CITATION:	*Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd* [2023] NTSC 36
PARTIES:	RALLEN AUSTRALIA PTY LTD v SWEETPEA PETROLEUM PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2022-00344-SC
DELIVERED:	20 April 2023
HEARING DATES:	20 and 21 June 2022
JUDGMENT OF:	Barr J

CATCHWORDS:

MINING AND PETROLEUM – Exploration permit – Pastoral property – Regulations required Tribunal to determine provisions of access agreement – *Petroleum Act 1984* (NT) s 58(j) – Statutory condition of exploration permit that permittee conduct operations and activities so as not to interfere with the lawful rights or activities of any person – Tribunal determined that s 58(j) did not create jurisdictional impediment to determination by Tribunal of access agreement – Held on appeal that 'lawful rights' means rights as affected by grant of exploration permit and approval of access agreement – Tribunal did not err in law

MINING AND PETROLEUM – Exploration permit – Pastoral property – Certain operations prohibited within 200 m of any "artificial accumulation of water" – Land holder argued before Tribunal that water was artificially accumulated in all of its water infrastructure, including in-ground pipes – Tribunal held that water in tanks and troughs was an "artificial accumulation of water", but not in pipes – Pipes were the means of distribution – Appellant argued that Tribunal wrongly adopted a reductionist

approach and should have assessed entire water infrastructure to be an "artificial accumulation of water" – Held no error of law – Not established that in-ground pipes on their own or as components of water infrastructure necessarily came within description of an "artificial accumulation of water".

NORTHERN TERRITORY CIVIL AND ADMINISTRATIVE TRIBUNAL – Application for leave to appeal to Supreme Court – Application for leave to appeal and appeal heard together – Appeal confined to questions of law – Error of law must be sufficient to vitiate the Tribunals decision – real possibility that error of law could have affected the Tribunal's decision – Appellant failed to establish vitiating errors of law

Northern Territory Civil and Administrative Tribunal Act 2014 s 5, s 45, s 46(1), s 141
Petroleum Act 1984 (NT) s 3(1), s 3(2), s 28, s 29, s 58(j), s 81(1), s 82A, s 111(1)(a)
Petroleum Regulations 2020 (NT) r 12, r 13, r 14, r 17, r 26, r 29, r 57(2), r 57(3), Schedule 2
Wilson v Lowery (1993) 4 NTLR 79; *Development Consent Authority v Phelps* [2010] NTCA 3, 27 NTLR 174, followed
Lee v MacMahon Contractors Pty Ltd [2018] NTCA 7, 335 FLR 350, referred to

Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389; *Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439; *Coco v The Queen* (1993-1994) 179 CLR 427; *CCM Holdings Trust Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 1072, 97 ATR 509; *Great Northern Railway Co v The Lurgan Town Cmrs* [1897] 2 IR 340; *Bermingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292; *Wainohu v NSW* [2011] HCA 11, 243 CLR 181; *NSW Land and Housing Corp v Orr* [2019] NSWCA 231, 100 NSWLR 578; *Metwally v University of Wollongong* (1985) 60 ALR 68, referred to.

Martin and Others v Hume Coal Pty Ltd [2016] NSWLEC 51; 215 LGERA 289, distinguished.

REPRESENTATION:

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Applicant:	N Hutley SC, R White
Respondent:	G Rich SC, H Baddeley

Solicitors:

Applicant:	Gadens
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd [2023] NTSC 36
No. 2022-00344-SC

IN THE MATTER of an application for leave to appeal, pursuant to s 141 *Northern Territory Civil and Administrative Tribunal Act 2014*

BETWEEN:

RALLEN AUSTRALIA PTY LTD
Applicant

AND:

SWEETPEA PETROLEUM PTY LTD
Respondent

CORAM: BARR J

REASONS FOR DECISION

(Delivered 20 April 2023)

[1] The applicant ("Rallen") seeks leave to appeal against the decision of the Northern Territory Civil and Administrative Tribunal ("the Tribunal"), made 7 February 2022, and consequential orders made on 4 May 2022 which determined an approved access agreement in accordance with the earlier decision and submissions received subsequently.

[2] The application for leave to appeal was filed on 14 February 2022. The fact that it was filed before the Tribunal had determined the approved access agreement is not an issue between the parties.

[3] On 9 March 2022, Grant CJ ordered that the application for leave to appeal and the appeal be heard together, for the reason that the success of the application for leave to appeal would rely on the merits of the proposed appeal. The grounds of appeal have been fully argued before me.

The nature of the appeal

[4] Any appeal from the Tribunal's decision is governed by s 141 *Northern Territory Civil and Administrative Tribunal Act 2014*, which reads as follows:

> **141 Appeal to Supreme Court**
>
> (1) A party to a proceeding may appeal to the Supreme Court against a decision of the Tribunal on a question of law.
>
> (2) A person may appeal only with the leave of the Supreme Court.
>
> (3) On hearing an appeal, the Supreme Court must do one of the following:
>
> (a) confirm the decision of the Tribunal;
>
> (b) vary the decision of the Tribunal;
>
> (c) set aside the decision and:
>
> (i) substitute its own decision; or
>
> (ii) send the matter back to the Tribunal for reconsideration in accordance with any recommendations the Supreme Court considers appropriate;

(d) dismiss the appeal.

[5] Appeals from the Tribunal to the Supreme Court are thus restricted under the terms of s 141(1) of the Act to "a question of law". The effect of the same restriction, on appeals to the Supreme Court from the Work Health Court under s 116(1) *Return to Work Act 1986* was considered by Mildren J in *Tracy Village Sports & Social Club v Walker*,[1] and repeated by this Court in *Wilson v Lowery*,[2] as follows:

> (1) In the process of arriving at an ultimate conclusion a trial judge goes through a number of stages. The first stage is to find the preliminary facts. This may involve the evaluation of witnesses who gave conflicting accounts as to those facts. If the trial judge prefers one account to another, that decision is a question of fact to be determined by him and is not reviewable on appeal. It may be that the reason given for preferring one witness to another is patently wrong. Nevertheless, no appeal lies: *R v District Court of the Metropolitan District Holden at Sydney; Ex parte White* (1966) 116 CLR 644 at 654; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156; *Haines v Leves* (1987) 8 NSWLR 442 at 469-470.
>
> (2) Regardless of the trial judge's reasons, if there is evidence which, if believed, would support the finding, there is no error of law: *Nicolia v Commissioner of Railways (NSW)* (1970) 45 ALJR 465.
>
> (3) If, on the other hand, there is no evidence to support a finding of fact which is crucial to an ultimate finding that the case fell within the words of the statute (for example, that injury by accident arose out of the course of the employment, or that the failure to give notice was occasioned by mistake), there is an error of law: *Nicolia v Commissioner of Railways* (supra); *Tiver Constructions Pty Ltd v Clair* (supra), per Martin and Mildren JJ (at 145-146); *Haines v Leves* (supra) (at 156).

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1 (1992) 111 FLR 32.

2 (1993) 4 NTLR 79.

(4) But, a finding of fact cannot be disturbed on the basis that it is "perverse", or "against the evidence or the weight of the evidence or contrary to the overwhelming weight of evidence". Nor may this Court review a finding of fact merely because it is alleged to ignore the probative force of evidence which is all one way, even if no reasonable person could have arrived at the decision made, and even if the reasoning was demonstrably unsound: *Haines v Leves* (at 469-470).

(5) The second stage is the drawing of inferences by the trial judge from the primary facts to arrive at secondary facts. This is subject to the same limitations that apply to primary facts.

(6) If there are no primary facts upon which a secondary fact could be inferred, and the secondary fact is crucial to the ultimate finding as to whether or not the case fell within the words of the statute, there is an error of law. If there are primary facts upon which a secondary fact might be inferred, there is no error of law.

(7) It is not sufficient that an appellate court would have drawn a different inference from those facts. The question is, whether there were facts upon which the inference might be drawn. If a tribunal draws an inference which cannot reasonably be drawn, it errs in point of law and its decision can be reviewed by the courts: *Instrumatic Ltd v Supabrase Ltd* [1969] 1 WLR 519 at 521; [1969] 2 All ER 131 at 132, Lord Denning MR, with whom Edmund Davies LJ and Phillimore LJ agreed; *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14.[3]

[6] The above statement is concerned largely with the process of fact-finding and the drawing of inferences from facts found. The principle to be derived is that findings of fact made by the Tribunal and inferences drawn on the basis of those facts are not open for reconsideration on the merits and necessarily stand unless infected by error of law. In this context, want of logic is not synonymous with

3 *Wilson v Lowery* (1993) 4 NTLR 79 at 84-5.

error of law, as Mason CJ observed in *Australian Broadcasting Tribunal v Bond*:[4]

> .... at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is *some* basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.

[7] Although the distinction between errors of fact and errors of law is a crucial distinction in many fields of law where it is critical to the existence of a right of appeal, it does not appear that the courts have settled on a test of general application to make that distinction clear beyond question in every case. However, some principles are clear. For example, in *Collector of Customs v Agfa-Gevaert Ltd*, the High Court unanimously affirmed the principle that the determination of whether a statute uses an expression in any sense other than that which it has in "ordinary speech" is always a question of law.[5]

[8] In *Collector of Customs v Agfa-Gevaert Ltd*,[6] the High Court gave general endorsement to five general propositions identified by the

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4 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356.

5 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 397.5, citing with approval the decision of Kitto J in the original jurisdiction of the High Court in *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1955) 94 CLR 509, which was upheld on appeal by the High Court (Dixon CJ, Williams and Taylor JJ).

6 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395-6.

Federal Court in *Collector of Customs v Pozzolanic Enterprises Pty Ltd*:[7]

> (a) The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law.
>
> (b) The ordinary meaning of a word or its non-legal technical meaning is a question of fact.
>
> (c) The meaning of a technical legal term is a question of law.
>
> (d) The effect or construction of a term whose meaning or interpretation is established is a question of law.
>
> (e) The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law.

[9] However, the High Court found difficulty in relation to propositions (b) and (d). Having determined that meaning and construction were interdependent, the Court observed, "... it is difficult to see how meaning is a question of fact while construction is a question of law without insisting on some qualification concerning construction that is currently absent from the law".[8] Moreover, proposition (e) is subject to the qualification, explained by the Court of Appeal in *Lee v MacMahon Contractors Pty Ltd*,[9] that a finding that facts come within the ordinary or non-technical meaning of a statutory word or phrase is one of fact which can be disturbed only if: (a) there is no evidence to support the findings of fact;[10] (b) if the trial court has misdirected itself in law;[11] or

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7 (1993) 43 FCR 280 at 287.

8 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 397.

9 *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7; 335 FLR 350 at [17].

10 *Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126 at 138.

(c) if the finding of fact is required by the statute to be determined through the application of a correct legal process requiring, for example, procedural fairness or taking relevant considerations into account.[12]

[10] In *Vetter v Lake Macquarie City Council*,[13] the High Court dealt with the scope of an appeal confined to questions of law from a trial court exercising workers compensation jurisdiction. The injured worker in that case was entitled to compensation if, without fault on her part, she was injured on a periodic journey between her workplace and home,[14] or, if she was injured after a deviation or interruption on such a journey, the risk of injury was not materially increased because of the deviation or interruption. The appellant had been successful at first instance in the Compensation Court but the award in her favour had been set aside by the Court of Appeal. In the High Court, the plurality (Gleeson CJ, Gummow and Callinan JJ) held that the primary judge had not erred in law in deciding that the appellant was injured while undertaking a journey "properly to be described as a periodic journey between her place of employment and place of abode within the

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11 *Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126 at 138.

12 The Court here referred to Gageler S, *What is a question of law?* (2014) 43 AT Rev 68.

13 *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439.

14 The relevant legislation referred to "the daily or other periodic journeys between the worker's place of abode in place of employment".

meaning of… the Act.[15] In arriving at this conclusion, the plurality made the following observations:[16]

> Whether facts as found answer a statutory description or satisfy statutory criteria will very frequently be exclusively a question of law. To put the matter another way … whether the facts found by the trial court can support the legal description given to them by the trial court is a question of law. However, not all questions involving mixed questions of law and fact are, or need to be susceptible of one correct answer only. Not infrequently, informed and experienced lawyers will apply different descriptions to a factual situation. That is why the test whether legal criteria have been met has been expressed in language of the kind used by Jordan CJ in *Australian Gas Light Co v Valuer-General*:
>
> > [I]f the facts inferred ... from the evidence ... are necessarily within the description of a word or phrase in a statute or necessarily outside the description, a contrary decision is wrong in law."
>
> …..
>
> Earlier in *Williams v Bill Williams Pty Ltd*, Mason J had observed:
>
> > [I]t may happen that the tribunal at first instance is confronted with the task of applying the statutory expression to primary facts in such circumstances that it is reasonably possible to arrive at different conclusions, the question being largely one of degree upon which different minds may take different views. Here, again, it is not possible to conclude that the decision appealed from is erroneous in point of law.
> >
> > The principle has been enunciated that, if different conclusions are reasonably possible, the determination of which is the correct conclusion is a question of fact.
>
> In *Hope v Bathurst City Council*, Mason J pointed out that when it is necessary to engage in a process of construction of the meaning of a word (or phrase) in a statute a question of law will be involved, but that the question may be a mixed one of fact and law. His Honour's reasons make it clear that a question exclusively of law arises … if, on the facts found 6 only one conclusion is open.

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15 *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [32].

16 *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [24], [26] and [27].

[11] The error of law must be such as to vitiate the decision of the Tribunal.[17] There must be "a real possibility (but not a mere or slight possibility), that the error of law could (but not necessarily would) have affected the tribunal's decision".[18]

Background

[12] Rallen is the lessee under the *Pastoral Land Act 1992* (NT) of NT Portion 701, known as Tanumbirini Station. The respondent ("Sweetpea") is the holder of a 'petroleum interest' in the form of an exploration permit, Exploration Permit 136 ("EP 136"), issued under the *Petroleum Act 1984* (NT). The area of EP 136 includes part of Tanumbirini Station.

