# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Gibson & Ors v The Minister for Finance, Natural Resources and the Arts & Anor* [2012] QSC 132 |
| PARTIES: | **RUSSELL KURT GIBSON**<br>(First Applicant)<br>**GREGORY RAYMOND McLEAN, JUNE EMILY PEARSON and NEVILLE IAN BOWEN**<br>(Second Applicants)<br>**HOPE VALE ABORIGINAL SHIRE COUNCIL**<br>(Third Applicant)<br>v<br>**THE MINISTER FOR FINANCE, NATURAL RESOURCES AND THE ARTS**<br>(First Respondent)<br>**HOPE VALE CONGRESS ABORIGINAL CORPORATION RNTBC (ICN 3135)**<br>(Second Respondent) |
| FILE NO/S: | 500 of 2011 |
| DIVISION: | Trial |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court, Cairns |
| DELIVERED ON: | 17 May 2012 |
| DELIVERED AT: | Cairns |
| HEARING DATE: | 22, 23 and 24 February 2012 |
| JUDGE: | Henry J |
| ORDER: | **1. The application is dismissed**<br><br>**2. I will hear the parties as to costs at 9.15am on 1 June 2012.** |
| CATCHWORDS: | ADMINISTRATIVE LAW – JUDICIAL REVIEW – where the Minister appointed the second respondent as grantee of a deed of grant in trust under the *Aboriginal Land Act 1991* (Qld) – whether there is an incompatibility of functions between the second respondent's role as grantee and its role as a registered native title body corporate – whether the second respondent has foreshadowed breaches of trust – whether those matters frustrate the objects of the *Aboriginal Land Act 1991* (Qld) – whether the Minister was not authorised to appoint the second respondent – whether the Minister had the jurisdiction to appoint the second respondent |

ADMINISTRATIVE LAW – JUDICIAL REVIEW – IMPROPER EXERCISE OF POWER – WEDNESBURY UNREASONABLENESS – where it is alleged there is an incompatibility of functions between the second respondent's different roles – where it is alleged the second respondent has foreshadowed breaches of trust – where it is alleged the appointment of the second respondent would frustrate the objects of the *Aboriginal Land Act 1991* (Qld) – whether the Minister's decision was so unreasonable that no reasonable person could so exercise the power

CONSTITUTIONAL LAW – INCONSISTENCY BETWEEN COMMONWEALTH ACT AND STATE ACT – whether the functions of a grantee of a deed of grant in trust under the *Aboriginal Land Act 1991* (Qld) are incompatible with the functions of a prescribed body corporate under the *Native Title Act 1993* (Qld) – whether the State act alters, impairs or detracts from the Commonwealth act – whether the State act is invalid to the extent of any inconsistency

ADMINISTRATIVE LAW – JUDICIAL REVIEW – IMPROPER EXERCISE OF POWER – RELEVANT CONSIDERATIONS – where it is alleged the appointment of the second respondent would frustrate the objects of the *Aboriginal Land Act 1991* (Qld) – where it is alleged the second respondent intended to breach its duties – where it is alleged the second respondent lacked the necessary managerial, administrative and financial skills to perform its duties as grantee of the deed of grant in trust – where it is alleged the second respondent is unduly influenced by a third party – whether the Minister was impliedly bound to consider these matters

ADMINISTRATIVE LAW – JUDICIAL REVIEW – IMPROPER EXERCISE OF POWER – RELEVANT CONSIDERATIONS – EXTENT OF ANY DUTY TO INQUIRE – whether the Minister was on notice of matters about which she should have made inquires – whether she should have made inquiries about whether the second respondent had foreshadowed breaches of trust, had the necessary managerial, administrative and financial ability, and was unduly influenced by a third party – whether there was material of central relevance – whether that material was obviously and readily available

ADMINISTRATIVE LAW – JUDICIAL REVIEW – IMPROPER EXERCISE OF POWER– IRRELEVANT CONSIDERATIONS – where it is alleged the Minister had to be satisfied of certain matters under s 42 of the *Aboriginal Land Act 1991* (Qld) before making an appointment – where that provision did not apply – where the Minister referred in her statement of reasons to the provision – whether the

Minister took into account irrelevant considerations

*Aboriginal Land Act 1991* (Qld) ss 38 – 49, 203.
*Constitution* s 109.
*Judicial Review Act 1991* (Qld) ss 20, 23.
*Native Title Act 1993* (Cth) ss 56 – 58.
*Native Title (Prescribed Bodies Corporate) Regulation 1999* (Cth) regs 7, 8.

*Associate Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223.
*Attorney-General (NSW) v Quin* (1990) 170 CLR 1.
*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
*Crime & Misconduct Commission v Assistant Commissioner J P Swindells & Ors* [2009] QSC 409.
*Gibson & Ors v The Minister for Finance, Natural Resources and the Arts & Anor* [2011] QSC 401.
*Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291.
*McLindon & Anor v Electoral Commission of Queensland* [2012] QCA 48.
*Minister for Aboriginal Affairs and Anor v Peko-Wallsend Ltd & Ors* (1986) 162 CLR 24.
*Minister for Immigration and Citizenship v SZIAI and Anor* (2009) 259 ALR 429.
*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.
*Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.
*Minister for Immigration and Multicultural Affairs v Yusef* (2001) 206 CLR 323.
*Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155.
*Re Minister for Immigration and Multicultural Affairs ex parte Applicant 20/2002*(2003) 198 ALR 59.
*Tickner v Bropho* (1993) 40 FCR 183.
*Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300.
*Weal v Bathurst City Council & Anor* (1987) 14 ALD 291.

Fiduciary Obligations, P.D. Finn, 1977.

COUNSEL: D J Campbell SC with A D Scott for the applicants
M Hinson SC with T Pincus for the first respondent
D Rangiah SC with D Yarrow for the second respondent

SOLICITORS: Bottoms English Lawyers for the applicants
Crown Law for the first respondent
P&E Law for the second respondent

[1] The applicants makes an application for a Statutory Order of Review of the decision of the first respondent, the Minister, to appoint the second respondent, Congress, as grantee of the Hope Vale Deed of Grant in Trust, the so called DOGIT, pursuant to s 40 of the *Aboriginal Land Act 1991* (Qld) ("*ALA*") ("the Act").

**Background**

[2] On 17 July 1986, the Hope Vale Aboriginal Shire Council ("the Council") was granted an area of about 110 hectares ("the land") by Deed of Grant of Land in Trust to be held "*in trust for the benefit of Aboriginal inhabitants*".[1]

[3] That grant was made under s 334 of the *Land Act 1962* (Qld), which has since been repealed. Under s 11(1)(a) of the *ALA* land granted in trust under the *Land Act* for the benefit of Aboriginal inhabitants is "*DOGIT land*", which is one of the categories of lands identified as "*transferable lands*" in s 10(1)(a) of the *ALA*. Part 4 Division 1, ss 38-49, of the *ALA* provides for the grant in fee simple of transferable lands and such land thereby continuing to be or becoming "*Aboriginal Land*".

[4] Prior to the renumbering of the Act, those provisions, or at least provisions like them, were contained at Part 3 Division 1 ss 27-38. Immediately prior to the Act's renumbering s 28(1) provided:

> *"The Minister must appoint <u>a registered Native Title Body Corporate or</u> such persons as the Minister considers necessary to be the grantees, as trustees for the benefit of Aboriginal people, of the land."* (emphasis added)

[5] Section 28(1) had not always contained the words "*a registered Native Title Body Corporate or*". Those words were included by amendments introduced through the *Land Valuation Act 2010* (Qld).

[6] The recently renumbered provisions of the *ALA* dealing with grants of transferable land as Aboriginal land make express provision for the circumstances under which a registered Native Title Body Corporate (RNTBC) can be made a grantee of a deed of grant in fee simple over transferable lands. Section 39 provides for the appointment of a RNTBC as a grantee, however, that will only occur in circumstances where the land is to be held by the grantee for the Native Title holders of the land. It is irrelevant for present purposes.

[7] Where such an appointment is not made pursuant to s 39, s 40(2) provides that the Minister may appoint as grantee of the land, inter alia, "*a CATSI corporation that is qualified to hold the land*". A CATSI corporation is defined in the definition schedule of the Act as meaning a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (Cth).

[8] The second respondent, Congress, is a CATSI corporation as well as a RNTBC. That, however, does not preclude its appointment under s 40 because s 40(3) provides:

> "*However, the Minister may appoint a CATSI corporation that is a registered Native Title Body Corporate as a grantee of land under subsection (2) only if –*

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1 Ex 1, Doc 1.

> *(a) under the Commonwealth Native Title Act, a determination has been made that Native Title exists in relation to all or a part of the land; and*
> *(b) the registered native title body corporate is registered on the national Native Title register for the determination.*

[9] In December 1997 the Federal Court made a native title determination for the area the subject of the 1986 DOGIT. Congress was appointed as a RNTBC in relation to that determination on 25 February 2002.[2] It is common ground that Congress meets both conditions of s 40(3).

[10] On 8 December 2011, the land was granted in fee simple to Congress "*to hold the land in trust for the benefit of Aboriginal people particularly concerned with the land and their ancestors and descendants, and under the Aboriginal Land Act 1991*". It is this decision that the applicants seek to have judicially reviewed.

**The nature of the power to judicial review**

[11] The *Judicial Review Act 1991* (Qld) ("*JRA*") gives this court the power to judicially review decisions of an administrative character. It is a limited power in that the court can only examine the lawfulness of the decision, not the merits of it.[3]

[12] In *Re Minister for Immigration and Multicultural Affairs ex parte Applicant S20/2002*[4] Justice Kirby, explaining that distinction, observed:

> *"…regardless of the supervisory jurisdiction invoked in a particular case, judicial review is said to be limited to reviewing the legality of administrative action. Such review, ordinarily, does not enter upon a consideration of the factual merits of the individual decision. The grounds of judicial review ought not be used as a basis for a complete re-evaluation of the findings of fact, a reconsideration of the merits of the case or a relitigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power."* [5] (emphasis added, citations omitted)

**The present application**

[13] The application advances seven grounds and includes some lengthy particulars. Despite the provision of written outlines of argument the hearing of oral submissions took two and a half days. Arguments and factual issues pertaining to some grounds are directly or indirectly relevant to other grounds. The grounds are not susceptible to abbreviated analysis.

[14] It is helpful to first identify the statutory sources of the grounds.

