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

PARTIES:	THE ENVIRONMENT CENTRE NORTHERN TERRITORY (NT) INCORPORATED v THE MINISTER FOR LAND RESOURCE MANAGEMENT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	88 of 2014 (21440487)
DELIVERED:	29 May 2015
HEARING DATES:	15 December 2014
JUDGMENT OF:	HILEY J

CATCHWORDS:

ADMINISTRATIVE LAW – Judicial review – legislation – *Water Act 1992* (NT) – decision of Minister under s 30 – nature of review function – Minister not confined to error-based review – Minister erred by failing to conduct merits review – matter remitted to Minister.

Administrative Decisions Tribunal Act 1997 (NSW); *Administrative Appeals Tribunals Act 1975* (Cth); *Compensation Court Act 1984* (NSW); *Competition and Consumer Act 2010* (Cth); *Conciliation and Arbitration Act* 1904 (Cth); *Environment Protection (Northern Territory Supreme Court) Act 1978* (Cth); *Health Practitioner Regulation National Law (Victoria) Act*

2009; *Taxation Administration Act 1996* (NSW); *Water Act 1992* (NT); *Water Regulations 2008* (NT); *Workplace Injury Management and Workers Compensation Act 1998* (NSW); *Workplace Relations Act 1996* (Cth).

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 235; *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267, applied.

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; *MacFarlane v Minister for Natural Resources, Environment and Heritage* (2012) 271 FLR 458; *Strange-Muir v Corrective Services (NSW)* (1986) 5 NSWLR 234, distinguished.

Applicants A1 and A2 v Brouwer and Another (2007) 16 VR 612; *Sapina v Coles Myer Ltd* [2009] NSWCA 71; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286; *Siddik v Work Cover Authority* [2008] NSWCA 116; *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue of the State of New South Wales* (2011) 245 CLR 446, followed.

Allesch v Maunz (2000) 203 CLR 172; *Avon Downs Pty Ltd v Commissioner of Taxation* (1949) 78 CLR 353; *Boston Clothing Co Pty Ltd v Margaronis* (1992) 27 NSWLR 580; *CDJ v VAJ* (1998) 197 CLR 172; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616; *Davidson v TAB* (1988) 56 NTR 8; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409; *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124; *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605, *Fortescue Metals Group Ltd* (2010) 242 FLR 136; *Fox v Percy* (2003) 214 CLR 118; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140; *Kozanoglu v The Pharmacy Board of Australia* (2012) 36 VR 656; *Litynski v Albion Steel Pty Ltd* (1994) 10 NSWCCR 287; *McDonald v Guardianship Board* [1993] 1 VR 521; *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423; *Meyering v Northern Territory* (1987) 47 NTR 21; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475; *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379; *Pilbara Infrastructure Pty Ltd v Australia Competition Tribunal* (2011) 193 FCR 57; *Rabuntja v Minister for Education* (1982) 19 NTR 5; *Re Control Investment Pty Ltd and Australian Broadcasting* Tribunal [No 2] (1981) 3 ALD 88; *State Transit Authority of New South Wales v Fritzi Chemler* [2007] NSWCA 249; *Tan v National Australia Bank Ltd* [2008] NSWCA 198; *Johnson v Federal Commissioner of Taxation* (1986) 72 ALR 625; *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281; *Twist v Randwick Municipal Council* (1976) 136 CLR 106; *Watson v Hanimex Colour Services Pty Ltd* (1992) 8 NSWCCR 190; referred to.

REPRESENTATION:

Counsel:

Plaintiff:	A Wyvill SC and N M Kelly
Defendant:	S Donoghue QC and J Watson

Solicitors:

Plaintiff:	Environmental Defenders Office (NT) Incorporated
Defendant:	Solicitor for the Northern Territory

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

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[2015] NTSC 30
No. 88 of 2014 (21440487)

BETWEEN:

THE ENVIRONMENT CENTRE NORTHERN TERRITORY (NT) INCORPORATED
Plaintiff

AND:

THE MINISTER FOR LAND RESOURCE MANAGEMENT
Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 29 May 2015)

Introduction

[1] The Environment Centre Northern Territory (NT) Incorporated ("plaintiff") sought judicial review of two decisions made by the defendant, the Minister for Land Resource Management ("Minister"). The Minister's decisions upheld earlier decisions by the Controller of Water Resources ("Controller") to grant a number of water extraction licences ("the licences") under the *Water Act 1992* (NT) ("the Act").

The plaintiff contends that the Minister erred in his reviews of the Controller's decisions and that the Minister's decisions should be set aside and remitted to him to be made again according to law.

[2] The two decisions of the Minister were made 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 first application for review related to the decision by the Controller on 1 April 2014 to issue seven water extraction licences permitting extraction of groundwater from the Mataranka Tindall Limestone Aquifer ("the Tindall aquifer").[1] The other application for review related to the decision by the Controller on 12 May 2014 to issue eleven water extraction licences permitting extraction of groundwater from the Oolloo Dolostone Aquifer ("the Oolloo aquifer").[2]

[3] The Tindall aquifer forms part of the expansive groundwater resource called the Daly Sedimentary Basin. The aquifer discharges water around the Elsey National Park area through Bitter and Rainbow Springs. These springs in turn feed the Roper River. The Oolloo aquifer is smaller in area but provides greater volumes of water. It overlays the northern part of the Tindall aquifer and sits closer to ground level. The largest groundwater-dependent ecosystems of the Oolloo aquifer are the Katherine and Daly Rivers.

[1] Two were new licences and five allowed current licensees an increase in water entitlement.
[2] Seven were new licences and four allowed current licensees an increase in water entitlement.

[4] At the commencement of the hearing I was informed by counsel for the plaintiff that the licensees whose licences may be affected by the outcome of this proceeding had been notified of the proceeding and given the opportunity to apply to be joined as a party. This was confirmed by affidavit of David John Morris affirmed on 22 December 2014.

Ground of review

[5] The ground relied upon at the hearing was that in each case the Minister misunderstood the statutory task required of him by s 30 of the Act by:

(a) failing to ask himself whether the decision under review was the decision that should (on the merits) have been made; and

(b) instead asking himself whether the Controller had erred in making the decision under review.[3]

[6] The plaintiff contended that s 30 required the Minister to undertake a merits review. He was bound to make up his own mind about what he ought to do and not confine himself to an error based review. The defendant conceded that the Minister did not undertake a merits review. The defendant contended that unless the Minister considered that the Controller had made an error he or she was bound to uphold

[3] Affidavit of Anna Louise Boustead affirmed 10 October 2014 ("ALB affidavit") [28(a)].

the Controller's decision. Only if error was demonstrated would the Minister be required or empowered to consider the matter on its merits.

[7] Counsel agreed that the only question that needed to be determined in the proceeding was whether or not the Minister was required to undertake a merits review.

Legal principles regarding reviews

[8] It is well established that the nature of a review of or appeal from an administrative decision must be determined by reference to the terms of the relevant statute.[4]

[9] In *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue of the State of New South Wales*[5] the High Court said, at [5]:

> An "appeal" from an administrative decision to a court is the creature of statute and it confers original, not appellate, jurisdiction. Further, where a jurisdiction called an "appeal" is enlivened, it is essential to identify its nature and the duties and power of the court in the exercise of that jurisdiction. The term "review" presents similar considerations. It takes its meaning from the context in which it appears. It may be used by the statute in question to empower decision-making by an administrative body, or to confer a species of original jurisdiction on a court. If the latter, again it will be necessary to

[4] *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-2 per Mason J; *Re Coldham: Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 273-4 per Deane, Gaudron and McHugh JJ; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 235 at 261-2; *CDJ v VAJ* (1998) 197 CLR 172 at 185-186 [53] per Gaudron J; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 295 [25], 311-2 [92], 324 [132]; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 202-3 per Gleeson CJ, Gaudron and Hayne JJ; *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue of the State of New South Wales* (2011) 245 CLR 446 at 450; *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 405 [57].

[5] (2011) 245 CLR 446 (*Tasty Chicks*).

identify the nature of the "review" and the duties and powers of the court in the exercise of that jurisdiction.

[10] In *Fox v Percy*,[6] Gleeson CJ, Gummow and Kirby JJ cited and summarised the remarks of Mason J in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd*[7] as providing a "fourfold distinction" between kind of appeals in the following terms:

> (i) an appeal stricto sensu, where the issue is whether the judgment below was right on the material before the trial court;
>
> (ii) an appeal by rehearing on the evidence before the trial court;
>
> (iii) an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so;
>
> (iv) and an appeal by way of a hearing de novo.[8]

[11] In *Dwyer v Calco Timbers Pty Ltd*,[9] the High Court said of the "fourfold distinction" referred to in *Fox v Percy*:

> But these categories cannot represent a closed class and particular legislative measures, such as those with which this appeal is concerned, may use the term "appeal" to identify a wholly novel procedure or one which is a variant of one or more of those just described.
>
> It was in that vein that McHugh J pointed out in *Eastman v The Queen*:[10]

[6] (2003) 214 CLR 118 (*Fox v Percy*).
[7] (1976) 135 CLR 616 (*Sperway*) at 619-621.
[8] *Fox v Percy* at 124.
[9] (2008) 234 CLR 124 at 128-129.
[10] (2000) 203 CLR 1.

> Which of these meanings the term 'appeal' has depends on the context of the term, the history of the legislation, the surrounding circumstances, and sometimes an express direction as to what the nature of the appeal is to be.
>
> In short, it is the proper construction of the terms of any particular statutory grant of a right of appeal which determines its nature.

