CITATION:	*Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families & Urban Housing as Delegate of the Minister for Environment & Anor and Arid Lands Environment Centre Inc v Minister for Environment & Anor* [2024] NTSC 4
PARTIES:	MPWEREMPWER ABORIGINAL CORPORATION RNTBC (ICN 7316) v MINISTER FOR TERRITORY FAMILIES AND URBAN HOUSING AS DELEGATE OF THE MINISTER FOR ENVIRONMENT AND FORTUNE AGRIBUSINESS FUNDS MANAGEMENT PTY LTD (ACN 607 474 251)
AND BETWEEN	
	ARID LANDS ENVIRONMENT CENTRE INC v MINISTER FOR ENVIRONMENT AND FORTUNE AGRIBUSINESS FUNDS MANAGEMENT PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2022-00191-SC and 2022-00087-SC
DELIVERED:	31 January 2024
HEARING DATES:	7, 8 and 9 September 2022
JUDGMENT OF:	Barr J

CATCHWORDS:

ADMINISTRATIVE LAW – Judicial review – Consolidated proceedings – Declaratory relief – Certiorari – Mandamus – Jurisdictional error – Unreasonableness – *Water Act 1992* (NT) – Minister's review of decision of Controller of Water Resources – Decision of Minister to substitute decision for that made by Controller – Grant of groundwater extraction licence with additional and amended conditions of licence – Applications of both plaintiffs dismissed.

2022-00087-SC- (ALEC)

JURISDICTIONAL ERROR – Whether Minister's decision affected by jurisdictional error – s 22B Water Act 1992 – "Water resource management" to be in accordance with declared water allocation plan –Whether Minister is bound by s 22B not to depart from provisions of declared plan – Minister has wide discretion under s 90(1) of the Act – Held Minister required to take into account the declared water allocation plan – Minister not required by s 22B to necessarily comply with declared water allocation plan – Ground 1 of application not made out.

JURISDICTIONAL ERROR – Whether Minister's decision lacked finality – Conditions precedent and staging conditions – Whether Minister impermissibly deferred mandatory considerations – Held Minister empowered by s 60(1) to impose conditions generally – Practical flexibility – Minister's power sufficiently wide to encompass the imposition of conditions precedent before extraction entitlements come into effect – Conditions precedent and staging conditions lawfully allow for flexible regulation – Ground 2 not made out.

UNREASONABLENESS – Whether Minister's decision was legally unreasonable – Whether Minister took account of irrelevant factors and failed to consider relevant factors – Minister not required to 'comply with' declared water allocation plan – Held Minister's decision was not in disregard of mandatory relevant considerations – Held Minister entitled to consider the Guideline document under the wide discretion in

s 90(1) – Plaintiff failed to establish unreasonableness in the *Wednesbury* sense – Plaintiff failed to establish that the Minister's decision was made for a purpose not authorised by statute, or otherwise lacking an evident and intelligible justification – Limited role of court on review – Ground 3 not made out.

2022-00191-SC (MAC)

UNREASONABLENESS – Whether decision was legally unreasonable – Whether Minister failed to give proper, reasonable and rational consideration to relevant factors – Plaintiff contends Minister unable to have made a reasonable decision within the limited time available – Role of relevant government department – Advisory role of the Review Panel – Minister's very detailed reasons – Clear evidence of engagement in an active intellectual process – Plaintiff failed to establish that the Minister failed to give proper, reasonable and rational consideration to relevant considerations – Grounds 1 and 2 of application not made out.

JURISDICTIONAL ERROR – Whether Minister's decision was affected by jurisdictional error – Whether Minister failed to observe necessary limits in her review in setting various categories of conditions precedent – Whether conditions precedent had a valid purpose, risked altering the proposal or were an impermissible delegation of authority – Held conditions were a valid exercise of the Minister's power – Grounds 3, 4 and 5 not made out.

UNREASONABLENESS – Whether decision was legally unreasonable or seriously irrational – Whether decisions were not supported by or contrary to evidence – Whether Minister failed to give sufficient weight to Review Panel recommendations – Minister's decision to extend the period of Stage 1 of the licence from two years to three years not in accordance with five year recommendation of the Review Panel – Held Panel's role – Minister entitled to take into account possible adverse consequences to viability of the licence applicant's horticulture project – Minister empowered to take such action as she thinks fit – Limited role of Court on review – Minister's reasons disclose a rational and intelligible basis for the licence decision – Grounds 6 and 7 not made out.

PROCEDURAL FAIRNESS – Whether Minister failed to afford procedural fairness – Content of duty informed by legislative purpose and context – Period between receipt of advice from Review Panel and Minister's decision on review – Whether Minister required to afford further opportunity to plaintiff to respond to various documents – Submissions of licence applicant and Minister's proposed licence conditions – Held plaintiff failed to establish that provision of documents and other data could realistically have resulted in a different decision – Further held content of Minister's duty did not require recurrent consultation with the plaintiff – Ground 8 not made out.

JURISDICTIONAL ERROR – Recent statutory amendment in effect at the time of Minister's decision – Jurisdictional pre-condition that the Minister be satisfied that "special circumstances" justified the grant of a licence for a period in excess of

10 years – Jurisdictional pre-condition not satisfied – Whether Minister bound by the provision as amended – Minister proposed to substitute amended decision for the Controller's decision – Minister's opinion as to the decision the Controller 'should have made in the first instance' – Held that legislative regime in place prior to amendment applied on the review – Controller could not have made a decision 'in the first instance' to comply with a legislative provision which had not come into effect – Minister did not err in law in failing to comply with provision as amended – No error of law going to jurisdiction – Ground 9 not made out.

LEGISLATION & OTHER MATERIALS

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) s 10(1)(c)

Aboriginal Land Rights (Northern Territory) Act 1976, s 11

Interpretation Act 1978 (NT) s 62A

*Migration Act 1958 (*Cth) s 501(3), s 501(3A), s 501CA

Motor Vehicles Act (1959-1963) (SA), s 102(2)

Native Title Act 1993 (Cth) s 24HA

Water Act 1992 (NT) s 4(1), s 18, s 19(2), s 22, s 22A, s 22B(4), s 22B(5), s 24(1), s 30(3)(a)(ii), s 30(3)(b), s 30(4), s 31, s 60(1), s 60(2), s 60(4), s 71A, s 71B(4), s 71C(2), s 71E(4), s 90(1), s 93(1)

Water Amendment Act 2000 (NT) s 5

Water Amendment Act 2007 (NT) s 7

Northern Territory, *Parliamentary Debates*, Legislative Assembly, 2 March 2000, pp 5340—5341, (Daryl Manzie, Minister for Asian Relations and Trade)

Western District Water Allocation Plan 2018-2021, Parts 1.1.2, 8.2.1, 8.3.1

AUTHORITIES

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; 239 CLR 27; *Baker v The Queen* [2004] HCA 45; 223 CLR 513; *Baskerville v Martin* [1067] SASR 156; *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 215 FCR 301; *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352; *Chapman and Others v Ticker and Others* (1995) 55 FCR 316; *Clark v Cook Shire Council* [2008] 1 Qd R 327; *Corporation of the City of Norwood Payneham and St Peters v Minister*

for Infrastructure and Transport [2021] SASC 97; *Corporation of the City of Unley v Claude Neon Ltd* (1983) 32 SASR 329; *DVO16 v Minister for Immigration and Border Protection & Anor* [2021] HCA 12; 273 CLR 177; *DWN042 v Republic of Nauru* [2017] HCA 56; *Environment Centre Northern Territory (NT) Inc v Minister for Land Resource Management* [2015] NTSC 30; 35 NTLR 140; *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30, 262 CLR 510; *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291; *Kioa v West* (1985) 159 CLR 550; *Lend lease Management Pty Ltd v Sydney City Council* (1986) 68 LGRA; *Lester Land Holdings Pty Ltd Development Assessment Commission* (2020) 243 LGERA 221; *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24; *Minister for Home Affairs v Ogawa* (2019) 269 FCR 536*; Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; *Minister for Immigration & Multicultural Affairs; Ex Parte Applicant s20/2002* (2003) 77 ALJR 1165; *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Mison v Randwick Municipal Counsel* (1991) 23 NSWLR 734; *Mobil Oil Australia Ply Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475; *Moriarty v Independent Commissioner Against Corruption (NT)* [2022] NTSC 46; *MZAPC v Minister for Immigration and Border Protection* [2021] 95 ALJR 441; *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277; *Ogawa v Finance Minister* [2021] FCAFC 17; *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory of Australia* [2010] FCA 911; *Shi v Migration Agents Registration Authority* [2008] HCA 31; 235 CLR 286; *Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 389; 109 FCR 152; *SZBEL v Minister for Immigration* (2006) 228 CLR 152; *The Queen v Hunt; Ex Parte Sean Investments Pty Ltd* (1979) 180 CLR 322; *Tickner v Chapman* (1995) 57 FCR 451; *Twist v Randwick Municipal Council* (1976) 136 CLR 106; *Winn v Director-General of National Parks and Wildlife* [2001] NSWCA 17, referred to.

REPRESENTATION:

Counsel in file no 2022-00191-SC:

Plaintiff:	C Young KC, L Hilly
First Defendant:	C Jacobi KC, T Cramp
Second Defendant:	S McLeod KC, M Wilkinson

Counsel in file no 2022-00087-SC:

Plaintiff:	J Lawrence SC, M Sherman
First Defendant:	C Jacobi KC, T Cramp
Second Defendant:	S McLeod KC, M Wilkinson

Solicitors in file no 2022-00191-SC:

Plaintiff:	Central Land Council
First Defendant:	Solicitor for the Northern Territory
Second Defendant:	Ward Keller

Solicitors in file no 2022-00087-SC:

Plaintiff:	Environmental Defenders Office Ltd
First Defendant:	Solicitor for the Northern Territory
Second Defendant:	Ward Keller

Judgment category classification:	A
Judgment ID Number:	Bar2402
Number of pages:	143

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families & Urban Housing as Delegate of the Minister for Environment & Anor and Arid Lands Environment Centre Inc v Minister for Environment & Anor [2024] NTSC 4

No. 2022-00191-SC and 2022-00087-SC

BETWEEN:

MPWEREMPWER ABORIGINAL CORPORATION RNTBC (ICN 7316)
Plaintiff

AND:

MINISTER FOR TERRITORY FAMILIES AND URBAN HOUSING AS DELEGATE OF THE MINISTER FOR ENVIRONMENT
First Defendant

AND:

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

BETWEEN:

ARID LANDS ENVIRONMENT CENTRE INC
Plaintiff

AND:

MINISTER FOR ENVIRONMENT
First Defendant

AND:

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

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 31 January 2024)

The parties

[1] The second defendant ("Fortune") is the lessee under Perpetual Pastoral Lease 1022 of Northern Territory Portion 653, which comprises some 2,949 square kilometres of land known as Singleton Station. The property is situated in the Western Davenport region of the Northern Territory, approximately 380 km north of Alice Springs.

[2] Fortune proposes to develop approximately 3,500 hectares of Singleton Station for the purpose of intensive irrigated horticulture. The proposed 'Singleton Horticulture Project' involves the development in sequence of nine separate blocks, each of about 400 hectares, over an eight-year period. Each block would have 16 interlinked irrigation bores, a total of 144 such bores. Fortune has identified the most suitable crops as mandarins, table grapes, dried grapes, onions, avocados, muskmelons and jujube. The success of the Project is dependent on Fortune having access to significant quantities of groundwater, increasing to 40 gigalitres or 40,000 megalitres (ML) of water per annum once the project is fully developed. The water requirement will increase in parallel with the

development program such that Fortune anticipates that it will require the maximum water allocation three to four years after Year 8 of crop planting, when trees approach maturity.[1]

[3] The plaintiff Mpwerempwer Aboriginal Corporation ("MAC") is the prescribed body corporate for the native title holders of the Singleton pastoral lease. MAC has a statutory role to act as their agent. The native title holders hold rights and interests which co-exist with the rights of Fortune as the lessee of the pastoral lease, including the right of access for the purpose of maintaining and protecting places and areas of importance on the land, the right to hunt and gather, and the right to take and use the natural resources of the land and waters.

[4] The primary contention made by MAC on behalf of the native title holders is that the taking of water pursuant to the proposed licence is modelled to significantly lower the water table across a large area of the pastoral lease, which is likely to reduce access to water, to damage sacred sites and affect the availability of animal species.

[5] The plaintiff Arid Lands Environment Centre Inc ("ALEC") is an environmental organisation in Central Australia which aims to support local people in the protection of arid lands. The central object, stated in

1 Based on the table and graph at p 122 of the affidavit of Stephanie Ann Jungfer, sworn 7 April 2022, (the "Jungfer affidavit"), the maximum allocation would be expected in Year 11 or Year 12 from initial drawdown at the start of the project.

its constitution, "is to protect the environment and ensure healthy futures for arid lands and peoples".[2]

[6] ALEC commenced proceedings on 13 January 2022. MAC commenced proceedings on 28 January 2022. An order was made on 10 March 2022 that the two proceedings be tried at the same time and determined together.[3] A further order was made that evidence in each proceeding was to be treated as evidence in both proceedings. The parties' cases, as consolidated, were heard over three days in September 2022.

[7] The defendants did not contest the standing of the plaintiffs to bring the proceedings respectively commenced by each of them.

Background

[8] Under s 22 of the *Water Act 1992* ("the Act"), the Minister may declare part of the Northern Territory to be a water control district and allocate a name to the district. Section 22B(1) of the Act provides that the Minister may declare a water allocation plan in respect of a water control district. Singleton Station is within the declared Western Davenport Water Control District and the relevant water allocation plan was the Western Davenport Water Allocation Plan 2018-2021 ("the WDWAP"). Section 22B(4) of the Act provides that "water resource management" in a water control district is to be in accordance with the water allocation plan declared in respect of the district.

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2 See ALEC's Originating Motion, Details of Claim, par 3.

3 *Supreme Court Rules*, SCR 9.12.

[9] On 18 August 2020, Fortune applied to the Controller of Water Resources ("the Controller") under s 60 of the Act for a licence to take groundwater from Singleton Station for the purpose of the proposed horticulture project described in [2] above.

[10] On 8 April 2021, the Controller decided under s 60 of the *Water Act* to grant Fortune a water extraction licence, being WDPCC100000 (the "Controller's decision").[4] The licence, which was subject to extensive conditions (including eight conditions precedent and staging conditions), allowed Fortune to take up to 40,000ML of groundwater per annum from aquifers in the Central Plains Management Zone in the Western Davenport Water Control District. The groundwater was to be taken from Singleton Station.

[11] In making the decision to grant the water extraction licence, the Controller had regard, inter alia, to a document entitled "Guideline: Limits of acceptable change to groundwater dependent vegetation in the Western Davenport Water Control District" ("the Guideline").[5] The stated purpose of the Guideline was to "provide guidance to applicants for water extraction licences in the Western Davenport Water Control District". It may be noted that the Guideline was, by express words, "intended to be read subject to the Western Davenport Water Allocation Plan 2018-

4 The licence granted by the Controller is at pp 203-214 of the Jungfer affidavit. The Controller's detailed reasons for her decision were contained in the document 'Water Extraction Licence Decision', also dated 8 April 2021. See pp 181-201 of the Jungfer affidavit.

5 The document was published by the Northern Territory Department of Environment and Natural Resources on 13 February 2020, and is reproduced at pp 1003-1016 of the Jungfer affidavit.

2021".[6] The Guideline was not given any express recognition or significance under the *Water Act 1992*. Counsel for ALEC described it as "at best a statement of Departmental policy".

[12] In May 2021, pursuant to s 30(1) of the Act, ALEC and MAC (and other aggrieved parties) sought a review by the Minister for Environment of the decision of the Controller to grant the water extraction licence. The grounds relied on are set out in [13] and [14] below. Both ALEC and MAC submitted that the Minister should set aside the Controller's decision and substitute a decision to refuse the licence.

[13] ALEC set out the following grounds in its application for review:[7]

- The Controller failed to appropriately assess the Licence in accordance with the WAP.
- The Licence is inconsistent with the WAP and was therefore granted in breach of the *Water Act.*
- The Controller should not have placed reliance on the Guideline because it is inconsistent with the WAP; is not a statutory document; was approved by the Controller herself as CEO; and allows for the destruction of up to 30% of GDEs.
- The Controller should not have placed reliance on the document titled Singleton Horticulture Project Groundwater Dependent Ecosystem Mapping and Borefield Design (the 'Fortune Report') as it is a desktop review rather than fieldwork; and it does not assess the impact to GDEs against the criteria required under the WAP.
- The Controller relied upon insufficient groundwater modelling.

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6 Guideline, under the heading 'Scope', at p 1006 of the Jungfer affidavit. The meaning of "subject to" is somewhat unclear, in that the Guideline adopted different criteria to Part 8.2.1 of the WDWAP – see the discussion in [61]-[65] below.

7 Jungfer affidavit, p 72.

- The Controller failed to properly consider the possible deterioration of water quality as required under section 90(1)(h) of the *Water Act 1992*.
- The Controller's reliance on the implementation of an Adaptive Management Framework is unrealistic, gives rise to future uncertainty and compromises the health of GDEs.
- The Controller did not appropriately consider impacts from the Licence on the Strategic Aboriginal Water Reserves (SWR).
- The Controller should have assessed the impacts of the Licence on cultural values.

[14] MAC set out the following grounds in its application for review:[8]

- The estimated sustainable yield used by the Controller is not consistent with the *Water Act 1992* or other definitions and allocation of water should not result in the depletion of aquifers.
- The Controller failed to take into account the uncertainties underlying the groundwater modelling and the conditions imposed on the Licence cannot address such deficiency.
- The Controller's decision fails to take into account the impact that the Licence will have on Aboriginal cultural values.
- The Guideline is inconsistent with the WAP and the Controller should not have relied upon it.
- The thresholds in the Guideline are arbitrary.
- The risks to aquatic GDEs have not been considered.
- There is a lack of understanding of region-specific GDEs.
- The Controller should not have granted the Licence for a term of more than 10 years given the uncertainty in the groundwater model and the potential impacts of granting the Licence.
- The Controller failed to address the concerns raised by the CLC about the biodiversity surveys conducted by NT Government.
- The licence conditions do not sufficiently address the soil salinity risks.

8 Jungfer affidavit, p 71. The grounds are attributed to the Central Land Council. MAC and others were represented by the Central Land Council.

[15] MAC subsequently raised a number of other matters in submissions to the Review Panel, including the submission that additional information should be required before a licence decision could be made,[9] and that the Guideline did not take into account cultural values.

[16] In July 2021, the Minister for Environment referred the matter to the Water Resources Review Panel ("the Review Panel") pursuant to s 30(3)(b) of the Act.

[17] The relevant provisions of s 30 are set out below:

> **30 Application for review**
>
> (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.
>
> (2) An application under this section shall be made in the prescribed manner and form.
>
> (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

9 For example, the need for an assessment of the water resource throughout the District, including hydrogeological investigations of groundwater dependent ecosystems ('GDEs') at a local level; and the need for a comprehensive map and assessment of cultural and biodiversity values of GDEs before any future application were considered. See the Review Panel report, p 19, par 24, Jungfer affidavit, p 71.

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.

[18] On 15 October 2021, the Review Panel provided its report to the Minister.

[19] At all material times, Stephanie Jungfer was an Executive Officer in the Department of Environment, Parks and Water Security. She carried out a number of roles in that position, including co-ordinating the material provided to the Minister for Environment (or the delegate of the Minister, as the case may be) when the Minister undertook a review of a decision of the Controller under s 30 of the Act.[10] In that role, Ms Jungfer wrote to the Review Panel on 2 November 2021 to seek clarification about an aspect of the Panel's report and recommendations, specifically, the Panel's opinion "that a comprehensive cultural impact assessment is required prior to the extraction of any significant volumes of water on Singleton Station".[11]

[20] On 3 November 2021, the Chairman of the Review Panel replied to Ms Jungfer as follows:[12]

> The key issue here, in the Panel's opinion, is that there is little in the Decision, or licence, that specifically addresses one of the key objectives of the Water Allocation Plan, i.e. "to protect Aboriginal cultural values associated with water".

10 Jungfer affidavit, p 4, par 4.

11 Review Panel report, par 39.

12 Jungfer affidavit, p 1659.

> The implementation activities related to cultural values (WAP 8.4.1, Objective 2)[13] were intended to map and document the water dependent cultural values of the region, and would have enabled the development of a set of cultural reference points to be used by the proponent in their modelling of impacts and reflected in the adaptive management framework.
>
> In lieu of this work having been done, the Panel's view is that it is now either up to the Department (in partnership with the CLC) to commit to undertake the necessary surveys and consultation/assessment described in the WAP, prior to significant groundwater extraction, or it is up to the proponent to facilitate that work. That work, which we have described as a 'cultural values impact assessment', needs to be undertaken as a pre-condition as it will provide the information that is required (but is not yet available) to inform our amended CP 5.
>
> .....
>
> The Panel is not equipped to fully define the terms of reference for a cultural values impact assessment but considers that these are some of the key components and work that needs to be done in order to meet the objectives of the WAP. Appropriate consultation is required and the panel acknowledges that this may be a challenging process for either the Department or the proponent.

[21] On 11 November 2021, pursuant to s 19(1) of the Act, the Minister for Environment delegated her powers under s 30 of the Act to the Minister for Territory Families and Urban Housing. The delegation was for the exercise of powers in relation to the Controller's Decision. When the delegated power was exercised, it was deemed to have been exercised by

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13 Part 8.4.1 of the WDWAP set out "WAP implementation activities". For objective 2, "Protect Aboriginal cultural values associated with water and provide access to water resources to support economic development", the specified activity was "Cultural values protection program – undertake baseline condition assessment of water dependent cultural values. (To be done in partnership with the Traditional Owners and the ranger program. Sensitivity of cultural values information to be protected)." The "Indicator of achievement" was "Baseline condition of water dependent cultural values and adaptive management trigger levels established".

the Minister who delegated the power.[14] Subsequent references in these reasons to "the Minister" will refer to the Minister-delegate.

[22] On 12 November 2021, two Ministerial Briefings were sent to the Minister by Ms Jungfer. The first briefing was sent at about 1.00pm on Friday, 12 November 2021. A supplementary briefing was sent to the Minister for Environment's chief of staff at about 5.46pm on 12 November 2021

[23] On Monday 15 November 2021, at about 12.45pm, Ms Jungfer attended a meeting with the Minister and the Minister's chief of staff.

[24] On 15 November 2021, after a revised draft licence had been provided to the Minister by Ms Jungfer at about 4.30pm, the Minister signed the following documents in connection with the grant of a water extraction licence to Fortune:

(a.) the Minister's reasons for decision, in a document entitled *Section 30 Review of Water Extraction Licence Decision*;

(b.) 'Licence to Take Water', licence number WDCP10358 ("the Licence"), and

(c.) letters to various parties, the Controller, and the Panel, notifying them of the Minister's decision.

14 *Water Act 1992*, s 19(2).

[25] In carrying out a review of the decision of the Controller, after receiving the advice of the Review Panel, the Minister was empowered to grant a water extraction licence pursuant to s 30(4) read with s 30(3)(a)(ii) *Water Act 1992*. The statutory discretion reposed in the Minister on a review of the decision of the Controller was co-extensive with that of the Controller; no separate criteria were prescribed for the review. The Minister's power to substitute a fresh decision for that of the Controller depended on the Minister being of the opinion that the substituted decision was one which the Controller should have made in the first instance. In my opinion, the power under s 30(3)(a)(ii) of the Act includes the power to stand in all respects in the shoes of the Controller. However, on the review, it was for the Minister to determine for herself the extent to which she needed to re-exercise the Controller's functions.[15]

[26] The Minister's actual decision was stated simply, as follows:

> As a delegate of the Minister for Environment, in accordance with s 30(3)(a)(ii) I have 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 that I would add to, and amend, the conditions of the licence as follows.

