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 COPRORATION RNTBC (ICN 7316)**
Appellant

and

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

and

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

FIRST RESPONDENT'S AMENDED SUBMISSIONS

Part I: These submissions are suitable for publication on the internet.

Part II: Concise statement of issues

1. The First Respondent engages with Grounds 1 and 2 only.[1]

2. Ground 1 misunderstands the Court of Appeal's (**CA**) reasons. That Court found that on the proper construction of the Minister's reasons ("the only reasonable *interpretation* of the Minister's decision": CA [95] **CAB 216**), she had made a determination that special circumstances existed. Contrary to the Appellant's submissions (**AS**), the CA did not draw an inference that the Minister had made that determination.

3. These submissions draw attention to the terms of the Minister's reasons, which refer in turn to the independent Review **Panel's** advice (**PA**) and the material before it. It is those passages which found the CA's conclusion that the reasons themselves demonstrated that the First Respondent had turned her mind to and been satisfied that special circumstances existed to justify the grant of a licence for 30 years: CA [95] **CAB 216**.

4. In any event, there is no reason, as a matter of principle, why a court should be prohibited from drawing an inference that a decision-maker was satisfied that a precondition for the exercise of their power was met, despite that issue not being referred to in those terms in a statement of reasons: cf AS [2(a)]. Whether an inference can be drawn should be determined on the evidence, not by taxonomy.

5. In relation to Ground 2, the *Water **Act** 1992* (NT) does not impose a mandatory consideration in the terms cast by the Appellant. Further, the CA and Primary Judge (**PJ**) correctly determined that the First Respondent had considered "aboriginal cultural values associated with water" through the imposition of conditions as part of a system of adaptive management. That was an exercise, not a deferral, of the First Respondent's statutory function.

Part III: *Judiciary Act 1903* (Cth), s 78B

6. Notices under s 78B of the *Judiciary Act 1903* (Cth) are not required.

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[1] *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13. Consistent with the approach below, the Minister makes submissions on the proper construction of the Act, the law concerning Ministerial decision-making, and the reasons of the CA and the Minister.

Part IV: Facts and statutory background

7. The factual background is set out in the reasons of the PJ and CA. The relevant background for Grounds 1 and 2 is as follows.

8. The Act establishes a scheme "for the investigation, allocation, use, control, protection, management and administration of water resources": Long Title. Like most resource legislation, it pursues a range of competing objectives aimed at providing for the "ongoing, sustainable use" of the resource: CA [164] **CAB 249**.

9. The Act achieves that purpose by vesting "property" in water in the "Crown", being the powers of control and management set out in the remainder of the Act.[2] The system of controls is constituted by a regulatory structure common to licensing water in Australia, which prohibits the taking of surface or ground water (ss 44 and 59) subject to rollback where there is a statutory authorisation or exemption: ss 10-14, 45, 60. A person who wishes to extract groundwater may apply to the **Controller** of Water Resources for a licence to do so: s 60.

10. Relevantly for Ground 2, the grant of a licence (a "water extraction licence decision": s 71A) must "take into account" a range of factors that are "relevant to the decision": s 90(1). That includes the terms of any Water Allocation Plan (**WAP**). A WAP had been declared for the resource. The relevant factors address the Act's concern with balancing economic, environmental and cultural objectives inherent in the Act's "beneficial uses": s 4(3). Further, the Controller must give notice of an intention to make a decision (s 71B(1)) and must "take into account" any comments received in response to that notice: s 71C(2).

11. The Controller can issue licences on such terms and conditions as they think fit: s 60(2). The Controller has a power to grant licences for up to 10 years but can only grant licences for a longer period if special circumstances exist: s 60(4).

12. The Second Respondent sought a licence for a period of 30 years to extract groundwater to facilitate a large horticultural development: CA [4] **CAB 171**. The Controller issued licence WDPCC10000 (**Original Licence**) subject to a number of conditions precedent (**CP**), on a staged basis and with a conservative system of adaptive management to deal with uncertainties concerning the

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2 *Yanner v Eaton* (1999) 201 CLR 351, [30] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

resource (**Controller's Decision**): CA [5] **CAB 171-2**. The Original Licence was issued for a period of 30 years, the Minister for Environment (**Environment Minister**) having certified, for the purpose of then s 60(4), that special circumstances justified a grant for that period: CA [31] **CAB 183-4**.

13. In May 2021, the Appellant and other parties sought review of the Controller's Decision pursuant to s 30(1): CA [7] **CAB 172**. The Environment Minister referred the application for review to a Panel for advice: s 30(3)(b); CA [10] **CAB 173**. Panels are established under s 24, are drawn from persons who have relevant "qualifications and experience" (s 24(3)), and are to be constituted for the "consideration of the matter" by those "best qualified and available": s 24(4).

14. On 29 September 2021, an amendment to s 60(4) commenced to, relevantly, require the Controller (not the Minister) to be satisfied that special circumstances existed before granting a licence for more than 10 years: CA [30] **CAB 183**.[3]

15. On 15 October 2021, the Panel provided the PA: CA [11] **CAB 173-4**.

16. On 11 November 2021, the Environment Minister delegated her powers under s 30 of the Act to the First Respondent (**Minister**): CA [12] **CAB 174**. On 15 November 2021, the Minister determined to issue licence WDCP10358 (**Licence**) which accepted and adopted most, but not all, of the PA.

