HIGH COURT OF AUSTRALIA

Minister for Aboriginal Affairs

Vs.

Peko-Wallsend Ltd.

Vs.

(Gibbs C.J., Mason, Brennan, Deane and Dawson JJ.)

31.07.1986

JUDGMENT

GIBBS C.J.:

1. I have had the advantage of reading the reasons prepared by Mason J. and am in general agreement with them. I need add only a few remarks.

2. For the reasons given by Mason J., the Minister, in deciding whether he is satisfied for the purposes of s.11(1)(b) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), as amended, ("the Act") that land should be granted to a Land Trust to be held for the benefit of Aboriginals, is bound to take into account the matters mentioned in s.50(3) of the Act, which include the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to either in whole or in part. In many, if not in most, cases the Minister, in considering those matters, will not need to go beyond the report of the Commissioner. However, if there is in the possession of the Minister, at the time when he considers the matter, material which shows that the position has changed since the Commissioner made his report, or that for any reason the Commissioner's comments were based on an erroneous view of the facts, the Minister is bound to take that material into account. The duty of the Minister is to consider the matters mentioned in s.50(3) in the light of the actual facts as disclosed by the material in his possession at the time when he considers whether or not he is satisfied for the purposes of s.11(1)(b), and not on a false assumption (whether the falsity is due to a change of circumstances or to an error on the part of the Commissioner) concerning the matters mentioned in s.50(3). If this were not so the Minister would in some cases be obliged to reach a conclusion that would be absurd or unjust, because its basis in fact was totally unsound. The injustice might, as Wilcox J. pointed out in the Federal Court, cut either way; sometimes the error of fact might favour the Aboriginal claimants and sometimes it might work against them. It does not follow that the Minister is bound to consider every argumentative submission made to him after the Commissioner has furnished his report; in the present case we are concerned only with material which reveals that the comments in the report were based on an erroneous view of the facts. I need hardly add that the error in the Commissioner's report in the present case was due, not to any fault of the Commissioner himself, but to the manner in which the respondents presented their case.

3. Of course the Minister cannot be expected to read for himself all the relevant papers that relate to

the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law.

4. In the present case the correspondence in the possession of the Department revealed the material fact that Ranger 68 was within the land recommended to be granted, contrary to the view on which the Commissioner had acted. The circumstance that the correspondence had been addressed to a predecessor in office of the Minister was quite irrelevant, since the letters were not personal, but were among the departmental papers. The material in the possession of the Department must clearly be treated as being in the possession of the Minister: see Daganayasi v. Minister of Immigration (1980) 2 NZLR 130, at p 148. The summary prepared by the officers in the present case made no mention at all of the facts that the Commissioner was under a misapprehension, and that Ranger 68 was within the area recommended to be granted, and the conclusion of the Federal Court that the Minister did not consider these facts cannot be challenged. The Federal Court therefore rightly concluded that the Minister's power under s.11(1) of the Act was not validly exercised.

5. The learned trial judge in the Federal Court found for the Minister on grounds which did not require him to exercise his discretion under s.16 of the Administrative Decisions (Judicial Review) Act 1977 (Cth), as amended. The Full Court of the Federal Court, which unanimously took a different view of the substantive question whether the Minister's decision was reached in accordance with law, was therefore called on for the first time to decide whether in its discretion relief should be refused notwithstanding that the conditions for the grant of relief had been satisfied. This appeal is brought from an original exercise of discretion and the case is not one in which we are called on to consider whether the Full Court misconceived its appellate function in interfering with a discretion already exercised by a primary judge. The ordinary principles which govern the manner in which an appellate court should deal with an appeal from an exercise of a judicial discretion will apply. I agree that in accordance with those principles no ground has been shown for disturbing the judgment.

6. It would seem, on principle, that if the Minister had been minded to give consideration to the facts stated in the correspondence from the respondents, he should first have given the Northern Land Council a fair opportunity to place before him its comments on that correspondence. That question was not fully discussed in argument before us, and is academic because the Minister did not consider the facts stated in the correspondence. Accordingly, I do not mention it further, although I should add that it does not now seem to be in contest that Ranger 68 is within the area recommended to be granted.

