-maker to “grapple with” it<sup>86</sup> and engage in an “active intellectual process”.<sup>87</sup> It is not the case, contrary to the NTCA’s statement, that “how she was to take such a matter into account ... was a matter for [her]”,<sup>88</sup> when those basal requirements had not been met.

72. There is “an important difference between a duty to take into account (or consider) relevant considerations (which requires those considerations to be weighed against other factors as part of a reasoning process) and the duty to consider (or take into account), for example, representations made by an affected person (which requires understanding of those representations and consideration of whether the points they make are relevant)”.<sup>89</sup> The Delegate Minister’s duty was one of the former kind,<sup>90</sup> which required her to weigh up a range of potentially conflicting factors under s 90(1) of the Act.

73. So, the Delegate Minister was required to engage with the material about the protection of Aboriginal cultural values to perform the evaluative reasoning exercise required by s 90(1). It required “more than mere advertence”<sup>91</sup> to the matter, and “an understanding of the matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration”.<sup>92</sup>

74. What is clear from the terms of CP10 is that the identification of Aboriginal cultural values and the consideration of the impacts of the Licence on them, became, upon the grant of the Licence, a matter for someone other than the Delegate Minister, and at a point far past “in making a water extraction licence decision”.

75. A failure to consider substantial facts about a matter at all, and to record consideration of the matter only in a formal sense,<sup>93</sup> is a failure to take that matter into account.<sup>94</sup> It is a “purported but

<sup>86</sup> *Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd* (2018) 98 NSWLR 712 at [24]-[25] (Basten JA).

<sup>87</sup> *Singh v Minister for Home Affairs* (2019) 267 FCR 200 at [30]-[34] (Reeves, O’Callaghan and Thawley JJ); *DVO16 v Minister for Immigration and Border Protection* (2021) 273 CLR 177 at [12] (Kiefel CJ, Gageler, Gordon and Steward JJ), [77] (Edelman J).

<sup>88</sup> CAB 259, AJ [193].

<sup>89</sup> *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water* (2023) 299 FCR 236 at [89], and see also [90] (Jackson and Kennett JJ), citing *ECE21 v Minister for Home Affairs* (2023) 297 FCR 422 at [7]-[8] (Mortimer, Colvin and O’Sullivan JJ); and *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531, [67]-[70] (Colvin J). And see *M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at [24]-[26] (Kiefel CJ, Keane, Gordon and Steward JJ).

<sup>90</sup> In particular, by analogy with *Gelorup*, which concerned matters under s 136(2) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) that the Minister is required to take into account in deciding whether or not to approve an action: see *Gelorup* (2023) 299 FCR 236 at [90] (Jackson and Kennett JJ).

<sup>91</sup> *Northern Inland Council for the Environment v Minister for the Environment* (2013) 218 FCR 491 at [64] (Cowdroy J).

<sup>92</sup> *Weal v Bathurst City Council* (2000) 111 LGERA 181 at [80] (Gyles J).

<sup>93</sup> *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643 at [45] (Rares and Robertson JJ).

<sup>94</sup> *Peko-Wallsend Ltd* (1986) 162 CLR 24, 61 (Brennan J).

not a real exercise” of the duty to take it into account.<sup>95</sup>

**Ground 3: failure to give MAC the same right to be heard on CP10 as given to Fortune**

76. The NTCA erred in failing to hold the Delegate Minister was obliged to give MAC, whose members hold the Aboriginal cultural values the subject of CP10, which derive from their native title rights and interests, the same opportunity to be heard on the terms of the proposed CP10 as she gave to Fortune.<sup>96</sup>

77. The native title holders represented by MAC hold proprietary rights and interests that coexist with the rights and interests of Fortune.<sup>97</sup> The Delegate Minister’s decision to grant the Licence on the condition of CP10 affected those rights and interests.