Part V: Argument

Ground 1

17. Ground 1 contends that the CA erred by holding it was permitted by *MZAPC*[4] to infer that the Minister was aware of the need to find special circumstances and that she determined there were special circumstances (**Determination Inference**). It does so under two alternative contentions. The first is that it is *never* permissible to draw an inference that a decision-maker was satisfied that a precondition to the exercise of power involving matters of policy and competing interests was met where that is not expressly referred to in a statement of reasons (**Question 1**): AS [30]. The second is that the inferences drawn by the CA were not the more probable on the evidence (**Question 2**).

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3 *Statute Law Amendment (Territory Economic Reconstruction) Act 2021* (NT), s 118.

4 ***MZAPC** v Minister for Immigration and Border Protection* (2021) 273 CLR 506.

Question 1

18. The First Respondent makes two points about Question 1. First, the CA found that the Minister determined there were special circumstances *by construing the Minister's reasons*. It did not do so by drawing any inference about what the Minister determined. Secondly, there is no inflexible rule that an inference can never be drawn about a state of mind concerning matters of policy.

19. *The CA did not draw the Determination Inference*: The analysis must start with the CA's reasons: CA [83]-[95] (**CAB 209-16**).[5] The CA made the ultimate finding that the Minister determined that there were special circumstances by the "*interpretation*" of the Minister's reasons in the "context to which we have referred": CA [95] **CAB 216**. The critical passage in the Minister's reasons was quoted by the CA in that paragraph. The Minister said: "*I have determined to accept the conclusions of the Review Panel for the reasons it has given on each of the issues raised by the Reviewing Persons* […]". The CA had earlier set out the other part of the Minister's reasons in which she had summarised the history of the controversy about "special circumstances" (CA [88] **CAB 212**), where in a brief but accurate statement the Minister recorded that there were "[c]oncerns… raised by the Reviewing Persons regarding the *30 year tenure* of the licence" but that the "Review 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*."*: CA [88], [42] **CAB 212, 190**.

20. The Minister's reasons are to be read in their context, in a commonsense way, and without an eye keenly attuned to the perception of error.[6] The Minister's reference to the "issues" included the issues raised by the Appellant and other parties concerning the licence period and the existence of special circumstances. The reference to the "conclusions of the Review Panel" included the Panel's conclusion, in response to those issues, that a licence period of greater than 10 years was "appropriate" given the scale of the development. The Panel's view that the licence term was "appropriate" must be understood to relate to the licence

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5 CA [63]-[82] (**CAB 200-209**) held that the amended s 60(4) applied to the Minister's review and that the Minister could consider the question of special circumstances on that review.

6 *MIEA v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ); *RCLN v MIC* [2025] FCAFC 113, [27] (the Court).

being addressed. This is confirmed by the preceding sentence, the reference to staged entitlements and CPs, and the heading to the passage ("Licence Period"). The Minister was entitled to rely on the PA to resolve this issue.[7]

21. The CA then concluded that the "only reasonable *interpretation*" of the Minister's decision was that she had been satisfied that special circumstances existed justifying the grant of the Licence for a period of 30 years: CA [95] **CAB 216**. That conclusion, properly understood, is not one reached by an inference that there had been a determination, but was reached from the proper construction of the Minister's express reasons. The submissions made to the CA by the Minister and the Appellant in respect of special circumstances focussed on what could or could not be drawn from the Minister's reasons. There was no submission by the Minister (or indeed the Appellant) that the resolution of that question turned on the drawing of factual inferences divorced from the reasons. The CA reasons, including the references to inferences, should be understood in that context.

22. It is important that two points are made here. First, the central premise in the Appellant's attack in respect of Ground 1[8] falls away once it is acknowledged that the CA did not draw the Determination Inference. Related to this, it is not the case that the CA held that "it was permitted by *MZAPC*" to draw that inference: cf Notice of Appeal [2]. On no reading of the CA's reasons did it seek to reconcile the interpretation of the passage in the Minister's reasons with the principle in *MZAPC*, because the CA had no reason to do so.[9]

23. What is expressed by the CA in terms of "inference" are competing contentions about the Minister's awareness of the need to make a finding. On the issue of awareness, the CA expresses itself in terms of drawing an "inference" from the "circumstances" (CA, [94] **CAB 216**) each of which arise from the "totality of materials" before the Minister: CA, [92]-[93] **214-215**. That can be described as the CA drawing an "inference" from the materials, or as a construction of what the Minister's reasons refer to and mean. It was not the drawing of an inference that there has been a finding absent text in the reasons to support it.

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7 *Davis v MICMSMA* (2023) 279 CLR 1, [25] ff (Kiefel CJ, Gageler and Gleeson JJ); ***Sean Investments*** *Pty Ltd v MacKellar* (1981) 38 ALR 363, 369 (Deane J).