7. I agree that the appeal should be dismissed.

MASON J.: This is an appeal from a decision of the Full Court of the Federal Court allowing an appeal from a judgment of Beaumont J. at first instance. It raises questions of administrative law arising from the interpretation of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ("the Act"). Certain provisions of the Act have been previously considered by this Court in Re Toohey; Ex parte Meneling Station Pty Ltd ("Meneling Station") [1982] HCA 69; (1982) 57 ALJR 59; 44 ALR 63. The purpose of the Act, as described in its long title, is to provide, inter alia, for the

granting of traditional Aboriginal land in the Northern Territory for the benefit of Aboriginals. To this end, the Act provides in s.50(1)(a) for the Aboriginal Land Commissioner ("the Commissioner"), on an application by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land, to ascertain whether those or any other Aboriginals are the traditional Aboriginal owners of the land, to report his findings to the Minister and, where he finds that there are Aboriginals who are the traditional Aboriginal owners of the land, to make recommendations to the Minister for the granting of the land or any part of it in accordance with ss.11 and 12. The last two mentioned sections provide the machinery by which the grant of land may be made to a Land Trust established under the Act for the purpose of holding title to the land. Section 11, as it stood at the relevant time, reads as follows:

"11. (1) Where -

(a) the Commissioner has, before the commencement of the Aboriginal Land Rights Legislation Amendment Act 1982, recommended, or, after the commencement of that Act, recommends, to the Minister in a report made to him under paragraph 50(1)(a) that an area of Crown land should be granted to a Land Trust for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of that area of land, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission; and

(b) the Minister is satisfied -

(i) that the land, or a part of the land, should be granted to a single Land Trust to be held for the benefit of Aboriginals who are the relevant Aboriginals in relation to that land or that part of that land; or

(ii) that different parts of the land should be granted to different Land Trusts so that each Land Trust holds the land granted to it for the benefit of Aboriginals who are the relevant Aboriginals in relation to that last-mentioned land,

the Minister shall -

(c) establish -

(i) in a case where he is satisfied that the land, or a part of the land, should be granted to a single Land Trust - a single Land Trust under section 4 to hold that land, or that part of that land, for the benefit of Aboriginals who are the relevant Aboriginals in relation to the land, or the part of the land, proposed to be held by that Land Trust; or

(ii) in a case where he is satisfied that different parts of the land should be granted to different Land Trusts - 2 or more Land Trusts under section 4 respectively to hold those different parts of that land for the benefit of Aboriginals who are the relevant Aboriginals in relation to the parts of the land respectively proposed to be held by each of those Land Trusts;
(d) where land in respect of which a Land Trust has been or is proposed to be established in accordance with paragraph (c) is, or includes, alienated Crown land, ensure that the estates and interests in that land of persons (other than the Crown) are acquired by the Crown by surrender or otherwise; and
(e) after any acquisition referred to in paragraph (d) has been effected in relation to land and a Land Trust has been established in accordance with paragraph (c) in respect of that land, recommend to the Governor-General that a grant of an estate in fee simple in that land be made to that Land Trust."

recommending a grant of land and the Minister is satisfied that the grant should be made, the Minister must recommend to the Governor-General that the land be granted to the Land Trust. Section 12(1)(a) empowers the Governor-General to execute a deed of grant of an estate in the land in accordance with the Minister's recommendation.

2. The respondents to this appeal, who at first instance were the applicants for an order of review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the ADJR Act"), contend that a decision made by the Minister for Aboriginal Affairs on 15 March 1983 that certain land be granted to a Land Trust to be held for the benefit of the Mirarr Kundjey'mi people was an improper exercise of the power conferred on him by s.11 of the Act in that he failed to take into account a relevant consideration in making his decision, namely the extent to which the respondents would be detrimentally affected by the grant.

3. In 1967, the third and fourth respondents began exploring for minerals as joint venturers in the Alligator Rivers region of the Northern Territory, pursuant to exploration licences granted to them. The exploration involved the expenditure of large sums of money but by 1976 had revealed an extensive uranium deposit in a mineralized body known as Ranger 68. That deposit was valued at some $280 million and occupies the eastern corner of an area called the Barote block, which is roughly triangular in shape with its apex pointing toward the south. In 1976 applications were made for mineral leases over a number of areas in the region, including the Barote block, but consideration of the applications was not completed before the Act was passed in that year.

4. In March 1978 the Northern Land Council made applications under the Act on behalf of Aboriginals claiming to have traditional land claims in the region of the Alligator Rivers. Two Aboriginal groups made claims over land encompassed by the Barote block: the Dadjbaku clan and

the Mirarr Kundjey'mi clan. The Commissioner conducted an inquiry into these claims from October 1980 to March 1981 and concluded that only the latter could be sustained. He recommended to the Minister that specified land be granted to a Land Trust for the benefit of the Mirarr Kundjey'mi people. The land the subject of the recommendation included 10% of the Barote block, being the eastern corner which, as events subsequently revealed, contained the entire Ranger 68 deposit. The remaining 90% fell in the Dadjbaku land not recommended for grant.

