HIGH COURT OF AUSTRALIA

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Details of Filing

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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

APPELLANT'S REPLY SUBMISSIONS

Part I: Certification

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

Part II: Argument

Ground 1: wrongly inferring matters about the Delegate Minister's state of satisfaction

2. The Delegate Minister first contends the NTCA did not draw inferences that she was aware of the need to find special circumstances and that she in fact was satisfied that there were special circumstances; but, rather, the NTCA "construed" or "interpreted" her reasons to come to those conclusions (1RS [18]-[36]). The Delegate Minister goes as far as saying the NTCA's task was one of "proper construction" (1RS [21], [37]). This contention either reveals error by the NTCA or is a distinction without a difference.

3. Reasons are evidence of the decision-maker's state of mind at the time the decision was made. Reasons must be proved.[1] The reasons for making a decision are a question of fact, and a statement of reasons is evidence going to that fact.[2] It is because reasons are evidence that inferences, such as those contended for by MAC in this case (AS [56]-[57]), can be drawn. No case holds that reasons are to be "interpreted" or "construed" as though they were a statute or contract (about each of which there is a body of principle concerning proper construction).

4. But on the basis the NTCA purported to "read" (1RS [20]) the reasons in a particular way, it is not apparent there is any substantive difference between doing so, and drawing inferences. This is a case where the reasons are silent on a matter required to be addressed by the statute. It is not a case where something was said, and judicial minds might reasonably reach different conclusions about what was meant. Of course reasons are not to be read "with an eye keenly attuned to error"[3] (1RS [20]), but nor are reasons to be read with an eye keenly attuned to reconstructing findings from the "circumstances" (AJ [83] CAB 210) in order to fill a gap. Such an approach strays impermissibly into merits review, as cautioned against in same passage of *Wu Shan Liang*.[4]

5. What the NTCA did is revealed by the structure of its reasons. The Delegate Minister's submission to the NTCA was that "it should be inferred from the surrounding circumstances that she had found special circumstances" (AJ [42] CAB 190; AJ [83] CAB 209-210). The NTCA set out the principle from *MZAPC* (AJ [83] CAB 210) that was relied upon by the Delegate Minister for that submission and, over the subsequent 12 paragraphs, drew what can only be described as a series of

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1 *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs [No 2]* (2003) 133 FCR 190 (French J).

2 *Rashid v Minister for Immigration and Citizenship* [2007] FCAFC 25 at [16]-[19] (Heerey, Stone and Edmonds JJ).

3 *Minister for Immigration and Ethnic Affairs v* ***Wu Shan Liang*** (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

4 *Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

inferences[5] from the decision-making process and materials before the Delegate Minister, culminating in its "interpretation" of one sentence in the reasons (AJ [83]-[95] CAB 209-216).

6. The NTCA did the very thing this Court held in *LPDT*[6] cannot be done: it made assumptions about whether the Delegate Minister was aware of the need to find special circumstances and about how she might have weighed the various matters going to special circumstances (*LPDT* at [15], [29], [49]). The NTCA wrongly assumed the Delegate Minister's function.

7. The Delegate Minister's submission that she "was entitled to rely on the [Review Panel] to resolve" the issue of the licence period (1RS [20]) is misplaced.[7] The Review Panel did not (and could not) "resolve" (cf 1RS [20]) that issue; it only gave a "view" that a period of greater than 10 years was "appropriate" (ABFM, Tab 7, page 220). There was no "resolution" of the question of whether the period of 30 years was appropriate, or whether or what "special circumstances" made it appropriate — far less in respect of the Licence that the Delegate Minister ultimately granted (with conditions precedent that the Review Panel had never seen) (cf 1RS [20]).

8. The Delegate Minister alternatively contends that the inferences drawn by the NTCA *were* open (1RS [37]-[42]). As to those submissions:

(a) *First,* the submissions to the Panel were *not* "replete with references" to the requirement that the *Delegate Minister must be satisfied as to special circumstances* (cf 1RS [38] and AJ [93]), for the simple reason that any references were to the earlier version of the Act, which did not impose a personal state of satisfaction on this decision-maker.[8]

(b) *Second*, and relatedly, the relevant state of mind had to be about *the* licence being granted (cf 1RS [39]), which could only have been the Licence as granted, complete with conditions precedent that were *not* the subject of consideration by the Environment Minister when she considered special circumstances, or by the Review Panel.

