

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

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MPWEREMPWER ABORIGINAL CORPORATION  
RNTBC

APPELLANT

AND

MINISTER FOR TERRITORY FAMILIES AND  
URBAN HOUSING AS DELEGATE OF THE  
MINISTER FOR THE ENVIRONMENT & ANOR

RESPONDENTS

*Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory  
Families and Urban Housing as delegate of the Minister for the  
Environment*

[2026] HCA 23

*Date of Hearing: 10 February 2026*

*Date of Judgment: 5 August 2026*

D14/2025

## ORDER

1. *Appeal allowed.*
2. *Paragraph 1 of the orders of the Court of Appeal of the Northern Territory of Australia dated 12 May 2025 be set aside and, in lieu thereof, it be ordered that:*
  - (a) *The appeal is allowed.*
  - (b) *Paragraph 1 of the orders of the Supreme Court of the Northern Territory of Australia made on 31 January 2024 be set aside and, in lieu thereof, it be ordered that:*
    - (i) *the licence granted to the second defendant on 15 November 2021 bearing licence number WDCP10358 be quashed; and*



- (ii) *the matter be remitted to the Minister administering the Water Act 1992 (NT) to be decided according to law.*
  - (c) *The issue of the costs of the proceeding before the Supreme Court be remitted to the primary judge.*
- 3. *The second respondent pay the appellant's costs of this appeal limited to the third ground of appeal.*
- 4. *The issue of the costs of the appeal before the Court of Appeal of the Northern Territory of Australia be remitted to that Court.*

On appeal from the Supreme Court of the Northern Territory

### **Representation**

C P Young KC and L E Hilly with H Douglas for the appellant (instructed by Central Land Council)

N Christrup SC, Solicitor-General for the Northern Territory, and C Jacobi KC with L S Spargo-Peattie for the first respondent (instructed by Solicitor for the Northern Territory)

J M Horton KC with W A Isdale for the second respondent (instructed by Ward Keller)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment**

Administrative law – Judicial review – Water extraction licence – Where 30-year water extraction licence granted under s 60 of *Water Act 1992* (NT) ("Water Act") – Where Minister required to be satisfied under s 60(4)(b) of Water Act that special circumstances justified grant of licence for period exceeding ten years – Where Minister required to take into account protection of Aboriginal cultural values associated with water – Where condition of licence was that licensee develop and submit Aboriginal cultural values impact assessment – Whether Minister satisfied that special circumstances justified grant of licence for period exceeding ten years – Whether Minister failed to take into account mandatory relevant consideration of Aboriginal cultural values – Whether Minister failed to accord procedural fairness to prescribed body corporate for relevant native title holders.

Words and phrases – "Aboriginal cultural values", "Aboriginal cultural values impact assessment", "adverse conclusion", "condition", "condition precedent", "cultural and biodiversity values", "discharge of statutory function", "groundwater", "groundwater dependent ecosystems", "interpretation of reasons", "judicial review", "jurisdictional error", "jurisdictional fact", "mandatory relevant consideration", "must take into account", "native title holders", "procedural fairness", "requirement of reasons", "requirement to manifest satisfaction", "review panel", "satisfied", "special circumstances", "state of mind", "state of satisfaction", "water allocation plan", "water extraction licence", "water extraction licence decision".

*Water Act 1992* (NT), ss 30, 60, 71A-71E, 90.



1 GAGELER CJ. This is an appeal from a decision of the Court of Appeal of the Northern Territory (Kelly, Huntingford and Burns JJ)<sup>1</sup> which affirmed a decision of the primary judge in the Supreme Court of the Northern Territory (Barr J)<sup>2</sup> to dismiss an application by the appellant ("MAC") for an order in the nature of certiorari to quash the purported grant to the second respondent ("Fortune") by the first respondent ("the delegate Minister") under s 30(3)(a)(ii) of the *Water Act 1992* (NT) of a 30-year licence to extract groundwater ("the water extraction licence").

2 The delegate Minister purported to make the decision to grant the water extraction licence under s 30(3)(a)(ii) of the *Water Act* on a review of an earlier decision made by the Controller of Water Resources ("the Controller") under s 60(1) of the *Water Act* and in substitution for that earlier decision. The delegate Minister did so having been sent extensive Ministerial briefings by the Department administering the *Water Act* following receipt of advice from the Water Resources Review Panel ("the Review Panel") in accordance with s 30(3)(b) and (4) of the *Water Act*.

3 In accordance with s 71E of the *Water Act*, the delegate Minister made a record of the decision and the Controller subsequently gave public notice of that record. The record of the decision so made and notified was required by s 71E(4) to "include the reasons for the decision".

4 The Court of Appeal held,<sup>3</sup> and it is no longer in dispute, that the delegate Minister in making a decision under s 30(3)(a)(ii) of the *Water Act* on review of the decision of the Controller under s 60(1) was precluded by s 60(3) read with s 60(4)(b) from granting a licence to extract groundwater for a period exceeding ten years unless the delegate Minister was "satisfied that special circumstances justify the longer period". The "satisfaction" so required in order for the delegate Minister to have had statutory authority to grant the water extraction licence was

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1 *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* (2025) 395 FLR 125.

2 *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing* (2024) 384 FLR 234.

3 *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* (2025) 395 FLR 125 at 148 [81].

a state of mind on the part of the delegate Minister the existence of which is properly labelled a "jurisdictional fact".<sup>4</sup>

The Court of Appeal found that, in deciding to grant the water extraction licence, the delegate Minister in fact formed a state of satisfaction that special circumstances justified the grant of the water extraction licence for the longer period of 30 years.<sup>5</sup>

MAC's principal ground of appeal to this Court boils down to a challenge to the correctness of that finding of fact. Against the background of the circumstances set out by Gordon, Steward, Gleeson and Beech-Jones JJ, I consider that the challenge must succeed.

It is beyond controversy that "[l]ike other historical facts to be determined in other civil proceedings, the facts as to what occurred in the making of [an administrative] decision must be determined in an application for judicial review on the balance of probabilities by inferences drawn from the totality of the evidence".<sup>6</sup> It is also beyond controversy that the applicant for judicial review bears the onus of proving on the balance of probabilities all of the facts that are necessary to establish that the maker of the decision exceeded a limit of the decision-making authority conferred by statute.<sup>7</sup>

Thus, in order to establish that the delegate Minister exceeded the limit of the decision-making authority set by s 60(3) read with s 60(4)(b) in purporting to make the decision under s 30(3)(a)(ii) of the *Water Act*, it was and remains incumbent on MAC to establish as a fact to be found on the balance of probabilities that the delegate Minister did not form a state of satisfaction that there existed special circumstances which justified the grant of the water extraction licence for the longer period of 30 years.

Contrary to one strand of MAC's argument on the appeal, s 71E of the *Water Act* does not purport to confine the evidence available to be weighed in making

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4 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651 [130].

5 *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* (2025) 395 FLR 125 at 151 [95].

6 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 524 [38] (footnote omitted). See also *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120.

7 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 524 [39].

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such a finding of fact to such record of a decision purporting to have been made under s 30(3)(a)(ii) of the *Water Act* as might have been made and publicly notified. On the assumption that a decision to which it applies will have reasons for which the decision is made, s 71E does no more than require that those reasons be recorded and publicly notified. The section does not purport to give the reasons recorded and publicly notified in purported compliance with its requirements a conclusive or definitive status. The potential for constitutional issues to have arisen were the section to have been construed to have had that effect<sup>8</sup> was not explored in argument on the appeal, was not the subject of notice under s 78B of the *Judiciary Act 1903* (Cth), and is therefore inappropriate to examine.

10 The present significance of s 71E of the *Water Act* instead lies in the requirement of s 71E(4) that the publicly notified record is to "include the reasons for the decision" requiring, on its proper construction, that the delegate Minister include in the publicly notified record of the decision to grant the water extraction licence "at least ... the essential ... grounds"<sup>9</sup> for that decision. The content of that requirement "entitles a court to infer" that something not mentioned by the delegate Minister in the publicly notified record was something not considered by the delegate Minister to be essential to the making of the decision.<sup>10</sup> Like any other inference of fact, the drawing of such an inference against the background of the delegate Minister's purported compliance with the statutory requirement of s 71E(4) is not mandated by legal principle but is "part of the process of fact finding": "an exercise of the ordinary powers of human reason in the light of human experience".<sup>11</sup> The drawing of this inference proceeds on an assumption as to how a responsible decision-maker can ordinarily be expected to seek to discharge such a statutory requirement. And, like any other inference of fact, the inference to be drawn from an omission to mention an essential ground for the decision – namely, that the ground was overlooked – might be supported or contradicted by other indications in the evidence.

11 Important in the present case is the gaping absence from the publicly notified record of the purported decision of the delegate Minister to grant the water extraction licence of any reference to the limitation set by s 60(3) read with

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8 Compare *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 100 [35].

9 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 224 [40].

10 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [69]. See also *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 328 [12].

11 *G v H* (1994) 181 CLR 387 at 390.

s 60(4)(b) on the decision-making authority conferred by s 30(3)(a)(ii) of the *Water Act* and any reference to the delegate Minister having formed the requisite state of satisfaction that special circumstances existed which justified the grant of the water extraction licence for the longer period of 30 years. The inference to be drawn from those omissions from the decision-making record is that the delegate Minister did not consider formation of a state of satisfaction as to the existence of special circumstances which justified the grant of the water extraction licence for the longer period of 30 years to have been essential to the making of the decision. Although potentially capable of being balanced or outweighed by countervailing inferences drawn from other evidence, that inference is only reinforced by the further evidence as to the sequencing of events, the contents of the Ministerial briefings to the delegate Minister and the contents of the report containing the opinion of the Review Panel. As revealed by that further evidence, the limitation on decision-making authority set by s 60(3) read with s 60(4)(b): was introduced by legislative amendment<sup>12</sup> after the making of the decision by the Controller which was under review and shortly before the report of the Review Panel; was not addressed in the report of the Review Panel; and was not explained or even referred to in the Ministerial briefings.

12        The appropriate conclusion to be drawn on the balance of probabilities in the totality of those circumstances is that the applicable limitation on decision-making authority was simply overlooked in the decision-making process. The delegate Minister was not apprised of the limitation, did not address herself to determining the existence of special circumstances which justified the grant of the water extraction licence for the longer period of 30 years and did not form a state of satisfaction that such special circumstances existed.

13        The failure of the delegate Minister to form the requisite state of satisfaction that special circumstances existed was of itself a failure to comply with the limitation set by s 60(3) read with s 60(4)(b) on the decision-making authority conferred by s 30(3)(a)(ii) of the *Water Act*, such as to render the delegate Minister's decision to grant the water extraction licence "in law ... no decision at all".<sup>13</sup> That must be so "irrespective of any effect that the [failure] might or might not have had on the decision that was made in fact".<sup>14</sup> The delegate Minister's error

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12    *Statute Law Amendment (Territory Economic Reconstruction) Act 2021* (NT).

13    *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 325 [2], quoting *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 616 [53].

14    *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 327 [6].

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was by its nature "jurisdictional" without the need to engage in any distinct inquiry into the "materiality" of the error.<sup>15</sup>

14 In relation to the remaining grounds of appeal to this Court, I agree with the reasoning of Gordon, Steward, Gleeson and Beech-Jones JJ to the conclusions that the delegate Minister did not fail to take account of a mandatory relevant consideration but did fail to afford MAC procedural fairness.

15 Having concluded that the purported decision to grant the water extraction licence under s 30(3)(a)(ii) of the *Water Act* contravened express and implied limitations on the decision-making authority conferred on the delegate Minister in the conduct of the review of the earlier decision of the Controller, the purported legal effect of the decision was appropriate to be quashed by an order in the nature of certiorari<sup>16</sup> and performance of the uncompleted statutory task of reviewing the earlier decision of the Controller was appropriate to be compelled by an order in the nature of mandamus.<sup>17</sup> It follows that I agree with the orders proposed by Gordon, Steward, Gleeson and Beech-Jones JJ.

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15 Compare *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 328 [12]; *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 522 [33].

16 *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at 492 [26].

17 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242.

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16 GORDON, STEWARD, GLEESON AND BEECH-JONES JJ. On 15 November 2021, the first respondent, the Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment ("the delegate Minister"), granted the second respondent, Fortune Agribusiness Funds Management Pty Ltd ("Fortune"), a 30-year licence to extract groundwater for the purposes of irrigating a property known as "Singleton Station" ("the water extraction licence") under the *Water Act 1992* (NT). The appellant, the Mpwerempwer Aboriginal Corporation RNTBC ("MAC"), is the prescribed body corporate for the native title holders of the Singleton Station pastoral lease.<sup>18</sup>

17 MAC sought judicial review of the delegate Minister's decision to grant the water extraction licence. Following the dismissal of both that proceeding and an appeal to the Court of Appeal of the Supreme Court of the Northern Territory of Australia, in this Court MAC relied on three grounds. The first ground was, in substance, that the grant of the water extraction licence was precluded by s 60(3) of the *Water Act* which only permits a licence to be granted for a period exceeding ten years if, amongst other matters, the delegate Minister was satisfied under s 60(4)(b) that special circumstances justified the grant of a licence for a longer period. MAC contended that the delegate Minister did not form an opinion to that effect and in that respect failed to discharge her statutory function. The second ground was that the delegate Minister failed to consider a mandatory relevant consideration, namely the protection of Aboriginal cultural values in a manner that was sufficient to comply with s 90(1) of the *Water Act*. The third ground was that, in making the decision, the delegate Minister failed to accord MAC procedural fairness by not providing MAC with notice that a particular term ("CP 10") would be attached to the water extraction licence, as was done for Fortune.

