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

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Propositions

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

2. The *Water Act* is a statutory regime that confers power on the Minister to grant rights to exploit the water resources of the Territory: s 9(2), s 59, s 60, s 61; *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510 at [63]-[65]; AS at [33]-[34].

3. The *Water Act* is to be understood as mandating compliance with the requirements of the regime as essential to the making of a valid grant of a licence to extract groundwater: *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510 at [63]-[65].

4. For s 60(4)(b), there were four requirements of the regime. *First*, the Delegate Minister had to engage in the two steps of the mental process required by the sub-section ("special circumstances justify the longer period"). *Second*, the Delegate Minister had to reach the requisite conclusion ("is satisfied"). *Third*, there had to be a manifestation of that conclusion in the published "full review decision" (s 71E(3)(b)). *Fourth*, reasons for that conclusion had to be published (s 71E(4)). AS at [34]-[35], [37].

5. As the Court of Appeal and the Delegate Minister accepted, neither the licence granted by the Minister, nor the Minister's reasons, record the manifestation of the conclusion about s 60(4)(b), any reasons for that conclusion, or any consideration of s 60(4)(b). CAB at 209 [83].

6. The *Water Act* does not countenance its requirements concerning s 60(4)(b) arising by inference, implication or interpretation. The public importance of, and public interest in, the proper management of water in the Territory requires the "person" identified in s 71E(3)(b) to be able to identify from the published "full review decision" and the published reasons that a s 60(4)(b) decision was made, and the reasons for it. The *Water Act* does not countenance that person also having to seek to obtain and then parse the unpublished material before the Delegate Minister to ascertain by inference or interpretation if and how a decision under s 60(4)(b) had been made. AS at [37].

7. For the same reasons, the Delegate Minister's application for this Court to receive additional material to "interpret" her published decision and reasons must be dismissed. None of that material is part of the "full review decision" under ss 71E(3)-(4). Further, it all pre-dates the change in the law on 29 September 2021.

8. Further, decisions about s 60(4)(b) that arise by inference, implication or interpretation impermissibly require a court to assume the function of the Delegate Minister because they involve making assumptions about whether and how the Delegate Minister undertook the exercise: *LPDT v Minister for Immigration* (2024) 280 CLR 321 at [15], [29]; AS at [31], [33], [36], [39], [46].

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

9. In making her decision, the Delegate Minister was obliged to take into account "the protection of Aboriginal cultural values associated with water", an objective of the Plan (s 90(1)(ab); ABFM at 16) and (to the extent it differs) "the impact on cultural values from the activities under the licence" (s 90(1)(k); ABFM at 297), as that was a matter she identified as relevant. AS at [62]-[63], [70]; ARS at [10].

10. The Delegate Minister's duty was to consider that matter in the light of "the actual facts", by bringing to mind "the salient facts which give shape and substance to the matter" and "on the basis of the most current material available": *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30, 45, 61. Those facts were contained in the Cultural Values Assessment: ABFM at 105. AS at [64]-[67].

11. The Delegate Minister did not engage with any of those facts, which had a direct bearing on the justice of granting the licence. She adopted the Review Panel's position in that she could not form a view on the significance of the information (ABFM at 202, 297), and imposed CP 10 to require Fortune to prepare its own cultural values assessment. AS at [69]; ARS at [11].

12. Her obligation to "take into account" the protection of Aboriginal cultural values was not met by imposing CP 10. Under the *Water Act*, there is a difference between (a) whether or not a right to take water should be granted (s 60(1)); and (b) conditions on the exercise of the *granted* right (s 60(2)). CP 10 was not responsive to consideration of the protection of Aboriginal cultural values at the point of making a decision to grant the right, but was a substitute for it: AS at [71], [74].

13. CP 10 (ABFM at 307-308), read with CP 1 (ABFM at 305), shows the "condition precedent" was not about regulating the exercise of the right to take water. It was about whether there would be a right to take at all. That confirms the matters in CP 10 as matters identified by the Delegate Minister as the "salient facts" to consider before the right would be granted; as such, they had to be taken into account by the Delegate Minister when making her decision, and not deferred, for consideration by another person, who would decide whether or not there was a right to take water.

Ground 3: failure to give MAC the right to be heard on CP10

14. There are two issues in dispute. ARS at [13].

15. Was the Delegate Minister's obligation of procedural fairness to the appellant in respect of CP 10 satisfied by the process before the Review Panel? It cannot have been given (a) even the Delegate Minister's advisers did not know what the Review Panel's recommendation involved (ABFM at 226); (b) the Chair of the Review Panel said the Panel was not equipped to define the terms of CP 10 and the process would be "challenging" (ABFM at 225); and (c) having formulated a proposed CP 10, the Delegate Minister consulted Fortune as it may "adversely impact" Fortune (ABFM at 280). AS at [84]-[86], ARS at [14].

16. Did CP 10 directly affect the appellant? ARS at [15]-[16]. The very subject of CP 10 was impacts on the cultural values of MAC's members, including who would assess them, where and what they were, and the extent to which they would be permissibly adversely affected by the activities under the licence. Those cultural values were intimately connected with the members' native title rights. Fortune has also (rightly) accepted there are "significant and numerous cultural values associated with multiple sites in the drawdown area" (2RS at [15]).

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