CITATION:	*The Environment Centre Northern Territory v The Northern Territory Environment Protection Authority and Anor* [2019] NTSC 69
PARTIES:	THE ENVIRONMENT CENTRE NORTHERN TERRITORY v NORTHERN TERRITORY ENVIRONMENT PROTECTION AUTHORITY and THE ENVIRONMENT CENTRE NORTHERN TERRITORY v PASTORAL LAND BOARD OF THE NORTHERN TERRITORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	123 of 2017 (21759813) and 124 of 2017 (21759816)
DELIVERED:	4 September 2019
HEARING DATES:	6, 7 and 14 December 2018
JUDGMENT OF:	Barr J

CATCHWORDS:

ADMINISTRATIVE LAW – MEETINGS – 'Proposed action' – proposed land clearing on pastoral property – Authority charged with deciding whether a public environmental report (PER) or environmental impact statement (EIS) necessary – 'meeting' took place by exchange of emails over several days – motion not put to a vote – analysis of email communications – chairperson wrongly determined majority decision not to require EIS – decision not "determined by the majority vote of members present and voting" – no decision made as to necessity for PER – non-compliance with mandatory legislative requirements – orders in the nature of certiorari and mandamus granted

Environmental Assessment Act 1982, s 3, s 4, s 7(1)

Northern Territory Environment Protection Authority Act 2012, s 6, s 7, s 8(1)(b), s 8(4), s 10(2), s 16, s 17, s 18, s 20(1), s 20(2) s 22, s 23,

Environmental Assessment Administrative Procedures, cl 6(1), cl 6(2), cl 8(1), cl 8(2)

Interpretation Act 1978, s 48A (2),

Minister for Natural Resources v New South Wales Aboriginal Land Council and anor (1987) 9 NSWLR 154; *Minister for Immigration and Citizenship v Yucesan and Another* [2008] FCAFC 110; 247 ALR 443; *Lee v Napier and ors* [2013] FCA 236, referred to

Everett v Griffiths [1924] 1 K.B. 941; *The King v Hendon Rural District Council; Ex parte Thorley* [1933] 2 K.B. 696, distinguished

REPRESENTATION:

Counsel:

Plaintiff:	H Hutton; P Bellach
Defendants:	S Brownhill SC, Solicitor-General; L Peattie

Solicitors:

Plaintiff:	Environmental Defenders Office (NT) Inc.
Defendants:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Bar1910
Number of pages:	33

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

The Environment Centre Northern Territory v The Northern Territory Environment Protection Authority and anor [2019] NTSC 69
No. 123 of 2017 (21759813) and 124 of 2017 (21759816)

BETWEEN:

THE ENVIRONMENT CENTRE NORTHERN TERRITORY
Plaintiff

AND:

NORTHERN TERRITORY ENVIRONMENT PROTECTION AUTHORITY
Defendant

AND BETWEEN:

THE ENVIRONMENT CENTRE NORTHERN TERRITORY
Plaintiff

AND:

PASTORAL LAND BOARD OF THE NORTHERN TERRITORY
Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 4 September 2019)

[1] Central to this litigation is a decision purportedly made by the Northern Territory Environment Protection Authority that the environmental impacts and risks of proposed vegetation clearing at Maryfield Station were not

sufficiently significant to warrant environmental impact assessment under the *Environmental Assessment Act 1982*. I will refer to that decision as "the purported decision".

[2] For reasons which follow, I find that the purported decision was not a valid decision of the Northern Territory Environment Protection Authority. The decision-making process did not comply with the mandatory requirements of s 20(1) *Northern Territory Environment Protection Authority Act 2012*. No vote was taken at a meeting of the Authority, and hence the purported decision was not a decision "determined by the majority vote of members present and voting", as required by the subsection.

Legislative and regulatory provisions

[3] The Northern Territory Environment Protection Authority ("the Authority") is established by s 6 of the *Northern Territory Environment Protection Authority Act 2012*.

[4] The Authority consists of five appointed members and the Chairperson of the Planning Commission (a commission established by s 81A *Planning Act 1999*). The appointed members are intended to be specialist members; that is, they are appointed on the basis that they have skills, knowledge and experience in the areas of environmental science, environmental and natural resource management, waste management and pollution control, and/or any of the other specialist areas referred to in s 10(2)(b) of the Act.

[5] At all relevant times, the appointed members of the Authority were Dr Paul Vogel, Ms Janice van Reyk, Dr Ian Wallis, Dr John Chapman, and Mr Colin (Joe) Woodward. Dr Vogel was the appointed chairperson. Dr David Ritchie was also a member of the Authority by virtue of being the Chairperson of the Planning Commission.[1]

[6] The objectives of the Authority are set out in s 7 of the Act and include promoting ecologically sustainable development (s 7(a)) and protecting the environment, "having regard to the need to enable ecologically sustainable development" (s 7(b)).

[7] Relevantly, one of the stated functions of the Authority is "to undertake functions associated with environmental assessments" (s 8(1)(b)). The Authority must "integrate both long-term and short-term economic, environmental and social equity considerations in its decision-making" (s 8(4)).

[8] Closely related to the *Northern Territory Environment Protection Authority Act 2012* is the *Environmental Assessment Act 1982*, s 4 of which states its sole object as follows: "to ensure, to the greatest extent practicable, that each matter affecting the environment which is, in the opinion of the NT EPA [the Authority] a matter which could reasonably be considered to be capable of having a significant effect on the environment, is fully examined and taken into account" in relation to, inter alia: (a) the formulation of

1 The Chairperson of the Planning Commission is a member of the Authority pursuant to s 10 (1)(b) *Northern Territory Environment Protection Authority Act*.

proposals, (b) the carrying out of works and other projects, and (d) the making of … decisions and recommendations.

[9] The word "environment" is defined as follows in s 3 *Environmental Assessment Act 1982*:

> *environment* means all aspects of the surroundings of man including the physical, biological, economic, cultural and social aspects.