18 For the reasons given below, the first and third grounds should be upheld, the water extraction licence should be quashed, and the matter remitted to the Minister administering the *Water Act*<sup>19</sup> to be decided according to law.

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18 See *Native Title Act 1993* (Cth), s 57(2) and *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory* [2010] FCA 911, as varied by Order of Charlesworth J in *Mpwerempwer Aboriginal Corporation RNTBC v Northern Territory* (Federal Court of Australia, NTD42/2018, 19 August 2020).

19 *Interpretation Act 1978* (NT), ss 19(2)(a)(i) and 19(4). The *Administrative Arrangements Order 2025* (NT) which commenced on 24 October 2025 allocates the administration of the *Water Act 1992* (NT) to the Minister for Water Resources: Sch 2.

## The statutory scheme

19 The *Water Act* is an "[a]n Act to provide for the investigation, allocation, use, control, protection, management and administration of water resources, and for related purposes".<sup>20</sup> In the Northern Territory, property in and the rights to the "use, flow and control" of all water, including groundwater, is vested in the Territory,<sup>21</sup> although there are exceptions, such as the taking of water for domestic purposes.<sup>22</sup> It is a criminal offence to take water from a bore unless authorised by the *Water Act* to do so.<sup>23</sup> The Minister or the Controller of Water Resources ("the Controller")<sup>24</sup> may exercise certain powers conferred upon each of them by the *Water Act*.

20 One of those powers, reposed in the Controller, and conferred by s 60 of the *Water Act*, is the ability to grant a licence to take groundwater from a bore. When the delegate Minister granted Fortune the water extraction licence on 15 November 2021, s 60 of the *Water Act* was in the following terms:

- "(1) Subject to this Act, the Controller may, on the Controller's own initiative or on application in the prescribed manner and form, grant to a person a licence in the prescribed form to take water from a bore.
- (2) A licence may be granted under subsection (1) subject to such terms and conditions, if any, as are specified in the licence document.
- (3) Subject to subsection (4), a licence shall be granted for such period, not exceeding 10 years, as is specified in the licence document.
- (4) A licence may be granted under subsection (1) for a period exceeding 10 years if:

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20 *Water Act 1992* (NT), long title.

21 *Water Act*, s 9.

22 *Water Act*, s 10.

23 *Water Act*, s 59.

24 *Water Act*, s 18.

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- (a) the licence is for a purpose, or meets criteria, that the Minister, by *Gazette* notice, specifies as justifying a longer period; or
- (b) the Controller is satisfied that special circumstances justify the longer period."

21 Section 60(3) and (4) are important. Section 60(3) precludes the grant of a licence for a period exceeding ten years. Section 60(4) creates an exception to the prohibition in s 60(3), conferring a power to grant a licence which exceeds a term of ten years where the criteria in para (a) or para (b) are satisfied. Here, Fortune wished to secure, and was in fact granted, a licence that greatly exceeded ten years.<sup>25</sup>

22 Significantly, for the reasons explained below, on 29 September 2021, just before the delegate Minister granted the water extraction licence to Fortune, s 60(4) was amended to be in the above terms. Section 60(4) had previously provided as follows:

"The Controller may, where in the opinion of the Minister there are special circumstances that justify so granting the licence, grant a licence for such period exceeding 10 years as is specified in the licence document."

23 For the purposes of this appeal, the relevant difference between the old s 60(4) and the new s 60(4)(b) is that previously the need for any opinion concerning the existence of special circumstances, which justify a licence with a term longer than ten years, was solely a matter for the Minister's satisfaction; following the amendment, it was a matter for the decision maker, namely the Controller (or the Minister in the course of any review of the Controller's grant of a water extraction licence).

24 Part 6A of the *Water Act* prescribes the process which is to be followed when a "water extraction licence decision" is made.<sup>26</sup> Subject to certain exceptions,

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25 There was no suggestion that the Minister had issued a Gazette notice under s 60(4)(a).

26 *Water Act*, s 60(1).

which are irrelevant for the purposes of this appeal, a decision about an application under s 60 is a "water extraction licence decision", to which Part 6A applies.<sup>27</sup>

25 Following receipt of an application, the first step is that the Controller must publish in a newspaper in the relevant locality a notice of the intention to make a water extraction licence decision which includes prescribed details in relation to the proposed licence.<sup>28</sup> The Controller must give a copy of this notice to the owners of the land immediately adjacent to the land from which the water will be taken and the land on which it will be used, and must also use reasonable efforts to identify, and provide a copy of the notice to, any occupiers of that immediately adjacent land.<sup>29</sup> The notice must include an invitation to make written comments within 20 business days.<sup>30</sup>

26 Section 90(1) provides that "in making a water extraction licence decision, the Controller must take into account any of the following factors that are relevant to the decision", including: any "water allocation plan" applying to the area in question;<sup>31</sup> and other factors the Controller considers should be taken into account or is otherwise required by law to consider.<sup>32</sup> Pursuant to s 22B of the *Water Act*, the Minister may declare a water allocation plan for a water control district and thereafter, for the duration of the plan, water resource management must accord with that plan.

27 After the end of the period allowed for written comments, the Controller must as soon as practicable make a decision either to grant or not to grant a licence.<sup>33</sup> In making that decision, the Controller must take into account all of the comments received in accordance with the *Water Act*.<sup>34</sup> A copy of the "full

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27 *Water Act*, s 71A(1)-(2)(a). A licence to take water from a bore granted under s 60 is a "water extraction licence": s 4(1).

28 *Water Act*, ss 71A(2) and 71B(2), (3).

29 *Water Act*, s 71B(6), (7).

30 *Water Act*, s 71B(4).

31 *Water Act*, s 90(1)(ab).

32 *Water Act*, s 90(1)(k).

33 *Water Act*, s 71C(1).

34 *Water Act*, s 71C(2).

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decision" must be made available to the public, and must include the reasons for the decision and the way in which the Controller has taken into account the comments received and any relevant factors mentioned in s 90(1) of the *Water Act*.<sup>35</sup>

28 At the relevant time, s 30 of the *Water Act* also provided that a person aggrieved, relevantly, by certain decisions made under the *Water Act*, including a decision pursuant to s 60, may apply to the Minister to review the matter.<sup>36</sup> In the case of a decision made by the Controller, amongst other things, the Minister may uphold the decision, or substitute for that decision another decision, which in the opinion of the Minister the Controller should have made.<sup>37</sup> The Minister may refer the matter to the Review Panel to seek its advice as to what action the Minister should take.<sup>38</sup> After the Review Panel has advised the Minister, the Minister must then take such action to uphold, or substitute a decision for, the Controller's decision as the Minister thinks fit.<sup>39</sup> There is no dispute that a review conducted under s 30 is a merits review and the Minister "stands in the shoes" of the Controller in making a decision under s 30(3).

29 Where the Minister decides to substitute the Controller's decision with the Minister's own decision, the Controller must publish a notice of this in the same newspaper or newspapers in which the original decision was published.<sup>40</sup> The notice must include a brief statement of the reasons for the review decision and must advise where a person may read or obtain a copy of the "full review decision".<sup>41</sup> The review decision must include both the reasons for the decision and the way in which the Minister or Controller has taken into account the comments

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35 *Water Act*, s 71C(3).

36 *Water Act*, s 30(1).

37 *Water Act*, s 30(3)(a)(i) and (ii).

38 *Water Act*, s 30(3)(b).

39 *Water Act*, s 30(4).

40 *Water Act*, s 71E(2).

41 *Water Act*, s 71E(3).

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previously received by the Controller in accordance with the *Water Act* and any relevant factors mentioned in s 90(1) of the *Water Act*.<sup>42</sup>

- 30 Three observations may be made about the foregoing legislative regime. First, in the Northern Territory water resources are an important publicly owned asset. Secondly, in making decisions about that resource, the *Water Act* requires consideration of comments received from the public both before a licence is granted and at the review stage. Thirdly, the *Water Act* requires the giving of published reasons which explain how a decision to grant, or not to grant, a licence was made, and which expressly address any public comments received and any relevant factors mentioned in s 90(1) of the *Water Act*.

## Facts

### *The parties*

- 31 Fortune is the lessee of a pastoral lease at Singleton Station. Singleton Station is situated in the Western Davenport region of the Northern Territory, approximately 380 km north of Alice Springs and 120 km south of Tennant Creek. Fortune sought a 30-year water extraction licence to extract up to 40,000 ML (40 gigalitres) of water each year for its proposed irrigated horticulture business.<sup>43</sup> It wishes to grow, amongst other foods, mandarins, table grapes and avocados.
- 32 The traditional owners, and native title holders, of Singleton Station are the Kaytetye people, and members of four landholding groups: Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen. MAC is the prescribed body corporate for these native title holders. They hold non-exclusive rights over Singleton Station which include, amongst other rights, the right to take and use the natural water resources, to access, maintain and protect places and areas of importance on or in waters, and to engage in cultural activities.<sup>44</sup>

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42 *Water Act*, s 71E(4).

43 One gigalitre of water is equivalent to 400 Olympic-sized swimming pools.

44 See the native title determination at *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory* [2010] FCA 911, as varied by Order of Charlesworth J in *Mpwerempwer Aboriginal Corporation RNTBC v Northern Territory* (Federal Court of Australia, NTD42/2018, 19 August 2020).

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### *The Davenport Water Plan*

33 In December 2018, the Minister for Tourism and Culture, acting for the Minister for Environment and Natural Resources, declared the "Western Davenport Water Allocation Plan" ("Davenport Water Plan") to be a water allocation plan for the purposes of s 22B of the *Water Act*. This plan covers an area that includes Singleton Station. One of the objectives of the Davenport Water Plan is to "protect Aboriginal cultural values associated with water and provide access to water resources to support local Aboriginal economic development". The Davenport Water Plan, under the heading "8.2.2 Aboriginal cultural values", sets out certain requirements for modelling to be undertaken to determine whether groundwater extraction might unacceptably impact on groundwater dependent Aboriginal cultural values. Amongst other things, the Davenport Water Plan provides that the Central Land Council ("the CLC") should maintain a record of relevant places and cultural values reliant on groundwater access, and may update the record of cultural values from time to time. One of the Davenport Water Plan's implementation activities includes a "[c]ultural values protection program" to be completed by the Department in partnership with traditional owners and with the assistance of the CLC.

### *The grant of a water extraction licence by the Controller*

34 On 18 August 2020, Fortune applied to the Controller for a licence to take groundwater at Singleton Station for a term of 30 years. In a Ministerial briefing concerning the existence of "special circumstances" which might justify such a term for the purposes of former s 60(4) of the *Water Act*, the Department of Environment described the project as "possibly the largest volume application in a single water resource by a single entity in Australia".

35 In accordance with former s 60(4) of the *Water Act*, in February 2021 the Minister for Environment provided her opinion to the Controller that she was satisfied that there were "special circumstances" which justified a 30-year term licence. Then, in April 2021, the Controller granted Fortune a water extraction licence with a term of 30 years.

### *Review of the Controller's decision*

36 A number of parties, including MAC, sought review of the Controller's decision pursuant to s 30 of the *Water Act*. Both MAC and the CLC wanted the licence quashed. It was not disputed that MAC was a "person aggrieved by ... [the]

decision".<sup>45</sup> The Minister for Environment referred the matter to the Review Panel pursuant to s 30(3)(b). The CLC, acting on behalf of MAC and various other parties, provided written submissions to the Review Panel, made representations to the Review Panel at the hearing, and provided an "Aboriginal Cultural Values Assessment" prepared by an anthropologist. The CLC, on behalf of MAC, also wrote to the Minister for Environment in June 2021 requesting that the CLC "be provided with an adequate opportunity to comment on all materials that you or the Review Panel will be considering when making a decision".

37 In the Review Panel's report, it summarised the submissions of the CLC and noted that the CLC was concerned about the lack of data concerning the groundwater dependent ecosystems ("GDEs") at Singleton Station. The CLC submitted that before any future application for a water extraction licence could be considered, there needed to be an assessment of the water resource in the area including hydrogeological investigations of the GDEs together with a program of drilling and aquifer testing to obtain spatially distributed data on aquifer properties. The CLC also wanted a comprehensive map and assessment of cultural and biodiversity values of the GDEs produced before any future grant of a water extraction licence. The lack of data was reflected in an assumption made by the anthropologist in making her assessment; the scientific premise of that assessment was that a reduction in groundwater could have significant negative impacts on GDEs. The accuracy of that premise, however, could not be established. The possibility of addressing the need for this additional work to be addressed as a condition of a licence was raised with the CLC but rejected by it in submissions.

38 Meanwhile, on 29 September 2021, the new s 60(4) commenced, which relevantly required that the Controller be satisfied that special circumstances justify a licence term exceeding ten years. As noted, on review, the delegate Minister (and not the Review Panel) was to perform that function.

#### *The Review Panel's report*

39 The Review Panel produced its advisory report in mid-October 2021, shortly after the amendment to s 60(4) had commenced. This report was not available to MAC or the CLC until it was publicly released on 15 November 2021.

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45 *Water Act*, s 30(1).