5. The Commissioner also investigated the detriment that might result to the third and fourth respondents if his recommendation were to be implemented. This he was bound to do under s.50(3)(b) of the Act, which provides that in his report the Commissioner shall comment on the detriment to persons or communities that might result if the land claim were acceded to in whole or part. It is apparent from the report that the Commissioner was unaware of the precise location of Ranger 68, other than that it lay in the Barote block, only 10% of which fell within the land recommended for grant (see pars.299, 302 and 320). These findings reflected the evidence given to the Commissioner by Mr Elliston, a director of the first respondent, which in the opinion of the Full Court was vague, inaccurate and misleading. Mr Elliston had said, in reference to the Barote block:

"There were two mineralised prospects in that
(area) - Ranger 4 and Ranger 68 are the significant
ones. Ranger 5 also occurs within it. Ranger 4
is to the southern extremity of it and Ranger 68 is
in the centre of it."

As I have already mentioned, Ranger 68 is in fact in the extreme eastern corner of the Barote block. In subsequent representations to the Minister, to which further reference will be made, the respondents stated that, for various reasons, they did not specify the precise location of Ranger 68 in their evidence to the Commissioner. One reason given was the commercial sensitivity of that information, but a further explanation may well be that the imprecision in identifying the location of Ranger 68 supported a submission made by the respondents, both to the Commissioner and later to the Minister, that the whole of the Barote block be excised from any land recommended for grant.

6. The ultimate recommendation of the Commissioner gave the location of Ranger 68 an importance which the respondents had perhaps failed to appreciate at the time of the inquiry. Had the Commissioner been made aware that such a valuable uranium deposit lay wholly within the area recommended for grant, he may have phrased his comments on the respondents' detriment in stronger terms. Following the publication of the Commissioner's report in July 1981, the respondents made a series of submissions to the Minister which it is necessary to recount in some detail. By letter dated 25 September 1981 the Managing Director of the fourth respondent wrote to the then Minister for Aboriginal Affairs, Senator Baume, informing him that Ranger 68 was in fact wholly situated within the area recommended for grant and that the Commissioner's report had accordingly understated the detriment to the respondents. The first respondent had previously sent a letter in similar terms. The Minister replied on 6 October acknowledging these submissions and stating that they would be taken into account when making a decision on the land claim. On 8 March 1982 the Minister announced his decision to make the land grants recommended by the Commissioner, with the exception of land in respect of which the respondents had outstanding applications for mineral leases. A decision on those areas, which included the Barote block, was deferred. In December 1982 Mr Wilson replaced Senator Baume as the Minister for Aboriginal Affairs, whereupon the respondents wrote to him to inform him that representations had already been made to his predecessor, and to request that a meeting be arranged to discuss the land claims.

In his reply of 1 February 1983 Mr Wilson stated that the Commissioner's report included detailed comments on the question of detriment and that in the circumstances a meeting was unnecessary. Following the defeat of the government at a general election, Mr Holding took office on 11 March 1983 as the new Minister for Aboriginal Affairs. On 15 March he decided to recommend that a land grant be made to a Land Trust for the benefit of the Mirarr Kundjey'mi people in respect of the claims on which a decision had been deferred in the previous year.

7. In making this decision the Minister had before him the Commissioner's report, which included the comments on detriment, and a brief prepared by his departmental officers entitled "Northern Territory Land Claims Awaiting Decisions". The brief included a table listing the outstanding land claims, summarizing the Commissioner's comments on detriment, and stating what action was recommended by the Department. The summary of detriment in relation to the Alligator Rivers claim was as follows:

"Potential detriment to Peko-EZ who have applied
for a number of mineral leases, some of which will
be subject to Aboriginal veto and all of which will
require negotiation of an agreement with the
Northern Land Council."

There was no reference to the submissions made by the respondents to Senator Baume and Mr Wilson after publication of the Commissioner's report and it would appear that the Minister was in fact unaware of them. The Minister does not claim to have considered these submissions. Nor were they produced in response to subpoenas directed to the Minister and his Department requiring the production of all documents that the Minister considered or to which he referred in making his decision. The trial judge drew the inference that the representations were not taken into account, and it is safe for me to proceed on the same basis.

8. The respondents commenced proceedings in the Federal Court for judicial review of the Minister's decision under the ADJR Act. The ground of review was that, in failing to consider the representations made by the respondents to Senator Baume and Mr Wilson, the Minister failed to take a relevant consideration into account and that consequently the decision was an improper exercise of the power conferred by the Act. At first instance Beaumont J. held that the Minister was not obliged to take into account the respondents' additional submissions on detriment and accordingly the decision could not be impugned. It was therefore unnecessary to consider the further question whether the Court should, in the exercise of the discretion conferred by s.16(1) of the ADJR Act, refuse to make the orders sought because the respondents' difficulties were brought about by their own conduct in failing to disclose the location of Ranger 68 to the Commissioner.

9. On appeal, a majority of the Full Court of the Federal Court (Bowen C.J. and Sheppard J.; Wilcox J. dissenting) reversed the decision. Their Honours were unanimous in the view that the Minister was obliged to consider the additional material supplied by the respondents and that his failure to do so constituted an improper exercise of the power conferred on him by s.11 of the Act, but divided on whether relief should be refused on discretionary grounds. The majority held that the respondents' failure to reveal the precise location of Ranger 68 was a tactical error rather than blameworthy conduct and that they should not be denied relief because of it. Wilcox J. held to the contrary.