[15] The application relies upon statutory grounds contained in s 20(2) of the *JRA*, namely:

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2 The second respondents are a RNTBC for part of the area determined in *Deeral (on behalf of herself and the Gamaay Peoples) v Charlie* [1997] FCA 1408.
3 See generally *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.
4 (2003) 198 ALR 59.
5 Ibid at [114].

> *"(c) that the person who purported to make the decision did not have the jurisdiction to make the decision;*
>
> *(d) that the decision was not authorised by the enactment under which it was purported to be made;*
>
> *(e) that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made."*

[16] The last sub-paragraph, in particular its reference to "*improper exercise of power*", is elaborated upon in s 23 of the JRA. The types of improper exercise of power allegedly relevant to this case are:

> *"(a) taking an irrelevant consideration into account in the exercise of a power; and*
>
> *(b) failing to take a relevant consideration into account in the exercise of a power; and …*
>
> *(g) an exercise of a power that is so unreasonable that no reasonable person could so exercise the power;…"*

[17] The applicants also submit that under s 109 of the *Constitution*, *"Inconsistency of laws"*, s 40 of the *ALA* is invalid to the extent it allowed the decision.

[18] If the applicants are successful on any of these grounds they seek a declaration that the decision is void and of no force or effect and an order quashing or setting aside the decision.

[19] Before turning to each ground of the application it is helpful to generally consider two recurring factual issues, namely incompatibility of functions and foreshadowed breaches of trust.

**Incompatibility of functions**

[20] The issue of the incompatibility of the functions of Congress is raised by a number of the grounds of review. Essentially, it is argued that the responsibilities of Congress as grantee of the DOGIT are incompatible with its responsibilities as a RNTBC.

*Duties as grantee of the DOGIT*

[21] Section 38(3)(b)(i) of the *ALA* states that the deed of grant must show the land is held "*for the benefit of Aboriginal people particularly concerned with the land and their ancestors and descendants*". The DOGIT does that here, stating:

> "*The grantee is to hold the land in trust for the benefit of Aboriginal people particularly concerned with the land and their ancestors and descendants, and under the Aboriginal Land Act 1991*".[6]

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[6] Ex 1, Doc 63.

It follows that in its role as grantee of the DOGIT, Congress has effectively the same duties as a trustee.

[22] This means that Congress is bound by the usual fiduciary duties of a trustee. It must avoid conflicts of duties, conflicts of interests, and conflicts of duties and interests; it must not obtain any benefit from its position as trustee; and it must not bind itself to a certain course with respect to a future exercise of its discretion as trustee.[7]

[23] In addition, Congress has obligations under s 203 of the *ALA, "Royalties in relation to mining on Aboriginal Land"*. That is, it must apply the royalties it receives under Acts including the *Mineral Resources Act 1929* (Qld), *"for the benefit of the Aboriginal people for whose benefit the trustee* (Congress) *holds the land, particularly those affected by the activities to which the royalty amount relates."*

*Duties as a RNTBC*

[24] The functions of Congress as a RNTBC can be found in the *Native Title Act 1993* (Cth) ("*NTA*") and its regulations.[8] Relevantly, reg 7(1) of the *Native Title (Prescribed Bodies Corporate) Regulation 1999* (Cth) states that a so-called prescribed body corporate ("PBC") which, like Congress, is not acting as a trustee PBC under s 56 of the NTA, has the following functions in respect of *"native title rights and interests*":

> *"(a) to be the agent prescribed body corporate for those* (native title) *rights and interests;*
> *(b) to manage the rights and interests of the common law holders as authorised by the common law holders;*
> *(c) to hold money (including payments received as compensation or otherwise related to the native title rights and interests) in trust;*
> *(d) to invest or otherwise apply money held in trust as directed by the common law holders;*
> *(e) to consult with the common law holders in accordance with regulation 8;*
> *(f) to perform any other function relating to those rights and interests as directed by the common law holders."*

[25] Note that while this regulation relates to so-called agent PBCs as distinct from so-called trustee PBC's, it nonetheless imposes fiduciary duties including holding money in trust.

[26] The *"common law holders"* are, per s 56 of the *NTA*, the persons included in the determination of native title as the native title holders.

[27] Pursuant to reg 8(2) the agent PBC *"must consult with, and obtain the consent of, the common law holders … before making a native title decision"*.[9] Under reg 8(1) a *"native title decision"* includes a decision *"to do … any … act that would affect the native title rights or interests of the common law holders"*.

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7 As to the latter, trustees must make their decisions with reference to what is proposed as at the moment of the decision - see *Gilbey v Rush* [1906] I Ch 11, 22-23; *The Watson's Bay & South Shore Ferry Company Ltd v Whitfield* (1919) 27 CLR 268 at 277.

8 *NTA* ss 57 & 58.

9 Regulation 8 was amended after the decision but its terms discussed herein are as they were at the time of the decision.

*The suggested incompatibility*

[28] The applicants suggest the functions of Congress as grantee of the DOGIT and as a RNTBC are incompatible in a number of aspects, firstly because the DOGIT land and the native title land largely occupy the same area. The alleged result is said to be that Congress will have an insoluble conflict in its dealings with others in respect of the land because it will be required to act for the benefit of all the Aboriginal people particularly concerned with the land whilst, at the same time, acting as the agent of the native title holders.

[29] Further, under an Indigenous Land Use Agreement ("ILUA") into which it has entered, Congress will have to obtain the consent of the Native Title holders before undertaking any activity likely to damage or interfere with Aboriginal Cultural Heritage.[10] The applicants suggest that this unduly fetters the future discretion of Congress in its role as grantee of the DOGIT.

[30] The applicants placed particular emphasis on the function of Congress regarding money in reg 7(1)(c) and (d) of the *Native Title (Prescribed Bodies Corporate) Regulation 1999* (Cth) in their attempts to demonstrate incompatibility. They submit these sub-regulations apply to all money received by Congress. That is, Congress would have to hold all money it received in its capacity as grantee of the DOGIT, including that money received under s 203 of the *ALA*, on trust for the native title holders. The applicants seek support for this in the inclusive language employed by sub-reg (c), including the broad description in brackets of types of payments, and the power of the common law holders in sub-reg (d) to direct the investment or application of such money.

*Does an incompatibility exist?*

[31] The applicants' submissions lose weight when read against ss 57 and 58 of the *NTA*.[11] Section 57 deals predominantly with determining which prescribed body corporate is to perform the functions of a RNTBC under the Act and regulations, while section 58 provides:

> ***"58 Functions under regulations***
> *The regulations may make provision for a registered native title body corporate to do all or any of the following:*
>
> *(a) if it does not hold the native title on trust under section 56, or regulations made for the purposes of that section—to act as agent or representative of the common law holders in respect of matters relating to the native title;*
> *(b) to perform in a specified way any functions in relation to the native title given to it under other provisions of this Act;*
> *(c) to hold on trust, or perform functions in relation to, compensation under this Act for acts affecting the native title;*
> *(d) to consult with, and act in accordance with the directions of, the common law holders in performing any of its functions;*

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10 Ex 1, Doc 51 page 10 clause 16.2.
11 T2-51 L30-L36.

> *(e) if it does not hold the native title on trust—to enter into agreements in relation to the native title that are binding on the common law holders, provided the agreements have been made in accordance with processes set out in the regulations;*
> *(f) to perform any other functions in relation to the native title."* (emphasis added)

[32] The regulation's provisions ought not be read as exceeding the purpose of their empowering legislation.[12] Their provision for a RNTBC's function should be read as relating to the native title or to matters relating to or affecting the native title. The correct interpretation of the reference to the money held in trust in regulation 7(c) and (d) is that it is money, whether received as compensation or otherwise, received or under the control of Congress in its capacity as a RNTBC performing its functions in relation to the native title. It does not apply more broadly to money received by Congress as grantee of the DOGIT.

[33] Congress would have to carry out its functions as a RNTBC, which include fiduciary duties, in accordance with the general law. Its function as a RNTBC, specifically as an agent PBC, in respect of monies would relate only to monies coming under its control in its capacity as an agent PBC and not in some other capacity.

[34] As to reg 8, the requirement of consultation and consent of the common law holders before making a decision to do any act that would affect their native title rights and interests, the applicants submit this obligation of Congress is in conflict with the duty of Congress as grantee of the DOGIT to hold the land in trust for the benefit of Aboriginal people particularly concerned with the land. The applicants emphasise an act affects native title *"if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise."*[13]

[35] The applicants submitted, by way of example, that Congress may decide as grantee of the DOGIT to allow, subject to any necessary other approvals, some of the DOGIT land to be used for a commercial development for the benefit of the aboriginal people particularly concerned with the land but that use may not be approved if the development will be inconsistent with the continued enjoyment of native title rights and the consent of the common law holders cannot be obtained. However the decision whether or not to consent would be the decision of the common law holders, that is, there is no real choice and thus no real potential for conflict attending the consequent decision of the agent PBC. It is quite a different decision than the decision of Congress as grantee of the DOGIT to allow the use subject to the necessary consents. As the first respondent emphasised, the problem identified by the example has the potential to occur regardless of whether the agent PBC and the grantee of the DOGIT are the same entity. The roles and decisions of the agent PBC and grantee of the DOGIT are in this context different, so that there is no conflict even if they are the same entity.

[36] Further, in respect of the obligation of Congress as a party to the ILUA to not damage or interfere with Aboriginal Cultural Heritage without written consent of

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12 *Acts Interpretation Act 1954* (Qld) ss 7 & 14A.
13 *NTA* s 227.

the Native Title Holders, that obligation is not materially different from the cultural heritage duty of care which it in any event bears pursuant to the *Aboriginal Cultural Heritage Act 2003*(Qld).

[37] In summary, the two roles of Congress are separate and distinct. Its role as grantee of the DOGIT is concerned solely with the management of Aboriginal land. On the other hand, its role as a RNTBC is concerned solely with native title rights and interests. Its obligations in managing the land are different from its functions in managing native title rights and interests.

[38] The incompatibilities suggested by the applicants are, at this stage, mere possibilities and assume Congress will not comply with its separate legal obligations.

[39] There is no inherent or inevitable incompatibility.

**Foreshadowed breaches of trust**

[40] Some of the applicants' grounds rely in part upon reasoning that the Minister knew or ought to have known that Congress would breach its duties as grantee of the DOGIT. The argument relates predominantly to an Overarching Deed which was entered into by Congress on 12 September 2011 with the Yuuru Aboriginal Corporation (in its own right and as the Trustee of the Yuuru Charitable Trust) (YAC), Nguurruumungu Indigenous Corporation (NIC), Thanil Aboriginal Corporation (TAC), Walmbaar Aboriginal Corporation (Walmbaar) and Hope Vale Community Corporation Pty Ltd (in its own right and as the Trustee of the Hope Vale Community Charitable Trust).[14] The Deed addresses how an ex gratia payment and subsequent royalties will be distributed.