[10] The *Environmental Assessment Act 1982*, s 7(1), permits the Administrator to determine administrative procedures for the purpose of achieving the object of the Act. Administrative procedures made pursuant to that sub-section are contained in the *Environmental Assessment Administrative Procedures* ("the Procedures") as varied from time to time.[2]

[11] Various processes are triggered when a proponent formulates a proposal or a "proposed action". Under the Procedures, after being informed of a proposed action, a responsible Minister must notify the Authority in writing. The notification must specify the proposed action and give details of the proponent.[3] After receiving such notification, the Authority may direct the proponent to provide further information which it considers necessary for determining whether or not a public environmental report (a 'PER') or an environmental impact statement (an 'EIS') is necessary in respect of the proposed action.[4] After receiving such further information, and, where

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2 Relevant to these proceedings, the administrative procedures are those in the reprint of 1 January 2013.

3 Procedures, cl. 6(1).

4 Procedures, cl. 6(2).

applicable, after due consultation with advisory bodies and the responsible Minister,[5] the Authority must give due consideration as to whether or not a PER or an EIS is necessary in respect of the proposed action.[6] The Authority must then inform the proponent and the Minister either that it has decided that a PER or an EIS is necessary,[7] or (if neither is considered necessary) that the administrative procedures are at an end.

[12] On or shortly after 20 June 2016, an application to clear vegetation from 237.95 km² of land at Maryfield Station was lodged with the Pastoral Land Board. That application set out details of the contentious "proposed action". In June 2017, the application was referred by the Pastoral Land Board to the Northern Territory Environment Protection Authority. Because of the basis on which I have decided this matter, it is not necessary for me to detail the administrative actions which took place from the time the application was lodged with the Pastoral Land Board in June 2016 and then referred to the Authority in June 2017. It is sufficient to note that, on 11 October 2017, Departmental officers provided to the members of the Authority a document entitled "Out-of-Session Briefing Paper",[8] in which it was recommended that the Authority decide that the Maryfield Station land clearing project did not require assessment under the *Environmental Assessment Act 1982*. A

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5 Procedures, cl. 8(1).

6 Procedures, cl. 8(2). The requirement to give due consideration is implied because Cl 8.2 begins "Having given due consideration as to whether or not it is necessary for a public environmental report or an environmental impact statement in respect of the proposed action …".

7 By implication it must specify which of the two (PER or EIS) it considers necessary.

8 Document 80A, Joint Tender Bundle ('JTB') p 446.

document containing suggested reasons on which the Authority might rely to support its decision was also provided.[9]

[13] I am satisfied that any decision, as to whether or not a PER or an EIS was necessary in respect of the proposed action, had to be made by a meeting of the Authority. Although s 36 *Northern Territory Environment Protection Authority Act 2012* permits the Authority to delegate any of its powers and functions to a member, a public sector employee or a Chief Executive Officer, no relevant power had been delegated by the Authority and so the decision, to be valid, had to be made by a meeting of the Authority.

[14] I turn to consider the statutory and regulatory requirements for such a meeting.

[15] Under s 17 (2) *Northern Territory Environment Protection Authority Act 2012*, the chairperson is required to convene a meeting of the Authority at least four times each year but may convene a meeting of the Authority at any time, pursuant to s17 (1). The quorum at meetings is a majority of members, that is, four of six.[10] A decision at a meeting must be determined by the majority vote of members present and voting.[11] If there is an equality of votes, the person presiding at the meeting has a casting vote.[12]

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9 Proposed 'Statement of Reasons', document 80D, JTB p 662; subsequently amended – see document 89, JTB p 698.

10 See s 18 of the Act. However, the statutory quorum requirement is displaced (reduced) in circumstances where a member has a disclosable personal interest under s 22 of the Act and is therefore prohibited from taking part in any deliberation or decision of the Authority pursuant to s 23 of the Act.

11 See s 20 (1) of the Act.

12 See s 20 (2) of the Act.

The meaning of a 'meeting' of the Authority

[16] In *Minister for Immigration and Citizenship v Yucesan and Anor*,[13] the Full Court of the Federal Court referred to the evolution in the common law's understanding of the notion of a 'meeting'. With specific reference to company law, the Court noted that the earlier requirement for a physical gathering had given way to acceptance that a meeting of company directors could validly take place where there was a 'meeting of minds' made possible by modern communication technology.[14] The Full Court then made the following observation:

> …. Business decisions to be made at a meeting of company directors will generally be arrived at after considering the advantages and disadvantages of competing ideas. While it would be foolish to suppose that the dynamics of a meeting by some form of telecommunication would be the same as the dynamics of a meeting where the decision-makers are present in person, the primacy of the intellectual component of the decision-making has been accepted and found its way into the concept of "a meeting of minds".

[17] Although the Full Court's discussion of the several company law authorities referred to in its judgment was probably obiter,[15] the cases cited in the Court's review are persuasive for the proposition that the essence of a meeting is a "meeting of minds", whether that is achieved by the gathering of individuals or by the use of modern technology.

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13 *Minister for Immigration and Citizenship v Yucesan and Another* [2008] FCAFC 110; 247 ALR 443 at [18].

14 *Minister for Immigration and Citizenship v Yucesan and Another* [2008] FCAFC 110; 247 ALR 443 at [21] – [25] and the cases there cited.

15 The Full Court's consideration of the company law requirements for a "meeting" arose because the Court was called upon to consider the requirement under cl 300.214 of Sch 2 to the Migration Regulations 1994 (Cth), as to whether the parties to a prospective marriage had "met" in circumstances where they had not met in person.

[18] In the case of public bodies, s 48A(2) *Interpretation Act 1978* relevantly provided that a body established by an Act, "if the Act requires or permits meetings of the members of the body to be held", could permit its members to participate in its meetings by telephone, closed circuit television, facsimile exchange or "any other means of communication", in which case the member would be taken as present at the meeting. The subsection was amended by the *Interpretation Legislation Amendment Act 2018*,[16] to make specific reference to "exchange of emails" and "online facilities". The amendment commenced on 11 December 2018 and thus had no effect with respect to the purported decision. Nonetheless, I am satisfied that the expression "any other means of communication" appearing in s 48A(2)(d) prior to the amendment would have permitted participation in meetings by the exchange or circulation of emails. The plaintiff does not submit that members of the Authority were not able to participate in that way.