[12] In *Applicants A1 and A2 v Brouwer and Another,*[11] the Victorian Court of Appeal noted that in *Turnbull v New South Wales Medical Board,*[12] Glass JA identified six categories of appeal "[g]raded in ascending order, in accordance with the width of the corrective power exercised by the appeal court", as follows:

(a) appeals to supervisory jurisdiction (judicial review);

(b) appeals on questions of law only;

(c) appeals after a trial before judge and jury;

(d) appeals from a judge in the strict sense;

(e) appeals from a judge by way of rehearing;

(f) appeals involving a hearing de novo.

[13] Their Honours observed that although this typology has been generally accepted since then, there is no definitive classification of appeals. At

[11] (2007) 16 VR 612 (*Applicants A1 and A2*) at [7].
[12] [1976] 2 NSWLR 281 at 297.

[8] they quoted the following passage from [11] of *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*:[13]

> … The statute in question may confer limited or large powers on an appellate body; it may confer powers that are unique to the tribunal concerned or powers that are common to other appellate bodies. There is, thus, no definitive classification of appeals, merely descriptive phrases by which an appeal to one body may sometimes be conveniently distinguished from an appeal to another.

[14] In *Brandy v Human Rights and Equal Opportunity Commission*[14] Mason CJ, Brennan & Toohey JJ said, at 261:

> But what emerges from the judicial decisions and, for that matter, from statutes is that 'review' has no settled pre-determined meaning; it takes its meaning from the context in which it appears.

[15] At [68] of *Siddik v WorkCover Authority of NSW*[15] McColl JA said that "the concept of a review per se is attended by no greater clarity than that of an appeal" and quoted the above passage. Her Honour added that "in like vein, in *Tomko v Palasty (No 2)* [2007] NSWCA 369 (at [43]), Basten JA (Hodgson and Ipp JJA agreeing) observed that the 'term [review] … may be said to have "a quite amorphous meaning" [which] will often depend upon the statutory context'."

[16] The nature of reviews and appeals from administrative bodies and the functions of the reviewing or appellate tribunal have been discussed in

[13] (2000) 203 CLR 194 (*Coal and Allied*).
[14] (1995) 183 CLR 235.
[15] [2008] NSWCA 116 (*Siddik*).

numerous judicial decisions. In most of those cases the relevant legislation has included provisions that provide some guidance, for example as to the way in which the reviewing or appellate tribunal is to exercise its jurisdiction and the kinds of orders that it can make. Accordingly care needs to be taken in applying principles identified in such cases where one is considering different legislation, particularly where, as is the situation here (and in many other Northern Territory statutes), there is no express guidance as to how the review or appeal is to be conducted.[16]

[17] In *Applicants A1 and A2*, their Honours noted that the difficulty in that case was that the relevant statute did not state what type of appeal was contemplated and that the court was left to infer from the surrounding provisions what kind of appeal Parliament had in mind.[17] Consequently the "risk of error was always going to be high once Parliament made provision for an appeal in novel circumstances without saying expressly what kind of appeal it had in mind."[18] At [12] their Honours observed that "there is a simple way of avoiding this kind of difficulty, as Murphy J suggested more than 30 years ago in *Sperway* at 630:

[16] Decisions of this Court (and appeals from this Court) which have had to consider the meaning and scope of rights of review or appeal conferred under Northern Territory laws include *Dare v Dietrich* (1979) 26 ALR 18; *Messel v Davern* (1981) 9 NTR 21; *Rabuntja v Minister for Education* (1982) 19 NTR 5; *Traut v Faustman Bros* (1983) 48 ALR 313; *Davern v Messel* (1984) 155 CLR 21; *Meyering v Northern Territory* (1987) 47 NTR 21; *Davidson v TAB* (1988) 56 NTR 8; *Hart v McGregor* (1996) 130 FLR 55 and *Tourism Holdings Australia Pty Ltd v Commissioner of Taxes for the Northern Territory* (2005) 15 NTLR 80.
[17] At [9].
[18] At [11].

> Statutory definitions of the various methods of appeal, perhaps in a general Interpretation Act would save much judicial time and public expense."

[18] An "appeal" often requires satisfaction that the decision below was affected by a relevant error on the part of the primary decision maker.[19] Such an appeal is often referred to as an "appeal in the strict sense" where an appellate court or tribunal cannot receive further evidence and its powers are limited to setting aside the decision under appeal and, if appropriate, to substituting the decision that should have been made at first instance.[20] Also often falling within this category are "appeals by way of rehearing" where there has been no further evidence admitted and no relevant change in the law.[21] In many cases the relevant error must be an error of law, in others it may also include an error of fact, and in others it may include something broader such as a purported exercise of discretion by acting upon a wrong principle.[22]

[19] The term "merits review" is used to distinguish a review of the merits of an administrative decision from "judicial review" which concerns the legality of an administrative decision.[23] In *East Melbourne Group Inc v Minister for Planning*,[24] Warren CJ referred to the "well

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[19] *Coal and Allied* [11-14]; Basten JA in *State Transit Authority of New South Wales v Fritzi Chemler* [2007] NSWCA 249 at [64] quoted in *Sapina v Coles Myer Ltd [2009] NSWCA 71* at [40]; Basten JA in *Tan* at [11] quoted in *Sapina* at [52].
[20] *Coal and Allied* at 12].
[21] *Coal and Allied* at [14] citing *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 106-108, per Dixon J.
[22] *Coal and Allied* at [21] referring to *House v The King* (1936) 55 CLR 499 at 505.
[23] See for example Toohey J in *Johnson v Federal Commissioner of Taxation* (1986) 72 ALR 625 at 628.7.
[24] (2008) 23 VR 605.

established principle that, when reviewing administrative action, the Court does not engage in a review of the merits of the decision. The distinction between a review on the merits and a review of the legality of a decision is fundamental to administrative law."[25] Merits review usually refers to a statutory form of appeal or review, which unlike judicial review, usually entails a rehearing *de novo*, and enables the reviewing body to "stand in the shoes of" the primary decision maker when exercising its review jurisdiction.[26]

[20] The term "merits review" is the term frequently used to describe the kinds of reviews conducted by the Administrative Appeals Tribunal ("AAT") under s 43(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("AAT Act"). Section 43(1) provides:

> (1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:
>
> (a) affirming the decision under review;
>
> (b) varying the decision under review; or
>
> (c) setting aside the decision under review and:
>
> (i) making a decision in substitution for the decision so set aside; or

[25] At [112].
[26] *Applicants A1 and A2* at [26] referring to the role of the Victorian Civil and Administrative Tribunal.

(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

[21] Per Kiefel J in *Shi v Migration Agents Registration Authority*,[27] at [140] – [142]:

> [140] The term "merits review" does not appear in the AAT Act, although it is often used to explain that the function of the Tribunal extends beyond a review for legal error, to a consideration of the facts and circumstances relevant to the decision. The object of the review undertaken by the Tribunal has been said to be to determine what is the "correct or preferable decision".[28] "Preferable" is apt to refer to a decision which involves discretionary considerations.[29] A "correct" decision, in the context of review, might be taken to be one rightly made, in the proper sense.[30] It is, inevitably, a decision by the original decision maker with which the Tribunal agrees.
>
> [141] … the Tribunal reaches its conclusion, as to what is the correct decision, by conducting its own, independent, assessment and determination of the matters necessary to be addressed.[31] To the contrary of the argument put by the respondent on this appeal, that the Tribunal's exercise of power is dependent upon the existence of error in the original decision, Smithers J denied that the Tribunal was limited to something of a supervisory role. As his Honour said, the Tribunal is authorised and required to review the actual decision, not the reasons for it.[32]
>
> [142] In considering what is the right decision, the Tribunal must address the same question as the original decision maker was required to address. Identifying the question raised by the statute for decision will usually determine the facts which may be taken into account in connection with the decision.

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[27] (2008) 235 CLR 286 (*Shi*).
[28] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 (*Drake*) at 419 and 421; and other cases.
[29] *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 427 [1].
[30] *Drake* at 431-2.
[31] *Drake* at 421-2 & 429-430.
[32] *Drake* at 429-430.

[22] The NSW Court of Appeal has held on several occasions that appeals "by way of review of the decision appealed against" under s 352 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) and under previous workers compensation legislation[33] are merits reviews in the same sense as is used in AAT matters.[34]

[23] Per Alsop P and Hoeben J in *Sapina v Coles Myer Ltd*,[35] at [57]:

> The decision under appeal is not to be ignored, but the task of the Presidential member is, as Spigelman CJ said in *Chemler*, 'to decide whether the original decision is wrong [that is to] decide what is the true and correct view.' This requires the Presidential member to decide for himself or herself these matters.

[24] At [56] of *Sapina* their Honours said that they regarded the expression "true and correct view" as synonymous with the expression "preferable and correct decision" more commonly used in the context of AAT reviews. Their Honours held that the Presidential member erred by looking only for error in the approach of the Arbitrator.[36] He failed to exercise his own judgment and reach his own conclusions.[37] He should have "decide[d] for himself whether the Arbitrator's decision was wrong and if so what was the preferred or correct decision."[38]

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[33] Such as s 36 of the *Compensation Court Act 1984* (NSW) which used the phrase "review the decision".
[34] *State Transit Authority of New South Wales v Fritzi Chemler* [2007] NSWCA 249 at [22] and [28]-[30] referred to and quoted in *Sapina v Coles Myer Ltd* [2009] NSWCA 71 at [20]. See too *Sapina* at [56].
[35] [2009] NSWCA 71 (*Sapina*).
[36] At [64].
[37] At [66].
[38] At [68].

[25] At [58] their Honours stressed that the Presidential member was not obliged "to rehear the case or to recall all the witnesses. The approach of the Presidential member as to how he or she goes about reaching his or her own decision will be a matter for him or her within the confines and freedoms of s 354."

