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# ROUSSOS

## LEGAL ADVISORY

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## Case Note

*The Environment Centre Northern Territory (NT) Inc v The Minister for Land Resource Management* [2015] NTSC 30

### Northern Territory Water Act, section 30

#### Summary

This Supreme Court matter related to the decision of the Controller of Water Resources under the (NT) *Water Act* to issue 7 water extraction licences relating to the Mataranka Tindall Limestone Aquifer; and 11 water extraction licences relating to the Ooloo Dolostone Aquifer.

The Minister agreed with the Controller's decision; and limited consideration to whether there was an error shown on the part of the Controller reaching that decision. The Minister took the view that, under the legislation, the Minister was not required to otherwise independently carry out a review of the Controller's decision on the merits.

Interpreting the legislation, the Supreme Court found the Minister was required to review the decision on the merits; and the Court referred the matter back to the Minister for that purpose.

#### The Tindall and Ooloo aquifers

The Tindall aquifer:

- forms part of the expansive groundwater resource called the Daly Sedimentary Basin.
- discharges water around the Elsey National Park area through Bitter and Rainbow Springs. These springs in turn feed the Roper River.

The Ooloo aquifer:

- is smaller in area but provides greater volumes of water.
- overlays the northern part of the Tindall aquifer and sits closer to ground level.
- the largest groundwater-dependent ecosystems of the Ooloo aquifer are the Katherine and Daly Rivers.

## Decision of the Controller of Water Resources and the Minister to issue water extraction licences

On:

- 1 April 2014, the Controller made a decision to issue 7 water extraction licences permitting extraction of groundwater from the Mataranka Tindall Limestone Aquifer (12 pages of reasons).
- 12 May 2014, the Controller made a decision to issue 11 water extraction licences permitting extraction of groundwater from the Ooloo Dolostone Aquifer (9 pages of reasons).

The Minister made two decisions on or shortly before 14 July 2014, when letters referring to the relevant applications for review and containing reasons were signed by the Minister.

### The Supreme Court Challenge

The Environment Centre Northern Territory (NT) Incorporated (ECNT) applied to the Supreme Court challenging those decisions. The matter was argued on 15 December 2014; and decided on 29 May 2015.

The issue revolved around whether the Minister was required by the legislation to, independently of the Controller, review the merits of the applications for water licences.

In the Court proceedings, The Minister:

- conceded he did not independently undertake a review of the merits of the Water Controller's decision; and argued the legislation did not require this.
- contended that only if there was a demonstrated error on the part of the Controller would the Minister be required or empowered to consider the matter on its merits.

The ECNT argued s30 of the *Water Act* required the Minister to undertake a merits review; and that the Minister was bound to make up his own mind about what he ought to do (and not confine himself to an error based review of the Controller's decision).

For its argument, the ECNT concentrated on s30(3)(a)(ii) of the *Water Act* (which states 'the Minister may in the case of an application against a decision of the Controller substitute for the decision the decision that, in the opinion of the Minister, the Controller should have made in the first instance'); and contended 'that this is the language of a merits review...because it suggests that the Minister's function on review is to 'do over again' what the Controller did.'

### Matters taken into account

As the Minister conceded he did not make a merits review of the Controller's decision, the Supreme Court did not need to enquire into how the Minister approached the matter.

Justice Hiley noted, however, that 'the Minister did refer to a number of things that the Controller took into account but also discussed other matters that he apparently considered relevant to the granting of water extraction licences under the Act.'

‘The main focus of the Minister’s reasons seems to have been the submissions placed before him by [the ECNT] in its applications for review under the heading “Grounds for Review”....[and there is] no reason why the Minister should not have referred to and had regard to the matters discussed and dealt with by the Controller in his detailed reasons, which comprised some 12 pages in relation to the Tindall licences, and nine pages in relation to the Oolloo licences.’

### The Supreme Court’s decision

The Supreme Court disagreed with the Minister’s argument (that the Minister is not obliged to review the merits of the Controller’s decision in the absence of some kind of error on the part of the Controller). The Court decided the Minister was required to independently review the application on the merits.

Accordingly, the Minister’s decisions of 14 July 2014 were set aside and the Minister was required to determine the water extraction applications afresh.

Justice Hiley said ‘the Minister is obliged to consider each of the matters raised in the application, whether or not they suggest some error of a legal or factual kind. The extent to which the Minister is obliged to consider the Controller’s decision or action, and any other materials whether or not they were before the Controller, will vary from case to case.’