40 On the issue of the appropriate licence term the Review Panel provided the following advice:<sup>46</sup>

**"Licence period**

81. In making her decision to grant the Licence for 30-years, the Controller sought the opinion of the Minister, *in accordance with section 60(4) of the Water Act*. The Minister affirmed that in her opinion there are special circumstances that justify a 30-year term licence.
82. [Environment Centre NT Incorporated ("ECNT")] submit that the Controller should not have applied her discretion to grant the Licence for a period of 30-years given the scientific uncertainty underpinning the WAP and the risk of serious and irreversible harm.
83. [The CLC, on behalf of MAC,] submits that the Controller should not have granted the Licence for a period greater than 10 years and maintains that the special circumstances referred to by the Minister do not exist in this case and refer to the circumstances included in section 5.2.1 of the *Guideline: Special Circumstances for water extraction terms of up to 30 years*.
84. The 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*.
85. The [Environmental Defenders Office] (on behalf of ECNT) also submit that the Minister's express involvement in informing the Controller's decision around licence term raises concerns about the current matter of the Licence review and submit that the Minister should therefore disqualify herself from the ultimate decision on the ground of apprehended bias. The Panel is not in a position to comment on this matter." (emphasis added)

41 Four points should be noted. First, in a covering letter to the report, the Review Panel emphasised that it was "not equipped nor able to make a determination on whether the decision was in accordance with the law as that ... is

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46 Water Resources Review Panel, *Re: Controller's Decision to Grant Groundwater Extraction Licence WDPCC10000* (Advice to the Minister, 14 October 2021) at 17-18 [81]-[85] (footnote omitted).

a matter of legal opinion". Secondly, while the Review Panel report does refer to s 60(4), these references were references to the old version of s 60(4) (in force prior to 29 September 2021), under which it was for the Minister (not the Controller) to express an opinion about the existence of special circumstances. There is nothing to suggest the Review Panel was aware of the change in the law prior to handing down its report. Thirdly, nowhere in the Review Panel's report would it appear that the Review Panel considered that it had responsibility to advise upon the correctness of the Minister for Environment's previous determination that special circumstances existed which justified a longer licence; given that the Review Panel's task was to review the decision of the Controller, and not of the Minister, that approach would have been consistent with the state of the law before s 60(4) was amended. Fourthly, and again consistently with the former s 60(4), the Review Panel did not recommend that the licence be for 30 years; it merely considered that a licence in excess of ten years was appropriate.

42 Consistently with the lack of data before it, the Review Panel was not able to form a view on the significance of the information presented in the anthropologist's assessment, but was of the opinion that a comprehensive cultural impact assessment was required prior to the extraction of any significant volumes of water at Singleton Station. The Review Panel advised that this could be addressed as a condition of the licence. It proposed the grant of a new licence with what it described as new "conditions precedent" (whether the proposed conditions were in fact conditions precedent or conditions subsequent need not be resolved). These proposed conditions precedent included a requirement that more data about the water resources at Singleton Station be obtained and a "cultural values impact assessment" be produced. Who was to undertake this work was not specified.

43 In a subsequent email sent by a Ministerial advisor to the Chair of the Review Panel, clarification was sought as to who was to be responsible for undertaking the cultural values impact assessment. The Chair replied to say that it was either up to the relevant Department to undertake the necessary assessment (in partnership with the CLC), or that it was up to Fortune to "facilitate that work". The Chair explained that it was the Review Panel's recommendation that Fortune "progress" activities as they relate to Singleton Station. If Fortune were to take responsibility for the cultural values impact assessment, the Chair noted that the work would need to be undertaken by "suitable", "acceptable" persons to both the Department and the CLC.

*A new proposed condition precedent*

44 On 10 November 2021 the Department sent a number of proposed new conditions "precedent" to the grant of a licence to Fortune, which it noted "may

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adversely impact Fortune". Fortune was given two days to respond. One of the proposed new conditions, labelled "CP 10", was in the following terms:

"The licence holder must develop and submit to the Controller a groundwater dependant Aboriginal cultural values impact assessment. The assessment must:

- (a) be prepared by a suitably qualified professional;
- (b) identify, map and document (as appropriate) the cultural values of Aboriginal people that will be impacted by groundwater extraction under this licence;
- (c) identify reference points to be used in modelling the impacts of groundwater extraction under this licence on the identified Aboriginal cultural values; and
- (d) specify monitoring parameters, trigger values and limits for the reference points which can be used to initiate actions under an adaptive management framework."

45 Four observations may be made about CP 10. First, it identified that Fortune, and not the Department and the CLC, was to develop and submit to the Controller the Aboriginal cultural values impact assessment. Secondly, Fortune agreed to CP 10 (and provided comments in relation to certain other proposed conditions) within two days. Thirdly, and importantly, the terms of CP 10 were not sent to MAC or the CLC until after the water extraction licence was issued. As it happens the water extraction licence was subsequently issued with CP 10 as one of its terms. Fourthly, the general subject matter of CP 10 was clearly related to that part of the submissions made by the CLC to the Review Panel concerning the impact of the water extraction licence on cultural and biodiversity values.<sup>47</sup>

46 During the course of argument in this Court, Senior Counsel for MAC contended that whilst MAC had been aware of the possibility that the completion of a cultural values impact assessment might be made a term of the water extraction licence, it had no prior notice that Fortune alone would be given responsibility for completing this task (as distinct from the Department or the CLC). That contention was not disputed by either the delegate Minister or Fortune.

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47 See above at [37].

*The material before the delegate Minister*

47 The day before Fortune communicated its acceptance of CP 10, the Minister for Environment delegated her powers to uphold or to substitute a decision for the Controller's decision to the delegate Minister under s 19 of the *Water Act*. Significantly, and as explained below, if the delegate Minister were to decide to uphold the Controller's decision, or substitute for that decision another decision that involved the grant of a licence for a period exceeding ten years, because the new s 60(4)(b) now applied, this would require the delegate Minister to determine for herself whether special circumstances existed that justified a water extraction licence for a term longer than ten years.

48 The next day, on the afternoon of Friday 12 November 2021, an Executive Officer in the Department of Environment, Parks and Water Security sent two Ministerial briefings to the delegate Minister. In aggregate, they exceeded 1,660 pages and included, amongst other things, the submissions made to the Review Panel, including the Aboriginal Cultural Values Assessment, as well as the report of the Review Panel. Two observations may be made about the Ministerial briefings. First, whilst the Ministerial briefings annexed or otherwise referred to some of the provisions of the *Water Act*, they did not annex or refer to the terms of either the old or the new s 60(4). Secondly, the Ministerial briefings provided the delegate Minister with four options, namely: to uphold the Controller's decision; to substitute a decision based on the recommendation of the Review Panel; to substitute a decision to refuse to grant the water extraction licence; or to proceed on some other basis. There was no reference in the Ministerial briefings to any need for the delegate Minister to determine whether special circumstances existed which justified a water extraction licence with a term of 30 years, or to the fact that in exercising a power to substitute the decision of the Controller, this was a matter that the delegate Minister had to be satisfied about if the licence was to be for a term that exceeded ten years. The phrase "special circumstances" was not mentioned in the body of the Ministerial briefings.

*The delegate Minister's decision*

49 On 15 November 2021, less than one business day after receipt of the Ministerial briefings, the delegate Minister decided to grant the water extraction licence to Fortune for a term of 30 years. The licence contained CP 10, as well as some other additional terms. Reasons were given. Under the heading "Decision", the delegate Minister stated that she had "taken into account" the views of the Review Panel, the submissions made to it, "and the other material before [her]". The delegate Minister then stated that she had determined "to accept the conclusions of the Review Panel for the reasons it has given on each of the issues raised", save for one exception which is not material to this appeal.

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50 On the issue of the term of the proposed water extraction licence, the delegate Minister noted the views of the Review Panel, as follows:<sup>48</sup>

"Concerns were raised by Reviewing Persons regarding the 30 year tenure of the licence.

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.

The Reviewing Parties also raised concern regarding Minister Lawler, as Minister for Environment, providing her opinion that there were *special circumstances* that justified the Controller granting the licence for a period of 30 years, and Minister Lawler's ability to make a decision under section 30(4) of the Act, citing apprehended bias. The Review Panel was unable to comment on this matter." (emphasis added)

51 However, the reasons of the delegate Minister made no reference to any need for her to be satisfied that there existed special circumstances that justified a term of 30 years, nor is there any reference in those reasons to s 60(4) and its requirements. As a result, the reasons of the delegate Minister disclose no findings about the issue of special circumstances, or whether the term of 30 years was justified.

52 On the issue of Aboriginal cultural values, the delegate Minister stated that she considered the issues raised by this matter, and then said, following a detailed summary of the Review Panel's conclusions on these issues, that she accepted the views of the Review Panel "in that regard". She then stated that "[f]or the reasons the Review Panel has given" she would add new condition CP 10. She also determined to make consequential changes to two other conditions precedent "to capture the identified Aboriginal cultural values".

### **Procedural history**

53 MAC sought judicial review in the Supreme Court of the Northern Territory of Australia. It relied on nine grounds to justify the quashing of the licence. It is not necessary to set those out. The primary judge dismissed all of the grounds and decided, amongst other reasons, that the delegate Minister's decision was made correctly in accordance with former s 60(4) which had been in force when the

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48 See above at [40].

Controller's decision was made.<sup>49</sup> On appeal, the Court of Appeal was of the view that the primary judge had wrongly applied the former s 60(4).<sup>50</sup> However, applying the version of s 60(4) in force when the delegate Minister's decision was made, the Court of Appeal inferred that the delegate Minister had in any event found sufficient special circumstances to justify a 30-year term for the licence.<sup>51</sup> The Court otherwise dismissed MAC's other grounds of appeal.

### **Ground one – discharge of the statutory task**

54 It was not in dispute that the delegate Minister's statutory task, in deciding to substitute for the decision that the Controller had made the one which the Controller should have made for the purposes of s 30(3)(a)(ii), also included being satisfied, for the purposes of s 60(4)(b), that special circumstances justified the grant of a licence with a term that exceeded ten years. That is because when the delegate Minister made her decision (on 15 November 2021), s 60(4)(b) conferred upon the Controller that task. For the purposes of exercising the power of review conferred by s 30(3)(a)(ii), that then became a task that the delegate Minister (standing in the shoes of the Controller) was required to address, if the licence to be granted was to extend beyond ten years.

55 In particular, it was never contended that the opinion formed by the Minister for Environment in February 2021 under former s 60(4) could be taken as somehow satisfying s 60(4)(b) on the review of the decision to grant the water extraction licence. Leaving aside any debate about the identity of the Minister who concluded that there were special circumstances under former s 60(4) and the delegate Minister, and the differences between former s 60(4) and s 60(4)(b), by the time the delegate Minister came to decide the application for review further submissions had been received, and they were required to be considered before any opinion under s 60(4)(b) could be formed.

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49 *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing* (2024) 384 FLR 234 at 301 [236].

50 *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* (2025) 395 FLR 125 at 144 [64].

51 *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* (2025) 395 FLR 125 at 151 [94]-[95].

*MAC's contentions*

56 MAC criticised the Court of Appeal's reliance, in drawing an inference from the reasons of the delegate Minister that she was satisfied special circumstances existed justifying a 30-year licence, upon the following passage from the reasoning of Kiefel CJ, Gageler, Keane and Gleeson JJ in *MZAPC v Minister for Immigration and Border Protection*:<sup>52</sup>

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

57 MAC essentially relied on two contentions. The first invoked the language of s 71E(3), which juxtaposes a "brief statement" of the reasons for the review decision with the "full review decision", and which requires the Minister or Controller (as the case may be) to give reasons for the decision, which include how comments from the public as well as the relevant factors mentioned in s 90(1) were taken into account. This was said to be the expression of a legislative intent that the court should determine ground one by reference to the reasons proffered by the delegate Minister, and to nothing else. Because those reasons do not disclose any analysis of the requirements of s 60(4), MAC contended that it followed that the delegate Minister had failed to apply that provision.

58 MAC's second contention was that where an Act of Parliament makes the formation of a state of satisfaction concerning matters of policy, about which reasonable minds might differ, a pre-condition of an exercise of statutory power, and there is an obligation to give reasons, which reasons do not disclose the formation of that state of mind, a court cannot infer that the pre-condition was satisfied. To do so would be to trespass into those matters of policy and involve the court substituting its opinion for that of the decision maker. MAC relied upon the following passage from the reasons of this Court in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*:<sup>53</sup>

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

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52 (2021) 273 CLR 506 at 524 [38] (footnote omitted).

53 (2024) 280 CLR 321 at 333 [29] (footnotes omitted).

*The delegate Minister's contentions*

59 In contrast, the delegate Minister submitted that the Court of Appeal had not "inferred" that the delegate Minister had addressed the need for special circumstances; rather, the Court of Appeal had merely "construed" the delegate Minister's reasons and concluded that, read properly, they revealed that the delegate Minister had addressed the statutory task. The first respondent highlighted that the delegate Minister would have been aware of the state of satisfaction reached by the original Minister about special circumstances, would have seen references in the Review Panel's report to the issue about the term of the licence and to submissions made to that Review Panel that special circumstances did not exist, and finally the delegate Minister knew that the licence was for a 30-year term. The delegate Minister relied upon the following passage from the reasons of Toohey J, sitting as a judge of the Federal Court of Australia, in *Turner v Minister for Immigration and Ethnic Affairs*:<sup>54</sup>

"the omission of an express reference to some consideration will not lead inevitably 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."

*Difficulties with the foregoing submissions*

60 The function of the Court is to determine whether the delegate Minister exercised her statutory function fully and in accordance with the law. In that respect, the observation of Toohey J is entirely correct and well established. But so too is the proposition that a failure to advert to a relevant matter may justify an inference that it has failed to be taken into account.<sup>55</sup> The same also applies to a failure to expressly state that a requisite state of satisfaction has been reached.

61 Determining whether a Minister has exercised that Minister's statutory function fully and in accordance with the law is a question of fact, as Kiefel CJ, Gageler, Keane and Gleeson JJ in *MZAPC* confirmed. It requires the Court to consider all of the material that bears upon that issue, including any reasons given, the materials before the decision maker, the applicable legal regime, and the relevant context, including historical context where relevant.