10. Two questions now arise in the proceedings before this Court. The first is whether the Minister

was bound, in making his decision pursuant to s.11, to have regard to the respondents' submissions, so that his failure to do so amounted to a failure to take into account a consideration relevant to the exercise of the power. The second question, which only arises if the first is answered in the affirmative, is whether relief should have been refused on discretionary grounds.

11. During argument, counsel for the Minister sought to raise an additional point, the effect of which was to deny that the Minister had failed to take into account the respondents' submissions. It was argued that where submissions are made to a Minister and summarized by his departmental officers in a way that omits certain details, and the Minister then makes a decision on the basis of that summary, it cannot be said that the Minister has failed to take those omitted details into account. He is entitled to delegate to his staff the function of deciding what weight, if any, should be given to a particular fact, and in the present case there was no evidence that the departmental officers had failed to consider those facts.

12. This submission, which was neither raised in the courts below nor listed as a ground of appeal in the Notice of Appeal to this Court, proceeds on the assumption that the Minister had power to delegate part of his decision-making function under s.11 to his Department and that he exercised this power by splitting the function, leaving his staff to decide what facts or matters would be taken into account. Section 76(1) of the Act authorizes the Minister, by an instrument of delegation signed by him, to delegate to a person any of his powers under the Act, other than those in Pt IV and the power of delegation. A power, when so delegated and exercised by the delegate, shall, for the purposes of the Act, be deemed to have been exercised by the Minister (s.76(2)). The Act contains no other express power of delegation. The presence of an express statutory power of delegation does not necessarily exclude the existence of an implied power to delegate or, to express it more accurately, to act through the agency of others. By way of illustration there are cases which establish that when a Minister is entrusted with administrative functions he may, in general, act through a duly authorized officer of his Department (Carltona Ltd v. Commissioners of Works (1943) 2 All ER 560, at p 563; In re Golden Chemical Products Ltd (1976) Ch 300). This principle partly depends on the special position of constitutional responsibility which Ministers occupy and on the recognition that the functions of a Minister are so multifarious that the business of government could not be carried on if he were required to exercise all his powers personally (O'Reilly v. State Bank of Victoria Commissioners (1983) 153 CLR 1, at p 11). The principle was applied in that case to the power given to the Commissioner of Taxation by s.264 of the Income Tax Assessment Act 1936 (Cth) to issue a notice requiring a person to furnish information, attend and give evidence, and produce documents, notwithstanding that the Commissioner had an express statutory power of delegation which he did not exercise in favour of the person who in fact issued the notice. The cases in which the principle has been applied are cases in which the nature, scope and purpose of the function vested in the repository made it unlikely that Parliament intended that it was to be exercised by the repository personally because administrative necessity indicated that it was impractical for him to act otherwise than through his officers or officers responsible to him.

13. However, there is nothing in the nature, scope and purpose of the power conferred by s.11, or in the context in which it is to be found, that makes it susceptible to this treatment. The Minister's function under the section is a central feature of the statutory scheme. Exercise of the power has important consequences, not only for the Aboriginals who will benefit from a grant of land to a Land Trust, but for others who may suffer detriment by reason of interference with their interests as a result of land being so granted. The importance of the Minister's function is evidenced by the preliminary procedures for which the Act makes provision - the holding of an inquiry under s.50 by the Commissioner, who is a Judge of the Supreme Court of the Northern Territory, and the making

by him of a report to the Minister which, if the power under s.11 is to be exercised, must contain a recommendation that land should be granted to a Land Trust for the benefit of Aboriginals. And finally there is the requirement in s.11(1)(b) that "the Minister is satisfied" that the land or part of it should be granted to a Land Trust or Land Trusts. These matters combine to compel the conclusion that the Minister's function under s.11 is to be exercised by him personally unless he delegates it pursuant to s.76.

14. There is no evidence that the Minister delegated his decision-making function under s.76 or otherwise. And in any event the appellants should not be permitted to raise for the first time in this Court an argument which, if raised at first instance, might have been answered by evidence. Accordingly, the submission must be rejected.

(1) FAILURE TO TAKE INTO ACCOUNT A RELEVANT CONSIDERATION

15. The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient standing to seek judicial review of ultra vires administrative action. That ground now appears in s.5(2)(b) of the ADJR Act which, in this regard, is substantially declaratory of the common law. Together with the related ground of taking into account irrelevant considerations, it has been discussed in a number of decided cases, which have established the following propositions:

(a) The ground of failure to take into account a relevant

consideration can only be made out if a decision-maker fails to take into account a consideration which he is bound to take into account in making that decision (Sean Investments Pty Ltd v. MacKellar (1981) 38 ALR 363, at p 375; CREEDNZ Inc. v. Governor-General (1981) 1 NZLR 172, at pp 183, 196-197; Ashby v. Minister of Immigration (1981) 1 NZLR 222, at pp 225, 230, 232-233). The statement of Lord Greene M.R. in Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1947] EWCA Civ 1; (1948) 1 KB 223, at p 228, that a decision-maker must take into account those matters which he "ought to have regard to" should not be understood in any different sense in view of his Lordship's statement on the following page that a person entrusted with a discretion "must call his own attention to the matters which he is bound to consider".