[41] The applicants submit that Congress has evinced an intention to act in breach of trust by entering into this Deed as it:

(a) sets out that some of the ex gratia payment will be distributed to Aboriginal people who are not particularly concerned with the land; and

(b) generally attempts to fetter Congress' future exercise of discretion as trustee.

*The ex gratia payment*

[42] A substantial ex gratia payment, of mining royalties received by the State from the Cape Flattery Silica Mines near Hope Vale, is to be paid to Congress upon its appointment as grantee of the DOGIT. The Deed provides that if Congress receives an ex gratia payment in excess of $6,000,000 (which appears likely) then it will be distributed as follows:

(a) 60% to be split between Walmbaar, TAC, NIC and the Yuuru Charitable Trust (YCT) (the first three will receive $1,000,000 each and the last will receive the balance).

(b) 30% to the Hope Vale Community Corporation Pty Ltd as the Trustee of the Hope Vale Community Charitable Trust;

(c) 10% will be retained by Congress to assist with the reasonable costs of administration, as determined by Congress, of the YCT, the Hope

[14] Ex 1, Doc 52.

Vale Community Charitable Trust, YAC, NIC, TAC, Walmbaar and the Hope Vale Community Corporation Pty Ltd.

[43] The respondents submit this distribution could not even potentially constitute a breach of trust because the ex gratia payment was not to be trust money.

[44] There is evidence suggesting it was long contemplated the ex gratia payment was at the very least to be paid subject to a condition as to how it would be applied. For instance, on 24 July 2007 when it was contemplated the funds might be paid to Council, a letter by the then Deputy Premier, Ms Anna Bligh, stated that a condition of the payment would be that it:

> *"i) … be applied to benefit the Aboriginal Inhabitants of the Deed of Grant in Trust for whose benefit the Council holds the land in trust".*[15]

[45] More recently in an undated letter to Congress the then Director General, Jim Reeves, stated the making of the ex gratia payment to Congress would be subject to the same condition, that is:

> *"…*
> *ii. The payment is to be applied to the benefit of the Aboriginal Inhabitants of the Deed of Grant in Trust and for whose benefit Congress will hold the land in trust".* [16]

This letter refers to a later version of the Overarching Deed than was before the Minister. The parties approached argument on this on the assumption the same condition was within the constructive knowledge of the Minister.

[46] The class of persons for whose benefit the payment is to be applied under such a condition is uncertain. The description *"Aboriginal inhabitants"* adopts the language of the 1986 DOGIT and the repealed *Land Act 1962* (Qld), but in the current era its intended meaning is imprecise. That imprecision is complicated by the physical impossibility involved in being the *"Inhabitants of the Deed".* Presumably the intention was to refer to the inhabitants of the land to which the DOGIT relates. The use of the words *"and for whose benefit Congress will hold the land in trust"* also presents difficulty. Read literally in conjunction with the earlier words those words are surplusage in that Congress will necessarily hold the DOGIT land for the benefit of its inhabitants. The probability is that these words were intended to relate generally to the persons for whose benefit Congress is to hold the DOGIT.

[47] That probably intended meaning is close to but not identical to that adopted by Congress. In its minutes of meeting of 12 September 2011 the preamble to its resolution about the Overarching Deed says:

> *"The State has also offered to make a substantial payment to Congress if Congress can demonstrate that it will use the money both lawfully and for the benefit of native title holders and other Aboriginal people with a connection to Hope Vale".*[17]

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15 Ex 1, Doc 4.
16 Ex 1, Doc 53.
17 Ex 1, Doc 50.

[48] That description is not identical to the condition foreshadowed by the State. It is uncertain whether it is consistent with the meaning of the condition attaching to the payment, which I have also described as uncertain.

[49] The uncertainty as to just what the condition foreshadowed as attaching to the ex gratia payment actually means makes it in turn uncertain whether the payments foreshadowed by the Overarching Deed foreshadow a breach of trust. For that reason alone the applicant's argument as to a foreshadowed breach of trust is unsustainable.

[50] There are other problems with the argument. An allied problem is that the uncertain meaning of the condition attaching to the payment makes it impracticable to assess what the condition ought be construed as, for instance, an equitable charge or a trust.

[51] Assuming that the condition attaching to the payment ought be construed as a trust, did the Deed provide evidence that Congress would act in breach of trust? As already explained it is uncertain what class of persons the condition attaching to the payment related to, however the applicants contend the condition required the funds to be applied for the benefit of the same class of persons for whom Congress was to hold the DOGIT, that is, *"for the benefit of Aboriginal people particularly concerned with the DOGIT land and their ancestors and descendants."*

[52] The applicants submit that there would be a breach of trust under the Overarching Deed because money would be applied for the benefit of Aboriginal people other than those particularly concerned with the DOGIT land. That is, it argues groups who represent interests broader than those of the people particularly concerned with the DOGIT land will receive money. The applicant relies on the principle that funds can only be subscribed to another charity if such funding of the recipient is expressly or by implication a purpose or object of the donor.[18]

[53] In the present case that would require the provision of such funding to be for the benefit of Aboriginal people particularly concerned with the DOGIT land and their ancestors and descendants. The applicants complain, for example, that the YCT is created for the purposes of benefiting Indigenous Persons who are members of the local Aboriginal communities living not only at Hope Vale but also beyond the DOGIT land in the Cooktown, Woorabinda and Cairns region of Queensland.[19] A similar point is advanced about the Hope Vale Community Charitable Trust, which has similar purposes as the YCT except that it does not include Woorabinda.[20]

[54] However, the fact that those Trusts may exist for the benefit of aboriginal persons living at places geographically removed from the DOGIT land is not to the point. The relevant connection is not limited to current geographic domicile. The persons for whom Congress is to hold the DOGIT land in trust are Aboriginal people particularly concerned with the land and their ancestors and descendants. Section 3(2) of the Act provides that Aboriginal people are particularly concerned with the land if:

> *"(a) they are members of a group that has a particular connection with the land under Aboriginal tradition; or*

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18 See *Baldry v Feintuck and Ors* [1972] 2 All ER 81 at 85.

19 Ex 1, Doc 47 pp 2 & 14.

20 Ex 1, Doc 48 pp 2 & 14.

*(b) they live on or use the land or neighbouring land."*

[55] The persons for whom the DOGIT is held therefore includes persons who may not live on or near the DOGIT land but who are members of a group with a connection to it under Aboriginal tradition or who are the descendants of such persons. Such persons may well reside at locations such as Cooktown, the Cairns region and even in Woorabinda in Central Queensland. Taking the most removed of those locales as an example, one source of relevant connection likely results from the evacuation of Aboriginal people from the district of the DOGIT land to Woorabinda during World War Two.[21]

[56] Thus it can be seen that simply because the Deed provides for payments of some of the ex gratia money to trusts created for the purposes of benefiting persons who may not live on the DOGIT land, it does not necessarily follow that such an application of funds to those trusts will not be for the benefit of Aboriginal people who are particularly concerned with the land.[22] On the other hand, the existing wording of the Deed does not necessarily exclude the risk that a payment in the future will not be in breach of trust, although it carries the safeguard that its clauses can be read down or severed to ensure validity and allows for renegotiation of such clauses.[23] In effect more information would need to be known of the factual detail of what will occur in the future in respect of any payments by Congress to entities mentioned in the Deed to conclude a future payment will be a breach of trust. At the highest, there only exists the possibility of a breach of trust.

[57] The possibility of a future breach of trust is theoretically present in respect of any trust. Under fiduciary law, the mere possibility of a breach does not equate to an actual breach of trust.[24] The contention of the applicants is that the Deed does more than raise such a possibility and instead shows that Congress will likely act in breach of trust. That contention is unsustainable.

[58] In summary it is uncertain what is meant by the condition which will attach to the payment, what class of persons is to benefit under the condition and whether the condition gives rise to a trust. The Deed does not show that Congress will likely act in breach of trust.

*Whether the Deed generally fetters the discretion of Congress as trustee*

[59] The Deed also makes provision for how other money, namely that received under the Cape Flattery Mine agreement and under s 203[25] of the *ALA*, will be dealt with by Congress. Almost identical measures are in place with respect to these monies, namely:

(a) 60% of the monies is to be paid as directed by the YAC;

(b) 30% is to be paid to the Hope Vale Community Corporation Pty Ltd on behalf of the Hope Vale Community Trust and or the Hope Vale Community Business Development Fund;

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21 Affidavit of Michael Neal sworn and filed 24 February 2012.

22 That is not to say that by these reasons the Court is making a finding sanctioning the future payment of entities nominated in the Deed. The court is not here concerned with questions of a kind which might arise were there an application before it pursuant to s 96 *Trusts Act 1973* (Qld).

23 Clauses 12.2, 12.3.

24 See Fiduciary Obligations, P.D. Finn 1977, 580-582.

25 Ex 1, Doc 52 actually refers to s 88 which is the former section number of the present s 203.

(c) 10% is to be retained by Congress to assist with the reasonable costs of administration, as determined by Congress, of the YCT, the Hope Vale Community Charitable Trust, YAC, NIC, TAC, Walmbaar and the Hope Vale Community Corporation Pty Ltd.

[60] The applicants argued this shows Congress will act in breach of trust. This argument has already been rejected in relation to the ex gratia payment and fails for the same reasons.

[61] Further, the applicants allege that the Deed, in purporting to stipulate how the money is to be distributed in the future, represents a fetter on Congress' discretion as trustee. The allegation does not require determination. Even if, it were correct the offending provisions of the Deed would be severable on the Deeds own terms.[26]

[62] Further the allegation, if correct, is in this case advanced as relevant to demonstrating the Minister ought have realised Congress was unsuitable for appointment as a trustee because it was already entering into agreements fettering the future exercise of its discretion. It is inherently unlikely the Minister would regard the Deed's foreshadowing of monetary distributions as providing evidence adverse to the suitability of Congress for appointment when the Deed was transparently entered into in consultation with the Minister's department, apparently with a view to the government being satisfied in advance about what distributions would be made.