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54 (1981) 35 ALR 388 at 392.

55 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [69].

62 In that respect, MAC's contention that the Court is limited to the delegate Minister's reasons, and nothing else, must be rejected. That contention was not supported by the language of s 71E of the *Water Act*; that provision does not by its terms limit in any way the material that a court may consider on a judicial review application.

63 Further, the distinction sought to be drawn by the delegate Minister between inferences and the construction of reasons is, in this context, unrealistic and unhelpful. The delegate Minister ultimately accepted that there was no sharp distinction between the two concepts.

64 Moreover, the contention made by MAC in reliance upon *LPDT* is too prescriptive. A court cannot, of course, cure an omission in the reasons of a decision maker by supplying new reasons;<sup>56</sup> that would constitute impermissible merits review.<sup>57</sup> But the drawing of an inference that a matter has not been considered or that a required state of satisfaction has not been reached, simply because it has not been mentioned in the available reasons, is not "mandatory".<sup>58</sup> The reasons of the decision maker, read in context, may support the drawing of an inference, on the balance of probabilities, that a matter, although not expressly adverted to, must be considered to have been taken into account or addressed. The usual example is when it can be inferred that a piece of evidence or argument was not considered by the decision maker to be sufficiently material to merit reference to that matter in the reasons.<sup>59</sup> No different rule applies because the subject matter of the decision making concerns matters of policy, or because the reaching of a state of satisfaction is a condition for an application of such statutory power.

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56 *FTZK v Minister for Immigration and Border Protection* (2014) 88 ALJR 754 at 767-768 [67]; 310 ALR 1 at 18; *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 288 FCR 565 at 595 [130].

57 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

58 *SZTMD v Minister for Immigration and Border Protection* (2015) 150 ALD 34 at 38 [19].

59 *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at 604 [46]; *Minister for Home Affairs v Ogawa* (2019) 269 FCR 536 at 558 [103].

*Failure to discharge the statutory function*

65 Whether a decision maker has failed to discharge their statutory function can only be answered by a full consideration of all of the materials that bear upon that issue, including reasons where they have been furnished, and by the drawing of inferences concerning the decision-making process from this evidence. As Dixon J observed in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*:<sup>60</sup>

"If [the decision maker] does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law."

66 MAC, as the party seeking to establish jurisdictional error, bears the onus of proof in this respect.<sup>61</sup>

67 Here, the materials that bear upon how the delegate Minister decided to grant the water extraction licence show that she "failed in the discharge of [her] exact function according to law" by failing to "address [herself] to the question"<sup>62</sup> posed by s 60(4)(b): namely, whether "special circumstances" existed and whether those special circumstances justified the grant of the licence for a period exceeding ten years (in this case, 30 years). The reasons, read fairly and "not ... construed

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60 (1949) 78 CLR 353 at 360.

61 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 327-328 [9]-[10], [13].

62 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.

minutely and finely with an eye keenly attuned to the perception of error",<sup>63</sup> show that the delegate Minister did not address herself to the question posed by s 60(4)(b).

68 An analysis of the delegate Minister's reasons themselves supports that conclusion. First, the reasons make no reference to the terms of s 60(4)(b) or the matters that paragraph required the delegate Minister to be satisfied of, although the reasons do refer to other provisions of the *Water Act*. Secondly, the reasons do not identify any "special circumstances". Thirdly, the reasons do not address at all how the circumstances justified a licence with a term which exceeded ten years, specifically 30 years.

69 Relevant contextual materials also support this conclusion. The Review Panel made no determination that "special circumstances" existed or that they justified a licence term of 30 years. It merely referred, as an historical fact, to the earlier opinion of the Minister for Environment under the former s 60(4) that such a term was justified by special circumstances<sup>64</sup> and to the receipt of submissions in opposition to that opinion. It then merely stated that a term greater than ten years was "appropriate for a large-scale development such as that proposed". That does not constitute the identification of special circumstances, or set out how such special circumstances justified the longer term that was sought and was to be granted. Further, the references in the Review Panel's report were references to the old s 60(4) (in force prior to 29 September 2021) and not to the amended s 60(4)(b).<sup>65</sup>

70 Then there are two Ministerial briefings. These did not advise the delegate Minister that if she were to approve the grant of a water extraction licence with a term that exceeded ten years, she would need to identify special circumstances and be satisfied that those special circumstances justified this longer term. No such special circumstances are described in the Ministerial briefings. And whilst the delegate Minister was supplied with some relevant extracts of the *Water Act*, these did not include s 60.

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63 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

64 See above at [35].

65 See above at [41].

71 The delegate Minister contended that it was sufficient, in all the circumstances, for the delegate Minister to have been aware of the Review Panel's views about the term of the proposed licence, and for the delegate Minister's reasons to have disclosed that she had determined to accept the conclusions of the Review Panel for the reasons it had given.

72 With respect, that submission suffers from two flaws. First, for the reasons given above, it cannot be concluded that the Review Panel undertook the task required by s 60(4)(b). Secondly, and in any event, the highly generalised and conclusionary adoption of the work of the Review Panel is no substitute for the delegate Minister's own task of assessing whether special circumstances existed and whether those special circumstances justified a licence with a 30-year term. It is plain from the statutory scheme that Parliament considered that a grant of a licence to exploit the water resources of the Northern Territory for more than ten years was an important issue which would require the particular and active attention of either the Controller or, upon review, the Minister. That did not occur here.

73 The delegate Minister did not reach the state of satisfaction that s 60(4)(b) of the *Water Act* required her to reach as a statutory pre-condition to the exercise of the power to grant a licence for a period exceeding ten years. In doing so, she failed to address herself to the relevant statutory question and so failed to discharge her statutory function according to law. Without that opinion having been formed, a water extraction licence for a period exceeding ten years could not be granted.<sup>66</sup> Ground one is upheld.

**Ground two – alleged failure to take into account a mandatory relevant consideration**

74 There can be little doubt that the factors listed in s 90(1) of the *Water Act*, save for s 90(1)(k) (being a reference to any other factors which the Controller considers should be taken into account), are mandatory considerations when they are relevant. The terms of s 90(1) make that clear: it states that the Controller "must take into account" the relevant factors listed. These included, by reason of s 90(1)(ab), the Davenport Water Plan. Because an objective of that plan is to "[p]rotect Aboriginal cultural values associated with water", it follows that in exercising the power of review the delegate Minister was obliged to take that objective into account. But it is well established that it was for the delegate

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66 The Minister had not issued a Gazette notice under s 60(4)(a).

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Minister to decide how to take this objective into account, and what weight to give to it, unless the *Water Act* dictated otherwise.<sup>67</sup>

75 There can be no doubt that Aboriginal cultural values were taken into account by the delegate Minister. Under a heading "Consideration of Cultural Values", the delegate Minister's reasons contain a summary of the requirements of the Davenport Water Plan's objective concerning those values, as well as a summary of the reasoning of the Review Panel, including its conclusion that it was unable to form its own views on this issue, and its recommendation that a comprehensive cultural values impact assessment was required. The delegate Minister expressed her agreement with that reasoning and then recorded her decision to impose CP 10 to enable the assessment to take place.

#### *MAC's contentions*

76 MAC submitted that this was not enough. As the Review Panel had formed no view about the likely impact on Aboriginal cultural values, MAC argued that it was not sufficient for the delegate Minister merely to adopt that non-conclusion. The delegate Minister, it was said, should have engaged with the Aboriginal Cultural Values Assessment which had been prepared by the anthropologist and which was before both the Review Panel and the delegate Minister. MAC submitted that if this Aboriginal Cultural Values Assessment were correct, it would indicate a likely loss or decline in Aboriginal cultural values and that it was the Minister's task to engage with the salient facts arising from that assessment. However, it was contended that the delegate Minister had not done so, and thus had not engaged in any "active intellectual process" concerning this issue.<sup>68</sup>

77 MAC also submitted that, by imposing CP 10, the delegate Minister effectively postponed the identification of Aboriginal cultural values and consideration of the impacts of the water extraction licence on those values, so that this matter was not taken into account "in making" a water extraction licence decision. MAC accepted that the Controller had the power to impose conditions, including conditions precedent, on a licence granted under s 60(2) of the *Water Act*. However, MAC submitted that the substance of a particular condition might disclose a failure to consider a mandatory matter. In this respect, MAC seeks to distinguish between conditions precedent to the *existence* of a right (which it

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67 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41, 64-65; *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375.

68 *DVO16 v Minister for Immigration and Border Protection* (2021) 273 CLR 177 at 189 [12].

submitted might disclose an error) and conditions precedent to the *performance or exercise* of a right (which it submitted are permissible). In this case, CP 1 of the water extraction licence provided that "[t]he right to take groundwater provided under this licence *will not take effect* (with the result that this licence will expire automatically)" (emphasis added) unless each of the specified conditions precedent, including CP 10, are fulfilled before 31 December 2023. MAC submitted that, by imposing CP 10, the delegate Minister had impermissibly delegated the consideration of the protection of Aboriginal cultural values to the Controller to consider at some later date.

*Disposition*

78 In more recent times, this Court has warned against the risk that an inquiry, framed in such terms as an "active intellectual process", gives rise to a risk of impermissible merits review. In *Plaintiff M1/2021 v Minister for Home Affairs*, Kiefel CJ, Keane, Gordon and Steward JJ said:<sup>69</sup>

"Labels like 'active intellectual process' and 'proper, genuine and realistic consideration' must be understood in their proper context. These formulas have the danger of creating 'a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [decision-maker's] decision can be scrutinised'. That is not the correct approach. As Mason J stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, '[t]he limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind'. The court does not substitute its decision for that of an administrative decision-maker."

79 In this case, the reasons of the delegate Minister reveal the extent of her consideration of the considerations said to be relevant to the decision to make on review. Accordingly, whether what the delegate Minister took into account was legally sufficient turns upon whether the *Water Act* obliged the delegate Minister to do more than what appears in the reasons.

80 In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* Brennan J observed:<sup>70</sup>

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69 (2022) 275 CLR 582 at 599-600 [26] (footnotes omitted).

70 (1986) 162 CLR 24 at 55.

"The Court has no jurisdiction to visit the exercise of a statutory power with invalidity for failure to have regard to a particular matter unless some statute expressly or by implication requires the repository of the power to have regard to that matter or to matters of that kind as a condition of exercising the power."

81 As Gleeson CJ and McHugh J observed in *Foster v Minister for Customs and Justice*, the "level of particularity with which a matter is identified" for the purpose of applying the foregoing principle may be significant.<sup>71</sup> In that respect, there is nothing in the terms of s 90(1) of the *Water Act* that obliged the delegate Minister to undertake the tasks suggested by MAC. The language in s 90(1) – "must take into account" – does not mandate the level of particularity that MAC asserts. Instead, other than requiring a listed factor to be "relevant" to the decision on review, the legislature has left the reviewing Minister to determine how that factor is to be addressed in deciding, for the purposes of s 30(3), whether to uphold the decision of the Controller or substitute it with another decision. It follows that the delegate Minister was not obliged by s 90(1)(ab) of the *Water Act* to do more than what is recorded in her reasons.

82 MAC's submission that the imposition of CP 10 amounted to the impermissible deferral of consideration of Aboriginal cultural values should also be rejected. MAC has not identified any textual basis for the restriction on the type of conditions precedent that may be imposed under s 60(2). Further, MAC's submission rests on the language of CP 1, rather than CP 10. If accepted, it would amount to an assertion that the delegate Minister failed to make a decision about whether to grant the water extraction licence at all. However, CP 1 makes it clear that it is "the right to take groundwater" under the water extraction licence that is conditional on satisfaction of the conditions precedent — not the grant of the water extraction licence itself. That is consistent with the statement in CP 1 that the water extraction licence "will expire automatically" if the various conditions precedent are not fulfilled, which must imply that the licence exists. Ground two fails.

83 It is not necessary to separately engage with MAC's submissions in relation to s 90(1)(k). That section could not impose a more onerous requirement to consider the protection of Aboriginal cultural values, or require findings of greater precision, than already required under s 90(1)(ab).

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71 (2000) 200 CLR 442 at 452 [23].

### Ground three – denial of procedural fairness

84 In *Disorganized Developments Pty Ltd v South Australia*<sup>72</sup> and in *Badari v Minister for Territory Families and Urban Housing*<sup>73</sup>, this Court recently re-affirmed the applicable principles concerning when an obligation of procedural fairness arises. In *Badari* the Court said:<sup>74</sup>

"Whether a statutory power is conditioned by a need to afford procedural fairness is a question of statutory construction. There is a strong common law presumption that a statutory power which is capable of having an adverse effect on legally recognised rights or interests of individuals is impliedly conditioned on the observance of procedural fairness. As Kiefel CJ, Gageler, Gleeson and Jagot JJ observed in *Disorganized Developments Pty Ltd v South Australia*:

'Decisions made in the exercise of statutory powers that affect the rights of individuals with respect to property are a category of cases that has a long history of attracting a duty of procedural fairness as a matter of 'fundamental justice', 'long-established doctrine' and a 'deep-rooted principle of the law', subject to displacement by Parliament through express words or necessary implication in the relevant statute.'

85 The parties accepted that the delegate Minister, in deciding to grant the water extraction licence in an exercise of the power under s 30(3)(a)(ii) of the *Water Act*, had an obligation to afford procedural fairness. The issue was the content of that obligation in the circumstances. In particular, was the delegate Minister required to provide MAC with an opportunity to comment on the proposed CP 10, in circumstances where MAC was not previously on notice of the possibility that Fortune (rather than the CLC or the Department) might be responsible for any cultural values assessment?