[13] The rights conferred by an exploration permit are stated in s 29 *Petroleum Act 1984* :

> (1) An exploration permit, while it remains in force, gives the permittee, subject to this Act and in accordance with the conditions to which the permit is subject and the directions, if any, lawfully given by the Minister, the exclusive right to explore for petroleum,[19] and to carry on such operations and execute such works as are necessary for that purpose, in the exploration permit area.
>
> (2) Without limiting the generality of subsection (1) but subject to this Act and any condition or direction referred to in that subsection, a permittee or, if there is more than one, the permittees jointly and his agents and employees may:

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17 See *Development Consent Authority v Phelps* [2010] NTCA 3; 27 NTLR 174 at [11].

18 *Development Consent Authority v Phelps* at [24]. The 'tribunal' referred to was the former Lands Planning and Mining Tribunal.

19 The definition of '*petroleum*' in s 5 *Petroleum Act 1984* includes "a naturally occurring hydrocarbon, whether in a gaseous, liquid or solid state".

(a) at any time, enter and remain in the exploration permit area with such vehicles, vessels, machinery and equipment as are necessary or convenient for carrying out the technical works programme or other exploration of the permit area;

(b) carry out the technical works programme and other exploration for petroleum in the exploration permit area;

(c) extract, remove or allow the release from the exploration permit area for sampling and testing, an amount of material reasonably necessary for the purpose of establishing the presence of petroleum, or such greater amount as is approved; and

(d) subject to the *Water Act 1992*, any prior lawful activity and to the directions, if any, of the Minister, use the water resources of the exploration permit area for the permittee's domestic use and for any purpose in connection with the permittee's approved technical works programme and other exploration.

(3) *Not reproduced.*

[14] Sweetpea, as an 'interest holder', does not have carte blanche right of entry to Tanumbirini Station in order to carry out 'regulated operations' in connection with its exploration permit.[20] Regulation 12, *Petroleum Regulations 2020*, provides that an interest holder must not commence regulated operations on land except in accordance with an 'approved access agreement'.

[15] The parties to an approved access agreement are the holder of the exploration permit and the owner/occupier of the land.[21]

[16] Part 4 Division 3 of the Regulations sets out the process by which an approved access agreement must be reached. At the start of the process, there is a period of negotiation, of at least 60 days, initiated on service

20 Reg 3 defines 'regulated operations' as "any operations for which an exploration permit, retention licence or production licence is required under the Act, other than preliminary activities".

21 See Reg 13 read with the definition of 'designated person' in reg 3.

by the interest holder of a ‘negotiation notice’ in the approved form. Regulation 16 requires that the parties take reasonable steps to negotiate an access agreement. The interest holder must pay the reasonable costs of the owner/occupier in participating in the negotiation process, including the reasonable costs of engaging legal, accounting or other experts to provide advice or reports.[22] If an access agreement cannot be reached within the negotiation period, the interest holder may request the owner/occupier to agree to alternative dispute resolution using a facilitator or mediator to achieve a negotiated outcome. The regulations provide a mechanism for the appointment of a mediator in default of agreement between the parties. If ultimately the alternative dispute resolution process fails to achieve a negotiated outcome within a specified time, the process is brought to an end. If the parties still do not agree on an access agreement, the interest holder may apply to the Tribunal “for a determination as to the provisions that should form the contents of an access agreement so as to allow the interest holder to gain access to the relevant land.”[23]

[17] In determining those provisions, the Tribunal must take into account and apply the requirements of regulation 14.[24] In brief, the access agreement determined by the Tribunal must contain the ‘standard minimum protections’ specified in Schedule 2. This is achieved by the

22 Reg 17.

23 Reg 26(1)(a) & (b), read with reg 29(1).

24 Reg 29(3).

inclusion of a provision expressed in the same or substantially the same terms as each of the Schedule 2 protections, or a "provision that reflects or satisfies a requirement specified in Schedule 2", or a "provision which reflects a standard that is greater than a standard specified in Schedule 2".[25]

[18] Schedule 2 sets out 25 "Matters to be addressed", and contains "Standard minimum protections" in respect of each of the matters addressed. So, for example, with respect to the matter of 'Gates' (clause 6), the standard minimum protection clause is as follows:

> Unless otherwise agreed with the owner/occupier in a specific case, the interest holder must, after using a gate, return the gate to its original position.

With respect to the matter of 'Minimise disturbance' (clause 2), the standard minimum protection clause is as follows:

> The interest holder must do everything that is reasonably practicable to minimise disturbance to the owner/occupier's livestock (if any) and existing uses of the land.

[19] Most of the standard minimum protections in Schedule 2 are clauses capable of inclusion, without amendment, into an access agreement. The examples given in the previous paragraph are examples of such 'cut and paste' clauses. However, some of the entries under 'Standard minimum protections' state the requirements of the intended clause, rather than the draft clause. These are referred to in regulation 14(3)(b)

25 Reg 14(3).

as “a provision that reflects or satisfies a requirement in Schedule 2”. For example, in relation to the matter of ‘Compensation for drilling’ (clause12), the standard minimum protection provision is as follows:

> The minimum amount of compensation payable for the drilling of a well on the land must be set out under this clause.

Similarly, in relation to the matter of ‘Compensation for decrease in value of land’ (clause 13), the standard minimum protection provision is as follows:

> This clause must indicate whether it is anticipated that any activities carried out on the land will lead to a decrease in the market value of land and, if so, a preliminary assessment of the amount of the decrease.

[20] I will consider separately the standard minimum protections for compensation for drilling and compensation for decrease in land value.

The Tribunal’s reasons for decision

[21] The first issue considered and decided by the Tribunal was in relation to its jurisdiction to determine disputes about compensation under s 81(1) *Petroleum Act* 1984. The subsection reads as follows:

> **81 Compensation to owners**
>
> (1) The holder of a petroleum interest must pay to:
>
> (aa) the owner of land comprised in the petroleum interest; and
>
> (ab) any occupier of land comprised in the petroleum interest who has a registered interest in the land,

in respect of the owner's and occupier's respective interests in the land, compensation for:

(a) deprivation of use or enjoyment of the land, including improvements on the land; and

(b) damage, caused by the permittee or licensee, to the land or improvements on the land; and

(c) any other prescribed reason or circumstance.

Note for subsection (1)

If a permittee or licensee and a person entitled to compensation are unable to agree on an amount or other benefit, by way of compensation, to which the person is entitled, either party may refer the dispute to the Tribunal under section 82A.

[22] The Tribunal noted that, pursuant to s 82A, it had jurisdiction to determine disputes about compensation under s 81(1).[26] The relevant parts of s 82A are set out below:

82A Jurisdiction of Tribunal for disputes

(1) The Tribunal has jurisdiction to deal with the following disputes:

(a) if a permittee or licensee and a person entitled to compensation under section 81(1) are unable to agree on an amount or other benefit, by way of compensation, to which the person is entitled;

(b) if a permittee or licensee and a person entitled to compensation under section 82(1) or (2) are unable to agree on an amount, by way of compensation, to which the person is entitled;

(c) any other kind of dispute prescribed by regulation.

(2) A dispute mentioned in subsection (1)(a) or (b) may be referred to the Tribunal by either party.

[23] It is apparent from the Tribunal's reasons that the parties below contemplated that the approved access agreement would include provisions for compensation beyond the requirements of regulation 29,

26 Tribunal Decision, par 17.

read with regulation 14 and clauses 12 and 13 in Schedule 2.[27]

For reasons explained in the following paragraphs, the Tribunal did not agree to assess and award compensation pursuant to s 82A of the Act in determining the provisions of an approved access agreement.

[24] I extract in full below Schedule 2, clauses 12 and 13:

	Matters to be addressed	Standard Minimum protections
12.	Compensation for drilling	(1) The minimum amount of compensation payable for the drilling of a well on the land must be set out under this clause. (2) This clause does not limit any right under any provision of the Act as to the provision or payment of compensation, or any right to apply to the Tribunal with respect to a dispute about compensation
13.	Compensation for decrease in value of land	(1) This clause must indicate whether it is anticipated that any activities carried out on the land will lead to a decrease in the market value of land and, if so, a preliminary assessment of the amount of the decrease. (2) This clause does not limit any right under the Act as to the provision or payment of compensation, or any right to apply to the Tribunal if there is a dispute about compensation.

[25] The Tribunal expressed the view that regulation 29 read with regulation 14 and the above Schedule 2 clauses did not limit a party's right to apply to the Tribunal in circumstances where amounts payable

27 Tribunal Decision, par 26.

by way of compensation had not been agreed. [28] However, the same regulations did not "create that right at the point of determining the provisions of an [approved access agreement]".[29]

[26] The Tribunal was clearly mindful, on the application made by Sweetpea, that its task under regulation 29(2), read with regulation 29(1), was to determine the provisions of an access agreement "so as to allow [Sweetpea] the interest holder to gain access to the relevant land".

[27] The Tribunal ultimately decided that the proceeding currently before it did not involve a dispute of the kind specified in s 82A. The Tribunal observed as follows:[30]

> In our view the proceeding currently before the tribunal does not involve a dispute as envisaged by section 82A. There is currently no entitlement to compensation under sections 81(1) or 82(1) or (2) as no compensable activities have been carried out on the land. Put shortly, the respondent has suffered no loss. There has been no deprivation of the use or enjoyment of the land nor any damage caused to the land or improvements on it.
>
> Regulation 6 prescribes for the purpose of s 81(1)(c) "the drilling of a well"; and "any decrease in market value of the land caused by regulated operations carried out on the land ...". Neither of those things has yet occurred.
>
> ..... It is not the role of the tribunal at this stage to consider possible bases of compensation and to include a remedy in advance within the AAA. Indeed to do so would require speculation as to damage and loss and would run the risk of falling short of the standard minimum protections required by regulations 29; 14 and Schedule 2.

28 Tribunal Decision, pars 34, 37.

29 Tribunal decision, par 37.

30 Tribunal decision, pars 41 – 45.a

> Even if such a course was open to the Tribunal it is difficult to see why compensation would be assessed prior to any actual loss or damage when the Act and Regulations clearly provide a process for considering claims after the event. The three year limitation periods provided for in sections 82(3) and 117A clearly envisage responsive rather than pre-emptive claims.
>
> In our view, to the extent the Initiating Application sought a determination under s 82A of the Petroleum Act, it was misconstrued. The respondent's reliance on that section in their response does not enliven NTCAT's jurisdiction to deal with such claims otherwise than is provided for in the Act and Regulations.

[28] The Tribunal thus held that the application seeking a determination under s 82A of the *Petroleum Act* 1984 was misconceived.[31] The Tribunal's jurisdiction under 82A had not been enlivened and so it declined to consider claims for compensation.

[29] The second issue considered by the Tribunal was the submission by Rallen that regulation 29(2) conferred a discretion as to whether or not to determine the contents of an access agreement. Sweetpea did not contest that the Tribunal had a discretion under regulation 29, but argued that the circumstances in which it would decline to exercise its jurisdiction would be rare.

[30] I am not sure that Sweetpea's concession was correct. My preliminary view is that, on a proper construction of the *Petroleum Act 1984* and *Petroleum Regulations 2020,* regulation 29(2) is an example of the exception; that "may" was intended to have a compulsory meaning, and that regulation 29(2) both enables and imposes a duty on the Tribunal

31 The Tribunal's use of the word "misconstrued" was presumably to indicate that the applicant had misconstrued s 82A of the Act.

to determine the contents of an access agreement. However, it is not necessary to consider this issue further because it is not raised as a ground of Rallen's proposed appeal.

[31] Rallen's arguments, to the effect that the Tribunal did not have jurisdiction or that it should decline to exercise jurisdiction, were summarised by the Tribunal as follows:[32]

> (i) the terms of the AAA will substantially interfere with private property rights and the respondent's business operations;
> (ii) the applicant does not currently have all of the approvals necessary to conduct the activities;
> (iii) the applicant has not sought to negotiate in good faith as required by the Act;
> (iv) the respondent has written to the Commonwealth and NT Ministers for the Environment challenging aspects of the Environment Management Plan (EMP); and
> (v) (in oral submissions), that the proposed activities of the applicant as they currently stand would not be compliant with the requirement in clause 2 of schedule 2 of the Regulations to minimise disturbance.

[32] Rallen relied on s 58(j) *Petroleum Act 1984* in support of the first argument. Section 58 *Petroleum Act* 1984 provides that an exploration permit is subject to various conditions, and s 58(j) states a condition that the permittee shall "conduct his operations and activities in relation to the exploration permit area in such a way as to not interfere with the lawful rights or activities of any person". Rallen submitted that the operations of the exploration permit would <u>necessarily</u> interfere with the lawful rights of Rallen and that the Tribunal

32 Tribunal decision, par 55.

therefore had "no jurisdiction to determine the terms of an access agreement if the activities authorised on [Rallen's] land by that access agreement [would] result in the interference of lawful rights and activities of the pastoral lessee".

[33] The Tribunal ultimately rejected Rallen's argument and held that s 58(j) did not create any jurisdictional impediment to the determination by the Tribunal of the provisions of an access agreement.[33] In reaching that conclusion, the Tribunal observed that the 'legal framework', referred to earlier in its reasons for decision,[34] clearly anticipated that the operations of a permittee would impact on the land holder.[35] The Tribunal noted that the objective of the *Petroleum Act 1984* was to encourage exploration,[36] but that the role of the Tribunal was to find a reasonable balance between the interests of an interest holder and the interests of the owner/occupier of the affected land.[37] The Tribunal then stated:[38]

> To read section 58(j) as preventing the permittee from undertaking operations and activities required of it under the permit, the Act and the Regulations, would make a nonsense of the legal framework. In our view, section 58(j) regulates the manner in which activities and operations are to be conducted rather than determining whether or not they will be. The permittee has a

33 Tribunal decision, par 61.

34 Tribunal decision, pars 4-17.

35 Tribunal decision, par 58.

36 *Petroleum Act 1984*, s 3(1): "The objective of this Act is to provide a legal framework within which persons are encouraged to undertake effective exploration for petroleum ....".