[26] The scope of a "review" has often been held to be broader than that of an appeal. This does not mean that the reviewing tribunal is obliged to engage in a re-hearing or re-examine all the evidence.[39] In *Sapina* at [52] their Honours quoted the following passage from the judgment of Basten JA in *Tan v National Australia Bank Ltd*[40] at [11]:

> Where a statute refers to an 'appeal' as opposed to a review, it may be intended that the appellate tribunal could vary or discharge the decision below only if satisfied that it was affected by a relevant error. However, the concept of an 'appeal' does not necessarily invoke the precondition of a finding of error: an appeal may be by way of hearing *de novo*, where the matter is heard afresh and a decision is given on the evidence presented at that hearing: *Coal and Allied* … at [13]. Furthermore, as noted in *McKee v Allianz Australia Insurance Ltd* [2008] NSWCA 163 at [64], the term 'review' may connote a fresh consideration of a matter, without the need to find error before setting aside or varying the decision below. But even in a hearing *de novo* the appellate tribunal will not necessarily disregard conclusions reached by the original decision maker.

[39] See for example *Sapina* at [24]-[25] quoting Kirby P in *Watson v Hanimex Colour Services Pty Ltd* (1992) 8 NSWCCR 190, at [32] quoting Gleeson CJ (Handley JA agreeing) in *Litynski v Albion Steel Pty Ltd* (1994) 10 NSWCCR 287 at 296-297 (*Litynski*), at [37] quoting Bryson JA (Handley JA and Bell J agreeing) in *Aluminium Louvres and Ceilings Pty Ltd v Xue Qin Zheng* [2006] NSWCA 34 at [38], at [40] quoting Basten JA in *Chemler* [64], at [52] quoting Basten JA in *Tan v National Australia Bank Ltd* [2008] NSWCA 198 (*Tan*) at [9] – [12], and at [57].
[40] [2008] NSWCA 198.

[27] As was pointed out by the Victorian Court of Appeal in *Kozanoglu v The Pharmacy Board of Australia*,[41] to describe an appeal or review as being a "review on the merits" "does not answer the important question as to what limits if any there are upon the process of review once the matter is before the [appellate tribunal]."[42] This will depend upon the powers given to the body or tribunal which is empowered to conduct the review.[43]

[28] Some appeals or reviews have been referred to as a hybrid. For example in *Kozanoglu* the Victorian Court of Appeal said, in relation to appeals to a "responsible tribunal" under s 199(1)(e) of the *Health Practitioner Regulation National Law (Victoria) Act 2009*, at [119]:[44]

> The appeal to a responsible tribunal under the *National Law* is neither an appeal in the strict sense, nor a rehearing de novo. It is rather a hybrid, whereby the material to be considered is confined to that placed before the initial decision maker, but with the opportunity available to both parties to present additional evidence which bears directly upon that decision as originally taken. It is not 'open slather', but nor is it an appeal confined to error.

[29] Other decisions have recognised a "novel form" of appeal or review which might contemplate a rehearing in some circumstances and a hearing de novo in others. Per McColl JA in *Siddik* at [100]:

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[41] (2012) 36 VR 656 (*Kozanoglu*).
[42] *Kozanoglu* at [35].
[43] See, for example, *Tan* at [12] quoted in *Sapina* at [52].
[44] See too [95] – [96].

> While a conclusion that an appeal by way of review may, depending on the circumstances, involve either a hearing de novo or a rehearing invokes a novel form of appeal, it ensures the legislature has created a flexible model which as I explain below assists the objectives of the legislature. In *New South Wales Thoroughbred Racing Board v Waterhouse* [2003] NSWCA 55; (2003) 56 NSWLR 691 (at [103] – [104]) Hodgson JA (Santow JA agreeing) held that an appeal under s 15 of the *Racing Appeals Tribunal Act 1983* involved both appeals of *a de novo* and rehearing nature.

[30] In some cases, the statute provides for a "gateway" through which an appellant must pass before being entitled to a merits review. An example of this is *Siddik* where the Registrar had to be satisfied that at least one of the grounds for appeal specified in the relevant provision existed before the appeal could proceed to an Appeal Panel, which could then conduct a full review on the merits. Identification of some kind of "error" might also be relevant in some cases where leave to appeal is required. Per Deane, Gaudron and McHugh JJ in *Re Coldham; Ex parte Brideson [No 2]*[45] at 275:

> In determining whether leave to appeal should be granted under s 88F(1), it would have been appropriate for the Commission to refuse leave unless it thought that there was an arguable case that the Registrar had acted upon a wrong principle, given weight to irrelevant matters, failed to give sufficient weight to relevant matters or made a mistake as to the facts or that the decision was plainly unreasonable or unjust. But once leave was granted, the Commission was bound to make its own decision on the evidence before it, including any further evidence admitted pursuant to s 88F(3).

[45] (1990) 170 CLR 267 (*Brideson [No 2]*).

Statutory Scheme

[31] The Act provides for the investigation, allocation, use, control, protection, management and administration of water resources in the Northern Territory.[46] The Act provides for the appointment by the Minister of a person to be the Controller of Water Resources.[47] The Controller has an extensive range of powers and functions to enable him to administer the Act.

[32] The Act prohibits the extraction of "ground water" without a licence.[48] The Controller has the power to grant licences to extract ground water.[49] A licence so granted is a "water extraction licence."[50] A decision to grant a water extraction licence is a "water extraction licence decision."[51]

[33] 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;[52]

[46] Long title of the Act.
[47] s 18.
[48] s 59.
[49] s 60.
[50] s 4(1).
[51] s 71A(1).
[52] s 71B(1).

(b) the Controller must publish that notice in a newspaper in the area to which the application relates;[53]

(c) the notice must include certain information;[54] and

(d) the notice must include an invitation to make written comments about the application to the Controller.[55]

[34] 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).

[35] 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.

[53] s 71B(2).
[54] s 71B(3).
[55] s 71B(4).

[36] 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)).

[37] 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))[56] of the Controller, or under section 5(6) of the Minister,[57] may apply to the Minister to review the matter.
>
> (2) An application under this section shall be made in the prescribed manner and form.[58]
>
> (3) Subject to this Act, the Minister may:

[56] s 93(3) requires the Controller to take action in relation to a licence where the Supreme Court makes an order under s 5 of the *Environment Protection (Northern Territory Supreme Court) Act 1978* (Cth).
[57] s 5(6) empowers the Minister to declare coastal waters of the Territory to be tidal water for the purposes of the Act.
[58] Clause 3(2) of the *Water Regulations 2008* (NT) provides that the Controller may approve the forms to be used under the Act.

(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[59] 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.

[38] 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"),[60] s 71E provides that certain notice and reasons requirements must be complied with. Specifically:

[59] The Review Panel is the Water Resources Review Panel established under s 24 of the Act. Its main functions, powers and duties are set out in ss 29, 30(4), 31 and 32.
[60] s 71E(1).

(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.

[39] 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).

[40] The Controller may amend or modify the terms and conditions of a licence, revoke a licence or suspend it for a period.[61]

Submissions

Plaintiff's submissions

[41] The plaintiff contended that the Minister's reasons demonstrate that he misunderstood the statutory task required of him by s 30, and asked himself the wrong question when undertaking the review.[62] The plaintiff contended that the Minister engaged in a process akin to

[61] s 93 of the Act.
[62] Plaintiff's Points of Claim filed 31 October 2014 ("Plaintiff's Points of Claim") at [25].

judicial review of the Controller's decision and wrongly asked what was the correct and preferable decision on the material before the Controller, rather than what was the correct and preferable decision on the material before the Minister.[63]

[42] I pause at this stage to note that it is not readily apparent that this is what the Minister did. In the reasons that he gave for upholding the Controller's decision, 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.[64] The main focus of the Minister's reasons seems to have been the submissions placed before him by the plaintiff in its applications for review under the heading "Grounds for Review".[65] I see 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,[66] and nine pages in relation to the Oolloo licences.[67]

[43] In any event, in light of the fact that I am only asked to consider whether or not the Minister was required to undertake a merits review

[63] Plaintiff's Points of Claim at [26] and [29].
[64] See the Minister's letters of 14 July 2014 at ALB Affidavit-19 (pp 251-4).
[65] See ALB Affidavit-17, p 229.
[66] See ALB Affidavit-15, pp 203-215.
[67] See ALB Affidavit-16, pp 217-227.

and the Minister's concession that he did not do that, there is no need for me to further consider what the Minister did.[68]

Section 30(3)(a)(ii)

[44] In support of its contention that the Minister must conduct a merits review, the plaintiff referred to s 30(3)(a)(ii) which empowers the Minister to "substitute for the Controller's decision the decision that, in the opinion of the Minister, the Controller should have made in the first instance". The plaintiff contended that this is the language of a merits review (referring to s 43 of the *Administrative Appeals Tribunals Act 1975* (Cth)) because it suggests that the Minister's function on review is to "do over again" what the Controller did.[69] The plaintiff also pointed to s 71E(4) of the Act which requires that a review decision under s 30(3)(a)(ii) "is to include 'the way in which the Minister … has taken into account' the s 71B(4) comments and the s 90 factors" as suggesting that the Minister's task is to exercise the discretion de novo.[70]

[45] However, this contention only relates to one of the many powers conferred upon the Minister. The provisions of s 71E do not apply to a decision by the Minister to uphold a decision of the Controller under s 30(3)(a)(i) of the Act. Even where s 71E does apply, the review

[68] Cf *Applicants A1 and A2* [67] – [68].
[69] Citing *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 502.
[70] Plaintiff's Points of Claim at [26].

decision, apart from including reasons for the decision, only needs to state *the way in which* the Minister has taken into account the s 71B(4) comments and any *relevant factors* mentioned in s 90(1).