[27] There followed a series of additional conditions precedent (CP9 and CP10) and an amended condition (SC1), with consequential amendments to CP1, CP3, CP5, CP7, CP8, and SC4. In relation to the use of conditions

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15 See *Environment Centre Northern Territory (NT) Inc v Minister for Land Resource Management* [2015] NTSC 30; 35 NTLR 140 (Hiley J) at [134].

precedent as conditions of licence under s 60(2) *Water Act 1992*, the Minister provided the following explanation:[16]

> I am satisfied that the conditions precedent and other conditions on this licence taken as a whole, including those that are additional and the amendments, address the risks, potential impacts and uncertainty associated with the proposed extraction of water. In particular this course allows the Licence Holder to continue to undertake the works, investigations and other activities required to meet the conditions precedent. They will provide additional information and will inform the development of appropriate plans. That will not only provide greater certainty but allow the Licence Holder, if the conditions are satisfied, to ultimately be able to extract water for productive activities in the future.

[28] The Minister was required by s 71E(4) of the Act to state in the review decision not only her reasons but also the way in which she took into account (1) the comments made in response to the published notice of intention to make the water extraction licence decision,[17] and (2) any relevant factors mentioned in s 90(1) of the Act.[18] I will say more about those matters below.

The parties' cases

[29] The plaintiff ALEC seeks a declaration that, in making the decision (which it describes as the 'purported decision'), the Minister failed to comply with s 22B(4), further and alternatively, with s 90(1)(ab) of the Act, and thereby committed a jurisdictional error in that the decision failed to accord with Part 8.2.1 of the WDWAP. ALEC seeks a further

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16 Minister's reasons, p 1692 of the Jungfer affidavit.

17 *Water Act 1992*, s 71B(4).

18 *Water Act 1992*, s 71E(4).

declaration that the Minister's decision involved jurisdictional error because the licence was granted subject to conditions which operated to defer consideration of matters which, for the decision to have been lawfully made pursuant to s 30(3)(a)(ii) of the Act, should have been determined prior to or at the time of the actual decision (15 November 2021). ALEC seeks a third declaration that the Minister's decision was "legally unreasonable".[19]

[30] In addition to the declarations, ALEC seeks an order in the nature of certiorari setting aside or quashing the Minister's decision, and an order in the nature of mandamus compelling at the Minister to "remake the purported decision according to law".

[31] The grounds of review relied on by ALEC, set out in the originating motion, are as follows:

> **Grounds of Review**
>
> 1. The Purported Decision involved a jurisdictional error in that the First Defendant failed to comply with s 22B(4) and, further and in the alternative, s 90(1)(ab) of the Act.
>
> **Particulars**
>
> a. On 15 July 2009, the Minister for Natural Resources, Environment and Heritage declared, pursuant to s 22 of the Water Act, the Western Davenport Water Control District as the area shown in the Schedule to the *Northern Territory Government Gazette No. G28 15 July 2009*.
>
> b. On 28 December 2018, the Minister for Tourism and Culture acting for the Minister for Environment and Natural Resources declared, pursuant to s 22B(1) of the Act, that the *Western Davenport Water Allocation Plan 2018-2021* (WAP) be a water allocation plan in respect of

19 Originating motion, 13 January 2022; summons on originating motion, 16 February 2022.

the Western Davenport Water Control District and that the WAP will remain in force until 6 December 2021: *Northern Territory Government Gazette No. S114, 28 December 2018.*

c. The WAP established a "groundwater dependent ecosystem protection area" (GDE Protection Area) (Figure 11, WAP) which overlapped with the bore field approved by the Purported Decision (Licence to Take Water, Schedule 1).

d. Section 8.2.1 of the WAP relevantly required that "proposed extraction should not result in a change to groundwater conditions beyond" certain identified limits within the GDE Protection Area. The following limits were then provided:

   i. "Modelled extraction does not cause the maximum depth to water table to exceed 15 metres below ground level";

   ii. "Modelled extraction does not result in the maximum depth to water table declining by more than 50% below the levels that would be expected under a natural baseline scenario (no pumping scenario)"; and

   iii. "Modelled extraction does not result in a rate of groundwater drawdown that exceeds 0.2 metres/year."

   (together, the WAP GDE Criteria)

e. Section 22B(4) of the Act provides that "water resource management in a water control district is to be in accordance with the water allocation plan declared in respect of the district."

f. Section 60 of the Act allows the Water Controller to grant a person a licence in the prescribed form to take water from a bore.

g. Section 90(1) of the Act sets out the factors which are to be considered in deciding to make, *inter alia*, a "water extraction licence decision". Section 71A(1) of the Act defines "a water extraction licence decision" as a decision to which Part 6A of the Act applies. Section 71A(2)(a) provides that Part 6A applies to the "grant of a water extraction licence". A "water extraction licence" is defined in s 4(1) as including, *inter alia*, "a licence under section 60 to take water from a bore". Therefore, in exercising a function to grant a licence under s 60, the First Defendant was required to take into account any of the factors listed at 90(1)(a)-(k) which are relevant to the decision. This

includes the following factor provided at s 90(1)(ab): “any water allocation plan applying to the area in question”.

h. The First Defendant's decision to grant the Licence was not in accordance with the WAP declared in respect of the Western Davenport Water Control District.

i. In granting the Licence, the Water Controller failed to assess the licence application against the WAP GDE Criteria, and instead assessed the licence application against criteria contained within a Departmental policy document titled “Guideline: Limits of acceptable change to groundwater dependent vegetation in the Western Davenport Water Control District” (Guideline).

j. The Defendant erred in failing to apply the WAP GDE Criteria in making the Purported Decision.

2. The Purported Decision involved a jurisdictional error because the Licence was granted subject to conditions under s 60(2) of the Act which operated to defer consideration of matters which, for the decision to have been lawfully made pursuant to s 30(3)(a)(ii) of the Act, were required to be determined prior to, or in the course of, making the Purported Decision.

Particulars

a. The Plaintiff refers to and repeats particulars (a) to (f) of Ground 1.

b. The First Defendant imposed a number of conditions on the Licence pursuant to s 60(2) of the Act. These conditions require the Licence holder to, *inter alia*,:

i. prepare for approval by the Water Controller a map (and spatial data), verified through suitable on-ground surveys, of groundwater dependent ecosystems in each landform on Singleton Station (NT Portion 653) in the Aeolian sandplain and alluvial plain areas shown in Figure 7.2 provided in Attachment A to the Licence (Condition CP5(a)(ii));

ii. prepare for approval by the Water Controller maps (and shapefiles) demonstrating the modelled spatial extent of predicted impact on groundwater levels (Condition CP5(b));

iii. prepare for approval by the Water Controller a revised version of the final bore field design (being Figure 53 in Attachment B to the Licence) or a revised pumping schedule and model pumping file for the bore field design, if the predicted impacts to groundwater levels

exceed the limits established under, *inter alia*, the Guideline (Condition CP5(i)-(iv));

iv. undertake an assessment of the potential salinity impacts to the Land and Water Resource from water taken and used under the Licence and submit a report to the Water Controller (Condition CP6);

v. develop and submit for approval by the Water Controller, an adaptive management plan (Condition CP7);

vi. develop and submit for approval by the Water Controller a program to assess the Water Resources on the Land (Condition CP9); and

vii. develop and submit to the Water Controller a groundwater dependent Aboriginal cultural values impact assessment (Condition CP10).

c. In granting the Licence permitting extraction of 40,000 ML/year subject to the conditions identified above in particular (b), the First Defendant constructively failed to exercise her jurisdiction under s 60 of the Act in that she did not consider, and deferred consideration of:

i. the adverse effects likely to be created as a result of activities under the Licence within the meaning of s 90(1)(c); and/or

ii. whether or not the proposed extraction that was to be approved under the Licence accorded with the WAP.

3. The Purported Decision was legally unreasonable.

Particulars

a. The Plaintiff refers to and repeats particulars (a) to (f) of Ground 1.

b. On the material before the First Defendant, the Water Resources Division: Water Assessment Branch of the Department of Environment, Parks and Water Security (Department) had modelled drawdowns which significantly exceeded the WAP GDE Criteria. For example, in relation to the criteria at particulars (d)(i) and (ii) of Ground 1, modelling prepared by the Department identified a maximum drawdown of 50 m within the proposed extraction area: Groundwater extraction licence resource assessment: AG06221 (Singleton Station): Water Resources Division Technical Report p 18 [3.3.4].

c. On the material before the First Defendant, no reasonable decision-maker could be satisfied that the Proposed Decision was in accordance with the WAP.

d. Further and in the alternative, the First Defendant relied upon the Guideline on the premise that it constituted "new scientific knowledge" even though the Guideline: (a) was not, of itself, scientific knowledge; and (b) did not reference any specific scientific knowledge which was not available at the time the WAP was declared.

[32] In their summary of the grounds relied on, Counsel for ALEC contend that the Minister erred in her decision to grant the licence in at least the three ways set out in the following paragraphs.[20]

[33] First, it is said that the Decision failed to accord with specific drawdown limits identified in the WAP, which were intended to protect groundwater dependent ecosystems. Under s 90(1)(ab) *Water Act 1992*, the Minister was required to take the WAP into account, while s 22B(4) of the Act required that water resource management (including licensing decisions) be in accordance with the WAP. Rather than applying the WAP, the Minister chose instead to apply a Departmental policy document (the Guideline referred to in [11] above), developed in consultation with Fortune, which had no statutory significance under the *Water Act 1992* and which was said to be "fundamentally inconsistent" with the WAP.

[34] Second, it is said that the Minister erred in imposing various conditions precedent which operated to defer consideration of matters which, for the decision to have been lawfully made under s 30(3)(a)(ii) of the Act, were

20 Outline of submissions, 26 July 2022, par 2.

required to be determined prior to, or in the course of, making the purported decision. The result of the conditions precedent was that the Minister left for a later decision an important aspect of the proposal which could result in a significant alteration of the proposal. That was said to violate the principle of finality with respect to ambulatory conditions recognised in the long-standing *Mison* and *Unley* line of authorities.[21]

[35] Third, it is said that the Decision was legally unreasonable "in that central planks of the analysis in support of the conclusions reached exhibited illogicality", in particular, the Minister's conclusion that her decision was consistent with the WAP was illogical. It is also said that those aspects of the Panel's reasons (adopted by the Minister) which took the Guideline into account as 'a relevant factor' because it constituted 'new scientific knowledge' were also illogical on the evidence before the Panel and Minister.

[36] The plaintiff MAC seeks an order in the nature of certiorari quashing the Licence bearing licence number WDCP 10358; alternatively, a declaration that the Licence is invalid insofar as it provides for any entitlement to take water in excess of 12,788 ML/year.

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21 *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734; *Corporation of the City of Unley v Claude Neon Ltd* (1938) 32 SASR 329.

[37] The grounds relied on by MAC are as follows:[22]

> **Grounds**
>
> **Delegated decision-making**
>
> 1. The first defendant (the Minister) failed to give proper consideration to relevant considerations under s 90 of the *Water Act*.
>
> **Particulars**
>
> On Thursday, 11 November 2021, the Minister was empowered by delegation to exercise powers under s 30(3) of the *Water Act*. On Monday, 15 November 2021, the Minister decided to grant the Licence. In her reasons, the Minister said she had reviewed and considered a significant volume of often technically complex materials.
>
> Given the short time between delegation and decision, and the volume and technical nature of the materials, it may be inferred the Minister cannot have properly considered the s 90 factors.
>
> 2. The Minister's decision to grant the Licence was seriously irrational as no rational Minister would have treated the s 90 considerations so irrationally.
>
> **Particulars**
>
> The plaintiff repeats the particulars to the preceding paragraph.
>
> **Conditions precedent**
>
> 3. The Minister failed to make a decision on the application as the conditions precedent leave open the possibility the proposal as carried out will be significantly different to the proposal the subject of the application.
>
> **Particulars**
>
> CP5, 7, 8, 9 and 10, read with the staging conditions, were imposed to address several risks and uncertainties identified by the Water Resources Review Panel. Depending on the information obtained in fulfilment of the conditions, and future decisions, it is possible the proposal as carried out will be significantly different to the proposal the subject of the application.

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22 Further amended originating motion between parties, annexure "KOB 59" to the affidavit of Kate O'Brien affirmed 5 September 2022.

4. Alternatively, the Minister failed to make a decision on the application to the extent the Licence provides for any entitlement to take water in excess of 12,788 ML/year as the conditions precedent leave open the possibility the proposal as carried out will be significantly different to the proposal the subject of the application.

Particulars

The plaintiff repeats the particulars to the preceding paragraph. In reaching the following conclusions, which were adopted by the Minister, the Panel affirmed it did not have necessary confidence in the volumes of water to be provided beyond stage 1. The Panel said:

- "It is the Panel's view that these risks and uncertainties need to be better defined before there can be confidence in the decision to provide the volumes of water that the Licence makes available to the proponent" (at [76])
- "entitlements beyond Stage 1 should be withheld until sufficient data has been gathered and analysed to enable more confidence in the understanding of the long-term aquifer behaviour and GDE response" (at [80])
- "In the Panel's opinion, the following is also necessary to reduce model uncertainty prior to the extraction of water for horticulture under this Licence:
    - A detailed assessment of the water resource on Singleton Station, including hydrogeological investigations at a local level, with a program of drilling and aquifer testing to obtain specific data on aquifer properties." (at [53])

5. The Minister failed to consider Aboriginal cultural values, a mandatory relevant consideration.

Particulars

Aboriginal cultural values were a mandatory relevant consideration under the Water Allocation Plan.

The Minister adopted the Panel's conclusion, as follows: "The Panel is not able to form a view on the significance of the information presented in [the Aboriginal cultural values 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."

Aboriginal cultural concerns were left to be addressed by conditions on the Licence instead of being taken into account when deciding whether or not a Licence should be granted.

Period of stage 1

6. The Minister's reduction of the period of stage 1 of the Licence from the 5 years recommended by the Panel to 3 years was supported by no evidence.

Particulars

The Panel recommended the period of stage 1 be increased to five years “to enable adequate assessment of aquifer behaviour and GDE condition" (at [79]-[80]). The panel comprised experts. Further, that period was supported by a Departmental submission to the Panel about the data to be gathered over the next 5 years and expert evidence relied on by the plaintiff.

The Minister is not an expert. She identified no evidence to support her decision to reduce the period of stage 1.

7. The Minister's reduction of the period of stage 1 of the Licence from the 5 years recommended by the Panel to 3 years was seriously irrational.

Particulars

The plaintiff repeats the particulars to the preceding paragraph.

Procedural fairness

8. The Minister failed to afford the plaintiff procedural fairness by failing to provide it with (a) all material relied on by the Minister and (b), additionally, the groundwater model.

Particulars

The Minister relied upon material not available to the plaintiff, particularly “the information considered by the Review Panel, and its subsequent clarification of the requirements of a cultural values impact assessment”; and “the response by the Licence Holder to the Notice of consideration of amended conditions associated with water extraction licence WDPCC100000 dated 12 November 2021”.

Further, the plaintiff requested all of the digital files comprising the groundwater model so it could analyse that model and undertake spatial predictive uncertainty analysis of the model. The plaintiff was denied the opportunity to

undertake this analysis and present the results to either the Panel or the Minister.

Had the groundwater model been given to the plaintiff, it would have presented a report to the Controller, and the Panel, and the Minister about the spatial predictive uncertainty of the model and that report would have been directly relevant to CPs 5 to 10.

Had the "subsequent clarification of the requirements of a cultural values impact assessment" been given to the plaintiff, it would have made submissions to the Minister about appropriate licence conditions for the process for, and terms of reference of, the assessment.

Had the "response by the Licence Holder to the Notice of consideration of amended conditions" been given to the plaintiff, it would have made submissions to the Minister about the scientific basis for the period of stage 1.

Licence period

9. The Minister erred in law by failing to comply with s 60(4) of the *Water Act* (as in force on 15 November 2021) before granting the Licence for a period exceeding 10 years.

Particulars

The Licence was not for a purpose, nor did it meet criteria, that the Minister by Gazette notice specified as justifying a longer period, as no purpose or criteria had been notified at the time of the grant of the Licence.

Even if s 60(4)(b) applies to a decision made by the Minister, the Controller had not herself been satisfied, as she did not herself consider, that special circumstances justified a licence period exceeding 10 years. Further, nothing in the Review Panel's reasons, or the Minister's reasons, addressed the requirements of s 60(4)(b).

[38] It can be seen that there is some common ground in the contentions of the plaintiff parties.

ALEC Ground 1

[39] Ground 1 in the ALEC proceeding relies on the asserted fact that the Decision to grant the Licence was not in accordance with the WDWAP, in

that the Minister did not apply the groundwater dependent ecosystems (GDE) impact criteria in the WDWAP.

[40] Part 8.3.1 of the WDWAP states, inter alia, "Groundwater extraction licence applications should demonstrate compliance with the criteria laid out in this WDWAP. Part 8.2 of the WDWAP, headed "Protection of environmental and cultural values", contained Part 8.2.1 in the following terms:

> **8.2.1 Terrestrial vegetation groundwater dependent ecosystems**
>
> Proposed extraction should not result in a change to groundwater conditions beyond the following limits within the GDE protection area (Figure 11) unless it can be shown that the vegetation is not accessing groundwater. Assessment of compliance with these criteria should be based on groundwater modelling giving consideration to the cumulative effect of all approved extraction.
>
> **Limits to change in groundwater levels within the GDE protection area**
>
> - Modelled extraction does not cause the maximum depth to water table to exceed 15 metres below ground level
> - Modelled extraction does not result in the maximum depth to water table declining by more than 50% below the levels that would be expected under a natural baseline scenario (no pumping scenario)
> - Modelled extraction does not result in a rate of groundwater drawdown that exceeds 0.2 metres/year.
>
> The Department of Environment and Natural Resources will monitor groundwater drawdown and the health and condition of a set of GDE reference sites to monitor the effectiveness of GDE protection approaches and refine the understanding of GDE groundwater interactions and dependence. Results will be reported annually via the integrated annual report on monitoring and compliance. Where groundwater drawdown trigger levels are exceeded or unacceptable impacts from groundwater drawdown on GDE health are observed (i.e. change in morphology, composition or loss of function) this will trigger an adaptive management response. …

[41] Counsel for ALEC contend that, on the materials before the Controller and Minister, it was clear that Fortune's proposal to extract 40,000ML from the GDE protection area could not satisfy the Part 8.2.1 criteria. They submit that the Minister failed to assess Fortune's application against those WDWAP GDE criteria, and instead assessed the application against the criteria in the Guideline document referred to in [11] above. They submit, inter alia, that the Guideline adopted drawdown thresholds which were radically less rigorous than those adopted in the WDWAP.[23] The Minister is thereby said to have failed to comply with s 22B(4) and (further and alternatively) with s 90(1)(ab) *Water Act 1992*, with the consequence that the Decision was affected by jurisdictional error: the Minister exceeded the limits of the decision-making authority conferred by the statute in reaching her decision.[24]

[42] I set out the substance of s 22B(4) in [8] above. The subsection requires that water resource management in a water control district be in accordance with the declared water allocation plan. Counsel for ALEC point out that the phrase 'water resource management' is not defined in

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23 Outline of submissions, 26 July 2022, par 59. The preceding part of that submission read as follows: "Whereas the WAP sought to meet the environmental water requirements of water dependent ecosystems, the Guideline arbitrarily stated (without articulating any justification, by reference to scientific evidence or otherwise) that 30% of GDEs did not need to have their water requirements met".

24 Counsel for ALEC rely on *MZAPC v Minister for Immigration and Border Protection* [2021] 95 ALJR 441, at [29] per Kiefel CJ, Gageler, Keane and Gleeson JJ. See submissions, par 53.

As to the Minister's asserted reliance on the Guideline, counsel for ALEC rely on the decision of Gleeson CJ in *NEAT Domestic Trading Pty Ltd v AWB Limited* (2003) 216 CLR 277 at [24] for the proposition that a (Departmental) policy must be (1) consistent with the statute under which the relevant power is conferred and (2) not such as to preclude the decision-maker from taking into account relevant considerations or as to involve the decision-maker in taking into account irrelevant considerations.

the Act, but contend that "within the scheme of the Act [it] clearly embraces a decision to grant a groundwater licence".[25]

[43] Section 90(1) *Water Act 1992* reads, relevantly, as follows:

> **90 Factors to be considered**
>
> (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:
>
> (a) the availability of water in the area in question;
>
> (ab) any water allocation plan applying to the area in question;
>
> (b) the existing and likely future demand for water for domestic purposes in the area in question;
>
> (c) any adverse effects likely to be created as a result of activities under the ... licence ... on the supply of water to which any person other than the applicant is entitled under this Act;
>
> (d) the quantity or quality of water to which the applicant is or may be entitled from other sources;
>
> (e) the designated beneficial uses of the water and the quality criteria pertaining to the beneficial uses;
>
> (f) the provisions of any agreement made by or on behalf of the Territory with a State of the Commonwealth concerning the sharing of water;
>
> (g) existing or proposed facilities on, or in the area of, the land in question for the retention, recovery or release of drainage water, whether surface or sub-surface drainage water;
>
> (h) the adverse effects, if any, likely to be created by such drainage water resulting from activities under the licence on the quality of any other water or on the use or potential use of any other land;
>
> (j) the provisions under the *Planning Act 1999* relating to the development or use of land in the area in question;
>
> (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.

25 Outline of submissions, par 8.

[44] In relation to s 90(1), a water extraction licence is for present purposes a licence under s 60 of the Act to take water from a bore. The expression 'a water extraction licence decision' should be read accordingly. As mentioned in [25], the *Water Act 1992* does not prescribe independent criteria to be applied by the Minister on a review of the Controller's decision. Therefore, the matters which the Minister was required to take into account in carrying out the review and making a water extraction licence decision were those s 90(1) factors which were relevant to the decision. The Minister was required by s 90(1)(ab) to take into account the WDWAP (on the basis that it was relevant to the Minister's decision, and that is common ground in ALEC's proceeding) but was also required to take into account the other specified factors as well as the unspecified factors referred to in s 90(1)(k) as: "other factors the [Minister] considers should be taken into account …". The Minister was also required to take into account comments made by interested persons in response to the Controller's notice of intention to make a water extraction licence decision published pursuant to s 71B(1) of the Act. In my opinion, that requirement arises by implication from s 71C(2) and s 71E(4)(a) of the Act which required that the review decision state or explain the way in which the Minister had taken into account comments made (to the Controller) in accordance with s 71B(4) as well as "any relevant factors mentioned in s 90(1)".

[45] In my opinion, the statutory requirement to 'take into account' the factors listed s 90(1) of the Act is a requirement to give consideration to them, that is, to engage in an "active intellectual process" directed at those factors,[26] or at least at those factors relevant to the decision. There are 11 factors specified in s 90(1). There is no requirement that any one or more of the factors are fundamental considerations in the water extraction licence decision.[27] Moreover, the sub-section does not provide an exhaustive list of the factors that the Minister must take into account as relevant in any given case, since s 90(1)(k) allows the Minister to take into account 'other factors' which the Minister considers should be taken into account. There is nothing in the language of s 90(1) which requires that the Minister give particular weight to any one factor or group of factors nor is there any indication that one or more factors are to be accorded primacy. This is unsurprising, given that the decision to grant a water extraction licence is multifactorial and involves the balancing of a range of relevant but possibly disparate considerations.

[46] In general, absent any statutory or contextual indication of the weight to be given to the factors which a decision maker is required to take into account, it is for the decision maker to determine the appropriate weight

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26 *DVO16 v Minister for Immigration and Border Protection & Anor* [2021] HCA 12; 273 CLR 177 at [12], per Kiefel CJ, Gageler, Gordon and Steward JJ, citing *Minister for Home Affairs v Ogawa* (2019) 269 FCR 536 at [96]-[101].

27 Cf. *The Queen v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322, where Mason J held (at 329) that the requirement to "have regard to costs necessarily incurred in providing nursing home care in the nursing home" meant that the decision maker had to give weight to those costs as a fundamental element in making his determination, inter alia, because it was the only matter explicitly mentioned as a matter to be taken into account. See also the discussion in *Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 389; 109 FCR 152 at [54] per Sackville J.

to be given to them.[28] The weight to be given to any one factor or group of factors may well vary from case to case. Moreover, the decision maker is not even obliged to take into account all of the s 90(1) factors, since the obligation is to take into account only those "that are relevant to the decision".

[47] In relation to s 90(1)(ab), I accept the submission of counsel for the Minister that the language employed is very different to a requirement that the decision maker is "bound by", "must follow" or "must adopt" the provisions of an applicable water allocation plan. I would add that there is no requirement that a water extraction licence decision must accord with, or not be inconsistent with, a water allocation plan applying to the area in question. The purpose of the statutory requirement that the decision maker take into account any applicable water allocation plan (in addition to many other factors) is to allow the decision maker to be guided by any such plan but not to be fettered in a way which would preclude consideration of a water extraction licence application which did not meet the criteria set out in the plan.