Aside of the legal principles of Judicial Review argued in the case, Justice Hiley indicated the following supported the Court’s interpretation of the relevant provisions of the *Water Act*:

- an ‘important consideration when construing the statutory powers of a Minister in a matter such as this is the public interest in the proper management of water.’
- a quote from the case of *ICM Agriculture Pty Ltd v The Commonwealth* that in ‘Australia, water and rights to use water are of critical importance, not just to those who are immediately interested in particular water rights, but to society as a whole.’
- that ‘it would be inimical to the protection of such an important public interest if the Minister’s powers, once enlivened under s30, were constrained in the way contended for by Minister. I agree with [the ECNT’s] contention that there is no reason expressed or implied, in s30 or elsewhere in the Act, why the Minister would not be able to advance and protect the public interest by taking into account information relevant to the grant of the licence under review, particularly where such information has been generated or acquired after the Controller made his or her decision.’

The Court considered the following factors also indicated the proper interpretation of relevant provisions of the *Water Act* required the Minister to carry out a review of the Controller’s decisions on the merits:

- as the Minister is responsible for administering the Act, the Minister ‘would be able to obtain any necessary specialist assistance from relevant departmental officers and other bodies established under the Act such as a Water Advisory Committee (s23) and the Review Panel. The Minister would also be entitled to rely upon the expertise of the Controller.’
- although ‘Parliament has vested most of the powers and responsibilities for the management of water resources in the Northern Territory in the Controller and decisions of the Controller are final, subject only to the right of review contained in s30’; this does not mean the Minister is limited to considering only whether an error has been made by the Controller.

- the ‘scope of an internal merits review ... is an important safeguard for the proper operation of the legislative scheme.’
- whilst it was argued that a merits review would require the Minister to ‘re-exercise all the functions of the Controller afresh, even if no error is shown in the decision made by the Controller, simply because a person aggrieved has made an application for review’, Justice Hiley noted the Minister has ‘a wide choice available as to how he or she undertakes the task of deciding for himself or herself what is the true and correct decision’; and it is for the Minister to decide how far he or she needs to ‘re-exercise’ the Controller’s functions in order to decide what is the true and correct decision.’

## Guidelines

The Court considered how the Minister might approach the matter. Justice Hiley thought that:

- the Minister’s review would not ‘necessarily require the Minister to engage in an extensive merits review de novo. Indeed it would often be pointless and unnecessarily time consuming for that to be done.’
- ‘the Minister would be entitled to assume the correctness of such part of the Controller’s decision as was not being impugned in the application for review, and to assume that the Controller had otherwise correctly performed his or her functions in the process of making his or her decision, such as, for example, taking into account the factors stipulated in s90.’

In relation to the ‘nature and extent of the Minister’s task when conducting a merits review’, the Court indicated the following points:

- ‘that the [Controller’s] decision is not to be ignored but that the [Minister] needs to decide for himself whether that decision is wrong and what is the ‘true and correct’ or ‘preferable and correct’ decision.’
- ‘a broad ranging factual enquiry afresh is not necessarily required.’
- ‘the [Minister] has a wide choice available as to how he or she undertakes the task of deciding what is the true and correct decision.’
- ‘error (or lack of it) by the [Controller] will or may be relevant to the [Minister’s] task, but does not define the task.’

Justice Hiley further indicated:

- after ‘perusing the application for review and the reasons provided by the Controller, the Minister may be satisfied, without more, that the decision or action of the Controller was appropriate, and should be upheld under s30(3)(a)(i) without making any further enquiry. Although that would involve a merits review, it would not require an extensive process such as consideration of all of the materials de novo.’
- as ‘part of that process, if the grounds do disclose error on the part of the Controller, the Minister should consider the possible effects of that error on the Controller’s decision or action.’

- the ‘existence of such an error, or of additional information that may already have come forward, might cause the Minister to decide that the Controller’s decision should be overruled or changed by substituting his or her own decision under s30(1)(a)(ii). This might, but would not necessarily, require the Minister to engage in a more extensive merits review.’
- alternatively, ‘the Minister might consider that he or she needs to consider additional information before making a decision. This could include examining some of the materials or comments that had been provided to the Controller under s 71B(4) or used by the Controller for the purposes of s 90(1), examining additional materials or comments provided by the applicant for review, or seeking assistance from the Review Panel. The Minister could then proceed to uphold the decision under s30(3)(a)(i) without more, or proceed under s30(3)(a)(ii) or (iii).’
- in ‘other cases the Minister might consider that the matter should be referred back to the Controller under s 30(1)(a)(iii) without having first made any such further enquiries. For example, the Minister might consider that the applicant for review has identified an important error on the part of the Controller, such as the failure to take a relevant s 90(1) factor into account, and conclude that the matter should be referred back to the Controller so that could occur.’