[46] It is readily understandable why the statute should require the giving of reasons where the Minister has substituted a fresh decision for the original decision of the Controller (under s 30(3)(a)(ii)), or where the Controller has made a decision that is substantially different from the original decision (following a referral by the Minister under s 30(3)(a)(iii)). Conversely, it is understandable why there is no such express requirement where the Minister upholds the Controller's original decision under s 30(3)(a)(i). The reasons for that decision would have already been given.

[47] The requirement to provide reasons of the kind required by s 71E does not necessarily lead to the conclusion that the Minister should have engaged in a merits review in the process of substituting his or her decision for that of the Controller. For example, the substituted decision could be to overrule the Controller's decision or to alter a condition of a proposed licence because of a particular error made by the Controller, or because of a change in policy or other circumstance relevant under s 90(1).[71]

[71] Cf *MacFarlane v Minister for Natural Resources, Environment and Heritage* (2012) 271 FLR 458.

[48] Nor would there be any reason why the Minister would need to engage in a merits review before referring a matter back to the Controller for reconsideration pursuant to the Minister's powers under s 30(3)(a)(iii), particularly if there was some error on the part of the Controller or some change in policy. In such circumstances it would be the Controller, not the Minister, who would be required to consider and address the s 71B(4) comments and any relevant s 90(1) factors afresh. It would be the Controller, not the Minister, who would make a new decision as to whether or not to grant the licence.

[49] If anything, the fact that s 71E does not require the Minister to give reasons for upholding the Controller's decision under s 30(3)(a)(i) or for referring the matter back to the Controller for reconsideration under s 30(3)(a)(iii), suggests that the Minister may not be under an obligation to engage in a comprehensive review of the merits, or to go beyond the assertions made in the application for review and such parts of the Controller's reasons as are relevant to those assertions.

MacFarlane v Minister for Natural Resources, Environment and Heritage[72]

[50] The plaintiff also relied on [48] of the decision of Kelly J in *MacFarlane v Minister for Natural Resources, Environment and Heritage*. That was an application for judicial review of a decision of

[72] (2012) 271 FLR 458 (*MacFarlane*).

the Minister under s 30(3)(a)(i) of the Act to uphold a decision of the Controller to refuse to grant a water extraction licence. At [48] her Honour said:

> Secondly, and more importantly, what is under review is the decision of the Minister in 2010, on the recommendation of the Review Panel, to uphold the decision of the Controller to refuse the licence application. In making that decision, the Controller was obliged to take into account those matters set out in s 90 of the Act at the time when the decision was to be made - not what the situation was in 2005. Those include the matters referred to above. The Minister was under the same obligation in reviewing the Controller's decision.

[51] Counsel for the plaintiff emphasised the last sentence and contended that her Honour's comments "suggest that her Honour understood s 30 to require the Minister to consider the s 90 matters at the time of the Minister's decision. … such a requirement indicates merits review."[73]

[52] I do not think this is correct. The plaintiffs in that matter complained about the fact that the Controller did not make a decision about the application which they had lodged in 2005 until 2010, during which time there was a significant change in policy reducing the maximum percentage of available water that could be allocated to water licences. The plaintiffs contended that, had the Controller made her decision in 2005, they would have been granted the licence. All that her Honour was saying at [48] is that the Minister was under the same obligation as was the Controller to have regard to the situation at the time when the

[73] Plaintiff's Points of Claim at [28].

decision was made (in 2010) rather than the time when the application was lodged (in 2005).

[53] Further, her Honour was not considering the nature of the review under s 30 of the Act. Her Honour was determining one of the grounds in the judicial review application before her, namely that the Minister had failed to take into account the delay in determining the application that the plaintiffs had lodged in 2005.

Defendant's submissions

[54] The defendant contended that the statutory provisions that define the scope of the Minister's review function under the Act (in particular, ss 30, 31 and 71E) do not require the Minister to engage in "merits review". Instead, those provisions contemplate that on a "review" the Minister must consider the errors alleged to have been made and, if not satisfied that any such errors were made, uphold the Controller's decision. Only if error is established may the Minister go on to re-make a decision.[74]

[55] The defendant submitted that the Minister's initial focus must be on any alleged errors that are identified in the application for review.

[74] Defendant's Outline of Submissions filed 5 December 2014 ("Defendant's Outline of Submissions") at [3(a)] and [27].

[56] The defendant placed particular reliance on the decisions of the High Court in *Pilbara Infrastructure v Australian Competition Tribunal Pty Ltd*[75] and *Coal and Allied*.[76]

Pilbara

[57] *Pilbara* was concerned with the extent of the power conferred upon the Australian Competition Tribunal to "review" decisions of the designated Minister to declare certain infrastructure services under s 44H of the *Competition and Consumer Act 2010* (Cth) ("the CCA"). The party who sought the review and other parties whose interests would have been affected if the review was successful provided the Tribunal with an extensive array of materials that had not been before the Minister.

[58] Section 44K of the CCA provided that the review was to be "a reconsideration of the matter" and that the Tribunal had the same powers as the Minister and could require the National Competition Council to provide further information and other assistance. The Tribunal could affirm, vary or set aside a declaration, or if the Minister had decided not to make a particular declaration the Tribunal could affirm the Minister's decision or set it aside and make the declaration.

[59] At [48] the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) said:

[75] (2012) 246 CLR 379 (*Pilbara*).
[76] (2000) 203 CLR 194.

> The requirement that the Tribunal review the Minister's decision neither permits nor requires a quasi-curial trial between the access seeker and the facility provider as adversarial parties, on new and different material, to determine whether a service should be declared. That would not be a "review" of the Minister's decision which was "a reconsideration of the matter".

[60] At [57] their Honours distinguished between a review of a decision made after a hearing, which would often involve a "rehearing", and a "review of a decision by the designated Minister that ordinarily, even invariably, would be made without any hearing."

[61] And at [65]:

> … The Tribunal treated its task as being to decide afresh on the new body of evidence and material placed before it whether the services should be declared. That was not its task. Its task was to review the Minister's decisions by reconsidering those decisions on the material before the Minister supplemented, if necessary, by any information, assistance or report given to the Tribunal by the NCC in response to a request made under s 44K(6).

[62] Heydon J expressed a number of reasons why the Tribunal's role was narrow. The first was "the very existence of s 44K(6)" which empowered the presiding member of the Tribunal to require the NCC "to give information and other assistance and to make reports … for the purposes of the review." He said that this "tells against an untrammelled liberty in those appearing before the Tribunal to tender,

and in the Tribunal itself to consider, material which had not been before the Minister."[77]

[63] There is some similarity between s 44K(6) of the CCA and the power given to the Minister in s 30(3)(b) of the Act to refer a matter to the Review Panel.

[64] Heydon J also rejected a submission by the respondents in that case that the Tribunal was in the same position as the Administrative Appeals Tribunal under the *Administrative Appeals Tribunal Act 1975* (Cth). His Honour said, at [145]:

> They submitted that it was thus able to take into account evidence that had not been before the primary decision maker. This submission does not support the respondents' construction of s 44K(4). Section 40(1) of that Act gives the Administrative Appeals Tribunal express powers to receive evidence. Section 40(1A) of that Act gives it express powers to make orders in the nature of subpoenas. Section 44K did not give the Tribunal these powers. Each of the two statutes must be construed in its own terms. They cannot be treated as identical or as generating relevant analogies.

[65] Counsel for the plaintiff submitted that the Court's conclusions about the nature of the review in *Pilbara* are distinguishable from the present matter because s 44K expressly stated that the review was to be "a reconsideration of the matter" whereas other provisions in the same statute expressly provided for other reviews to be conducted by way of rehearing. Those reviews were reviews by the Tribunal of certain

[77] [131].

determinations of the body formerly known as the Trade Practices Commission ("the Commission"), being determinations involving the grant or refusal by the Commission of certain authorisations. In the course of considering applications for such authorisations the Commission was obliged to take into account submissions by the applicant or any other person, prepare draft determinations and invite interested persons to an oral conference.

[66] At [140] Heydon J said:

> In these two senses [namely taking submissions into account and conferring with interested people], there had been a hearing before the Commission. It was therefore appropriate for the Act to provide that the review of the Commission's determination be undertaken as a "rehearing" in s 101(2). The Minister's decision under s 44H, on the other hand, did not involve a hearing which was in any sense like those the Commission conducted under Pt VII Div 1."

[67] Immediately after that, at [141], his Honour said that the distinction between the two kinds of reviews was "not of fundamental significance. What is of fundamental significance is that nothing in the provisions in Pt IX Div 2 (ss 102A-110) suggested that they applied to s 44K reviews."

[68] At [60] the plurality had noted that s 101(2) of the relevant Act had used "rehearing" to describe the task of the Tribunal reviewing a determination of the Commission, and that s 44K(4) referred to

"reconsideration", in both cases in a context wholly divorced from the exercise of judicial power. They said:

> Nonetheless, some different meaning must presumably be intended by the use of the different words in identifying the review to be undertaken by the Tribunal. The contrast is best understood as being between a "rehearing" which requires deciding an issue afresh on whatever material is placed before the new decision maker and a "reconsideration" which requires reviewing what the original decision maker decided and doing that by reference to the material that was placed before the original decision maker (supplemented, in this kind of case, only by whatever material the NCC provides in answers to requests made by the Tribunal pursuant to s 44K(6).

