HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

SECOND RESPONDENT'S SUBMISSIONS

<u>PART I: CERTIFICATION</u>

1. These submissions are in a form suitable for publication on the internet.

<u>PART II: ISSUES</u>

2. The second respondent ("Fortune") adopts paragraphs 1 to 6 of the first respondent's ("the Minister") statement of issues in respect to Grounds 1 and 2.

3. In respect to Ground 3, the issue that arises for consideration:

   (a) was the Minister obliged to give MAC the same opportunity to be heard on the terms of the proposed condition, CP10, as was given to Fortune?

<u>PART III: JUDICIARY ACT 1903: S. 78B</u>

4. Notice is not required under s. 78B of the *Judiciary Act 1903 (Cth)*.

<u>PART IV: FACTS</u>

5. There does not appear to be any disputed facts.

<u>PART V: ARGUMENT</u>

Ground 1: Wrongly inferring matters about the Minister's state of satisfaction which forms a pre-condition to the exercise of a statutory power

6. Fortune adopts the Minister's submissions in respect to Ground 1. This ground should be dismissed.

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

7. Fortune adopts the Minister's submissions in respect to Ground 2. This ground should be dismissed.

Ground 3: Failure to give MAC the same right to be heard on CP 10 as given to Fortune

8. On 18 August 2020, Fortune applied to the Controller for a licence to take groundwater under s. 60 of the Act.

9. On 2 September 2020, a delegate of the Controller wrote to the Central Land Council ("CLC"), in its capacity as a representative or potential representative body for registered

native title holders, enclosing a notice of initiation to make a water extraction licence decision in respect of Fortune's proposed development.

10. The notice sought comments in relation to Fortune's application. The CLC subsequently provided detailed comments on the proposed water licence decision on behalf of MAC (and other parties).

11. The Controller, on 8 April 2021, decided to grant Fortune a water extraction licence. The licence, was subject to extensive conditions, including eight conditions precedent and staging conditions.

12. In May 2021, pursuant to s. 30(1) of the Act, MAC (and other aggrieved parties) sought a review by the Minister for Environment of the decision of the Controller to grant the water extraction licence. MAC submitted that the Minister should set aside the Controller's decision and substitute a decision to refuse the licence.

13. Relevantly, one of MAC's grounds in its application for review was that the Controller's decision failed to take into account the impact the Licence would have on Aboriginal cultural values.

14. In July 2021, the Minister for Environment referred the matter to the Water Resources Review Panel ("the Review Panel") pursuant to s. 30(3)(b) of the Act.

15. As part of the review process, the CLC, acting on behalf of MAC, made written submissions to the Review Panel. In addition, the Review Panel met on seven occasions, including a meeting on 3 September 2021 where in-person representations were made by the applicants for review, including the CLC on behalf of MAC. Material presented to the Review Panel by the CLC, which were not before the Controller, included an Aboriginal Cultural Values Assessment report prepared by an anthropologist engaged by the CLC. That report (in part) identified significant and numerous cultural values associated with multiple sites in the "drawdown area". In affording procedural fairness, the Review Panel provided copies to all parties of the submissions received by it from each of the review applicants, the Department of Environment, Parks and Water Security and Fortune. An opportunity for further responses was provided for by the Review Panel[1].

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[1] para 3, p 204, ABFM.

16. In accordance with s. 30(4) of the Act, on 15 October 2021, the Review Panel provided a report to the Minister for Environment:. Relevantly, the report dealt with "*Consideration of Cultural Values*"[2] and ultimately stated that it was "*not able to form a view on the significance of the information presented on that report but is of the opinion that a comprehensive cultural impact assessment is required prior to the extraction of any significant volumes of water on Singleton Station*"[3]. The report recommended that the Minister set aside the groundwater extraction licence and substitute a decision to grant a new licence that included additional conditions precedent, including, relevantly, the requirement for a cultural values impact assessment[4].

17. On 2 November 2021, a senior public servant tasked with coordinating material to be provided to the Minister for the purpose of making the review decision wrote to the Chair of the Review Panel seeking clarification and further information as to what the Review Panel meant by requiring a cultural values impact assessment to be undertaken as a new condition precedent.

18. On 10 November 2021, the Department wrote to Fortune and sought its comments on the terms of proposed CP10. Fortune replied by accepting the proposed CP 10.

19. The imposition of CP10 by the Minister reflected the recommendation made by the Review Panel after undertaking, afresh, a review of the Controller's decision in light of submissions made by MAC (and others).

20. Fortune agrees that the Act does not exclude the presumption of procedural fairness either expressly or by necessary implication: AS [82]. As to what is necessary and appropriate to ensure a fair process will depend on the particular factual and statutory context. An obligation to afford procedural fairness conveys the notion of a "flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case"[5]. A decision maker will generally satisfy the obligation "by adopting a

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2 paras 35-40, pp211-212, ABFM.
3 para 39, pp211-212, ABFM.
4 paras 91-92, p221, ABFM.
5 AJ [231], p 274 CAB; *Kioa v West* (1985) 159 CLR 550 at 585 (Mason J), 611 (Brennan J); *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [25]-[26] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is to be exercised"[6].

21. MAC contends that it should have been treated in exactly the same way as Fortune in this particular respect. Furthermore, MAC says that it was effectively taken by surprise by the Minister's decision to address the need for a cultural values impact assessment by means of a condition precedent: AS [84]. Each contention should be rejected.