[48] In the present case, considerable leeway should be afforded to the Minister in relation to determining the validity of the impugned decision to grant a water extraction licence, not only because the factors to be taken into account must pass through the filter of relevance, but also because the weight to be given to those factors is then for the Minister to

28 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 41, per Mason J.

determine. Further, the range of factors which the Minister must take into account is substantially expanded by the inclusion of the "other factors" (referred to but not expressly specified in s 90(1)(k)) which the Minister considers "should be taken into account". My conclusion is that the Minister has a wide discretionary power under s 90(1) *Water Act 1992*.

[49] The question to be considered is whether and to what extent s 22B(4) of the Act limited that wide discretionary power. In other words, did the requirement that 'water resource management' be in accordance with the WDWAP oblige the Minister to refuse a water extraction licence application in circumstances where the proposal did not fully or substantially accord with the water allocation plan.

[50] The contentions put on behalf of ALEC depend on whether s 22B(4) compelled the Minister (who was required under s 90(1)(ab) to "take into account" the WDWAP) not merely to consider the WDWAP but to act in accordance with all of the principles and requirements stated in it. The underlying thrust (or at least the logical extension) of ALEC's contentions is that the WDWAP has primacy in the exercise of the discretionary power under s 90(1) of the Act, such that there could be no lawful departure from its provisions.

[51] Section 22B *Water Act 1992* is in Division 1 (General Administration), one of several divisions within Part 3 (Administration). Sections 22A and

22B were inserted by the *Water Amendment Act 2000*.[29] Section 22B has remained substantially unaltered.[30] That section is concerned with water allocation plans and water resource management. In order to determine the meaning of the undefined phrase 'water resource management' in s 22B(4), it is appropriate to have regard to the legislative purpose, since a construction promoting the purpose or object underlying an Act is to be preferred to a construction that does not do so. It does not matter whether the purpose or object is expressly stated in the Act or not.[31]

[52] A general statement of the purpose or object of the *Water Act 1992* is set out at the head of the Act, before Part 1, in the following terms:

> An Act to provide for the investigation, allocation, use, control, protection, management and administration of water resources, and for related purposes

[53] There was no similar statement of the purpose or object set out in the *Water Amendment Act 2000* (which enacted/inserted s 22A and s 22B). However, the purpose was stated by the Minister in his second reading speech, in which he also explained that the legislative changes drew upon five "fundamental principles which are at the core of government policy

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29 *Water Amendment Act 2000*, Act 20/2000, s 5. Originally, s 22A contained only the provision which is now s 22A(1).

30 The present s 22B(7) was enacted subsequently.

31 *Interpretation Act 1978* (NT), s 62A. See also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at [4], [5], per French CJ.

for sustainable use of water". Relevant parts of the second reading speech are extracted below:[32]

> The purpose of this bill is to amend the *Water Act* to provide a process for the allocation of water resources to beneficial uses, including the environment, and to enable trade in water licences.
>
> ... there is some urgency to implement this important legislative change so as to ensure that competition [policy] payments due to the Territory are not jeopardised.
>
> The changes needed are not extensive, nor are they complex. They draw upon the fundamental principles which are at the core of government policy for sustainable use of water. These principles are:
>
> - sustaining long term development of water resources, with water allocation always limited to sustainable yield and incorporating safety margins where there is uncertainty;
> - ensuring environmental integrity, with water always allocated for water dependent ecosystems;
> - planning in partnership with all legitimate stakeholders, with ultimate responsibility vested in government to allocate water for overall community benefit;
> - providing security for enterprise development, with longer term water licences for business investment and planning; and
> - optimising economic benefit, by allowing free market trading in water licences.
>
> The Northern Territory is indeed fortunate in that our natural water resources are both plentiful and in excellent condition and hence available to support new development. We are determined that this will remain the case. The widespread over-exploitation and degradation suffered in southern states will not occur here.
>
> The changes I will now outline are designed specifically to ensure that the Territory can build on its strong competitive advantages of unique environmental conditions and sustainable development potential.
>
> Section 22 of the Act, which currently allows for water control districts to be declared, will be expanded to also allow for beneficial uses and water allocation plans to be declared. Simply put, water allocation plans share water resources among the mix of beneficial

32 Northern Territory, Parliamentary Debates, Legislative Assembly, 2 March 2000, Hansard pp 5340 – 5341 (Minister Daryl Manzie). Underline added.

> uses in water control districts. Identifying the mix of beneficial uses, and the preparation and operation of an allocation plan to share the available water between the mix of beneficial uses, will require input from water advisory committees appointed under section 23. ...
>
> The water allocation planning process will also recognise the environment as a fundamental beneficial use and will always allocate a share of streamflow and groundwater to maintain the health of rivers and wetlands. Where water allocation plans are declared, the level of extraction through water licences will be limited to the sustainable yield of regional water resources, accounting for environmental allocation. All water use licences will now be issued for up to 10 years - they are currently 2 years. This will give water users greater surety to raise finance and make investment decisions. Water licences will also be able to be traded freely within the district, in accordance with the allocation plan. However, 'use it or lose it' rules will apply so that licences will be amended or revoked where water entitlements are not used. In conjunction with the ability to trade licences, this will ensure that water is used to best economic advantage.

[54] I note the Minister's reference to "the water allocation planning process". The Minister's explanatory speech identified the purpose or intended result of a declared water allocation plan as the appropriate sharing of available water resources in a water control district between the mix of beneficial uses in that district. That was consistent with (the subsequently enacted) s 22B(5) of the Act, which specified the objectives of a water allocation plan as ensuring that water would be allocated within the estimated sustainable yield to beneficial uses, and that the total water use for all beneficial uses would be less than the sum of the allocations to each beneficial use.[33] In my opinion, planning and management of the

33 *Water Act 1992*, s 22B(5)(a) & (b). The current paragraphs (a) and (b) of s 22B(5) are the same or substantially similar to those inserted by the *Water Amendment Act 2000*.

water resource in a water control district was and remains the meaning of 'water resource management'.

[55] The legislative history of s 90(1) does not support ALEC's contentions. Immediately prior to 6 June 2000, s 90(1) specified factors or matters the same or substantially the same as those contained in the present paragraphs (a), (b), (c), (d), (e), (f), (g), (h)(j) and (k).[34] However, under s 90(1) as it then stood, they were matters the Controller "may take into account". In contradistinction, s 90(1A) *Water Act 1992* stated that the Controller "must take into account any water allocation plan applying to the area in question".[35]

[56] The *Water Amendment Act 2007* made relevant amendments to s 90(1) and s 90(1A).[36] The specified factors in s 90(1) became matters which the Controller was obliged to take into account ("the Controller must take into account ..."), subject to relevance ("any of the following factors that are relevant to the decision"). Further, the factor previously contained in s 90(1A) was now part of s 90(1), as the newly inserted s 90(1)(ab): "any water allocation plan applying to the area in question".

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34 Section 90(1)(k) was in slightly different terms: "(k) all other matters the Controller considers relevant in making the decision or which he or she is required by or under any other law in force in the Territory to take into account."

35 That mandatory requirement had been inserted by the *Water Amendment Act 2000*, Act 20/2000. Subsection (1A) read as follows: "In addition to subsection (1), in deciding whether to grant a licence under section 45 or 60, the Controller must take into account any water allocation plan applying to the area in question." [underline emphasis added].

36 *Water Amendment Act 2007*, s 7.

[57] The effect of the 2007 amendments was that the requirement for the Controller to take into account any applicable water allocation plan, which had previously been an independent mandatory consideration under s 90(1A), arguably predominant over the s 90(1) discretionary factors, was now on 'equal footing' with the s 90(1) factors, and, like them, subject to relevance. Further, the factor specified in s 90(1)(k) which the Controller was required to take into account ("must take into account") was amended to read: "(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".

[58] I refer to the conclusion stated in [54] above. In my opinion, s 22B(4) *Water Act 1992* has a different sphere of operation to that contended for by ALEC. It is not directed to the weight to be given to a water allocation plan in a water extraction licence decision, which is addressed under s 90(1) of the Act. It does not predetermine a water extraction licence decision so as to prohibit any departure from the provisions of a declared water allocation plan. If that were not so, it would be contrary to the wide discretion given to the Minister under s 90(1) of the Act, discussed in [48] above.

[59] Given my conclusions in relation to (1) the meaning of the phrase 'water resource management' in s 22B(4) *Water Act 1992* and (2) the nature of the requirement to 'take into account' various factors under s 90(1) of the Act, ALEC's first ground of review must fail. In making the water

extraction licence decision, the Minister did not have a statutory obligation to "comply with" s 22B(4) of the Act. Further, although the Minister had a statutory obligation under s 90(1)(ab) of the Act to take into account the WDWAP, the Minister did not have a statutory obligation to "comply with" the WDWAP in the sense asserted by ALEC. More specifically, with respect to particular d. of ground 1, the Minister did not have a statutory obligation to apply and make a licence decision in strict accordance with Part 8.2.1 of the WDWAP. Finally, in relation to its criticism of the Minister for taking into account the Guideline,[37] and giving the Guideline greater weight than the WDWAP, ALEC has not established that the Minister was not entitled to take into account the Guideline pursuant to s 90(1)(k) as a factor the Minister considered should be taken into account.

[60] There is a further matter I should mention in this context. As I have explained, the complaint of ALEC is that the Minister failed to comply with s 22B(4) of the Act by making a licence decision which did not accord with Part 8.2.1 of the WDWAP. It does not allege that the Minister did not take into account the WDWAP. Indeed, it could not do so in circumstances where the Guideline at section 3.1 set out the substance of Part 8.2.1 of the WDWAP in relation to limits to change in groundwater levels within the GDE protection area, as follows:

37 The 'Guideline' document is referred to in [11] above.

> The Western Davenport Water Allocation Plan (the Plan) has an objective that detrimental impacts on water dependent ecosystems as a consequence of consumptive use will be avoided as far as possible. More specifically, the Plan sets limits for change in groundwater conditions within the GDE protection area as follows (refer section 8.2.1)
>
> - Modelled extraction does not cause the maximum depth to water table to exceed 15 m below ground level
> - Modelled extraction does not result in the maximum depth to water table declining by more than 50% below the levels that would be expected under a natural baseline scenario (no pumping scenario)
> - Modelled extraction does not result in a rate of groundwater drawdown that exceeds 0.2 m/year.

[61] For reasons explained at section 3.2, the Guideline adopted different criteria to those in Part 8.2.1 of the WDWAP, based on additional research, modelling based on satellite imagery, on-ground sampling, and modelling/mapping on a regional scale based on field investigations. The Guideline recognised that the purpose of the WDWAP was to provide for consumptive use of groundwater and, in that context, accepted that some impact on GDE's was unavoidable, albeit "within carefully managed levels". The Guideline at section 4 set out a determination made by the Department of Environment and Natural Resources "that 70% of the current extent of GDE's in the Western Davenport Water Control District should be protected from negative impact".[38] In relation to those GDEs to which the 70% threshold might apply, the Guideline proposed, in effect, that it should apply to the more ecologically valuable GDEs, listed as those that are "large in individual extent"; that are in good condition

38 The 70% threshold applied within each of the two major landform classes in the Western Davenport Water Control District, identified as 'aeolian sand plain' and 'alluvial plain'.

(having regard to the impacts such as grazing, fire, weeds); that provide habitat for threatened or rare species; that have relatively high species richness; that have relatively complex vegetation structure; that represent the range of environmental variation in ecosystems found in the region; and those that are "important in maintaining connectivity between habitat patches across the landscape" (I think this meant wildlife corridors). The Guideline stated that application of the suggested 70% threshold "should result in protection of a high proportion of groundwater dependent ecosystems having high densities of plants of Aboriginal cultural value".

[62] The Guideline at section 4.1 set out a differential approach to determining the potential for negative impact on groundwater dependent vegetation, depending on whether the vegetation was over 'shallow groundwater' (less than 10 m deep) or 'deeper groundwater' (10-15 m deep).

[63] For GDEs over shallow groundwater, the Guideline stated that there would be "potential for negative impact" if modelled extraction showed the possible occurrence ("may occur") of one or more of the following: (1) the maximum depth to water table exceeds 10 m below ground level; (2) the maximum depth to water table declines by more than 50% below the levels that would be expected under a natural baseline (no pumping) scenario; and (3) modelled extraction results in a rate of groundwater drawdown that exceeds 0.2 m/year.

[64] For GDEs over deeper groundwater, the Guideline stated that there would be "potential for negative impact" if modelled extraction showed the possible occurrence ("may occur") of one or more of the following: (1) the maximum depth to water table declines by more than 35% below the levels that would be expected under a natural baseline (no pumping) scenario; and (2) modelled extraction results in a rate of groundwater drawdown that exceeds 0.2 m/year.

[65] It can be seen that the Guideline provided an explanation or justification for its stated criteria for determining the potential for negative impact on groundwater dependent vegetation differing from the criteria in Part 8.2.1 of the WDWAP.

[66] The fact that the Minister ultimately decided that different criteria to those set out in Part 8.2.1 should be applied does not mean that she did not 'take into account' the WDWAP. Not only did the Minister take into account the Guideline (which itself set out and engaged with Part 8.2.1), but the Minister expressly dealt with the WDWAP, in particular Part 8.2.1, where she summarised the matters considered by the Controller, including the WDWAP and the Guideline, and noted that the Controller had taken into account the risk to GDEs being within thresholds outlined in the Guideline. The Minister also referred to Part 10.1 of the WDWAP for an explanation of the term 'adaptive management framework', the stated tools of which included licence conditions, policy, water allocation plans, monitoring programs, research

and investigations, compliance programs and modelling. In that context, the Minister adopted the opinion of the Review Panel that the Controller's use of licence conditions (including several conditions precedent, to be satisfied before extraction of water under the licence were to proceed) was a reasonable measure to manage risk and uncertainty.[39] The Controller had observed that potential impacts to GDEs (and other water users) could be managed by licence conditions which (1) staged the release of water and (2) required implementation of a monitoring and adaptive management plan.[40] The Minister stated in her reasons that the licence contained a number of conditions precedent which had to be addressed prior to the extraction of water under the licence, which the Review Panel considered appropriate to manage risk and uncertainty.

[67] The proposition that Part 8.2.1 of the WDWAP had some binding regulatory force, or even some derivative statutory force via s 22B(4), as ALEC contends, becomes even more improbable when regard is had to the

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39 Review Panel report, par 71, under heading 'Use of Adaptive Management Framework to manage uncertainty and risk': "... the Controller's approach to dealing with these aspects as Conditions Precedent is reasonable. The risks ... associated with water extraction and water extraction cannot occur under this Licence until the Conditions Precedent have been dealt with and approval is granted to proceed." Further, at par 75: "The WAP discusses the merits of adaptive management where there is uncertainty and enables the use of an adaptive management framework for the regulation of water extraction. ... incorporating an adaptive management framework into licence conditions is consistent with the WAP and appropriate for achieving the objectives of enabling water extraction for consumptive use while meeting the environmental water requirements of non-consumptive uses".

40 Controller's decision, par 124(c). The Controller then observed, at par 125, that a water extraction licence and its conditions were one element of a 'dynamic adaptive management approach' to water resource management. She referred in particular to conditions precedent, to give an applicant the opportunity to resolve uncertainties associated with (1) the location and types of GDEs and (2) salinity and groundwater quality, with conditions precedent then requiring an applicant to develop a monitoring program and an adaptive management plan to ensure that environmental objectives for the management zone were being met. The Controller also referred to staging conditions which would limit the volume of water that could be taken in a period, which would require the holder of the licence to demonstrate that the predicted impacts to GDEs did not exceed the thresholds outlined in the Guideline.

language used. It is apparent that the language of the WDWAP is in the nature of guidance, instruction and recommendation. For example, in Part 8.2.1, relied on by ALEC, the word 'should' is used: "Proposed extraction *should* not result in a change to groundwater conditions ..." and "Assessment of compliance with these criteria *should* be based on groundwater modelling". The use of the word 'should', rather than 'must', denotes a non-regulatory standard which is clearly not mandatory.[41] That conclusion is confirmed by the following extract from Part 1.1.2 of the WDWAP, dealing with 'Groundwater resources' (underline emphasis added):

> Groundwater allocations to the beneficial uses of environment and non-consumptive cultural [uses] are intended to protect GDEs and cultural values relying on groundwater. In addition to this allocation, the WDWAP <u>recommends</u> the following limits to change in groundwater conditions at GDEs caused by proposals to extract groundwater:
>
> - The maximum depth to groundwater does not exceed 15 metres.
> - The magnitude of change in the depth to groundwater is not more than 50%.
> - The rate of change of the groundwater table is not more than 0.2 metres per year.

[68] It is tolerably clear that this was a reference to the limits to change in groundwater levels within any GDE protected area, and is referring to the same matters as Part 8.2.1, albeit expressed slightly differently.

41 Section 8.2.1 is extracted in [40] above.

[69] The further matters discussed in [60] to [68] confirm the conclusion I stated in [59], that ALEC's first ground of review must fail.

ALEC Ground 2

[70] As explained in [34], this ground asserts the impermissible deferral of mandatory relevant considerations. Counsel for ALEC submit that this is apparent from the conditions set by the Controller, and adopted by the Minister subject to the amendments and the additional conditions precedent referred to in [27] above.

[71] The conditions precedent ("CP") clauses set out conditions which had to be fulfilled in order for the entitlements in the staging conditions of the licence to take effect. The first staging condition (SC 1) included a Table (reproduced below) and provided that, subject to the Licence, Fortune would have an entitlement to take water from a bore for the stage specified in Column 1 of the Table, in the amount specified in Column 2, for the period specified in Column 3 and from the bore field specified in column 4.

Table 2 Staged entitlement

Column 1	Column 2	Column 3	Column 4
Stage	Entitlement ML/yr	Period	Bore Field (Block)
1	12 788	For a period of 3 years from the date the Controller approves, in accordance with CP 2, that the Conditions Precedent have been satisfied.	Block 1, 2 and 3

2	22 845	For a period of 2 years from the date the Controller approves proceeding from Stage 1 to Stage 2.	Block 1, 2, 3, 4 and 5
3	31 779	For a period of 2 years from the date the Controller approves proceeding from Stage 2 to Stage 3.	Block 1, 2, 3, 4, 5, 6 and 7
4	40 000	For the remaining duration of the licence from the date the Controller approves proceeding from Stage 3 to Stage 4.	Block 1, 2, 3, 4, 5, 6, 7, 8 and 9

[72] The staging conditions provided that Fortune required approval in writing from the Controller to proceed from one stage to the next stage (express mention was made about proceeding from Stage 1 to Stage 2).[42] In order to obtain such approval, Fortune was required to provide to the Controller a 'stage completion report' prepared by a suitably qualified person which demonstrated, inter alia, that the relevant bore field had a production rate capable of delivering the entitlement specified for the approved stage and that, based on results from the monitoring program, the volume of water actually taken in the approved stage and the proposed volume of water to be taken in future stages met the objectives of the most recently approved adaptive management plan.

42 Staging condition SC 2.

[73] In imposing staging conditions, the Minister adopted the approach taken by the Controller, as follows:[43]

> ... the Controller established staging conditions limiting the volume of water that could be taken in any period to allow for the impacts of the water taken in the previous stage/s to be monitored in accordance with the approved monitoring program, to determine that the extraction is behaving as predicted and is managed within the defined thresholds that meet the environmental and cultural objectives outlined in approved adaptive management plan.

[74] The content of the conditions precedent is set out in [75] to [80] below.

[75] Condition CP 5(a)(ii) of the Licence required that Fortune prepare for approval by the Controller a map (and spatial data), verified through suitable on-ground surveys, of the groundwater dependent ecosystems in each landform on Singleton Station in the aeolian sandplain and alluvial plain areas shown in an attachment to the licence.

[76] Condition CP 5(b) of the Licence required Fortune to prepare for approval by the Controller maps (and shape files) demonstrating the modelled spatial extent of predicted impact on groundwater levels.

[77] Condition CP 5(c) of the Licence required Fortune, in the event that the extent of predicted impact mapped in accordance with condition CP 5(b) exceeded, relevantly, the limits outlined in the Guideline, to prepare for approval by the Controller a revised version of the bore field design set out in an attachment to the Licence, and a model pumping file (pumping

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43 Minister's reasons, p 1686 of the Jungfer affidavit. The reference was to par 54 of the Controller's decision, p 188 of the Jungfer affidavit.

schedule) for the revised bore field design, together with maps (and shape files) based on the revised bore field design demonstrating the modelled spatial extent of predicted impact to, relevantly, the groundwater dependent ecosystems mapped in CP 5(a) at 5 yearly intervals for a minimum of 40 years to meet the protection limits outlined in the Guideline.

[78] Condition CP 6 required Fortune to undertake an assessment of the potential salinity impacts to the land and water resource from water taken and used under the Licence and to submit a report to the Controller. One of the matters required to be included in the assessment and report was the management of salinity impacts in order to maintain groundwater quality and to prevent or minimise adverse effects on the potential use of any other land.

[79] Condition CP 7 required Fortune to develop and submit for approval by the Controller an adaptive management plan which had to include "clear and measurable objectives" which, inter alia, would achieve or reduce the predicted impact on groundwater levels determined under condition CP 5, and which would also protect 70% or more of the groundwater dependent ecosystems in each of the two major landform classes.[44] Fortune was required to prepare the adaptive management plan in consultation with the Department. Condition CP 7 was very detailed in terms of the matters to be dealt with in the proposed adaptive management plan, and required

44 The 70% threshold was derived from the Guideline. See the discussion in [61] above.

that the plan include "quantitative triggers and limits which can be used to initiate adaptive management actions" when, for example, groundwater level response to water taken under the Licence deviated from the predictions mapped in accordance with condition CP 5 and/or if impact on the health of groundwater dependent ecosystems was measured or predicted to exceed 30% of the extent of groundwater dependent ecosystems in each of the two major landform classes as determined under CP 5.[45]

[80] Condition CP 8 required Fortune to develop and submit for approval by the Controller a monitoring program to assess the impact of water taken under the Licence on groundwater levels, on the health of groundwater dependent ecosystems mapped in accordance with CP 5, and on other uses of the water resource. The requirements for the monitoring program were set out in detail.

[81] As mentioned in [27] above, the Minister imposed conditions CP 9 and CP 10 which were additional to those imposed by the Controller. The inclusion of both conditions was as a result of the report of the Review Panel, as the Minister explained in her reasons:[46]

> By granting the licence with additional conditions, I accept the view of the Review Panel for the reasons it has given that further assessment of the water resources on Singleton Station is required and have established a new condition precedent, CP 9, which requires the licence holder to develop and submit for approval by the

45 Condition CP 7(e)(i) & (iii).

46 Minister's reasons, p 1692-3 of the Jungfer affidavit.

> Controller a program to assess the water resource on the land which is to incorporate a drilling program, including both production and monitoring bores; verification of the stratigraphy of the subsurface of the land; identify the aquifers; verify their properties and quantify their yields; and determine interconnectivity.
>
> I have also considered the issues raised by Reviewing Persons, regarding impact on cultural values from the activities under the licence and I accept the views of the Review Panel in that regard. For the reasons the Review Panel has given I have determined to add a new condition precedent, CP 10, which requires that the licence holder must develop and submit to the Controller a groundwater dependent Aboriginal cultural values impact assessment ...

[82] Condition CP 9 required Fortune to develop and submit for approval by the Controller a program to assess the water resource under which, amongst other things, aquifers were required to be identified, the interconnectivity between aquifers determined, and aquifer yields quantified by pumping tests of at least 48 hours of constant discharge with a recovery period of 24 hours or 95% recovery to initial groundwater levels. The program was required to be implemented following the Controller's approval.

[83] Condition CP 10 required Fortune to develop and submit to the Controller "a groundwater dependent Aboriginal cultural values impact assessment" prepared by a suitably qualified professional, which had to identify, map and document the cultural values of Aboriginal people which would be impacted by groundwater extraction under the Licence and to identify reference points to be used in modelling such impacts and specify monitoring parameters, trigger values and limits for the reference points

which could be used to initiate actions under an adaptive management framework.