78. Native title is “a set of rights and interests existing at common law”,<sup>98</sup> and is recognised by the common law in the sense that the law “will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them”.<sup>99</sup> Native title has “some or all of the features which a common lawyer might recognise as a species of property”,<sup>100</sup> and although there may be no precise analogy with other common law property rights,<sup>101</sup> native title is nonetheless “rights and interests to do things in relation to land and waters”<sup>102</sup> and is “property which is enduring, substantial and significant”<sup>103</sup> within a “perfectly general”<sup>104</sup> meaning of the word. To reason otherwise would be “untenable”.<sup>105</sup>

79. An obligation to afford procedural fairness conditions administrative decisions that affect property rights and interests.<sup>106</sup> It is a “presumptive obligation”<sup>107</sup> where the exercise of a statutory

<sup>95</sup> *Re Patterson; ex parte Taylor* (2001) 207 CLR 391 at [189] (Gummow and Hayne JJ), quoting *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473, 483 (Gibbs J).

<sup>96</sup> CAB 280, AJ [244]; and CAB 275, AJ [234].

<sup>97</sup> CAB 172, AJ [8]; CAB 13, PJ [3].

<sup>98</sup> *Commonwealth v Yunupingu* (2025) 99 ALJR 519 at [61] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), citing *Queensland v Congo* (2015) 256 CLR 239 at [31] (French CJ and Keane J).

<sup>99</sup> *Yunupingu* (2025) 99 ALJR 519 at [61] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), citing *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [42] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>100</sup> *Yunupingu* (2025) 99 ALJR 519 at [134] (Gordon J), citing *Yarmirr* (2001) 208 CLR 1 at [12] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>101</sup> *Yunupingu* (2025) 99 ALJR 519 at [135] (Gordon J); and see [58] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

<sup>102</sup> *Yunupingu* (2025) 99 ALJR 519 at [134] (citing *Northern Territory v Griffiths* (2019) 269 CLR 1 at [23] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ)), [138] (Gordon J).

<sup>103</sup> *Yunupingu* (2025) 99 ALJR 519 at [143] (Gordon J); and see [2], [50] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

<sup>104</sup> *Yunupingu* (2025) 99 ALJR 519 at [133] (Gordon J).

<sup>105</sup> *Yunupingu* (2025) 99 ALJR 519 at [50] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

<sup>106</sup> And has from the beginning of their development: *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180; *Smith v R* (1878) LR 3 App Cas 614 (PC); *Municipal Council of Sydney v Harris* (1912) 14 CLR 1; *Delta Properties Pty Ltd v Brisbane City Council* (1955) 95 CLR 11; *Commissioner of Police v Tanos* (1958) 98 CLR 383, 395 (Dixon CJ and Webb J); *Kioa v West* (1985) 159 CLR 550, 618-619 (Brennan J).

<sup>107</sup> *Disorganized Developments Pty Ltd v South Australia* (2023) 280 CLR 515 at [41]; see also [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). And more generally, absent legislative intention to the contrary, it is an implied

power “is capable of having an adverse effect on legally recognised rights or interests.”<sup>108</sup> And a right to use water is “of critical importance” to those who are “immediately interested” in it.<sup>109</sup> In respect of procedural fairness being owed to holders of immediate property interests, this Court recently confirmed that:<sup>110</sup>

Decisions made in the exercise of statutory powers that affect the rights of individuals with respect to property are a category of cases that has a long history of attracting a duty of procedural fairness as a matter of “fundamental justice”,<sup>111</sup> “long-established doctrine”<sup>112</sup> and a “deep-rooted principle of the law”,<sup>113</sup> subject to displacement by Parliament through express words or necessary implication in the relevant statute.