[69] Although the nature and purpose of the declarations and legislation the subject of *Pilbara* are quite different to the present situation, the discussion about the scope of the review is of some assistance in the present case. In particular, apart from repeating that the nature and scope of appeals and reviews will depend very much upon the terms and context of the relevant statute,[78] the judgments recognise that the nature of some reviews will fall between two extremes – on the one hand reviews requiring error to be demonstrated; on the other hand reviews where the reviewing body is permitted and or required to conduct a full merits review.

[70] Nevertheless, that decision concerned the scope of the Tribunal's powers, not whether or not some kind of error needed to be found as part of the process. It seems to have been accepted throughout all the

[78] See for example [57].

proceedings that the review before the Tribunal was a merits review, not a judicial review.[79]

Coal and Allied[80]

[71] The defendant contended that the review contemplated by s 30 of the Act is of the same kind as that which the High Court held in *Coal and Allied* to require the existence of error on the part of the primary decision maker.[81]

[72] *Coal and Allied* concerned the nature of an "appeal" to the Full Bench of the Industrial Relations Commission (an administrative tribunal). The Full Bench had power to admit further evidence on appeal and to make a wide range of decisions confirming, setting aside or varying the original decision.

[73] After noting the importance of looking to the relevant statute in order to determine the functions and powers of the appellate body, the plurality (Gleeson CJ, Gaudron and Hayne JJ) referred to some of the phrases often used to describe appeals including "appeals in the strict sense", "appeals by way of rehearing" and "appeals by way of hearing de novo".[82]

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[79] See the reasons of the Tribunal in *Re Fortescue Metals Group Ltd* (2010) 242 FLR 136 at [24]; 271 ALR 256, and of the Full Court of the Federal Court in *Pilbara Infrastructure Pty Ltd v Australia Competition Tribunal* (2011) 193 FCR 57 at [15] – [16].
[80] (2000) 203 CLR 194.
[81] Defendant's Outline of Submissions [30].
[82] At [12]-[13].

[74] At [13] their Honours stated that if an appellate tribunal can receive further evidence and its powers are not restricted to making the decision that should have been made at first instance, the appeal is usually and conveniently described as an appeal by way of rehearing (as distinct from a hearing de novo).

[75] At [14] their Honours said:

> Ordinarily, if there has been no further evidence admitted and if there has been no relevant change in the law, a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker.[83] That is because statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that, *unless there is something to indicate otherwise*, the power is to be exercised for the correction of error. However, the conferral of a right of appeal by way of a hearing de novo is construed as a proceeding in which the appellate body is required to exercise its powers whether or not there was error at first instance.[84]
>
> (emphasis added)

[76] In *Allesch v Maunz*,[85] a decision delivered only four weeks before *Coal and Allied*, the plurality (Gaudron, McHugh, Gummow and Hayne JJ) said that the powers of an appellate court on an appeal by way of rehearing "are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error … *unless … there is some statutory*

[83] *Allesch v Maunz* (2000) 203 CLR 172. See also *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111] per McHugh, Gummow and Callinan JJ.
[84] *Coal and Allied* [14].
[85] (2000) 203 CLR 172.

provision which indicates that the powers may be exercised whether or not there was error at first instance"[86] (emphasis added). As authority for this conclusion their Honours cited *Brideson [No 2]*.[87]

[77] In *Coal and Allied* the Court held that because the appeal was properly described as an appeal by way of rehearing, and because there was nothing to suggest otherwise, the Full Bench could exercise its powers "only if there is error on the part of the primary decision maker".[88]

[78] Their Honours discussed and distinguished *Brideson [No 2]* by drawing attention to differences between the relevant statutory provisions. In *Brideson [No 2]* the relevant statutory provision stated that "upon the determination of an appeal under this section by the Commission, the Commission *shall* "make such order as it thinks fit." Their Honours said that the existence of that requirement "indicated that the Commission's appellate powers were not constrained by the need to identify error on the part of the primary decision-maker, but, rather, that the Commission was obliged to give its own decision on the evidence before it."[89] This was a clear example of a statute indicating a requirement for the appellate tribunal to proceed irrespective of error.

[79] I pause at this stage to note that although s 30(3) of the Act permits the Minister to substitute his or her decision for that of the Controller,

[86] At [23].
[87] (1990) 170 CLR 267.
[88] *Coal and Allied* [17].
[89] *Coal and Allied* at [15].

there is no requirement for the Minister to "make such order as [he or she] thinks fit." Rather the Minister *may* do certain things, as could the Full Bench of the Commission in *Coal and Allied*. On the other hand, as counsel for the plaintiff pointed out, if the Minister refers the matter to the Review Panel and the Minister receives advice from the Review Panel, s 30(4) provides that the Minister "*shall* take such action under subsection (3)(a)(i) or (ii) as he or she thinks fit" (emphasis added). This was the kind of language which led the High Court in *Brideson [No 2]* to conclude that error did not have to be found.

[80] *Brideson [No 2]* concerned an application for the registration of a particular organisation under the *Conciliation and Arbitration Act 1904* (Cth). The powers conferred upon the appellate tribunal enabled it to grant or refuse such registration and to take into account additional evidence. The Court held that this included an obligation to take into account evidence of the events which had occurred since the making of the original decision. On the other hand, *Coal and Allied* concerned an appeal against a decision terminating a bargaining period under the *Workplace Relations Act 1996* (Cth) and declaring that no new bargaining period should be initiated until a specified date. That appeal was concerned only with the circumstances at the particular point in time when the original decision and declaration were made.

[81] These two decisions provide examples of important differences between the functions of different appellate tribunals. The appellate

tribunal in *Brideson [No 2]* was required to exercise original jurisdiction and make its own fresh decision. On the other hand, the appellate tribunal in *Coal and Allied* was required to focus on the circumstances in existence at the time when the original decision and declaration were made.

[82] This kind of distinction is recognised in the following comments of Kiefel J (Crennan J agreeing) in *Shi*:[90]

> Where the decision to be made contains no temporal element, evidence of matters occurring after the original decision may be taken into account by the Tribunal in the process of informing itself. Cases which state that the Tribunal is not limited to the evidence before the original decision-maker, or available to that person, are to be understood in this light. It is otherwise where the review to be conducted by the Tribunal is limited to deciding the question by reference to a particular point in time. (references omitted)

[83] I share the reservations expressed by Basten JA in *State Transit Authority of New South Wales v Fritzi Chemler*[91] at [63] – [64] about trying to classify appeals (or reviews) in accordance with the categories suggested in other cases, including *Sperway* and *Coal and Allied*. As has been said in most if not all of the cases, the necessary questions must be answered by reference to the particular legislation concerned.

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[90] (2008) 235 CLR 286 at 328, [143] citing inter alia *Comptroller General of Customs v Akai Pty Ltd* (1994) 50 FCR 511 at 521.
[91] [2007] NSWCA 249 (*Chemler*).

The *Strange-Muir* presumption

[84] The defendant then referred to the following passage from the judgment of McHugh JA in *Strange-Muir v Corrective Services (NSW)*[92] at 250E:

> … there is a presumptive rule that in an administrative appeal to an administrative body the issue is whether the decision was correct when it was made. The hearing is not de novo. This is so whether or not the tribunal is empowered to hear additional evidence.

[85] McHugh JA stressed that the terms of the relevant legislation may well suggest otherwise. Neither of the other two judges in that matter (Kirby P and Priestley JA) endorsed such a presumption, Priestley JA (who was in the majority with McHugh JA) preferring "to rest [his] opinion upon a reading of the words of the section in the context of that Act as a whole."[93]

[86] In *Brideson [No 2]*[94] Deane, Gaudron and McHugh JJ referred to this passage without endorsing its correctness. Rather, their Honours said, at 273:

> His Honour considered that in this respect an appeal to an administrative tribunal against an administrative act was to be contrasted with an appeal to a court against an administrative act. *Be that as it may*, it is well settled that, when the legislature gives a court the power to review or hear an "appeal" against the decision of an administrative body, a presumption arises that the court is to exercise original jurisdiction and to

[92] (1986) 5 NSWLR 234 (*Strange-Muir*).
[93] Ibid 246F.
[94] (1990) 170 CLR 267.

> determine the matter on the evidence and law applicable as at the date of the curial proceedings: see *Ex parte Australian Sporting Club Ltd.; Re Dash*.[95] Nevertheless, whether the right of appeal against an administrative decision is given to a court or to an administrative body, the nature of the appeal must ultimately depend on the terms of the statute conferring the right: *Builders Licencing Board v Sperway Constructions (Syd) Pty Ltd*.[96]
>
> (emphasis added)

[87] The correctness of the presumptive rule was doubted by a Full Court of the Supreme Court of Victoria in *McDonald v Guardianship and Administration Board*[97] (a matter concerning a review to the Victorian Administrative Appeals Tribunal) and more recently by the Victorian Court of Appeal in *Applicants A1 and A2* (a matter concerning an appeal from a decision of the Chief Commissioner of Police to the Director, Police Integrity).[98] In the latter decision their Honours (Maxwell P, Neave and Redlich JJA) identified three reasons for not applying the "presumption" in that matter, and added that the court in *McDonald* rejected McHugh JA's view that the reviewing tribunal does not make a new decision.[99]

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[95] (1947) 47 S.R. (NSW) 283.
[96] (1976) 135 CLR 616.
[97] [1993] 1 VR 521 at 528-529 (*McDonald*). See too *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1998) 89 FCR 200 at 227-228. Although this decision was reversed on appeal in *Coal and Allied*, none of the members of the High Court in that matter said anything about the presumption except Kirby J who said at [75] that his conclusion did not rest on the "supposed" presumptive rule.
[98] (2007) 16 VR 612 at [63] – [66].
[99] [66].

[88] The plaintiff submitted that the existence of this presumption in the context of a review is inconsistent with the passage in *Tasty Chicks*[100] at [5] (which I quoted in [9] above).