(b) What factors a decision-maker is bound to consider in

making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors - and in this context I use this expression to refer to the factors which the decision-maker is bound to consider - are not expressly stated, they must be determined by

implication from the subject matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard (see Reg. v. Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd [1979] HCA 62; (1979) 144 CLR 45, at pp 49-50, adopting the earlier formulations of Dixon J. in Swan Hill Corporation v. Bradbury [1937] HCA 15; (1937) 56 CLR 746, at pp 757-758, and Water Conservation and Irrigation Commission (N.S.W.) v. Browning [1947] HCA 21; (1947) 74 CLR 492, at p 505). By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject matter, scope and purpose of the Act.

(c) Not every consideration that a decision-maker is bound

to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision (see, for example, the various expressions in Baldwin & Francis Ltd v. Patents Appeal Tribunal (1959) AC 663, at p 693; Hanks v. Minister of Housing and Local Government (1963) 1 QB 999, at p 1020; Reg. v. Chief Registrar of Friendly Societies; Ex parte New Cross Building Society (1984) QB 227, at p 260). A similar principle has been enunciated in cases where regard has been had to irrelevant considerations in the making of an administrative decision (Reg. v. Bishop of London (1889) 24 QBD 213, at pp 226-227; Reg. v. Rochdale Metropolitan Borough Council; Ex parte Cromer Ring Mill Ltd (1982) 3 All ER 761, at pp 769-770).

(d) 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, at p.228).

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, at p 375; Reg. v. Anderson; Ex parte Ipec-Air Pty Ltd [1965] HCA 27; (1965) 113 CLR 177, at p 205; Elliott v. Southwark London Borough Council (1976) 1 WLR 499, at p 507; (1976) 2 All ER 781, at p 788; Pickwell v. Camden London Borough Council (1983) QB 962, at p 990). 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, at pp.230, 233-234, 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. This ground is now expressed in ss.5(2)(g) and 6(2)(g) of the ADJR Act in these terms. The test has been embraced in both Australia and England (Parramatta City Council v. Pestell [1972] HCA 59; (1972) 128 C.L.R. 305, at p.327; Bread Manufacturers of N.S.W. v. Evans [1981] HCA 69; (1981) 56 ALJR 89, at p 96; [1981] HCA 69; [1981] HCA 69; 38 ALR 93, at p 106; Re Moore; Ex parte Co-operative Bulk Handling Ltd (1982) 56 ALJR 697; 41 ALR 221, at pp 221-222; Hall & Co. Ltd v. Shoreham-By-Sea Urban District Council (1964) 1 W.L.R. 240, at pp.248, 255; (1964) 1 All E.R. 1, at pp.8, 13; Reg. v. Hillingdon London Borough Council; Ex parte Royco Homes Ltd (1974) QB 720, at pp 731-732; Newbury District Council v. Secretary of State for the Environment (1981) AC 578, at pp 599-600, 608).

However, in its application, there has been considerable diversity in the readiness with which courts have found the test to be satisfied (compare, for example, Wednesbury Corporation, at p.230, and Parramatta City Council, at p.328, with the conclusions reached in South Oxfordshire District Council v. Secretary of State for the Environment (1981) 1 WLR 1092, at p 1099; (1981) 1 All ER 954, at p 960; Shoreham-By-Sea Urban District Council, and Minister of Housing and Local Government v. Hartnell (1965) AC 1134, at p 1173). But guidance may be found in the close analogy between judicial review of administrative action and appellate review of a judicial discretion. In the context of the latter, it has been held that an appellate court may review a discretionary judgment that has failed to give proper weight to a particular matter, but it will be slow to do so because a mere preference for a different result will not suffice (Lovell v. Lovell [1950] HCA 52; (1950) 81 CLR 513, at p 519; Gronow v. Gronow [1979] HCA 63; (1979) 144 CLR 513, at pp 519-520, 534, 537-538; Mallet v. Mallet [1984] HCA 21; (1984) 58 ALJR 248, at pp 252, 255; [1984] HCA 21; 52 ALR 193, at pp.200-201, 206-207). So too in the context of administrative law, a court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits.