(c) *Third*, MAC is not suggesting that the NTCA *should* have positively inferred that the Delegate Minister had *no* awareness of the Act and its requirements (cf 1RS [38]). The relevant contention (AS [52]) is that, because of the circumstances surrounding the decision, it was not open to infer, in the sense that it was not more probable (AS [58]), that she *was* familiar with

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5 And indeed, some are expressly described as inferences: see AJ [90] CAB 213; AJ [92] CAB 214; AJ [94] CAB 216.

6 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321.

7 And the cited case of *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1 is not apposite here. The Review Panel was an independent advisory panel, not a departmental officer acting on *Carltona* principles.

8 The last submission made to the Review Panel was on 28 September 2021, one day before the amendments to s 60 of the Act came into force (ABFM, Tab 7, pages 222-224).

the Act beyond the (limited) sections in her brief (cf AJ [92] CAB 214). Nothing before her referred to her need to form a personal state of satisfaction about *the* Licence she was granting.

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

9. The Delegate Minister misconstrues s 90(1) of the Act (1RS [50]). A decision-maker *must* take into account all of the matters listed in s 90(1), to the extent *relevant* to the particular decision. Whether the matters in s 90(1)(a)-(j) are relevant to the particular decision is not a matter within the decision-maker's discretion. Some are matters that would only be (objectively) relevant in particular factual circumstances, eg, those involving "existing or proposed facilities on … the land" (s 90(1)(g)).

10. Section 90(1)(k) does not "relevantly provide[] that the Controller may take into account any other factor they consider should be taken into account", or "vest[] in the Controller a discretion, not an obligation, to take those 'other factors' into account" (cf 1RS [50]). It *obliges* the decision-maker to take into account other factors that the decision-maker "considers should" be taken into account. Once it is considered that a factor should be taken into account, it must be. And, considerations can "become" mandatory over the course of a decision-making process, particularly where additional information becomes available.[9]

11. The question raised by Ground 2 is not one of the level of "particularity" at which one of those factors (here, the protection of Aboriginal cultural values) must be taken into account (cf 1RS [51]-[53]). It is what it means to "take something into account" at all. The protection of Aboriginal cultural values was relevant under s 90(1), and because of the information on it put before the Delegate Minister:[10] by analogy with *Peko-Wallsend*, "[i]t would be a strange result indeed to hold that 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 making the … grant".[11] In its submissions, Fortune concedes the report identified "significant and numerous cultural values associated with multiple sites in the 'drawdown area'" (2RS [15]). Instead of weighing the justice of the grant of the Licence against this material, or bringing to mind the salient facts that give shape and substance to the matter, she simply granted the Licence, and then told Fortune to bring to its mind the salient facts that give shape and substance to the matter to satisfy CP10. It would be a different case if the only material before the Delegate Minister was some vague assertion about the existence of unspecified cultural values. But there was a substantial report, evidencing in Fortune's words "significant and numerous cultural values associated with multiple sites."

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9 *Stambe v Minister for Health* (2019) 270 FCR 173 at [107] (Mortimer J); and *Minister for Aboriginal Affairs v* ***Peko-Wallsend*** (1986) 162 CLR 24 at 45 (Mason J). And see AS [63]-[65].

10 Namely, the Aboriginal Cultural Values Assessment Report dated 1 September 2021: ABFM, Tab 6, pages 105-201.

11 *Peko-Wallsend* (1986) 162 CLR 24 at 45 (Mason J).

12. Finally, the Delegate Minister is wrong to submit, by drawing together disparate parts of the Review Panel Report, that what the Review Panel "meant when it said it was unable to form a view on the 'significance' of the information [about Aboriginal cultural values]" was that "those risks would be best mitigated … [by] adaptive management" (1RS [60]). The Review Panel, as it said,[12] could not form a view on the significance of the material.