[84] I made brief reference in [66] above to the manner in which the Minister took into account the WDWAP, the Guideline, the Controller's reasons and the report of the Review Panel. Having considered the detail of the conditions precedent, and having analysed the Minister's reasoning, I am satisfied that consideration was given to the specific issues of environmental impact and Aboriginal cultural values, as explained in [85] to [90] below.

[85] In relation to condition precedent CP 5, the Controller had considered the predicted impacts of groundwater extraction on GDEs based on a modelled distribution of GDE's in the District at the regional and property levels, and was satisfied that the total negative impact remained below the 30% threshold in the Guideline. The Review Panel report stated that information provided to the Panel demonstrated that the Guideline thresholds were based on detailed scientific investigations and assessments carried out since the WDWAP had been declared, and considered that it was appropriate for the Controller to take the Guideline into account under s 90(1)(k) of the Act.[47] The Minister adopted that approach. There was no failure to consider the impact on GDEs.

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47 Review Panel Report, pars 45 and 46, p 76 of the Jungfer affidavit. The Panel refrained from providing a legal opinion in relation to the Controller's reliance on the Guideline, which was appropriate given the Panel's function.

[86] In relation to condition precedent CP 6, the Controller had addressed the salinity impacts of the proposed extraction and use of water under the Licence. She identified a reduced risk of salinity problems because, in the sandy and highly permeable sandplain soils on which the proposed extraction activity would take place, salts would flush beyond the root zone.[48] The Controller nonetheless acknowledged that there was uncertainty as to the effect on the underlying groundwater resource, and imposed specific conditions under the licence to examine and address any adverse impacts from salinity. The Review Panel made a specific recommendation that there be a detailed assessment and investigation of salinity risks prior to extraction of groundwater, as outlined in the Controller's decision. Condition precedent CP 6 adopted that recommendation.

[87] In relation to condition precedent CP 7, the Controller had considered that the scientific understanding of the water resource and predicted impacts of the proposed groundwater extraction were moderately well-established. However, as the Controller acknowledged, the modelled data relied on could be influenced by assumptions and predictions and she therefore determined that the models and predictions should be tested as extraction went ahead. In considering the use of an adaptive management framework to manage uncertainty and risk, the Review Panel accepted that the

48 Controller's decision, par 82, p 191 of the Jungfer affidavit.

Controller's approach was reasonable,[49] and the Minister adopted this approach.[50]

[88] In relation to condition precedent CP 8, the Controller had considered that the potential for any adverse impact of groundwater extraction, or departure from modelled predictions, could be monitored and addressed by conditions requiring Fortune to report on its water usage; monitoring the effects on groundwater levels and the potential effect on other users, following which "any adverse effect could be addressed through the implementation of an adaptive management plan".[51] In this respect also, the Review Panel accepted that the Controller's approach was reasonable, and the Minister adopted that approach by the very detailed CP 7 summarised in [79] above.

[89] In relation to condition precedent CP 9, the Controller had determined to grant the licence having assessed the water resources in the District, including the availability of groundwater, the impacts of groundwater extraction and the effect of groundwater extraction under the proposed

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49 Review Panel Report, par 71, p 81 of the Jungfer affidavit. It may be noted that the Review Panel at par 76 referred to the challenge that the adaptive management plan would rely on information that would only become available once extraction commenced, and so the volume of water available for extraction, and the period of the entitlement, should be commensurate with the risks and uncertainties around aquifer response and GDE impact that are regulated through the adaptive management framework.

50 Minister's reasons, pp 1689-1690 of the Jungfer affidavit. The Minister made specific reference to the concerns identified by the Review Panel at par 76 of its report, at p 1690 of the Jungfer affidavit.

51 Controller's decision, par 73, p 190 of the Jungfer affidavit. In this context, it may be noted that Part 8.2.3 of the WDWAP included the following recommendation: "Relevant licences should contain clauses that allow the Controller of Water Resources to direct that corrective actions (e.g. changed pumping regimes) be employed, or otherwise amend, modify or revoke a licence, where monitoring suggests exceedance of trigger levels or unexpected and unacceptable impacts".

licence on the supply of water to other users.[52] The Review Panel then suggested that, prior to the extraction of water, a detailed assessment be undertaken of the water resource on Singleton Station, to include hydrogeological investigations at a local level to verify the modelled outputs and reduce model uncertainty.[53] The Minister accepted the recommended approach, and CP 9 was the result.

[90] In relation to condition precedent CP 10, I referred in [81] above to the Minister's reasons for imposing conditions precedent CP 9 and CP 10, which were both additional to those imposed by the Controller. The need to model groundwater dependent ecosystems was relevant to Aboriginal cultural values because, under the WDWAP, such values were associated with those ecosystems. The Review Panel considered that the Controller had not properly taken into account the cultural significance of GDEs which might be impacted by the extraction of water under the Licence, and suggested that a comprehensive cultural values impact assessment be undertaken prior to the extraction of significant volumes of water under the licence.[54] The Minister adopted this suggestion, for reasons given by her.[55]

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52 Controller's decision, starting at p 185 of the Jungfer affidavit, pars 27-33, 40-46 and 60-74.

53 Review Panel report, par 53, p 78 of the Jungfer affidavit.

54 See [19] and [20] above in relation to Ms Jungfer's clarification of the Review Panel's recommendation that a comprehensive cultural impact report be obtained.

55 Minister's reasons, p 1687 of the Jungfer affidavit.

[91] Counsel for ALEC contend that the nature of the conditions precedent was such that matters which were essential to the proposal's capacity to comply with the key terms of the WDWAP and the mandatory relevant considerations in s 90(1) of the Act were deferred for later consideration. Such deferred matters included the mapping of groundwater dependent ecosystems; modelling to substantiate the spatial extent of impacts on groundwater levels; the actual bore field design; salinity impacts and material to substantiate compliance with the Guideline were deferred. Additional conditions precedent CP 9 and CP 10 were said to exacerbate the problem. All of these matters were said to deprive the Decision of finality, rendering it invalid.

[92] Counsel for ALEC refer to "a long line of authorities decided under various Australian planning and environment laws which recognise the proposition that in instances where a statute confers power to grant a consent or licence subject to conditions, if the purported consent leaves for later decision an important aspect of the development which would alter the proposed development in a significant or fundamental respect, then it may be invalid".[56] On that basis, ALEC contends that an authorisation to extract water may not utilize licence conditions to allow

56 Outline of submissions, 26 July 2022, par 65. Footnote 110 to par 65 referred to the following authorities: *Corporation of the City of Unley v Claude Neon Ltd* (1983) 32 SASR 329 at 332 (Wells J); *Lend Lease Management Pty Ltd v Sydney City Council* (1986) 68 LGRA 61 at 86 (Cripps CJ of LEC); *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737 (Priestly JA, Clarke and Meagher JJA agreeing); *South of Perth Yacht Club Inc v Jacob* [2016] WASC 160 at [52] (Chaney J); *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd* (2017) 27 Tas R 405 at [99]-[106] (Porter JA, Pearce and Brett JJ agreeing); *Lester Land Holdings Pty Ltd v Development Assessment Commission* (2020) 243 LGERA 221 at [241]-[247] and [291] (Parker J); *Corporation of the City of Norwood, Payneham and St Peters v Minister for Infrastructure and Transport* [2021] SASC 97 at [241] (Parker J).

for subsequent variation, refinement or adaptation of matters which are said to be "significant" or "fundamental".

[93] The problem with ALEC's contention is that the town planning cases are not truly analogous to the present case, notwithstanding superficial similarities. As Spiegelman CJ observed in *Winn v Director-General of National Parks and Wildlife*, the so called 'principle of finality' is peculiarly applicable to the construction of planning statutes.[57] It is concerned with the possibility that an ultimate development may be "significantly different from the development for which the application was made",[58] or that a delegated decision could "alter the proposed development in a fundamental respect".[59]

[94] I accept the submission of counsel for the Minister that the stated principles cannot be applied to the *Water Act 1992* with the generality contended for by ALEC. Authorisations concerned with the ongoing extraction of a resource such as water are not properly comparable with planning authorisations under statutes intended to achieve very different objectives.

[95] Under the general law, the power of a decision-maker to grant an approval (or impose conditions on an approval) is ordinarily dictated by a statute under which the decision-maker acts. If the validity of an approval

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57 *Winn v Director-General of National Parks and Wildlife* [2001] NSWCA 17 at [15].

58 *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737A, per Priestley JA.

59 Ibid at 740B, per Clarke JA.

or conditions attached to it is challenged, the question then is whether the approval granted or the conditions challenged are authorised by the statute.[60] In the present case, the power to attach conditions to a licence to extract groundwater are to be found solely in the *Water Act 1992*.

[96] Groundwater is a valuable resource for human consumption, and for commercial use in agriculture, horticulture and the pastoral industry. The *Water Act 1992* is concerned with all aspects of the use of water, including the commercial use of water, which includes groundwater. One of the principles stated by the Minister, extracted in [53] above, was "providing security for enterprise development, with longer term water licences for business investment and planning". The extended term of water licences, made possible by the amending legislation in 2000, was to "give water users greater surety to raise finance and make investment decisions". The amendment to the *Water Act 1992* to allow free market trading in water licences was for the stated purpose of "optimising economic benefit" and to ensure that water was used "to best economic advantage".

[97] However, the inherent character of groundwater is that it is a resource which can be depleted and, hypothetically, exhausted. Hence, another of the principles explained by the then Minister, extracted in [53] above, was that water allocation should always be limited to sustainable yield

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60 *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 215 FCR 301 at [154] per Gilmour, Foster and Barker JJ.

and should incorporate “safety margins where there is uncertainty”. Similarly, the Minister referred to the principle of ensuring environmental integrity, with “water always allocated for water dependent ecosystems”.

[98] Groundwater systems are not only affected by human activity, but also by natural processes. Aquifers may be stressed by groundwater extraction, but they may be recharged by rainfall infiltration. Rainfall from year to year is variable. Modelling of a hydrogeological system may provide information on how a particular water extraction project is expected to impact on the affected groundwater and on groundwater dependent ecosystems. However, the capacity of a model to capture real-world complexity is limited, particularly where historical data is limited or lacking. This means that outputs of models may be uncertain. Logically, a greater level of certainty may only be possible with the benefit of observations and measurements of groundwater behaviour after extraction (or some measure of extraction) has actually been carried out. On my understanding, this is the reason for the extensive conditions precedent imposed by the Minister.

[99] Under the Licence conditions, Fortune is to bear the risk and expense of complying with and/or satisfying those conditions precedent. Even then, under the staging conditions, Fortune will be at risk, for many years, of not being permitted to proceed to a subsequent stage of its horticulture project. I refer to [71] and [72] above in relation to the staging conditions. Based on information provided in a ministerial briefing to the

Minister for Environment dated 20 January 2021, the Singleton Horticulture Project would require a total capital cost in excess of $150 million, with annual operational costs at maturity estimated to be approximately $110 million. Although Fortune estimated losses in the early years of development, it predicted that the project would become profitable from Year 7 and ultimately generate a profit of $40 million annually from Year 13 onwards.[61]

[100] If things do not pan out for Fortune, in terms of satisfying the conditions precedent, then it may not be permitted to commence or continue the extractive activities contemplated by the Licence. If Fortune were unable to satisfy any one of the staging conditions, then it would not be able to proceed to the next stage and would not be entitled to extract the greater volume of groundwater permitted for that next stage. As a result, Fortune might ultimately extract much less water than the volumes applied for and permitted under the Licence (subject to conditions). However, I do not consider that such an outcome would 'fundamentally alter' the nature of the application. Moreover, the postulated alteration would be in accordance with the stated objects of the *Water Act 1992*, which include the protection, management and administration of water resources. The fact that the conditions of the Licence may result in the extraction of reduced volumes of water, consistent with the scheme of the *Water Act*

61 Ministerial Briefing, Jungfer affidavit, pp 165-167. The briefing was in relation to the Minister's opinion pursuant to s 60(4) *Water Act 1992* (as it then stood) in relation to special circumstances justifying a longer term licence.

1992, demonstrates that the principle of finality is not appropriately applied to determinations under s 60 *Water Act 1992*, or at least not to the Minister's decision in this matter.

[101] Given the matters discussed in [95] – [99] and the lengthy term of the Licence granted to Fortune, it would make sense that there be flexible regulation in the monitoring and control of groundwater extraction, including mechanisms to adapt extractive activities during the period of operation of the licence to respond to more specific information obtained after the grant of the licence. A licence to take groundwater may logically need to be conditioned to take into account future activity under the licence, changed conditions, new circumstances or unforeseen events. In this context, I accept the submission of counsel for the Minister that there is no reason why, on the grant of a licence, there could not be a requirement for a licence holder to undertake surveys, mapping, modelling or other measures to validate the assessment made at or prior to the grant of the licence. The requirement could be that the activity occur before the authorised extraction commences, or that the activity be ongoing throughout the term of the licence. The extraction may then require reduction or some other adjustment in the event that the activities taken to validate the assessment differ from the expectations at the time of the grant of the licence.[62]

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62 First defendant's written submissions, 16 August 2022, pars 78-79.

[102] It is unlikely that the full implications of the proposed extraction under Fortune's licence could have been determined in advance. However, the conditions precedent and the staging conditions referred to and summarised above were imposed by the Minister to provide measures to protect the water resource and to take into account the matters required to be taken into account under s 90(1) of the Act. Whether those measures were sufficient or adequate would involve an impermissible consideration of the merits, which is not the function of this Court on an application for judicial review.

[103] ALEC's objections to the utilisation of conditions precedent by the Minister are based on the underlying proposition that all matters the subject of the conditions precedent must be identified, investigated and fully understood prior to the grant of the licence. The contention is that nothing of any significance should remain outstanding; that every question should be answered, and that there should be no remaining doubts or uncertainties. However, as mentioned in [95] above, a determination as to whether any and, if so, which conditions must be fixed at the time of the grant of the licence is necessarily one of statutory construction.[63] In this context, nothing in the *Water Act 1992* appears to support the proposition advanced by ALEC.

63 See also *Winn v Director-General of National Parks and Wildlife* [2001] NSWCA 17, per Spigelman CJ at [15].

[104] Section 60 of the Act authorizes the grant of a licence to take groundwater "subject to such terms and conditions, if any, as are specified in the licence document". The Controller (and the Minister) are empowered to impose conditions generally. While the s 90(1) factors must be taken into account, there is no statutory requirement as to the degree of satisfaction the Controller (or Minister) must have in order to impose conditions. As to the nature of the conditions which may be imposed, the Act does not exclude the imposition of conditions precedent to the extraction of water, or conditions which involve ongoing assessment of the effects of extraction of groundwater under a licence and the power of the Controller to flexibly respond to any adverse effects.

[105] Decisions such as *Winn* reflect the general law principle that the question as to whether a conditional approval or a condition attached to the approval of some activity is valid, is an exercise in statutory construction. They also reflect the general principle that the approval or a condition is not necessarily invalid because a condition retains in the decision-maker some ongoing flexibility in relation to the implementation of an approved activity or because it delegates some authority in relation to the implementation of the decision to some other person or agency.

[106] In the context of the *Water Act 1992*, the imposition of conditions precedent and staging conditions, under which matters of detail were left for later determination (by the Controller), and the delegation (to the Controller) to supervise Fortune's compliance with those conditions,

introduced a level of practical flexibility which may be seen as logical in relation to the extraction of groundwater, in accordance with the statutory scheme. There was no impermissible deferral of mandatory relevant considerations.

[107] Pursuant to s 60(2) *Water Act 1992*, a licence to take groundwater may be granted "subject to such terms and conditions … as are specified in the licence document". That power is wide enough to encompass the imposition of conditions precedent before extraction entitlements come into effect. Indeed, such conditions precedent are one of the adaptive management tools referred to in the WDWAP.

[108] ALEC has not established a failure on the part of the Minister to determine a grant of a licence. In my judgment, ALEC's second ground of review must fail.

ALEC Ground 3

[109] ALEC contends on this ground that the Minister's decision was legally unreasonable for the same reasons set out in particulars (a) – (f) of ALEC's first ground,[64] and for the fact that the Minister adopted aspects of the Review Panel's reasons which treated the Guideline as "a relevant factor" under s 90(1)(k) because it constituted "new scientific knowledge".[65]

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64 ALEC's grounds of review are set out in [31] above.

65 Outline of submissions, 26 July 2022, par 65.

[110] Counsel for ALEC contend that, in conferring a statutory power, the legislature is taken to intend that the power be exercised reasonably by a decision-maker. That is clearly correct.[66] Counsel then rely on the observation by Nettle and Gordon JJ in *Minister for Immigration and Border Protection v SZVFW* that the legal standard of reasonableness is concerned with "whether, in relation to the particular decision in issue, the statutory power, properly construed, has been *abused* by the decision-maker or, put in different terms, the decision is beyond power".[67] Counsel refer to 'numerous cases' which make clear that a finding of legal unreasonableness may be made where there is a want of logic in the decision,[68] leading to the submission extracted below:[69]

> On the material before the Minister, no reasonable decision-maker could be satisfied that the extraction proposed by Fortune was consistent with the WAP. The drawdown impacts disclosed in the technical report significantly exceeded the WAP GDE Criteria and there was an absence of material to substantiate the proposal's compliance even with the radically reduced Guideline criteria (resulting in the imposition of CP 5, CP 7 and CP 9). As a matter of logic, the Minister simply could not be satisfied that her Decision accorded with the WAP. In addition, those aspects of the Review Panel's reasons (adopted by the Minister) which took the Guideline into account as "a relevant factor" because it constituted "new scientific knowledge" were also illogical on the evidence before the Review Panel and Minister for reasons that are broadly similar to those outlined above.[70] In particular, the adoption of a 70%

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66 See, for example, *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332 at [63], per Hayne, Kiefel and Bell JJ, and the cases there cited.

67 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [80]. Italic emphasis was part of the joint judgment.

68 Specific reference was made to *Minister for Immigration & Citizenship v Li* and *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [10].

69 Outline of submissions, 26 July 2022, pars 71, 72.

70 Reference was here made to par 61 of ALEC's Outline of submissions, which contained the following broad submission: "Insofar as the Controller relied upon the language in the WAP concerning new scientific

> protection threshold was entirely unjustified having regard to the scientific context for the Guideline and the available evidence.
>
> The Minister's decision was legally unreasonable in that central planks of the analysis in support of the conclusions reached exhibited illogicality, resulting in jurisdictional error.

[111] Unreasonableness in the *Wednesbury* sense, that is, a decision which is 'so unreasonable that no reasonable person could have arrived at it', will be made out where a decision is illogical, irrational, or lacking a basis in findings or inferences of fact supported on logical grounds.[71] However, as explained by the plurality in *Minister for Immigration & Citizenship v Li*, the formulation of unreasonableness in *Wednesbury* is "not the starting point for the standard of reasonableness, nor should it be considered the end point".[72] Indeed, as French CJ observed in *Li*, "vitiating unreasonableness may be characterised in more than one way susceptible of judicial review". His Honour made this further observation, with reference to the subject matter, scope and purpose of the statute conferring the relevant discretion: [73]

> A decision made for a purpose not authorised by statute, or by reference to considerations irrelevant to the statutory purpose or beyond its scope, or in disregard of mandatory relevant considerations, is beyond power. It falls outside the framework of rationality provided by the statute.

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knowledge, that reliance was both based upon a misconception of the relevant passage of the WAP and lacked an evident or intelligible justification in the evidence before her."

71 *Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, [34]–[37], [52]. See also *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611, [124]–[126].

72 *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332 at [68], per Hayne, Kiefel and Bell JJ.

73 Ibid, at [26], per French CJ.

[112] The issue in *Li* was whether the Migration Review Tribunal's refusal to allow an adjournment sought by the respondent was unreasonable, resulting in jurisdictional error. The decision to refuse the adjournment was explained by the Tribunal on the bases that (1) the respondent had been provided with enough opportunities to present her case and (2) the Tribunal was not prepared to delay the matter any further. The plurality noted that the reference to delay was not further explained by the Tribunal in its reasons;[74] further, that it was not apparent why the Tribunal decided to abruptly conclude the review.[75] Their Honours ultimately concluded that unreasonableness should be inferred from the refusal itself, notwithstanding that no particular error could be identified:[76]

> … In the circumstances of this case, it could not have been decided that the review should be brought to an end if all relevant and no irrelevant considerations were taken into account and regard was had to the scope and purpose of the statute.

[113] The plurality judgment in *Li* contained the following statements of principle:

> The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the

74 Ibid, at [80].

75 Ibid, at [83].

76 Ibid, at [85]. The plurality observed that judicial review of administrative action is in part analogous to appellate review of judicial discretion, and applied the principles stated in *House v The King* (1936) 55 CLR 499 (at 505) to the review of the exercise of the statutory discretion. This led to the conclusion that unreasonableness may be inferred from the facts and from the matters falling for consideration in the exercise of the statutory power – *Li* at [76].

> statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.[77]
>
> Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.[78]

[114] Gageler J agreed with the plurality in *Li* that the appeal should be dismissed, holding that "no reasonable tribunal, seeking to act in a way that is fair and just, and according to substantial justice and the merits of the case, would have refused the adjournment".[79] However, his Honour stressed the stringency of the *Wednesbury* test, observing that judicial determination of *Wednesbury* unreasonableness in Australia had in practice been rare; that *Li* was a rare case, and that his reasons "should not be taken as encouragement to greater frequency".[80]

[115] Speaking in relation to general principles, Gageler J cautioned that judicial determination of *Wednesbury* unreasonableness is constrained by two principal considerations, the first being the stringency of the test,[81] and the second being "the practical difficulty of a court being satisfied that the test is met where the repository is an administrator and the exercise of the power is legitimately informed by considerations of policy".[82] His Honour cited with approval the proposition that it is "harder to be satisfied that an administrative body has acted

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77 *Li*, at [67].

78 Ibid, at [76].

79 Ibid, at [124].

80 Ibid at [113].

81 That is, that 'a purported exercise of power is so unreasonable that no reasonable repository of the power could have so exercised the power'.

82 *Li*, at [108].

unreasonably, particularly when the administrative discretion is wide in its scope or is affected by policies of which the court has no experience".[83]

[116] Some five years after *Li* was decided, in *Minister for Immigration and Border Protection v SZVFW*,[84] the High Court allowed an appeal brought by the Minister, holding that the decision of the Refugee Review Tribunal to decide an application for review, without hearing from the respondents, was not legally unreasonable in circumstances where the respondents had been informed of the hearing date by letter sent to their notified postal address.

[117] In SZVFW, Kiefel J observed as follows:[85]

> Statements such as that made in the *Wednesbury* case, that a decision may be regarded as unreasonable if no reasonable person could have made it, may not provide the means by which a conclusion of unreasonableness may be arrived at in every case. But it serves to highlight the fact that the test for unreasonableness is necessarily stringent. And that is because the courts will not lightly interfere with the existence of a statutory power involving an area of discretion. The question is where that area lies.
>
> In *Minister for Immigration and Citizenship v Li*, reference was made to what had been said in *Klein v Domus Pty Ltd* regarding the need to look to the purpose of the statute conferring the discretionary power. Where it appears that the dominating, actuating reason for the decision is outside the scope of that purpose, the discretion has not been exercised lawfully. But this is not to deny that within the sphere of the statutory purpose there is scope for a decision-maker to give effect to the power according to his or her view of the justice of the case, without interference by the courts.

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83 Citing *Norbis v Norbis* (1986) 161 CLR 513 at 541.

84 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541.

85 Ibid, at [11]-[12], citations omitted.

[118] In *Minister for Immigration and Border Protection v Stretton*, Allsop CJ equated legal unreasonableness with going beyond the source of the statutory power vested in the relevant decision-maker. His Honour observed:[86]

> The boundaries of power may be difficult to define. The evaluation of whether a decision was made within those boundaries is conducted by reference to the relevant statute, its terms, scope and purpose... the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.

[119] As I concluded in [48] above, the Minister has a wide discretionary power under s 90(1) *Water Act 1992*. I also concluded in [59] that the Minister did not have a statutory obligation to "comply with" the WDWAP in the sense asserted by ALEC, which had contended that the Minister was required to make a licence decision in accordance with or "consistent with" Part 8.2.1 of the WDWAP. ALEC contends by its third ground that, as a matter of logic, the Minister simply could not have been satisfied that her Decision accorded with the WAP. However, I reject that contention since, as a matter of law, the Minister was not required to be so satisfied. That disposes of the first part of ALEC's submission as to legal

86 *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 at [11].

unreasonableness, based on specific error, extracted in [109] and [110] above.