[89] *Tasty Chicks* concerned the right of a taxpayer to seek review of a decision made by the Chief Commissioner of State Revenue under the *Taxation Administration Act 1996* (NSW). A taxpayer dissatisfied with such a decision could apply for a "review" of the decision to the Administrative Decisions Tribunal ("the ADT") or to the Supreme Court of New South Wales. Both the ADT and the Court had similar powers, including powers to receive further evidence and to make any assessment that could have been made by the Chief Commissioner.[101]

[90] The High Court rejected the Court of Appeal's decision which was to the effect that where the application for review was made to the Supreme Court, the applicant needed to establish that the decision of the Chief Commissioner was vitiated by error of a kind referred to in *Avon Downs Pty Ltd v Commissioner of Taxation*.[102] Their Honours agreed with the trial judge that, with one minor but irrelevant

[100] (2011) 245 CLR 446.
[101] Pursuant to s 63 of the *Administrative Decisions Tribunal Act 1997* (NSW) ("the ADT Act") the ADT was empowered to decide "the correct and preferable decision … having regard to the material before it" and could "exercise all the functions conferred on the Chief Commissioner – see [14] of the reasons. Pursuant to ss 75A(7) & 75A(1) of the *Supreme Court Act 1970* (NSW) the Supreme Court can receive further evidence and make any assessment which ought to have been made – see [17] of the reasons.
[102] (1949) 78 CLR 353 (*Avon Downs*).

exception, the powers on review were the same for both the Supreme Court and the ADT.[103]

[91] Before leaving *Tasty Chicks* I should note that the powers conferred upon the reviewing tribunal (both the Supreme Court and the ADT) in s 101(1) of the *Taxation Administration Act 1996* (NSW) were similar to those conferred under s 30 of the Act. The reviewing tribunal could confirm or revoke the earlier decision (cf s 30(3)(a)(i)), make a different decision (cf s 30(3)(a)(ii)) or remit the matter to the primary decision maker (cf s 30(3)(a)(iii)). The only differences between the two statutory provisions that may be relevant are that the Supreme Court had express powers to receive further evidence and to make any assessment which ought to have been made at first instance,[104] and the ADT had express powers to decide "the correct and preferable decision … having regard to the material then before it" and to exercise all the functions conferred on the Chief Commissioner.[105]

[92] In light of the doubts expressed in McDonald and *Applicants A1 and A2* and the fact that the High Court in *Tasty Chicks* saw no relevant distinction between reviews to the Supreme Court and reviews to the ADT, I consider that that there is no longer any relevant distinction of the kind made by McHugh J in *Strange-Muir* between appeals or

[103] [20].
[104] Under s 75A of the *Supreme Court Act 1970* (NSW).
[105] Under s 63 of the ADT Act.

reviews to an administrative tribunal on the one hand and to a court on the other.

Five Indicators

[93] The defendant then identified "five indicators in the Act that support the conclusion that the review function under s 30 involves, in the first instance, review for error" and thus not a merits review.

[94] The first indicator refers to s 71E and makes some of the points that I have already discussed above at paragraphs [44] to [49] in relation to s 30(3)(a)(ii). The defendant contended that because s 71E does not require reasons to be given addressing the s 71B(4) comments and any relevant s 90(1) factors where the Minister decides to uphold the Controller's decision under s 30(3)(a)(i), one should conclude that "in cases where the Minister is not persuaded that the Controller erred, the review function is at an end and the Minister should simply affirm the Controller's decision. In that situation, it is no part of the Minister's function to consider whether he or she would have made the same decision made by the Controller."[106]

[95] I disagree with this contention. The absence of an express requirement to give reasons in some circumstances does not infer that error needs to be shown before the Minister can exercise his or her power under s 30(3)(a)(i), any more than it infers that the Minister should look at

[106] Defendant's Outline of Submissions at [37].

the merits. Nor does it infer that error needs to be shown before the Minister can exercise other powers under s 30(3)(a) or (b).

[96] Further, as the plaintiff pointed out, there is no express requirement for reasons to be given where the Minister exercises power under s 30(3)(b) and refers the matter to the Review Panel. Indeed, following such a referral, s 30(4) requires the Minister to take action either under s 30(3)(a)(i) or (ii). Only where the Minister then takes action under s 30(3)(a)(ii) would reasons have to be given pursuant to s 71E.

[97] I agree with the plaintiff's submission that "this simply reflects the fact that where a decision is upheld there has been no change in circumstances such that it is necessary to broadly advertise reasons and that the objects of Part 6A would not be advanced in those circumstances."[107]

[98] The second indicator asserted by the defendant is that unlike s 43 of the AAT Act, s 30 of the Act does not contain any provision to the effect that the Minister has all the powers and discretions of the original decision maker. Such a provision has been construed as enabling a reviewing body such as the AAT to stand in the shoes of the original decision-maker.[108] Accordingly the various authorities concerning the review function of the AAT do not provide a reliable guide to the task of the Minister.

[107] Plaintiff's Submissions in Reply filed 12 December 2014 at [13].
[108] See for example *Shi* at [134] – [135].

[99] I have already noted at [91] that the legislation considered in *Tasty Chicks* contained provisions similar to those in s 43 of the AAT Act and s 30 of the Act.

[100] The plaintiff pointed to the fact that s 30(3)(a)(ii) gives the Minister the power to substitute the decision that the Controller should have made in the first instance. A decision made by the Minister under s 30(3)(a)(ii) will be a decision of the reviewing tribunal in the same way as a decision made by the AAT when exercising its analogous power in s 43(1)(c)(i) of the AAT Act. Unlike provisions which enable an appellate tribunal to vary the original decision, the decision of the Minister under s 30(3)(a)(ii) is his or her decision. It may include, for example, a decision under s 60 to grant a licence to take water from a bore and to specify terms and conditions.

[101] Further, like the AAT, the Minister has power to seek and obtain additional information and advice, including from the Review Panel under s 30(3)(b).

[102] Also, consistent with the effect of the AAT's exercise of other analogous powers under s 43(1)(a) and s 43(1)(c)(ii) of the AAT Act, a decision under s 30(3)(a)(i) upholding the Controller's decision and a

decision of the Controller following referral back under s 30(3)(a)(iii) will remain the operative legal decision of the Controller.[109]

[103] The defendant's third indicator is that the Minister does not have the same obligations as the Controller had (under ss 71B – 71D) when making the initial decision – for example notifying the public, inviting public comments and so on. The defendant says that this is inconsistent with the Minister having wide power to remake the original decision.

[104] I agree with the plaintiff's contention that it would not be necessary for the Minister to perform these functions again given that they would have already been carried out by the Controller. The Minister would be obliged under s 71E(4) to take into account the comments made in accordance with s 71B(4) and any relevant factors mentioned in s 90(1).

[105] The defendant's fourth indicator is that "unlike the Controller, the Minister does not have any power to obtain further evidence." While acknowledging that the Minister can refer the matter to a Review Panel, in which case the Review Panel does have a range of powers that would enable it to obtain further evidence (s 31), the defendant submits that absent such a referral, no one has any fresh opportunity to submit evidence or make submissions to the Minister as part of the review.

[109] *Shi* at 315 [100] per Hayne and Heydon JJ, quoting *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167 at 175-176.

[106] The plaintiff pointed out that the power to receive further evidence can be the subject of necessary implication. In *Applicants A1 and A2* the Court said, at [27]:

> … The director must be able to consider any additional material which the parties wish to place before him on the appeal.[110] As with VCAT, the existence of that power is a matter of necessary implication, rather than express provision.[111]

[107] The ability of a person to provide additional material to a Minister, and the obligation upon a Minister to take such material as is relevant into account in performing his or her functions, are well established. For example, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[112] Mason J said, at p 45, [20]:

> It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has actual or constructive knowledge and which may have a direct bearing on the justice of making the land grant, and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one sense this conclusion may be seen as an application of the general principle that an administrative decision maker is required to make his decision on the basis of material available to him at the time the decision is made. But that principle is itself a reflection of the fact that there may be found in the subject matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision maker.

[108] I agree that the Minister should be able to better inform himself or herself on certain matters if necessary, without having to resort to a

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[110] See *McDonald v Guardianship Board* [1993] 1 VR 521, 534 (Fullagar, Tadgell & Phillips JJ).
[111] At 528-30.
[112] (1986) 162 CLR 24 (*Peko-Wallsend*).

Review Panel. For example, the application for review might raise the need for the Minister to seek particular information about some fact that was either not evident in the Controller's reasons or not present in the materials before the Controller, or about some circumstance that arose after the Controller had made the initial decision. Of course the Minister would be obliged to accord natural justice in certain circumstances, for example where he or she was proposing to substitute a decision which was contrary to the legitimate expectations of an applicant who had already obtained a favourable decision from the Controller.

[109] The plaintiff also noted that the Minister could refer the matter back to the Controller for reconsideration "with or without directions about new matters that the Controller shall take into account".[113]

[110] The fifth indicator asserted by the Minister flows from the fact that the power to conduct a review is conferred on the Minister. The defendant says that:

> If the Minister is required, simply as a result of an application under s 30, to re-exercise afresh the power that is conferred on the Controller (a specialist statutory officer created by the Act), the effect would be to make the Minister, rather than the Controller, the decision-maker in many cases under the Act, even in routine matters. It is improbable that Parliament intended to confer a right on affected persons to require potentially time-consuming statutory tasks of the Controller to

[113] Plaintiff's Points of Claim at [10].