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

13. There are three uncontested matters. *First*, neither the Delegate Minister nor Fortune contends *Fortune* was *not* owed procedural fairness by the Delegate Minister in respect of the content and terms of what became CP10 (2RS [20]-[21], [25]). Of course it was.[13] *Second*, proposed CP10 was not formulated until *after* the Review Panel process and indeed after an inquiry was made of the Review Panel by the Department.[14] *Third*, there is no contest about MAC's native title rights, or that they attract obligations of procedural fairness. The area of dispute is accordingly very narrow: was MAC owed the same opportunity that was owed and given to Fortune?

14. Fortune's first contention is that MAC was granted procedural fairness concerning CP10 as part of the earlier Review Panel process (2RS [23]-[25]). Would Fortune make the same contention about its position if it had not been heard on, and was dissatisfied with, proposed CP10, which imposed on it additional obligations to "develop and submit" a cultural values impact assessment and effectively deferred its entitlements until that was done?[15] Would Fortune accept it had an opportunity to "present its case" (2RS [24]) on that non-existent and unformulated condition and was given the opportunity to "make its point" (2RS [25])? Fortune does not submit that the Review Panel process exhausted the procedural fairness owed to itself.[16] Of course procedural fairness required bringing the terms of the proposed condition to the notice of Fortune and inviting its comments. The proposed condition was sufficiently new, important and able to be isolated, and was capable of affecting Fortune adversely. So, it is no answer to point to what was, in respect of CP10, a superseded process.

15. Fortune's only answer to the asymmetry when compared to MAC, is its second contention: CP10 did not directly affect MAC (2RS [29]). CP10 was the only way the Delegate Minister addressed the protection of Aboriginal cultural values: its terms determined what those values were, and the extent to which they would, or would not, be protected. CP10 is about the cultural values of

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12 ABFM, Tab 7, pages 211-212.

13 As to which, see the discussion of that point in circumstances where the Minister is exercising the statutory review function under s 30 of the Act in *The Environment Centre Northern Territory (NT) Incorporated v The Minister for Land Resources Management* (2015) 35 NTLR 140 at [108] (Hiley J).

14 ABFM, Tab 8, pages 225-226.

15 ABFM, Tab 11, page 288.

16 Cf *South Australia v O'Shea* (1987) 163 CLR 378 at 389 (Mason CJ), and see 412 (Brennan J) explaining the difference between that case and *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, in which the appellant had *not* had the opportunity to be heard on matters affecting its interests.

MAC's members, which Fortune concedes were "significant and numerous" and "associated with multiple sites" (2RS [15]). The sites are on land in the drawdown area[17] and are connected to the groundwater (typically through soaks or vegetation).[18] Fortune's contention is untenable in light of its properly made concession, the terms of CP10[19] and the evidence of Kate O'Brien.[20] As Prof Michael Dodson AM affirms:[21]

> Everything about Aboriginal society is inextricably interwoven with, and connected to, the land. Culture is the land, the land and the spirituality of Aboriginal people, our cultural beliefs or reason for existence is the land. You take that away and you take away our reason for existence.

16. By CP10, the Delegate Minister put into Fortune's hands (a private company with interests likely to conflict with those of MAC) responsibility for, and control over, the main determinants of the impact of the proposed water extraction upon the native title holders' own cultural values.[22] Who should carry out the assessment? Who would be consulted? What counted as cultural values? What "reference points" would be selected and why? What "monitoring parameters, trigger values and limits" would be selected and why? What say would the native title holders have in those matters? The answers are fundamental to the protection of cultural values, which are fundamental to the reason for existence of the native title holders. A more direct effect cannot be conceived.

Orders

17. MAC does not oppose remitter to the Minister for Water Resources: 2RS [33].

Dated 11 December 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

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17 ABFM, Tab 14, page 323.
18 ABFM, Tab 6, page 115.
19 ABFM, Tab 12, pages 307-308.
20 ABFM, Tab 13, pages 320-322.
21 *Love v Commonwealth* (2020) 270 CLR 152 at [276] (Nettle J), citing Dodson, "Land Rights and Social Justice", in Yunupingu (ed), *Our Land is Our Life: Land Rights – Past, Present and Future* (1997) 39 at 41.
22 Cultural values form part of the "indissoluble whole" of the native title holders' rights and interests and cannot be divorced from their traditional laws and customs: *Northern Territory v Griffiths* (2019) 269 CLR 1 at [44], [153]-[154], [158], [200], [214] and [223] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).