[19] The purported decision was not made at a formal meeting at which members gathered together or attended in person. Rather, as described in [12] above, it involved consideration of an "Out-of-Session Briefing Paper". The Authority was permitted to determine its own procedures by s 16 *Northern Territory Environment Protection Authority Act 2012*, and had previously issued a document entitled "Meeting Procedures and Processes" which made provision for "NT EPA Out-of-Session Process" and the consideration of

16 Act 22/2018.

"NT EPA Out-of- Session papers".[17] The quorum for deliberation and decision about Out-of-Session papers was stated to be "a majority of members entitled to participate in the deliberation and/or decision of the Out-of-Session paper". That appears to be consistent with the statutory quorum requirement in s 18 and the majority vote requirement in s 20 of the Act.[18]

Consideration of the "Out-of-Session Briefing Paper"

[20] The briefing paper referred to in [12] and [19] recommended that the Authority decide that the Maryfield Station Land Clearing Project did not require assessment under the *Environmental Assessment Act*, for reasons which it was recommended the Authority approve.[19] The draft suggested statement of reasons concluded as follows:[20]

> *Conclusion*
>
> The NT EPA considers that the Project does not require further assessment under the EA Act and has provided recommendations to the PLB to ensure that impacts can be appropriately managed and responsibilities under other relevant legislation can be met.
>
> DECISION
>
> The proposed action, which was referred to the NT EPA by the Pastoral Land Board, has been examined by the NT EPA and preliminary investigations and inquiries conducted. The NT EPA has decided that the potential environmental impacts and risks of the proposed action are not so significant as to warrant an environmental impact assessment by the NT EPA under provisions of the *Environmental Assessment Act*. However, the proposed action will require assessment and approvals

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17 "Meeting Procedures and Processes", version 2, approved by the Authority in February 2016 (JTB p 844-850).

18 The quorum requirement is subject to the disqualification provisions in s 23 of the Act, referred to in footnote 10 above.

19 JTB p. 446; draft Reasons p. 662-665.

20 JTB p. 665.

> under the *Pastoral Land Act* to ensure the environmental issues associated with the proposed action are effectively managed.
>
> This decision is made in accordance with clause 8(2) of Environmental Assessment Administrative Procedures, and subject to clause 14A the administrative procedures are at an end with respect to the proposed action.

[21] On Wednesday 11 October 2017 at 10:25 AM, the following message was sent by email to all members of the Authority:

> Good Morning Members
>
> Please see attached OOS/2017-369-Maryfield Station Land Clearing Project, for decision, approval and noting
>
> Your response would be appreciated via reply email by Wednesday 18 October. If you have any major comments, please cc all in the email.

[22] The email was sent by Amanda Waa, executive officer to the Authority. The document(s) she referred to were not actually attached to the email but were uploaded to the 'members only' portal. Login details were provided to enable the recipients to access over 220 pages of documents which had been posted, comprising (inter alia) the "Out-of-Session Briefing Paper", Agency comments, and draft suggested statement of reasons.[21] It appears (and there is no evidence to the contrary) that the recommended decision and the draft statement of reasons had been prepared by Departmental officers without previous input from the chairperson or the other members of the Authority. Members probably first learnt of the proposed action when they had access to the 'members only' portal after receiving the email from Ms Waa referred to in [21].

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21 JTB pp. 446-672.

[23] The first member to respond was Dr Ian Wallis. On Wednesday 11 October 2017 at 1:32 PM, he sent an email to fellow members (and Departmental officers) in which he wrote as follows:

> Members
>
> My inconsistency meter is flashing red. This project is clearing 20,431 ha – for comparison, Noonamah Ridge is 2,800 ha. For many projects with much smaller area involved, we have required extensive flora and fauna surveys.
>
> I am not convinced there has been an adequate survey by the proponent to establish that there are no significant risks to biodiversity. Changes in water resources also may be significant.
>
> While I have sympathy with the view that an EIS is overkill, perhaps this is a situation where we should consider a PER with restricted scope.

[24] Dr Wallis then sent another email to the same recipients, about one hour later, on Wednesday 11 October at 2:30 PM. That email read as follows:

> Members
>
> From reading the associated documentation from the Pastoral Board and other NT agencies, it seems that there has been an ongoing process to agree on clearing conditions, rather like an EIS process. I thought what seemed to be missing was a formal statement of objectives and then a decision as to whether or not (*or to what degree) these objectives are being met.
>
> Perhaps in the longer term, a Strategic Review of land clearing with the Pastoral Board may be of value. In the short term, I consider the clearing impacts need to be exposed to public scrutiny and suggest a PER is the best option.

[25] Paul Purdon, an officer of the Department, sent an email to Dr Wallis and the other members on Wednesday 11 October at 2:59 PM. Notwithstanding the recorded time for that email, it would appear his email was sent after he

had read and considered the first (but not necessarily the second) of the emails sent by Dr Wallis.[22] Mr Purdon's email read as follows;

> Afternoon all
>
> On the issue Ian has raised about surveys, survey effort depends on potential for, and number of threatened species likely to be present, presence or absence of potential habitat and whether that habitat is critical to the persistence of that threatened species. In the case of Noonamah there were a lot of threatened species that had very restricted range, and the Project had the potential to have a significant impact on the global populations. In the case of Maryfield, there was one species that was targeted as 'known to occur' (Northern shrike-tit) but its habitat is very widespread. The back and forth between the Department and the proponent on this proposal was informed by advice from our Flora and Fauna Division.