> be performed by the Minister as a matter of course, even when no error was made by the Controller in the original decision.[114]

[111] The plaintiff pointed out the Minister's powers under s 19 of the Act to delegate his powers and functions. Further, as the defendant noted elsewhere in its submissions, a Minister is entitled to receive assistance from others (most obviously from others in his or her Department) and of course from the materials before the Controller, in discharging a review function.[115]

[112] The plaintiff also contended that even if the Minister was required to identify some error before proceeding with the review, the work involved in that process would be just as extensive as it would be if he or she had to conduct a merits review. This may not always be so. There may well be cases where an error is readily apparent from the application for review itself as a result of which the Minister might be able to exercise his or her powers under any of ss 30(3)(a)(ii), (iii) or (b) without considering all of the other material.

[113] In any event, the fact that the Minister's task might be time-consuming "does not justify, let alone require, any different construction of the key provisions" of the Act.[116]

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[114] Defendant's Outline of Submissions [42].
[115] Defendant's Outline of Submissions [48] – [52] citing *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 115, and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30-31, 37-38 and 65-66. See also *Re Control Investment and Australian Broadcasting Tribunal [No 2]*(1981) 3 ALD 88 at 92.
[116] *Applicants A1 and A2* [41].

Plaintiff's reply

[114] In its submissions in reply[117] the plaintiff sought to distinguish *Pilbara* and *Coal and Allied* from the present matter and referred to a number of decisions of the New South Wales Court of Appeal concerning appeals by way of review under s 352 of the *Work Place Injury Management and Workers Compensation* Act 1998 (NSW).[118]

[115] That provision relevantly provided:

> 352(5) An appeal under this section is to be by way of review of the decision appealed against.
>
> (6) Evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the decision appealed against may not be given on an appeal to the Commission except with the leave of the Commission.
>
> (7) On appeal, the decision may be confirmed or may be revoked and a new decision made in its place. Alternatively, the matter may be remitted back to the Arbitrator concerned, or to another Arbitrator, for determination in accordance with any decision or directions of the Commission.

[116] In *Sapina*, the NSW Court of Appeal held that there was no requirement for the Presidential member of the Commission (being the body to whom the "appeal" was made) to identify an error before exercising the powers in s 352(7).[119]

[117] Plaintiff's Outline of Submissions in Reply dated 12 December 2014.
[118] I note that s 352(5) since has been amended to expressly limit the nature of such appeals.
[119] *Sapina* [2009] NSWCA 71at [55].

[117] At [57] Allsop P & Hoeben J (Beazley JA agreeing) said:

> Whilst the new regime of dealing with workers compensation claims must be examined in its own statutory context, it is important to appreciate that the legislature has used a phrase that had in the prior regime, a tolerably settled meaning. Section 36 of the *Compensation Court Act* used the phrase "review the decision". Subsections s 352(1) and (5) of the WIM Act make clear that the "appeal" is to be by way of review of the decision. The notion of "review of a decision" had been clearly held in the context of the former legislation and the WIM Act to be wider that an appeal strictly so-called and encompassing a reconsideration beyond correction of error. The decision under appeal is not to be ignored, but the task of the Presidential member is, as Spigelman CJ said in *Chemler, "to decide whether the original decision is wrong* [that is to] *decide what is the true and correct view."*[120] This requires the Presidential member to decide for himself or herself these matters. That does not mean that there must be a de novo hearing in each case. Cases such as *Watson, Boston Clothing, Linski* and *AGL v Samuels* made plain that this was not so under s 36 and the terms of ss 3, 352 (7) and 354 make clear that no such broad ranging factual enquiry afresh is necessarily required. The terms of the WLM Act, ss 3 and 354 and the width of the powers in s 352 (7) make clear that the Presidential member 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. As Allsop P said in *Cook v Midpart,* error (or lack of it) by the Arbitrator will or may be relevant to the task of the Presidential member, but it does not define the task.

[118] The plaintiff relied heavily on the above passage in *Sapina* as applicable to the functions of the Minister under s 30 of the Act. In particular the plaintiff relied on *Sapina* as authority for the conclusion that the Minister was wrong to confine himself to looking for error in the Controller's decision and that he should have conducted a merits review.

[120] Quoting from *Chemler* at [30].

[119] As with most of the authorities concerning appeals and reviews, care must be taken before too readily applying what has been said in *Sapina* and its predecessors to reviews of the kind involved in the present matter. As is clear from the opening words of [57] in *Sapina*, the nature of reviews under NSW workers compensation legislation has been discussed and settled in many earlier decisions, many of which were reviewed in the passages leading up to [57].

[120] First, it has been accepted that Parliament intended to confer broad review functions under workers compensation legislation like that involved in *Chemler* and *Sapina* because of the fact that such legislation is beneficial and decisions made under it affect very substantial rights of injured workers to receive a means of sustenance and other fundamental benefits.[121]

[121] Secondly, the reviewing bodies – the Workers Compensation Commission (constituted by a Presidential member) and its predecessor the Workers Compensation Court (constituted by a judge of that court) – were specialist tribunals, and in as good a position to remake a decision as was the original decision maker. See for example the observations in the last sentence of [57] of *Sapina*. See too the observations of Kirby P in *Boston Clothing Co Pty Ltd v Margaronis*[122]

[121] See for example Kirby P in *Watson v Hanimex Colour Services Pty Ltd* (1992) 8 NSWCCR 190 at pp 205- 206 quoted in *Sapina* at [24]; Kirby P in *Boston Clothing Co Pty Ltd v Margaronis* (1992) 27 NSWLR 580 at 587 quoted in *Sapina* at [30] and Kirby P in *Litynski* at 299-300 quoted in *Sapina* at [33].
[122] (1992) 27 NSWLR 580 (*Boston Clothing*).

at 587 quoted in [30] of *Sapina*, and in *Australian Gas Light Co v Samuels* at 623 quoted in [34] of *Sapina* followed by the observation by Alsop P and Hoeben J that "this passage does remind one of the importance in the present structure of the proper role of the deployment of the particular skills of the Presidential members to provide merits reviews."

[122] In relation to the "beneficial legislation" distinction it could be said that the review function in relation to water extraction licence decisions should also be broadly construed in light of the primary aim of the Act to protect the valuable water resources of the Northern Territory.

[123] I do not consider that the specialist tribunal distinction is very relevant in relation to reviews under the Act. Here the reviewing tribunal comprises the Minister 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 (s 23) and the Review Panel. The Minister would also be entitled to rely upon the expertise of the Controller.[123]

[123] *Applicants A1 & A2* [62] – [62].

[124] The plaintiff also referred to passages in the High Court's decisions of *Shi*[124] and *Tasty Chicks*[125] where the task of the review tribunal was not confined to the identification and correction of error.

[125] The plaintiff then responded to each of the defendant's "five indicators" and concluded that none of those matters counterbalance the plain terms in s 30 which "grant the Minister a broad range of options to deal with the matter including by requiring further investigations, all of which are prefixed by the word 'may'", and which contain no words of limitation in relation to the review.[126] I agree with those observations.

[126] The plaintiff reiterated its emphasis on the importance of water as a public resource and stressed the importance of the responsible Minister having overall control. The Minister would not have that power if error on the part of the Controller had to be established before the Minister could do anything other than uphold the Controller's decision under s 30(3)(a)(i).

[127] 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 s 30. Where such a right has been

[124] (2008) 235 CLR 286 at [43] – [51], [97] and [140] – 145].
[125] (2011) 245 CLR 446 at [22].
[126] Plaintiff's Outline of Submissions in Reply [23].

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

[128] I consider that the following views expressed by Spigelman CJ (with whom Basten JA and Bryson AJA agreed) at [22] of *Chemler* and repeated by McColl JA at [80] of *Siddik* concerning the review function of a Presidential member in those cases are apposite to the review function of the Minister conferred under s 30 of the Act:

> The scope of an internal merits review by a Presidential member is an important safeguard for the proper operation of the legislative scheme.

Supplementary written submissions

[129] During oral submissions I asked senior counsel for the defendant why it was necessary for the Minister to find error in all cases, including where the Minister was proposing to refer the matter back to the Controller or to refer it to the Review Panel, and for assistance as to what kind of error had to be identified. One example discussed was whether the Minister could intervene, perhaps by exercising power under s 30(3)(a)(ii) or (iii), in circumstances where other or better information or subsequent events made it clear that the Controller's decision should not stand, but where no error had been identified.

[130] Counsel submitted that the error could be of a legal or factual kind and could extend to a situation where other information demonstrates that the Controller's decision was based upon a factual position that is no longer accurate. In answer to my further question as to what could be done in such circumstances, but where there was no error even in such a broad sense, counsel maintained the position that the Minister could not interfere. Counsel drew my attention to the Controller's power under s 93 of the Act to amend or modify the terms and conditions of a licence as a means by which such a situation could be rectified. However, I do not consider that the power in s 93 would provide the appropriate remedy in all cases where the circumstances require the alteration of an action or decision of the Controller. For example, where an action was taken or a decision was made in the exercise by the Controller of another power under the Act such as ss 15(4), 20, 21, 39(2), 53(1), 70 or 84(b), actions or decisions also reviewable under s 30, s 93 would have no possible application.

[131] Counsel for the defendant submitted that the review function may involve something of a hybrid regime, and likened it to the regimes in *Coal and Allied* and *Siddik* where once error or a relevant ground of appeal had been established the appellate tribunal was free to engage in a rehearing and substitute its own decision. Counsel conceded that before exercising powers under s 30(3)(a)(ii) the Minister may have to engage in a merits review. I invited counsel to provide a supplementary

written submission that more clearly described the process that the defendant says the Minister is obliged to follow in the course of exercising his or her powers under s 30(3) if, as the defendant contends, the Minister needs to identify error in every case before doing anything but upholding the Controller's decision.