[120] As to the second part of ALEC's submission, I bear in mind that the court's role is supervisory; a court must be careful not to exceed that supervisory role by undertaking a merits review of an exercise of discretionary power.[87] Counsel for Fortune have referred me to a very apt observation made by the Full Court of the Federal Court in *Ogawa v Finance Minister*,[88] as follows:

> ... of all of the jurisdictional error grounds, none is more fraught with the possibility of impermissible transgression by the judicial branch into the constitutional remit of the executive branch than unreasonableness. Equally, once the content of that jurisdictional error ground is understood, a judicial conclusion that it is not made out carries with it no element of agreement with the merits of an administrator's decision, only recognition after evaluation thereof that the process by which it was reached was reasonable and that the conclusion reached was one reasonably open on the material before the administrator.

[121] It is clear that ALEC's submission relates to the factual merits of the Minister's decision, in that it attacks the adoption of a 70% protection threshold in the Guideline, adopted by the Minister, the explanation for which is discussed in [61] – [65] above. The proceeding in this Court is not an appeal, enabling a general review of the Minister's decision. The merits of the Minister's decision are not relevant to an application for

87 See, for example, *Li*, at [66].

88 *Ogawa v Finance Minister* [2021] FCAFC 17 at [17] per Logan, Katzmann and Jackson JJ.

certiorari and mandamus. I therefore reject the second part of ALEC's submission as to legal unreasonableness.

[122] ALEC has not established unreasonableness in the *Wednesbury* sense. It has also not established that the Minister's decision was made for a purpose not authorised by statute, or by reference to considerations irrelevant to the statutory purpose or in disregard of mandatory relevant considerations. It has not established that the statutory power has been 'abused'. Finally, it has failed to establish that the Minister's decision lacks an evident and intelligible justification.

[123] The proceeding commenced by ALEC should be dismissed.

MAC grounds 1 and 2

[124] In submissions, MAC has combined grounds 1 and 2 into a ground that the Minister failed to give proper, reasonable and rational consideration to relevant considerations under s 90 *Water Act 1992*. The essential contention is that the Minister had insufficient time to properly consider the complex matters raised by Fortune's application. It can be seen that MAC pursues the issue of legal unreasonableness on a different basis to ALEC; MAC's claim is related to the asserted inability of the Minister to make a rational decision within the limited time available to her.

[125] MAC seeks to bring the present case within the principles stated by the Federal Court in *Tickner v Chapman*,[89] and *Carrascalao v Minister for Immigration and Border Protection*.[90]

[126] The relevant legislation in *Tickner* was the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The Act required the Minister to be satisfied, before making a declaration protecting a specified area from desecration under s 10(1) of the Act, that the area was a 'significant Aboriginal area' and 'under threat of injury or desecration', and also to have received and considered a report by a person nominated by him and any representations attached to the report. A single judge of the Federal Court had held that it was an express requirement of s 10(1)(c) of the Act that the Minister personally consider all of the representations attached to the report as well as the report itself. The trial judge heard evidence about the way in which the representations were put before the Minister and concluded that what occurred did not amount to the Minister having 'considered' the representations, as required by s 10(1)(c).[91] His Honour observed as follows:[92]

> In my opinion, these various definitions [of the verb "consider"] point to a substantial personal involvement on the part of the individual who is required "to consider" the written material. It does not mean that he must read every word of every document. A busy Minister of the Crown is entitled to receive assistance from his staff:

89 *Tickner v Chapman* (1995) 57 FCR 451.

90 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352.

91 *Chapman v Tickner* (1995) 55 FCR 316 at 369-370 (O'Loughlin J).

92 Ibid, at 369B, 370A, 370F.

> *Minister for Aboriginal Affairs v Peko Wallsend Ltd*, at 30 per Gibbs CJ, at 65 per Brennan J. But that entitlement does not, of course, permit him to delegate his decision-making power: see s 31 of the Commonwealth Heritage Act: nor does it allow him to abrogate his responsibilities. The concept of his considering the representations must involve a balanced mixture of staff assistance and personal involvement. ...
>
> But, in my opinion, the evidence that had been placed before the Court in these proceedings has shown, as a matter of probability, that the Minister did not give any "consideration" to the representations at all. I have come to this conclusion because of a combination of factors. ... secondly, the evidence makes it clear that the representations were not available to the Minister or his staff until the day preceding the making of the s 10 declaration. The evidence of Ms Kee with respect to the Minister's commitments in this critical 24 hour period, coupled with the time taken by her to consider the representations, justify a finding that the Minister's busy schedule would not have given him sufficient time to consider the representations to the requisite degree. ...
>
> The consequence of these findings is the conclusion that there has been a fundamental failure by the Minister to comply with the statutory obligation that he consider the representations before deciding whether to exercise his power to make a declaration under s 10 Commonwealth Heritage Act.

[127] The trial judge in *Chapman v Tickner* made an order quashing the Minister's decision. The Minister's subsequent appeal to the Full Court (Black CJ, Burchett and Kiefel JJ) was dismissed, all of the judges being of the view that the trial judge was correct in setting aside the Minister's decision.

[128] Black CJ held that the context of the legislation, given the policy of public involvement in the process and the potential gravity of the consequences of granting or withholding a declaration, made it clear that the Minister's duty to consider under s 10(1)(c) required personal

compliance by the Minister as a necessary step in the exercise of the Minister's power.[93] His Honour then observed as follows:[94]

> The Minister must personally consider the report and any representations attached to it. …
>
> The meaning of 'consider' used as a transitive verb referring to the consideration of some thing is given in the Oxford English Dictionary (2nd edition) as "to contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of". Consideration of a document such as a representation or a submission … involves an active intellectual process directed at that representation or submission.
>
> It is not surprising that the Minister should be required personally to participate in this way in a process that may lead to a declaration under s 10. The powers given to the Minister under the Act for the purposes of protecting Aboriginal heritage are capable of affecting very seriously the interests of third parties, and for this reason the Parliament has provided for decision-making at the highest level. It is this feature of the scheme of the Act – the explicit requirement that the Minister consider the representations - that removes the process under s 10 from the general rule that a Minister is not expected to do everything personally: see the observations of Brennan J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 416 adopting Lord Reid's comments in *Ridge v Baldwin* [1964] AC 40 at 72; cf *O'Reilly v Commissioners of State Bank of Victoria* (1983) 153 CLR 1 at 11-12 per Gibbs CJ. The express requirement that the Minister consider the representations also gives rise to a more precisely defined duty binding on the Minister than the Minister's duty to consider matters in connection with satisfying himself or herself that a grant of land should be made under s 11 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). …

[129] Black CJ went on to hold that the Act required that the representations had to be "truly considered", and that the process adopted whereby the Minister relied upon a ministerial officer's opinion about the

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93 *Tickner v Chapman* (1995) 57 FCR 451 at 461G.

94 Ibid, at 462B.

representations was insufficient.[95] Similarly, Burchett J concluded that, on many matters, it was the ministerial officer who considered the representations and that "what she communicated to the Minister was her own value judgment about them".[96] His Honour held that the Minister could not simply rely on an assessment of the representations made by others because it was the Minister's task to evaluate them himself.[97] In the circumstances, the Minister had not 'considered' the representations.

[130] Kiefel J in a separate judgment referred to the requirement imposed by statute that the Minister himself consider the representations. Her Honour described the obligation as "clearly personal to the Minister", adding:[98]

> It is expressly made non-delegable. ... It may be contrasted with legislation considered in the cases to which Mason J referred in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1982) 162 CLR 24 at 38 such as *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560 and *Re Golden Chemical Products Ltd* [1976] Ch 300 where the nature, scope and purpose of the function to be undertaken by the Minister made it unlikely that it was to be undertaken by the Minister and where the statute did not prohibit the Minister exercising the power through the agency of others. That is not to say that the Minister here could not seek the assistance of his staff, but he must himself consider the report and representations. ...
>
> To "consider" is a word having a definite meaning in a judicial context. The intellectual process preceding the decision of which s 10(1)(c) speaks is not different. It requires that the Minister have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forward and to appreciate who is making them. From that point the Minister might sift them, attributing whatever weight or persuasive quality is thought appropriate. However, the Minister is required to

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95 Ibid, at 465A.

96 Ibid, at 476C.

97 Ibid, at 476G.

98 Ibid, at 493G, 495G.

> know what they say. A mere summary of them cannot suffice for this purpose, for the Minister would not then be considering representations, but someone else's view of them, and the legislation has required him to form his own view upon them.

[131] The meaning of the word 'consider', explained in *Tickner v Chapman*, was approved by the Full Court of the Federal Court in *Carrascalao v Minister for Immigration and Border Protection*.[99] The relevant statutory provision was s 501 *Migration Act 1958* (Cth), specifically s 501(3)(b), which gave the Minister power to cancel a visa if the Minister reasonably suspected that the person did not pass the character test and the Minister was satisfied that the cancellation was in the national interest. The Minister's power was non-delegable and thus could only be exercised by the Minister personally. Following cancellation of their visas, Mr Carrascalao and another applicant applied for judicial review of the Minister's decision in relation to each of them on the basis that the circumstances in which the Minister made the decisions, including the shortness of the time in which he could have reviewed the material before him, meant that he could not have given proper, genuine and realistic consideration to the merits of the two matters.[100] In a unanimous judgment, the Court in *Carrascalao* distinguished the legislative

99 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352, at [43], [46].

100 Ibid, at [2].

provision under consideration from that considered by the Court in *Tickner*, in the following passage:[101]

> … An express statutory obligation on a decision-maker to consider (or have regard to) something may well provide a "more precisely defined duty", as Black CJ observed in *Tickner v Chapman*. In our view, however, the ordinary meaning of the word "consider" in this judicial review context requires the Minister to engage in an "active intellectual process" in assessing the merits of a case when contemplating the possible exercise of the power under s 501(3).

[132] The Court then observed:[102]

> Whether or not there was such an active intellectual process requires the Court to conduct an evaluative judgment, taking into account the available evidence and reasonable inferences, as to all the relevant factors and circumstances of each case. These include, but are not limited to, the nature and volume of the material placed before the Minister to assist his decision making, as well as other matters which arise from the relevant statutory context.
>
> … however, it is appropriate to state two matters. First, a finding by the Court that the Minister has not engaged in an active intellectual process will not lightly be made and must be supported by very clear evidence, bearing in mind that the judicial review applicants carry the onus of proof. Secondly, some broad guidance may be obtained from other authorities as to the kinds of circumstances in which such a finding could be made. In referring to these authorities, we did not suggest that the requisite evaluative judgment is to be conducted as though it involves a "Tick the box" component exercise by reference to other decided cases. As we have emphasised, each case will necessarily turn on its own particular facts and circumstances.

[133] Although the legislation considered in *Carrascalao* did not expressly provide for personal consideration of a specified report or particular documents, unlike the legislation considered in *Tickner*, the Court in *Carrascalao* observed that the statutory framework, particularly the

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101 Ibid, at [46].

102 Ibid, at [47], [48].

displacement of the requirements of natural justice and the limited scope of the representations which an affected person might make in seeking to have the Minister revoke a visa cancellation decision, highlighted the need for the Minister to exercise the important power under s 501(3) of the Act with appropriate care and attention, including by engaging in an active intellectual process and reviewing relevant material placed before him to assist in the discharge of the significant statutory function.[103]

[134] The Court in *Carrascalao* upheld the appeal on the ground that the Minister failed to give proper, genuine and realistic consideration to the merits of the two visa cancellation decisions. The volume of material relating to Mr Carrascalao was approximately 370 pages and that of the other affected applicant approximately 330 pages. The earliest time at which the Minister could have actually seen the Carrascalao material was 7:42 pm on the day and in the case of the other applicant, approximately 7:48 pm the same day. The Minister cancelled the other applicant's visa at 8:18 pm and Mr Carrascalao's visa at 8:25 pm. A significant issue adverted to by the Court was that there was no evidence as to how the Minister actually divided his time in respect of his consideration of the two matters.[104] After referring to a period of 43 minutes taken by the Minister to review the materials in both cases, the Court reached the

103 Ibid, at [60]. The fact that the visa holders had no legal right to be heard was referred to again at [128] as having "accentuated the need for the Minister carefully to engage with the materials before making such serious decisions".

104 Ibid, at [126].

conclusion that there was insufficient time for the Minister to engage in the requisite active intellectual process.[105]

[135] MAC's contentions proceed from the starting point that the review power in s 30 of the *Water Act 1992* is reposed in the Minister personally. Pursuant to s 30(3)(a)(ii), the Minister may substitute for the Controller's decision a decision which in the opinion of the Minister the Controller should have made in the first instance. Where the matter has been referred to the Review Panel pursuant to s 30(3)(b), the Minister is required to take such action after receiving the Review Panel's advice as the Minister thinks fit. MAC submits that the Minister is required to participate personally in a process that may lead to a decision which would have significant impacts on a precious and particularly scarce finite resource, in circumstances where there are numerous competing potential users of that resource. I am not sure whether groundwater is correctly characterized as a "finite resource", except hypothetically, as explained in [97] and [98] above. Although the submission may otherwise be accepted, it is not particularly helpful because the meaning and extent of the requirement to 'personally participate' is left open to interpretation.

[136] Counsel for MAC rely on the decision of Hiley J in *Environment Centre Northern Territory (NT) Inc v Minister for Land Resource Management*,[106] for the proposition, inter alia, that the Minister was obliged to consider

105 Ibid, at [129].

106 *Environment Centre Northern Territory (NT) Inc v Minister for Land Resource Management* [2015] NTSC 30; 35 NTLR 140.

for herself whether the decision of the Controller was wrong and what was the 'true and correct' or 'preferable and correct' decision.[107] I do not agree that the Minister was obliged to consider that the decision of the Controller was wrong before substituting a decision, as counsel for MAC appear to submit. In general terms, it must be open to the Minister to decide that the Controller's decision could be improved upon or added to so as to justify the Minister substituting a decision that, in the Minister's opinion, the Controller should have made in the first instance.

[137] My opinion expressed in the previous paragraph is consistent with what was said by Hiley J at [127] of the *Environment Centre* judgment:

> Where such a right has been exercised by a person aggrieved by a decision of the Controller, I see no reason why the Minister's ability to perform his or her important functions under the Act in relation to such a decision should be constrained by a requirement, not stated in s 30 or elsewhere, for error to be established.

[138] Counsel for MAC submit that the exercise of her powers under s 30 *Water Act 1992* required the Minister to engage in an active intellectual process in determining the matter. They submit that the Minister was under a legal obligation to consider the merits of the licence application, including the application of the relevant factors under s 90(1) of the Act. This was said to require meaningful consideration of those factors, in the sense of being proper, genuine and realistic.[108] They further submit that

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107 Ibid, at [151]. See MAC's written submissions, 26 July 2022, par 29.

108 Reference was made to *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at [292] (Gummow J); *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [35].

the Minister must "read, identify, understand and evaluate" the application and representations made and "bring [her] mind to bear upon the facts stated ... and the arguments or opinions put forward, and appreciate who is making them".[109] It may be noted that the passage last quoted was taken from the statement of Kiefel J in *Tickner v Chapman*, extracted in [130] above, made in the context of legislation which required personal consideration by the Minister (as the decision-maker) of the report and representations attached to the report.

[139] MAC also contends that the level of engagement by the Minister had to occur 'within the bounds of rationality and reasonableness'. That submission is taken from *Plaintiff M1/2021 v Minister for Home Affairs*.[110] The context was the Minister's statutory obligation under s 501(3A) of the *Migration Act 1958* to cancel a person's visa if satisfied the person had been sentenced to a term of imprisonment of 12 months or more and that the person was serving a sentence of imprisonment on a full-time basis in a custodial institution. Where a person's visa was cancelled under that provision, s 501CA of the Act allowed for possible revocation of the cancellation decision if the Minister or delegated decision-maker were satisfied that the person passed the character test or that there was another reason why the original decision should be revoked. The process pursuant to s 501CA commenced with the affected

109 Reference was made to *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 at [23] – [24] per Kiefel CJ, Keane, Gordon and Steward JJ and at [43], per Gageler J agreeing.

110 Ibid, at [25].

person making representations. In that statutory context, the majority held that the decision maker must read, identify, understand and evaluate those representations.[111] Their Honours referred to the observation of Kiefel J in *Tickner v Chapman*, referred to in [130] above, in the following passage:[112]

> The weight to be afforded to the representations is a matter for the decision-maker. ...
>
> It is also well-established that the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness. What is necessary to comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations. The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things according to the length, clarity and degree of relevance of the representations.

[140] It can be seen that the statute in *Plaintiff M1/2021 v Minister for Home Affairs* imposed an obligation on the decision-maker to consider representations made by or on behalf of the former visa holder. It is unclear how the propositions stated in *Plaintiff M1/2021* have direct relevance to the Minister's statutory obligations in the present case. Further, relevant to MAC's submissions summarised in [135] above, I note that the majority in *Plaintiff M1/2021* cautioned as follows:[113]

> 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,

111 Ibid, at [24].

112 Ibid, [24]-[25].

113 Ibid, at [26], citations omitted.

> 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.

[141] In relation to the chronology set out by me at [21] – [24] above, MAC submits that the Minister was not briefed with the first tranche of material in respect of the review until 1:00pm on Friday, 12 November 2021 at the earliest. Receipt of that material was confirmed in the morning of Saturday 13 November 2021. The two briefings provided to the Minister totalled over 1,660 pages, and they included voluminous reports, including reports of a detailed technical nature. The Minister did not have particular expertise or qualifications in relation to environmental management, water regulation or hydrology. The Minister made her decision at about 4:30pm on Monday 15 November 2021, which was less than one business day after she was provided with the briefing materials.[114]

[142] MAC submits that the Minister's reasons state that she had "reviewed and considered" the 1,600 plus pages of material briefed to her.[115] That submission may not be correct. The Minister did not assert that she had reviewed and considered a specific number of pages of material; she stated that she had reviewed and considered the documents in the

114 See also MAC's Reply submissions, 26 August 2022, par 8.

115 MAC's written submissions, par 31(d).

categories (a) – (f) at page 4 of her reasons for decision.[116] Further, the submission may not be particularly relevant, unless as a matter of law the Minister was bound to consider all the materials briefed to her. In my opinion, she was not. The *Water Act 1992* did not require the Minister to engage in such an extensive merits review de novo. I say more about that in [161] below.

[143] Counsel for MAC points out that, in the stated categories of documents which the Minister said she had reviewed and considered, the Minister did not expressly mention the two ministerial briefings prepared for her by the Department. Because the Minister stated in her reasons, "I have not considered any other information as part of the review", Counsel for MAC submits that there is no evidence before the Court that the Minister had read those briefings.[117] That submission provides a good example as to why a court should not scrutinise a decision-maker's reasons in an overzealous manner.[118] The Minister's reasons in the respect identified appear to be wrong, because I note that the Minister's signature appears at the end of both ministerial briefing documents, confirming her consideration of the contents of both and, in one, a determination accepting one of several options presented to her.[119] I do not see any

116 Minister's reasons, pp 1684-5 of the Jungfer affidavit.

117 MAC's written submissions, par 31(d) & (g).

118 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 279, cited with approval in *DWN042 v Republic of Nauru* [2017] HCA 56 at [25].

119 Jungfer affidavit, pp 1726, 1729.

significance in the Minister not mentioning having read the ministerial briefings when in all probability she had done so.[120]

[144] MAC submits that, even if the ministerial briefings were documents considered by the Minister, they provided an "insufficient basis to conclude that the Minister engaged in the requisite intellectual process".[121] There are two problems with that submission. First, the submission appears to assume that the ministerial briefing documents were the only documents considered by the Minister, contrary to the Minister's reasons and the evidence.[122] Secondly, the submission suggests that it was for the Minister to prove that she had engaged in the requisite intellectual process. However, that is not the law. In common with applicants in all judicial review proceedings, MAC as plaintiff has the onus of proving that the Minister did not engage in the requisite intellectual process. A finding to that effect will not be lightly made.[123]

[145] Counsel for MAC then refer to extracts from the Minister's diary which suggest that she had significant unrelated demands upon her time between the receipt of briefing materials on Saturday 13 November and 4:30pm on Monday 15 November when the Minister signed the various documents referred to in [24] above. MAC asks the Court to infer that the Minister

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120 Jungfer affidavit, pp 7-11, pars 11-22.

121 MAC's written submissions, par 31(g).

122 The evidence in MAC's case does not establish that the Minister relied entirely on a ministerial briefing document or departmental summary, one of the exceptions referred to by Gibbs CJ in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 31.

123 *Carrascalao*, at [48].

did not dedicate any time to the briefing materials outside the 45-minute briefing meeting, based on the 'insufficiency of time' contentions already referred to, supported by a *Jones v Dunkel* inference to be drawn from the fact that the Minister refused requests by MAC's lawyers to provide a full account of the activities she engaged in over the decision-making period and did not give evidence in the proceeding. All of this is said to provide an insufficient basis to conclude that the Minister engaged in the requisite intellectual process.

[146] MAC's submission concludes as follows:[124]

> The abbreviated time period in which the Minister made her decision is compounded by the complexity of the decision before her. As noted above, the Review Panel did not present the Minister with a single recommendation, but rather two alternative options that needed to be considered. Further, the outcome of the Minister's review was to not follow either of those options. Rather, the Minister decided to impose a licence with a new staging condition … which had not been the subject of recommendation by the Review Panel or part of the Controller's initial decision. The timeframe within which she undertook this task demonstrates that the Minister failed to give proper, reasonable and rational consideration to her exercise of power.

[147] In order to determine whether the Minister did or did not engage in the requisite intellectual process, it is important to consider the nature of the review process under s 30 *Water Act 1992* and the Minister's statutory powers in relation thereto. The section was the subject of detailed consideration by Hiley J in the *Environment Centre* judgment referred to

124 MAC's written submissions, par 32.

in [136] and [137] above,[125] in which a number of matters relevant to the present case were decided. I refer to those in [148] – [152] below.

[148] His Honour held that the review was a 'merits review' and that the Minister's powers of review were not limited to the correction of error.[126]

[149] The defendant in the *Environment Centre* case had made a submission to the effect that, if the review were not for the purpose of correction of error, then the Minister would be required to re-exercise all the functions of the Controller afresh, simply because a person aggrieved had made an application for review. Hiley J rejected that submission, agreeing with the plaintiff's contention that it was for the Minister to decide how far he or she needed to 're-exercise' the Controller's functions in order to decide what was the true and correct decision.[127]

[150] Hiley J observed that the extent to which the Minister was obliged to consider the Controller's decision or action, and any other materials whether or not they were before the Controller, will vary from case to case.[128] A review on the merits would not necessarily require an extensive process such as consideration of all the materials de novo.[129] The Minister might be required to engage in a more extensive merits review if he or she

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125 *Environment Centre Northern Territory (NT) Inc v Minister for Land Resource Management* (2015) 35 NTLR 140.

126 Ibid, at [133], [138].

127 Ibid, at [134].

128 Ibid, at [152].

129 Ibid, at [153].

decided to substitute his or her own decision for that of the Controller pursuant to s 30(1)(a)(ii) of the Act, but not necessarily so.[130]

[151] Hiley J also referred to the possibility that the Minister might consider that he or she needs to consider additional information before making a decision. His Honour referred specifically to examining some of the materials or comments that had been provided to the Controller under s 71B(4);[131] or used by the Controller for the purposes of s 90(1); examining additional materials or comments provided by the applicant for review, or seeking assistance from the Review Panel.[132] His Honour concluded that particular consideration as follows:[133]

> None of these scenarios would necessarily require the Minister to engage in an extensive merits review de novo. Indeed it would often be pointless and unnecessarily time-consuming for that to be done.

[152] Of some significance for MAC's application, Hiley J accepted the proposition that the Minister is entitled to receive assistance from others, most obviously from others in his or her Department, and from the materials before the Controller, in discharging a review function.[134]

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130 Ibid, at [155].

131 In this respect, I determined in [44] above that, if comments had been provided to the Controller under s 71B(4) of the Act, then it is implied that the Minister is to take such comments into account.

