



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
OUTLINE OF ORAL SUBMISSIONS**

Part I: CERTIFICATION

This outline of oral submissions is in a form suitable for publication on the Internet.

Part II: Propositions to be advanced in oral argument

Point 1 - Procedural fairness does not require precise symmetry or equality of treatment.

1. MAC's assertion is inconsistent with authority: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, [26].
2. Court of Appeal correctly said ([231] (CAB 274)) it is 'flexible obligation ... appropriate and adapted to the circumstances of the case'.
3. Central concern is avoiding practical injustice.
4. Interested parties were affected differently by exercise of administrative powers, so appropriate to afford 'differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law': *Green v The Queen* (2011) 244 CLR 462, [28].
5. A fair result may require the law to account for different circumstances, rights and

impacts on different persons and their different interests (*Kioa* at 585; JBA 500). The test is procedural *fairness* not procedural *equality*.

Point 2 - There are good reasons why Fortune was further consulted about the proposed CP10 and the duration of SC1

6. Fortune held licence that had been granted. Under review the conditions of the licence were being changed.
7. Proposed changes were partly adverse: Original Licence had 8 CPs; Stage 1 was for 2 years from when Controller considered the CP was met: CA[5] (CAB 171). Minister proposed new CP10 and SC 1 extending Stage 1 to 5 years: CA[201] (CAB 262).
8. May have had implications for the viability of the project itself.
9. This altered vested rights of Fortune: a direct effect.
10. MAC's interest is different at this stage: not direct or less direct affect (*contra*, AS[88]; see *Disorganized Developments* [33]; JBA 369).
 - a. Not the licence holder and no interference without further approval on cultural values;
 - b. CPs and amended SC1 protected MAC's interests.
11. There was *asymmetry* in the interests of Fortune and MAC. A fair repository of the power need not have provided an identical *further* opportunity to MAC.
12. Statutory context informs the content of procedural fairness: *SZBEL* [26].
 - a. MAC not the licence applicant: PJ[212] (CAB 127);
 - b. consideration of Aboriginal cultural values was a discretionary consideration: PJ[176] (CAB 108). Its bounds are not expressly framed by the legislation or its subject matter, scope and purpose. There is greater flexibility as to how and with what particularity that issue is considered. The issue of weight is for the Minister to decide: CA[135] (CAB 234).

Point 3 - MAC was afforded procedural fairness.

13. Written and in-person submissions were made on behalf of MAC to the Review Panel: CA[217] (CAB 269).
14. MAC gave a Aboriginal Cultural Values Assessment prepared by a qualified professional: CA[220] (CAB 270).

15. MAC was on notice the Review Panel might decide to deal with cultural values by way of conditions precedent.
 - a. CA[236] (CAB 276) noted that MAC was aware Original Licence addressed multiple matters relevant to the taking of water by conditions precedent;
 - b. MAC submitted to the Review Panel that '*it is not appropriate to relegate*' the issue of cultural values to '*a licence condition*': CA[234] (CAB 275-6);
 - c. Opportunity was given to make submissions for requirements for appropriate cultural values impact assessment at this point: CA[235] (CAB 276).
 - d. There was no 'surprise' to MAC (contra AS[84]), it just did not take full advantage of the opportunity it had. What is 'required by procedural fairness is a fair hearing, not a fair outcome': *SZBEL* at [25].

16. Only one of the questions at [16] of MAC's Reply has been answered: Who should carry out the assessment? Answer: a 'suitably qualified professional'. This is what MAC had attempted. Any proper assessment requires an anthropologist.

Point 4 - MAC has further opportunities to be heard and to assert its entitlements

17. Look to whether 'the decision-making process, viewed in its entirety, entails procedural fairness': *South Australia v O'Shea* at 389; (JBA 959)
18. CP10 leaves matters for further inquiry and later decision-making. Court of Appeal recognised the Minister 'was not purporting to make a decision as to what would be required for an appropriate cultural values impact assessment': CA[238] (CAB 277).
19. There are processes and checks that will call for input from MAC, entitlements to be heard, and opportunities to challenge (including when approval is sought from Controller (CP2)). This is recognised by the Review Panel (CA[200] (CAB 262) and Fortune (CA[202] (CAB 263). It was also mentioned by the Court of Appeal: CA[242] (CAB 279).

10 February 2026



J M HORTON



W A ISDALE