#### *The parties' respective contentions*

86 MAC's contentions under this ground of appeal were simple. Not having been forewarned that the task of undertaking the necessary Aboriginal cultural

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72 (2023) 280 CLR 515.

73 (2025) 100 ALJR 30; 426 ALR 212.

74 (2025) 100 ALJR 30 at 36 [17]; 426 ALR 212 at 218-219 (footnotes omitted).

Gordon J  
Steward J  
Gleeson J  
Beech-Jones J

30.

values impact assessment was to be allocated to Fortune as a term of the water extraction licence, MAC should have received a similar letter to that sent to Fortune on 10 November 2021 before the licence was issued. Specifically, MAC, like Fortune, should have been invited to comment on the proposed insertion of CP 10 into the licence.

87 In that respect, MAC led evidence before the primary judge: that if it had been given notice of proposed CP 10, the CLC (on behalf of MAC) would have contended that any cultural values impact assessment needed to begin with the identification of the Aboriginal peoples with interests in Singleton Station; that the CLC would be better placed than Fortune to conduct the assessment; that a project proponent ought not be in control of a process that could constrain its project; and that the concept of "cultural values" should be defined, and broadly.

88 Fortune contended otherwise, essentially for three reasons. First, MAC was afforded sufficient procedural fairness when it was permitted to make submissions to the Review Panel. Secondly, Fortune's completion of the cultural values assessment is, under the terms of the licence, to be undertaken by a suitably qualified professional and subject to the approval of the Controller that this condition had been fulfilled. Without such approval groundwater extraction cannot commence. Thirdly, MAC would have an opportunity in the future to make further submissions, especially at the time when approval would be sought before the Controller.

### *Disposition*

89 The statutory scheme governing the review of the Controller's decision, the making of submissions to the Review Panel and the making of the delegate Minister's decision have been described above. Fortune was successful in its application for the water extraction licence. At the review stage, Fortune was at jeopardy of having that licence removed, or the terms and conditions of that licence altered to its detriment. MAC was a "person aggrieved" by the Controller's decision to grant the water extraction licence. MAC sought review of that decision and had provided detailed written submissions. As noted, MAC was the prescribed body corporate for the native title holders and, contrary to Fortune's submissions that CP 10 did not directly affect MAC, their exercise of their non-exclusive native title rights clearly had the potential to be affected by the grant of the water extraction licence for such a large amount of water for such a long period of time. As noted, CP 10 sought to directly address a particular issue of concern raised by MAC on behalf of the native title holders, namely the impact of the grant of the water extraction licence on cultural and biodiversity values.

90 As noted, it was not disputed that the delegate Minister was obliged to afford procedural fairness to both Fortune and MAC. However, given the statutory scheme and their differing interests,<sup>75</sup> it does not follow that the content of that obligation was the same for MAC as it was for Fortune. Hence the relevant inquiry is not, as MAC's submissions appeared to contemplate, whether MAC was entitled to the same opportunity to be heard on the terms of the proposed CP 10 as Fortune, but the proper inquiry is to ask what was the content of the obligation to afford procedural fairness to MAC in so far as it was proposed to address the cultural and biodiversity issues of concern to the native title holders? In particular, was MAC entitled to be afforded a reasonable opportunity to be heard before a condition was imposed in *the form of CP 10* that supposedly responded to those concerns?

91 The answer to that question is "yes". However, that is not because a decision maker is obliged, having heard from affected parties, to give some advance warning of the decision to be made. The following observation of Lord Diplock in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* remains good law:<sup>76</sup>

"the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished."

92 Instead the answer is "yes" because the position is different where a decision maker has reached an adverse conclusion which would not have been obviously open on the known material. In such a case, that adverse conclusion should be disclosed to the person affected before reaching any final outcome. Thus, the following propositions from a judgment of Jenkinson J in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs*<sup>77</sup> were approved by the Full

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75 *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* (2024) 278 CLR 300 at 314 [26].

76 [1975] AC 295 at 369, cited in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 166 [48].

77 (1991) 31 FCR 100 at 108-109.

Court of the Federal Court of Australia in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*:<sup>78</sup>

- "1. The subject of a decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with it ...
2. The subject is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material ..."

93 In this case, the relevant "adverse conclusion" is that MAC's concerns about the cultural and biodiversity impacts of the grant of the water extraction licence were to be addressed by having Fortune and its expert assess those impacts. Whilst MAC was aware before the grant of the licence of the possibility of a cultural values assessment being made a condition in the terms of the licence, it had no knowledge that Fortune would be the entity chosen to undertake that task; that was not a matter that was an "obvious and natural evaluation of" the material known to MAC, especially given the CLC's participation in the Davenport Water Plan, which contemplated that a cultural values assessment would be conducted by the CLC and the Department. To the contrary it was unusual and wholly unexpected that the delegate Minister would adopt such a method for addressing MAC's and the native title holders' concerns. It follows that MAC should have been given a reasonable opportunity to make a submission in respect of the possible imposition of CP 10.

94 It further follows that Fortune's contentions that natural justice was afforded to MAC should be rejected. The appointment of Fortune to arrange for the assessment contemplated by CP 10 to be undertaken was not raised before the Review Panel in the course of preparing its report and so MAC did not have the opportunity to make submissions on that topic to the Review Panel. The fact that the Controller must ultimately approve Fortune's assessment and MAC might have the opportunity to respond does not address the concern that it is Fortune and its expert who will undertake that assessment, identify the Aboriginal cultural values impacts and the modelling reference points, and specify the monitoring parameters, the trigger values and the limits for those reference points. Nor does it address the concern that the CLC should have been appointed to undertake those tasks instead.

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78 (1994) 49 FCR 576 at 591.

33.

95 The third ground must be upheld.

### Relief

96 On the issue of relief three matters should be noted. First, there is an agreement between MAC and the delegate Minister that each bear their own costs. Secondly, the participation of Fortune in this Court was limited to the third ground of appeal. Thirdly, the effect of setting aside the decision is that the application for review of the Controller's decision remains undetermined and no actions can be taken in reliance on the water extraction licence granted by the Controller in the meantime until the decision is re-made by the Minister administering the *Water Act* according to law.

97 The following orders should be made:

1. Appeal allowed.
2. Paragraph 1 of the orders of the Court of Appeal of the Northern Territory of Australia dated 12 May 2025 be set aside and, in lieu thereof, it be ordered that:
  - (a) The appeal is allowed.
  - (b) Paragraph 1 of the orders of the Supreme Court of the Northern Territory of Australia made on 31 January 2024 be set aside and, in lieu thereof, it be ordered that:
    - (i) the licence granted to the second defendant on 15 November 2021 bearing licence number WDCP10358 be quashed; and
    - (ii) the matter be remitted to the Minister administering the *Water Act 1992* (NT) to be decided according to law.
  - (c) The issue of the costs of the proceeding before the Supreme Court be remitted to the primary judge.
3. The second respondent pay the appellant's costs of this appeal limited to the third ground of appeal.
4. The issue of the costs of the appeal before the Court of Appeal of the Northern Territory of Australia be remitted to that Court.

EDELMAN J.

**General concurrence and additional reasons**

98 I agree generally with the reasons of Gordon, Steward, Gleeson and Beech-Jones JJ, subject to the additional remarks below concerning ground one. The context of ground one is the grant of a licence to take water from a bore following what was described by the Chief Executive Officer of the Department of Environment, Parks and Water Security of the Northern Territory as "possibly the largest volume application in a single water resource by a single entity in Australia", amounting to the equivalent of filling 16,000 Olympic-sized swimming pools every year for 30 years. The issue raised by ground one is centrally concerned with the meaning of the words "is satisfied" in the requirement in s 60(4)(b) of the *Water Act 1992* (NT), read with s 30(3)(a)(ii), that the Minister "is satisfied" that special circumstances justify the grant of a licence to take water for a period exceeding ten years.

99 The appellant, Mpwerempwer Aboriginal Corporation RNTBC ("MAC"), expressed the issue as whether the Court of Appeal of the Northern Territory erred in concluding that it could infer two matters establishing satisfaction of special circumstances in the mind of the Minister for Territory Families and Urban Housing ("the delegate Minister") as the delegate of the Minister for Environment. The two matters were a subjective awareness by the delegate Minister of the need to find "special circumstances" and that she "determined" that special circumstances existed. MAC asserted that drawing such inferences was contrary to the principle that "a reviewing court does not rework or rewrite a decision-maker's reasons". MAC submitted that in ascertaining whether the delegate Minister was satisfied that special circumstances existed, it was not permissible for a court to consider any material beyond the delegate Minister's reasons for decision.

100 In many contexts, a "jurisdictional fact" arising from words like "is satisfied" in s 60(4)(b) of the *Water Act* will be concerned with the state of mind of a decision maker. This is particularly so where a decision maker is not required to give reasons for their decision. Even in some cases where reasons are required, the relevance of the requirement of reasons to a provision concerning satisfaction of a decision maker might be merely as evidence from which an inference might be drawn about whether the state of mind of the decision maker was one of satisfaction. Everything depends on the proper interpretation of the particular statutory provisions. There cannot be any universal proposition that the meaning of a statutory requirement that a decision maker be "satisfied" must be concerned with the state of mind of the decision maker, established by direct evidence or by inference. Section 60(4)(b) of the *Water Act* should not be interpreted in that way.

101 Relevantly to s 60(4)(b), the *Water Act* did not merely require the delegate Minister to give reasons in this case for a review decision concerning the

licence for which there was a requirement of satisfaction of special circumstances. The *Water Act* provided for a careful regime of public notice and transparency structured around the required reasons. The *Water Act* required the reasons of the delegate Minister to include the way in which all of the specified mandatory considerations under s 90(1) that were relevant were taken into account.<sup>79</sup> And if the delegate Minister was substituting a decision for the original decision, the *Water Act* required a notice of the decision to be published in the same newspaper or newspapers in which a notice of the original decision was published, with a brief statement of the reasons and advice of where the "full review decision" could be read or obtained.<sup>80</sup>

102        It would be a very curious interpretation of s 60(4)(b) if, despite the transparent regime with public notice of reasons including a requirement that the reasons contain all the specified mandatory considerations which are relevant, the provision were taken to be concerned only with a state of mind of the Minister, which might be unknown to the public and which might ignore or contradict the reasons. It would be somewhat irrational to think that the Northern Territory Parliament contemplated the spectacle of a Minister (or delegate) giving evidence of a thought process that differed from the objective and apparent meaning of the required public reasons, given as part of a careful scheme constructed for reasons of transparency. And it would be wholly irrational to think that such evidence, even if accepted, could be held to establish satisfaction of special circumstances when such satisfaction was not made manifest in those reasons interpreted in the context of all relevant surrounding circumstances. The act of the Northern Territory Parliament in enacting s 60(4)(b) should not be treated so irrationally. The requirement in s 60(4)(b), read with s 30(3)(a)(ii), that the Minister be "satisfied" of special circumstances is a requirement that the Minister manifest satisfaction of special circumstances in the reasons given by the Minister.

103        In this case, the reasons of the delegate Minister, when properly interpreted in light of all background and surrounding circumstances, do not contain any expression or implication of satisfaction of special circumstances by the delegate Minister.

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79    *Water Act*, s 71E(4)(b).

80    *Water Act*, ss 71E(2), 71E(3).

## Two interpretations of "is satisfied"

104 The relevant words of s 60(4)(b) of the *Water Act* at the relevant time were as follows:

"A licence may be granted ... for a period exceeding 10 years if ... the Controller is satisfied that special circumstances justify the longer period."

This provision applies in circumstances including when the Minister (or a delegate<sup>81</sup>) conducts a review under s 30 (of a decision of the Controller under s 60(4)) which could, as it did in this case, lead to the delegate Minister substituting for the Controller's decision "the decision that, in the opinion of the Minister, the Controller should have made in the first instance".<sup>82</sup>

### *The approach of the delegate Minister to the meaning of "is satisfied"*

105 The delegate Minister, as the first respondent before this Court, submitted that the requirement in s 60(4)(b) that the Controller or the Minister be "satisfied" that special circumstances justify a longer period was a requirement of a subjective state of mind. That state of mind might be inferred by evidence of things said and done by the Controller or the Minister. Or it could be the subject of direct evidence. As the Solicitor-General for the Northern Territory submitted, the delegate Minister in this case could have given evidence as to her subjective state of mind.

106 On this meaning of s 60(4)(b), the satisfaction of the Controller or the Minister is a question of fact concerning the existence of a state of mind. The existence of that state of mind is as much a fact as the state of their digestion.<sup>83</sup> The onus would be upon an applicant for judicial review to prove the state of mind of the Controller or the Minister by inference from evidence of things said and done by the Controller or the Minister.<sup>84</sup> The Controller or the Minister could give direct evidence of their state of mind which, if accepted, would preclude such an inference. Indeed, the evidence of the Controller or the Minister might even be that

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81 *Water Act*, s 19.

82 *Water Act*, s 30(3)(a)(ii).

83 *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483. See also *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* (2024) 98 ALJR 1245 at 1266 [113]; 419 ALR 324 at 352.

84 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 524 [38].

a plain and obvious interpretation of written reasons did not accurately reflect the Controller's or the Minister's state of mind at that time.