37 Regulation 57(2).

38 Tribunal decision, par 60.

> licence and a subsequent obligation to carry out activities and operations. The manner in which they are done must not, beyond the inevitable, interfere with the lawful rights or activities of the landholder. We accept [Sweetpea's] submission that the word "interfere" in the context of the legal framework requires some action or failure that unnecessarily impacts on the landholder's interests. Such action or failure may amount to a breach of the Act and an offence under section 106 and/or may ground a claim for compensation.

[34] The Tribunal also stated that s 58(j) would continue to operate "despite the provisions" of any access agreement.

[35] I would make an observation of my own at this point. The "lawful rights" referred to in the s 58(j) exploration permit condition must mean the lawful rights such as they are after the grant of the exploration permit. This is made clear by the fact that s 58 sets out the conditions of an exploration permit *granted* under the Act. Moreover, the original, pre-permit, "lawful rights" or "lawful activities" of an owner/occupier of land may be further affected as a result of the provisions of an access agreement. For example, it is a fundamental common law right of a person in possession or entitled to possession of private property to exclude others from such property or premises.[39] Yet the holder of an exploration permit has the right, inter alia, to enter and remain in the exploration permit area (with vehicles, machinery etc.) to carry out a technical works program or other exploration of the

39 *Coco v The Queen* (1993-1994) 179 CLR 427 at 435.9, citing *Plenty v Dillon* (1991) 171 CLR 651 CLR 635, at 639.

permit area.[40] It would be wrong to confine consideration of the concept of "lawful rights or activities" to the position under the common law, unaffected by the grant of an exploration permit or the approval of an access agreement. I include reference to the access agreement because Rallen could not enter onto Tanumbirini, and be in a position to carry out its operations and activities, if an access agreement were not in place.

[36] Rallen's second argument was that Sweetpea had not obtained all of the approvals necessary to conduct the activities it proposed to carry out under its exploration permit. Specific examples included the following:[41] it did not have approval to construct a road from the Carpentaria Highway to EP136; it did not have approval to conduct any proposed works outside of EP136; and it did not have permission to conduct operations within areas to which s 111 of the Act applied. Sweetpea required further approvals for the constructions of well pads, drilling wells and construction of roads within EP136. Sweetpea acknowledged in evidence tendered before the Tribunal that it was required to obtain various approvals before commencing any operations pursuant to its exploration permit. Specific mention was made of the need to obtain an approved Environment Management Plan from the Minister for Environment (who would take advice from the Northern

40 *Petroleum Act 1984*, s 29(1) & (2)(a). The 'exclusive right to explore' is subject to the Act, the conditions of the exploration permit and any directions given by the Minister.

41 Tribunal Decision par 62.

Territory Environment Protection Authority);[42] an Approval Certificate from the Aboriginal Areas Protection Authority and an access authority certificate known as Application Authority Certificate 9 (or 'AA9') for any works falling outside the area of the exploration permit.[43]

[37] The Tribunal concluded that there was no reason not to exercise its discretion, conferred under the regulations, to determine the provisions of an access agreement while any other necessary processes took their course. It observed that such other processes were "separate and distinct from the role of the Tribunal".[44]

[38] The third of Rallen's arguments was that Sweetpea had not negotiated in good faith, in breach of regulation 10. Sweetpea denied the lack of good faith on its part. The Tribunal did not decide whether one or both of the parties had, or had not, acted in good faith. The Tribunal rejected negotiation in good faith as a preliminary threshold requirement (as contended by Rallen) and held that there was no basis upon which to read the conferral of jurisdiction under regulation 29(1) as being subject to compliance by the parties with regulation 10.[45]

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42 Evidence before the Tribunal confirmed that the Northern Territory Environment Protection Authority had recommended that the Minister approve the Environment Management Plan submitted by Sweetpea for EP 136, and that the Minister had accepted that advice and approved the Seismic Environment Management Plan for EP 136 on 2 November 2020. [AB Vol 2, p 837-840].

43 Witness statement Joel Riddle, 19 November 2021, par 10 [AB Vol 2, p 895].

44 Tribunal decision, par 65.

45 Tribunal decision par 69.

[39] The fourth of Rallen's arguments was that it had written to the Commonwealth and Northern Territory Ministers for the Environment challenging aspects of the approved Environment Management Plan for the exploration permit, and requesting a reconsideration. Neither Minister had responded. The Tribunal did not consider that the unanswered correspondence was a sufficient reason to delay the determination of the provisions of the access agreement. Further, the Tribunal noted that Rallen had not sought judicial review of the Environment Management Plan.[46]

[40] The last of Rallen's objections in relation to the Tribunal's exercise of jurisdiction was that the proposed activities of Sweetpea would immediately breach the requirement in clause 2 of Schedule 2 of the regulations, which reads as follows:

Matters to be addressed	**Standard Minimum protections**
2. Minimise disturbance	The interest holder must do everything that is reasonably practicable to minimise disturbance to the owner/occupier's livestock (if any) and existing uses of the land.

46 Tribunal decision par 73. The Tribunal further observed that, if such an application had been commenced, there may have been a basis upon which the Tribunal would delay a decision on the terms of an approved access agreement, but that was not the case.

[41] The basis for Rallen's objection was evidence given in cross-examination by Joel Riddle, a director of Sweetpea.[47] Prior to giving evidence, Mr Riddle had considered Rallen's expressed concern that Sweetpea's seismic survey operations came within 200 metres of an "artificial accumulation of water or any outlet from which water may be obtained", contrary to s 111(1)(a)(iii) *Petroleum Act 1984*. As a result, he had asked a qualified geoscience technical advisor to map an alternative seismic line or lines which, inter alia, avoided by 200 metres any artificial accumulation of water or any water outlet.[48] Annexed to Mr Riddle's witness statement were two maps: 'Option 1' which set out the initial seismic lines in accordance with the approved Environment Management Plan, and 'Option 2' which set out revised seismic lines.

[42] It was apparent from the data shown for the respective options (and from the accompanying maps) that the total seismic line length was less for Option 2, achieved as a result of shortening nearly all of the seismic lines.[49] The cross examination of Mr Riddle elicited a concession as to the obvious that, if Option 2 satisfied Sweetpea's obligations to the Northern Territory Government under the exploration permit, Sweetpea could shorten the seismic lines and would not need to

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47 Mr Riddle was also the Managing Director and Chief Executive Officer of Tamboran Resources Ltd, Sweetpea's parent company.

48 Witness statement Joel Riddle, par 27 [AB vol 2, p 898].

49 AB Vol 2, pp 1096-1097; annexure pages 196 and 197 to Mr Riddle's statement.

carry out seismic testing along the full length of the seismic lines shown in Option 1. When it was put to Mr Riddle that an entire seismic line could be deleted, he stated that that alternative had not been considered. The only option examined was that which involved shortening the seismic lines.[50]

[43] Rallen argued that, if the seismic lines were not shortened or the number of seismic lines not reduced, the intended activities of Sweetpea would go beyond the minimum activities required for effective exploration, resulting in an immediate non-compliance with clause 2 of Schedule 2 of the regulations. The Tribunal held that Rallen's submission was misconceived:[51]

> Clause 2 of Schedule 2 does not require a permittee to conduct the minimum scope of activities possible. The scope of permitted activities is determined by the EP and the EMP. Under those instruments, along with whatever other approvals may be necessary, the permittee may undertake the activities. It may turn out that not all activities will be necessary for effective exploration. The effect of Clause 2 of Schedule 2 is that whichever of the authorised activities are undertaken must be done in a way that minimises disturbance. The Tribunal plays no role in determining what activities may or may not occur under the permit. The purpose of the AAA [approved access agreement] is to ensure that whatever of the permitted activities do occur, disturbance will be minimised.

[44] Having dismissed all of the arguments contra, the Tribunal determined that it had jurisdiction to determine the conditions of an approved

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50 AB Vol 3, p 2027.

51 Tribunal decision, par 75.

access agreement and that it would proceed to determine those conditions.

[45] Some of the matters considered and decided by the Tribunal are not contentious on this appeal and do not feature in the proposed grounds of appeal.[52] However, a particularly contentious issue, before the Tribunal and on appeal, is in relation to s 111 *Petroleum Act 1984*, the relevant parts of which are as follows:[53]

> **111 Certain operations prohibited**
>
> (1) Subject to this section, a permittee or licensee must not:
>
> (a) carry out operations, which would otherwise be permitted under this Act, on land that is:
>
> (i) used as, or within 50 m of land being used as, a residence, yard, garden, orchard or cultivated field; or
>
> (ii) used as, or within 200 m of land being used as, a cemetery; or
>
> (iii) within a distance of 200 m of any artificial accumulation of water or any outlet from which water may be obtained; and
>
> (b) construct a well, wellhead, pipeline or petroleum processing facility, which would otherwise be permitted under this Act, on land that is used as, or within 2 km of land being used as, a habitable dwelling; and
>
> (c) construct a well or well pad, which would otherwise be permitted under this Act, on land that is within 1 km of a designated bore.
>
> (2) The permittee or licensee may carry out operations on land mentioned in subsection (1)(a)(i) or (iii) with the written approval of:
>
> (a) the owner of the land or, if the occupier of the land has, in the land, an interest registered on the Register kept by the

52 For example, the Tribunal's finding that it did not have jurisdiction to determine an approved access agreement for land outside the area of EP 136: Tribunal decision, pars 78-84.

53 Subsections (4) and (5) have not been reproduced.

Registrar-General under Part 3 of the *Land Title Act 2000*, the occupier; and

(b) any registered native title bodies corporate, or registered native title claimants, in relation to the land.

(3) The permittee or licensee may carry out construction of a well or well pad on land mentioned in subsection (1)(c) with the written approval of:

(a) the owner of the land or, if the occupier of the land has, in the land, an interest registered on the Register kept by the Registrar-General under Part 3 of the *Land Title Act 2000*, the occupier; and

(b) any registered native title bodies corporate, or registered native title claimants, in relation to the land; and

(c) the owner of the designated bore.

[46] The evidence of Sweetpea before the Tribunal was that it intended to access the exploration permit area on Tanumbirini using the existing pastoral track (known as the 'central track') running from the Carpenteria Highway in a southerly direction, along the line of a fence dividing the Southern Cross and Telecom paddocks. Running parallel to the track and within 200 metres of the track was a polythene pipe water reticulation system, which carried water between various bores, tanks and troughs used for the watering of Rallen's cattle. Rallen argued that its water infrastructure, as a whole, was an "artificial accumulation of water" within the meaning of those words in s 111(1)(a)(iii) of the Act; further, that it comprised or included "outlets from which water may be obtained". If those arguments were accepted, Sweetpea would have been prevented from carrying out otherwise permitted operations within a distance of 200 metres of any such artificial accumulation of water or water outlet.

[47] The relevance of these competing contentions, in the wider context, was that the Tribunal was required by the regulations to determine the contents of an access agreement. Matters to be addressed, pursuant to clause 13 of Schedule 2 of the regulations, were compensation for decrease in value of land and the associated standard minimum protection requirement that the access agreement include a clause which "must indicate whether it is anticipated that any activities carried out on the land will lead to a decrease in the market value of land and, if so, a preliminary assessment of the amount of the decrease".

[48] Sweetpea's case was that any assessment of the decrease in market value of the land should be made on the basis that all of its proposed operations would use existing pastoral tracks in order to minimise the need for land clearing, and thereby minimise damage to the land and consequent decrease in market value. Rallen's response was that Sweetpea could not use existing tracks because of the operation of s 111 of the Act, such that the operations of Sweetpea would require it to form new access tracks, with more extensive clearing and consequently greater damage to Rallen's land. Rallen could have given written approval for Sweetpea not to comply with a s 111(1)(a)(iii), but had made clear to the Tribunal that such permission had not been granted and was unlikely to be granted.[54] Sweetpea ultimately accepted

54 Tribunal decision, par 87.

that the practical solution was to ensure that its operations (including its seismic survey operations) were carried out so as not to come within the prescribed distances, in much the same way as it was required to ensure that its operations avoided all sacred sites within the exploration permit area,[55] by going the requisite distance around those areas.

[49] The absence of agreement between the parties made it necessary for the Tribunal to determine the meaning of the expressions "artificial accumulation of water", "outlet from which water may be obtained" and "carry out operations".

[50] The authorities referred to by me in [8] – [10] above draw a distinction between the ordinary meaning and the non-legal technical meaning of a word or phrase. In relation to the expression "outlet from which water may be obtained", neither of the parties before the Tribunal sought to argue that it should be interpreted otherwise than in accordance with its ordinary meaning. Similarly, in relation to the expression "artificial accumulation of water", neither party contended for any technical meaning of the composite expression or referred to the concept of 'accumulation of water' as part of a hydrologic cycle. Rallen contended that water was "artificially accumulated" in all of its water infrastructure, in that water "is accumulated in troughs, tanks and

55 Rallen's written submissions, 19 November 2021, pars 35, 33.

pipes".[56] Rallen thus impliedly contended that the Tribunal should apply the ordinary meaning of the expression. Sweetpea urged a similar approach in its submission that the words should be construed "applying the normal principles of statutory construction ... by reference to the plain and natural meaning of these words, the context in which they are used, and by reference to the object of the Act/Regulations".[57] I am satisfied that there is no question of law on this appeal as to whether the *Petroleum Act 1984* used the expressions "artificial accumulation of water" and "outlet from which water may be obtained" in any sense other than that which they have in ordinary speech. However, that still leaves open the question whether the relevant improvements (or 'water infrastructure') are necessarily within or outside those descriptions.