22. MAC, as "a person aggrieved" by the decision of the Controller, applied to the Minister to review the decision to grant Fortune a water extraction licence: s. 30(1) of the Act.

23. The review process before the Review Panel afforded procedural fairness to MAC and other parties to comment, as they sought fit, on the proposed water extraction licence decision and particularly on Aboriginal cultural values. MAC availed itself of this opportunity. The representations and evidence on behalf of MAC were the subject of consideration by the Review Panel in its report.

24. The Review Panel was authorised under the Act to make a recommendation to the Minister and for the Minister to make a decision without conducting any further inquiry in respect to information before her. The process before the Review Panel provided a sufficient opportunity for MAC to present its case so that the decision-making process, viewed in its entirety, entailed procedural fairness to MAC[7].

25. The Primary Judge and Court of Appeal correctly observed there was no obligation on the Minister to give MAC the opportunity to further comment after it had made representations to the Review Panel and engaged in the processes before the Review Panel. MAC had been given the opportunity to make its point and it had made its point[8]. This is not a case like *Disorganized Developments Pty Ltd v South Australia*[9] because the obligation to afford procedural fairness had been given to MAC. The Minister was not required to provide MAC with a further opportunity to comment before the granting of Licence to Fortune.

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6 *Kioa v West* (1985) 159 CLR 550 at 627 (Brennan J) see also *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [367] (Gageler J).

7 *South Australia v O'Shea* (1987) 163 CLR 378 at 389 (Mason CJ).

8 Primary judgment [211]-[214], pp 127-129 CAB and AJ [233], p 275 and [244], p 280 CAB.

9 (2023) 280 CLR 515.

26. As the Court of Appeal observed, the submissions made by the CLC to the Review Panel alluded to the possibility that the requirement for a cultural values impact assessment may be addressed by way of a condition precedent, but submitted that this approach would be inappropriate[10]. The Court of Appeal found therefore that "[t]he CLC had the opportunity at this point to make submissions regarding the requirements for an appropriate cultural values assessment had it chosen to do so"[11]. MAC could not have been taken by surprise. It cannot be said that MAC was not aware of the possibility that the requirement for a consideration of Aboriginal cultural values could be imposed by way of a condition precedent. In fact, the obverse is true. As the Court of Appeal found:

> "[236]… it is beyond doubt that the CLC, at that time representing MAC, was aware that the Original Licence addressed multiple matters relevant to the taking of water by means of conditions precedent. The CLC was alive to the possibility that the Minister may decide to take the same approach regarding a cultural values impact assessment. The CLC chose to simply submit that it was not appropriate that the matter be addressed by a condition precedent. While the CLC undoubtedly hoped that the Minister would accept that submission, it had no legitimate expectation that she would do so, nor did it have a right to make further representations to the Minister on this issue before the Minister granted the Licence."[12]

27. In *Disorganized Developments Pty Ltd v South Australia*[13], this Court said:

> [33] Since *Twist*, the law has evolved to include an established and "strong" common law presumption, generally applicable to any statutory power the exercise of which is capable of having an adverse effect on legally recognised rights or interests, that the exercise of the power is impliedly conditioned on the observance of procedural fairness. Consistent with the historical scope of the duty of procedural fairness, the core operation of the presumption requires the provision of procedural fairness where the relevant power <u>directly affects</u> the rights or interests of a particular individual. In such a case, the presumption operates "unless clearly displaced by the particular statutory scheme". (emphasis added).

28. The relevant statutory power in this context was the power to impose terms on the grant of the Licence, relevantly here CP 10 (s. 60 of the Act). CP 10 required Fortune, <u>before</u> it could extract groundwater, to develop and submit to the Controller a groundwater dependent Aboriginal cultural values impact assessment prepared by a suitably qualified professional, which had to identify, map and document the cultural values of Aboriginal people which would be impacted by groundwater extraction under the Licence and to

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10 AJ [235], p 276 CAB.
11 AJ [235], p 276 CAB.
12 AJ [236], p 276 CAB.
13 (2023) 280 CLR 515 (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

identify reference points to be used in modelling such impacts and specify monitoring parameters, trigger values and limits for the reference points which could be used to initiate actions under an adaptive management framework[14].

29. MAC was to be afforded procedural fairness on the exercise of a relevant power that 'directly affected' the rights and interests of a person aggrieved. Whilst MAC does not identify how it is said that the exercise of the power to impose a condition on the Licence affected those rights and interests, the imposition of CP 10 did not directly do so such as to give rise to an obligation to provide MAC with an opportunity to be heard on the imposition of CP 10 on the Licence granted to Fortune.

30. It was therefore appropriate, in these circumstances, for the Minister to proceed to make the water extraction Licence decision without affording MAC an opportunity to be heard. as that afforded to Fortune, on the imposition of CP 10.

31. This ground should therefore be dismissed.

PART VI: ORDERS SOUGHT

32. The appeal should be dismissed, with costs.

33. Alternatively, in the event the appeal is allowed and it is ordered that the Licence granted on 15 November 2021 be quashed, the second respondent seeks an additional order that:

    (a) the matter be remitted to the Minster to be decided according to law.

PART VII: TIME

34. It is estimated that 30 minutes will be required for the presentation of Fortune’s oral argument.

Dated: 20 November 2025

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[14] pp 307-308, ABFM.