80. The appellants in *Disorganized Developments* were owed procedural fairness in respect of a decision that would condition the exercise of their property rights, and *purely* on the basis that they held rights and interests as owners and occupiers of the relevant land.<sup>114</sup> As to the content of the obligation, “[t]here is no reason to doubt that an owner or occupier may have something to say of relevance about the characteristics of the land or its uses ... that may be relevant to a decision to exercise the ... power”.<sup>115</sup> That case did not require consideration of the scope of procedural fairness in relation to a power liable to adversely affect a large group of persons, because the appellants’ specific property rights would be directly affected by the relevant declaration, and in a manner “markedly different from other persons who might be adversely affected by such a declaration”.<sup>116</sup>

81. There is no reason in principle why MAC should not have been given the opportunity to be heard about the inclusion of CP10 on the Licence, in its terms. Fortune was given that opportunity. And the opportunity was owed to MAC for the same reason — because the terms of CP10 would directly affect the native title holders’ rights and interests in the land and waters of Singleton Station in a manner markedly different from other persons.<sup>117</sup>

---

condition on the exercise of a statutory power that a person whose interests may be affected by it be informed of the case against them and given an opportunity to comment on adverse material: *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [97] (Gummow, Hayne, Crennan and Bell JJ), citing *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at [39]-[41] (Gaudron and Gummow JJ); *SZBEL v Minister for Immigration and Multicultural Affairs* (2006) 228 CLR 152 at [29]-[32] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ), endorsing *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 590-592 (Northrop, Miles and French JJ).

<sup>108</sup> *Disorganized Developments* (2023) 280 CLR 515 at [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

<sup>109</sup> *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at [90] (Hayne, Kiefel and Bell JJ).

<sup>110</sup> (2023) 280 CLR 515 at [28] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

<sup>111</sup> *Harris* (1912) 14 CLR 1, 14 (Isaacs J).

<sup>112</sup> *Delta* (1955) 95 CLR 11, 18 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ).

<sup>113</sup> *Tanos* (1958) 98 CLR 383, 395-396 (Dixon CJ and Webb J, Taylor J agreeing at 397).

<sup>114</sup> *Disorganized Developments* (2023) 280 CLR 515 at [35] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

<sup>115</sup> *Disorganized Developments* (2023) 280 CLR 515 at [44]-[45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

<sup>116</sup> *Disorganized Developments* (2023) 280 CLR 515 at [35] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

<sup>117</sup> That native title interests are interests capable of being affected in a manner attracting obligations of procedural fairness was raised, and appears to have been accepted in principle, in *Wik Peoples v Queensland* (1996) 187

82. The Act does not exclude a presumption of procedural fairness expressly or by necessary implication. Quite the opposite: it provides a pathway for review exercisable by “a person aggrieved” by a decision to grant a licence,<sup>118</sup> which MAC exercised in respect of the Controller’s decision. A “person aggrieved” is a person whose individual interests may be affected in a manner greater than that of the general public.<sup>119</sup>

83. The decision of the Delegate Minister was a decision pursuant to s 30(3)(a)(ii) of the Act, in substitution for the original decision of the Controller. The Review Panel was effectively acting in an advisory capacity,<sup>120</sup> and was not the repository of the obligation of procedural fairness that conditioned the ultimate decision of the Delegate Minister.

84. It is no answer that MAC was given an opportunity to be heard at an earlier point in the process – at a time when CP10 was not yet formulated or proposed. After participating in the Review Panel process, and contrary to the NTCA’s conclusion, MAC was “effectively taken by surprise by the [Delegate] Minister’s decision to address the need for a cultural values impact assessment by means of a condition precedent”,<sup>121</sup> and in particular one which put the assessment entirely in the hands of Fortune, without any obligation to consult with the holders of those cultural values or their representatives.<sup>122</sup> Those terms were adverse to the native title holders’ rights and interests.

85. The content of the duty to act with procedural fairness may not bind a decision-maker to ask an interested party for a submission which that party could have properly made within the statutory decision-making forum.<sup>123</sup> But neither MAC nor Fortune *could* have made submissions on the terms of CP10 to the Review Panel, because CP10 did not exist: its terms were not raised during the Review Panel process,<sup>124</sup> and its terms could not have been anticipated.<sup>125</sup>

86. MAC led evidence about the specific submissions it would have made on the terms of CP10,

---

CLR 1, 98-99 (Brennan CJ), 258-259 (Kirby J). And in the context of the grant of a mining authorisation it has been accepted that traditional owners—including people asserting traditional ownership—were owed procedural fairness in the grant of the authorisation because that grant affected their rights and interests: *Starkey v South Australia* (2011) 111 SASR 537 at [99], [113]-[114] (Stanley J, Gray J and David J agreeing at [32], [34]).