132 *Environment Centre*, at [123], [156]. Prior to the commencement of this case, the Minister had not referred the matter to the Review Panel with a request for advice, pursuant to s 30(3)(b) of the Act.

133 Ibid, at [158].

134 Ibid, at [111]. His Honour referred to *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 115; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30-31, 37-38 and 65-66; and *Re Control Investment Pty Ltd and Australian Broadcasting Tribunal [No 2]*(1981) 3 ALD 88 at 92.

[153] In my opinion, the decisions in *Tickner v Chapman* and *Carrascalao v Minister for Immigration and Border Protection* do not determine the outcome in the present case.

[154] I accept the validity of the statements in *Carrascalao* as to the requirement for the decision-maker to engage in an active intellectual process and to give proper, genuine and reasonable consideration to the merits of the matter. The paucity of time taken by the Minister in that case was extraordinary. On my analysis of the decision, the Full Court was satisfied on the facts that there was insufficient time for the Minister to engage in the requisite active intellectual process. I am not so satisfied in the present case. I bear in mind that, in *Carrascalao*, the Minister was the primary decision-maker. In the present case, the Minister was charged with carrying out a review of the Controller's decision, after receiving the advice of the Review Panel. It was for the Minister to herself determine how far she needed to re-exercise the Controller's functions.

[155] In *Tickner*, an express statutory obligation was imposed upon the Minister to consider personally a report and any representations attached to it bearing upon the possible making of the s 10(1) declaration. There is no analogous requirement in the *Water Act 1992* that the Minister *personally* consider any particular reports, submissions or other documents of the kind specified in *Tickner*. I referred in [44] above to the matters required to be taken into account. I explained that it is implied by s 30(3)(b) and s 30(4) of the Act that the Minister will take into account the advice given

by the Review Panel before taking action under s 30(3)(a)(i) or (ii). It is implied because it would be a pointless exercise for the Minister to refer the matter to the Review Panel with a request for advice and then not consider the advice. That is the case whether or not the Minister accepts or rejects such advice, in whole or in part. There is no evidence in this proceeding that the Minister did not take the advice of the Review Panel into account. On the contrary, the Minister's reasons refer in detail to the report of the Review Panel.[135]

[156] It is also implied, for the reasons given in [44], that the Minister must take into account comments made in accordance with s 71B(4). The Minister refers in her reasons to having considered "the comments made under s 71E(4)".[136] I consider that that is either a typographical error or a minor mistake in the drafting of the reasons, because the Minister referred at length to the multiple concerns of the 'Reviewing Persons', and explained in her reasons how those concerns had been taken into account, in compliance with the requirements of s 71E(4). MAC has not established that the Minister did not take into account the s 71B(4) comments. I would add that I do not consider that the requirement made it necessary for the Minister to personally read all such comments in circumstances where the Minister adopted the process under s 30(3)(b) of the Act to refer the matter to the Review Panel for advice. The Review Panel considered not only the comments but also the grounds of review of

135 Jungfer affidavit, pp 1686 – 1693.

136 Jungfer affidavit, p 1685, par (a).

the commenting parties who had become "aggrieved" persons under s 30(1) of the Act. In brief, the comments and grievances were 'filtered' through the process of the review undertaken by the Review Panel. That review included receiving written submissions and hearing oral submissions from the representatives of the applicants for review.[137] The position is thus different to that described by Kiefel J in *Tickner*, where a "mere summary" of representations provided to the Minister was held not to suffice in circumstances where the statute required that the Minister read the representations himself.

[157] The clear implication of s 30(4) read with s 30(3)(a)(ii) of the *Water Act 1992* is that, before substituting a fresh decision for that made by the Controller, the Minister must be of the opinion that the decision the Minister wishes to substitute is an improvement on the Controller's decision.

[158] I accept the submission of counsel for Fortune that, in carrying out the review of the Controller's decision, after receiving the advice of the Review Panel, the Minister was not required to, and could not reasonably be expected to read for herself all the papers that relate to the matter.[138] Despite the personal nature of the power, the Minister was entitled to obtain assistance from departmental officers. The proper role of the

137 Jungfer affidavit p 68, par 2.

138 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30.9, per Gibbs CJ.

relevant Department was explained by Brennan J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* as follows:[139]

> Part of a Department's function is to undertake an analysis, evaluation and précis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and précis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the fact does not protect the decision …

[159] The principle was recognised in *Carrascalao* at [61] where it was said that the Minister was entitled to obtain assistance from departmental officers and members of his private staff, including to have them prepare summaries of information for review by him. The stated qualifications to that proposition (ie, materially deficient summary; inadequate summary of substantive argument; express requirement for Minister to personally consider relevant information) were on the basis that the applicable legislation, under which natural justice did not apply, required that the Minister personally exercise the power to cancel a visa if the Minister reasonably suspected that the person did not pass the character test and

139 Ibid, at 65 per Brennan J.

the Minister was satisfied that the cancellation was in the national interest.[140]

[160] In the present case, I consider that in conducting the review the Minister was entitled to allow the documents relevant to the issues she had to consider to be filtered by the Controller's decision,[141] the Review Panel's report, [142] and the ministerial briefing documents referred to above. When the Minister's reasons are read as a whole, it is clear that the Minister relied, as she was entitled to do, on the Controller's decision and, perhaps more so, on the Review Panel's report.[143] It was appropriate for the Minister to place significant weight on the advice in that report. The situation is analogous to reliance by the Minister for Aboriginal Affairs on the report of the Aboriginal Land Commissioner, where the Minister "in many if not in most cases … will not need to go beyond the report of the Commissioner", in making a grant of land pursuant to s 11 *Aboriginal Land Rights (Northern Territory) Act 1976*.[144]

[161] MAC's case that the Minister failed to engage in the "requisite intellectual process" is based on a conclusion that the Minister was unable to read more than 1600 pages of documents in the course of a day or two. In submissions in reply, counsel for MAC appear to accept that

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140 *Migration Act 1958 (Cth)*, s 501, as in force at the relevant time. See [131] above.

141 Jungfer Affidavit, pp 181 – 201.

142 Jungfer Affidavit, pp 67 – 85.

143 Minister's reasons, pp 1686-1691 of the Jungfer Affidavit.

144 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, at 30, per Gibbs CJ. The distinction between the requirement of the statute in *Tickner* and that in *Peko-Wallsend* was commented on by Black CJ in *Tickner* at 462F.

the Minister reviewed the material, but again complain that she could not have undertaken the requisite intellectual process.[145] In my opinion, those submissions misconceive the Minister's review function. Moreover, the submissions overlook the very detailed reasons provided by the Minister, which engage with numerous issues, including Fortune's application and its implications, the matters to be taken into account under s 90(1) of the Act, the comments made by commenting or aggrieved parties under s 71B(4) of the Act, the Controller's decision, the advice received from the Review Panel, and departmental advice in the ministerial briefing documents, all of which provide evidence of engagement in an active intellectual process. In my assessment, the Minister's written response to the ministerial briefing documents, endorsed on those documents, and then the Minister's detailed reasons themselves, signed by her, provide clear evidence of active intellectual engagement with the subject matter of the review.

[162] In my judgment, MAC has failed to establish that the Minister failed to give proper, reasonable and rational consideration to relevant considerations under s 90(1) *Water Act 1982*.

[163] Grounds 1 and 2 are not made out.

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145 Reply submissions, par 8: "... The Minister could have not undertaken the requisite intellectual process required by law in relation to the matters raised given the important public purposes of the legislative scheme and the volume and technical nature of the materials".

MAC grounds 3, 4 and 5

[164] By these grounds, MAC contends that the Minister failed to observe certain limits in her review, in respect of each of the following categories of conditions precedent: conditions about an adaptive management plan and monitoring program (CP 7 and CP 8); conditions about assessing the water resource (CP 9); and conditions about Aboriginal cultural values (CP 5 and CP 10).

[165] In MAC's contention, the power to impose conditions was limited by a number of matters:[146] (1) the conditions must be related to the purpose for which the function of the Minister is being exercised;[147] (2) a purported decision to grant a licence will not be a decision if a condition imposed has the effect of significantly altering the proposal in respect of which the application was made; (3) a purported decision to grant a licence will not be a decision if the fulfilment of the condition would significantly alter the proposal in respect of which the application was made;[148] (4) a purported condition to grant a licence will not be a decision if the effect of an imposed condition is to leave open the possibility that the proposal, as carried out in accordance with the decision and the condition, will be significantly different from the proposal that was originally made; and (5)

146 Written submissions, par 35.

147 The contention actually reads, somewhat convolutedly: "The power is limited to those conditions that are reasonably capable of being regarded as related to the purpose of which the function of the Minister is being exercised".

148 It is unclear to me how this differs from the previous contention about 'significantly altering'. If a condition has the effect of 'significantly altering' the proposal, then it seems to follow that the fulfilment of the condition would also 'significantly alter' the proposal.

where the criteria for future assessment are imprecise or unspecified, there may be an effective but impermissible delegation of authority.

[166] The first limitation may be accepted. However, MAC has not established that the conditions imposed by the Minister were not related to the purpose for which the Minister's function was exercised.

[167] The second, third and fourth submitted limitations are all directed at the possibility of a significant alteration to the proposal, that is, the proposal as carried out will be significantly different from the proposal originally made. However, MAC has not sought to rely upon any comparison between the application to take groundwater made by Fortune on 31 July 2020,[149] and the staged entitlement set out in the Table in [71] above. MAC has not identified the significant difference suggested by its submissions.[150] The only way in which I can see that the proposal, as carried out, will be different to that applied for is as referred to by me in [100], namely that Fortune would be unable to satisfy the staging conditions and, on that basis, not permitted to proceed to the next stage. There is also the possibility that Fortune would be unable to satisfy all the conditions precedent. As I observed in [100], and for the reasons given, I do not consider that a possible outcome, in which Fortune

149 See the relevant parts of the Application form – Jungfer affidavit pp 98-99. Annexed to the Application was a document containing estimated monthly water use for the selected crops with estimates for projected irrigation water demand (primary use) and secondary (domestic) use, with projected totals – pp 125-128 of the Jungfer affidavit.

150 The high point in MAC's submission in relation to the suggested 'significant difference' is in par 46 of its written submissions: "Even bore locations and the amount of water to be taken in any each year of the licence term could change".

extracts lower volumes of water than those applied for and permitted under the Licence (subject to conditions), would be such as to adversely affect the validity of the Minister's decision. Moreover, to the extent it is relevant, I would have thought that an outcome in which Fortune extracts lower volumes of water than applied for is one which MAC would regard favourably.

[168] MAC's submissions otherwise are that the imposition of conditions precedent was inappropriate where there had not been a sufficient assessment of the water resource throughout the District to support the Department's groundwater model, and where risks and uncertainties had not been defined or identified sufficiently to permit the volumes of water sought by Fortune. As a result, the Minister's decision was "[not] attended with sufficient certainty beyond stage 1", essentially because of reservations expressed by the Review Panel. In MAC's submission, the Minister was not able to consider the matters relevant to the decision required by s 90(1)(ab), (b), (c), (e), (g), (h) and (k) of the Act.[151]

[169] I do not accept the submission that the Minister did not make a decision about water entitlements with sufficient certainty beyond the first stage. The general requirements of the staging conditions are explained in [72] above. In my opinion, the staging conditions are precise and certain. Any uncertainty is in relation to whether the staging conditions can be

151 Written submissions, pars 40, 45.

satisfied but, although that is a possible problem for Fortune, it does not invalidate the Minister's decision.

[170] The Minister either had the power to deal with Fortune's application by imposing conditions precedent, or she did not. For reasons explained in [91] – [108], I consider that the Minister had the power and that her utilisation of conditions precedent was lawful. That is not to deny that, after taking into account the matters which the Minister was required to take into account, she might not have refused the licence or deferred the decision to grant the licence and required that specified matters be further investigated, so that there would be no or fewer remaining doubts or uncertainties before granting the licence. However, that was not the way in which the Minister chose to proceed and, as I observed in [107], the power in s 60(2) *Water Act 1992* is wide enough to encompass the imposition of conditions precedent before extraction entitlements come into effect. Any remaining arguments to the effect that the conditions precedent were inadequate, or that the Minister did not give sufficient weight to certain matters, are arguments in relation to the merits of the Minister's decision, not the lawfulness of the decision.

[171] The fifth submitted limitation was that there may have been an impermissible delegation of authority. The contention in full is as follows:[152]

152 Written submissions, par 45.

> … because the availability of water in the area had not yet been sufficiently determined, the core of what is to be determined by the Minister on review has been deferred for further assessment and approval by the Controller. Because of the significant uncertainty around the water resource, such deferred assessment is not merely a deferral to the Controller to assess the matters in accordance with prescribed criteria, but rather is an impermissible delegation to the Controller to undertake the review statutorily given to the Minister.

[172] In my opinion, there was no impermissible delegation of authority. The Controller of Water Resources was a person appointed under s 18 *Water Act 1992*. The Controller had a statutory duty pursuant to s 34 of the Act to ensure as far as possible that a continuous program for the assessment of water resources within the Northern Territory was carried out, including the investigation, collection, collation and analysis of data in relation to, amongst other things, the use of water resources. The Controller also had an independent statutory power to amend or modify the terms and conditions of any licence pursuant to s 93(1) of the Act. The power could not be exercised in a way that would result in an increase in the total quantity of water permitted to be taken under a licence. Further, if the Controller were satisfied that a licence holder had contravened or failed to comply with a term or condition of a licence, the Controller could revoke or suspend the licence.[153] In making any such decision, the Controller was required to have regard to the s 90(1) factors, discussed at length in these reasons. If it is accepted that the Minister's utilisation of conditions precedent (and staging conditions) was legitimate, it was appropriate and arguably desirable for the Controller to

153 *Water Act 1992*, s 93(2).

be nominated as the relevant officer to receive, consider and approve (as the case may be) the reports, maps, plans, programs and assessments required by the Minister's reasons, to ensure that the conditions precedent and staging conditions were satisfied.

[173] The final matter referred to in [164], in respect of which MAC contends the Minister failed to observe certain limits, was in relation to Aboriginal cultural values. As mentioned in [19], the Review Panel had recommended that a comprehensive cultural impact assessment be carried out prior to the extraction of any significant volumes of water on Singleton Station. No such assessment had been carried out prior to the grant of Fortune's licence. The Minister took the Panel's recommendation into account by adding condition CP 10, summarised in [83], for reasons extracted and discussed in [81] and [90] above. In this context, the map and spatial data derived from on-ground surveys, required by condition CP 5(a), was to include Aboriginal cultural values identified in the assessment required by condition CP 10.

[174] MAC contends that, because no assessment was done prior to the grant of the Licence, "there is a real possibility that the Licence proposal will be different from that for which the application was made". MAC refers to there being approximately 93 Aboriginal sacred sites within the drawdown area, approximately half of which have groundwater dependent

values.[154] The implication of this contention is that some accommodation may be required within Fortune's proposal to take into account Aboriginal concerns in relation to sacred sites. I fail to see how this possibility gives rise to error in the Minister's decision.

[175] MAC further contends that the Minister failed to take into account a relevant consideration in making the Decision in that she did not have "a clear articulation of the relevant Aboriginal cultural values, nor how the grant of the Licence was expected to impact them"; further, that the consideration of how to protect those cultural values was impermissibly deferred to the Controller.[155]

[176] I do not accept MAC's further contention. There was no express statutory requirement for the Minister to have before her "a clear articulation of the relevant Aboriginal cultural values". I do not agree that such a requirement can be inferred from the subject matter, scope and purpose of the legislation, as MAC contends.[156] The fact that relevant Aboriginal cultural values may be taken into account pursuant to s 90(1)(k) *Water Act 1992* does not elevate that discretionary consideration to a mandatory relevant consideration. In any event, it is clear that the Minister did consider the WDWAP and Aboriginal cultural values from the fact that the Minister added condition CP 10.

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154 MAC's written submissions, par 53.

155 MAC's written submissions, par 54.

156 Based on *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, at 40, per Mason J, with reference to s 22B, and s 90(1)(ab), (b) and (k) of the Act. See footnote 126 to par 54 of MAC's written submissions.

[177] In my judgment, the requirement for the preparation and submission to the Controller of a 'groundwater dependent Aboriginal cultural values impact assessment' did not constitute an impermissible deferral. Moreover, the requirement was consistent with the report of the Review Panel which had recommended the cultural impact assessment prior to the extraction of any significant volumes of water. MAC has not established that the condition precedent was other than a valid exercise of power under s 60(2) of the Act.

[178] Grounds 3, 4 and 5 are not made out.

MAC grounds 6 and 7

[179] MAC by these grounds contends that the Minister's decision to amend the period of Stage 1 to three years was not supported by any evidence, and was contrary to and inconsistent with the evidence before her, including the recommendation of the Review Panel, which she had accepted in respect of every other aspect of the review. MAC contends that there was nothing before the Minister to justify a reduction of the five-year staging condition, which had been recommended by the Review Panel "to enable adequate assessment of aquifer behaviour and GDE condition".[157] MAC contends that the Minister had no technical expertise or experience to enable her to conclude that a period of three years would provide for a sufficient level of assessment of the impacts of groundwater extraction in Stage 1. MAC contends that the Minister "should properly have been

157 Review Panel report, par 92, Jungfer affidavit, p 85.

guided by expert evidence", and that the decision to impose a three year staging period was legally unreasonable and/or seriously irrational.

[180] The reason for the Review Panel's recommendation was as follows:[158]

> The Panel's opinion is that in order to better manage the risk and uncertainty associated with this project, entitlements beyond Stage 1 should be withheld until sufficient data has been gathered and analysed to enable more confidence in the understanding of long term aquifer behaviour and GDE response. ... The Panel recommends that the period for Stage 1 be extended from 2 years to 5 years.

[181] Under Stage 1 as determined by the Controller, Fortune was limited to taking 12,788 megalitres per year for the first two years of water extraction. The effect of the Minister's decision was to extend the period of Stage 1 from two years to three years, running from the date of the conditions precedent being satisfied. That can be seen from the Table extracted in [71] above. The requirements of the conditions precedent are summarised at [75] to [80] above.

[182] A more accurate characterisation of the Minister's decision on review is that she increased the period of Stage 1 from two years to three years, and in so doing she did not accept the Panel's recommendation that the period of Stage 1 should be increased from two years to five years. In other words, the Minister accepted the Panel's recommendation only in part.

158 Ibid, par 80, Jungfer affidavit, p 83.

[183] Given MAC's contentions in relation to legal unreasonableness and serious irrationality, it is appropriate to consider the Minister's reasons for decision.

[184] First, it may be noted that the Minister acknowledged the concerns of the Review Panel, as appears from the following extract from the Minister's reasons:[159]

> The Review Panel agreed with the concerns raised by Reviewing Persons that the current staging of the Licence may not allow enough time to effectively monitor groundwater and environmental response associated with each stage. In particular this applied at Stage 1 to 2 given the current lack of site specific data on aquifer and unsaturated zone properties, lack of current groundwater monitoring bores and time series monitoring data and the associated groundwater model uncertainty.
>
> It is the opinion of the Review Panel that in order to better manage the risk and uncertainty associated with this project, entitlements beyond Stage 1 should not be available until sufficient data has been gathered and analysed to enable more confidence in the understanding of long-term aquifer behaviour and GDE response.
>
> The Review Panel recommended that the period for Stage 1 be extended from 2 years to 5 years.

[185] Next, under the heading 'Decision', the Minister stated as follows:[160]

> 1. I have determined to adopt the Review Panel's recommendation to substitute the decision of the Controller. The licence which I propose to grant with additional and amended conditions in my opinion appropriately gives effect to the Review Panel's recommendations with the exception of the amendment to staging.
>
> I am satisfied that that the conditions precedent and other conditions on this licence taken as a whole, including those that

159 Minister's reasons, Jungfer affidavit, p 1690.

160 Minister's reasons, Jungfer affidavit, pp 1692-4. Three separate extracts from the Minister's reasons are set out. The numbering is for ease of reference and does not appear in the Minister's reasons.

are additional and the amendments, address the risks, potential impacts, and uncertainty associated with the proposed extraction of water. In particular this course allows the Licence Holder to continue to undertake the works, investigations and other activities required to meet the conditions precedent. They will provide additional information and will inform the development of appropriate plans. That will not only provide greater certainty but allow the Licence Holder, if the conditions are satisfied, to ultimately be able to extract water for productive activities in the future.

…

2. By granting the licence with additional conditions, I accept the view of the Review Panel for the reasons it has given that further assessment of the water resources on Single[ton] Station is required and have established a new condition precedent CP9 which requires the Licence Holder to develop and submit for approval by the Controller a program to assess the water resource on the Land which is to incorporate a drilling program, including both production and monitoring bores; verification of the stratigraphy of the subsurface of the Land; identify the aquifers; verify their properties and quantify their yields; and determine interconnectivity.

…

3. I have also considered the staging conditions of the licence.

   I understand that in the staging of the licence granted by the Controller, the Controller took into consideration both the development schedule of the Project as well as limiting the volume of water that could be taken in any period to allow for the impacts of the water taken in the previous stage/s to be monitored in accordance with the approved monitoring program, to determine that the extraction is behaving as predicted and is managed within the defined thresholds that meet the environmental and cultural objectives outlined in an approved adaptive management plan.

   The Review Panel has recommended that the period of Stage 1 be extended from 2 years to 5 years to enable adequate assessment of the impact of the water extraction on aquifer behaviour and GDE condition.

   I have considered this recommendation. I consider that the additional requirements under the further conditions precedent (in conjunction with the other conditions precedent) will contribute to addressing the concerns raised in relation to staging and in understanding the behaviour of the aquifer.

> I have also considered that the Controller was of the view, for the reasons she gave, that 2 years in Stage 1 provided sufficient certainty in assessing impacts. In considering that matter I understand that the Licence Holder cannot proceed to the next stage unless the conditions for the previous stage have been satisfied.
>
> I do however recognise the Review Panel's view that there needs to be further time given to assess the impacts of groundwater extraction on aquifer behaviour, GDE condition and groundwater dependent Aboriginal cultural values.
>
> I have also considered the consequence of extending Stage 1 to 5 years on the Licence Holder's ability to meet its proposed development schedule. I have had regard to submissions it has made, and have taken into account, the impact upon it of extending Stage 1.
>
> In *balancing those considerations*, I consider that it is appropriate to increase Stage 1 to 3 years. I am satisfied that further period will provide for a sufficient level of assessment of the impacts of groundwater extraction in Stage 1. [italic emphasis added]

[186] The reference to the submissions made by the Licence Holder was to Fortune's letter to the Department of Environment, Parks and Water Security dated 12 November 2021.[161] In that letter, Fortune explained that its business plan and financial model for the Singleton Horticulture Project was based on a four-stage development, with each stage of two years. One consequence of extending stage 1 from two years to five years would be the probable need to split the project into two separate development projects, which Fortune considered was less attractive to investors and financiers because of increased uncertainties. Fortune stated that the viability of any Stage 1 project would be "in serious question". Another consequence of extending Stage 1 beyond

161 Jungfer affidavit, pp 1678-1680.

two years would be the need to review the proposed Stage 1 crop selection, with likely choice of lower value annual crops, which was contrary to the company's commitment to achieving maximum value for every megalitre of water utilised. Fortune's letter also stated that the company required scale to justify capital investment in infrastructure for processing, packing and cooling. If Fortune were limited to extracting the quantities of water recommended by the Review Panel for Stage 1, namely five years, the scale of the project would be reduced and, without suitable community infrastructure in place, it would be increasingly difficult to attract and retain quality key staff.

[187] My summary of Fortune's submission is not to endorse the validity of the statements made, but simply to explain the Minister's reference to the consequence of extending Stage 1 to five years on Fortune's ability to meet its proposed development schedule. I refer to s 90(1)(k) *Water Act 1992*. It must be inferred that the commercial and operational consequences of extending Stage 1 was a matter which the Minister considered should be taken into account. In my opinion, the Minister was entitled to take into account possible adverse consequences to the viability of the Singleton Horticulture Project, given the very significant proposed capital investment and the potential economic benefits to the Northern Territory economy and community if the project proved viable.