[51] The Tribunal ultimately found that the tanks and troughs were properly characterised as "artificial accumulations of water", but that the in-ground polythene pipes were not:[58]

> In our view it is clear that in the context of the Act and Regulations an accumulation of water is a body of water gathered or "heaped up" in a mass or quantity.[59] While a broad definition of 'accumulation' may include the *process* of accumulation, on the

56 Rallen's written outline of submissions, 3 December 2021, par 53, continued as follows: "The water is drawn from the beneficial groundwater aquifer often but not always by pumps on the water bore, the bore water feeds directly to pipes, the pipes connect to the tanks and the water then passes through pipes to troughs". [AB 1899].

57 Sweetpea's outline of submissions in reply, 8 December 2021, par 36.

58 Tribunal decision, par 92.

59 The reference to "heaped up" was taken from *Great Northern Railway Co v The Lurgan Town Cmrs* [1897] 2 IR 340.

> face of it, the term in section 111 refers to an entity rather than a process of accumulation. The operations cannot come within 200 metres of "*any*" accumulation of water. That is, water that has already accumulated. The poly pipes may well be integral and connected to the water system but their function is to transport water to the point of accumulation being the tanks and troughs.

[52] In support of its preferred interpretation, the Tribunal referred to the objective set out in s 3(1) of the Act (to encourage effective exploration for petroleum). The Tribunal also referred to the requirement in regulation 57 that it seek to find a reasonable balance between the interests of disputing parties in the creation of an access agreement, but always with a view to ensuring that the interest holder is not prevented from carrying out authorised operations in a manner consistent with the Act and the regulations. The Tribunal then observed:[60]

> It seems likely that the avoidance of accumulations of water is designed to prevent operations in areas where cattle are likely to congregate so as to reduce interference with the cattle. In that context the better definition of an accumulation of water is one around which cattle are likely to congregate.

[53] The Tribunal confirmed that, in determining any likely decrease in the market value of the land, it would proceed on the basis that Sweetpea's ability to use existing tracks would not be impacted by the presence of poly pipes but would be impacted by the existence of water tanks and troughs.[61]

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60 Tribunal decision, par 94

61 Tribunal decision, par 98.

Proposed grounds of appeal

[54] The proposed grounds of appeal argued on the application for leave are contained in the further amended draft notice of appeal, dated 6 June 2022. There are nine grounds in all,[62] as follows:

1. The Tribunal misconstrued the *Petroleum Act 1984* (the Act) in:
    a. determining an Approved Access Agreement (AAA) which would allow the Respondent to carry out activities and operations on the Appellant's land which would be inconsistent with the conditions of the Respondent's Exploration Permit (EP 136);
    b. determining that s 58(j) of the Act did not prevent exploration for petroleum being conducted on the Appellant's land pursuant to an AAA in a manner which would interfere with the Appellant's lawful rights or activities;
    c. determining that s 58(j) is confined to regulating the manner in which the Respondent's activities and operations are to be conducted on the Appellant's land pursuant to an AAA;
    d. determining that s 58(j) should be construed by reference to cl 2 of sch 2 of the *Petroleum Regulations 2020* (Regulations) and reg 57(2) of the Regulations.
2. The Tribunal erred in law by failing to address the Appellant's evidence and submissions that the Respondent's proposed activities and operations for which it sought an AAA would substantially interfere with the Appellant's lawful rights and activities contrary to s 58(j) of the Act and that, in the circumstances, the Tribunal should exercise its discretion not to determine an AAA.

3. The Tribunal misconstrued the Act in:
    a. failing to find that the accumulation of water within the Appellant's reticulated watering system consisting of poly pipes did not amount to an 'accumulation of water' within the meaning of s 111(1)(a)(iii) of the Act;

62 Grounds 1, 2, 3, 4, 5, 5a, 6, 7 and 8. Ground 1 contains four sub-grounds.

b. failing to find that the taps, troughs and tanks within the Appellant's reticulated watering system did not amount to an '*outlet from which water may be obtained'* within the meaning of s 111(1) (a)(iii) of the Act.

4. The Tribunal misconstrued the Regulations in determining that, absent agreement between the parties, an AAA could be granted for a term beyond the length of the term of the EP in existence at the time of the determination.

5. The Tribunal erred in law in determining an AAA with an indeterminate term in circumstances where the Tribunal was incapable of performing the exercise required of it by reg 57(2) of the Regulations to find a reasonable balance between the interests of the Appellant and the Respondent because it could not know, in the absence of the relevant approvals, what activities and operations would take place on the Appellant's land, for how long, or subject to what conditions.

5a. The Tribunal failed to provide reasons why the terms of the alternative access agreement put forward by Rallen were rejected and in so doing erred in law.

6. The Tribunal erred in law in failing to exercise its jurisdiction pursuant to reg 29(1) of the Regulations to determine whether or not the AAA should include provisions relating to compensation pursuant to s 81(1) of the Act, having erroneously determined that s 82A of the Act precluded it from exercising that jurisdiction.

7. The Tribunal misconstrued the Regulations and erred in law in determining that the Appellant's valuation methodology did not reflect a decrease in market value within the meaning of cl 13 of sch 2 of the Regulations.[63]

8. The Tribunal erred in law, by determining provisions of an access agreement which reflect a standard less than the standard minimum protections in schedule 2 of the Regulations, contrary to the requirement of regulation 14 of the Regulations; and in so doing failed to properly exercise its jurisdiction as required by regulation s 29(3) of the Regulations.

[55] In relation to proposed ground 3, relating to s 111(a)(iii) of the Act, Sweetpea has filed a notice of contention asserting that the Tribunal's

63 The proposed ground of appeal refers to "cl 12 of sch 2 of the Regulations", but Rallen's arguments clearly relate to cl 13, not cl 12.

decision and consequential orders determining the provisions of an approved access agreement should be upheld on the additional ground set out below:

> The poly pipes forming part of the Applicant's reticulated watering system are not 'an outlet from which water may be obtained' for the purposes of section 111(1)(a)(iii) of the *Petroleum Act 1984*.

[56] The relief sought by Rallen, in the event that leave to appeal were granted and the appeal upheld, are orders setting aside (1) the decision of the Tribunal contained in the reasons dated 7 February 2022 and (2) the orders for an access agreement dated 4 May 2022. Rallen seeks consequential orders that the matter be remitted to the Tribunal for determination in accordance with the Court's reasons. On such remitter, it would seek the re-determination by the Tribunal of the terms of the approved access agreement whereby access would be "by reference to a set term, and after a proper process of considering and balancing the interests of Rallen and Sweetpea".[64]

Consideration of applicant's arguments

Proposed ground 1

[57] Rallen argues that the source of Sweetpea's entitlement to enter Tanumbirini Station is found in the statutory scheme, under which the

64 The reference to a 'set term' is one which is fixed by reference to the timing of specific activities and not merely co-extensive with the term of EP 136.

rights conferred by the exploration permit, set out in s 29, are subject to the Act and in accordance with the conditions of the permit. Those rights are therefore limited by s 58(j), which is said to be an important protective provision in respect of Rallen's right to use Tanumbirini for pastoral purposes, including the breeding of cattle in the Southern Cross and Telecom paddocks.

[58] Rallen contends that the passage extracted by me in [33] above demonstrates that the Tribunal misunderstood or misdirected itself as to the construction of s 58(j) *Petroleum Act 1984*. Rallen argues that s 58(j) "does more than merely regulate the manner in which activities and operations are to be conducted on the land in question"; rather, that it is an important limitation on the qualified right to enter for the purposes of exploration; and that, if there is evidence that the proposed operations authorised by the access agreement would interfere with the landowner's lawful rights or activities on the land, no right to enter that land in order to conduct those activities should be granted.[65] Rallen refers to the uncontested evidence of three of its witnesses before the Tribunal: the station manager of Tanumbirini; Rallen's Northern Territory group station Manager; and an agricultural economist, which evidence was said to demonstrate the scale of interference by Sweetpea's proposed activities (or 'regulated operations') with Rallen's cattle operation.

65 Rallen's outline of written submissions, 13 May 2022, par 24. See also Submissions in reply, 16 June 2022, par 30.

[59] Rallen argued that an access agreement which authorised such interference, contrary to s 58(j), was contrary to the conditions of the exploration permit and could not be lawfully determined by the Tribunal. In the alternative, Rallen argued that the Tribunal did not have jurisdiction to determine an access agreement that was contrary to the conditions of the exploration permit.[66]

[60] In my opinion, Rallen's contentions should be rejected, for the following reasons.

[61] First, as explained by me in [35] above, Rallen's "lawful rights" and "lawful activities" have to be assessed having regard to the extent to which they were affected by the grant of an exploration permit (and the approval of an access agreement). For example, not only did the grant of the exploration permit limit the right of Rallen to exclude Sweetpea from entering Tanumbirini, but Rallen became subject to an obligation not to interfere with activities being conducted by Sweetpea in accordance with that exploration permit, to the extent that such interference would amount to an offence contrary to s 108A *Petroleum Act 1984*.

[62] Second, I agree with the reasoning of the Tribunal that the "legal framework" of the *Petroleum Act 1984*, referred to in s 3(2) of the Act, clearly anticipates that the operations of a permittee would impact on a

66 Rallen's outline of written submissions, 13 May 2022, par 25.

landholder. It may be noted in this context that the express objective of the Act (extracted below) does not mention the protection of the interests of owners of land, notwithstanding that subsequent provisions of the Act clearly do so:

> **3 Objective**
>
> (1) The objective of this Act is to provide a legal framework within which persons are encouraged to undertake effective exploration for petroleum and to develop petroleum production so that the optimum value of the resource is returned to the Territory.
>
> (2) The legal framework provides for the following:
>
> (a) the granting of petroleum interests to persons for exploration, production and ancillary activities associated with exploiting petroleum, and the renewal or transfer of those interests;
>
> (b) clear statements about the role of government following the grant of petroleum interests;
>
> (c) the promotion of active exploration for petroleum, and of the development of petroleum production if commercially viable, by persons granted petroleum interests;
>
> (d) the assessment of proposed technical works programmes for the exploration, appraisal, recovery or production of petroleum and of the financial capacity of persons proposing to carry out those programmes;
>
> (f) the reduction of risks, so far as is reasonable and practicable, of harm to the environment during activities associated with exploration for or production of petroleum;
>
> (g) the collection of information about petroleum exploration and production and the dissemination of that information;
>
> (h) the efficient administration of this Act and collection of royalties;
>
> (i) other matters in connection with exploration for and production of petroleum.

[63] The Tribunal observed, correctly in my opinion, that the objective was "aimed at encouraging and promoting exploration for and development

of petroleum"; and that the legal framework "provides for the granting of petroleum interests to persons for exploration, production and ancillary activities associated with exploiting petroleum and the renewal or transfer of those interests".[67]

[64] The legal framework contained in the *Petroleum Act 1984* includes s 29(1) and s 29(2)(a), briefly described in [35] above. The exercise of the rights referred to, including entering and remaining in the exploration permit area with vehicles and machinery to carry out an approved technical works program or other exploration of the permit area, would inevitably interfere to some extent with the rights or activities of an owner of land within the permit area. In those circumstances, although the rights described in s 29 are expressed to be subject to the Act and to the conditions of the exploration permit itself, it would be inconsistent with the object of the Act and the provisions of the Act as a whole to read the s 58(j) condition as precluding the exercise of the rights expressly conferred by s 29, whenever they happened to interfere in some way with the "lawful rights or activities" of a landowner within the permit area.[68] Perhaps the clearest indication of the proposition that the legal framework anticipates that the operations of a permittee will adversely impact on an owner of land is

67 Tribunal decision, par 6.

68 It may be noted that the s 58(b) statutory condition for exploration permits obliges the permitee to carry out its approved technical works programme with reasonable diligence and good oilfield practice. The permittee has a positive obligation to carry out its approved works programme.

seen in s 81 of the Act, which requires the holder of a petroleum interest to pay an owner of land compensation for deprivation of use or enjoyment of the land and improvements and damage caused by the permittee to the land or improvements.

[65] Proposed ground of appeal 1(d) asserts that the Tribunal misconstrued the *Petroleum Act 1984* in determining that s 58(j) should be construed by reference to clause 2 of Schedule 2 of the *Petroleum Regulations 2020* and regulation 57. It is correct that the Tribunal referred to clause 2 of Schedule 2 (and regulation 57) as examples in support of the Tribunal's view that "the legal framework clearly anticipates that the operations of the permittee will impact on the landholder". To the extent that the Tribunal relied on the regulations in that context, it was in error. The reference to the "legal framework" in s 3(2) *Petroleum Act 1984* is to provisions contained in the Act itself. In its consideration of the legal framework in the early part of its reasons for decision, the Tribunal referred to the regulations but, correctly, made specific reference only to sections of the Act, and not to any of the regulations.[69]

[66] It is generally impermissible for an Australian court to refer to delegated legislation for the purpose of interpreting an Act.[70] There are some exceptions to the general rule, for example, where

69 Tribunal decision, pars 4 –11. Specific reference was to s 3(1), s 3(2)(a), s 11, s 20, s 29(1) and s 29(2) of the Act.

70 Pearce and Geddes, *Statutory Interpretation in Australia* (8th edition) Lexis Nexis, par 3.41.

contemporaneously prepared regulations together with the principal Act form part of a legislative scheme, or where a section of an Act is expressed to be subject to the regulations. However, in *CCM Holdings Trust Pty Ltd v Chief Commissioner of State Revenue*,[71] Bergin CJ in Eq rejected the possible application of an exception to the general rule on the basis that the relevant regulation came into operation seven years after the principal Act. In the present case, I note that the *Petroleum Regulations 2020* came into effect in January 2021, more than 35 years after the commencement of the *Petroleum Act 1984*.