107 Of course, the "jurisdictional fact"<sup>85</sup> concerning the state of mind of the Controller or the Minister will almost invariably be qualified by statutory implications. For instance, a state of mind expressed as one of "satisfaction" of a matter will impliedly require (amongst other things) the satisfaction to have been reasonably, rationally, and logically formed, by taking into account all mandatory relevant considerations and without taking into account irrelevant considerations.<sup>86</sup>

*The approach of MAC to the meaning of "is satisfied"*

108 The effect of the submission for MAC, although not put precisely in these terms, was that the requirement that the Controller or the Minister be "satisfied" is a requirement that the Controller or the Minister *manifest* satisfaction, expressly or impliedly, from words used in their reasons for decision. Although the satisfaction that must be manifest will be qualified by the same statutory implications as the state of mind considered above, the jurisdictional fact of satisfaction is not concerned with the state of mind of the Controller or the Minister. The jurisdictional fact is a question of interpretation of the reasons for decision of the Controller or the Minister. Although this meaning of "is satisfied" is limited to the interpretation of the reasons for decision provided by the Controller or the Minister, contrary to the submission of MAC there is no basis to conclude that the Northern Territory Parliament intended to take the highly artificial approach of limiting the contextual material to which a court can have regard in the interpretation of those reasons.<sup>87</sup>

109 In some circumstances it will be possible to conclude that, despite a lack of *express* reference, the Controller or the Minister manifested a state of mind of satisfaction of special circumstances or "the reasons for the decision ... [had] taken into account ... any relevant factors mentioned in section 90(1)".<sup>88</sup> As with the interpretation of all utterances, some matters can be implicit or implied in

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85 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651 [130].

86 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 998 [38]; 207 ALR 12 at 20-21.

87 Compare *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 at 538-541 [35]-[45]. See Weir, "*Westfield* 5 years on" (2012) 21 *Australian Property Law Journal* 166.

88 *Water Act*, s 71E(4)(b).

communications, such as where the matters are either so obvious that they are presupposed or where they can be inferred from other matters that are said expressly.

110 On this approach, the onus of proof for whether a decision maker manifested satisfaction in reasons is not entirely an onus upon an applicant. The issue is one of interpretation of the reasons, which involves integrated questions of fact (for which an applicant will generally bear the onus) and law.<sup>89</sup> As Gordon, Steward, Gleeson and Beech-Jones JJ explain,<sup>90</sup> there is no "sharp distinction" that can be drawn between, on the one hand, the exercise of establishing facts or drawing factual inferences and, on the other hand, the interpretation of reasons. The factual aspects that must be proved by an applicant include: the existence of the reasons of the decision maker; the factual context of those reasons; and, within those reasons, the meaning of any common word or expression, including by social use shown from dictionaries or legal corpus linguistics.<sup>91</sup> But the remainder of the interpretative exercise is a task which must be performed by the court and is not the subject of any onus of proof.

#### *The better interpretation*

111 There is no doubt that a statutory requirement that a decision maker be "satisfied" as to some matter is capable of bearing either meaning in context. In some cases, such a statutory requirement has been found, or assumed, to mean a (subjective) state of mind,<sup>92</sup> although this can present difficulties of application where the decision maker is a corporation or other statutory entity<sup>93</sup> so that the "opinion" of the entity could only be subjective and divorced from reasons given by the entity if the "opinion" is derived from the states of mind of a sufficient number of those individuals, or sufficiently important individuals, participating in the decision.<sup>94</sup> In every case, however, the existence and content of a particular "jurisdictional fact" is a matter of statutory interpretation. In relation to s 60(4) of the *Water Act*, there are three powerful indicators that the jurisdictional fact of

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89 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395-396.

90 Reasons at [63].

91 See Tobia, "Testing Ordinary Meaning" (2020) 134 *Harvard Law Review* 726.

92 See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651 [130].

93 *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385 at 403.

94 *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at 294-296 [64]-[70].

"satisfaction" means satisfaction that is manifest in the required reasons for decision, interpreted in light of all background and surrounding circumstances.

112 First, the condition in s 60(4)(b) is an alternative to the condition in s 60(4)(a). The condition in s 60(4)(a), although concerned with the "purpose" of granting the licence, or "criteria" for the grant of the licence, is plainly a condition concerned with the purpose which the Minister *manifests* ("specifies"). Section 60(4)(a) permits the grant of a licence for a period exceeding ten years if "the licence is for a purpose, or meets criteria, that the Minister, by *Gazette* notice, specifies as justifying a longer period".

113 Secondly, the reason that s 60(4)(b) uses the expression "the Controller is satisfied", rather than expressly saying that the Controller "specifies" or manifests satisfaction, is that the detail concerning the manner in which that satisfaction is to occur (by a decision by the Controller or review decision by the Minister) is provided separately in Pt 6A of the *Water Act*. Part 6A includes s 71C(3), which provides that for a decision by the Controller "[a] copy of the full decision must be available to the public and must include the reasons for the decision and the way in which the Controller has taken into account" particular comments about the application and specified mandatory considerations where relevant. Likewise, by ss 71E(1)(a) and 71E(4), a decision by the Minister on review under s 30(3)(a)(ii) in substitution for the original decision "must include the reasons for the decision and the way in which the Minister or Controller has taken into account" the same comments and factors. By ss 71E(2) and 71E(3), notice of the decision of the Minister must be published in the same newspaper or newspapers as the original decision, and the notice must include a brief statement of the reasons for the review decision and advise where a person "may read or obtain a copy of the full review decision".

114 Thirdly, when it replaced the older provision, the purpose of the new s 60(4) (which is the provision in issue) was said to contrast with the older provision which was "based on the Minister's opinion". The new s 60(4) was designed to "create[] additional certainty for industry ... and provide transparency in the decision-making process".<sup>95</sup> It would be very curious if a legislative amendment that was introduced to provide transparency was intended to operate based upon the uncommunicated thoughts of the Controller or the Minister, even when those uncommunicated thoughts contradicted the objective interpretation of the required, and public, reasons.

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95 Northern Territory, Legislative Assembly, *Statute Law Amendment (Territory Economic Reconstruction) Bill 2021*, Explanatory Statement at 45.

## Conclusion

115 The consequence of this interpretation of s 60(4)(b) is that the relevant assessment of whether the "jurisdictional fact" in that provision was met in this case is not concerned with the state of mind of the delegate Minister but is, instead, concerned with the content of the reasons given by the delegate Minister interpreted in light of all background and surrounding circumstances and all of the specified mandatory considerations which are relevant. As Gordon, Steward, Gleeson and Beech-Jones JJ explain, the reasons of the delegate Minister show that the delegate Minister did not address herself to the question posed by s 60(4)(b).<sup>96</sup> For that reason, ground one should be allowed.

116 I agree with the reasons of Gordon, Steward, Gleeson and Beech-Jones JJ for the failure of ground two. Ground two fails because the reasons of the delegate Minister complied with the requirements in ss 90(1)(ab) and 90(1)(k) that the Minister take into account "any water allocation plan applying to the area in question". Hence, the delegate Minister complied with the applicable requirement that the "review decision ... include the reasons for the decision and the way in which the Minister ... has taken into account ... any relevant factors mentioned in section 90(1)".<sup>97</sup>

117 I also agree with the reasons of Gordon, Steward, Gleeson and Beech-Jones JJ for the success of ground three, and with the orders that their Honours propose.

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96 Reasons at [67]-[73].

97 *Water Act*, s 71E(4)(b).

JAGOT J.

### The appeal

118 The appellant, the Mpwerempwer Aboriginal Corporation RNTBC ("MAC"), is a registered native title body corporate and the prescribed body corporate under a determination of native title made in accordance with the provisions of the *Native Title Act 1993* (Cth) applying to land and waters held under Perpetual Pastoral Lease No 1022 in the Northern Territory, known as Singleton Station.<sup>98</sup> The first respondent, the Minister for Territory Families and Urban Housing ("the delegate Minister"), was delegated by the Minister for Environment (as the Minister administering the *Water Act 1992* (NT)) the function of determining an application by the Central Land Council ("the CLC")<sup>99</sup> on behalf of MAC and others for review of a decision of the Controller of Water Resources ("the Controller") under the *Water Act* to grant to the second respondent, Fortune Agribusiness Funds Management Pty Ltd ("Fortune"), a water extraction licence for a period of 30 years subject to conditions.<sup>100</sup> The application for a water extraction licence was described in the decision-making process as "unique" and "possibly the largest volume application in a single water resource by a single entity in Australia". The delegate Minister determined the review application by substituting for the decision of the Controller a grant of a water extraction licence for a period of 30 years, subject to conditions additional to those which the Controller had imposed.

119 MAC applied for judicial review of the delegate Minister's review decision. The primary judge in the Supreme Court of the Northern Territory (Barr J) dismissed MAC's application.<sup>101</sup> The Court of Appeal of the Supreme Court of the Northern Territory (Kelly, Huntingford and Burns JJ) dismissed MAC's appeal from the decision of the primary judge.<sup>102</sup> For the following reasons MAC's appeal must be allowed.

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98 *Native Title Act 1993* (Cth), ss 55, 57(2)-(3), 58, 193, 223-225, 253.

99 The CLC is the "representative body" under the *Native Title Act* (s 203AD) for the area which includes the land comprising Singleton Station.

100 Separate applications were also made by other parties, which were determined together with the CLC's application.

101 *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing* (2024) 384 FLR 234.

102 *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* (2025) 395 FLR 125.

## Ground one

### *The terms of ground one*

120 Ground one is that:

"The [Court of Appeal] erred by holding it was permitted by [*MZAPC v Minister for Immigration and Border Protection*<sup>103</sup>] to infer two critical matters about the [delegate Minister's] state of mind into her statutory reasons for granting the licence, being (a) she was aware of the need to find 'special circumstances' under s 60(4)(b) of the *Water Act* ... ; and (b) she determined there were 'special circumstances', notwithstanding that was contrary to the principle confirmed in [*LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*<sup>104</sup>] that a reviewing court does not rework or rewrite a decision-maker's reasons."

121 In the terms expressed, ground one is needlessly over-complicated. The references to the two cases, *MZAPC v Minister for Immigration and Border Protection* ("MZAPC")<sup>105</sup> and *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* ("LPDT"),<sup>106</sup> concern the question whether an administrative decision-maker's non-compliance with an obligation relating to the making of the decision (such non-compliance having been found) was material to the decision in fact made. The test of materiality is whether, had the decision-maker complied with the obligation, the decision-maker "could realistically" have reached a different decision.<sup>107</sup> Those parts of the reasoning in *MZAPC* and *LPDT* to which reference is made in ground one explain that, in applying that test of materiality, it is first necessary to determine "the facts as to what occurred in the making of the decision ... on the balance of probabilities by inferences drawn from the totality of the evidence".<sup>108</sup> It is then necessary to determine "had there been compliance with a legal obligation that was in fact breached, whether the decision that was in fact made could have been different had the condition been complied with", which "falls to be determined as a matter of reasonable conjecture within the parameters set by the historical facts that have

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103 (2021) 273 CLR 506 at 524 [38].

104 (2024) 280 CLR 321 at 333 [29].

105 (2021) 273 CLR 506 at 524 [38].

106 (2024) 280 CLR 321 at 333 [29].

107 *MZAPC* (2021) 273 CLR 506 at 523 [35].

108 *MZAPC* (2021) 273 CLR 506 at 524 [38].

been determined on the balance of probabilities".<sup>109</sup> In so determining, it is not permissible at either stage of the inquiry to "engage in a review of the merits of the decision, reconstruct a decision-making process, rework the apparent basis upon which a decision has been made, or rewrite the reasons for decision".<sup>110</sup> In other words, unless and until non-compliance is found, no question of materiality arises.

122 The question whether there has been non-compliance with an obligation in relation to the making of an administrative decision is a question of fact to be determined in accordance with the ordinary principles applicable to fact-finding and the drawing of inferences. Those ordinary principles include that, subject to any statutory provision to the contrary, in conventional civil litigation: (i) the party asserting the non-compliance bears the onus of proof; (ii) the applicable standard of proof is on the balance of probabilities; and (iii) facts are to be found and inferences are to be drawn having regard to the whole of the relevant evidence.

*Relevant statutory provisions*

123 At the time the Controller granted the water extraction licence, 8 April 2021, s 60 of the *Water Act* provided that:

- "(1) Subject to this Act, the Controller may, on the Controller's own initiative or on application in the prescribed manner and form, grant to a person a licence in the prescribed form to take water from a bore.
- (2) A licence may be granted under subsection (1) subject to such terms and conditions, if any, as are specified in the licence document.
- (3) Subject to subsection (4), a licence shall be granted for such period, not exceeding 10 years, as is specified in the licence document.
- (4) The Controller may, where in the opinion of the Minister there are special circumstances that justify so granting the licence, grant a licence for such period exceeding 10 years as is specified in the licence document."

124 Section 30, the provision enabling review of a decision of the Controller to grant a water extraction licence (defined in s 4(1) to include a licence under s 60 to take water from a bore), was in these terms:

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109 *MZAPC* (2021) 273 CLR 506 at 524 [38] (footnote omitted).

110 *LPDT* (2024) 280 CLR 321 at 333 [29] (footnote omitted).

"(1) Subject to subsection (2), a person aggrieved by an action or decision under this Act ... of the Controller ... may apply to the Minister to review the matter.

...

(3) Subject to this Act, the Minister may:

(a) in the case of an application against an action or decision of the Controller:

(i) uphold the action or decision;

(ii) substitute for the decision the decision that, in the opinion of the Minister, the Controller should have made in the first instance; or

(iii) refer a matter back to the Controller for reconsideration of the action or decision with or without directions about new matters that the Controller shall take into account in that reconsideration; or

(b) in any case, refer the matter to the Review Panel with the request that it advise the Minister within the time indicated on what action the Minister should take in relation to the matter.

(4) If a matter has been referred under subsection (3)(b) to the Review Panel, the Review Panel must consider it and advise the Minister accordingly and the Minister must take such action under subsection (3)(a)(i) or (ii) as the Minister thinks fit."