[188] As I concluded in [48] above, the Minister had a very wide discretionary power under s 90(1) of the Act. The Minister was entitled (and on the

review, required) to take into account the staging of the licence granted by the Controller. The Minister noted the Controller's view that the two-year period specified for Stage 1 provided sufficient certainty in assessing impacts. The Minister had to balance the Controller's view against the advice given by the Review Panel. It is clear from s 24(1), s 30(3)(b) and s 30(4) of the Act that the role of the Review Panel was advisory. The opinion and recommendations of the Review Panel were not binding on the Minister. After receiving the advice, the Minister was required to take such action as the Minister thought fit. The Minister's decision demonstrates that she sought to balance hydrogeological risks – which she considered would be mitigated ("addressed") by extensive conditions precedent (including the 'new' condition precedent CP 9), comprehensive monitoring and a rigorous adaptive management plan – against the identified commercial risks to Fortune and the predicted financial disincentives to a very significant horticultural project. In my judgment, the Minister's reasons disclose a rational and intelligible basis for the water extraction licence decision.

[189] MAC's essential argument in relation to unreasonableness or irrationality is that the Minister did not give sufficient weight to the recommendation of the Review Panel extracted in [180] above, or that the Minister accepted the Panel's recommendation in part only. However, any argument about the period of time, greater than two years, required to assess aquifer behaviour and GDE impacts, is an argument about the

merits of the Minister's decision. In this respect, I refer to my observations in [120] and [121] above, including that a court must be careful not to exceed its supervisory role by undertaking a merits review of an exercise of discretionary power. My comments in relation to ALEC's case at [122] apply also to MAC's case.

[190] Grounds 6 and 7 are not made out.

MAC ground 8

[191] By this ground, MAC contends that the Minister failed to afford procedural fairness in that she did not provide an opportunity for MAC to respond to material, said to be central to the review decision, before the Minister made that decision.[162] Specifically, MAC complains that it was not provided with an opportunity to be heard in relation to information considered by the Review Panel and the subsequent clarification of the requirements of a cultural values impact assessment, referred to by me in [19] and [20]; that it was not provided with the additional and amended licence conditions imposed by the Minister, referred to in [27]; and that it was not provided with Fortune's submission, summarised by me in [186]. MAC also complains that it was not provided with the groundwater model data which underpinned the WDWAP.

[192] The obligation to afford procedural fairness is a flexible obligation to adopt fair procedures which are appropriate and adapted to the

162 Written submissions, par 63.

circumstances of the case: "… the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires".[163]

[193] The content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the case.[164] It is informed by the legislative purpose and context, and the nature of the power or function being exercised.[165]

[194] I explained MAC's standing to bring the present Supreme Court proceeding in [3]. However, in considering the parties' submissions as to the existence and extent of the asserted requirement to accord procedural fairness to MAC in the period after the Review Panel reported to the Minister and before the Minister's decision, I need to go back to September 2020.

[195] On 2 September 2020, the Director, Water Licensing and Regulation, who was also the delegate of the Controller, wrote to the Central Land Council (in its capacity, inter alia, "as a representative or potential representative body for registered native title holders or applicants both exclusive and non-exclusive who are occupiers of the Land or land adjoining the Land") enclosing a notice of intention to make a water extraction licence

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163 *SZBEL v Minister for Immigration* (2006) 228 CLR 152 at [26], per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ; *Moriarty v Independent Commissioner Against Corruption (NT)* [2022] NTSC 46 at [97].

164 *SZBEL v Minister for Immigration* at [26].

165 *Kioa v West* (1985) 159 CLR 550, 584-585.

decision.[166] Subsequently, the notice was published in the NT News on 4 September 2020.[167] The notice sought comments in relation to Fortune's application, pursuant to s 71B(4) *Water Act 1992*.

[196] The Central Land Council made enquiries to obtain further information, and then facilitated a meeting on 29 September 2020 with the directors of MAC and various other Aboriginal persons, to inform them of Fortune's water extraction proposals. On 9 October 2020, the Chief Executive Officer of the Central Land Council wrote and sent a letter to the delegate of the Controller.[168] Curiously, the letter did not actually state that the Central Land Council was acting on behalf of MAC. Rather, the letter repeatedly referred to the CLC and to "the CLC's position". However, it is tolerably clear that the letter was written on behalf of MAC as the prescribed body corporate under the relevant native title determination,[169] albeit also on behalf of others with interests in common with MAC. The letter referred to s 24HA *Native Title Act 1993* (Cth) and expressed disappointment that the Northern Territory Government had chosen "to continue not to comply with its obligations under the Native Title Act" by not sending a notice of intention to MAC direct. After that somewhat irrelevant rebuke, the following six pages set out very detailed comments

166 Affidavit of Kate O'Brien, affirmed 10 May 2022, par 31.

167 Review Panel report, par 8, Jungfer affidavit, p 68.

168 Affidavit of Kate O'Brien, affirmed 10 May 2022, par 37. The letter is reproduced at pp 261-267 of the Jungfer affidavit.

169 See *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory of Australia* [2010] FCA 911.

on the proposed water extraction licence decision, clearly relevant to the position of MAC (and the other parties mentioned).

[197] After the Controller granted a water extraction licence to Fortune on 8 April 2021, MAC was one of several aggrieved parties which sought a review of the Controller's decision. MAC's grounds for review are set out in [14] above. The Central Land Council, acting on behalf of MAC and various other parties, made written submissions to the Review Panel. In its report, the Review Panel referred to MAC and those other parties collectively as "Review Applicant 2". It appears that submissions were made on behalf of all the parties represented by the Central Land Council and not on behalf of MAC individually. The Review Panel met on seven occasions, including a meeting on 3 September 2021 at which "representations were made by representatives from each of the applicants for review, the Department of Environment, Parks and Water Security, and Fortune".[170] To afford procedural fairness, the Review Panel provided copies to all parties of the submissions received by the Panel from each of the Review Applicants, the Department and Fortune, and then provided further opportunity for their responses.[171]

[198] The Review Panel provided its report to the Minister on 15 October 2021. MAC's contentions in relation to failure to afford procedural fairness are

170 Review Panel report, par 2, Jungfer affidavit, p 68. It may be noted that Dr Ryan Vogwill, expert hydrogeologist engaged by the Central Land Council, gave evidence to the Panel on 3 September 2021. See [199] below.

171 Review Panel report, par 3, Jungfer affidavit, p 68.

in respect of the period after the Minister received the report of the Review Panel, as appears from the following extract from MAC's submissions:[172]

> The Water Act expressly contemplates that procedural fairness will be afforded to those, such as MAC, who will be directly impacted by a water extraction licence decision. So much is clear from the obligation on the Minister in providing her reasons for decision when making a substituted or varied decision to include "the way in which the Minister... has taken into account... the comments made in accordance with section 71B(4)".[173] In this context, where the Minister intended to make amendments to the licence conditions such that it would significantly impact on MAC's interests affected by the decision, it was incumbent upon the Minister to take into account comments on that variation, and accordingly, extend an invitation to make written comments.[174] By only extending that invitation to Fortune, and not MAC (or others who had sought a review of the Controller's decision) the Minister failed to afford procedural fairness. Had MAC been afforded this opportunity it would have emphasised the need for the Minister to consider the scientific rationale for the length of Stage 1, and referred the Minister to the comments made on that topic by Dr Vogwill.[175] In circumstances where the Minister made the variation to the Staging Conditions in the absence of any expert evidence, such expert evidence, if before the Minister, could have impacted her assessment.

[199] Dr Ryan Vogwill is a consultant hydrogeologist engaged by the Central Land Council. Reports authored by him had been provided at all stages of the consideration of Fortune's licence application: to the Controller, to the Water Resources Review Panel, and to the Minister for Environment. He also gave evidence to the Review Panel on 3 September 2021. The

172 Written submissions, par 66.

173 See discussion in [44] above.

174 The submissions referred to *Water Act 1992*, s 71B(4).

175 Reference was made to the affidavit of Dr Ryan Ian James Vogwill affirmed 10 May 2022, pars 14-25.

Review Panel specifically referred to Dr Vogwill's involvement, as follows:[176]

> CLC submissions included representation and advice from consultant hydrogeologist Dr Vogwill. The primary concern raised is the level of hydrogeological uncertainty and its impact on the applicability of the groundwater model when used for developing the WAP and in assessing the licence application. The CLC maintain that, given the large volumes sought by Fortune, and the long term of the Licence, information and data essential to the grant of the licence is missing and must be supplied before a licence decision can be made. The CLC identified a number of matters about information and data relating to the hydrogeology and model, that should be addressed before significant decisions are made, including the following:
>
> There must be an assessment of the water resource throughout the District, including hydrogeological investigations of GDEs at a local level, and a program of drilling and aquifer testing must be carried out to obtain spatially distributed data on aquifer geometry, lithology, hydraulic properties, water levels and water quality. ...

[200] In his affidavit affirmed 10 May 2022, Dr Vogwill provided an opinion about materials not seen by him before the Minister made the licence decision. One of his comments was that a particular Technical Memorandum dated 30 July 2020 did not contain "an adequate exploration and presentation of the model's predictive uncertainty".[177] The significance of that comment has not been made clear. Dr Vogwill also stated his view that the Review Panel's recommendation of five years for Stage 1 was reasonable, notwithstanding that he "personally would have recommended a more thorough investigation be completed for the initial licence application". Dr Vogwill asserted that the longer staging was important to ensure that the adaptive management was "robust and

176 Review Panel report, par 49, Jungfer affidavit, p 77.

177 Affidavit, par 13.

sufficiently precautionary". [178] He raised a number of concerns about the decision to set a period of three years for Stage 1. In support of a longer licence stage, Dr Vogwill affirmed as follows:[179]

> I have concerns (like the Water Resources Review Panel) that a first licence stage period of three years will not permit sufficient data to be collected and analysed, such that substantial improvements to the risk/impact assessment can occur.

[201] It is clear that Dr Vogwill would have opposed the Minister setting a period of three years for Stage 1. However, he would not have opposed the opinion and recommendation of the Review Panel that Stage 1 should be for a period of five years, which he thought reasonable. In essence his opinion was the same as that of the Review Panel.

[202] Another of MAC's complaints referred in [191] was that it was not provided with the digital files comprising the relevant groundwater model. Although MAC submits that many of the assumptions in the model cannot be tested due to a lack of data, it nonetheless acknowledges that those assumptions are not unreasonable.[180]

[203] In this Court, Counsel for MAC make the following further submission, in support of their contention that the groundwater model data was not provided to MAC before the Minister made her decision:[181]

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178 Ibid, par 16.

179 Ibid, par 23.

180 Written submissions, par 68.

181 Ibid.

> MAC also submitted to the Review Panel that a spatial predictive uncertainty analysis of the model should be undertaken before any significant decisions are made …

[204] The implication of the submission to this Court is that MAC's submission to the Review Panel was a submission about Fortune's water extraction licence application and any decision made in relation to it. However, that is not the case; the submitted need for a spatial predictive uncertainty analysis was for a different purpose. MAC submitted that the Minister should proceed with the preparation and declaration of a new WAP, in respect of which the Minister should require the model underlying the replacement plan to be subjected to spatial predictive uncertainty analysis before the WAP was declared.[182]

[205] MAC's essential submission is that the asserted failure to afford procedural fairness materially affected the decision made by the Minister because, if there had been no such failure, there was a realistic possibility that the decision could have been different.[183]

[206] I have not exhaustively analysed the possible consequences in the event that all of the documents and data, the subject of MAC's complaint, had been provided to the Central Land Council and MAC before the Minister made the impugned decision. However, having regard to the matters considered by me at [198] – [204], and in particular [201], I am not

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182 Central Land Council's Outline of Submissions to the Review Panel, par 3(b), Jungfer affidavit, p 1279.

183 MAC cites *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [30], per Kiefel CJ, Gageler and Keane JJ; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [45], per Bell, Gageler and Keane JJ; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at [34], per Kiefel CJ, Gageler, Keane and Gleeson JJ.

satisfied on the balance of probabilities that the provision of the documents and data could realistically have resulted in a different decision. Moreover, for reasons given below in [207] – [214], I am not satisfied that there was any failure on the part of the Minister to afford procedural fairness.

[207] The content of the obligation to afford procedural fairness must be found in the *Water Act 1992*. In this context, counsel for Fortune have drawn my attention to the judgment of Kitto J in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation,*[184] where his Honour referred to the legal requirements for the discharge of a quasi-judicial function and observed as follows (citations omitted):

> And notwithstanding what Lord Lorburn said in *Board of Education v Rice* about "always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view", the books are full of cases which illustrate both the impossibility of laying down a universally valid test by which to ascertain what may constitute such an opportunity in the infinite variety of circumstances that may exist, and the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place. By the statutory framework I mean the express and implied provisions of the relevant Act and the inferences of legislative intention to be drawn from the circumstances to which the Act was directed and from its subject matter …

[208] Under the *Water Act 1992*, there is no doubt that the MAC was entitled to procedural fairness, to the extent that the Minister was required to take into account written comments made on its behalf in making the review

184 *Mobil Oil Australia Ply Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503-504.

decision. Those comments, made to the Controller in accordance with s 71B(4), and further representations and evidence on behalf of MAC, were the subject of detailed consideration by the Review Panel. The Review Panel was not obliged to conduct a hearing, but had the power to do a number of things in order to enable it to advise the Minister, including requiring a person to appear, produce documents, and give evidence on oath.[185] In the present case, a hearing took place in which the Review Panel heard representations from the parties, as explained in [197] above. The Review Panel then provided its advice to the Minister in the form of a report.

[209] As held in [160], the Minister was entitled to allow the documents relevant to the issues she had to consider to be filtered by the Controller's decision and the Review Panel's report. Under s 71E(4)(a) of the Act, the Minister's reasons for decision had to state or explain the way in which the Minister had taken into account the s 71B(4) comments. The Minister's reasons contain multiple references to the submissions made by the 'Reviewing Persons' in relation to the following: consideration of cultural values; the Guideline and its impacts on GDEs; hydrogeological conceptual and numerical modelling and scientific uncertainty; the use of adaptive management framework to manage uncertainty and risk; the period of Stage 1 of the Licence; and the overall Licence period. The references in the Minister's reasons were not only in relation to the

185 *Water Act 1992*, s 31(1).

written comments made by the 'Reviewing Persons' under s 71B(4) but to the additional matters submitted by them or on their behalf to Review Panel. The Minister stated that she accepted the conclusions of the Review Panel (for the reasons given by it) on each of the issues raised by the Reviewing Persons with the exception of the Review Panel's recommendation of an amendment to Stage 1 of the Licence.[186]

[210] The 'status' of comments made in accordance with s 71B(4) of the Act are to be ascertained by reference to s 71C(2) and s 71E(4)(a) of the Act, which required that they had to be taken into account and that the reasons had to demonstrate the way in which they were taken into account. The status of persons making comments derived from those requirements. That is the relevant statutory framework. I do not overlook the fact that some of the persons making comments became "persons aggrieved" who made application under s 30(1) of the Act for a review of the Controller's decision. As mentioned in [209], further evidence was called and representations were made on behalf of MAC (as one such "person aggrieved") to the Review Panel. However, there was no express statutory requirement for the Minister to take into account such further evidence and representations. I refer to s 71C(2) and s 71E(4)(a), which are limited in scope to the s 71B(4) comments. Nonetheless, whether required to do so or not, the Minister did take into account the further submissions of

186 See Minister's reasons, Jungfer affidavit, pp 192-4. See also the discussion in [188] above.

those parties identified by her as the ‘Reviewing Persons’, as explained in [209] above.

[211] The flaw in MAC’s submission, extracted in [198] above, is that it seeks to impose on the Minister an obligation not only to consider the written comments made under s 71B(4), but to thereafter oblige the Minister to give the persons who made such comments the opportunity to continue to comment, *even after* they had made additional written representations to the Review Panel and then engaged with the Review Panel by making oral representations and calling evidence at a formal meeting.

[212] By its complaint that the Minister received further submissions from Fortune, MAC contends in effect that it should have been treated in exactly the same way as Fortune. However, MAC was not the licence applicant. There is nothing in the Act and there is no principle of administrative law which required that, to accord procedural fairness to MAC, the Minister was required (1) to provide recurrent opportunities for MAC to be heard on each condition of the Licence, or proposed variation to the licence conditions; (2) to provide MAC with each and every document potentially relevant to the Licence decision or (3) to give MAC an opportunity to comment on correspondence between the Minister and Fortune. I accept the submission of counsel for Fortune that the *Water Act*

1992 did not commit the Minister (or the Controller) to a 'Groundhog Day' scenario of recurrent consultation in this manner.[187]

[213] In reply submissions, counsel for MAC state that it does not seek "recurrent opportunities… to be heard on each aspect of the Licence", reiterating the "three specific kinds of material" in respect of which MAC claims to have been denied procedural fairness.[188] In my opinion, however, the practical effect of the core contention extracted in [198] is that MAC seeks the right to be heard, and further heard, and then to continue to be heard.

[214] The logical extension of MAC's contention is that, if it made further submissions (for example, based on the Vogwill affidavit, confirming or expanding on opinions which Dr Vogwill had already submitted to the Review Panel), then Fortune would have to be given the opportunity to make further submissions and, if so advised, provide further expert evidence. Inevitably, MAC would argue that, as an affected entity, it should then be given the opportunity to comment on such further submissions and any such further evidence provided by Fortune. I realize that things did not reach that stage, but that is where they could well have gone. In my opinion, MAC's entitlement to procedural fairness, such as it was, did not require the Minister to give it the opportunity to further

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187 *Clark v Cook Shire Council* [2008] 1 Qd R 327 at [32], per Keane JA. The issue in the case was the extent to which the modifications to a proposed planning scheme after public notification and receipt of submissions resulted in a planning scheme "significantly different" from the proposed planning scheme notified, in which case the legislation required that the process undertaken would have to recommence.

188 MAC Reply submissions, par 26.

comment after it had made written representations to the Review Panel and engaged in the Review Panel's processes described in [197] and [208]. In simple terms, MAC had been given the opportunity to make its point and it had made its point.

[215] Ground 8 is not made out.

MAC ground 9

[216] MAC contends by this ground that the Minister erred in law by failing to comply with s 60(4) of the *Water Act 1992* (as in force on 15 November 2021) before granting the licence for a period exceeding 10 years.

[217] Relevant to this ground is the text of s 60 of the Act prior to and following a change to the legislation which took effect on 29 September 2021.

[218] Immediately prior to 29 September 2021, s 60(4) was as follows:

> (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.

[219] The amended provision was (and remains) as follows:

> (4) 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.

[220] The relevant chronology is as follows. On 15 February 2021, the Minister for Environment provided her opinion as to special circumstances. On 8 April 2021, the Controller granted the water extraction licence to Fortune. In May 2021, MAC (and ALEC) sought a review by the Minister for Environment of the Controller's decision. In July 2021, the Minister for Environment referred the matter to the Review Panel. The legislative change came into effect on 29 September 2021. The Review Panel provided its report to the Minister on 15 October 2021. The Minister substituted the decision the subject of the applications for judicial review in this Court on 15 November 2021. It is clear that the law had changed by the time of the Minister's substituted decision.

[221] MAC contends that s 60(4), as amended, provides that a licence may be granted for a period exceeding 10 years in two specific circumstances. In the present case, (1) there had been no relevant Gazette notice by the Minister pursuant to s 60(4)(a) specifying any purpose or criteria justifying a licence period longer than 10 years, and (2) the Controller did not consider whether special circumstances justified a longer period and so was unable to be satisfied under s 60(4)(b). Because neither circumstance was met, MAC submits that the Minister erred in law in granting the licence for a 30 year period.

[222] At the time the Controller made the decision to grant the water extraction licence to Fortune on 8 April 2021, she was not required to consider special circumstances; she was entitled to rely on the opinion of the

Minister that there were special circumstances.[189] The Minister for Environment had provided her opinion, by endorsement on a ministerial briefing document on 15 February 2021, that there were special circumstances justifying the grant of a water extraction licence for 30 years.[190] Those special circumstances were the scale of Fortune's proposed horticulture project, the level of investment in the project, the time required to develop the project and potential economic benefits for the Northern Territory.[191]

[223] I came to a preliminary view that focus only on the text of s 60(4) prior to and following the legislative change was a possible distraction from a necessary consideration of s 30(3)(a)(ii) *Water Act 1992*, specifically the words "the decision that … the Controller should have made in the first instance". As the High Court has so often emphasised, questions presented by the application of legislation can be answered only by first giving close attention to the relevant provisions; reference to decided cases or other secondary material must not be permitted to distract attention from the language of the applicable statute.[192]

[224] I considered that s 30(3)(a)(ii) could be interpreted such that the decision that the Controller "should have made in the first instance" meant a decision under the law as it stood at the time of the Controller's decision.

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189 Controller's decision, par 120, Jungfer affidavit, p 195.

190 Jungfer affidavit, p 167.

191 Ibid, pp 166-7.

192 See, for example, *Shi v Migration Agents Registration Authority* [2008] HCA 31; 235 CLR 286 at [92], per Hayne and Heydon JJ.

However, because my concern had not been raised with the parties at the time of the hearing, I sought submissions as to the proper interpretation of sub-paragraph (3)(a)(ii). I am grateful to counsel for their prompt and comprehensive responses at short notice.

[225] In their supplementary submissions, MAC contends that the Minister was obliged to apply the law as it stood at the time of her (review) decision. I set out the summary submission in full below:[193]

> The Minister was obliged to perform a *de novo* merits review. Before the September 2021 amendments, there can be no doubt the Minister was obliged to do that by reference to the facts, matters and circumstances (including the law) as it stood at the time of her decision (see *Environment Centre Northern Territory (NT) Inc v Minister for Land Resource Management* (2015) 35 NTLR 140 at esp 183 [148]). Any other conclusion would be most unusual, particularly given the role of the Review Panel in the statutory scheme. Indeed, if the words in s 30(3)(a)(ii) worked to confine the review to the facts, matters and circumstances as they existed at the earlier time, there would likely be additional grounds for review to the extent the Minister took into account events after that time. In that context, the language in s 30(3)(a)(ii) serves to confirm the nature of the power being exercised by the Minister. It would be an unusual result (and construction) if, after the amendment, the words in s 30(3)(a)(ii) went beyond confirming the nature of the power to fix the facts, matters and circumstances to be taken into account in a way they had not previously done. There is nothing in the amendments or the statutory scheme that suggests that was the intended result and, indeed, as Hiley J recognised in *Environment Centre Northern Territory NT Inc*,[194] such a result would be inimical to the protection of such an important public interest.
>
> MAC submits that the Minister was bound to apply facts, matters and circumstances, including the law, as it stood at the date of her review when exercising her powers under s 30(3)(a) of the *Water Act 1992*. She was bound to undertake contemporaneous review of the original

193 MAC's further submissions on ground 9, 23 January 2024, pars 2-3.

194 *Environment Centre Northern Territory (NT) Inc v Minister for Land Resource Management* (2015) 35 NTLR 140 at esp [148].

> decision. The words in s 30(3)(a)(ii) "the Controller should have made in the first instance" do not displace that obligation.

[226] MAC submits further that the orthodox position for a review entity charged with merits review is to make the decision, consistently with its function of reviewing a decision contemporaneously, by reference to the facts and circumstances, including the law, as they stand at the date of the reviewing entity's decision.[195]

[227] The primary authority cited in support of the proposition referred to in the previous paragraph is *Shi v Migration Agents Registration Authority*,[196] in which it was held by a High Court majority (Kirby, Hayne, Heydon and Crennan JJ; Kiefel J dissenting) that the Administrative Appeals Tribunal was not limited to considering the facts and circumstances existing at the time of the Authority's decision, but rather was required to consider the state of affairs existing at the time of the Tribunal's decision. Kirby J referred to the desirability of administrative decision-makers having regard to the best and most current information available.[197] Hayne and Heydon JJ observed as follows:[198]

> Once it is accepted that the Tribunal is not confined to the record before the primary decision-maker, it follows that, unless there is some statutory basis for confining that further material to such as would bear upon circumstances as they existed at the time of the initial decision, the material before the Tribunal will include information about conduct and events that occurred after the decision

195 MAC's further submissions on ground 9, par 5.

196 *Shi v Migration Agents Registration Authority* [2008] HCA 31; 235 CLR 286.

197 Ibid, at [41].

198 Ibid, at [99].

> under review. If there is any such statutory limitation, it would be found in the legislation which empowered the primary decision-maker to act; there is nothing in the AAT Act which would provide such a limitation.