<sup>118</sup> Act, s 30(1).

<sup>119</sup> *Argos Pty Ltd v Minister for the Environment and Sustainable Development* (2014) 254 CLR 394 at [28] (French CJ and Keane J), [60]-[61] (Hayne and Bell JJ), endorsing *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64, 79 (Ellicott J); and the related “special interest” test for standing developed in a line of cases most recently summarised in *Forestry Corporation of New South Wales v South East Forest Rescue Inc* (2025) 99 ALJR 794 at [8] (Gageler CJ, Edelman, Steward, Jagot and Beech-Jones JJ).

<sup>120</sup> Act, s 30(4). And see by analogy *Burrugubba v Minister for Natural Resources and Mines* (2018) 2 Qd R 93 at [17] (McMurdo JA; Morrison and Philippides JJA agreeing).

<sup>121</sup> CAB 275, AJ [234]; cf *Alphaone* (1994) 49 FCR 576, 592 (Northrop, Miles and French JJ).

<sup>122</sup> These aspects of CP10 were contrary to the recommendations of the Chair of the Review Panel: ABFM Tab 8, page 225 (Email from Chair of Review Panel to Department dated 3 November 2021).

<sup>123</sup> *Burrugubba* (2018) 2 Qd R 93 at [65] (McMurdo JA; Morrison and Philippides JJA agreeing).

<sup>124</sup> See *Burrugubba* (2018) 2 Qd R 93 at [55] (McMurdo JA; Morrison and Philippides JJA agreeing).

<sup>125</sup> *Burrugubba* (2018) 2 Qd R 93 at [55] (McMurdo JA; Morrison and Philippides JJA agreeing); *Alphaone* (1994) 49 FCR 576, 591-592 (Northrop, Miles and French JJ).

including that any assessment ought to begin with the identification of the Aboriginal people with interests in Singleton Station; that the CLC would be better placed than Fortune to conduct the assessment; that a project proponent ought not be in control of a process that could constrain its project; and that the concept of “cultural values” should be defined, and broadly.<sup>126</sup>

87. It is not to the point that the Delegate Minister was entitled to impose conditions precedent to the Licence.<sup>127</sup> And it is not enough to satisfy the requirements of procedural fairness that MAC was generally aware of the possibility that an Aboriginal cultural values assessment *could* be the subject of a condition precedent, and that it made a submission to the Review Panel that such an approach would not be appropriate.<sup>128</sup> Fortune was also generally aware of the possibility that such a matter could be the subject of a condition precedent, received MAC’s submission to the Review Panel, and made its own submission.<sup>129</sup> Yet Fortune was, properly, given the opportunity to comment on proposed CP10 because its terms were new and it may have adversely affected its interests. The same opportunity should have been afforded to MAC.

88. Like *Disorganized Developments*, this is not a case that requires the consideration of the scope of procedural fairness in relation to a power liable to adversely affect a large group of people: the decision to impose CP10 directly affected the rights and interests of the native title holders represented by MAC in a manner different from the public at large and, added to which, MAC was already a participant in the statutory review process as “a person aggrieved” by the original decision. The possible interests of a broader class of persons does not detract from the application of the presumption to MAC.<sup>130</sup>

89. The Delegate Minister rightly recognised that Fortune, as the pastoral lessee and prospective licence holder, had to be heard on the terms and inclusion of CP10 on the basis that CP10 “may adversely impact Fortune”.<sup>131</sup> The Delegate Minister failed to recognise that MAC, as the representative of the native title holders for the Singleton Station pastoral lease,<sup>132</sup> had the same right on the same basis. That failure works against the “motivating rationale” of the decision in *Mabo (No 2)*, which was to ensure that “all persons, including native title holders, are equal before the law in

<sup>126</sup> ABFM, Tab 13, pages 320-322 (Affidavit of Kate O’Brien dated 10 May 2022 at [101]-[106]).