(e) The principles stated above apply to an administrative

decision made by a Minister of the Crown (Murphyores Incorporated Pty Ltd v. The Commonwealth [1976] HCA 20; (1976) 136 CLR 1; Re Hunt; Ex parte Sean Investments Pty Ltd [1979] HCA 32; (1979) 53 ALJR 552; 25 ALR 497; Padfield v. Minister of Agriculture, Fisheries and Food [1968] UKHL 1; (1968) AC 997; Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1976] UKHL 6; (1977) A.C. 1014). However, in conformity with the principle expressed in (b) above, namely that relevant considerations may be gleaned from the subject matter, scope and purpose of the Act, where the decision is made by a Minister of the Crown, due allowance may have to be made for the taking into account of broader policy considerations which may be relevant to the exercise of a ministerial discretion.

16. In the present case, the respondents submit that the Minister, in failing to consider the submissions which they had made to his predecessors, neglected to take into account a consideration which he was bound to take into account in making his decision. It is convenient to divide this central issue into two separate, but related, questions. The first is whether the Minister is bound to

take into account the comments on detriment which the Commissioner is required by s.50(3)(b) of the Act to include in his report to the Minister. The second is whether he is also bound, as opposed to merely entitled, to take into account submissions made to him which correct, update or elucidate the Commissioner's comments on detriment.

17. In Meneling Station this Court considered the nature of the Commissioner's obligations under s.50(3) of the Act. That subsection provides that, in making a report to the Minister, the Commissioner "shall have regard" to the strength or otherwise of the traditional attachment by the claimants to the land claimed, and "shall comment" on each of four matters, the second of which is "(b) the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to either in whole or in part". The Court held by majority (Gibbs C.J., Murphy, Wilson and Brennan JJ.; Mason J. dissenting) that the Commissioner was not bound to have regard to the matters listed in s.50(3)(a)-(d) or to give them weight in deciding whether to recommend a grant of land. These were matters on which he need only "comment" in his report, leaving the resolution of competing interests to the Minister. Although not strictly necessary for the purposes of the decision, the majority also considered whether the Commissioner was entitled to take into account the matters in s.50(3)(a)-(d), even if not bound to do so. Murphy, Wilson and Brennan JJ. held (at pp.65-66, 67 and 72; pp.77, 80 and 91 of A.L.R.) that he was not entitled to have regard to these matters. The Chief Justice expressed no opinion. The relevant point to be drawn from the case is that, because the Commissioner is neither bound nor entitled to have regard to detriment in making his recommendation, the respondents' only opportunity to have the detriment to them taken into account is at the stage when the Minister is considering whether he is satisfied that the land grant should be made.

18. In Meneling Station only two members of the Court referred to the Minister's obligations under s.11 of the Act. Gibbs C.J. said, at p.61; p.67 of A.L.R., that:

> "The Minister is in no sense bound by the recommendation of the Commissioner, and in making his decision may wish to consider the matters mentioned in pars.(a) to (d), including the detrimental effect of acceding to the claims." (emphasis added)

On the other hand Brennan J. said, at p.72; p.91 of A.L.R.:

> "The Minister's recommendation is not a mere affirmation or rejection of the recommendation made by the Commissioner. The Minister, having regard to the Commissioner's recommendation that it would be right for the Crown to grant the land in satisfaction of the traditional owners' needs and entitlement, must decide whether other factors warrant refusing the grant recommended, and in reaching his decision the Minister is bound to have regard also to the Commissioner's comments upon the matters referred to in pars.(a) to (d) of s.50(3)." (emphasis added)

19. The Act does not expressly state that the Minister is bound to take into account the Commissioner's comments on the matters in pars.(a) to (d) of s.50(3) in exercising his power under s.11(1)(b) to decide whether or not he is satisfied that a land grant should be made. But a consideration of the subject matter, scope and purpose of the Act indicates that such a finding is necessarily implied by the statute. The factor that leads irresistibly to this conclusion is the specific requirement in s.50(3) that the Commissioner comment in his report on each of the four matters enumerated in the subsection, including of course detriment. That provision recognizes that the granting of land to a Land Trust may adversely affect the interests of many people, in some cases in a very substantial way. The legislature was clearly concerned that the Minister should not overlook crucial considerations which might counterbalance or outweigh the fairness and justice of granting the land when making his decision under s.11(1)(b). Accordingly, it provided the means whereby such factors would be analysed and drawn to his attention for the purpose of having them taken into account. That purpose would not be achieved if the Minister was merely entitled, but not bound, to consider these factors. Furthermore, this Court's decision in Meneling Station, by removing from the Commissioner both the obligation and the entitlement to reflect in his recommendation to the Minister any question of detriment, has the result that the Minister is the sole forum in which these matters may be taken into account. A finding that the Minister is not required to take into account the matters in s.50(3)(a)-(d) would deny the respondents the opportunity of compelling a consideration of the detriment that may be occasioned by the granting of land to a Land Trust. For the reasons already given, such an interpretation of the Act cannot be accepted.