[228] Similarly, Kiefel J observed that, where the decision to be made contained no temporal element, evidence of matters occurring after the original decision may be taken into account by the Tribunal in the process of informing itself.[199]

[229] I fail to see how the decision and separate judgments in *Shi* support the proposition that the 'facts and circumstances' include the law as it stands at the date of the reviewing entity's decision. *Shi* was concerned with factual matters, the crucial question being whether the appellant was a fit and proper person to give immigration assistance. The issue was whether, in considering that question, the Administrative Appeals Tribunal was limited to considering the facts and circumstances existing at the time of the respondent Authority's decision.

[230] As appears from the submission extracted in [225] above, MAC also relies on the decision of Hiley J in the *Environment Centre* case in support of the proposition that the Minister was obliged to perform a merits review "by reference to the facts, matters and circumstances (including the law) as it stood at the time of her [review] decision". However, that reliance is misplaced insofar as it seeks to include the law as it stood at the time of the review decision. Hiley J did not mention the

199 Ibid, at [143].

law; he was referring to 'information'. This is what his Honour actually said, at [148]:

> I consider it would be inimical to the protection of such an important public interest if the Minister's powers, once enlivened under s 30, were constrained in the way contended for by the defendant. I agree with the plaintiff's contention that there is no reason express or implied, in s 30 or elsewhere in the Act, why the Minister would not be able to advance and protect the public interest by taking into account *information* relevant to the grant of a licence under review, particularly where such *information* has been generated or acquired after the Controller made his or her decision. [italic emphasis added]

[231] The statement of Hiley J extracted in the previous paragraph supports the proposition that the Minister is able to take into account information, or 'facts, matters and circumstances' known or identified at the time of the review decision, whether or not they were available to the Controller. In my opinion, that is clearly correct.[200] There is no statutory limitation confining the Minister to a consideration of the circumstances as they existed at the time of the Controller's decision or which precluded the Minister taking into account evidence provided or representations made after the Controller's decision. Moreover, the scheme of the Act is that factual matters arising subsequent to the Controller's decision (for example, in this case, the evidence and representations made by MAC to the Review Panel, or the report of the Review Panel, or Fortune's subsequent submissions) may be taken into account by the Minister on a review. Indeed, the Act requires the Minister to consider the advice of the

200 See, for example, *Shi v Migration Agents Registration Authority* [2008] HCA 31; 235 CLR 286, per Hayne and Heydon JJ at [99], [101].

Review Panel and take such action as the Minister thinks fit. It is clear that s 30(3)(a)(ii) does not limit the facts to be considered on a review.

[232] However, that does not resolve the question in the present case as to the law which applies when the Minister, having appropriately taken into account factual matters arising subsequent to the Controller's decision, decides to substitute the decision which, in the opinion of the Minister, the Controller should have made in the first instance.

[233] In their supplementary written submissions, counsel for the Minister state that, despite the formula used in s 30(3)(a)(ii) being relatively common in statutes conferring power on a reviewing decision-maker, the Minister is not aware of any authority that answers the specific question. Counsel submits that the question of what facts and law are to be applied on a review "are to be drawn from s 30, and the Act as a whole".[201] The submission is then as follows: s 60 of the Act being a procedural provision, the Minister does not contend that s 30(3)(a)(ii) operates to fix the procedural law as that applying at the time of the Controller's decision;[202] and, just as s 30(3)(a)(ii) is not determinative of what facts apply when determining a review, so it is not determinative of the procedural law that applies.[203]

201 Written submissions, par 8.

202 Ibid, par 9.

203 Ibid, par 13.

[234] In my opinion, the sub-paragraph should be interpreted such that the decision which the Controller "should have made in the first instance" means a decision under the law as it stood at the time of the Controller's decision. The fact that the Minister is required to take into account factual matters or factual considerations arising subsequently to the Controller's decision does not mean that the Minister is required to take into account legislative changes enacted subsequently. In my analysis, the relevant question is: "How could the Minister be of the opinion that her intended substitute decision was the one which the Controller 'should have made in the first instance' if the intended substitute decision is to be made under a statutory framework which did not exist at the time of the Controller's decision?". Logically, the Controller could not have made a decision in the first instance to comply with a legislative provision which had not come into effect.

[235] The construction I prefer accords with the ordinary grammatical meaning of the text of s 30(3)(a)(ii). It is consistent with context and legislative purpose. The result is not unreasonable or absurd. As applied in the present case, it operates to preserve the 'value' of the processes engaged in by multiple parties in the 12 months preceding the amendment to s 60(4) of the Act. In my opinion, there is no incongruity in the Minister being able to take into account subsequent facts, but not being bound by subsequent changes in the law. Facts which emerge subsequently may well highlight deficiencies in the Controller's decision, and lead the

Minister to make a decision which, in the Minister's opinion, the Controller should have made in the first instance; whereas the fact that the law may have changed says nothing about whether the decision was the one which the Controller *should have made* in the first instance, before the legislative change.

[236] In my judgment, the unamended s 60 of the Act applied on the review, as a result of the text of s 30(3)(a)(ii). On that basis, the Minister did not err in law by failing to comply with s 60(4) of the *Water Act 1992*, as in force on 15 November 2021. MAC's contentions referred to in [221] cannot be maintained, and ground 9 should be dismissed.

[237] However, if I have erred in relation to the interpretation of s 30(3)(a)(ii) and, as a result, erred in the conclusion expressed in [236], I proceed in the alternative to consider MAC's contentions summarized in [221] above.

[238] The first argument advanced by MAC was that there had been no relevant Gazette notice pursuant to s 60(4)(a) of the Act. I accept that argument. Counsel for the defendants do not contend otherwise.

[239] In relation to the second argument advanced by MAC, I have concluded that there is no evidence that the Controller considered whether special circumstances justified a longer licence period than 10 years. As I explained in [222] above, when the Controller made a decision to grant the water extraction licence to Fortune on 8 April 2021, she was not

required to consider special circumstances. The following extract from the Controller's reasons for decision makes clear that she relied on the opinion of the Minister in relation to special circumstances:

> Licence period
>
> 118. In accordance with the Act, a water extraction licence may be granted for a period, not exceeding 10 years, as is specified in the licence. I may grant a licence for a period exceeding 10 years, where, in the opinion of the Minister, there are special circumstances that justify it under the Act.
>
> 119. During the processing of the application, the applicant requested that a 30-year licence term be applied to the Licence and therefore, the opinion of the Minister was sought to inform my decision.
>
> 120. The Minister for Environment has affirmed that in her opinion there are special circumstances that justify a 30-year term licence including:
>
> - the scale of the Project
> - the level of investment in the Project
> - the time required to develop the Project
> - the potential economic benefits for the Northern Territory.
>
> 121. I have decided to grant the licence for a 30-year term.

[240] MAC submits that the Controller's reasons are bereft of any reference to her opinion on special circumstances. I agree.

[241] Counsel for the Minister argue that the Controller must have considered whether "special circumstances" justified the granting of a licence for a period exceeding 10 years. Counsel contend that, given the prohibition in s 60(3) and the need for the Controller to make the decision, it is implied that the Controller must herself have been satisfied of the existence of the special circumstances for the purposes of the former s 60(4): "[it] would

be improbable that the Controller might specify the period of the licence without … considering and accepting the existence of special circumstances which justify the longer period".[204]

[242] I am not prepared to draw an inference that the Controller "must have considered" that special circumstances justified the grant of a licence for a period of 30 years simply because she granted a licence for a period of 30 years. My reluctance is on account of the following three matters: (1) the Controller did not give any reasons for her decision; for example, she did not state that she had considered matters for and against the grant of a licence which not only exceeded 10 years, but exceeded 10 years by a further 20 years; (2) given the reference to the opinion of the Minister for Environment in par 120 of the Controller's decision, immediately preceding the statement of the Controller's decision to grant the licence for a 30-year term, it appears more likely than not that it was the Minister's opinion which was the basis for the Controller's decision; and (3) the Controller did not express her agreement with the special circumstances on which the Minister's opinion relied.

[243] I acknowledge that Joanne Townsend had provided the Minister for Environment with the ministerial briefing in which she listed the matters raised by Fortune as special circumstances in support of its request for a 30-year licence term. I referred to that ministerial briefing in [99] above.

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204 First defendant's supplementary written submissions on Ground 9, par 26.

However, the ministerial briefing was provided by Ms Townsend in her capacity as Chief Executive Officer, not as the Controller.

[244] The primary submission of counsel for the Minister is that the power in s 30(3)(a)(ii) includes the power on review to stand in all respects in the shoes of the Controller. That includes not only the Controller's power to grant a licence to take groundwater under s 60(1) of the Act but also the power under s 60(4) to grant such a licence for a period exceeding 10 years if satisfied that special circumstances justify the longer period. Counsel for MAC contend that, under the *Water Act 1992*, it is the Controller, not the Minister, who is empowered by s 60(4) of the Act.[205] If that contention were correct, then it would apply also to s 60(1) of the Act, and the Minister would not have the power on review to substitute a decision granting a licence to take groundwater under s 60(1). I reject MAC's contention. I am satisfied that the reference to the Controller in s 60(4)(b) of the Act is to be read and understood as a reference to the Minister on review.

[245] However, the problem in relation to the Minister's reasons is that she did not expressly state her satisfaction that special circumstances justified the licence period of 30 years. Counsel for the Minister submit that the reasons on the review disclose that the Minister was satisfied of the existence of matters that amount to "special circumstances" when she addressed the contention by the Reviewing Persons that the licence term

205 Written submissions dated 5 September 2022, par 12.

granted by the Controller should not have been 30 years. On that basis, they submit that the Minister's reasons need to be read in light of the grounds being agitated on the review, which expressly contended that there were no "special circumstances".[206]

[246] It is appropriate to consider what is meant by "special circumstances". Counsel for the Minister rely on the decision of Bray CJ in *Baskerville v Martin*.[207] The issue considered was the meaning of the expression 'special reasons' in s 102(2) *Motor Vehicles Act 1959-1963* (SA). The Chief Justice observed:[208]

> What then are special reasons? They cannot, in my view, be exhaustively enumerated. All that can be said at large is that special is the antithesis of general; ... and that Parliament was contrasting reasons which are special with reasons which are general. Nothing which is a common or usual factor in the ordinary typical case can constitute a special reason. There must be something extraordinary, unusual or atypical. This has often been said before. Perhaps it cannot be better put than it was put by Napier J, as he then was, in *Gassner v Frost*, that there must be something "clearly distinguishable from the general run of the cases that Parliament had in mind when it provided for the penalty of disqualification".

[247] In *Baker the Queen*,[209] Gleeson CJ made the following observation in relation to legislation which requires courts to find 'special reasons' or 'special circumstances':[210]

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206 First defendant's supplementary written submissions on ground 9, pars 11, 13.

207 *Baskerville v Martin* [1967] SASR 156.

208 Ibid, at 160-161; citations omitted.

209 *Baker v The Queen* [2004] HCA 45; 223 CLR 513.

210 Ibid, at [13].

> There is nothing unusual about legislation that requires courts to find "special reasons" or "special circumstances" as a condition of the exercise of a power.[211] This is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors.

[248] In my opinion, the reference to "special circumstances" in s 60(4) *Water Act 1992* is to be read as circumstances which are out of the ordinary, unusual, or atypical and which take the licence application out of the general run of licence applications; or circumstances of the licence application which are special compared to circumstances of the ordinary kind to which the limit of 10 years would be appropriate.

[249] As mentioned in [245] above, counsel for the Minister contend that her reasons on the review disclose that she was satisfied of the existence of matters which amounted to "special circumstances" when she addressed the contention put by the reviewing persons that the licence term granted by the Controller should not have been 30 years.

[250] Under the heading "Licence Period" in her reasons, the Minister summarised the contentions of the reviewing persons and the conclusion of the Review Panel, as follows:[212]

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

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211 His Honour cited, by way of example, *United Mexican States v Cabal* (2001) 209 CLR 165.

212 Jungfer affidavit, p 1690.

> 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.

[251] It is correct that MAC, at least, had expressed concerns about the licence period. For example, in its application for review of the Controller's decision, MAC asserted this ground: "The Controller should not have granted the licence for a term of more than 10 years given the uncertainty in the groundwater model and the potential impacts of granting the Licence".[213]

[252] Counsel for the Minister submit that the brief reasons extracted in [250] are to be understood against the background of a contest advanced in the reviewing persons' written submissions to the Review Panel about that part of the Controller's reasons also headed "Licence period". It was contended in the submissions to the Panel that there were not in fact "special circumstances". Counsel's summary and analysis of the submissions made by reviewing persons to the Panel is set out below:

(a) The Central Land Council (on behalf of MAC and others) extracted s 60(4) of the *Water Act 1992*, referred to special circumstances and then contended the "Controller should not have granted the Singleton Water Licence for a term of more than 10 years given the uncertainty underlying the Groundwater Model and the potential impacts of granting the Singleton Water Licence." [214] The Central Land Council submitted that special circumstances - being "sound scientific knowledge of the water resource from which the licence takes water" and "the impacts of extraction have been or can be assessed with a high degree of

213 See [14] above, dot point 8.

214 Jungfer affidavit, p 1061.

certainty" – "these [special circumstances] do not exist for the water extracted from the Western Davenport District".[215]

(b) The Environment Centre NT Incorporated contended there was an "insufficient basis for the extension of the term of the licence under s 45(4) [sic] of the Water Act."[216] The Environment Centre NT Incorporated submitted "Given the high degree of scientific uncertainty underpinning the WDWAP, the statement in the WDWAP that future water allocation plans may have reduced estimated sustainable yield, and the likelihood of serous and irreversible impacts, this extension is unwarranted, and puts the water resource at significant risk."[217]

(c) In support of the 30-year term, Fortune raised the following as special circumstances: the time required to develop the project, the scale of the project, the level of investment in the project and the potential economic benefits of the project.[218]

(d) The Department in turn submitted that it did "not accept that the level of uncertainty is insufficient and considers that any residual uncertainty is appropriately managed through the licence conditions, and in particular the requirement for an approved monitoring plan and to implement an adaptive management plan."[219] The Department submitted that it did "not accept that the management of residual uncertainty through these conditions precludes the grant of a 30 year licence. The development proposal extends beyond 10 years and can only consider staging and conditioning the development through the period that the development is proposed".[220]

[253] Counsel for the Minister place reliance on the Minister's statement that she had considered the above submissions.[221]

[254] Counsel for the Minister contend that it was against that backdrop that the Review Panel reviewed and considered both the first Minister's decision

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215 Jungfer affidavit, p 1062 [64].

216 Jungfer affidavit, p 1082.

217 Jungfer affidavit, p 1082.

218 Jungfer affidavit, p 166.

219 Jungfer affidavit, p 1504 [158].

220 Jungfer affidavit, p 1504 [160].

221 Jungfer affidavit, pp 1684-5. Submissions, par 17.

and the Controller's decision.[222] It also had regard to the reviewing persons' submissions addressing the issue.[223] The Review Panel turned its mind to the issue and was "of the view that a licence term of greater than 10 years, with suitable conditions precedent and staged entitlements [was] appropriate for a large-scale development such as that proposed."[224] Counsel argue that the latter was a finding of a "special circumstance" and a rejection that there was not a "special circumstance". They further submit that the Minister expressly adopted the Review Panel's conclusion by setting out the Review Panel's finding of a special circumstance on the 'Licence Period' as it related to the issue raised on review.[225] The Minister "determined to accept the conclusions of the Review Panel for the reasons it has given on each of the issues raised".[226]

[255] I interpose my response to that part of the submission in the previous paragraph referring to the Minister having set out the Review Panel's finding of a special circumstance. The Review Panel did not find that there were any special circumstances which justified the grant of a licence for the longer period of 30 years. It simply expressed the view correctly attributed to it in the previous paragraph.[227] The Minister then did no more than set out the view of the Review Panel that a licence term

222 Jungfer affidavit, pp 68 [4], 86 [1d], [1g].

223 Jungfer affidavit, pp. 68 [4], 86-8, 1062 [62]-[64], 1082, 1469-70, 1476-7, 1504 [157]-[160].

224 Jungfer affidavit, p 84 [84].

225 Jungfer affidavit, p 1690.

226 Jungfer affidavit, p 1692.

227 Jungfer affidavit, p 84 [84].

of greater than 10 years was ‘appropriate’ for a large-scale development such as that proposed. It would therefore be more correct to say that the Minister set out what is now contended to have been the Review Panel’s finding of a special circumstance. However, I do not agree that the Review Panel made a *relevant* finding in relation to special circumstances, because it made no mention of being satisfied that special circumstances justified the licence period of 30 years.

[256] Counsel for the Minister further submit that the Minister, as part of the ministerial briefing, reviewed and considered,[228] the first Minister's decision,[229] the Controller's decision,[230] and the submissions made by the reviewing persons to the Review Panel.[231]

[257] Counsel for the Minister submit that the Minister’s approach as expressed in the decision was to grant the Licence “on the same basis as the Controller” but with the identified additions and amendments to the conditions of the Licence.[232] Counsel contend that, in doing so, the Minister should be understood to have accepted the first Minister's opinion (which was attached to the Ministerial Briefing and from which she did not depart) when she granted the Licence on similar terms to that

228 Jungfer affidavit, pp 1684-5.

229 Jungfer affidavit, pp 165-7.

230 Jungfer affidavit, p 195 [118]-[121].

231 Jungfer affidavit, pp 1062 [62], 1082, 1469, 1504.

232 Jungfer affidavit, p 1682.

granted by the Controller, but with the variations she identified.[233] The Minister is thus said to have complied with the requirement in s 60(4)(b) of the *Water Act 1992*.

[258] The question for my determination is whether, in the absence of a clear statement to this effect, an inference can properly be drawn that the Minister was satisfied that special circumstances justified the licence period of 30 years. Counsel for MAC caution against reliance on "implications, obtuse references or imprecisions". I consider that caution both appropriate and relevant. My concern is that acceptance of the submissions of counsel for the Minister would require a deal of conjecture on my part.

[259] As I interpret s 60(4) of the Act, in force at the date of the Minister's decision, the Minister was required to be satisfied that special circumstances justified the grant of a licence for a period of 30 years, that period being "*the* longer period" referred to in s 60(4)(b). The use of the definite article points to the need for satisfaction about the actual proposed period of a particular licence, not simply more general satisfaction that it be for a period exceeding 10 years.

[260] I bear in mind that the property in and the rights to the "use, flow and control" of all water in the Territory, including groundwater, is vested in the Territory. The Minister exercises those rights on behalf of the

233 Jungfer affidavit, pp 165-7, 195 [118]-[121], 1684-5

Territory.[234] As counsel for MAC point out, s 60(4)(b) is an important constraint on the exercise by the executive of the power to grant a licence to exploit an important resource. They refer to the decision of the majority in *Forrest & Forrest Pty Ltd v Wilson*,[235] for the proposition that where a statutory regime confers power on the executive government to grant exclusive rights to exploit the resources of the State, the regime will, subject to provision to the contrary, be understood as mandating compliance with the requirements of the regime as essential to the making of a valid grant.[236] MAC contends that satisfaction by the Controller that "special circumstances" existed was a jurisdictional pre-condition to the exercise of the power. Having found (in [244]) that the reference to the Controller in s 60(4)(b) is to be read and understood as a reference to the Minister on review, I will treat MAC's contention to be that satisfaction by the Minister on review that "special circumstances" existed was a jurisdictional pre-condition to the exercise of the power exercised by her to grant a licence for the longer period of 30 years.

[261] MAC submits that the only assessment made of "special circumstances" in this case was that by Minister Lawler when she provided an opinion as to special circumstances on 15 February 2021. The only reference to "special circumstances" in the decision of the Minister on review was her observation that Minister Lawler had provided her opinion on special

234 *Water Act 1992*, s 9(2).

235 *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; 262 CLR 510 (Kiefel CJ, Bell, Gageler and Keane JJ.)

236 Ibid, at [64].

circumstances and that the reviewing parties had raised a concern about Minister Lawler's ability to make a decision on account of apprehended bias.[237] The Minister did not state whether or not she agreed with the opinion of Minister Lawler.

[262] MAC has established that there is no evidence that the Minister was satisfied that special circumstances justified the grant of a licence for a period of 30 years, that being "the longer period" referred to in s 60(4)(b). As mentioned in [245] above, the Minister did not expressly state her satisfaction that special circumstances justified the licence period of 30 years. Further, although the Minister made reference to the decision of Minister Lawler (the first Minister), that was in a different context. The Minister did not state that she adopted the opinion of Minister Lawler. I do not agree that the Minister "should be understood to have accepted the first Minister's opinion", simply because it was attached to the ministerial briefing document. Further, the suggestion that the Minister relied on the Controller's opinion cannot be sustained because, for reasons explained in [242], the Controller did not relevantly state her own satisfaction and her decision was more likely than not based on Minister Lawler's opinion, and not the Controller's own opinion. Finally, the suggestion that the Minister was entitled to rely on the opinion of the Review Panel similarly cannot be sustained because of the

237 Minister's reasons, Jungfer affidavit, p 1690.

very limited comments made by the Review Panel, referred to by me at [255] above.

[263] My conclusion is that, if it were a jurisdictional pre-condition that the Minister needed to be satisfied that special circumstances justified the grant of a licence for a period of 30 years, then that pre-condition was not satisfied.

[264] That leads to a consideration of the consequences. Clearly there would be at least some invalidity. The question for determination is whether the Licence would be wholly invalid, or only partially invalid, that is, valid for 10 years and invalid to the extent of the next 20 years. Counsel for the Minister refer to *Project Blue Sky v The Australian Broadcasting Authority* for the proposition that whether an act done in breach of a condition regulating the exercise of a statutory power is invalid depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition.[238] Counsel refer to the test for determining the issue of validity which was preferred by the majority in *Project Blue Sky*,[239] namely whether it was a purpose of the legislation that an act done in breach of the provision would be invalid. On the basis of those judicial statements, counsel for the Minister contend that the only purpose that can be discerned in the *Water Act 1992* is that a licence for a period longer than 10 years would not be valid in the absence of

238 *Project Blue Sky v The Australian Broadcasting Authority* (1998) 194 CLR 355 at [90], per McHugh, Gummow, Kirby and Hayne JJ.

239 Ibid, at [93].

there being satisfaction as to special circumstances, not that there would be no valid licence granted at all. They contend, inter alia, that s 60(4) only regulates the power of the Minister to specify a longer period of the licence than that specified in s 60(3). If there were a failure to reach satisfaction that special circumstances justified the longer period, a licence granted under s 60(1) of the *Water Act 1992* would operate for a period of 10 years.

[265] The Minister's argument has a certain attraction, but I do not think it is right. The licence itself specified a commencement date of 1 December 2021 and an expiry date of 8 April 2051.[240] I do not see that licence term as somehow divisible. As counsel for MAC contend, it does not follow that an invalid grant for more than 10 years somehow defaults to a valid grant for less than 10 years. Moreover, as the majority observed in *Forrest & Forrest Pty Ltd v Wilson*: [241]

> The majority in Project Blue Sky were strongly influenced in reaching a conclusion in the negative by the consideration that the requirement in question regulated the exercise of functions already conferred on the agency, rather than imposed essential preliminaries to the exercise of those functions. ...
>
> Finally, and importantly, *Project Blue Sky* was not concerned with a statutory regime for the making of grants of rights to exploit the resources of a State.

[266] The above extract strongly suggests that the principles explained in *Project Blue Sky* are not applicable to the present case.

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240 Jungfer affidavit, p 1696. It may be noted that the Minister's reasons referred to a commencement date of 9 April 2021.

241 *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; 262 CLR 510 at [62] and [63], per Kiefel CJ, Bell, Gageler and Keane JJ.

[267] As I explained in [237], my consideration in [238] – [263] of the case advanced by MAC was in the alternative, in the event that the conclusion I expressed in [236] was wrong. The position remains that Ground 9 is not made out.

[268] The result is that the proceeding commenced by MAC should be dismissed.

Conclusion

[269] I order that the proceeding commenced by each plaintiff be dismissed.

[270] The question of costs is reserved. If the issue of costs cannot be agreed, the parties have liberty to file written submissions in relation to costs, with the issue to be determined on the papers unless any party seeks an oral hearing.