[63] For instance, the Minister wrote to the Premier on 8 October 2011 saying of the Deed's content:

> *"The allocation and disbursement proposed differs from that contemplated by Cabinet Budget Review Committee's Decision No. 2796. However, I believe it nevertheless satisfies what underpinned the Cabinet Budget Review Committee's decision regarding issues of transparency, governance, community benefits and robustness. Indeed these issues were a major factor which influenced the parties to adopt this revised structure."*[27]

Thus, even if it is correct to say the deed involves a fetter of discretion that fetter appears to have been included to satisfy the Minister. Against that background it is inconceivable that the Minister would regard it as adverse to the suitability of Congress for appointment. It is irrelevant to the issues in this case.

*Other possible breaches*

[64] The applicants rely upon a complaint raised in a submission to the Minister of a foreshadowed inequitable distribution of royalties, and an ex gratia payment of money from royalties, associated with the Cape Flattery Mine.[28] The complaint is founded upon the contents of correspondence by the Chief Executive Officer of Cape York Land Council ("CYLC") dated 12 November 2008 about the interests and concerns of the Yuuru People and proposing possible distributions of the monies in different proportions.[29] Its content simply does not provide evidence

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26 Clause 12.2.
27 Ex 1, Doc 54.
28 Ex 1, Doc 40 pp 55, 62-64, 77-79.
29 Ex 1, Doc 40 pp77-79.

Congress will act in breach of trust. Further, it is entirely unremarkable that the Yuuru people might seek a substantial proportion of the funds in that they are particularly affected by the mining activity[30] and s 203(2) of the *ALA* requires the trustee of the land to apply royalties "*for the benefit of the Aboriginal people for whose benefit the trustee holds the land, particularly those that are affected by the activities to which the royalty amount relates*." (emphasis added)

[65] The applicants highlighted a special general meeting minute of Congress.[31] It records a resolution of Congress of 4 August 2011 to reimburse Balkanu Cape York Development Corporation from the ex gratia money the sum of $116,000 and CYLC Aboriginal Corporation the sum of $100,000 for their involvement in the ex gratia and *ALA* transfer.[32] There is no evidence the Minister or her department were aware or should have been aware of this resolution and it is therefore irrelevant. In any event the resolution was earlier in time than the Overarching Deed and its content is superseded by the Deed's indication of how Congress had agreed the ex gratia money is to be dealt with.

[66] The applicants' written submissions also alleged other possible breaches of trust by Congress, involving the multiple roles of Mr Brian Cobus.[33] However, it remains unexplained how the multiple roles of Mr Cobus evidence a likely future breach of trust by Congress. There was no evidence before the Minister of any likely breach of trust arising from, or impropriety in, Mr Cobus having or exercising multiple roles.

**Ground One: Not authorised by the enactment**

[67] Ground one of the application, based on s 20(d) of the JRA, is:

> *"That the decision was not authorised by the enactment under which it was purported to be made."*

[68] Senior Counsel for the applicants argued that the decision was, effectively, "*not authorised*" because the alleged incompatibility of functions and foreshadowed breaches of trust so frustrated the *ALA's* objects.[34]

[69] The expression "*not authorised*" was considered in *Australian Broadcasting Tribunal v Bond*[35] where Toohey and Gaudron JJ took the view that the expression in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) signified:

> *"…a decision that is expressly or impliedly forbidden. The expression does not refer to findings or conclusions which, although not required, bear upon or may bear upon some issue for determination under an enactment."*[36]

[70] Was the decision that the Minister made expressly or impliedly forbidden under s 40 of the *ALA*? It cannot be said that it was expressly forbidden, given the

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30 Ex 1, Doc 59 p1.
31 Ex 1, Doc 46.
32 Ex 1, Doc 46.
33 Applicants Written Submissions at [65].
34 T2-6, L42-L46. Senior Counsel for the applicants submitted that this is a facet of Wednesbury unreasonableness: T2-3, L58 – T2-4, L1-L2. To the extent that this is so it will be dealt with under ground two.
35 (1990) 170 CLR 321.
36 Ibid at 378.

appointment of a RNTBC is expressly allowed by s 40(3) in certain circumstances and those circumstances existed in the case of Congress. This express allowance makes it difficult, as a matter of logic, to give any serious weight to the contention that the decision was impliedly forbidden and of itself provides a complete answer to ground one.

[71] However, for the reasons explained earlier there was no evidence of incompatibility of functions or foreshadowed breaches of trust of such a nature or substance as to cause the Minister to conclude Congress ought not be appointed. For those same reasons there could not in any event be substance to the argument the appointment so frustrated the objects of the *ALA* as to be impliedly forbidden by the ALA.

[72] The decision to appoint Congress was authorised by the enactment under which it was made. This ground must fail.

**Ground Two: Reasonableness**

[73] Ground two of the application, relying on s 23(g) of the *JRA* is:

> *"That the making of the decision was an improper exercise of power conferred by the enactment under which it was purported to be made in that it was so unreasonable that no reasonable person could so exercise the power".*

[74] This ground, which repeats and relies upon the particulars in ground one, invokes what is commonly referred to as the Wednesbury principle. The principle finds its genesis in *Associate Provincial Picture Houses Limited v Wednesbury Corporation*[37] in which Lord Greene MR stated that "*there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority".*[38]

[75] Whilst the Wednesbury principle clearly involves a degree of examination of the reasonableness of a decision, it is not a merits review. This was made clear by Brennan J in *Attorney General (NSW) v Quin*[39] where His Honour stated:

> *"Properly applied, Wednesbury unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power…acting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a purported exercise of the power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action".* [40] (emphasis added)

[76] It is possible that Wednesbury unreasonableness is restricted to exercises of discretionary power and has no application to fact-finding errors or mandatory exercises of power.[41] The other view is that "Wednesbury *unreasonableness*

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37 [1948] 1 KB 223.
38 Ibid at 229.
39 (1990) 170 CLR 1.
40 Ibid at 36.
41 See, e.g., *Crime & Misconduct Commission v Assistant Commissioner J P Swindells & Ors* [2009] QSC 409; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59.

*remains available to challenge findings of fact but that, in practical terms, it "will largely be confined to review of discretionary decisions".*"[42]

[77] In any event, the standard that must be met in order for this ground to succeed is demanding. It is necessary that *no* reasonable person *could* have made the decision that the Minister did.[43] The applicants argue that no reasonable person could have made the decision when faced with the potential incompatibility of functions, the foreshadowed possible breaches of trust and the consequential frustration of the *ALA*.[44]

[78] I have already discussed the lack of substance to the complaints of incompatibility of functions and foreshadowed breaches of trust. Even allowing that minds may to some extent differ as to the substance of those complaints, they fall substantially short of grounding the level of concern necessary for this ground to succeed.

[79] Overall, the demanding standard required for Wednesbury unreasonableness is not met. It was open for the Minister to consider on the material before her that there was no incompatibility of functions or foreshadowed breaches of trust of such substance as to cause the Minister to conclude Congress ought not be appointed. It is insufficient that the applicants disagree with the reasoning employed by the Minister.[45]

**Ground Three: Inconsistency with Commonwealth Law**

[80] Ground three of the application is:

> *"That in the alternative to grounds 1 and 2, to the extent that the ALA authorises the appointment of the Second Respondent as grantee of the DOGIT under section 40 of the ALA, the ALA is inconsistent with sections 57 and 58 of the NT Act and section [7] of the Prescribed Bodies Corporate Regulation and invalid by reason of section 109 of the* Constitution*".*

[81] The particulars of ground three are:

> *"The prescribed functions of the second respondent are incompatible with the duties of a grantee of land under section 40 of the ALA to:*
>
> *(a) hold the land the subject of the DOGIT solely for the benefit of the Aboriginal people particularly concerned with the land; and*
>
> *(b) apply royalties received by the second respondent under section 203 of the ALA solely for the benefit of the Aboriginal people particularly concerned with the land."*

[82] Section 109 of the Constitution provides that:

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42 *Crime & Misconduct Commission v Assistant Commissioner J P Swindells & Ors* [2009] QSC 409 at [12] quoting *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [562].

43 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 290.

44 It was not argued in this context that no reasonable person could have made the decision without seeking further information about these matters. That line of argument was pursued under a different ground.

45 See comments Gleeson CJ and McHugh J in *Eshetu* supra at [41].

> *"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".*

[83] The Court of Appeal has recently considered s 109 in *McLindon & Anor v Electoral Commission of Queensland*.[46] It provided instruction which is relevant to this case:

> *"The task where reliance is placed upon s 109 of the Constitution is to apply it after an analysis of the particular laws in question to discern their true construction. Once the federal law has been construed it is necessary to consider whether, upon its proper construction, the State law is "inconsistent" with the federal law."* [47]

[84] What is the proper construction of ss 57-58 of the *NTA* and reg 7 of the *Native Title (Prescribed Bodies Corporate) Regulation 1999* (Cth)? To determine this it is necessary to consider "*its language, purpose and scope, viewed as a whole and within its context*".[48]

[85] As earlier discussed, s 57 deals predominantly with determining which prescribed body corporate is to perform the functions of a RNTBC under the Act and regulations while s 58, quoted above, provides the regulations may provide for a RNTBC to perform various functions in relation to the native title. Those functions are prescribed in reg 7, quoted above. As emphasised earlier, s 58 repeatedly uses language linking the functions to the native title or matters relating to or affecting the native title. Viewing the provisions as a whole and within context, the prescribed functions are to be construed as functions relating to the native title rights and interests or to matters relating to or affecting the native title rights and interests, that is, the management of native title rights and interests.

[86] As to the State Act, the duties of a grantee under s 40, flowing from s 38(3)(b)(i) of the *ALA* are, as discussed above, to hold the land for the benefit of Aboriginal people particularly concerned with the land and their ancestors and descendants.

[87] In respect of the application of mining royalties the grantee's duties as trustee under s 203(2) of the Act is, as mentioned earlier, to:

> *"…apply the amount received for the benefit of the Aboriginal people for whose benefit the trustee holds the land, particularly those that are affected by the activities to which the royalty amount relates."*

[88] The duty under s 203 is owed to the Aboriginal people for whose benefit the land is held under s 40, namely Aboriginal people particularly concerned with the land.

[89] That range of persons in the State provisions is plainly broader than and not limited to the more limited range of persons – the native title holders – beneficially interested in the exercise of functions under the above-mentioned Commonwealth

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46 [2012] QCA 48.