<sup>127</sup> Cf CAB 276-277, AJ [237].

<sup>128</sup> Cf CAB 275-276, AJ [234]-[236].

<sup>129</sup> ABFM, Tab 7 (Review Panel Report), pages 204 (at [3]-[4]) and 224 (items 32 and 32a).

<sup>130</sup> *Disorganized Developments* (2023) 280 CLR 515 at [35] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

<sup>131</sup> CAB 262, AJ [201]; ABFM Tab 10, page 280 (Letter from Department to Fortune dated 10 November 2021).

<sup>132</sup> *Burragebba* (2018) 2 Qd R 93 at [55] (McMurdo JA, Morrison and Philippides JJA agreeing).

the enjoyment of their human right to own and inherit property”.<sup>133</sup> Native title rights and other property rights both “take their place in the general legal order”.<sup>134</sup>

### **Part VII: Orders sought**

90. MAC seeks the following orders.

- (a) Appeal allowed.
- (b) Paragraph 1 of the orders of the Northern Territory Court of Appeal dated 12 May 2025 be set aside and in lieu thereof it be ordered that:
  - 1. The appeal is allowed.
  - 2. Paragraph 1 of the orders of the Supreme Court of the Northern Territory made on 31 January 2024 be set aside and in lieu thereof it be ordered that:
    - (A) The licence granted to the Second Respondent on 15 November 2021 bearing licence number WDCP10358 be quashed; and
    - (B) the Second Defendant pay the Plaintiff’s costs.
  - 3. The Second Respondent pay the Appellant’s costs.
- (c) The Second Respondent pay the Appellant’s costs.

91. No orders for costs are sought against the Minister because of an agreement between MAC and the Minister about costs.

### **Part VIII: Estimate of time for oral argument**

92. MAC estimates up to 90 minutes are required for submissions in chief, and 20 minutes in reply.

Dated 23 October 2025



**Chris Young**  
(03) 9225 8772  
chris.young@vicbar.com.au



**Laura Hilly**  
(03) 9225 6324  
laura.hilly@vicbar.com.au



**Hannah Douglas**  
(03) 9225 7999  
douglas@vicbar.com.au

<sup>133</sup> *Yunupingu* (2025) 99 ALJR 519 at [80] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

<sup>134</sup> *Wik* (1996) 187 CLR 1, 197 (Gummow J); see also *Mabo (No 2)* (1992) 15 CLR 1 at 61 (Brennan J).

## ANNEXURE TO APPELLANT'S SUBMISSIONS

| No | Description                | Version                                 | Provision(s)                               | Reason for providing this version                                                                             | Applicable date or dates (to what event(s), if any, does this version apply)                                                                                                   |
|----|----------------------------|-----------------------------------------|--------------------------------------------|---------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1  | <i>Water Act 1992</i> (NT) | As in force from 20 Nov 20 to 1 Jul 21  | ss 4, 22, 22A, 22B, 30-32, 60, 71A-71E, 90 | Act in force at the time of Controller's original decision and MAC's application for review of that decision. | 8 April 2021; date of Controller's decision. 7 May 2021; MAC sought review of the Controller's decision.                                                                       |
| 2  | <i>Water Act 1992</i> (NT) | As in force from 1 Jul 21 to 29 Sept 21 | s 30                                       | Act in force at the time the Minister for Environment referred MAC's review application to the Review Panel.  | 26 July 2021; Minister for Environment referred MAC's application for review to the Review Panel.                                                                              |
| 3  | <i>Water Act 1992</i> (NT) | As in force from 29 Sept 21 to 3 Mar 23 | ss 4, 22, 22A, 22B, 30-32, 60, 71A-71E 90  | Act in force at the time of the Delegate Minister's decision to grant the Licence.                            | 11 November 2021; Minister for Environment delegated her powers under s 30 to the Delegate Minister. 15 November 2021; Delegate Minister granted the Licence and gave Reasons. |