[26] On Wednesday 11 October 2017 at 4:03 PM, Dr David Ritchie wrote to members (and Departmental officers) as follows:

> Hi Colleagues
>
> This is an order of magnitude beyond the old 200 ha "football field" threshold and the delay in the PLB referring this application to us maybe indicates they have concerns (or as the briefing suggests are floundering around a bit when considering this kind of application) – a good case study for why we need legislative reform in this area.
>
> The problem here is that it will set a precedent – (I'm assuming we have not had a lot of applications on this scale?) If I thought an EIS would guarantee a better environmental outcome then I would recommend we go down that path – but I do not – so agree with the approach whereby we give the PLB recommended conditions that will form part of the Permit – as long as we have an understanding from the PLB that they must be included – Otherwise its an EIS.

22 A general problem with the time attributed to the sending of emails is the difference in the time zones between the sender and recipients. This is reflected in the different times for the sending of particular emails in the JTB, depending on whether they were printed from the email account of the sender or receiver.

[27] On Thursday 12 October 2017 at 6:15AM, Janice van Reyk emailed members (and additional recipients Amanda Waa and Paul Purdon) as follows:

> I agree with David's comments. The scale is very concerning. There are also community concerns. It appears this is what prompted PLB to refer the matter to the NT EPA. I think the letters and the SoR could be a lot stricter in the language and convey this was a line decision.

[28] I make the following observations in relation to the email exchange to this point. Dr Wallis has progressed from suggesting consideration of "a PER with restricted scope" to expressing the view that a PER was the best option to expose the clearing impacts of the proposal to public scrutiny. Dr Ritchie has indicated his preference that the Authority's environmental concerns be resolved by the imposition of conditions, formulated by the Authority and provided to the Pastoral Land Board, which would then form part of the land clearing permit to be issued by the Board. However, in the absence of confirmation from the Board ("an understanding from the PLB") that such conditions would form part of the permit ("must be included"), Dr Ritchie thought that the Authority should require an EIS. Ms van Reyk has agreed with Dr Ritchie's comments, without exception or qualification. Because of her reference to the "SoR" (statement of reasons), I infer that she has agreed that the Authority decide not to require an EIS, but expressly or impliedly conditional on the matters stated by Dr Ritchie (with which she had agreed). I am not prepared to infer, as contended on behalf of the defendants, that Ms

van Reyk agreed unconditionally with the recommended outcome and content of the draft suggested statement of reasons.

[29] It may be noted that neither Dr Ritchie nor Ms van Reyk responded to Dr Wallis's stated preference for a PER. In fact, there was no further mention of a PER, by any of the members, notwithstanding the requirement that the Authority give consideration as to whether or not a PER or an EIS is necessary in respect of any proposed action.[23]

[30] On Thursday 12 October 2017 at 11:44 AM, Dr John Chapman sent an email to members (and Departmental officers) as follows:

> Hello all
>
> I agree with David & Janice. This is a very large area for clearing and sets a precedent; it is a pity that our legislation doesn't ask for offsets. Also I notice in the later correspondence a few East-West corridors. I could not clearly establish whether these actually connect with anything else (as they should). There seemed to be a corridor down the western side but the proponents argued that there needed to be a fire break clearing along the boundaries, so this was a bit confusing.

[31] The next relevant email appears to be that sent by Dr Wallis on Sunday 15 October 2017 at 8:06 PM, addressed to Mr Ritchie and copied to the other members. The email read as follows:

> Members
>
> 1. I note that there is majority support not to require an EIS and I concur with that decision.
> 2. However I note that when we inspect mine or other sites in the NT the environmental destruction due to the pastoral industry is readily apparent (eg Legune Station).

23 See [11] above, and Procedures, cl 8(2).

3. Thus we should not miss the opportunity to start a process to achieve ESD in the pastoral industry.

4. On the face of it, and based on the information provided, I cannot conclude that clearing 20,400 ha of trees has no significant impacts and meets the ESD requirements that are fundamental to an EPA approval.

5. I note that the Briefing Paper raises some concerns:

   .. the approval and policy framework for land clearing is inconsistent across different tenures, and is inadequate to provide guidance for landscape scale or cumulative impact assessment. If it agrees that assessment is not required, the NT EPA may wish to qualify its decision by identifying that decision-making guidance does not provide a sound basis for assessing additional large scale applications in the same catchment.

6. The EPA Guidelines for referral of land clearing proposals seem to me to be deficient in terms of large scale effects on biodiversity and ecology, and on regional water resources (not to mention efficient pastoral operations). Our focus on threatened species is too narrow.

   Flora and fauna assessments including review of proximity to Sites of Conversion Significance, to the satisfaction of the Pastoral Land Board, indicate that no:

   - threatened species listed under the Territory Parks and Wildlife Conservation Act; or
   - habitat of potential significance to the above; are within, or in proximity to, the proposed development site; or
   - there is little potential for significant impact to biodiversity and a Biodiversity Management Plan provides for the adequate protection relocation of threatened flora and fauna and is endorsed by the DLRM.

6. [bis] Thus I conclude that we need some public (transparent) process to update our guidelines and then make a decision on the Maryfield Station proposal from a more informed perspective.

[32] It is clear from the last paragraph of the email reproduced in [31] that Dr Wallis had not made a final decision on the proposed Maryfield Station land clearing and that he did not consider that the Authority had decided the issue. Indeed, Dr Wallis did not agree to a decision being made in relation to

the proposed Maryfield Station land clearing until a public and transparent process had been undertaken. I am satisfied that this statement was another way of expressing the view stated in his email of 11 October, reproduced in [24] above, that the clearing impacts needed to be exposed to public scrutiny by means of a PER. The references to 'public scrutiny' and 'a public transparent process' unmistakably convey the same concept.