8 AS [28] ("it could be inferred"), [29(b)], [30], [31], [36], [38], [39], [40], [45], [46].

9 The reference to *MZAPC* at CA [83] was not the foundation of the ultimate conclusion at [95].

24. The "totality of those materials" is explained, as the CA reasoned, by commencing from the fact that there was "no doubt" that the period of the licence was in issue before the Panel and before the Minister: CA [83] **CAB 209-210**. The Second Respondent had applied for a licence for a 30-year period: CA [84] **CAB 210**. The Original Licence was issued for a period of 30 years, the Environment Minister having certified for the purposes of s 60(4) that special circumstances justified the grant of a licence for that period: CA, [31], [84] **CAB 183-4, 210**. The application for review, including consideration of the licence period and the existence of special circumstances, was referred to the Panel for advice: CA [10], [86] **CAB 173, 211**. The Appellant positively submitted to the Panel (in submissions available to, and considered, by the Minister) that the proposed licence period was inappropriate and that special circumstances *did not exist*: CA [87]-[88] **CAB 211-212**; ABFM Tab 7 [24] and [26]. The Panel then expressly referred to the Appellant's submission that special circumstances did not exist and responded to that by saying 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": CA [88] **CAB 212**. The CA then referred to the function of the Panel and the contents of advice to the Minister in the brief and said that "these circumstances strongly support the inference that the Minister was aware of the need to find special circumstances which would justify a licence of 30 years duration": CA, [94], by reason of the matters identified at CA [42], [92]-[93], [94] **CAB 190, 214-216**.

25. Attention should be paid to five parts of the PA in analysing Ground 1: CA [89]-[90], [93] **CAB 213-215**.

    (a) First, the Panel's advice was responsive to the Appellant's submission that special circumstances did not justify the grant of a licence for more than 10 years. The advice that a licence period of more than 10 years was "appropriate" was a rejection of that submission. It was not "inappropriate" (cf [AS] 43) for the Panel to give that advice: it was its function to do so.

    (b) Secondly, the advice could only be understood in that way because the reference to 10 years was only relevant to the existence or non-existence of

special circumstances for the purposes of s 60(4). That period otherwise has no significance in the statutory scheme or on the facts of the application.

(c) Thirdly, the Panel was considering an application for a 30-year licence and there was no contest at any time about the grant of a licence of another duration. The analysis occurred under the heading "Licence period" and referred to the "30 year tenure of the licence": CA [42] **CAB 190**.

(d) Fourthly, the Panel identified in its advice the circumstance justifying the longer licence period as the scale of the development, and referred to "suitable conditions precedent" and "staged entitlements". That is consistent with the Environment Minister's earlier opinion that special circumstances existed which justified the 30-year licence period.

(e) Fifthly, the Panel did not advise the First Respondent that there were no special circumstances justifying a licence period of 30 years, nor did it recommend the Minister grant the licence for a lesser period.

26. *No inflexible rule*: There is no reason why, as a matter of principle, a court should be prohibited from *ever* drawing an inference that a decision maker was satisfied a statutory precondition was met only because that state of satisfaction is not recorded in the decision maker's reasons. As Toohey J has said[10]:

> … the omission of an express reference to some consideration will not inevitably lead to a conclusion that it was not taken into account. An examination of the reasons for decision and of the decision itself may justify the inference that it was.

27. The issue should be approached functionally on the evidence, not from *a priori* classifications. The drawing of an inference is nothing more than making a deduction from primary facts[11] in exercise of "the ordinary powers of human reason in the light of human experience."[12] An inference may be drawn if a fact finder is satisfied that the fact to be inferred is more probable than any other inference that might arise from the proven facts and circumstances.[13] That mode

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10 *Turner v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 388, 392. See similarly *He v Minister for Immigration ad Border Protection* (2017) 255 FCR 41, [79] (the Court).
11 *Martin v Osborne* (1936) 55 CLR 367, 375 (Dixon J).
12 Ibid; *G v H* (1994) 181 CLR 387, 390 (Brennan and McHugh JJ).
13 *Luxton v Vines* (1952) 85 CLR 352, 358 (Dixon, Fullagar and Kitto JJ).

of reasoning is ubiquitous and inferences from facts which are proved or agreed "are as much part of the evidence as those facts themselves".[14]

28. Before an inference can be drawn, there must be more than merely two conflicting inferences of equal probability[15] and a fact finder must avoid conjecture (noting that the distinction between permissible inference and conjecture occurs on a continuum in which there is no bright line division[16]). However, "if circumstances are proved in which it is reasonable to find on the balance of probabilities in favour of the conclusion sought", the inference should be drawn.[17]

29. As the Appellant accepts (AS [30]), it is permissible for inferences to be drawn in proceedings for judicial review concerning the process of decision making, the decision maker's state of mind, and the decision maker's reasons. Each of those questions is an ordinary question of fact which must be proven either by direct evidence or by inference from primary facts.[18] As the plurality of this Court said in *MZAPC* (2021) 273 CLR 506 at [37] (quoted at CA [83] **CAB 210**):

> Like other historical facts to be determined in other civil proceedings, the facts as to what occurred in the making of a decision must be determined in an application for judicial review on the balance of probabilities by inferences drawn from the totality of the evidence.