47 Ibid at [18] citing *Momcilovic v The Queen* (2011) 280 ALR 221 at 296-297 [245], 299 [258 and 314 [314]; *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-77 [28]; *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 280 ALR 206 at 215-216 [39]-[41].

48 Ibid at [21] citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70].

provisions. But how could that give rise to an inconsistency of a kind rendering the State provisions invalid?

*Are the sections inconsistent within the meaning of s 109 of the Constitution?*

[90] Such an inconsistency will arise "*where a State law alters, impairs or detracts from the operation of a federal law*."[49]

[91] The mere fact there is an inconsistency in the range of persons beneficially interested in the exercise of an entity's function in one capacity under State law and in the exercise of its duties in a different capacity under federal law, does not mean the State law alters, impairs or detracts from the operation of the federal law. The capacity in which it is to exercise its duties and functions would logically have to be the same for that inconsistency to be of potential consequence to the present argument.

[92] It is not a novel notion that the same entity can assume multiple fiduciary engagements. It is, as Professor Finn observed in his seminal text, *'Fiduciary Obligations'*, "*the staple of the commission agent, the solicitor, the corporate trustee, the company trustee, the company direct and the liquidator*".[50]

[93] Like corporate trustees so too may Congress, which has all the powers of a body corporate,[51] hold multiple roles as a fiduciary.

[94] The obligations of Congress under the Commonwealth provisions are to manage native title rights and interests in its capacity as a prescribed body corporate. The obligations of Congress under the State provisions are to hold land in its capacity as the grantee of the DOGIT and to apply those mining royalties that are received by it in that capacity. These are separate obligations.

[95] It is not to the point that these different obligations are linked to interests in land. The classes of interest in land that are native title and Aboriginal land are different. A grant of Aboriginal land under the *ALA* Part 4 does not affect native title. Native title continues in force despite a grant of transferable land as Aboriginal land.[52]

[96] There is no inconsistency. The State law does not alter, impair or detract from the Federal law under consideration. This ground must fail.

**Ground Four: Failure to take relevant considerations into account**

[97] Ground four, which finds its basis in s 23(b) of the *JRA*, is:

> *"That the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made in that the First Respondent failed to take into account relevant considerations in the exercise of the power".*

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49 Ibid at [18] citing *Momcilovic v The Queen* (2011) 280 ALR 221 at 296-297 [245], 299 [258 and 314 [314]; *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-77 [28]; *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 280 ALR 206 at 215-216 [39]-[41].

50 Supra at 252.

51 See *Corporations (Aboriginal and Torres Strait Islander) 2006* (Cth) s 96-1.

52 *Aboriginal Land Act 1991* (Qld) s 45.

[98] The particulars of ground four effectively allege that the Minister failed to consider whether:

(a) the appointment of Congress as grantee of the DOGIT would frustrate the objects of the power to make such an appointment and in particular s 40(2)(a);
(b) Congress intended to breach its duties as grantee of the DOGIT;
(c) Congress has the necessary managerial, administrative and financial skills to perform its duties as grantee of the DOGIT;
(d) Congress is unduly influenced by the CYLC.

*What was the Minister bound to consider?*

[99] The first step is to decide what the Minister was bound by the statutory provisions to consider.

[100] Relevant considerations are:

(a) the eligibility of the grantee, per ss 40(2) and (3);
(b) whether there has been consultation with and consideration of the views of aboriginal people particularly concerned with the land, per ss 40(4), 41(4) and 41(1)(b);
(c) any matter the Minister considers relevant, including for example whether any Aboriginal people particularly concerned with the land other than the native title holders may be adversely affected and if so any action the RNTBC intends to take to address the concerns of the Aboriginal people, per ss 40(7), 39(4)(b) and (c);
(d) any Aboriginal tradition applicable to the land, per s 40(8).

[101] Of these, the threshold requirement of (a) is met and (d) has not arisen as a material concern in the present case. As to (c), which arises for consideration if the Minister considers it relevant, it is only likely to be considered materially relevant if raised in any event in the context of (b). The critical requirement therefore is (b), namely the requirement in s 40(4) that the Minister "*must consult with, and consider the views of, Aboriginal people particularly concerned with the land*". Section 41(4) specifically provides Aboriginal persons may make written representations to the Minister about a proposed appointment. Section 40(4) obliges the Minister to consider the views expressed in such written representations.

[102] It must next be considered whether the *ALA* impliedly required the Minister to consider any other matters. This can be done by looking at the subject matter, scope and purpose of the Act.[53]

[103] The primary purpose of the *ALA* is to provide for the granting of land as Aboriginal land. The preamble to the Act reveals more detail:

> *"9 The Parliament is further satisfied that special measures need to be enacted <u>for the purpose of securing adequate advancement of the interests and responsibilities of Aboriginal people in Queensland</u> and to rectify the consequences of past injustices.*
>
> *10 It is, therefore, the intention of the Parliament to make provision, by the special measures enacted by this Act, for the adequate and appropriate recognition of the interests*

[53] *Minister for Aboriginal Affairs and Anor v Peko-Wallsend Ltd & Ors* (1986) 162 CLR 24 at 39, 40.

> *and responsibilities of Aboriginal people in relation to land and thereby to foster the capacity for self-development, and the self-reliance and cultural integrity, of the Aboriginal people of Queensland."* (emphasis added)

[104] This suggests the purpose of granting of Aboriginal land is to secure the adequate advancement of the interests and responsibilities of Aboriginal people and foster their self-development and self-reliance. Put more simply, and bearing in mind the relevant Aboriginal people for a grant of land are those particularly concerned with the land, the purpose of granting Aboriginal land is to benefit the Aboriginal people particularly concerned with the land.

[105] Given the commendable purpose of such grants of land it is unlikely that just any entity would suffice for appointment. It is inevitable that consideration of whether the transfer to a particular grantee will benefit the Aboriginal people particularly concerned with the land requires consideration of the appropriateness of the grantee to be the holder of the land on trust for the benefit of the Aboriginal people particularly concerned with it.

[106] In summary, the Minister was therefore bound to consider:

1. the views of Aboriginal people particularly concerned with the land (an express requirement);
2. whether Congress was an appropriate entity to hold the land on trust for the benefit of the Aboriginal people particularly concerned with it (an implied requirement).

[107] As to the latter, the applicants argued in effect that the Minister was bound to give material consideration to all matters potentially going to appropriateness for appointment. However, it is unlikely Parliament intended to impose such a requirement on the Minister. The level of particularity contended for by the applicants is not warranted on the language of the preamble or s 40 itself. While the Minister is bound to consider appropriateness for appointment the scrutiny that ought be given as part of that process to individual matters is for the Minister to determine. Thus, while the Minister is bound to consider the views of Aboriginal people particularly concerned with the land, it is for the Minister to decide what weight and level of consideration ought be given to matters raised by them as going to the appropriateness or otherwise of appointing a particular entity. It may be, for instance, that only a moment's consideration of a matter raised as going to appropriateness for appointment will reveal it is not of sufficient substance, relevance or importance to warrant further scrutiny.

*What did the Minister have before her?*

[108] To decide whether the Minister considered the matters she was bound to consider it is necessary to examine her Statement of Reasons.[54] That document outlines the evidence and material upon which findings of fact were made. The Minister relied on two Briefing Notes, the first numbered CTS No. 17248/11 and the second numbered 17196/11. The second of these is irrelevant to these proceedings.

[109] The relevant Briefing Note has attached to it a table titled *"Submissions in response to advertising the Minister's intention to appoint Congress RNTBC as the grantee of*

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[54] Ex 1, Doc 61.

*Hope Vale DOGIT 2011"*.[55] This table includes reference to submissions that to varying extents supported and opposed the appointment of Congress. That part of the table which referred to a submission against the appointment made by June Pearson personally and on behalf of Council, Hope Vale Foundation and Greg McLean listed the main points of this submission as including:

> *"1) Congress is unrepresentative of the people living in Hope Vale (only represents the native title holders)*
>
> *2) Proposal ignores Government Report (Kingham and Pitt) note: Kingham report recommended a land trust made up of community reps and Pitt report noted concerns about Congress being the grantee.*
>
> *3) Congress has foreshadowed breach of trust (inequitable disbursement of royalties)*
>
> *...*
>
> *7) No proper managerial, administration or financial skills (currently relies on outside agencies)*
>
> *8) Influence of outside bodies on Congress (concern that State deal with persons not resident in the community)."* [56]

[110] The Statement of Reasons at [3] refers generally to the Minister having considered the views of the various interested parties who provided submissions but does not disclose, beyond reference to the briefing note, any other material on which the decision was based. It is therefore logical to conclude that the Minister did not view the content of the Kingham Report or the Pitt Reports. However, it appears the Department did have possession of those reports. Accordingly, the Minister is deemed to have constructive knowledge of their contents and cannot defend a failure to consider a relevant matter contained therein.[57]

*The Kingham and Pitt Reports*

[111] What did the Kingham and Pitt reports contain? The Kingham Report, of 9 June 2006, raised concerns about the potential incompatibility of functions, which could consequently frustrate the objects of the *ALA*. Her Honour Judge Kingham, who at that stage was the Deputy President of the Land & Resources Tribunal, prepared it. Page 15 of her report stated that:

> *"The State's advice, based on senior counsel advice, is that there is a real and substantial conflict of interest for a PBC, such as Congress, to be as trustee of the trust".*[58]

[112] It goes on to state that this position "*is not necessarily accepted by the other lawyers*".[59] However, the Department accepted it for a period of time. This is evident in a letter from the then Director-General dated 27 August 2007, in which it is stated:

> *"As to who may be trustees for the proposed balance area land trust, the department previously has indicated that it does not currently support the involvement of the PBCs as trustees because of the conflict of interest that could arise. ... in the department's view a*

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55 Ex 1, Doc 59, Attachment E, p 2.

56 Ibid.

57 *Minister for Aboriginal Affairs and Anor v Peko-Wallsend Ltd & Ors* supra at 31 & 66 (Mason J).

58 Ex 1, Doc 3, p 15.

59 Ibid.

> *person in their role as trustee owes a legal obligation to everyone who is a member of the trust and not just those whose interests that person might consider they 'represent'. … This puts a PBC, which is limited in it membership to only the native title holders and owes them a particular responsibility, in an impossible conflict given how the trust must make decisions."* [60]

[113] The applicants emphasised the former view of the Department was that a RNTBC should not become a grantee of a DOGIT.