## The Water Act statutory scheme

In the *ECNT v the Minister* case, the Supreme Court described the statutory scheme as follows.

- The *Water Act* provides for the investigation, allocation, use, control, protection, management and administration of water resources in the Northern Territory.
- The Act provides for the appointment by the Minister of a person to be the Controller of Water Resources.
- The Controller has an extensive range of powers and functions to enable him to administer the Act.
- The Act prohibits the extraction of ‘ground water; without a licence.
- The Controller has the power to grant licences to extract ground water.
- A licence so granted is a ‘water extraction licence.’
- A decision to grant a water extraction licence is a ‘water extraction licence decision.’

‘Water extraction licence decisions must be made in accordance with Part 6A of the Act. Part 6A consists of ss 71A-71E. Section 71B relevantly provides that prior to making a decision:

- (a) the Controller must give notice of an intention to make a water extraction licence decision.
- (b) the Controller must publish that notice in a newspaper in the area to which the application relates.
- (c) the notice must include certain information.
- (d) the notice must include an invitation to make written comments about the application to the Controller.

Section 71C provides for what must be done by the Controller in making a water extraction licence decision. Relevantly, s 71C provides that:

- (2) In making the decision, the Controller must take into account all the comments about the relevant application made in accordance with section 71B(4).
- (3) A copy of the full decision must be available to the public and must include the reasons for the decision and the way in which the Controller has taken into account:
  - (a) the comments mentioned in subsection (2); and
  - (b) any relevant factors mentioned in s 90(1).

Section 90(1) provides that, when making a water extraction licence decision, the Controller must take into account any of the factors listed in that section that are relevant to the decision.

Section 71D provides for actions that must be taken by the Controller after a water extraction licence decision has been made. Relevantly:

- (a) the Controller must give notice of the decision, both to the applicant and by publishing a notice of the decision in the same newspaper(s) as that in which notice of the relevant application was given (s 71D(1));
- (b) that notice must include a brief statement of the reasons for the water extraction licence decision, must advise where a person may read or obtain a copy of the decision, and advise that a person aggrieved may seek review of the decision under s 30 (s 71D(2)).

Section 30 of the Act provides as follows:

- (1) Subject to subsection (2), a person aggrieved by an action or decision under this Act (other than section 93(3)) of the Controller, or under section 5(6) of the Minister, may apply to the Minister to review the matter.
- (2) An application under this section shall be made in the prescribed manner and form.
- (3) Subject to this Act, the Minister may:
  - (a) in the case of an application against a decision of the Controller:
    - (i) uphold the action or decision;
    - (ii) substitute for the decision the decision that, in the opinion of the Minister, the Controller should have made in the first instance; or
    - (iii) refer a matter back to the Controller for reconsideration of the action or decision with or without directions about new matters that the Controller shall take into account in that reconsideration; or
  - (b) in any case, refer the matter to the Review Panel with the request that it advise the Minister within the time indicated on what action the Minister should take in relation to the matter.
- (4) Where a matter has been referred under subsection (3)(b) to the Review Panel, the Review Panel shall consider it and advise the Minister accordingly and the Minister shall take such action under subsection 3(a)(i) or (ii) as he or she thinks fit.

If the Minister decides to exercise the power in s 30(3)(a)(ii) or if the Controller makes a decision following a referral by the Minister under s 30(3)(a)(iii) that is substantially different from the original decision (both of which are described as “the review decision”), s 71E provides that certain notice and reasons requirements must be complied with. Specifically:

- (a) the Controller must publish notice of the review decision in the same newspaper (or newspapers) in which the original decision was published (s 71E(2));

- (b) that notice must include a brief statement of the reasons for the review decision and advise where a person may read or obtain a copy of the full review decision (s 71E(3));
- (c) the review decision must include the reasons for the decision and the way in which the Minister or Controller has taken into account s 71B(4) comments and s 90(1) factors.

The Act does not impose any such requirements in respect of a decision of the Minister to uphold a decision of the Controller under s 30(3)(a)(i).

The Controller may amend or modify the terms and conditions of a licence, revoke a licence or suspend it for a period.'

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