[67] Notwithstanding the error identified in the previous two paragraphs, I am satisfied that the proposition stated by the Tribunal, that the legal framework clearly anticipated that the operations of the permittee would impact on the landholder, is correct. The matters referred to in [64] above clearly support the proposition. The consequence is that, although the Tribunal may have erred in law, the error was not such as to vitiate the decision or even to negative the proposition which the Tribunal sought to support.

[68] Third, I agree with the reasoning of the Tribunal that the access agreement, containing the provisions determined by the Tribunal, would regulate access to the land but not so as to override statutory provisions or the statutory conditions of Sweetpea's exploration permit

71 *CCM Holdings Trust Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 1072; 97 ATR 509, at [120]-123.

contained in s 58 *Petroleum Act 1984*. Sweetpea would thus continue to be bound by the statutory condition in s 58(j). The proper interpretation and application of s 58(j) may need to await a determination by a court in future, in the event that it were alleged that Sweetpea had conducted its operations and activities on Tanumbirini in breach of the statutory condition. Such a determination might also shed light on the extent of interference with "the lawful rights or activities" of the landholder required to constitute such breach and, as a consequence, the circumstances in which Sweetpea might need to apply to the Minister pursuant to s 28 *Petroleum Act 1984* to vary, suspend or waive the statutory condition in s 58(j) of the Act.[72] However, with respect to the role of the Tribunal on an application under regulation 29(1) by an interest holder "for a determination as to the provisions that should form the contents of an access agreement so as to allow the interest holder to gain access to the relevant land", I reject Rallen's arguments that (or to the effect that) it was the task of the Tribunal to identify and assess the detail of all Sweetpea's intended operations and activities on Tanumbirini; to then consider the extent to which they would or might interfere with Rallen's cattle operations; and, if satisfied that there was any level of interference, to refuse to determine the provisions of an access agreement.

72 Rallen submitted in oral submissions that an application under s 28 of the Act was the only way in which the tension between s 29 and s 58(j) could be resolved, and that Sweetpea had not made such an application. See also Rallen's submissions in reply, 16 June 2022, par 21-22.

[69] I am satisfied that the Tribunal made no vitiating error of law. The first proposed ground cannot be maintained.

Proposed ground 2

[70] Rallen argues under this ground that, in deciding to proceed to determine the conditions of an access agreement, the Tribunal failed to address evidence led and submissions made on behalf of Rallen in relation to the substantial interference which Sweetpea's proposed activities and operations would cause to Rallen's lawful rights and activities, which evidence and submissions should have led the Tribunal to exercise its discretion not to determine an access agreement. In written submissions, Rallen argues that, by ignoring the submission advanced by Rallen, based on uncontested facts, the Tribunal failed to accord Rallen natural justice and constructively failed to exercise its jurisdiction.

[71] Rallen's submission appears to overlook the fact that the Tribunal specifically acknowledged Rallen's contention that the Tribunal lacked jurisdiction (or should decline to exercise jurisdiction) on the ground that "the terms of the [approved access agreement] would substantially interfere with private property rights and the respondent's business operations".[73] Further, the Tribunal expressly referred to Rallen's argument "that the operations of the applicant will necessarily interfere

73 Tribunal decision, par 55(i).

with lawful rights of the lessee and accordingly cannot be undertaken".[74] Moreover, in its further observation, referred to in [65] above, that "the legal framework clearly anticipates that the operations of the permittee will impact on the landholder", the Tribunal impliedly accepted that there would be adverse impact.

[72] In my opinion, it was not necessary for the Tribunal to make findings in detail in relation to the anticipated adverse impact of Rallen's operations and activities, for reasons set out in [68] above. There was no denial of natural justice or constructive failure to exercise jurisdiction. Rallen's reliance on the decision of the New South Wales Court of Appeal in *Resource Pacific Pty Ltd v Wilkinson* is misplaced in that, in the present case, the Tribunal was not bound to give consideration to Rallen's evidence and submissions beyond the extent that it did.[75]

[73] The second proposed ground cannot be maintained.

Proposed ground 3

[74] This ground relates to s 111(1)(a)(iii), which is included in the extract in [45] above. As mentioned in [51], the Tribunal found that Rallen's tanks and troughs were properly characterised as "artificial

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74 Tribunal decision, par 57.

75 Rallen relied on pars [8]-[9] and [42] of *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33. Par [42] reads, in part, "If a particular finding is a necessary step in support of the court's orders, the failure to make the finding may constitute an actual failure to exercise the jurisdiction conferred on the court, despite the appearance of exercise. [underline emphasis added]

accumulations of water", but that the in-ground polythene pipes were not.

[75] Rallen contends under this ground that the Tribunal erred in its construction of s 111(1)(a)(iii) of the Act by adopting a reductionist approach, focusing on the parts rather than the whole of the water reticulation system.[76] The argument proceeds on the basis of undisputed facts that the pipeline adjoining the central track is part of a water reticulation system which includes water tanks and troughs which are serviced by the in-ground water reticulation system. Rallen submits that the relevant enquiry should have been whether water in the water reticulation system as a whole was an "artificial accumulation of water", and not whether each component part of the water reticulation system was an "artificial accumulation of water".

[76] Rallen's submission, that the Tribunal incorrectly adopted a reductionist approach, relies on the decision of the New South Wales Land and Environment Court in *Martin and Others v Hume Coal Pty Ltd*.[77] Hume Coal held an exploration license authorising the exploration for coal over an area of land which included the properties of Mr Martin and other applicants. Legislation restricted the holder of an exploration licence from exercising any of the rights conferred by the licence on land "on which is situated any significant improvement

76 Rallen's written outline of submissions, 13 May 2022, par 36.

77 *Martin and Others v Hume Coal Pty Ltd* [2016] NSWLEC 51; 215 LGERA 289.

… except with the written consent of the owner …".[78] The definition of "significant improvement" included "any substantial … valuable work or structure". On appeal it was held that the Commissioner had failed to consider whether the water reticulation system (of which irrigation piping was a part) was a significant improvement on the land affected by the exploration licence. Preston CJ observed as follows:[79]

> … the Commissioner incorrectly adopted a reductionist approach, focusing on the parts rather than the whole of the irrigation piping system. On the facts, the irrigation piping underneath the cattle laneways is part of a water reticulation system that includes components on and over the surface of land, including water tanks and troughs in the paddocks. The function of the water reticulation system is to deliver high-quality water to grazing livestock in the paddock. The relevant enquiry is whether this water reticulation system as a whole is a significant improvement and not whether each component part of the water reticulation system is a significant improvement by itself. Each of the component parts combined to make up a structure that extends across the cattle laneways and paddocks of each property.
>
> The Commissioner was required to determine whether this structure as a whole was substantial and valuable so as to be a significant improvement. ….
>
> The Commissioner therefore failed to consider the right question of whether the water reticulation system (of which the irrigation piping was a part) was a significant improvement situated on land specified in the exploration licence.

[77] The above extracts from the decision in *Martin and Others v Hume Coal Pty Ltd* stand for the proposition that the water reticulation system, which included in-ground irrigation piping, constituted a 'structure' within the defined meaning of the term "significant

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78 *Mining Act 1992* (NSW), s 31(1)(c).

79 *Martin and Others v Hume Coal Pty Ltd*, [89], [90] and [92].

improvement", which then required the Commissioner to assess whether it was a 'substantial' structure in order to determine whether it came within the definition of "significant improvement" in s 31(1)(c) of the *Mining Act 1992*. Although there is some factual similarity between the situation of Mr Martin and that of Rallen, in terms of in-ground irrigation systems connected to tanks and troughs in cattle paddocks, the decision in *Martin and Others v Hume Coal Pty Ltd* does not assist in the task of interpretation of the expressions "artificial accumulation of water" and "outlet from which water may be obtained".

[78] The Tribunal considered the proper construction of the expression "any artificial accumulation of water" in the context of the *Petroleum Act 1984*. It held that the expression meant "a body of water gathered or heaped up in mass or quantity", and that s 111(1)(a)(iii) referred to "an entity rather than a process of accumulation ... to water that has already been accumulated".[80] The Tribunal rejected the notion that in-ground polythene pipes were 'an accumulation of water', and held that the tanks and troughs were the artificial accumulations of water and that the pipes were the means of distribution to them.[81]

[79] There are several possible policy reasons for the prohibition or restriction in s 111(1)(a)(iii). The fact that the prohibition is directed at

80 Tribunal decision, par 92.

81 Tribunal decision, par 90.

protecting artificial and not natural accumulations of water (for example, natural watercourses and lagoons) suggests that the sub-paragraph is not concerned with maintaining water quality generally. The sub-paragraph may well be directed to avoiding or minimising damage to pastoral improvements, or to avoiding or minimising disruption of pastoral operations and activities at locations where cattle congregate to drink, as suggested by the Tribunal.[82] The inclusion or addition of water outlets – "any outlet from which water may be obtained" – would support the latter purpose. In the general context, man-made dams come to mind as obvious artificial accumulations of water, even though there was no reference to dams in the evidence or submissions before the Tribunal. However, no obvious sole purpose is apparent, particularly when one considers that land protected by the s 111 prohibitions is not restricted to land used for pastoral purposes.

[80] In my opinion, the Tribunal was correct to focus upon an 'entity' or 'body of water' as constituting the relevant "artificial accumulation of water", rather than the means by which water is transported to the end point of accumulation. In simple terms, it can be said that water stays in a water pipe until such time as a tap is turned on and the water flows out. However, that does not mean that water 'accumulates' in a water pipe. More relevantly, it does not mean that water in water pipes can be

82 Tribunal decision, par 94.

said to be an "artificial accumulation of water" for the purpose of s 111(1)(a)(iii) of the Act.

[81] In my opinion, it could not be said that the in-ground polythene pipes (whether on their own or as components of the Tanumbirini 'water infrastructure') *necessarily* came within the description of an "artificial accumulation of water".[83] Rallen has not established that the Tribunal erred in law in the construction of the expression "artificial accumulation of water" in s 111(1)(a)(iii) of the Act by excluding the in-ground polythene pipes from that description.

[82] Under proposed ground 3(b), Rallen argues that the Tribunal "failed to deal with Rallen's alternative submission that the water reticulation system as a whole, consisting of the polythene pipe connected to and feeding the troughs and water tanks, provide an 'outlet from which water can be obtained' within the meaning of s 111(1)(a)(iii)".[84] The full context in which that alternative submission is said to have been made is unclear. Sweetpea conceded before the Tribunal that the water tanks and troughs came within the expression "any outlet from which water may be obtained", but contended that the poly pipes which transported water to those outlets did not. In relation to Rallen's 'artificial accumulation of water' contention, the Tribunal held that the pipes "may well be integral and connected to the water system but their

83 As to the word "necessarily", see statement of Jordan CJ in *Australian Gas Light Co v Valuer-General,* cited with approval in *Lake Macquarie City Council v Vetter*, part of the extract in [10] above.

84 Outline of written submissions, 13 May 2022, par 38.

function is to transport water to the point of accumulation being the tanks and troughs".[85] Rallen's contention in relation to the expression "outlet from which water may be obtained" was based on the same logic: in the same way that its water infrastructure, taken as a whole, was an artificial accumulation of water so also was it an outlet from which water may be obtained. The contention was bound to fail, just as Rallen's 'artificial accumulation of water' contention failed. However, the Tribunal did not make a specific finding as to whether the water reticulation system as a whole constituted an "outlet from which water may be obtained".

[83] In my opinion, Rallen's alternative submission is simply wrong. In ordinary language, an "outlet from which water may be obtained" means an opening where water is let out (through a tap or a valve). The in-ground pipes which lead to the point at which water is let out are not 'outlets'. Pipes are not 'converted' to become taps because they are from part of the same water reticulation system. I refer to [55] above, and find that the contention in Sweetpea's notice of contention is clearly correct.

[84] In relation to sub-ground 3(b), I accept the submission of Sweetpea that Rallen's alternative submission before the Tribunal was misconceived.[86] Whatever may be said about the asserted failure on the

85 Tribunal decision, par 92.
86 Respondent's outline of submissions, 7 June 2022, par 51.

part of the Tribunal to deal with the submission, the submission had no merit, whether in fact or law. If the Tribunal erred, as asserted by Rallen, the error had no consequences. There was no vitiating error of law.

[85] I would make a further observation in relation to ground 3 generally, following from my observations in [47]–[49]. The Tribunal's view in relation to the s 111(1)(a)(iii) prohibitions could not bind a court of law in civil or criminal proceedings if in future it were alleged that Rallen had carried out prohibited operations, contrary to the Act. The only reason the Tribunal was required to consider s 111(1)(a)(iii) was to enable it to draft a clause in the access agreement, as required by clause 13 of Schedule 2 of the regulations,[87] containing an *indication* as to whether it was *anticipated* that any activities carried out on the land would lead to a decrease in the market value of the land and, if so, to provide a preliminary assessment of the amount of the decrease. Even if it were anticipated that activities carried out on the land would lead to a decrease in market value (for example, in the event Sweetpea caused damage to the land by building an alternative road to avoid prohibited locations along the central track), and a preliminary assessment of the amount of the decrease were included in the access agreement, that preliminary assessment would have no legal effect and could not bind the parties because the standard minimum protection

87 Schedule 2, clause 13, extracted in [24] above.

required a condition that the clause did not "limit any right under the Act as to the provision or payment of compensation, or any right to apply to the Tribunal if there is a dispute about compensation".[88]

[86] The consequence is that if, contrary to my finding, the Tribunal erred in law in relation to the construction of s 111(1)(a)(iii) of the Act, the Tribunal's error would not be a vitiating error. On the assumption (for present purposes) that the Tribunal provided an inadequate preliminary assessment of decrease in market value, such assessment would be hypothetical only, and would have no effect in law on the rights, entitlements or liabilities of the parties.