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At the time the delegate Minister decided to grant the water extraction licence, 15 November 2021, s 60(4) of the *Water Act* had been amended by s 118 of the *Statute Law Amendment (Territory Economic Reconstruction) Act 2021* (NT). The relevant amendment had commenced on 29 September 2021. That Act did not contain any savings or transitional provision relating to an opinion the Minister formed under s 60(4) before its amendment. As amended, s 60(4) provided for the grant of a water extraction licence in these terms:

"A licence may be granted under subsection (1) for a period exceeding 10 years if:

(a) the licence is for a purpose, or meets criteria, that the Minister, by *Gazette* notice, specifies as justifying a longer period; or

- (b) the Controller is satisfied that special circumstances justify the longer period."

126 The *Water Act* included a provision that applied if "a water extraction licence decision (***the original decision***) is reviewed under section 30 and", relevantly, the Minister decides to make a decision in substitution for the original decision in accordance with s 30(3)(a)(ii) (as occurred in this case). The provision, s 71E, provided, relevantly, that:

- "(2) Within 10 business days after the review decision is made, the Controller must publish a notice of the decision in the same newspaper (or newspapers) in which the original decision was published.
- (3) The notice must include a brief statement:
  - (a) of the reasons for the review decision; and
  - (b) advising where a person may read or obtain a copy of the full review decision.
- (4) The review decision must include the reasons for the decision and the way in which the Minister or Controller has taken into account:
  - (a) the comments made in accordance with section 71B(4); and
  - (b) any relevant factors mentioned in section 90(1)."

### *Deciding ground one*

127 It was common ground that, at the time the delegate Minister granted the water extraction licence, there was no Gazette notice as specified in s 60(4)(a) of the *Water Act* as amended in respect of that licence. Accordingly, for the water extraction licence to be granted for the period of 30 years, the pre-condition in s 60(4)(b) had to be satisfied ("the Controller is satisfied that special circumstances justify the longer period"). Because the delegate Minister was exercising power on review under s 30(3)(a)(ii), to substitute for the Controller's decision "the decision that, in the opinion of the Minister, the Controller should have made in the first instance", the pre-condition in s 60(4)(b) applied to that exercise of power by the delegate Minister.<sup>111</sup>

128 A pre-condition to an exercise of statutory power in the form that s 60(4)(b) takes, by reference to the decision-maker's "satisfaction", establishes a

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<sup>111</sup> See *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2025) 281 CLR 327 at 334-336 [15]-[20].

jurisdictional fact. The consequence is that the fact, being the required state of satisfaction, must exist before the power is available to be exercised.<sup>112</sup> A failure to form a required state of satisfaction, that state of satisfaction being a jurisdictional fact which conditions the availability of a statutory power, is necessarily a material error.

129        MAC contended that, by reason of the terms of s 71E of the *Water Act*, the question whether the delegate Minister had complied with s 60(4)(b) of the *Water Act* was to be answered by reference only to the "full review decision" and no other material. However, s 60(4)(b) does not require any record to be made or notice to be given of the decision-maker having reached the required state of satisfaction. Nothing else in the *Water Act* displaces principle (iii) referred to above, that in conventional civil litigation facts are to be found and inferences are to be drawn having regard to the whole of the relevant evidence. Section 71E(3) does not displace this principle because the delegate Minister's "reasons for the review decision" do not have to include a record that s 60(4) has been satisfied. MAC's contention, that in a court deciding if the statutory pre-condition was satisfied or not, the court must consider only the delegate Minister's reasons for the decision, therefore must be rejected. As explained below, however, this does not mean that the absence of any record in the delegate Minister's reasons for decision of the delegate Minister having formed the state of satisfaction that s 60(4)(b) required is irrelevant to the question of jurisdictional fact to be decided. To the contrary, it is relevant and of importance.

130        For the same reasons, MAC's contention that s 71E of the *Water Act* means that the question whether the delegate Minister formed the state of satisfaction s 60(4)(b) required must be answered on the express terms of the Minister's reasons and without "inference, implication or interpretation" is pitched too high. It is fundamental to a court's fact-finding task that relevant statements be interpreted (including by recourse to ordinary processes of implication) and that inferences be drawn or not drawn therefrom as appropriate.

131        The problem with MAC's contentions in this regard is that they attempt to elevate mere steps in the fact-finding task to questions of principle governing the performance of that task. The contentions must be rejected as a distraction from what was and remains a conventional task of fact-finding in accordance with the three basic principles referred to above. Once those basic principles are applied to the evidence, the inference that must be drawn is that the delegate Minister failed to form the state of satisfaction that s 60(4)(b) of the *Water Act* required before granting the water extraction licence.

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112    eg, *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-654 [130]-[137].

132 Contrary to the submissions for the delegate Minister, MAC's onus of proof does not require MAC to prove that the delegate Minister was not satisfied that there were special circumstances that justified the period of 30 years for the water extraction licence. MAC's onus was to prove only that the delegate Minister did not form the state of satisfaction s 60(4)(b) required.

133 The terms of the amendment to s 60(4) of the *Water Act* are important. Before the amendment, the statutory pre-condition in s 60(4) was that the Minister had to form an opinion that "there are special circumstances that justify so granting the licence ... for such period exceeding 10 years as is specified in the licence document". If the Minister had formed that opinion, the Controller could grant a water extraction licence for a period longer than ten years as specified in the licence. If an aggrieved person had applied for review of such a decision of the Controller and that review application had been determined under s 60(4) of the *Water Act* before its amendment, the review would have been of the "decision of the Controller" under s 30(3)(a) of the *Water Act*. That review would not have extended to a review of the opinion of the Minister under s 60(4). Provided that the Minister on review, in exercising the power to grant a water extraction licence in substitution for the Controller's decision under s 30(3)(a)(ii), did not grant a licence for any period longer than that the subject of the Minister's opinion, the pre-condition in s 60(4) before its amendment would have remained satisfied without any requirement for the Minister to form another opinion under s 60(4) on the review application. As amended, however, s 60(4)(b) required the Controller to form the required state of satisfaction. As that is a function of the Controller, it formed part of the "decision of the Controller" which was subject to review by the delegate Minister. As the delegate Minister granted the water extraction licence in substitution for the Controller's decision under s 30(3)(a)(ii), the delegate Minister also had to exercise the Controller's function under s 60(4)(b) of the *Water Act* before doing so.

134 No part of the documentary evidence relevant to the decision-making process of the delegate Minister in respect of the review application records the different operation of s 60(4) before and after its amendment on 29 September 2021. No part of that documentary evidence records any advice to the delegate Minister in respect of the amendment to s 60(4) or its legal consequences for the delegate Minister's decision on review. No part of that documentary evidence records that the delegate Minister should form or had formed the state of satisfaction s 60(4)(b) required before granting the water extraction licence. While the Court of Appeal concluded that the "material before the [delegate] Minister was replete with references to the need to find special circumstances",<sup>113</sup> that

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113 *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* (2025) 395 FLR 125 at 150 [93].

characterisation of the documents evidencing the process before the delegate Minister is unsustainable.

135 The Controller's decision was referred to the Water Resources Review Panel ("the Review Panel") and the Review Panel provided a report shortly after the amendment to s 60(4) of the *Water Act* commenced. The report did not refer to the amendment. This is reflected in the Review Panel's report which refers to the fact that the Controller had sought the opinion of the Minister under s 60(4) and the Minister had "affirmed that in her opinion there are special circumstances that justify a 30-year term licence". This is a reference to s 60(4) before its amendment, under which it was for the Minister, not the Controller as the decision-maker, to form the required state of satisfaction under s 60(4). Moreover, the Review Panel's report says that its view was that a licence of greater than ten years "is appropriate for a large-scale development such as that proposed". The Review Panel's report does not disclose that s 60(4) had been amended. It cannot be assumed that the Review Panel either was aware of any such amendment at the time it completed its report or was aware that the delegate Minister might have to consider and comply with any such amended provision.

136 The Ministerial briefing provided to the delegate Minister on 12 November 2021 contains no reference to the fact of the amendment or the terms of s 60(4) as amended. Indeed, the Ministerial briefing states that "[r]elevant extracts of the *Water Act* ... are at Attachment B" but Attachment B does not include s 60(4) as amended or in its unamended form. The recommendation to the delegate Minister in the Ministerial briefing does not refer to s 60(4) as amended or in its unamended form. In respect of option two contained in the briefing, which was to substitute for the Controller's decision a decision to grant a water extraction licence but with additional conditions to those the Controller imposed, the Ministerial briefing does not disclose that the delegate Minister had to first form the state of satisfaction required under s 60(4)(b).

137 The delegate Minister's decision is recorded without reference to the delegate Minister having first formed the state of satisfaction required under s 60(4)(b). Rather, the delegate Minister's decision states only that, in accordance with s 30(3)(a)(ii), the delegate Minister had "determined on the review to substitute the decision made by the Controller but would grant the licence on the same basis as the Controller save" for the imposition of additional conditions and minor amendments to the existing conditions.

138 The delegate Minister's reasons for the grant of the water extraction licence do not refer to s 60(4) of the *Water Act* as amended. Rather, the delegate Minister's reasons record that, for the purposes of the determining the review application, the delegate Minister had "reviewed and considered", amongst other things, "the relevant legislative provisions and the applicable criteria". There is no justification for inferring that those relevant legislative provisions and applicable criteria are other than those identified in the Ministerial briefing (which included the Review

Panel's report). Indeed, the delegate Minister's reasons expressly state that the delegate Minister had "not considered any other information as part of the review". While the delegate Minister's reasons record that, before the Controller's decision, the Minister had formed the then-required opinion under s 60(4) of the *Water Act*, the reasons do not refer to the amendment to s 60(4), the need for the delegate Minister to form the required state of satisfaction under s 60(4)(b) as amended, or the delegate Minister having done so. The only reference to "special circumstances" in the delegate Minister's reasons is in the context of the Minister (meaning the Minister for Environment) having formed the opinion under s 60(4) of the *Water Act* before the Controller's decision was made and of a concern expressed by the parties who had sought review that the Minister for Environment ought not to conduct the review of the Controller's decision by reason of apprehended bias.

139           Contrary to the Court of Appeal's conclusion, the documentary evidence in fact contains no reference to the "need" for the delegate Minister to form the required state of satisfaction under s 60(4) as amended. Rather, the documentary evidence records only one matter, being the large scale of the project, which might have enabled the delegate Minister to form a state of satisfaction that the grant of the water extraction licence for a period of 30 years was justified, as required by s 60(4)(b) as amended.

140           Given that s 60(4) establishes a jurisdictional pre-condition to the availability of the power to grant a water extraction licence for a period longer than ten years, it would be expected that the terms and operation of s 60(4) of the *Water Act* as amended would have been: (i) specifically drawn to the delegate Minister's attention in the Ministerial briefing; (ii) the subject of a specific recommendation in the Ministerial briefing as to whether the delegate Minister could and should be satisfied or not that special circumstances existed justifying the grant of the water extraction licence for the period of 30 years and, if so, what those special circumstances were; and (iii) the subject of specific record of the delegate Minister's satisfaction or not in at least the delegate Minister's reasons for the decision, if not in the licence itself in terms which related directly to the requirements of the provision. Yet those matters do not appear in any document concerning the functions of the delegate Minister on review of the Controller's decision. Moreover, when s 60(4) is referred to in those documents, the context is the provision before its amendment and the opinion reached by the Minister for Environment before the making of the Controller's decision.

141           These circumstances amply discharge MAC's onus of proving that the delegate Minister did not form the required state of satisfaction under s 60(4)(b) of the *Water Act* as amended. The consequence is that a jurisdictional fact which conditioned the exercise of the power to substitute a decision granting a water extraction licence for the Controller's decision, the delegate Minister having formed the required state of satisfaction under s 60(4)(b) of the *Water Act* as

amended, did not exist. That means the delegate Minister's decision to grant the water extraction licence is void, as is the water extraction licence itself.

## Ground two

### *The terms of ground two*

142 Ground two is that:<sup>114</sup>

"The [Court of Appeal] erred in holding [that the delegate Minister] took Aboriginal cultural values into account by imposing a condition on the licence, even though she did not form a view about the only information before her on those values and even though the statutory scheme required those values to be taken into account *before* the licence was granted, and did not permit their consideration to be deferred to a licence condition."

### *Relevant statutory provisions*

143 Section 22B of the *Water Act* included the following:

"(1) The Minister may, by notice in the *Gazette*, declare a water allocation plan in respect of a water control district.

...

(4) Water resource management in a water control district is to be in accordance with the water allocation plan declared in respect of the district."

144 Section 90 of the *Water Act* provided in part that:

"(1) In ... making a water extraction licence decision, the Controller must take into account any of the following factors that are relevant to the decision:

...

(ab) any water allocation plan applying to the area in question;

...

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114 Emphasis in original.

- (k) other factors the Controller considers should be taken into account or that the Controller is required to take into account under any other law in force in the Territory."

145 Section 71A(1) of the *Water Act* defined a "water extraction licence decision" as a decision about an application to which Pt 6A of the *Water Act* applied. By s 71A(2)(a), Pt 6A applied to the application for "the grant of a water extraction licence". As noted above, s 60(1) of the *Water Act* enabled the Controller (and therefore the delegate Minister on review under s 30(3)(a)(ii)) to grant a water extraction licence, s 60(2) providing that the licence may be granted "subject to such terms and conditions, if any, as are specified in the licence document".