30. As such, the drawing of such inferences is not only permissible but commonplace in judicial review. The foundation of the Appellant's argument below was (and in this Court is: AS [58]-[59]) an inference that the Minister *did not* hold the opinion referred to in s 60(4)(b) of the Act because the Minister's reasons did not expressly refer to that state of mind. Similarly, a court may infer from the absence of reasons that a decision maker had no good reasons for the decision they reached.[19] Conversely, reasons might state that the decision maker *has* considered

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14 *Jones v Dunkel* (1959) 101 CLR 298, 309 (Menzies J).
15 *Luxton v Vines* (1952) 85 CLR 352, 358 (Dixon, Fullagar and Kitto JJ).
16 *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262, [84] (Spigelman CJ, Davies AJA agreeing).
17 *Luxton v Vines* (1952) 85 CLR 352, 358 (Dixon, Fullagar and Kitto JJ).
18 M Aronson et al, *Judicial Review of Administrative Action and Government Liability*, 2022, 7th ed, Lawbook Co., [5.200]; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 359-360 (Dixon J); *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575, [59]-[60] (Perram J); *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 190, [37] and [39] (French J); *Curo Capital Pty Ltd v Registrar of Personal Property Securities* [2020] FCA 1515, [45] (Jackson J).
19 *Re Minister for Immigration and Multicultural Affairs; Ex parte* ***Palme*** (2003) 216 CLR 212, [39] (Gleeson CJ, Gummow and McHugh JJ).

an essential matter, but the inadequacy of the material on which a decision maker acted might support an inference that it was not in reality considered.[20]

31. In each case, such inferences are not "mandatory" merely because some basis for them is identified.[21] As such, the mere absence or presence of a statement in a decision maker's reasons does not mean that such inferences *should* or *must* be drawn, or that the opposite inference *must not* be drawn. The "manner in which a statement of reasons is drawn and its surrounding context" may demonstrate that, despite the absence of an express advertence to a matter, there was an issue or material so obviously relevant that it is unthinkable that the decision maker would not have considered it.[22] Courts are thus "frequently require[d]" to "draw inferences from matters that have not received complete expression" in a decision maker's reasons.[23] Whether they should do so depends upon the evidence.

32. Against that, the Appellant says that a special category of case exists where (a) reasons are required, (b) the reasons given are silent about the decision maker's statement of mind, and (c) the positive state of mind is a pre-condition to a statutory power concerning a matter of policy about which reasonable minds might differ: AS [30]. In such a case, the Appellant says that *any* inference will inevitably require the court to engage with the merits of the decision: AS [31].

33. None of those factors, individually or collectively, justify such an inflexible rule. A court might conclude that a statement of reasons does not exhaust the decision maker's reasons for a decision and extraneous material (such as contemporaneous statements made by the decision maker, working papers or material within a briefing) might found an inference that the state of mind was formed. Similarly, the reasons might be silent as to a particular pre-condition, but that the issue is subsumed within some broader finding recorded in the reasons.[24] In either case, the court may draw the inference without engaging with the merits of the findings.

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20 Ibid, and also *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, [36] (McHugh and Gummow JJ).

21 *SZTMD v Minister for Immigration and Border Protection* (2015) 150 ALD 34, [19] (Perram J), quoted with approval in *Minister for Home Affairs v HSKJ* (2018) 266 FCR 591, [44] (the Court).

22 *KXXH v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 292 FCR 15, [54] (the Court).

23 Ibid.

24 *Applicant **WAEE** v MIMIA* (2003) 256 FCR 593, [47] (the Court).

34. The Appellant has identified no authority which positively prohibits the drawing of such inferences. ***LPDT*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at [29] does not say so when it says (relied on at AS [39] and quoted at CA [61] **CAB 199**):

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

35. That statement of principle does not intersect with the issue here. As explained in the preceding sentence by the High Court, the Full Court of the Federal Court had concluded that a tribunal had erred in making findings under a government policy, but concluded that those errors were not material because the Full Court "identified other aspects of the tribunal's reasons as bases to the same end", positing that there was a "realistic possibility" that the Tribunal could have found the appellant's conduct "serious" on other grounds.[25] That is, the Full Court "rework[ed] the apparent basis upon which the decision had been made"[26] by postulating an alternative path of reasoning. Similarly, the authorities in fn 51 of *LPDT* refer to situations where there is *nothing* in a statement of reasons about an issue and a court is asked to infer from external circumstances that the issue was nevertheless considered. That is permissible, but should rarely be done.[27]

36. That was not the process engaged in by the CA. As explained, the Court made findings of fact about the Minister's adoption of the PA, the recommendation of the Panel and her own summary of contentions about the licence period. The Court did not find that this path of reasoning was erroneous and postulate that another course of reasoning would have been followed but for any error. Nor did it ask itself whether other findings of fact made by the Minister could have sustained the finding required by s 60(4)(a). The Court was alive to the principle in *LPDT* and aware that it could not engage in merits review: CA [61] **CAB 199**.

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25 *LPDT* (2024) 280 CLR 321, [29] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).
26 Ibid, [29], [36] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot JJ), [49] (Beech-Jones J).
27 See, for example, *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 288 FCR 565, [130] (the Court).

Question 2

37. The task being one of proper construction, the inferential analysis developed by the Appellant does not arise. If the task is thought to be inferential, then in addition to what is said at [22]-[25] above about the Minister's reasons, the following matters ought be considered in addressing the Appellant's seven factors identified at AS [50]-[57].

38. The first to third matters (the Act had recently changed; the Minister was not familiar with the Act; and the Ministerial briefings did not refer to s 60(4)) were addressed by the CA and taken into account: CA [92] **CAB 214**. As the CA observed, the submissions to the Panel (including the Appellant's own submissions) were "*replete with references*" to the requirement that she be satisfied that special circumstances existed: CA [93] **CAB 214**; PA [81]-[83] (ABFM Tab 7 pp 219-20). That the Minister was not the Minister ordinarily administering the Act does not found a positive inference that the Minister *was not* aware of the Act and its requirements: cf AS [52].[28] The CA's conclusion rested on "the totality of the material before her" and which the Minister had considered (CA [93] and [95] **CAB 214-6**), not on prior responsibility for the Act.