[33] On Monday, 16 October 2017 at 3.36 PM, Dr Wallis emailed Dr Vogel (but not the other members) to express further concerns about that part of the draft suggested statement of reasons extracted in [20] above, or possibly the re-draft of the suggested statement of reasons set out in [36] and [37] below. The email read as follows:

> Paul,
>
> Do you mean that the clearing will require further assessment – or has that been done?
>
> [*The next two paragraphs apparently quote the draft reasons and insert the word "further" in capitals to highlight the enquiry*]
>
> > However, the proposed action will require FURTHER assessment and approvals under the *Pastoral Land Act* to ensure potential environmental impacts associated with the proposed action are effectively managed.
> >
> > This decision is made in accordance with clause 8(2) of Environmental Assessment Administrative Procedures, and subject to clause 14A the administrative procedures are at an end with respect to the proposed action.
>
> Can it be staged?
>
> What monitoring/checking is proposed?
>
> What limit is there on clearing? 4 to 5% of the area.
>
> Somehow, saying the clearing of 20,000 ha of trees has no significant environmental impact (where it seems we mean no threatened species are known) sits badly with me. From looking at photos of the area, I

> wonder [if] previous pastoral activities has reduced biodiversity so much that there are no threatened species left?
>
> Somehow, we need to include a condition about retaining/improving biodiversity, as it will go downhill with so many trees lost.

[34] On Monday 16 October 2017 at 4:02 PM, Dr Wallis emailed the member group of recipients, as follows:

> For the reasons sent earlier, I do not support the recommendation and request that we consider a more transparent public process to reach our decision.

[35] On Monday 16 October 2017 at 6:15 PM, Dr Paul Vogel, chairperson of the Authority, wrote to members as follows:[24]

> Colleagues
>
> I have taken into consideration all your comments regarding this proposal and have amended the SoR to more strongly make the point about the broader policy implications of large scale land clearing in the pastoral region that need to be resolved. While I share many of your concerns, I believe there is little to be gained from an environmental perspective from subjecting the proposal to an EIA. There has already been public consultation on the proposal through the PLB. Furthermore, the proposal has been in the system for some time and a decision needs to be made.

[36] The email suggested that Dr Vogel believed that a decision needed to be made quickly, and that he had made (or was about to make) the decision. The amendment to the proposed statement of reasons referred to by Dr Vogel included the insertion of the following,[25] in lieu of the 'Conclusion' contained in the initial suggested draft statement of reasons set out in [20] above:

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24 Document 89, JTB p. 697.

25 JTB p. 701.

Conclusion

The NT EPA considers that the Project does not require further assessment under the EA Act and has provided recommendations to the PLB to ensure that potentially significant environmental impacts can be appropriately managed such that the NT EPA's environmental objectives are likely to be met.

However the proposal does raise important strategic policy issues in relation to broad scale land clearing in the agricultural and pastoral regions of the NT, not only from a biodiversity and natural resource impact perspective (including cumulative impacts), but also in the context of climate change policy. Project environmental impact assessment is an inefficient tool for dealing with these broader, important policy issues. As such, the NT EPA will be raising these matters with the PLB and the Chief Executive Officer of the DENR in the first instance.

The NT EPA has committed to reviewing its guidance on when a land clearing application should be referred for consideration under the *Environmental Assessment Act*. The matter of when a development application should be referred for assessment is also being considered under the Northern Territory Government's environmental regulatory reform agenda.

[37] The 'Decision' part (the last two paragraphs) remained the same as in the first draft suggested reasons for decision, except that the word "potential" was inserted so that the sentence at the end of the main paragraph ended with the words "… to ensure *potential* environmental impacts associated with the proposed action are effectively managed." That change was not significant.

[38] On Wednesday, 18 October 2017 at 5:28 PM, Dr Vogel sent an email to Dr Wallis, apparently in response to Dr Wallis's email sent Monday 16 October 2017 at 3:36 PM, referred to in [33] above. Dr Vogel's email read as follows:

Ian, in response to the matters you raised I provide the following information:

- Biodiversity scientists have advised that there are only two threatened species that have a moderate likelihood of occurring on this site. For these species and other biodiversity, the retention of native vegetation and buffers around wetlands, drainage lines and increased slopes, and the connection of these features using wildlife corridors of native vegetation is in line with Government advice. Furthermore, the original proposal was for some 24,000 ha of clearing which was reduced to 20,000 ha as a result of the above negotiated conservation measures.
- The advice to the EPA is that we are not close to approaching a threshold point for cumulative impacts from land clearing in this bioregion, with the total amount of clearing of this bioregion being less than 1% on the available evidence.
- However, the NT EPA is focussing at the strategic level by informing government that it does not have a sound policy framework in place to deal with applications of this scale. I believe we should also be informing the Minister of this situation.
- The clearing will be staged from a practical point of view. Staging from an environmental management perspective is unlikely to be an effective tool unless for example, it is part of a research program where the next stage is being informed by research outcomes. Given the advice from biodiversity scientists we are not suggesting a research program. Nor are offsets appropriate given the 1) neither the NT EPA nor Govt have an Offsets Policy in place and ; 2) it would be hard to argue there is a significant residual impact on biodiversity at a regional scale, which is a pre-condition for offsets to be activated. There is potential to reduce impacts to the threatened species if clearing was conducted outside the breeding season for the threatened species. This could be discussed with Govt's biodiversity experts and built into the Biodiversity Management Plan.
- With respect to improving the quality of retained vegetation, there are landscape scale problems such as feral animals (cats, pigs etc.), fire regime, weeds etc that should be part of the Biodiversity Management Plan. The development of such a Plan would be a condition of PLB approval and would be to the satisfaction of DENR. Compliance with approval conditions would be enforced by the PLB.

In the absence of a whole-of-Govt position on large scale clearing in the NT (from biodiversity, hydrology, and GHG perspectives), the EPA needs to make a timely decision about whether to assess this proposal

(it has been in the system for some time I am advised), notwithstanding the degree of unease we all share.

There has been substantial time spent between the proponent and the DENR on re-designing the proposal to protect and conserve sufficient habitat which in my view would be one element of the likely outcome of an assessment process anyhow. The only other assessment outcome would be to recommend rejection of the proposal on the grounds it is environmentally unacceptable, which on the basis of the available evidence and the impact avoidance and mitigation measures, is not where the majority landed.

For this reason, plus the other reasons spelt out in the revised ToR,[26] by majority decision of the NT EPA, the proposal does not require an impact assessment. Having said that, I think it would be a good idea if this matter was placed on the agenda for our next meeting.