[132] In its supplementary written submissions, the defendant said that the alleged errors may be "factual errors or legal errors (including the failure to take account of mandatory relevant considerations under ss 71B(4) or 90(1), bias, unreasonableness etc)."[127] The plaintiff submitted in response that "it is entirely unclear for what precise meaning of error the Minister contends."[128]

[133] This lack of clarity, the fact that the Act says nothing about "error", and the assumption that the Minister should be able to interfere if there has been a significant change in factual circumstances after the Controller has made his or her decision such that to uphold the Controller's decision would be contrary to the public interest in such an important resource as water, suggests to me that the Minister's discretion is not limited to cases where error is established.

[134] The defendant also submitted that the construction of s 30 urged on the Court by the plaintiff would require the Minister to "re-exercise all the functions of the Controller afresh, even if no error is shown in the

[127] Defendant's Supplementary Submissions [8].
[128] Plaintiff's Reply to Defendant's Supplementary Submissions [2(a)].

decision made by the Controller, simply because a person aggrieved has made an application for review."[129] The plaintiff rejected this proposition, saying: "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'.[130] 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."[131] I agree with this contention.

[135] The defendant set out a summary of the steps to be taken in the review process under s 30.[132] Under "Step 2" of the defendant's summary, "the Minister must consider whether any of the errors identified in the application for review have been established", and "in addition the Minister may, but is not required to, consider whether the Controller made any errors that were not identified by the person aggrieved in the application for review." The defendant contended that "as part of step 2, and for the purpose of considering whether any errors were made by the Controller, the Minister may, but is not required to, refer the matter to the Review Panel (being an advisory rather than a review body) with a request that it advise the Minister on the action that the Minister should take (ss 30(3)(b) and 30(4)."[133]

[129] Defendant's Supplementary Submissions [6].
[130] Quoting *Sapina* [57].
[131] Plaintiff's Response to Defendant's Outline of Submissions [2(f)].
[132] Defendant's Supplementary Submissions [8] - [11].
[133] Defendant's Supplementary Submissions [9(a)].

[136] In response to this the plaintiff pointed out that if the Minister did refer the matter to the Review Panel under s 30(3)(b) for advice as to whether there was error and what action the Minister should take, and the Review Panel concluded that the Controller's decision was contrary to the public interest but did not involve error, the Minister would be powerless to set aside the Controller's decision. Such an anomaly would also arise if the Review Panel proceeded to recommend that the Controller's decision be set aside or changed, for example by the Minister making his or her own decision under s 30(3)(a)(ii). This is an example of the point discussed in [125] to [128] above.

[137] The defendant also clarified its apparent acceptance during oral submissions that s 30 contemplates a "novel" form of review, and stressed that before exercising his or her powers, including powers under s 30(3)(a)(ii), the Minister would have to identify error on the part of the Controller. The defendant maintained its contention that the review function conferred by s 30 involves a function of a kind precisely analogous to that identified in *Coal and Allied*,[134] stating: "That is not a hybrid or novel model. It is an entirely conventional review function."[135]

[138] On the contrary, I consider that there are significant differences between the powers and functions of the Minister under the s 30 of the

[134] Defendant's Supplementary Submissions [16].
[135] Defendant's Supplementary Submissions [16].

Act and those considered in *Coal and Allied*. One difference comes from the Minister's important function of preserving an important public resource based upon reliable information available to the Minister at the time of the review. Another is the Minister's power under s 30(3)(a)(ii) to substitute his or her own decision as an original decision maker, as distinct from correcting an error made in relation to circumstances at a particular historic point in time.[136] In my view the nature and purpose of the Act and the responsibilities and powers under it indicate that the Minister's powers of review under s 30 are not limited to the correction of error.[137]

Further consideration and conclusions

Rights of review conferred under s 30

[139] The right of an aggrieved person to apply to the Minister under s 30(1) is not confined to applications to review water extraction licence decisions, or even to decisions of the Controller. It also extends to *actions* of the Controller, and decisions made by the Minister to declare coastal waters of the Territory to be tidal water for the purposes of the Act.[138] In the latter case, the Minister may refer the matter to the Review Panel under s 30(3)(b). In the case of other applications, namely applications against an action or decision of the

[136] See discussion above at [80] to [82].
[137] See discussion above at [75] to [78].
[138] s 5(6) of the Act.

Controller, the Minister may do any of the things set out in s 30(3)(a) or refer the matter to the Review Panel pursuant to s 30(3)(b).

[140] On its face s 30(3) confers a wide discretion upon the Minister. Although the provision identifies what actions the Minister may take, it does not indicate how the Minister is to go about exercising his or her discretion. That is left at large.

[141] The right of an aggrieved person to apply for a review is qualified by the opening words in s 30(1) – "[s]ubject to subsection (2)" – and the requirement in s 30(2) that "an application under this Section shall be made in the prescribed manner and form." The form that was prescribed until November 2008 when the *Water Regulations (NT)* were amended[139] and the form which was used by the plaintiff in the present matter[140] contained provision for the applicant to state the "Grounds for Application for Review". Subclause 4(3) of the Regulations provides that "where 2 or more applicants seek reviews on similar grounds in respect of matters concerning land in the same general locality, the Review Panel may consider the matters together."

[142] The requirement that the applicant for review be an aggrieved person, the requirements in both the Act[141] and the Regulations[142] that the applicant use a particular form which identifies grounds, and the

[139] Water Amendment Regulations 2008, Subordinate Legislation No. 31 of 2008, notified in the Northern Territory Government Gazette on 26 November 2008.
[140] See ALB Affidavit-17 (pp 229-238 and 240-249).
[141] s 30.
[142] In clauses 3 and 4 and their predecessors.

reference to grounds in subclause 4(3) of the Regulations may provide some assistance in determining the scope of the Minister's obligations and functions under s 30(3).

[143] At the least, the requirement implies that the main focus of the review would be the points raised in those grounds and the accompanying materials.

[144] One would expect the applicant for review to particularise its grievance in the application,[143] thus enabling the Minister to identify the basis for the application and the particular parts of the Controller's decision which the applicant was challenging.[144]

[145] Although a requirement to provide "grounds" in notices of appeal and similar documents might often carry with it an assumption that some kind of reviewable error must be asserted and established, absent contrary statutory intention there is no reason to conclude that such an error must be established at any stage of the process.

[143] As the plaintiff did in this matter.
[144] Per Kirby P in *Watson v Hanimex Colour Services Pty Ltd* (1992) 8 NSWCCR 190 at 205-6: "[The fact that a decision under review will stand and be binding between the parties unless it is altered on review] suggests the need, on the part of the aggrieved party, to provide some proper basis for disturbing the decision under challenge."

[146] There is no suggestion in the Act, or elsewhere, that the right of review is constrained by any need to identify and state grounds which may show error on the part of the Controller.[145]

Primacy of the public interest and assistance from other decisions

[147] Most of the decisions which have been brought to my attention concern private rights and involve important principles including finality in the litigation. Another 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. As was said in *ICM Agriculture Pty Ltd v The Commonwealth:*[146]

> 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.

[148] I consider that it would be inimical to the protection of such an important public interest if the Minister's powers, once enlivened under s 30, were constrained in the way contended for by the defendant. I agree with the plaintiff's contention that there is no reason expressed or implied, in s 30 or elsewhere in the Act, why the Minister would not be able to advance and protect the public interest by taking

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[145] Compare the relevant statutory provisions the subject of the High Court's decision in *Avon Downs* (1949) 78 CLR 353, discussed and distinguished by the High Court in *Tasty Chicks*, where when seeking a review from a decision of the Chief Commissioner the applicant was limited to the grounds of the objections initially made to the Chief Commissioner, and where the taxpayer's liability depended upon the Commissioner being "satisfied" the particular facts existed. Compare too requirements in legislation such as that discussed in *Siddik* for some kind of error to be identified before the appellate tribunal could proceed with the appeal or review.
[146] (2009) 240 CLR 140 per Hayne, Kiefel and Bell JJ at [90]. See too French CJ, Gummow and Crennan JJ at [50].

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.[147]

[149] The various decisions which I have discussed are instructive and helpful not only in relation to the primary issue of concern in the present matter, namely whether or not the review under s 30 is constrained by the need to establish error, but also as to the nature and extent of the Minister's task when conducting a merits review.

[150] I consider that the powers and duties imposed upon the Minister under s 30 of the Act are relevantly similar to those considered in those cases including *Shi*, *Tasty Chicks*, *Applicants A1 and A2* and *Sapina*. Each of those cases concerned merits reviews. So too have other cases involving appeals or reviews under Northern Territory legislation where Parliament has not clearly identified the nature of such appeals or reviews.[148]

[151] Relevant and applicable to the present matter are a number of the points concerning the task of the appellate tribunal discussed and summarised in [57] of *Sapina* (which I quoted in [117] above), including:

[147] See discussion in [122] and [126] - [127] above. See too observations about the importance of the public interest in other matters such as *Shi* at [50] and *Peko-Wallsend* at pp 44-45.
[148] See the decisions listed at footnote 18 of these reasons.

- 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.

[152] I consider that 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.

[153] 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 s 30(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.

[154] 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.

[155] 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 s 30(1)(a)(ii). This might, but would not necessarily, require the Minister to engage in a more extensive merits review.

[156] 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 s 30(3)(a)(i) without more, or proceed under s 30(3)(a)(ii) or (iii).

[157] 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.

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

[159] I consider that 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 s 90.

[160] I reject the defendant's contentions to the effect 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. I find therefore that the Minister erred in approaching his review of the applications in the way that he did and thus failing to consider the Controller's decisions on the merits.

[161] I set aside the Minister's decisions of 14 July 2014 and order the Minister to determine the plaintiff's applications for review of the Controller's decisions afresh.