20. The second question, which lies at the heart of this appeal, is whether the Minister is also bound to take into account submissions made to him which correct, update or elucidate the Commissioner's comments on detriment. Once it is accepted that the subject matter, scope and purpose of the Act indicate that the detriment that may be occasioned by a proposed land grant is a factor vital to the exercise of the Minister's discretion, it is but a short and logical step to conclude that a consideration of that factor must be based on the most recent and accurate information that the Minister has at hand. Considerable time may elapse between completion of the Commissioner's report and the date at which the Minister makes his decision; in the present case it was well over one and a half years. In that time there may be such a change of circumstances that the Commissioner's comments may no longer prove to be an accurate guide, there may be uncertainties or ambiguities in his comments that deserve clarification, or, as in the present case, even though there may have been no change of circumstances, interested parties may have become aware that the Commissioner's report omitted material matters on the subject of detriment. It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has actual or constructive knowledge and which may have a direct bearing on the justice of making the land grant, and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one sense this conclusion may be seen as an application of the general principle that an administrative decision-maker is required to make his decision on the basis of material available to him at the time the decision is made. But that principle is itself a reflection of the fact that there may be found in the subject matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker.

21. This conclusion is all the more compelling when the decision in question is one which may adversely affect a party's interests or legitimate expectations by exposing him to new hazard or new jeopardy. The granting of land to a Land Trust for the benefit of Aboriginals is a decision of this nature because an Aboriginal Land Council established under the Act has power to refuse to grant a mining interest over Aboriginal Land (s.40), or to grant it on such terms and conditions as to

payment or otherwise as are provided for by agreement (s.43). When the Act specifically provides for the Commissioner to comment on the manner in which persons may be adversely affected by the making of a land grant, and provides the means whereby those comments are brought to the Minister's attention, there may readily be found in the subject matter, scope and purpose of the Act an implication that the Minister is bound to take resultant detriment into account when making his decision. There is no sound reason for confining that obligation to a consideration of the comments in the report; matters put to the Minister by interested parties correcting, updating or elucidating the Commissioner's comments can be of no less relevance.

22. Although it was not argued in the present case that the failure to consider the respondents' submissions amounted to a denial of natural justice, the foregoing reasoning conforms to the principles of natural justice, on the assumption that they are applicable. No doubt those principles would also require a Minister who has received additional submissions from one party, before acting on them, to afford other interested parties an opportunity to answer them. But this does not negate the proposition that the Minister is bound to consider submissions put to him by parties who may be adversely affected by a decision. Moreover, the argument lends no assistance to the appellants in a case such as this where the submissions made to the Minister relate to the explication of an undisputed question of fact. An opportunity to reply, had it been afforded to other interested parties, could not have affected in any way the fact that Ranger 68 lay wholly within the land recommended for grant.

23. For these reasons, and the further reason that it cannot be said that the omitted factor was so insignificant that the failure to take it into account could not have materially affected the decision, I conclude that the Minister was bound to consider the submissions made by the respondents to his predecessors in office.

24. The appellants opposed this conclusion on the basis that the Act, as interpreted in Meneling Station, creates a division of functions between the Commissioner on the one hand, who is given the judicial or quasi-judicial apparatus to conduct a fact-finding inquiry, and the Minister on the other, who is required to consider the Commissioner's report and decide whether a land grant should be made. They say that it cannot be inferred that the Minister is obliged to engage in a further fact-finding exercise, which is a function more appropriately performed by the Commissioner. The answer to this submission is that the Minister is obliged only to take into account additional submissions that have been made to him. He is not required to initiate an independent inquiry to verify the accuracy of the Commissioner's findings or to update them. Nor will he always be required to investigate whether submissions put to him by an interested party have a sound foundation in fact, because he might be of the opinion that, even if true, the submissions would not affect his decision, and, of course, questions of weight will generally be for the Minister alone.

25. The appellants further submitted that there are great practical difficulties in requiring the Minister to consider every submission made to him on a matter that touches or concerns the making of a land grant. But the strength of this submission vanishes once it is realized that the Minister may expressly delegate his powers under the Act (s.76) and may refer matters to the Commissioner for his consideration (s.50(1)(d)).

(2) DISCRETION

26. The finding that the Minister failed to take into account a consideration which he was bound to take into account makes it necessary to consider the further question whether the relief sought should have been refused on discretionary grounds. The appellants submit that the respondents

should have been refused relief because it was their own conduct in withholding from the Commissioner information about the precise location of Ranger 68 that is the source of their present complaint. It will be recalled that the opinion of the primary judge on the principal issue under appeal made it unnecessary for him to express a conclusion on the question of discretion. His Honour did state, however, that if the failure to identify the location of Ranger 68 arose as a result of a deliberate decision by the respondents, such a circumstance "could conceivably be seen as decisive against the exercise of the powers given by (s.16 of the ADJR Act)". On appeal, the Full Court of the Federal Court held, by majority, that the circumstances of the case did not warrant refusing relief on discretionary grounds. The respondents had not set out deliberately to mislead the Commissioner. The course they adopted in giving evidence to the Commissioner revealed no more than mistake or carelessness in the presentation of their case.