Regards, Paul

[39] The following day, Thursday 19 October 2017 at 4:42 PM, Dr Vogel sent the rest of the members a copy of his email to Dr Wallis, as follows:

> For the information of members, I have forwarded my response to a number of matters that Ian raised in relation to the Maryfield clearing Nol (sic). Unfortunately I can't seem to find the matters Ian raised on my laptop so hopefully my response still makes sense!

[40] The members were not made aware of the specific issues raised by Dr Wallis in his email of 16 October 2017, extracted at [33], because Dr Wallis had written only to Dr Vogel, and because Dr Vogel could not find Dr Wallis's email on his laptop when he forwarded a copy of his reply.

[41] Based on his reading of the emails set out above in [21] to [39], Paul Purdon, Departmental officer, reached the conclusion on Monday, 23 October 2017 "… that the majority have supported the recommendation to

26 Dr Vogel probably intended to write 'SoR', an abbreviation of 'Statement of Reasons'.

not assess."[27] I consider that Mr Purdon's conclusion was wrong. Mr Purdon had an incomplete understanding of what had taken place in the course of the meeting. I say more about that below.

[42] Dr Vogel signed statement of reasons on 25 October 2017.[28] The content of the 'Conclusion' and 'Decision' remained the same as set out in [36] and [37] above.

Consideration

[43] In its summons on originating motion,[29] the Plaintiff seeks judicial review (declaratory relief, an order in the nature of certiorari and an order in the nature of mandamus) on 12 grounds. Ground 12 pleads that the defendant did not make a decision pursuant to cl. 8 (2) of the *Environmental Assessment Administrative Procedures*, and sets out particulars, relevantly, as follows:

> The documents provided by way of particular discovery establish that … only Dr Vogel expressed unconditional support for the Purported Decision. The other members who participated in the decision-making process supported the Purported Decision only if there was an "understanding" from the Pastoral Land Board that certain conditions of approval would be included. There was and could have been have been no such understanding and the recommended conditions were ultimately rejected by the Pastoral Land Board …
>
> Accordingly, the Purported Decision was not made by a majority of a quorum of the defendant, having regard to ss 18 and 20 of the *Northern Territory Environment Protection Authority Act*.

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27 Email Paul Purdon to Amanda Waa and Lisa Bradley sent 23 October 2017 at 12:09 PM.

28 Document 94, JTB pp. 708-711.

29 Amended Summons on Amended Originating Motion in proceeding 124 of 2017, filed 24 October 2018.

[44] It necessary to make a finding as to the members who participated in the meeting of the Authority which considered the Out-of-Session paper. As explained in [5] above, the members of the Authority were Dr Paul Vogel (chairperson), Ms Janice van Reyk, Dr Ian Wallis, Dr John Chapman, Mr Colin (Joe) Woodward and Dr David Ritchie. It appears that the email referred to in [21] above was sent by Ms Waa to all members of the Authority. With the exception of Mr Woodward, all members participated in the group discussion to the extent that each of them sent one or more emails to the other members. Mr Woodward did not respond at any time, and I assume he was not present at the meeting.

[45] Making due allowance for the manner in which the meeting took place, I find that five members: Dr Vogel, Ms van Reyk, Dr Wallis, Dr Chapman and Dr Ritchie were present at the meeting, at least for some of the time. The quorum requirement, four out of six members,[30] was to that extent satisfied. Any valid decision would have required a majority vote "of members present and voting", that is, of three out of the five members present.[31]

[46] The proposed action to be considered by the meeting was, in relative terms, a very extensive land clearing project. It may be seen in the context that, for the 12-year period from 2003 to 2015, data in relation to tree clearing permits for the Northern Territory showed a total of 198 permits issued,

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30 See s 18 *Northern Territory Environment Protection Authority Act*: "subject to s 23(1)(c), the quorum for a meeting of the NT EPA is a majority of members." Section 23(1) applies to reduce the quorum where a member is excluded from taking part in decision-making because of a conflict of interest, and is not presently relevant.

31 See s 20 (1) *Northern Territory Environment Protection Authority Act*: "A decision at a meeting of the NT EPA must be determined by the majority vote of members present and voting."

averaging roughly 15 permits per year, with the total area of vegetation permitted to be cleared under permits being 100,962 hectares, representing an average annual permitted clearing of 7,766 hectares. The largest aggregate area permitted to be cleared in a single year occurred in 2013, when eight permits were issued for a total of 19,899 hectares. One of those eight was a permit approved for an area of 18,126 hectares for the establishment of improved pastures at Tipperary Station.

[47] On or about 8 October 2017, Mr Purdon had carried out some calculations as to the level of greenhouse gas (GHG) emissions from the proposed clearing at Maryfield Station. His indicative estimate was that the proposed clearing would result in about 18.5 percent of total annual Northern Territory emissions.[32]

[48] Mr Purdon's calculations were based on GHG calculations previously done for land clearing proposals on two properties in the same bio-region as Maryfield Station – Bloodwood Station and Gorrie Station – for the clearing of 3,792 hectares and 1,910 hectares respectively.[33]

[49] As mentioned in [22], the recommended decision and the draft statement of reasons had been prepared by Departmental officers without previous input from the members of the Authority. I note that Mr Purdon's calculations were not provided to the Authority. However, the draft statement of reasons

32 Document 76, JTB p. 434: email Paul Purdon to Lisa Bradley, 8 October 2017.

33 Calculations were based on computer modelling of emissions using FullCAM, the Australian Government model for tracking the greenhouse gas emissions and carbon stock changes associated with land use and management.

for decision,[34] under the heading "Air Quality", stated: "Greenhouse gas emissions have not been considered in the proponent's application", but added: "The project is expected to make a considerable contribution to the NT's annual greenhouse gas emissions as a result of vegetation clearing and in the context of the Northern Territory as a low emissions jurisdiction".[35] The latter statement is consistent with the calculations referred to in [47].

