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: **MPWEEMPWER 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)

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: This outline is in a form suitable for publication on the internet

Part II: Outline of propositions

Ground 1: Special circumstances

1. ***The CA correctly held that the Minister was satisfied special circumstances existed***: The CA was interpreting the Minister's reasons ("only reasonably *interpretation* of the Minister's decision"): **CA [94]-[95] CAB 216; 1RS [19]-[25]**. The CA was not inferring matters where the reasons were entirely silent: **cf AS [29], [49]**.
2. The Minister "accept[ed] the conclusions of the Review Panel": **CA [94] CAB 216**. The CA was seeking to understand the meaning those words in their context, including the materials before the Minister showing a controversy about that matter: **CA [83]-[94] CAB 209-216; 1RSBFM 22 [118]-[121]** (Controller's Decision)**, 29** (Controller's Licence)**, 60** (review application)**; ABMF 102-103** (Environment Minister's opinion).
3. The Review Panel expressly referred to the controversy concerning special circumstances, and to a Guideline on the existence of those circumstances, concluding that "a licence term of greater than 10 years was "*appropriate* for a large-scale development such as that proposed": **ABFM 202-221**; **1RSBFM 48-54**. The reference to "10 years" can only be to the threshold in s 60(3)-(4). There was no suggestion the Licence would be granted for a period more than 10 but less than 30 years. The reference to "large-scale developments" was an accurate summary of the special circumstances found by the Environment Minister: **CA [90] CAB 213, [95] CAB 216**.
4. The material before the Minister was "replete" with references to the controversy concerning special circumstances: **CA [93] CAB 214; e.g. 1RSBFM 6, 46, 80, 89, 103, 113-114, 128-129, 136, 160**. Her reasons expressly refer to special circumstances: **ABFM 295**. She then "accept[ed] *the conclusions* of the Review Panel for *the reasons* it [gave] *on each of the issues raised by the Reviewing Persons*": **ABFM 297**. The "issues" included the controversy concerning special circumstances. The "reasons" and "conclusions" included the Review Panel's resolution of that controversy.
5. At most, this is a case about *competing* inferences. The Appellant bore the onus of proof and had to demonstrate that the Minister *was not* satisfied of the matter in s 60(4). If that prism is right, the Appellant's inference was not the more probable: **1RS [37]-[42]**.
6. ***No inflexible rule:*** There is no inflexible rule that a court cannot draw an inference that a decision-maker was satisfied that a matter existed when their reasons do not refer to it expressly: **1RS [26]-[36]**. Section 71E(3)(b) does not control the inquiry: **cf** Appellant's

Outline of Oral Submissions (**AOS**) **[4]-[7]**. The Appellant conflates matters concerning the *adequacy of reasons* with when an *inference may be drawn*. Non-compliance with a requirement like s 71E(3)(b) is not jurisdictional and it was never so contended: *Palme* (2003) 216 CLR 212, [55] (**JBA Part C T 19**). Not referring to a matter in reasons may *support* an inference that it was not taken into account, but that is only the starting point and reference may be made to context and extraneous material: **1RS [31]-[33]**.

Ground 2: Mandatory consideration

7. ***The Appellant's mandatory consideration:*** Before this Court, the Appellant says the Minister impermissibly did not form "a view about the only information before her" concerning Aboriginal cultural values: **AS [60]**.

8. Mandatory considerations must be identified at the level of particularity fixed by the statute: **1R [44]-[46]**. Mandatory considerations for a "water extraction licence decision" are found in ss 71C(2) and 90(1): **1RS [49]**. The Appellant says its mandatory consideration arises expressly from ss 90(1)(ab) or (k): **AS [70]**. Reliance on s 90(1)(e) appears to be withdrawn: **AOS [9]**.

9. Under s 90, the requirement ("*must*") is to "*take into account*" a range of broad policy matters, where they are relevant. Section 90(1)(k) confers a discretion to take into account other factors ("Controller *considers should be*"): **1RS [50], [51(c)], [53]**. It does not create mandatory considerations: **PJ [176] CAB 108**.

10. The Appellant relies on s 90(1)(ab) and the "objective" of the Western Davenport WAP: "*2. Protect aboriginal cultural values associated with water and provide access to water resources to support local Aboriginal economic development*": **ABFM 26.** Neither the Act nor the Plan specifies how that objective is to be fulfilled or the weight to be given to that objective. Those were matters for the Minister: **1RS [51(a)], [52]-[53]**.

11. The relevance of the criteria in s 90(1) may depend on the circumstances of an application ("that are *relevant* to"), but the scope of any mandatory consideration arising from the Act, and instruments made under it, do not turn on the information provided: **cf AR [11]**. The observations in *Peko-Wallsend* (**JBA Part C T 15**) address a different point: **AOS [10]**. The references to "actual facts" and "most current material available" were to material correcting a report which was itself a mandatory consideration.

12. ***The Minister took into account the protection of cultural values:*** In any event, the CA and PJ were correct to find that the Minister had taken the Plan objective into account: **CA [193] CAB 259; PJ [176] CAB 108; 1RS [54]-[63]**. That was because: **(a)** the

Minister was expressly referred to the objective by the Panel and referred to the objective in her reasons: **ABFM 211 [36]; ABFM 292**; **(b)** the Minister read the Donaldson report which identified cultural values and "*potential*" impacts upon those values "*if*" the Licence had certain effects: **ABFM 170 [3.1], 174 [3.2], 180 [3.3], 181 [3.4], 185 [3.5], 187 [3.6]**; **(c)** the 10 September 2021 CLC letter said that the Donaldson report "did not purport" to be a "comprehensive" assessment and that "protecting the cultural values" associated with water "requires a comprehensive assessment": **1RSBFM 98-99**; **(d)** in response, and expressly referring to that submissions (**ABFM 207-8**), the Panel recommended CP 10, requiring a comprehensive cultural values impact assessment: **ABFM 211-2 [39]**; **(e)** the Panel also considered cultural values in relation to groundwater dependent ecosystems: **ABFM 213 [47]**; **(f)** the Minister adopted the Panel's views about those matters: **ABFM 292-293, 297**; **(g)** the Minister imposed CP 10, requiring mapping and documenting of cultural values, identifying reference points to be used in modelling and by reference to them fixing monitoring parameters and trigger values: **ABFM 307-308**; **(h)** CP 10 operated in combination with amendments to CP 5, 7 and 8, which formed the "adaptive management plan", made binding through CP 2, such that staged extraction could not occur without approval of the plan, and ongoing validation of the extent of impacts: **ABFM 292, 296-7**; and **(i)** by extending the time within which those assessments would need to be done, expressly referring to this factor: **ABFM 298-299**.

13. CP 10 did not impermissibly defer consideration of cultural value: **1RS [64]-[65]; cf AS [60], [71], [74]**. That depends on the Appellant's characterisation of the consideration being correct. Further, the use of conditions precedent was a permissible exercise of the Minister's function, balancing the Act's competing objectives of managing risk and facilitating development: **CA [162]-[169] CAB 248-252**. There is no appeal from that holding. There is one power to exercise in s 60(1)-(2), not two: **cf AOS [12]-[13]**.

Dated: 10 February 2026

N Christrup SC **C Jacobi KC** **L Spargo-Peattie**