[114] However, the conflict of interest issue as raised in the Kingham Report in 2006 and the Department's view of it in 2007 appears to be temporally stale. It also precedes the specific statutory inclusion of RNTBCs in 2010 as potential grantees. Moreover, the contrary view, which is that there is no inherent conflict in Congress owing different fiduciary obligations to a different range of persons in its different capacities, is an unremarkable view for the Department to have more recently formed. Against that background the Kingham Report and the Department's former view as to the conflict of interest issue were irrelevant.

[115] The Pitt Reports were a series of three preliminary reports prepared by Mr Warren Pitt, a former Member of the Queensland Parliament, preparatory to finalising his *"Hope Vale Ex Gratia Final Proposal"* document recommending Hope Vale Shire Council to operate a trust account for the receipt of the ex gratia payment. Generally, the reports were negative about the CYLC and its employee Mr Brian Cobus, who was described as a temporary chair of Congress. In particular, the first report makes reference to the fact that Mr Cobus had a compromised "*ability to maintain a necessary degree of separation*" by virtue of his employment by the CYLC.[61]

[116] Broader concerns about the CYLC are raised in the second report.[62] That report was prepared following a visit by Mr Pitt to Hope Vale to attend a workshop with the Yuuru clan groups. He reported:

> *"… on the day before I was advised operatives of Cape York Land Council were in Hope Vale applying pressure to traditional owners not to participate in the workshop.*
>
> *It would appear their efforts to undermine this element of the process were successful as no one attended…"* [63]

[117] Mr Pitt concluded it was his *"profound belief their interference in this matter is done with less than honourable intentions*".[64] Mr Pitt was of the opinion that CYLC was really interested in securing an ongoing funding stream and also in remaining relevant.

[118] The third report was made following a further workshop in Hope Vale. At that workshop the Dingal and Thanil clans explained that they had not attended the previous workshop because of poor communication. This significantly undermines

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60 Ex 1, Doc 5, p 4.
61 Ex 1, Doc 17, p 2.
62 Ex 1, Doc 18.
63 Ibid at 1.
64 Ibid at 2.

the conclusion drawn by Mr Pitt in the second report that the CYLC had applied pressure to the traditional owners not to attend that workshop. Nonetheless, the third report repeats similar complaints about CYLC. Mr Pitt wrote:

> *"It was reported to the meeting that Cape York Land Council was present in the Hope Vale Community on the day urging all Yuuruu clans not to attend. I was happy that many chose to ignore this intimidation."*

[119] In Mr Pitt's Notes & Observations he observed that the CYLC "*may continue to attempt to derail any further progress*".[65]

[120] Despite the occasionally vehement tone of Mr Pitt's reports and proposal, perusal of them reveals they do not allege, or, contrary to the applicants' particulars, support, any allegation of undue influence by CYLC over Congress.[66] It is important to bear in mind that in his reports Mr Pitt was not expressing his views as an Aboriginal person particularly concerned with the land. Further, the more strident of his views were largely based on information from others yet did not change in their stridence when that information was contradicted. His expressed views about the motives of the CYLC seemed not to acknowledge its legitimate role on behalf of native title holders in the process. In any event, they were views more relevant to the CYLC and Mr Cobus than to Congress. Further, Mr Pitt's final proposal was dated 19 March 2010, well over a year before the Minister's decision.

[121] In the circumstances Mr Pitt's reports and proposal were irrelevant to the Minister's decision-making in the present case. If that conclusion is incorrect then they were, at best for the applicant, of peripheral relevance only.

*Other material*

[122] The applicants sought to demonstrate the Department's knowledge of potential problems using a number of letters in its possession.

[123] One was the letter, discussed earlier in these reasons, of 12 November 2008 from Mr Peter Callaghan, the Chief Executive Officer of the CYLC Aboriginal Corporation to Mr Scott Spencer, the then Director-General of the Department. In that letter Mr Callaghan was clearly purporting to speak on behalf of the Yuuru clan groups. There were numerous examples of this in the letter including "*Yuuru want to ensure*", "*Yuuru are aware*", "*Yuuru suggest*" and "*Yuuru are most concerned*".[67] The potential relevance of the letter is said to be that is shows a representative of CYLC was advocating for the Yuuru people. That does not make it relevant to the Minister's decision regarding Congress. The letter was irrelevant to the Minister's decision-making or, if that conclusion is incorrect, was, at best for the applicant, of tenuous relevance.

[124] Another letter identified in the applicants' argument was written by Mr Greg McLean, the Mayor of Hope Vale Shire Council, to Mr Jim McNamara, the Assistant Director General of the Department. In that letter, concerns are raised about the appointment of Congress as grantee of the DOGIT and the decision to

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65 Ex 1, Doc 22, p 8.

66 In fairness to the applicants they may not have had access to the reports when settling their grounds.

67 Ex 1, Doc 8.

make the ex gratia payment to that body.[68] It is readily apparent the letter is written for the purpose of dissuading government from granting the DOGIT and administration of the ex gratia payment to Congress and urging it to prefer the Hope Vale Foundation, the entity previously advanced by Hope Vale Shire Council. The letter does not raise any potentially relevant issues or facts that were not in any event canvassed in the materials that were before the Minister.

[125] I note for completeness that letter, which is dated 12 October 2010, refers to a meeting with Mr McNamara of 16 August at which Mr McNamara mentioned he also planned to meet with representatives of CYLC who were also representatives of Congress. These may be the meetings intended to be referred to in particular 1 d) iii to this ground and in the second applicant's submission to the Minister[69] as having occurred on 12 October 2010. While the particulars impliedly rely on those events as evidence of undue influence they were nothing of the sort. Not even the second applicant's submission to the Minister put it that highly. The only inference the submission sought to draw from these events was that CYLC had an involvement in negotiations regarding the potential granting of the DOGIT.[70] Such unremarkable involvement by CYLC cannot logically support any adverse inference let alone an inference of undue influence.

[126] I have already dealt with the supposed incompatibility, conflict and breach of trust issues said to arise generally and in respect of the Overarching Deed. There is insufficient substance to them for them to be sufficiently material to the appropriateness of appointing Congress as to have warranted the consideration of the Minister.

[127] In respect of the issue of the administrative, financial and management skills of Congress, the issue was not advanced with much substance in the joint submission. The submission's summary of its representations relevantly stated:

> *1.7 <u>No proper managerial, administrative or financial skills of Congress</u>*
>
> > *Congress does not have the administrative structure to handle the grantee position and must rely on outside agencies.*

However the ensuing submission did not enlarge significantly upon this assertion. It merely emphasised the fact that the Hope Vale Shire Council had financial policies and procedures and then asserted:

> *"27. In contrast, Congress has no structure in place to support it in its role as a new Grantee. In particular, as far as I am aware, it has no bank account, no policies or procedures regarding its administration, including financial asset management, nor any general system by which it would have the administrative capacity to operate as a Grantee.*

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68 Ex 1, Doc 29.

69 Ex 1, Doc 40 [70] – [73].

70 Ibid at [70].

> *28. … I urge that any new Grantee appointed should have in place a transparent administrative and financial system, together with appropriate administrative policies and procedures."*

[128] In short, the submission effectively advanced the question of whether Congress had proper managerial, administrative and financial systems as a topic that the Minister should inquire into. There is no evidence, beyond the effectively neutral fact of the absence of knowledge of the authors of the joint submission that Congress did not have or was not going to implement such systems.[71] The applicants did not point to any documents said to have been before the Minister or readily available to her which may have identified cause for concern.

*Was there a duty to inquire?*

[129] In some situations, a decision-maker will have a duty to inquire. Here, it is argued that the Briefing Note placed the Minister on notice of matters about which she should have made inquiries. These matters included whether there was any evidence that Congress intended to breach its duties, whether Congress had the necessary managerial, administrative and financial ability, and whether Congress was unduly influenced by CYLC.

[130] In support of their submission that the Minister should have made inquiries about these matters, the applicants assert the Briefing Note is obviously deficient in that the actions listed as having been taken in response to Ms Pearson's submission do not, at all, address the majority of the concerns raised.

[131] However, a duty to inquire will only arise in exceptional circumstances. In *Prasad v Minister for Immigration and Ethnic Affairs*[72] Wilcox J stated:[73]

> *"The circumstances under which a decision will be invalid for failure to inquire are, I think, strictly limited...It is not enough that the court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it."* (emphasis added)

[132] Justice Wilcox's comments were obiter dicta and made in the context of Wednesbury unreasonableness. However, they have been cited favourably by the High Court.[74] Further, it has been recognised that a duty to make further inquiries can arise, under the duty to take into account relevant considerations, where information goes directly to the "*fundamental basis"* for a Minister's decision and is "*readily available"* to the Minister for the asking.[75]

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71 Ex 1, Doc 43, the draft Operational Plan of Congress of June 2011 is evidence suggesting such systems were being implemented, although it is unclear whether the Minister had constructive knowledge of it.

72 (1985) 6 FCR 155. Applied in *Luu & Anor v Renevier* (1989) 91 ALR 39.

73 Ibid at 169-170.

74 *Minister for Immigration and Citizenship v SZIAI and Anor* (2009) 259 ALR 429 at 434 -436. Also see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 290.

75 *Tickner v Bropho* (1993) 40 FCR 183 at 199, *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300, [625].

[133] The exceptional circumstance that the material must go to an issue of central relevance to the decision to be made and be obviously and readily available demonstrates the very limited extent of any obligation to inquire. Plainly it would not be enough that a reviewing Court thinks it might have been sounder for the Minister to make further inquiries.

[134] Setting aside whether they were of central relevance, the materials which it was obvious were readily available were the Kingham report, the Pitt Reports and the Overarching Deed, which dealt with how the ex gratia payment and future royalty payments would be disbursed.

[135] The Kingham and Pitt Reports were not of central relevance.

[136] As to the Overarching Deed, it was referred to in the Briefing Note and the Minister thus had constructive knowledge of it. As already mentioned, the letter of the Minister to the Premier of 8 October 2011 refers positively to the arrangements contemplated by the deed.[76] The Deed did not contain or suggest the existence of material that was of central relevance to the decision to be made regarding the DOGIT. As already explained, its content did not reveal that Congress was going to act in breach of trust. Further, there was nothing in its content to suggest the existence of other material that was centrally relevant and readily available. It is noteworthy that the foreshadowed breach of trust raised in the joint submission did not relate to a breach of the kind the applicants unsuccessfully contend for based on the deed. Rather, it was founded on correspondence which was included in the submission and which, as already discussed, fell well short of evidencing a likely breach.