#### *Relevant evidence*

146 The Western Davenport Water Allocation Plan 2018-2021 ("the WDWAP") was declared to be a water allocation plan in respect of the Western Davenport Water Control District, in which Singleton Station is located, on 22 December 2018 and remained in force until 6 December 2021. The objectives of the WDWAP were stated to include "[p]rotect Aboriginal cultural values associated with water and provide access to water resources to support local Aboriginal economic development". In respect of "groundwater dependent ecosystems" ("GDEs"), the WDWAP referred to a "strategy to protect GDEs [which] also includes a program to improve the information base upon which GDEs are managed. This includes field assessment and mapping of GDEs, research into GDE groundwater access requirements and a program of monitoring GDE condition and groundwater levels at GDE sites." The WDWAP said that it "seeks to protect cultural values by building the understanding of the location and water access requirements of cultural values depending on water". The WDWAP also recommended the involvement of "Traditional Owners to advise on cultural values and their groundwater requirements via formation of a Traditional Owner advisory committee (or a different approach to achieve the same effect) and working with the Rangers in assessing, monitoring and preserving cultural values".

147 The WDWAP stated that it "adopts an adaptive management framework. This includes establishing trigger values for groundwater levels and condition of GDEs and cultural values at which various management responses should be enacted. It is noted that the [WDWAP] is based on limited information. Further research, particularly in regard to accessibility of groundwater stored in the regolith [the unconsolidated surface layer above solid rock] and the location and individual requirements of GDEs is recommended to occur within the term of the [WDWAP]. Due to these data limitations, there is a significant risk that the consumptive pool could be reduced in future [water allocation plans]." Under the heading "Cultural water use" the WDWAP recorded that further work was required for "cultural use protection such as soaks, ceremonial areas and hunting grounds" both relating to GDEs and otherwise. The WDWAP recommended the

implementation of "a program of identification, assessment, documentation, condition monitoring and (to a practical extent) maintenance of the cultural values which could depend upon water", as well as groundwater modelling to "determine if proposed groundwater extraction will unacceptably impact on groundwater dependent Aboriginal cultural values", which would require the "participation of local Aboriginal people in water management and planning". An implementation program included, as an entry under a heading "Objective 2. Protect Aboriginal cultural values associated with water and provide access to water resources to support economic development", a "[c]ultural values protection program" to be "done [by the Department of Environment and Natural Resources] in partnership with the Traditional Owners and assisted by [the] CLC".

148 The CLC on behalf of MAC and others made submissions in respect of the application for review of the Controller's decision. The Review Panel's report recorded those submissions as including that there needed to be a comprehensive map and assessment of cultural and biodiversity values of GDEs before consideration of the grant of a water extraction licence. In support of this submission the CLC obtained an anthropologist's report. The Review Panel report noted that the WDWAP was based on "limited information" and therefore promoted a "program of further research and investigation in order to improve confidence and reduce risk" including an "adaptive management framework" by which "trigger values" were to be identified as prompting "management responses". The Review Panel noted the implementation activities set out in the WDWAP, including those to protect Aboriginal cultural values, observing that it was not clear "which if any of those activities identified have been progressed". The Review Panel said in its report that it was not "able to form a view on the significance of the information presented in [the anthropological] report but is **of the opinion that a comprehensive cultural impact assessment is required prior to the extraction of any significant volumes of water on Singleton Station**".<sup>115</sup>

149 The water extraction licence as granted by the delegate Minister contains these conditions:

"CP 1. The right to take groundwater provided under this licence will not take effect ... unless these Conditions Precedent are fulfilled before 31 December 2023.

...

CP 10. The licence holder must develop and submit to the Controller a groundwater dependent Aboriginal cultural values impact assessment. The assessment must:

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115 Emphasis in original.

53.

- (a) be prepared by a suitably qualified professional;
- (b) identify, map and document (as appropriate) the cultural values of Aboriginal people that will be impacted by groundwater extraction under this licence;
- (c) identify reference points to be used in modelling the impacts of groundwater extraction under this licence on the identified Aboriginal cultural values; and
- (d) specify monitoring parameters, trigger values and limits for the reference points which can be used to initiate actions under an adaptive management framework."

### *Deciding ground two*

150 Ground two must be rejected.

151 In accordance with s 90(1)(ab) of the *Water Act*, the delegate Minister was required to take into account the WDWAP as a "water allocation plan applying to the area in question" only as "relevant" to the decision to grant the water extraction licence. The WDWAP was a document of 80 pages including details of water resources, water use, estimated sustainable yield, risk and uncertainty, water management arrangements, risk identification and mitigation strategies, and implementation, monitoring and review, as well as multiple schedules, appendices, tables and figures. It was for the delegate Minister to determine the extent and degree of consideration of Aboriginal cultural values as contained in the WDWAP called for by the decision in respect of the water extraction licence. The same is true of s 90(1)(k) of the *Water Act*, which, insofar as relied upon by MAC, vested in the decision-maker the function of identifying other factors the decision-maker considers relevant to the decision to be made.

152 MAC's real complaint is not that the delegate Minister failed to take into account the WDWAP insofar as it dealt with Aboriginal cultural values. The real complaint is that the terms of CP 10 expose that the delegate Minister could not assess the effect of the water extraction licence on Aboriginal cultural values but granted the licence in any event on the basis that such an assessment could be made by the Controller subsequently once Fortune had submitted the "groundwater dependent Aboriginal cultural values impact assessment" required by CP 10. As MAC put it, CP 10 was not responsive to consideration of the protection of Aboriginal cultural values but was in substitution for that consideration. CP 10 thereby functioned to defer the consideration that s 90(1)(ab) required at the time of deciding to grant the licence to a subsequent time and a different person (being the Controller).

153 The difficulty MAC's argument confronts is that the delegate Minister's obligation in respect of the grant of the water extraction licence was not to ensure that Aboriginal cultural values were protected. Rather, the delegate Minister's obligation was to take into account the WDWAP as relevant to the decision to grant the licence. The WDWAP, as noted, contemplated that the Department of Environment and Natural Resources in partnership with the Traditional Owners and assisted by the CLC would develop a cultural values protection program. Whether that had been done or not, no such document was available to the Review Panel or the delegate Minister. Rather, CP 10 required Fortune itself to arrange for, in effect, such a document to be prepared and submitted to the Controller before the right to take groundwater under the licence would take effect. Given that the WDWAP expressly contemplated an adaptive management approach to the use of water resources and the protection of GDEs and Aboriginal cultural values dependent on or independent of GDEs, it is not possible to characterise CP 10 as involving a deferral of the consideration which s 90(1)(ab) and (k) of the *Water Act* required.

### Ground three

#### *The terms of ground three*

154 Ground three is as follows:

"The [Court of Appeal] erred in failing to hold [that the delegate Minister] was obliged to give MAC, whose members held the Aboriginal cultural values the subject of a proposed licence condition [CP 10], and which derived from their native title rights and interests, the same opportunity to be heard on the terms of the proposed condition as she gave to [Fortune]."

#### *Relevant statutory provisions*

155 Part 6A, ss 71A-71E, of the *Water Act* contained provisions which required notice to be given of an intention to make a water extraction licence decision, of the making of a water extraction licence decision, and of a substituted or varied water extraction licence decision. No provision in Pt 6A suggested that its provisions exhausted any duty of procedural fairness that the delegate Minister might have had in making the decision to substitute for the decision of the Controller the grant of the water extraction licence subject to CP 10. The parties accepted that the delegate Minister's exercise of power under s 30(3)(a)(ii) of the *Water Act* to grant the water extraction licence in substitution for the licence the Controller had granted was conditioned on the observance of procedural fairness but disagreed as to whether that required MAC to be given notice of the terms of CP 10 before the grant of the licence subject to that condition.

*Relevant evidence*

156 The Department of Environment, Parks and Water Security recognised that, as CP 10 was newly proposed by the Review Panel (in addition to CP 9), Fortune may be "adversely impact[ed]" by CP 10 (as well as CP 9). The Department therefore notified Fortune of the terms of these proposed conditions precedent and invited Fortune's response before the delegate Minister made any decision on the review application. Fortune responded to the effect that it accepted the new conditions precedent. Neither MAC, nor the CLC on MAC's behalf, was given notice of proposed CP 10. Proposed CP 10, however, was undoubtedly responsive to the Review Panel's assessment of the submission the CLC made on behalf of MAC and others that, as supported by the anthropologist's report, there needed to be a comprehensive map and assessment of cultural and biodiversity values of GDEs before consideration of the grant of a water extraction licence. As will be recalled, the Review Panel said it could not form a view on the significance of the information in the anthropologist's report and therefore recommended that a comprehensive cultural impact assessment be required prior to the extraction of any significant volumes of water at Singleton Station.

*Deciding ground three*

157 As noted, MAC is the prescribed body corporate for the native title holders of the native title rights and interests in the land the subject of the Singleton Station pastoral lease. Those rights include, for example, "the right to live on the land, and for that purpose, to camp, erect shelters and other structures", "the right to hunt, gather, take and use the natural resources of the land and waters, including the right to access, take and use natural water resources on or in the land", and "the right to access, maintain and protect places and areas of importance on or in the land and waters".<sup>116</sup> By reason of the native title determination recognising those native title rights and interests, those rights and interests became enforceable under and protected by both common law and equity.<sup>117</sup> That the rights and interests so granted to the native title holders are non-exclusive rights and interests does not diminish their character as the kind of proprietary or quasi-proprietary rights and

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116 See *Native Title Act*, s 57(2) and *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory* [2010] FCA 911, as varied by the Order of Charlesworth J in *Mpwerempwer Aboriginal Corporation RNTBC v Northern Territory* (Federal Court of Australia, NTD42/2018, 19 August 2020) at Annexure 1 [4].

117 *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 539-540 [61]; 421 ALR 604 at 621-622.

interests to which the requirement to provide procedural fairness ordinarily would attach.<sup>118</sup>

158 The submissions which the CLC made on behalf of MAC were submissions for MAC as the prescribed body corporate for the native title holders of the native title rights and interests in the land the subject of the Singleton Station pastoral lease. In that capacity MAC was a body holding legally recognised rights and interests on trust for the native title holders in circumstances where the grant of the water extraction licence subject to CP 10 would directly and adversely affect those rights and interests. In this context, the critical circumstances were threefold. First, the WDWAP, which the delegate Minister was required to take into account, expressly contemplated that there would be prepared by the Department of Environment and Natural Resources, in partnership with the Traditional Owners and assisted by the CLC, an Aboriginal cultural values protection program. Second, the CLC, on behalf of MAC, had submitted on the review application that this document had to be prepared before a water extraction licence was granted. Third, the function intended to be performed by CP 10 was to require Fortune to retain a suitably qualified person to prepare, in effect, the Aboriginal cultural values protection program.

159 It is not that the making of a submission by an interested person on the review application meant that the person had to be notified of every condition potentially addressing any issue of concern the person had raised in their submission.<sup>119</sup> In respect of CP 10, MAC was not just another person making a submission. MAC was the representative of the holders of the legally recognised rights and interests in the land and waters the subject of the water extraction licence, which were the very rights and interests that CP 10 was intended to protect. Moreover, nothing in the circumstances could have put the CLC or MAC on notice of a possibility that a condition precedent would be imposed requiring Fortune to submit a "groundwater dependent Aboriginal cultural values impact assessment" to be prepared without the involvement of the CLC or MAC (or, for that matter, the Department). As observed in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*,<sup>120</sup> while "[w]ithin the bounds of rationality a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case", if procedural fairness obligations apply "[t]he subject is entitled

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118 eg, *Disorganized Developments Pty Ltd v South Australia* (2023) 280 CLR 515 at 535-537 [28]-[33]; *Badari v Minister for Territory Families and Urban Housing* (2025) 100 ALJR 30 at 36 [17]; 426 ALR 212 at 218-219.

119 eg, *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369, cited in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 166 [48].

120 (1994) 49 FCR 576.

to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material".<sup>121</sup>

160 CP 10 is not an "obvious and natural" outcome of any material made known to MAC before the decision of the delegate Minister to grant the water extraction licence. Contrary to the apparent assumptions of Fortune and the delegate Minister, CP 10 does not require: (i) the Controller to approve the groundwater dependent Aboriginal cultural values impact assessment; or (ii) Fortune, the suitably qualified professional, or the Controller to consult with MAC, the CLC or the Department about the preparation of the Aboriginal cultural values impact assessment. All that CP 10 requires is for Fortune to "develop and submit to the Controller a groundwater dependent Aboriginal cultural values impact assessment" as described.

161 One of the important objects that procedural fairness satisfies in decision-making processes is to improve the quality of decision-making. If the CLC and MAC had been notified of the proposal to impose CP 10 or a condition precedent similar to it on the water extraction licence, they could have pointed out, amongst other things, that CP 10 does not require Fortune to obtain the Controller's approval of the groundwater dependent Aboriginal cultural values impact assessment (a most basic omission from the terms of CP 10) and does not require, for example: (i) Fortune to consult with the CLC, MAC and the Department about the selection of the "suitably qualified professional"; (ii) the "suitably qualified professional" to consult with the CLC, MAC and the Department about the work required to satisfy requirements (b)-(d) of the proposed condition; or (iii) the Controller to consult with the CLC, MAC and the Department before deciding whether or not to approve the Aboriginal cultural values impact assessment. Nor does CP 10 permit the Controller to amend or modify the groundwater dependent Aboriginal cultural values impact assessment or to impose conditions on its approval.

162 Leaving aside ground one, the delegate Minister's decision to grant the water extraction licence would be void, as would be the water extraction licence itself, because the making of the decision including a condition to the effect of CP 10 was conditioned on MAC being given notice of the proposed condition and an opportunity to be heard by the making of a written submission about that proposed condition before any decision was made. MAC was given no such notice and no such opportunity.

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121 (1994) 49 FCR 576 at 591.

## **Orders**

163      The orders which Gordon, Steward, Gleeson and Beech-Jones JJ propose should be made.