[50] Adrienne Lisa Bradley held the role of Director Environmental Assessments in the Environment Division of the Department. In giving evidence, Ms Bradley said that she considered that the likely greenhouse gas emissions from the proposed Maryfield Staion land clearing represented a "highly significant amount of emissions for the Northern Territory." She understood that Mr Purdon's reference to 18.5 per cent of the Northern Territory's annual greenhouse gas emissions was not to a percentage of emissions from land clearing alone, but to 18.5 per cent of the Northern Territory's entire annual greenhouse gas emissions, that is, from land clearing and all other sources.

[51] Dr Vogel disclosed in evidence that he also made some estimates of the likely greenhouse gas emissions from the proposed Maryfield Station land clearing. He estimated that it would release up to one million tonnes of greenhouse gas emissions, out of a Northern Territory (annual) total of some 16 million tonnes. He estimated that it would represent three to six percent

34 See [20] above.

35 Document 80D, JTB p. 664.

of total Northern Territory greenhouse gas emissions. It did not appear that Dr Vogel shared his estimates with the other members of the Authority. It is unclear where Dr Vogel's calculations stand in comparison with those carried out by Mr Purdon, but that is not ultimately relevant to my decision.

[52] On the understanding that consideration of the "Out-of-Session Briefing Paper" in the present case was a 'meeting', the only agenda item for the meeting was the proposed Maryfield Station land clearing project.

[53] It can be seen from pars [46] to [51] that the proposed action to be considered at the meeting was very significant. It was a matter affecting the environment which could reasonably be considered to be capable of having a significant effect on the environment. It is unclear why it fell to be considered by the "Out-of-Session Process", rather than by a regular meeting. Whatever the reason, I consider that where a 'meeting' of the Authority takes the form of communication by email and exchange of emails, over six or seven days, it is most important that the motion for consideration and decision be put clearly, that a vote be taken (with votes for and against noted), and that any resolution be properly recorded. It is also important that the meeting be formally closed.

[54] If a 'motion' can be identified from the recommended decision extracted above in [20], it was: "That the Authority decide that the potential environmental impacts and risks of the proposed action are not so significant

as to warrant an environmental impact assessment by the Authority under the provisions of the *Environmental Assessment Act 1982*".

[55] The motion was silent as to whether or not a public environmental report (a 'PER') was necessary in respect of the proposed action. As I explained in [11], it was necessary for the Authority to consider and make a decision as to the necessity for both a PER and an EIS.[36] If the Authority decided that an EIS was not necessary, it still had to consider whether a PER was necessary. The motion had not come from the members of the Authority, or from the 'floor of the meeting', but rather from Departmental officers. The failure to include reference to a PER in the recommended decision was carried through to the amended decision (the purported decision), notwithstanding that Dr Wallis had by then made clear his view as to the need for a PER. I refer to the evidence and observations in [24], [28] and [32] above.

[56] The motion was not put to a vote by the chairperson, whose task it was to put motions to the meeting and to record resolutions or decisions in relation to such motions. That was a crucial shortcoming. It is extraordinary that it was left to Mr Purdon, after the event, to examine the entrails of the emails and divine (wrongly, in my opinion) that the Authority by majority vote had decided that an EIS was not necessary.

[57] In my judgment, Dr Vogel was not entitled to pronounce, as he did in his email of Wednesday, 18 October 2017: "… by majority decision of the NT

36 See footnote 6 to par [11] above, and the reference to Procedures, cl. 8(2).

EPA, the proposal does not require an impact assessment". Leaving to one side the position of Dr Wallis, I am satisfied that none of Dr Ritchie, Ms van Reyk or Dr Chapman had moved from his or her stated positions, referred to in [28] and [30] above. It is tolerably clear that the only basis on which they agreed that an EIS was not necessary was if the Pastoral Land Board confirmed that conditions to be set by the Authority would form part of the land clearing permit to be granted by the Board, something to which the Pastoral Land Board could not lawfully commit in advance. None of the three members mentioned waived or modified his or her qualification to their agreement. Therefore, there was no agreement on their part to unconditionally decide that an EIS was not necessary in respect of the proposed action. Moreover, those three members did not participate further: they did not respond to Dr Vogel's email to members sent Monday 16 October 2017, referred to in [35] above, not even after Dr Vogel's email to members sent Thursday, 19 October 2017, referred to in [39] above. Indeed, it is unclear whether or not they were still "present" at the meeting, let alone "present and voting", at any time after 12 October 2017. Those issues may have been clarified if a motion had been properly put and a vote taken, which unfortunately did not happen.

[58] I would make a further observation in relation to Dr Vogel's email to members sent 16 October 2017. There is no evidence that there was any attachment to that email. Therefore, contrary to the defendants' submissions, the amended statement of reasons for the purported decision – containing the

amendments made by Dr Vogel referred to in [36] – was probably not provided to the members. Indeed, the email suggests that Dr Vogel may have viewed himself as a delegate of the Authority, which he was not.

The defendants' contentions – ground 12

[59] The Solicitor contends that in circumstances where a decision maker has voluntarily provided a statement of reasons, it is that statement which must provide the central focus for determining the validity of the decision. Her further contention is that, given the statement of reasons issued under the hand of the chairperson, "it must be presumed that a majority existed".[37] With respect, I do not agree.

[60] The Solicitor's submission relies upon the observations made by McHugh JA in *Minister for Natural Resources v New South Wales Aboriginal Land Council and another*,[38] in relation to the maxim "omnia praesumuntur rite esse acta". The issue in that case was whether the purported grant of a permissive occupancy of land by the secretary of the Western Lands Commission was valid. After the relevant grant document had been admitted into evidence without objection, counsel for the Land Council raised the point as to whether the secretary had authority to grant the permissive occupancy. The Minister did not seek to prove the relevant instrument of delegation, but relied on the above maxim. The trial judge held that the maxim was not applicable. McHugh JA held that the trial judge was in error

37 Defendants' written submissions, par 191.

38 *Minister for Natural Resources v New South Wales Aboriginal Land Council and anor* (1987) 9 NSWLR 154 at 164, per McHugh JA.

in so holding; and that the judge should have found that the secretary had authority to exercise the Minister's power. His Honour observed as follows:

> The natural home of the maxim is public law. Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled. Thus a person who acts in a public office is presumed to have been validly appointed to that office [citations omitted]. And a council which must form an opinion as to whether there will be any detriment upon the granting of a planning permit is presumed to have formed the opinion before granting the permit. …
>
> A particular application of the maxim which is relevant to this case is stated in Broom's Legal Maxims, 10th ed (1939) at 642 as follows:
>
> > " … where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. In these cases the ordinary rule is *omnia praesumuntur rite et solenniter esse acta donec probetur in contrarium* – everything is presumed to be rightly and duly performed until the contrary is shown."