39. The fourth matter (the Panel did not itself resolve any dispute or form any opinion about special circumstances) needs to be analysed with the Panel's finding that the licence was "appropriate", its reference to 10 years (which reference has no other explanation in the statutory scheme, or on the arguments, *other* than to "special circumstances") and its reference to a licence period of 30 years.

40. As to the fifth matter, that the CA should have drawn a *Jones v Dunkel* inference because the Minister did not give evidence, such an inference would not readily be drawn here. That submission was not put to the Primary Judge.[29] Had that been put, submissions would have needed to be made about whether that was open given that the Ground was added mid-trial, and that in seeking leave to amend, the Appellant said that "no additional evidence was necessary" and the new ground could be determined "on the evidence and information already

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28 *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, [165] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

29 Such an inference was sought, but not drawn, concerning a different question: PJ [124]-[163] (**CAB 78-101**).

available to the Court", being "the reasons of the Controller, the Review Panel and the Minister".[30] All of the material before the Minister was properly tendered into evidence.[31] The Departmental officer (who drafted the Ministerial briefings, drafted the Minister's reasons and attended a meeting with the Minister about her decision: PJ [19]-[24] **CAB 19-21**) gave evidence in chief and was available (but not required) for cross-examination.[32]

41. Those matters aside, such an inference would not in any event be readily drawn. While there is no absolute rule that inferences cannot be drawn from the failure of a Minister to give evidence about their functions, "their position is different to many other classes of witness".[33] Because of their multifarious functions, it is "well settled"[34] that "in many, if not all, cases… the absence of a Minister giving evidence in the witness box will be easily understood."[35] As such, a court "would not ordinarily hasten to draw an inference that a Minister had deliberately refrained from giving oral evidence" because of a concern that this evidence would not assist their case.[36] It is readily explicable that a Minister would not give evidence in chief where the relevant issue only arises mid-trial and the party seeking leave positively asserts that no further evidence is required.

42. The sixth and seventh matters (that the written reasons must be presumed to be an accurate account of the Minister's reasons and that a failure to address a matter in the reasons raises an inference that it was overlooked) were the CA's starting point: see CA [83] **CAB 209-10**.

Ground 2: Failure to take into account a mandatory consideration

43. Ground 2 contends that the CA erred in concluding that the Minister had not failed to consider Aboriginal cultural values: AS [60].

Relevant principles

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30 First Respondent's Book of Further Materials, Tab 1, pp 51 and pg 53 [3(c)]. See also p50: "arises on evidence and information already available to the Court".
31 *Shell Road Development Pty Ltd v Minister for Planning* [2025] VSC 525, [167] (Quigley J).
32 ***EWV20*** *v Minister for Home Affairs (No. 3)* [2021] FCA 866, [36], [66] (Griffiths J).
33 *Kassam v Hazzard* (2021) 393 ALR 664, [132] (Beech-Jones J).
34 *EWV20* [2021] FCA 866, [66] (Griffiths J).
35 *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, [325] (Spender J). See also ***Lebanese Moslem Association*** *v MIEA* (1986) 11 FCR 543, 548 (Pincus J).
36 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, [143] (Kirby J).

44. As the PJ and CA correctly observed, the Minister would only have committed a jurisdictional error if she failed to take into consideration a factor which she was *bound* to take into account: CA [192]-[193], [195] **CAB 259-60**; PJ [103]-[104], [175]-[176] **CAB 68-69, 108**.[37] Because the essential preconditions on the valid exercise of power depend upon the terms of the statute[38], any obligation to take a matter into account must also be derived from the statute[39], such that both the existence and scope of the obligation are questions of statutory construction. Such obligations may be derived from the express terms of the Act or by implication from the subject-matter, scope and purpose of the Act and the nature of the repository of the power.[40] Where the Act does not expressly provide for such an obligation, there must be "some warrant" in the text of the Act to imply one.[41] The notion of implication can be put to one side in this case because the Appellant says that the asserted obligation arises expressly under s 90(1): AS [70].

45. Within those statutory bounds, the matters to be taken into account, and the manner of taking them into account, are questions for the decision maker.[42] A plaintiff is not entitled to create an "exhaustive list of all the matters which the decision-maker might conceivably regard as relevant" and then criticise the decision-maker if one or more of those matters is not taken into account.[43]

46. Allied to that, the "*level of particularity in which a matter is identified for the purpose of applying this principle*" will often be significant.[44] In order for a failure to address a particular matter to rise to the level of jurisdictional error, the statute "must expressly or impliedly require consideration of the matter *at that*

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37 *Minister for Aboriginal Affairs v* ***Peko****-Wallsend Ltd* (1986) 162 CLR 24, 39 (Mason J); *Minister for Immigration v* ***Yusuf*** (2001) 206 CLR 323, [73]-[74] (McHugh, Gummow, Hayne JJ); *Abebe v Commonwealth* (1999) 197 CLR 510, [195] (Gummow and Hayne JJ).

38 ***Hossain*** *v Minister for Immigration and Border Protection* (2018) 264 CLR 123, [27] (Kiefel CJ, Gageler and Keane JJ).

39 *Peko* (1986) 162 CLR 24, 55 (Brennan J) and also 39-42 (Mason J).

40 Ibid, 39-40 (Mason J).

41 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 (Dixon J).