Proposed ground 4

[87] Rallen contends under this ground that the Tribunal erred in determining an access agreement with an expiration date beyond the period of the existing term of the exploration permit.

[88] The contention requires a consideration of clause 25 of Schedule 2, which sets out the 'standard minimum protection' in relation to termination of an access agreement:

Matters to be addressed	Standard Minimum protections
25. Termination	(1) The agreement terminates: (a) by mutual agreement between the parties; or

88 Schedule 2, clause 13(2), extracted in [24] above.

(b) on the expiration of the term of the agreement (unless the term is extended by mutual agreement between the parties); or

(c) on the expiration of the petroleum interest (unless the agreement is extended by mutual agreement between the parties); or

(d) if the Tribunal determines that the agreement be terminated

(2) The termination of the agreement does not affect any right or liability accrued before the termination agreement.

[89] The clause determined by the Tribunal, by its order made 4 May 2022, was as follows:

26 TERM AND TERMINATION (SMP 25)

(a) The agreement commences on the Commencement Date and terminates:

(i) by mutual agreement between the parties; or

(ii) on the expiration of the petroleum interest (unless the agreement is extended by mutual agreement between the parties); or

(iii) if the Tribunal determines that the agreement be terminated.

(b) The termination of the agreement does not affect any right or liability accrued before the termination of the agreement.

[90] It can be seen from sub-clause (a)(ii) that the Tribunal determined that the access agreement should be co-extensive with the term of the term of the exploration permit (subject to the parties' agreement or a

Tribunal determination). The clause, as settled, incorporated minimum protection alternatives 1(a), (c) and (d), but not (b).

[91] The Tribunal's reasons are set out below: [89]

> [135] A clause commensurate with clause 25 of the SMPs in Schedule 2 must be included in the AAA. That clause establishes when an AAA is terminated and provides four options being:
>
> (a) by mutual agreement; or
>
> (b) on the expiration of a set term; or
>
> (c) on the expiration of the EP; or
>
> (d) if terminated by the Tribunal.
>
> [136] In our view options (b) and (c) are mutually exclusive and we must determine to include one or other of them.
>
> [137] In these proceedings there is little likelihood that once a term is set, the parties will mutually agree on a termination but it remains open to them to do so. Similarly there is currently no agreement between the parties as to the appropriate length of any set term.
>
> [138] In each proceeding the applicant submits that the term of the agreement should be consistent with the period of the EP as extended from time to time.
>
> [139] In the Yarabala proceeding ... [not relevant].
>
> [140] In the Rallen proceeding the respondent seeks a termination date of not more than 70 days from any notice of commencement of regulated activities or alternatively on the expiration of the current term of the EP but with a resurrection of the AAA for short periods at 6 months and 12 months from the completion of activities to facilitate monitoring and rehabilitation obligations.
>
> [141] We have determined that absent agreement between the parties, the appropriate termination provision is one that is consistent with the period of the EP as varied from time to time. We accept the applicant's submission that the period of operations under the legal framework is inherently uncertain. How long access will be required depends on the results of the exploration phase. Any change in the nature of operations will be considered by the Minister and will require a variation of the existing or a new EMP. Where necessary either party can initiate the process under section 37 to vary an AAA.

89 Tribunal decision, pars 135 – 141.

[92] Rallen contends that the Tribunal's reasoning demonstrates that the Tribunal misunderstood and misapplied the regulations and thus erred in law. The contention proceeds that, in finding paragraphs (b) and (c) mutually exclusive, in par 136, the Tribunal reduced the standard protection to be given to the landowner by clause 25(1)(b) and determined a provision which provided lesser protection to the landowner.[90] On the hearing of the appeal, senior counsel for Rallen argued that, because of the wrongly self-imposed need to choose one of (b) and (c), and then choosing (c), making no reference to (b), the Tribunal did not properly consider all relevant terms for the access agreement put by Rallen. In submissions in reply on the hearing of the appeal, senior counsel argued that there had been "a constructive failure to exercise jurisdiction" or "a clear abdication of jurisdiction", because the Tribunal assumed a false dichotomy.

[93] Before the Tribunal, Rallen submitted that the termination date should have been not more than 70 days from any notice of commencement of regulated activities or alternatively on the expiration of the current term of the exploration permit, but with a 'resurrection' of the access agreement for short periods at six months and 12 months from the completion of activities to facilitate monitoring and rehabilitation obligations.[91] Rallen's essential grievance on appeal is that the term of

90 Applicant's outline of submissions, 13 May 2022, par 44.

91 Tribunal decision, par 140.

the access agreement, as determined by the Tribunal, was "indeterminate and uncertain", with access potentially available to Sweetpea for many years, limited only by the life of the exploration permit, which could be extended or renewed.[92] However, Rallen's further contention is that the words "on the expiration of the petroleum interest" in standard minimum protection clause 1(c) should be construed to refer to the expiration date of the exploration permit at the date of the access agreement. Rallen argues that the Tribunal was in error in construing the expression to mean "on the expiration of the petroleum interest as varied from time to time". The standard minimum protection "plainly requires the term of the access agreement to be defined at the outset".[93]

[94] Evidence before the Tribunal was that the exploration permit (EP 136) had been granted by the Minister on 28 August 2012, for a period of 5 years.[94] Subsequently, there had been various extensions, suspensions and variations approved by the Minister's delegate.[95] For example, a 12-month suspension of the proposed Year 4 work commitments and an extension of the term of the exploration permit had been granted to give Sweetpea "additional time to undertake mediation with the leaseholders of Beetaloo Station and Tanumbirini Station, to secure an

92 Applicant's outline of submissions, 13 May 2022, par 45.

93 Applicant's Reply submissions, 16 June 2022, par 50.

94 AB 1724.

95 AB 1738, 1740.

access agreement and commence the 2D seismic survey".[96] The most recent extension of the term of the exploration permit was to 27 August 2023.

[95] In part reliance on the evidence referred to in the previous paragraph, Sweetpea identifies a threshold difficulty with Rallen's proposed construction of standard minimum protection clause 1(c). Section 28(1) *Petroleum Act 1984* expressly empowers the Minister to "vary, suspend or waive a condition" of an exploration permit. Sweetpea contends that what Rallen describes as 'the term of the EP in existence at the time of the determination' is a term that is inherently capable of extension pursuant to s 28(3) of the Act. Sweetpea also relies on s 5(2) of the Act which provides that a reference in the Act to "the term of an exploration permit or licence" is a reference to "the period during which the permit or licence remains in force and a reference to the date of expiration of an exploration permit or licence is a reference to the day on the expiration of which the permit or licence ceases to have effect."

[96] I accept Sweetpea's submissions on this issue, and reject Rallen's contention that the phrase "on the expiration of the petroleum interest" in standard minimum protection clause 1(c) refers to the expiration date of the exploration permit at the date of the access agreement. I am not prepared to construe the words of the regulation in a manner

96 Letter from Senior Executive Director Energy Development to CEO Sweetpea, 21 June 2021, AB 909.

inconsistent with the interpretation given in the principal Act. The expression “expiration of the petroleum interest” denotes the petroleum interest expiring or ceasing to have effect. That must take account of the original term and any extensions. Further, in my opinion, it is not clear that the policy objective is that contended for by Rallen, namely, providing “the protection of certainty” to the landowner. For example, it is arguable that ‘certainty’ would be achieved by there being one agreement for the whole of the period during which the operations and works under the exploration permit are carried on. Otherwise there would be a need for the parties to re-engage in the process described in [16], possibly on multiple occasions, with potential for much disputation and uncertainty. There is thus no clearly identified ‘purposive approach’ which would lead to the construction contended for by Rallen being the preferred construction.

[97] There is a further matter I would mention. Rallen contends that the construction adopted by the Tribunal involved the ‘reading in’ of words which were not necessary to give effect to the purpose of the Act and regulations. I do not consider that the Tribunal’s construction involved ‘reading in’ any words. However, Rallen’s construction unavoidably involves reading in, after the words “on the expiration of the petroleum interest”, the words “the expiration date being that specified as at the date of this access agreement”, or words to that effect, and perhaps further words to clarify the intention. In the

circumstances, I consider that the statement of McHugh JA in *Bermingham v Corrective Services Commission of New South Wales*,[97] in relation to the circumstances in which a court may read words into a legislative provision to give effect to its purpose, do not assist Rallen.

[98] I turn now to consider whether the Tribunal erred in law in determining that sub-clauses 1(b) and 1(c) were mutually exclusive.

[99] I observed in [19] that most of the standard minimum protection clauses in Schedule 2 are capable of inclusion without amendment into an access agreement. Others state the requirements of the intended clause, rather than set out a draft of the clause itself. Clause 25 in Schedule 2 is the former. The effect of regulations 14(2) and 14(3)(a) is that the access agreement had to include "a provision expressed in the same, or substantially the same terms" as clause 25.[98] The question for determination is whether the Tribunal erred in law in not including a provision (in the alternative) for the access agreement to terminate "on the expiration of the term of the agreement…".

[100] If the standard minimum protection clause 25 in Schedule 2 were inserted into the access agreement, in precise terms as follows:

> This agreement terminates:
> ……

97 *Bermingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292 at 302D.

98 Although, under regulation 14(3)(c) – not presently relevant – it could have included "a provision that reflects a standard that is greater than a standard specified in schedule 2".

(b) On the expiration of the term of this agreement (unless the term is extended by mutual agreement between the parties)

it would achieve nothing unless the term of the agreement were specified elsewhere. Therefore, to the extent that the suggested error of law is that the Tribunal did not replicate standard minimum clause 25(1)(b) in the access agreement, it does not resolve Rallen's real complaint, namely, that the Tribunal, in the exercise of its discretion, determined that the term of the access agreement should be co-extensive with the term of the exploration permit as varied from time.

[101] Sweetpea submits that the Tribunal correctly identified options (b) and (c) as mutually exclusive. It contends that, if both options were included in an access agreement, then a 'term of the agreement' fixed under option (b) would end, either before 'the expiration of the petroleum interest', in which case option (c) would not be the termination date at all; or conversely, after the 'expiration of the petroleum interest', in which case option (b) would not be the termination date. That submission is logically correct. Sweetpea contends that, properly understood, clause 25 gave the Tribunal a choice between setting a fixed term or a term lasting until the expiration of the petroleum interest and that, in choosing one rather than the other, the Tribunal made a discretionary decision which is not susceptible to an appeal.

[102] I am not satisfied that the Tribunal erred in law as contended for by Rallen under ground 4. However, as I explained in [11], an error of law must be such as to vitiate the Tribunal's decision; there must be a real possibility that the error of law could have affected the Tribunal's decision. The Tribunal had to consider the opposing submissions referred to in par 138 and par 140 of its decision, extracted in [91] above. The parties were clearly a long way apart. The Tribunal determined that the term of the access agreement should be co-extensive with the term of the exploration permit, as varied from time to time, because it accepted that the period of operations was inherently uncertain and that the length of time for which access was required would depend upon the results of the exploration phase. The Tribunal also noted that either party could initiate a process to vary an approved access agreement.[99] In my opinion, given the Tribunal's positive persuasion that the term of the access agreement should be dependent on the term of the exploration permit, there is no possibility (let alone a 'real possibility') that the error of law contended for could have affected the Tribunal's decision.

[103] I am not satisfied that the Tribunal made a vitiating error of law. The consequence is that proposed ground 4 cannot be maintained.

Proposed ground 5

99 The Tribunal mistakenly referred to section 37. It is clear, however, that it was referring to regulation 37, which permits an approved access agreement to be varied, if not in accordance with its own terms or otherwise by agreement between the parties, then by further processes in proceedings under Part 4 Division 7 of the Regulations.

[104] Proposed ground 5 is more like a submission than a ground of appeal. It is a further attack on the determination by the Tribunal that the term of the access agreement should be co-extensive with the term of the exploration permit as varied from time to time (the 'indeterminate term' submission), combined with a submission that the access agreement was "inherently vague and uncertain as to the scope of the activities that Sweetpea could undertake on Tanumbirini during the term".[100] Ground 5 may be broken down as follows: (1) the Tribunal did not find a reasonable balance between the interests of Sweetpea and the interests of Rallen; (2) the Tribunal could not do so because the Tribunal "could not know … what activities and operations would take place on Tanumbirini, for how long, or subject to what conditions". Rallen submits that the Tribunal misunderstood regulation 57(2), and that there was a constructive failure on the part of the Tribunal to exercise jurisdiction.[101]

[105] Regulation 57(2), relied on by Rallen, provides that the Tribunal "must seek to find a reasonable balance between the interests of an interest holder and the interests of a designated person". In support of its submission that it was impossible for the Tribunal to strike that reasonable balance without identifying the activities that the Tribunal understood were likely to take place on Tanumbirini and understanding

100 Rallen's outline of written submissions, 13 May 2022, par 51.

101 Rallen's Reply submissions, 16 June 2022, par 55.

what the impacts of those activities might be, Rallen provided the following example of what it contends would have been a proper balancing of interests:[102]

> An example of the balancing of interests that the Tribunal should have undertaken, but did not, was to consider the impact of the proposed activities as outlined in the EMP on Rallen's operations, and to determine an access agreement with provisions limited to the activities and commitments outlined in the EMP and any conditions imposed on approval by the Minister. The term ought to have been fixed by reference to the identified operations and period over which they were to be conducted, and the access agreement should have included a provision which limited the clearing of vegetation on Tanumbirini to that which was identified in the EMP. Rallen's proposed draft access agreement which it tendered before the Tribunal did just that. However the access agreement as determined by the Tribunal does not purport to limit the extent of vegetation clearing or otherwise restrict the scope of regulated activities that may be undertaken on Tanumbirini.[103]

[106] Rallen's submission gives the impression that the Tribunal had no or little information and understanding idea about the activities proposed by Sweetpea. That would not be a correct impression. The Tribunal had the evidence of Joel Riddle, referred to in [41] above, both in the form of a witness statement and oral evidence. There was far more extensive detail in the Northern Territory Environment Protection Authority advice document, Approval Notice and statement of reasons.[104] By way of example of such detail, one of the conditions of the approval was that Sweetpea submit to the Department of Environment, Parks and

102 Rallen's Reply submissions, 16 June 2022, par 58.

103 The reference to the 'EMP' was to the Environment Management Plan, see footnote 42 to [36] above.

104 AB 827-849.

Water Security "daily on-site reports indicating the status and progress of the groundwater bore installation and seismic surveys, kilometres of clearing per seismic line; and progressive rehabilitation completed".[105]

[107] Rallen fairly acknowledges that the effect of regulation 6 and regulation 30 of the *Petroleum Environment Regulations 2016* is that any additional activities beyond the scope of the approved Environment Management Plan would need to be the subject of a further Environment Management Plan and an approval by the Minister, before Sweetpea could undertake them on Tanumbirini.[106] However, Rallen contends that that is irrelevant to absolving the Tribunal from the requirement that the Tribunal strike a balance before determining the access agreement.