[61] Although the presumption of regularity carries considerable weight in administrative law, it is clear that, if 'regularity' is disproved, the presumption is rebutted.[39] In the present case, the process behind the purported decision has been exposed to scrutiny by this Court, and found wanting. In those circumstances, the chairperson's signature to the decision and statement of reasons is not conclusive.

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39 That was the case in *Lee v Napier and ors* [2013] FCA 236. There the question for determination was whether members of the Professional Services Review Committee had been validly appointed to the Professional Services Review Panel, in circumstances where the Minister for Health had failed to consult with the Australian Medical Association, as required by law, prior to making the appointments. Katzmann J held that the presumption of regularity would only arise where there was no reason to think that the appointments were not valid. In that case, there was not only significant reason to think that the appointments were not valid, but the observance of the necessary statutory formality had been disproved. As a result, her Honour at [70] expressed doubt that there was any room for operation of the presumption. In the alternative, she was satisfied that the presumption had been rebutted.

[62] Pointing to the fact that the three members did not respond to the chairperson's emails, as mentioned in [57], the Solicitor contends that their voting took place by silence or acquiescence, in reliance on two English cases in which participants at council meetings were deemed to have voted notwithstanding the absence of specific evidence that they had. The first of those was *Everett v Griffiths*,[40] where the defendant had chaired a council meeting which, by unanimous vote, awarded a tender to a company of which he was a shareholder. McCardie J held that the defendant had voted and thereby breached a statutory provision which prevented him from voting on a question in which the company was 'interested'. His Honour observed as follows:

> In my opinion the defendant voted at each of the three meetings I have mentioned. … The defendant tried to draw a distinction, when giving evidence, between "unanimous" and "nemine contradicente". I can see no distinction on the facts here. … The minutes satisfy me that there were no dissentients and so does the evidence. The minutes indicate that there were no abstentions from voting and so does the evidence. The defendant voted just as much as any of the other members present. If he did not vote no one voted and an absurdity would result. He admitted in evidence that he "agreed" with the resolutions passed when he was present. I think it reasonably plain that he voted on each occasion. A man may give his vote in divers ways, either by writing, or by hand, or by voice, or by conduct – e.g., by nod. The form in which acquiescence is given matters not if acquiescence be actually indicated.

[63] The Solicitor also relies on *The King v Hendon Rural District Council; Ex parte Thorley*.[41] There the court quashed the decision of a council allowing stables to be converted into a garage and restaurant because one of the

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40 *Everett v Griffiths* [1924] 1 K.B. 941.

41 *The King v Hendon Rural District Council; Ex parte Thorley* [1933] 2 K.B. 696.

councillors who was present at the meeting which approved the application was an estate agent who was at the same time acting for the owner/vendor of the property. Although the councillor in question took no part in the meeting which unanimously approved the development plans, each of the members of the court separately concluded that the councillor had voted, essentially because the resolution, being unanimous, could only have been passed by the votes of all those who were present at the meeting. Humphreys J specifically agreed with the judgment of McCardie J in *Everett v Griffiths*. The Court issued a writ of certiorari to quash the council's decision on the ground that the agent's interest disqualified him from taking part in the council's consideration of the matter.

[64] The common element to both *Everett v Griffiths* and *The King v Hendon Rural District Council* was that the vote had been unanimous. Such unanimity led to the logical inference that all persons at each meeting had voted in support of the motion. That could not be said in the present case, because there was no unanimity.[42] Similarly, the observation by McCardie J that a man may give his vote "in divers ways", including by conduct and even by a nod, provided that acquiescence is indicated, must be seen in the context that his Honour was referring to a meeting at which the participant members of council were present in person, and voting on a motion which was formally put.

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42 Dr Vogel, the chairperson, recognised and acknowledged that the purported decision was not a unanimous decision. In the final paragraph of his email of 18 October 2017, extracted in [36] above, he used the words "…by majority decision of the NT EPA". To the extent it is relevant, Mr Purdon reached a similar conclusion, that is, that the majority had supported the recommendation to not assess – see [31] above.

[65] I refer again to my observations in [53] above. The chairperson did not utilise the long established mechanism whereby a majority might have been identified by putting the motion to a vote. As a result, the extent to which members agreed to the motion can only be determined by the content of their last or most recent communications. In the circumstances of this case, nothing is properly to be inferred from their silence or failure to respond.

[66] I am satisfied that the purported decision of the Authority was not a decision "determined by the majority vote of members present and voting", as required by s 20(1) *Northern Territory Environment Protection Authority Act 2012*. The purported decision was not a valid decision. The decision should be called up and quashed, and an order in the nature of mandamus should issue to direct the Authority to reconsider the proposed action and decide according to law whether a PER or an EIS is necessary.

[67] The parties acknowledge that the validity of the decision made by the Pastoral Land Board to issue the land clearing permit depends on the validity of the decision made by the Authority, and hence that decision also should be called up and quashed.[43]

Further matters

[68] The plaintiff has pleaded and argued numerous other grounds in support of its application for review of the purported decision. Given my conclusions

43 Defendants' written submissions, par 193: "It is accepted that the Board's decision will be invalid if the Court declares the NTEPA's decision to be invalid".

in relation to ground 12, it is not necessary for me to decide the many further issues of law argued by the parties.

[69] The plaintiff should take out formal orders consistent with these reasons. The parties will have liberty to apply in relation to the drafting of final orders.