42 *Sean Investments* (1981) 38 ALR 363, 375 (Deane J).

43 Ibid.

44 *Forster v Minister for Customs and Justice* (2000) 200 CLR 442, [23] and [25]-[30] (Gleeson CJ and McHugh J), [38] and [44]-[45] (Gaudron and Hayne JJ). See also *Yusuf* (2001) 206 CLR 323, [73]-[74] (McHugh, Gummow and Hayne JJ) and ***Chengshu*** *Longte Grinding Ball Co Ltd v Parliamentary Secretary to Minister for Industry, Innovation and Science* (2019) 270 FCR 244, [93(5)(b)] (Yates, Moshinsky and Thawley JJ).

level of particularity".[45] If the statute does not do so, a plaintiff cannot complain that a factor was not considered "in a particular manner and to a particular extent."[46] Relevantly for present purposes, a statute which merely requires a decision maker to "take into account" certain matters does not generally require the decision maker to make a positive finding about them.[47]

47. Finally, an obligation to take a matter into account requires the decision maker to engage in an "active intellectual process"[48] and give "proper, genuine and realistic consideration"[49] to it. However, a conclusion that the decision-maker has not engaged in an active intellectual process "will not lightly be made and must be supported by clear evidence, bearing in mind that the judicial review applicants carry the onus of proof."[50] Finally, caution is required in applying that standard, which is apt to slide into review of the merits of the consideration.[51]

The Act did not oblige the Minister to make findings identified by the Appellant

48. Having correctly identified that any obligation had to be identified in the statute, the PJ and CA then correctly identified that the statute did not impose an obligation to consider the matters particularised by the Appellant: CA [193]-[195] **CAB 259-60**; PJ [176]-[177] **CAB 108-9**. The Appellant's primary contention is that the Minister was bound to determine the "likely loss or decline of Aboriginal cultural values" caused by the Licence and then decide whether that would be "acceptable": AS [67]. The Act imposes no such obligation.

49. The Act confers a broad discretion to grant a licence, qualified by particular express mandatory considerations. By s 60(1), the Controller "may", on their

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45 *Indara Inbuilding Solutions Pty Ltd v Australian Communication and Media Authority* [2024] FCAFC 117, [113] (the Court). See also *Chengshu* (2019) 270 FCR 244, [93(5)(b)] (the Court).

46 *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349, [126] (Jagot J).

47 *Pelka v Secretary, Department of Families, Housing, Community Services & Indigenous Affairs* (2008) 102 ALD 22; [2008] FCAFC 92, [15] (the Court); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Jokic* [2020] FCA 1434, [15] (Jagot J); *Davis v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 686, [34]-[38] (Dowsett J).

48 *DVO16 v Minister for Immigration and Border Protection* (2021) 273 CLR 177, [12] (Kiefel CJ, Gageler, Gordon and Steward JJ), [77] (Edelman J).

49 *Bondlemonte v Bondelmonte* (2017) 259 CLR 662, [43] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

50 ***Carrascalao*** *v Minister for Immigration and Border Protection* (2017) 252 FCR 352, [48] (the Court).

51 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, [30] (the Court); *Carrascalao* (2017) 252 FCR 352, [35] (the Court).

own motion or by application in the prescribed form, grant to a person a licence to take water from a bore. Sections 71C(2) and 90 create express mandatory considerations for such decisions. Section 71C(2) concerns comments and is not relevant to the present appeal.

50. Relevantly, s 90(1) provides that the Controller must "take into account" a series of matters when deciding whether to grant a licence. Those matters need only be taken into account when they are "relevant" to the decision. Further, s 90(1)(k) relevantly provides that the Controller may take into account any other factor they consider should be taken into account. That vests in the Controller a discretion, not an obligation, to take those "other factors" into account.

51. Importantly, none of s 90(1)(a)-(k) impose an obligation to consider a matter at the level of particularity sought by the Appellant. The Appellant relies on three sub-paragraphs to anchor its obligation (AS [70]) only one of which (s 90(1)(k)) was referred to in the Notice of Appeal before the CA: CA [25(8)] **CAB 180**.

(a) s 90(1)(ab) obliges the Controller to consider "any water allocation plan applying to the area in question". One of the obligations in the relevant WAP was "to protect Aboriginal cultural values associated with water and provide access to water resources to support local Aboriginal economic development": ABFM Tab 3, pp 26 and 53; CA [11] **CAB 174**. That did not impose the particular obligation asserted by the Appellant. The relevant factor was no more specific than "protect[ing] Aboriginal cultural values". That objective was expressly referred to and considered by the Panel and the Minister (e.g ABFM Tab 7 [36]) and, for the reasons below, their response directly engaged with it.

(b) s 90(1)(e) obliges the Controller to take into account the designated beneficial uses of water. One of the designated beneficial uses in the Water Control District was the "environment" (s 22A(2)(a)), but the Appellant's reliance on that conflates two distinct statutory definitions. "Beneficial use" is defined exhaustively in s 4(1) to "*mean*[]" the "uses of water specified in subsection (3)". Section 4(3)(d) then specifies the beneficial use of the "environment" to be "to provide water to maintain the health of *aquatic ecosystems*". The "environment" is separately defined to mean "all

aspects of the surroundings of humans" including "the physical, biological, economic, *cultural and social aspects*". That does not alter the particular definition of the beneficial use in s 4(3)(d).