[108] The obligation of the Tribunal set out in regulation 57(2) is qualified by regulation 57(3), under which the Tribunal must ensure that the interest holder is not prevented from carrying out any operations authorised under the relevant petroleum interest in a manner consistent with or authorised by the Act, the regulations or an exploration permit; or required by the Act, regulations or an exploration permit. In the present case, regulation 57(3) means that, however the balance is struck between the interests of Sweetpea and the interests of Rallen,

105 AB 840.

106 Rallen's Outline of written submissions, 13 May 2022, par 55.

Sweetpea should not be prevented from carrying out operations authorised *and required* under its exploration permit.

[109] Rallen's submissions, summarised in [104]-[105] do not take into account or even refer to the requirements of regulation 57(3).

[110] Sweetpea relies on that sub-regulation and refers to the level of uncertainty about future exploration activities, affected as they are by initial results. Sweetpea argues that it would be inconsistent with regulation 57(3) to require that the Tribunal have a more detailed understanding than it did in the present case as to the extent of activities and operations likely to take place, and for how long, before Sweetpea could even begin the operations authorised and required under its exploration permit. I agree.

[111] In my opinion, proposed ground 5 cannot be maintained.

Proposed ground 5a

[112] Rallen argues under this ground that the Tribunal failed to provide reasons for rejecting the alternative access agreement tendered by Rallen. That alternative access agreement contained proposed protections which Rallen says "were the same as, satisfied a requirement of, or were greater than the standards in Schedule 2".[107]

107 Rallen's Outline of written submissions, 13 May 2022, par 59.

[113] Rallen's document was a draft which reproduced the standard minimum protection clauses in Schedule 2, with proposed inserts and amendments highlighted in red print.[108] It proposed, inter alia, a definitions section; an insert into clause 2 ('Minimise disturbance') to require the parties to agree to "the baseline conditions of the land" to be mapped out after a site visit; an insert into clause 11 ('Rehabilitation and remediation') to enable Rallen to engage an expert at Sweetpea's expense to advise on rehabilitation and requiring Sweetpea to implement the reasonable recommendations of that expert; a clause 12(1) ('Compensation for drilling') requiring Sweetpea to pay Rallen the minimum amount of compensation payable for the drilling of a well on the same day that it gives notice that it intends to commence the drilling; an additional sub-clause in clause 25 ('Termination') providing for the access agreement to terminate if Sweetpea was in breach and failed to remedy the breach within 14 days; and a clause 31 in the following terms:

> The interest holder must not interfere with the lawful activities and rights of the occupier. In the event of a conflict of direct activities, the occupier will give notice to the interest holder and the interest holder must stop its activities and exit the land until the occupier has completed that activity.

[114] Rallen submitted in an explanatory footnote that it relied on s 58(j) *Petroleum Act 1984* for the proposed clause 31. It would be more correct to say that it relied on its own interpretation of s 58(j).

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108 AB 1707-1723.

The reason for the proposed clause was to enable Rallen to properly conduct a muster which, it asserted, would require that Sweetpea exit the land for the period of the muster. Whether or not a muster would necessarily result in "a conflict of direct activities" would depend on the extent to which cattle were grazing in proximity to that part of the land where Sweetpea's activities and operations were being conducted, and the route of the muster, which would be determined to a real extent by those carrying out the muster. The necessity for Sweetpea to not only stop its activities but also to "exit the land" seems extreme, but that is not an issue which the proposed ground of appeal requires me to decide. Nor is it relevant for me to decide whether or not Rallen's other proposed inserts were reasonable. The question is whether the Tribunal erred in law by not giving reasons for not including Rallen's proposed inserts in the finally approved access agreement.

[115] It is important to note firstly the extent to which the Tribunal modified the standard minimum protection clauses or requirements to take into account the amendments proposed by Rallen, because that affects the extent to which it may have been required to give reasons. Reference to the approved access agreement demonstrates the following. Rallen's proposed insert into clause 2 was not included in full, but the Tribunal included a separate clause, clause 29, requiring the parties to attend a site visit no later than 14 days before the commencement of operations on the land. The clause also required the parties to discuss (but not

map) access points, s 111 ‘no-go zones’ and intended or actual camps. Rallen’s proposed insert into clause 11 was included in part, but such that the Sweetpea was not obliged to implement the reasonable recommendations of the rehabilitation expert, but rather to consider in good faith such written recommendations. Further in relation to clause 11, the Tribunal accepted in full a clause proposed by Rallen (not referred to by me in [113] above) which required Sweetpea to rehabilitate the land in respect of any improvements which Rallen did not want to remain. In relation to Rallen’s proposed clause 12(2), the Tribunal did not accept that the minimum compensation amount should be paid on the day that notice is given of intention to commence drilling of a well, but included a clause that payment was to be made within 14 days of the date of the notice. In relation to Rallen’s proposed inclusion of an additional sub-clause in clause 25, the Tribunal instead included a separate clause (clause 27) dealing with breach by either party, which provided that if the breach were not remedied within the time provided in a notice (not less than 14 days’ notice required) served by the non-defaulting party, then the non-defaulting party could have recourse to the dispute resolution mechanism under clause 25 of the approved access agreement.[109] Finally, I note that the Tribunal did not adopt or include Rallen’s proposed interference clause, clause 31, discussed in [114] above.

109 Despite the difference in numbering, clause 25 of the AAA is the same as standard minimum protection clause 24 (‘Dispute resolution’).

[116] My preliminary view is that there was not a great deal of explanation required on the part of the Tribunal.

[117] I turn to consider the Tribunal's reasons,[110] which set out its approach to determination of the provisions of the access agreement:

> .... A simple adoption of the terms of Schedule 2 without reasons would not amount to a proper determination by the Tribunal. The Terms of an AAA must be determined in the circumstances of each case. While in some cases the minimum protections contained in Schedule 2 might suffice, that is something that must be properly considered by the Tribunal. To approach the exercise otherwise would mean that the holder of a petroleum interest would be placed at an unfair advantage knowing that (in the event that negotiations failed) the terms of any AAA would simply be those contained in the Schedule.
>
> In our view the SMPs effectively provide the Tribunal with a starting point. Each clause within them must be included in the AAA. Whether or not the wording is changed or the protections are enlarged in favour of the landholder is a matter for the Tribunal to consider. The process we have adopted in these proceedings is to firstly ensure that each of the SMPs is addressed. We have accepted any further clauses that have been agreed between the parties to include provisions by agreement.
>
> Where the parties have raised a dispute around certain clauses we have declined to include provisions which provide protections that are already catered for within the Act or Regulations. We have also declined to include provisions which we consider to be otherwise unnecessary. Where a party has sought to include a provision which in our view was a reasonable inclusion, we have accepted that provision. In cases of dispute around the wording of particular provisions we have opted for a version that most closely resembles the provisions in Schedule 2.

[118] The above reasons, and the extent to which the proposed clauses submitted by Rallen were incorporated into the approved access agreement, albeit with modifications, demonstrate that the Tribunal

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110 Tribunal decision, pars 105-107. The reference to 'SMPs' is to the standard minimum protection clauses in Schedule 2 of the Regulations.

was seeking to find a reasonable balance between the interests of Sweetpea and the interests of Rallen. While it is a matter of impression and degree, the Tribunal clearly took into account Rallen's proposed clauses and provisions and incorporated them either in full or in modified form. As mentioned above, the Tribunal did not adopt or include Rallen's proposed interference clause, clause 31. It is probable that the Tribunal considered that clause unnecessary because the protection "was already catered for within the Act", specifically s 58(j) of the Act, but it is also possible that the Tribunal did not consider it a reasonable provision. The corollary of the Tribunal's statement, that it would accept a provision sought by a party which the Tribunal considered reasonable, is that the Tribunal would reject a provision which it did not consider reasonable.

[119] My analysis does not support Rallen's contention that that the Tribunal "did not accept Rallen's provisions and with only the slightest of modifications adopted the SMPs instead".[111] Further, Rallen's submission that the Tribunal "failed to provide reasons as to why Rallen's competing provisions and its draft access agreement and submissions were not accepted" is not correct. I refer to the reasons extracted in [117] above. The Tribunal explained that the parties' proposed provisions were not included if they provided protections

111 Rallen's outline of submissions, 13 May 2022, paragraph 60. The reference to the SMP is to the standard minimum protections clauses.

already catered for in the Act or Regulations, or were otherwise unnecessary.

[120] If Rallen's real complaint is that the Tribunal should have given more detailed reasons, specifically setting out and addressing each and every one of the provisions which Rallen sought, comparing them with the provisions sought by Sweetpea, then engaging in the discussion of the relative merits of the competing clauses before settling the clause to be included, I would reject that as unrealistic. No doubt more detailed and specific reasons could have been provided, but the standard is not one of perfection. The law is tolerably clear that the content of the duty to give reasons will vary according to the nature of the jurisdiction which a court (and I include here a tribunal) is exercising and the nature of the question being decided.[112] This Court should take a pragmatic and functional approach in assessing the extent or adequacy of reasons properly required to be given by the Tribunal to explain its decision. I agree with the submission of Sweetpea that it was not necessary for the Tribunal to engage in a clause-by-clause or line-by-line analysis of every provision of the access agreement, and deal with the alternative clauses rejected and their respected merits. The exercise did not lend itself to that level of extensive reasoning.

112 See for example, *Wainohu v NSW* [2011] HCA 11; 243 CLR 181 at [56] per French CJ and Kiefel J; *NSW Land and Housing Corp v Orr* [2019] NSWCA 231; 100 NSWLR 578 at [68].

[121] I reject the proposition in proposed ground of appeal 5a that the Tribunal erred in law by failing to provide reasons for rejecting the terms of the access agreement submitted by Rallen.

Proposed ground 6

[122] Rallen contends under this ground that the Tribunal erroneously determined that s 82A of the Act precluded it from exercising jurisdiction pursuant to regulation 29(1) to determine whether or not the access agreement should include provisions relating to compensation pursuant to s 81 of the Act.

[123] I explained this issue and summarised the Tribunal's reasons for decision in [21] – [28] above. In brief, the Tribunal held that there was no entitlement to compensation under s 81(1) or s 81(2) because no compensable activities had been carried out on the land and Rallen had not suffered any compensable loss. On that basis, the Tribunal held that its jurisdiction under s 82A had not been enlivened.

[124] Rallen submits that the evidence before the Tribunal demonstrated that Sweetpea's activities were likely to cause harm or damage to its land and to its operations on Tanumbirini. In relation to damage to land, Rallen's proposition may be accepted in general terms, although the damage may be temporary, and one would not normally expect compensation to be assessed until such time as Sweetpea had carried out required rehabilitation and remediation measures under the Act and

standard minimum protection clause 11 of Schedule 2, (or clause 11 of the approved access agreement determined by the Tribunal). Rallen contends that the Tribunal erred in determining that its jurisdiction to award compensation for damage was found only in s 82A of the Act. Rallen contends that regulation 14(3)(c), which permits the Tribunal to include a provision in an access agreement which "reflects a standard that is greater than a standard specified in Schedule 2", conferred jurisdiction on the Tribunal to consider whether, in the light of the evidence, it should include in the access agreement a provision reflecting a standard greater than the specified minimum standard.

[125] Rallen does not connect the ground to the requirement under standard minimum protection clause 12(1) ('Compensation for drilling') that the minimum amount of compensation payable for the drilling of a well on the land must be set out in the access agreement. In any event, that requirement was satisfied by the inclusion of clause 12(1) of the approved access agreement, which fixed the compensation payable for the drilling of each well at $15,000, to be paid within 14 days of the date of giving notice of intention to commence drilling of that well.

[126] I note also that the ground overlooks clause 15 of the approved access agreement ('General compensation') which, read with Annexure 1, imposed an obligation on Sweetpea to pay compensation at specified rates for specified future activities. The compensation rates specified were "the basis of calculation of amounts ... of compensation payable

to the Occupier under sections 81 and 82 of the Act".[113] The approved access agreement further provided that compensation did not limit the right of Rallen to claim compensation under s 81 and s 82 for damage as a result of Sweetpea's "negligence or breach of the law" or "for any other activities". Moreover, the compensation provided for did not limit Sweetpea's rehabilitation obligations "under law". It is clear, contrary to Rallen's arguments, that the approved access agreement did include provisions in relation to compensation that were referable to s 80 and s 81 of the Act.