*Was there any failure to consider relevant matters?*

[137] The Statement of Reasons clearly indicates that the Minister did consider the matters she was bound to consider, namely the views of Aboriginal people particularly concerned with the land and the appropriateness of Council for appointment:

> *"FINDINGS ON MATERIAL QUESTIONS OF FACT*
>
> *Considering the information provided in Ministerial Briefing Notes CTS No. 17248/11, I decided that for the purposes of:*
>
> *1. S. 38 (3) that the deed could show that the land was held by the grantee for the benefit of Aboriginal people particularly concerned with the land and their ancestors and descendents*
> *2. S.40 (2) that Congress was a CATSI corporation that is qualified to hold land for those beneficiaries and had advised that it agreed to becoming trustee of the lands described in the deed of grant. The Supreme Court ruling referred to above confirmed that Congress could be appointed as grantee under this section (previously numbered as section 28);*

[76] Ex 1, Doc 54.

3. *S. 40(4) had been satisfied. I considered the views of the various interested parties who had provided submissions in response to public notification of the proposed grantee. These views are set out in Attachment E to briefing note CTS No. 17248/11. I noted the contents of the schedule summarising the various submissions provided to the department which both supported and opposed the transfer for a variety of reasons.*

*In particular I noted the views of the current trustee, the Hope Vale Aboriginal Shire Council, the Hope Vale Foundation Limited, Mr Gregory McLean and Ms June Pearson which had been set out in a joint submission provided to the department.*

*I noted that the joint submission referred to in the preceding paragraph opposed the transfer to Congress for the following reasons:*

*(i) Congress is unrepresentative of the people living in Hope Vale (only represents the native title holders);*
*(ii) Proposal ignores Government Report (Kingham and Pitt) note: Kingham report recommended a land trust made up of community reps and Pitt report noted concerns about Congress being the grantee;*
*(iii)Congress has foreshadowed breach of trust (inequitable disbursement of royalties)*
*...*
*(v) Foundation represents all of Hope Vale residents;*
*...*
*(vii) No proper managerial, administration or financial skills (currently relies on outside agencies);*
*(viii) Influence of outside bodies on Congress (concern that State deal with persons not resident in the community)...*

*REASONS FOR DECISION*

*I made my decision on the basis that:*

1. *all of my relevant statutory obligations under the Act had been met*

*...*

4. *that consultation with Aboriginal people particularly concerned with the land sufficiently supported the appointment of Congress as grantee for Lot 35 on Plan DP232620. Having considered the views of the various interested parties I was of the opinion that Congress was an appropriate body as grantee for transferable land on the Hope vale Deed of Grant in trust (excluding the township area) to hold the land for the benefit of Aboriginal people*

> *particularly concerned with the land and their ancestors and descendants."* (emphasis added)[77]

[138] The passages emphasised in the reasons above present a very significant obstacle to this ground. They contain clear assertions by the decision-maker that she did consider the matters she was bound to consider. They also assert the Minister gave consideration to the matters raised in opposition to the grant being made to Congress, those being nearly the same matters which the applicant now complains she did not consider.

[139] It is well accepted that a court undertaking judicial review should not be over-zealous when examining the reasons of the decision-maker. For instance, the majority of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* observed:

> *"The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error. These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed."*[78]

[140] On the other hand, it is also generally accepted that a decision maker's reasons should reflect that there has been genuine and proper consideration of relevant matters.[79] The applicants seized upon this when examining the Minister's Statement of Reasons.[80]

[141] The applicants emphasised two decisions in particular. The first was *Weal v Bathurst City Council & Anor*[81] in which Mason P adopted Gummow J's approach in *Khan v Minister for Immigration and Ethnic Affairs*[82] that taking something into account requires "*proper, genuine and realistic consideration upon the merits*".[83] Mason P found that simple advertence to a matter did not amount to consideration of it.[84]

[142] The second case referred to was *Minister for Immigration and Multicultural Affairs v Yusef*,[85] which supports the proposition that if a decision maker has not mentioned a matter, then it can be inferred it was not considered to be material.[86]

[143] The applicants purport to extend that line of inference a step further, contending, in effect, that the mere noting of a matter without accompanying findings about the

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77 Ex 1, Doc 61.

78 (1996) 185 CLR 259 at 272. See also, *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594.

79 See *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1 at 14 -15.

80 See T1-49, L34 – L46.

81 [2000] NSWCA 88.

82 (1987) 14 ALD 291.

83 *Weal v Bathurst City Council & Anor* (2000) 111 LGERA 181 at 185[9] citing *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at 292.

84 *Weal v Bathurst City Council & Anor* (2000) 111 LGERA 181 at 185[13].

85 (2001) 206 CLR 323.

86 Ibid at [69] (McHugh, Gummow and Hayne JJ). See T2-17, L28-L30.

matter means it should be inferred the matter was not actually considered or taken into account.[87]

[144] However whether such an inference is warranted must invariably depend on the materiality of the matter, as is reflected in the definition of *"reasons"* in the *Judicial Review Act* 1991 (Qld) at s 3:

> *"**reasons**, in relation to a decision, means –*
> *(a) findings on material questions of fact; and*
> *(b) a reference to the evidence or other material on which the findings were based;*
> *as well as the reasons for the decision."*

There may be an array of matters, whether in the form of evidence or other material, referred to in reaching findings but it is not necessary to articulate discrete findings about all of those matters in order to demonstrate they have been considered. It is only in respect of material questions of fact that an expectation arises of findings being articulated.

[145] It ought be appreciated the observation of Mason P in *Weal's Case,* that simple advertence to a matter does not amount to consideration of it, related to a matter the decision maker had been required by statute to take into consideration as a relevant matter. It was clearly a material matter, consideration of which was a mandatory part of the decision making process.

[146] In the present case the fact the decision maker adverted to, by noting, the reasons advanced in the joint submission for opposing the transfer to Congress, cannot sustain the inference sought by the applicant, that the Minister did not consider those reasons.

[147] I am fortified in reaching that conclusion by the additional consideration that in any event she did more than merely note the reasons advanced in the joint submission and expressly stated she had considered them. That is apparent from the outset of paragraph 3 of her findings on material questions of fact where she said she had *"considered the views of the various interested parties who had provided submissions"* and paragraph 4 of her reasons for the decision where she again referred to having *"considered the views of the various interested parties".*[88]

[148] The applicants' assertion the Minister ought to have inquired into the reasons advanced by those opposed to the appointment of Congress or engaged in her documented reasons in some analysis and findings specifically in respect of the reasons advanced in opposition to Congress is in substance a complaint about merits. The argument that it was not enough to merely note the reasons advanced in opposition to the appointment of Congress assumes those matters were of central or material importance when that does not follow from a consideration of the limited matters the Minister was statutorily obliged to consider. That is, it assumes some special weight ought to have been accorded to the reasons submitted against the appointment of Congress, elevating their status to matters of central or material importance, when it was a matter for the decision-maker to decide what weight she ought give those reasons.

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87 T2-17, L30-L44.
88 Ex 1, Doc 61 pp 4, 5.

[149] Properly conceptualised the argument is really an argument of *Wednesbury* unreasonableness, as was explained by Mason J in *Minister for Aboriginal Affairs and Anor v Peko-Wallsend Ltd and Ors:*

> *"The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned: Wednesbury Corporation.*
>
> *It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power: Sean Investments Pty. Ltd. v. MacKellar; Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd.; Elliott v. Southwark London Borough Council; Pickwell v. Camden London Borough Council. I say "generally" because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable". This ground of review was considered by Lord Greene M.R. in Wednesbury Corporation, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it."*[89] (citations omitted, emphasis added)

[150] In the case at hand there was no statutory indication of the considerations for or criteria relevant to assessing suitability for appointment, let alone a statutory indication of what weight ought be given to such considerations or criteria.

[151] Minds may differ as to the merits of the decision to grant the DOGIT to Congress in the face of the reasons submitted to the Minister in opposition to such a grant. However, while the Minister was obliged to consider the views of Aboriginal people particularly concerned with the land, she was not obliged to agree with any or all such views. To the extent those views included reasons why the appointment was not appropriate, in the absence of any statutory criteria for assessing appropriateness it was a matter for the Minister to determine the weight to be given to those reasons and to consider whether further inquiry into them was warranted.

[152] The content of the views advanced against the appointment, even when considered in their re-shaped form as particulars to this ground, was not such as to inevitably compel the conclusion that those views should prevail or give rise to further inquiry. A decision-maker acting reasonably could readily conclude the matters raised were

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89 Supra at 40-41.

not of such substance or relevance as to be material considerations in the decision-making process.

[153] It ought be borne in mind the decision fell to be made against a background where there was a statutory obligation to make an appointment and there had been a prolonged history of consultation. Unanimity of views in the affected community was seemingly unachievable and was not required. The views advanced against appointment were not the only views before the decision-maker and did not fall to be considered in a vacuum. Submissions had also been made supporting Congress as an appropriate entity for the grant. The Briefing Note also revealed the Dhubbi RNTBC and Walmbaar RNTBC, the only other RNTBCs which could have become candidates for appointment, supported the appointment of Congress.[90]

[154] In all of the circumstances it was not manifestly unreasonable to not inquire further into or accord central or material importance to the views of and reasons advanced by those opposing the appointment of Congress or to the re-stated versions thereof articulated as particulars to this ground.

[155] This ground must fail.

**Grounds Five and Six: Took irrelevant considerations into account**

[156] These grounds relate to s 42(3)(a)(ii) of the *ALA*. The applicant argues that provision requires the Minister to be satisfied arrangements are in place to ensure local government can continue to provided local government services to communities on the DOGIT land government services

[157] Grounds five and six both state:

> *"That the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made in that the First Respondent took into account irrelevant considerations in the exercise of the power".*

[158] Despite the fact that grounds five and six indicate that the Minister took into account irrelevant considerations, the particulars to ground five reveal that she is actually alleged to have failed to take into account relevant considerations. It is contended that under s 42(3)(a)(ii) of the *ALA* the Minister was bound to consider the following before making a decision:

(a) what the necessary arrangements would be to ensure the third applicant could continue to provide local government services to communities on the land ("the necessary arrangements");
(b) what arrangements the third applicant considered to be necessary; and
(c) whether the necessary arrangements were *"in place"* within the meaning of s 42(3)(a)(ii) of the *ALA*.

[159] Relevantly, s 42(3) states:

> *"(3) However, the Minister <u>need not act</u> as mentioned in subsections (1) and (2) in relation to land until the Minister is reasonably satisfied—*
> *(a) arrangements are in place to ensure—*

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90 Ex 1, Doc 59, Attachment D.