(c) s 90(1)(k) relevantly permits the Controller to consider any other matter they consider to be relevant. The Minister on review was not *bound* to consider any such matter, so failing to properly consider such a matter alone could not constitute a jurisdictional error. Further, even if the Appellant's logic were to be accepted, the scope of the obligation would be defined by reference to what the Minister acting reasonably determined should be considered. Here, the Panel and Minister considered the potential impact of the Licence on "cultural values" (CA [176]-[179] **CAB 253-4**), but that did not bring with it the specific obligation asserted by the Appellant.

52. It is also important to appreciate the limited nature of the obligation imposed by s 90(1). The obligation is one to "take into account" certain matters. It imposes on its terms no obligation to make findings about particular issues potentially falling within those matters: CA [195] **CAB 260**.[52]

53. In the end, because s 90(1) is silent as to the manner in which those factors should be taken into account, *how* to do so is a matter for the Minister: CA [193] **CAB 259**; PJ [170] **CAB 105**.[53] That is reinforced by the evaluative nature of the factors in s 90(1)(a)-(k) and the task which the Minister must perform in taking those matters into account, each of which involves questions of high policy, "balancing use and protection of the resource": CA [166], [169] **CAB 250-2**.[54] That generality is inimical to the implication of obligations, at a fine level of granularity, to take those factors into account in a particular way.[55]

The Minister did consider the impact of the Licence on cultural values

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52 See the authorities in fn 44 above.
53 *Peko* (1986) 162 CLR 24, 41-42 (Mason J).
54 See, similarly, Act ss 4(3), 22B(5)(a)-(b) and 23(1B).
55 *Minister for Immigration v Huynh* (2004) 139 FCR 505, [74] (Bennett and Kiefel JJ), approved in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, [125]-[129] (Heydon and Crennan JJ, Gleeson CJ, Gummow and Hayne JJ agreeing).

54. The CA further found that the PJ was correct in determining the Minister had in any event turned her mind to the impacts on cultural values of extraction under the Licence and addressed it through the use of conditions: CA [193] **CAB 259**.

55. CPs were imposed against a background of uncertainty about the nature of the water resource and the effects of the foreshadowed extraction on it: CA [162]-[163], [168] **CAB 248-51**. They provided a cautious system of adaptive management which reflected the Act's competing objectives: CA [168]-[169]. The relevant features of that system may be explained as follows.

56. The inclusion of CP 10 required the Second Respondent to develop and submit to the Controller a groundwater dependent cultural values impact assessment: ABFM Tab 11 pg 296. Through consequential amendments made to other CPs – specifically 5, 7 and 8 – this formed part of the adaptive management approach to the proposal: CA [142], [179] **CAB 237-8, 254**; PJ [75]-[77], [79], [83], [173] **CAB 54-8, 107**. CP 5 requires the undertaking of special mapping of groundwater dependent ecosystems (**GDEs**) and Aboriginal cultural values, further modelling based on that spatial mapping, and revisions of the bore field design or pumping schedule to reduce impacts should the extent of predicted impacts on groundwater levels exceed the limits in relevant policies (in the case of GDEs) or the limits established under CP 10 (in the case of Aboriginal cultural values). The activities undertaken under those CPs work through the adaptive management plan developed in accordance with CP 7 to require adjustment if the impacts differ from the expectations held at the time of the grant of the Licence. That adaptive management plan is then made binding through the requirement of compliance in General Condition 2. The effect is that water cannot be extracted without a plan being developed, approved and complied with.

57. The imposition of CP 10 was informed by the PA – the Panel did not express *no view* about the issue: cf AS [68]. The PA noted submissions from the Appellant that the "Controller's decision fail[ed] to take into account the impact that the Licence will have on Aboriginal cultural values" and that a government guideline "does not take into account Cultural Values": PA [24] (ABFM Tab 7). It also referred to submissions by the Arid Lands Environment Centre that the "Controller should have assessed the impacts of the Licence on cultural values":

PA [25]. The Panel said that the WAP included an objective "to protect Aboriginal cultural values associated with water and provide access to water resources to support local Aboriginal economic development" and set out in detail the ways in which the WAP pursued that objective: PA [36].

58. The Appellant points to the Panel's observation that an Aboriginal Cultural Values **Assessment** had been provided, that the Panel could not form a view about the "significance of the information presented in that report", and that a "comprehensive cultural impact assessment [was] required prior to the extraction of any significant volumes of water on Singleton Station": PA [39]. Two points should be made about that observation. The first is that it must be read with the Assessment itself (ABFM Tab 9 pg 275), which identified no particular impact on any particular cultural value. The Assessment identified a number of Aboriginal cultural values connected to water and then identified some "potential impacts" at a high level of generality. For example, in relation to effects on sacred sites, the Assessment said that the extraction "has the *potential* to adversely impact groundwater dependent sacred sites" (at [3.2]), but does not say whether this *would* occur or *where* it would occur, because that could not be known without further modelling of the resource. CP 10 directly responds to that uncertainty by permitting minor extraction to enable that modelling to take place.

59. The second point is that this observation was not the end of the Panel's consideration of the issue. It immediately said that it had also given consideration to that issue "in relation to GDEs": PA [87]-[89] (ABFM Tab 7). It concluded that a 70% threshold for GDE retention might not be adequately protective and that this was "particularly relevant in terms of the protection of water dependent *cultural values as an objective of the WAP*": PA [47]. It said that, due to the level of uncertainty, including concerning the "cultural values associated with GDEs that may be impacted by th[e] project", the licence should have been conditioned differently: PA [91]. It then recommended adjusting the staging conditions "to enable adequate assessment of the aquifer behaviour and GDE condition" and the addition of a CP requiring a "cultural values impact assessment": PA [92].