[127] Sweetpea points out that the compensation provisions in the approved access agreement determined by the Tribunal (clauses 12, 15 and the Annexure) were the subject of agreement between the parties. The evidence demonstrates that a joint communication sent to the Tribunal on 5 April 2022 attached an agreed draft of the two clauses and a schedule,[114] which the parties requested be included in the approved access agreement. They were duly included as clauses 12, 15 and Annexure 1.

[128] In the circumstances, I am satisfied that there is no basis for Rallen's complaint that the Tribunal failed to exercise jurisdiction under regulation 29(1) in relation to including provisions relating to compensation pursuant to s 81(1) of the Act in the approved access

113 Approved access agreement, clause 15(c).

114 AB 2101-2103.

agreement. This is so, even if the Tribunal's construction of s 82A *Petroleum Act 1984* were incorrect.

[129] Proposed ground 6 is not made out.

Proposed ground 7

[130] Rallen argues under this ground that the Tribunal misconstrued clause 13 of Schedule 2 of the Regulations and erred in law in determining that Rallen's valuation methodology did not reflect a 'decrease in market value' within the meaning of that clause.

[131] The ground of appeal ultimately asserts a constructive failure to exercise jurisdiction (see further below), but Rallen's essential grievance is that the Tribunal preferred the evidence of Sweetpea's valuer (Frank Peacocke) to the evidence of Rallen's valuer (Shaun Hendy).

[132] In its consideration of the valuation evidence, the Tribunal noted that the methodology adopted by Mr Peacocke and Mr Hendy to ascertain decrease in market value differed markedly. Mr Peacocke adopted a comparative sales approach to support his opinion that the activities to be undertaken by the applicant on the respondent's land would result in 'nil' decrease in market value. Mr Hendy adopted a piecemeal approach, leading to the conclusion that the decrease in market value resulting from Sweetpea's activities would $475,000.

[133] As the Tribunal explained, Mr Peacocke's opinion was formed on the basis of certain critical assumptions, namely that (1) any approved access agreement would include the standard minimum protections; (2) remediation and rehabilitation works would occur in compliance with the Environment Management Plan, industry standards, the standard minimum protections and statutory requirements; (3) activities would be carried out in such a way as to cause as little disturbance as practicable to the environment and the landholder's use of the land; and (4) that compensation would be determinable at a future date.[115]

[134] Mr Peacocke had considered comparable sales in the Northern Territory over at least the previous 10 years and had come to the opinion that there was no evidence that the proposed activities would impact the market value of the property. He took into account that the proposed area in which exploration activities would be carried out comprised "only a very small proportion of the overall subject property". His ultimate view was that "a potential purchaser of the subject property would not be successful in negotiating a discernible discount in the price payable for the property due the existence of the previously impacted activity areas".

[135] Mr Hendy applied the 'piecemeal approach' to his valuation, that is, a summation of the components said to represent the various heads of compensation. He considered that this was a more appropriate approach

115 Tribunal decision, par 128.

in circumstances "when the difference in the value land before is of little discernible difference to the after valuation calculation."[116]

[136] The Tribunal referred to the fact that, in calculating the head of damage "decrease in market value of land", Mr Hendy included the following three factors:[117] (1) increased operations costs required to monitor and manage affected land for weeds; (2) increased operating costs required to monitor and manage affected areas for land degradation; and (3) increased operating costs required to communicate with the operator regarding the above issues as required outside of the operator's monitoring and rehabilitation process.

[137] The Tribunal's reasons for referring the approach or methodology of Mr Peacocke were as follows:[118]

> In our view Mr Hendy's approach is not a compelling basis upon which to determine a reduction in market value. The landholder and any prudent hypothetical purchaser are entitled to rely upon the standard minimum protections and the obligations of the permit holder under the EMP and statutory regime. These include obligations to control weeds and erosion and to monitor and make good any damage. Failure to do so may ground an application for compensation. We do not consider the need to "monitor the monitor" a compelling basis for accepting a decrease in the value of the land. The decision of Mr Hendy to apply a piecemeal approach seems to be in response to the fact that in a comparison between before and after sales any diminution of land value is negligible to the point of being indiscernible. We prefer the method used by Mr Peacocke.

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116 Tribunal decision, par 131.

117 Tribunal decision par 132. In his examination-in-chief, Mr Hendy referred to the need for the owners and managers "to prudently incur additional management costs just to monitor the activities that sweet pea as the operator propose to do along the seismic lines. See AB 2038.5.

118 Tribunal decision, pars 133, 134.

> Accordingly, we do not anticipate that the proposed activities will lead to a decrease in the market value of the land and will include a provision to that effect in the AAA. The provision will also make clear that it does not limit the right of the respondents to apply for compensation on this basis should a decrease in the value of the land occur as a result of the applicant's activities.

[138] Rallen argues that Mr Peacock undertook his 'before and after valuation' on the assumption that the proposed activities on the land were those set out in the draft access agreement attached to Sweetpea's initiating application filed on 13 August 2021 which, Rallen contends, defined those activities narrowly and set out a proposed work program limited to short time periods.[119] Rallen asserts that Sweetpea "immediately before the proceedings commenced" provided a new access agreement in which the scope of activities was widened, but that (1) the valuers did not "update their evidence" to reflect the widening of the scope of activities, and (2) submissions were not sought or made by either party as to the impact of the wider scope. The result, in Rallen's submission, is that the Tribunal did not assess whether any decrease in market value of Tanumbirini was anticipated as a result of "any activities carried out on the land", as required by clause 13(1) of Schedule 2. Rallen contends that there was "no evidence before the Tribunal which assessed whether such a wide scope of activities, to be conducted on an open-ended timeframe, as permitted by the terms of the access agreement determined by it, would lead to a decrease in the market value of Tanumbirini". The Tribunal therefore "constructively

119 Rallen's outline of written submissions, 13 May 2022, par 67.

failed to exercise its jurisdiction, which was to determine the compensation payable as a result of the activities to be carried out on the land".[120]

[139] As to the very last part of the submission extracted in the previous paragraph, I point out that the Tribunal's task was not to determine 'the compensation payable as a result of the activities to be carried out on the land', but rather to *indicate*, for the purposes of the access agreement, "whether it is *anticipated* that any activities carried out on the land will lead to a decrease in the market value of the land and, if so, [to provide] a *preliminary assessment* of the amount of the decrease". I refer to the discussion of the standard minimum protection clause 13(1) requirement in [85] – [86] above.

[140] Returning to the submission summarised in [138], it is curious that Rallen now complains that the valuers did not "update their evidence" to reflect the widening of the scope of activities. The obvious reason is that the representatives of the parties, specifically Rallen's lawyers, did not alert the valuers to what is now asserted to be a significant widening of the scope of activities to be carried on, and ask the valuers to 'update their evidence'. I refer to the lengthy cross-examination of Mr Peacocke by Rallen's counsel.[121] It does not appear that counsel raised the issue of the widening of the scope of activities and timing

120 Rallen's outline of written submissions, 13 May 2022, par 71.
121 AB 2002-2018.

thereof, or that he questioned Mr Peacocke as to whether the extent of the widening affected or might affect his opinion. Further, when counsel conducted the examination-in-chief of Mr Hendy (after the cross examination of Mr Peacocke), again he did not raise the issue.[122]

[141] To the extent that the Tribunal did not deal with suggested deficiency in the valuers' evidence in relation to the widening of the scope of activities to be carried on and the time periods involved, it was because the parties did not raise the issue for the Tribunal's consideration and determination. I referred to the absence of evidence in [140] above. As to the contention that "submissions were not sought or made by either party as to the impact of the wider scope", the most relevant fact is that counsel for Rallen did not make any such submission. It is elementary that the parties are bound by the conduct of their respective cases before the Tribunal. As the High Court remarked in *Metwally v University of Wollongong*:[123]

> Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.

[142] The statement in *Metwally* is particularly relevant in the present case because, had the issue now raised been argued before the Tribunal, the critical assumptions made by Mr Peacocke, referred to in [133], would

122 AB 2038-2040.

123 *Metwally v University of Wollongong* (1985) 60 ALR 68 at 71.9.

not necessarily have been displaced by any widening of the scope of activities to be carried on or the time periods involved. Indeed, Rallen has not sought to explain how those critical assumptions would not be valid in the context of the widened scope and timing of exploration activities.

[143] Counsel for Sweetpea refers to the limited effect in any event of the Tribunal's consideration of the valuation evidence, and contends that even if the Tribunal had 'anticipated' a decrease in the market value of the land, the only consequence would be that the resulting clause in the access agreement would include a 'preliminary assessment' of the amount of the decrease. Counsel contends that, "either way, the resulting clause does not limit any right under the Act as to the provision or payment of compensation, or any right to apply to the Tribunal if there is a dispute about compensation".[124] I agree. This submission accords with my reasoning in [85] and to the conclusion stated in [86].

[144] In conclusion in relation to proposed ground 7, even if, through the parties' inadvertence to raise a relevant matter for the Tribunal's consideration, the Tribunal failed to consider that relevant matter, it would not be a vitiating error of law for the reason that the indication as to anticipated decrease in the market value of the land is

124 Sweetpea's outline of submissions, 7 June 2022, par 87.

hypothetical and has no effect in law on the rights, entitlements or liabilities of the parties.

Proposed ground 8

[145] Under this ground of appeal, Rallen refers to the terms of clause 27 of the access agreement determined by the Tribunal. Rallen contends, correctly, that clause 27 is not found in the standard minimum protections in Schedule 2. As I explained in [115], the clause came to be included in the agreement in response to Rallen's suggestion that a sub-clause be inserted into clause 25 of the standard minimum protection clauses to provide for the access agreement to terminate if Sweetpea was in breach of the access agreement and failed to remedy the breach within 14 days. The proposed sub-clause was as follows:[125]

> The agreement terminates:
>
> (e) if the interest holder breaches the access agreement and fails to remedy the breach within 14 days, and if the breach is incapable of remedy and incapable of compensation or the interest holder fails to compensation [*sic*] the occupier within 14 days of receipt of a reasonable estimate of the damage.

[146] For completeness, I set out below clause 25 ('Dispute Resolution') and clause 27 ('Breach') of the access agreement determined by the Tribunal:

> **25. DISPUTE RESOLUTION (SMP 24)**
>
> (a) In the event of a dispute that arises out of, or in relation to, the agreement, the parties agree:

125 AB 1720.

(i) that the party raising the matter in dispute will give notice to the other relevant party or parties; and

(ii) that the parties will act in good faith and use reasonable endeavours to resolve the dispute in a timely manner.

(b) Subclause (a)does not prevent a party seeking relief in a matter of urgency

27. BREACH

(a) If a party (non-defaulting party) alleges a material breach of this access agreement by the other party (defaulting party) then the non-defaulting party may serve a notice on the defaulting party (Notice of Default) specifying the material breach complained of, what is required to rectify the material breach and a reasonable time (not less than 14 days) to remedy the material breach.

(b) If the defaulting party does not:

(i) remedy the material breach within the time required; or

(ii) give written notice of dispute in relation to the Notice of Default, within 14 days of the receipt of Notice of Default, then the non-defaulting party may revert to the dispute resolution mechanism under Clause 25.

[147] Rallen contends that clause 27 as "an impermissible threshold" to a party accessing clause 25; that none of the standard minimum protections in Schedule 2 contain a threshold which must be met before the dispute resolution process can be invoked under clause 25 of the access agreement.[126] It contends that the Tribunal erred on a question of law by misconstruing the Regulations and determining a provision of the access agreement which did not reflect the relevant standard minimum protections in Schedule 2.

126 Clause 25 of the access agreement corresponds to standard minimum protections clause 24 in Schedule 2.

[148] Sweetpea contends that clause 27 is couched in permissive language, evidenced by the use of the word “may”. The clause does not exclude recourse to clause 25 in the event of any dispute.

[149] In my opinion, clause 27 permits a non-defaulting party which alleges a material breach of the access agreement to follow a procedure which would bring the breach ‘to a head’. It does not mandate that procedure. If followed, the procedure described in clause 27(a) might lead to a resolution of the allegation of a material breach, for example, if the breach is remedied. In that case, there would be no dispute resolution required under clause 25. On the other hand, the procedure described in clause 27(a) might lead to the alleged defaulting party giving written notice of dispute, which would then lead back to clause 25.

[150] Clause 27 does not exclude recourse to clause 25 in the event of a dispute. In my opinion, there is no necessary conflict between clause 25 and clause 27. I consider that they should be read harmoniously, such that they are both available to the parties and provide alternative paths to resolution of an asserted breach or other dispute.

[151] The error of law contended for under proposed ground 8 is not made out.

[152] If I am wrong in my conclusion in the previous paragraph, then it would be appropriate to simply strike out clause 27, to effect a variation of the Tribunal’s decision. This may be ordered by the Court

pursuant to s 141(3)(b) *Northern Territory Civil and Administrative Tribunal Act 2014*, extracted in [4] above. This would be only a very limited variation of the Tribunal's decision.

Orders

[153] The application for leave to appeal is allowed.

[154] The appeal is dismissed.

[155] The decision of the Tribunal is confirmed.

[156] The question of costs is reserved.

[157] If Rallen contends that a costs order should not be made against it in this appeal, it must file and serve written submissions within 21 days of today. If Rallen does not avail itself of that opportunity, I will determine costs without further reference to the parties. If Rallen files and serves written submissions in relation to costs, Sweetpea then has 21 days from the date of receipt of Rallen's submissions to file and serve written submissions in response. Rallen then has a further 10 days within which to file and serve its reply. The issue of costs will then be determined on the papers.

[158] The parties should file orders in the Registry consistent with these Reasons.

[159] By way of clarification, where I have ordered in [154] that the decision of the Tribunal is confirmed, I refer to the Tribunal's order

made 4 May 2022, to which was attached the Access Agreement determined by the Tribunal.