> *(i) the Commonwealth and the State can continue to provide services to communities on the land after it is granted; and*
> *(ii) the local government for the area in which the land is situated can continue to provide local government services to communities on the land after it is granted..."* (emphasis added)

[160] Ground five is premised upon an assumption the words of s 42(3)(a)(ii) require the Minister to be satisfied, before acting, that arrangements to ensure local government services can continue to be provided are in place. For the reasons previously explained in my earlier refusal of injunctive relief in this case that interpretation is wrong.[91] It appears to erroneously interpret s 42(3)'s words, *"need not act"*, as meaning, *"must not act"*. Section 42(3)(a)(ii) does not require the Minister to be satisfied of anything as a condition of appointing a grantee. It merely gives liberty to the Minister to delay fulfilling the duty imposed by s 42(1) if the Minister wishes to so delay until reaching a level of reasonable satisfaction about the matters mentioned. Section 42(3) is not a condition, but a permissive provision by which the Minister is not obligated by the imperative in s 42(1) and (2) to act as soon as practicably.

[161] The premise of ground five, that the Minister was bound to consider the matters referred to in its particulars, is therefore wrong and ground five must fail.

[162] The particulars to ground six allege the Minister took into account irrelevant considerations, in that the Minister wrongly considered it relevant that:

(a) significant areas of land and infrastructure required for local government services were not on Lot 35 on Plan DP232620;
(b) Congress had agreed to grant any necessary leases to the third applicant for its continued use and occupation of land on Lot 35 on Plan DP232620;
(c) an agreement was being pursued by departmental officers with Congress that would provide the Council with rights of access to land on Lot 35 on Plan DP232620 for the provision of local government services for up to twelve months after the grant of the DOGIT.

[163] These considerations were listed in paragraph 6 of the Minister's "*Findings of material questions of fact"*,[92] which were, relevantly:

> *"...I decided that for the purposes of:*
>
> ...
>
> *6. S.42 (3) as it relates to the continuation of local government services that as:*
>
> - *significant areas of land and infrastructure required for local government services were not on Lot 35 on Plan DP232620;*

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91 *Gibson & Ors v The Minister for Finance, Natural Resources and the Arts & Anor* [2011] QSC 401 at 11.

92 Ex 1 Doc 61 p 5.

- *Congress had agreed to grant any necessary leases to Council for its continued use and occupation of land on Lot 35 on Plan DP232620 necessary for services;*

- *An agreement was being pursued with Congress that would provide Council with rights of access to land on Lot 35 on Plan DP232620 for the provision of local government services for up to 12 months after a grant was made to Congress;*

*sufficient mechanisms existed to ensure that there would not be an interruption to the continued provision of local government services."*[93]

[164] The Minister's ensuing *"Reasons for Decision"* reasoned, relevantly:

> *"I made my decision on the basis that: ...*
>
> *2. that mechanisms existed to ensure that ... local government services could continue after the appointment of Congress as grantee for Lot 35 on Plan DP232620;..."*[94]

[165] A significant problem with this ground is the Minister did not have to take these considerations into account under s 42(3)(a) because that provision did not, as I have already found, contain the mandatory requirement contended for by the applicant. That is, the Minister's reference to these considerations was not necessary to the lawfulness of the appointment. For that reason alone the ground should fail. However, there are other reasons why the ground cannot succeed.

[166] The applicants submit that this lack of legal obligation to refer to the considerations is overcome as a flaw in their argument because the Minister, in her Statement of Reasons, did refer to them in her findings in support of her conclusion *"for the purposes of ... S. 42(3) as it relates to the continuation of local government services ... that sufficient mechanisms existed to ensure that there would not be an interruption to the continued provision of local government services"*.[95] Her finding was also listed as one of the bases for the making of her decision.[96] However, the applicants do not contend the alleged error lay in the Minister's approach of having regard at all to whether satisfactory mechanisms existed to ensure local government services could continue. That is unsurprising in that even disregarding s 42(3), it was hardly unreasonable to have regard to such a matter.

[167] Rather, the applicants contend there were irrelevancies inherent in each of the considerations referred to by the Minister. In re-articulating the argument in the course of oral submissions into a *Wednesbury* unreasonableness argument, Senior Counsel for the applicants explained what was really being questioned was the reasonableness of the Minister's conclusion, on a proper assessment of the true lack of relevance of each of the considerations, *"that arrangements were in place"*.[97] In point of fact the Minister did not expressly conclude *"arrangements were in place"*

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93 Ex 1, Doc 61, pp 3, 5.
94 Ex 1, Doc 61, p 5.
95 Ex 1, Doc 61, pp 3, 5.
96 Ex 1, Doc 61, p 5, para 2 under "*Reasons for the decision".*
97 T2-33, L21-L23.

and rather found *"sufficient mechanisms existed"* to ensure there would not be an interruption to the continued provision of local government services. The apparently fine distinction is not academic because despite the seeming re-shaping of the applicants' argument for this ground and its consequential drift away from an erroneous reliance upon s 42(3) as mandatory, it is still seemingly relying upon there being no *"arrangements … in place"* within the meaning of s 42(3).

[168] It was suggested the first of the allegedly irrelevant considerations was irrelevant because it was not an *"arrangement"* within the meaning of s 42(3)(a)(ii) of the *ALA* as it does not ensure the Council can continue to provide local government services to the Hope Vale community. However, it does not have to be an *"arrangement"* in order to be relevant to assessing, as the Minister did, the sufficiency of mechanisms to ensure local government services could continue. Admittedly this first allegedly irrelevant consideration was not the most important relevant fact but at the very least it was a background fact of some relevance in weighing up the sufficiency of those mechanisms in all the circumstances of this particular case.

[169] The remaining considerations are alleged to be irrelevant because they were not arrangements "*in place*" within the meaning of s 42(3)(a)(ii) given that they were subject to negotiation. It was submitted for the applicants that there were two possible arrangements. One was that the community services infrastructure could be leased. It was this option that was ventilated before the Minister.[98] The other, which was not ventilated before the Minister, was that the land with community service infrastructure on it could be excised from the DOGIT land, which is possible under s 16 of the *ALA*.[99]

[170] The applicants contended that this second option is contemplated to be the normal arrangement under the Act.[100] Support for this is found in the explanatory notes to the *Aboriginal and Torres Strait Island Land Amendment Bill 2008* (Qld). However, the question of whether the Minister ought have considered the separate decision-making power of s 16, relating to whether or not land is excised,[101] involves descent into the merits. Further, the amended application does not allege that the Minister should have considered it.

[171] More importantly, the applicants' argument assumes there can only be consideration of arrangements which are sufficiently advanced to be described as being in place when, as already explained, the Minister was not legally required to conclude that arrangements were in place. The applicants' unreasonableness argument in this context is presumably that no reasonable decision-maker could have considered any incomplete arrangements as relevant to assessing the existence and sufficiency of mechanisms to ensure continued local government services. Incomplete arrangements may arguably be less significant considerations than already fixed arrangements, but it does not follow they are irrelevant or that no reasonable decision-maker could regard them as relevant. The actions implemented by the proposed grantee in preparing to ensure continuation of local government services may logically be relevant to the decision-maker's state of re-assurance or

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98 T2-31, L53.
99 T2-31, L54-L56.
100 T2-31, L57-L58.
101 T2-36, L3-L4.

satisfaction that sufficient mechanisms exist to ensure continuation of local government services.

[172] The applicants argued the agreement of Congress to grant any necessary leases to the Council was irrelevant in that the agreement to do so was in the ILUA and Council was not a party to the ILUA. However, the fact that Congress and Council had not reached their own agreement on the matter did not make it irrelevant to take into account this clear evidence of the intention of Congress.

[173] Further, even without this evidence on the matter, the Minister would have been entitled to infer that the entity granted the DOGIT would have a duty as trustee, to ensure for the benefit of those for whom it held the land, that it would do all things necessary on its part to safeguard the continued provision of local government services, such as entering into leases and allowing access. That duty would not be limited by or in conflict with the role of Congress as a RNTBC, indeed under the Native Title Determination the exercise of native title rights and interests was expressly made subject to the right of the Council *"to exercise its lawful statutory powers, duties and functions on native title land"*.[102]

[174] In a similar vein, Council has a statutory duty to fulfil,[103] inherent in which would be entering into the leases necessary to allow it to continue to discharge that duty. It ought also be borne in mind that Council had been advocating against the appointment of Congress, so, pending the Minister's decision, it is hardly surprising Council had not yet entered into agreements with Congress.

[175] The applicants' unstated argument is that the Minister ought have made two remarkable assumptions. The first was that Congress could not be trusted to grant Council the necessary leases when it had clearly said it would and when its duty as trustee would inevitably require it to allow access to and enter necessary leases with Council. The second assumption was that Council would not enter into the necessary leases despite it having to do so in order to fulfil its statutory duty. There would have been no proper basis to make such assumptions. The Minister was entitled to proceed on the assumption Congress would do what it agreed it would do and, if Congress were granted the DOGIT, that both Congress and Council would behave in accordance with their respective duties.

[176] For all of these reasons ground six must fail.

**Ground Seven: No jurisdiction**

[177] Ground seven of the application is that:

> *"The First Respondent did not have jurisdiction to make the decision".*

[178] It is alleged that the Minister did not have jurisdiction because she did not first form the required state of satisfaction *"reasonably"* within the meaning of s 42(3)(a)(ii) of the *ALA*.

[179] The success of this ground depends upon the interpretation given to s 42(3)(a)(ii). As I have already found, the words "*need not act*" in that section do not mean,

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102 Ex 1, Doc 2, p107.

103 *Local Government Act 2009* (Qld).

"*must not act*". Rather, they relieve the Minister of any obligation to appoint a grantee as soon as practicable. In other words, the jurisdiction of the Minister to make a decision under s 40 is not dependent on s 42(3).

[180] In light of this, it is unsurprising that the applicants did not strongly pursue this ground in their written submissions or at hearing. The ground must fail.

**Conclusion**

[181] All of the grounds have been unsuccessful. The application should therefore be dismissed.

[182] It will be necessary to hear argument as to costs, including reserved costs, in the near future, unless the parties reach agreement in the meantime as to the costs orders that should be made.

**Orders**

[183] My orders are:

1. The application is dismissed
2. I will hear the parties as to costs at 9.15am on 1 June 2012.