60. As such, the PA accepted there could be an impact on Aboriginal cultural values and concluded that those risks would be best mitigated through a system of

adaptive management. That is what the Panel meant when it said it was unable to form a view on the "significance" of the information in the Assessment (which did not predict impacts of extractive drawdown at specific locations), and said that a cultural values impact assessment (which would do so) should be undertaken prior to any substantial extraction.

61. The Minister's reasons accepted the PA and adopted that adaptive management approach: CA [95], [233] **CAB 216, 275**. In doing so, the Minister considered all of the materials submitted by the Reviewing Parties, including the Assessment submitted by the Appellant: ABFM Tab 11 pp 290, 297. The Minister noted that the Controller had included staging conditions to allow for the impacts of water taken during earlier stages to be monitored, to determine whether the resource was behaving as predicted, and to ensure extraction "is managed within the defined threshold that meets the environmental *and cultural objectives*" in the adaptive management plan: ABFM Tab 11 pg 291. The Minister referred to the Assessment and the Panel's advice about it, including that the protection of GDEs was "particularly relevant in terms of the protection of water dependent *cultural values* as an objective of the [WAP]" and accepted that advice: ABFM Tab 11 pg 292, 297-8.

62. In addition, the Minister determined to extend Stage 1 of the Licence to a period of 3 years, responsive to the Panel's concerns about GDE conditions and cultural values: ABFM Tab 11 p 296. The Minister said that this would ensure "further time [was] given to assess the impacts of groundwater extraction on aquifer behaviour, GDE condition and *groundwater dependent Aboriginal cultural values*": ABFM Tab 11 pp 298-299. The Minister was expressly "satisfied [this] further period [would] provide for a sufficient level of assessment of the impacts of groundwater extracted in Stage 1": ABFM Tab 11 pg 300. She then concluded that those "conditions precedent and other conditions on [the] licence taken as a whole… address the risks, potential impacts, and uncertainty associated with the proposed extraction of water": ABFM Tab 11 pg 297.

63. That was plainly to engage in an active intellectual process concerning the issue, in a context of uncertainty and a statutory scheme which required the Minister to,

as far as practicable, facilitate development in a sustainable way. How to balance those matters and to respond to that uncertainty was a question for the Minister.

The imposition of CP 10 was not a deferral of the consideration

64. As the CA elsewhere held, the imposition of CPs was not a failure to exercise the Minister's discretion or the impermissible deferral of a consideration. Rather, the imposition of those conditions was a legitimate part of the exercise of the review function through the creation of a system of adaptive management: CA [166], [196] **CAB 250-1, 260**. There is no appeal from those parts of the CA's reasoning. Consistent with that, the Appellant does not challenge either the capacity of the Controller to impose conditions precedent under s 60 (AS [71]) or the validity of the other conditions precedent on the Licence.

65. The Appellant's contention that the Minister impermissibly delegated the task of taking into account cultural values should be rejected at two levels: AS [74]. The first is that it proceeds from the (erroneous) premise that the Minister was obliged to consider that matter at a level of particularity not supported by the statutory text. The second is that the imposition of CP 10 was not the abdication of any statutory obligation to consider, but the discharge of that function through the imposition of CP 10 and the related amendments to other conditions.

Consequential orders

66. There is an agreement between the Appellant and the First Respondent as to costs (as there was before the PJ and CA) that each party will bear their own costs.

Part VII: Estimate of time for oral argument

67. No more than ~~30~~ 60 minutes will be required for the First Respondent's oral submissions.

Dated: ~~20 November 2025~~ 22 December 2025

Nikolai Christrup
Solicitor-General of the Northern Territory
Tel: (08) 8999 6682
nikolai.christrup@nt.gov.au

Chad Jacobi KC
Tel: 0437 810 110
cjacobi@awchambers.com.au

Lachlan Spargo-Peattie
Tel: (08) 8999 6682
lachlan.spargo-peattie@nt.gov.au

ANNEXURE TO FIRST RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1.	*Statute Law Amendment (Territory Economic Reconstruction) Act 2021* (NT)	In force 29 September 2021 to 3 October 2021	s118	Date of commencement of amendment to section 60(4) of the *Water Act 1992* (NT)	• 29 September 2021
2.	*Water Act 1992* (NT)	In force 20 Nov 2020 to 1 Jul 2021	ss 4, 22A, 24 30 – 32, 60, 71, 71A – 71C, 90	In force when: • the Environment Minister endorsed existence of special circumstances; • the Original Licence was issued by the Controller; and • the Appellant submitted an application for review.	• 15 February 2021 • 8 April 2021 • 7 May 2021
3.	*Water Act 1992* (NT)	In force 29 Sept 2021 to 3 Mar 2023	Long title, ss 4, 10-14, 19, 22A, 22B, 23, 24, 30 – 32, 44, 45, 59, 60, 71A – 71C, 90	In force when: • the PA was provided to the Environment Minister; • the Environment Minister delegated s 30 powers to Minister; and • the Licence was issued by the Minister.	• 14 October 2021 • 11 November 2021 • 15 November 2021