27. The question must be answered by reference to the principles of law which regulate the circumstances in which an appellate court may review the exercise of a judicial discretion. These principles are not in doubt. They were authoritatively enunciated in House v. The King [1936] HCA 40; (1936) 55 CLR 499, at pp 504-505, in terms which have been frequently applied by this Court, most recently in Norbis v. Norbis [1986] HCA 17; (1986) 60 ALJR 335; 65 ALR 12.

28. The appellants contend that these principles do not apply to a case such as the present in which the discretion is initially exercised by an appellate court and review of that discretionary judgment is sought in a further appellate court. The reason, in their submission, is that the latter court is in as advantageous a position as the former to assess the evidence and exercise the discretion. The case can thus be distinguished from the usual case in which the discretion is exercised by a trial judge who has the benefit of hearing and observing the witnesses. I am unable to agree with this submission. The rules governing appellate review of a discretionary judgment are only partly founded on the opportunity of the judge who first exercises the discretion to assess the evidence at first hand. More fundamentally, they are grounded in the view that it would not be right to overturn a judicial decision solely on the basis of the appellate court's mere preference for a different result, when the question is one on which reasonable minds may come to different conclusions, the decision of the judge first exercising the discretion falls within a reasonable range, and no error on his part can be shown.

29. The decision of the majority of the Full Court of the Federal Court that the circumstances of the case did not justify refusing the respondents relief on discretionary grounds was one which was well open to them on the facts. In my opinion it has not been shown, nor indeed was it even submitted, that in coming to that conclusion the Full Court committed some error which vitiated its decision. The appellants' argument can be put no higher than an assertion that the Full Court should have reached a different result.

30. I would dismiss the appeal.

BRENNAN J.: On 2 July 1981, in accordance with s.50(1) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ("the Act"), the Aboriginal Land Commissioner (Toohey J.) presented his report on the Alligator Rivers Stage II land claim to the Minister for Aboriginal Affairs and the Administrator of the Northern Territory. Among the areas under claim were two contiguous tracts of land lying between the East Alligator and South Alligator Rivers identified respectively as Dadjbaku and Mirarr Kundjey'mi. Dadjbaku lies to the west of Mirarr Kundjey'mi, and the boundary between them is straddled by an area, known as the Barote area, which contains deposits of uranium. The respondents held applications for mining leases in the Barote area. The respondents

were represented by counsel before the Commissioner and called evidence on the hearing of the land claims. The Commissioner found, in accordance with s.50(1)(a) of the Act, that there were traditional Aboriginal owners (whom he identified) of certain areas of unalienated Crown land under claim. He made a recommendation that those areas, including Mirarr Kundjey'mi, be granted to a Land Trust. The Commissioner did not find that there were traditional owners of the area of land identified as Dadjbaku, and he made no recommendation for the grant of that land. Pursuant to pars.(b) and (c) of s.50(3) of the Act, the Commissioner commented on the detriment that might result to the respondents if the land claim were acceded to and the effect which acceding to the claim would have on the proposed patterns of land usage (see pars.296 to 321 of the report). After tracing the history of their exploration activity in the Alligator Rivers area as disclosed by the evidence of Mr Elliston, a director of Peko-Wallsend Limited, and a written submission tendered by the respondents, the Commissioner noted (par.299) that -

" The first successful result of the exploration program was the discovery of significant uranium mineralisation at Ranger 1 in 1970. That is outside the claim area. Other promising discoveries were later made, including Ranger 68 in 1976. This lies in the Barote areas marked on Exhibit 82, '90% in Dadjbaku. The balance of the northern extremity is in Mirarr Kundjey'mi' (Mr Elliston)." (Underlining added.)

The words attributed to Mr Elliston are quoted precisely from his evidence, though it seems that it was the eastern, not the northern extremity of the Barote area that lay in Mirarr Kundjey'mi. The balance of Mr Elliston's evidence before the Commissioner about the position of Ranger 68 reads as follows:

" Is that the area that is Ranger 68?---Yes. There were two mineralised prospects in that (the Barote area) - Ranger 4 and Ranger 68 are the significant ones. Ranger 5 also occurs within it. Ranger 4 is to the southern extremity of it and Ranger 68 is in the centre of it. In fact the mineralised belt comes right through from the Pancon border which was its eastern margin and it disappears to the north-west on this other side. The precise delineation of Ranger 68 at this present time is confidential to the company, is it not?---I have made a statement about it in the appendix. It is not entirely confidential. The companies have published the significant drilling results and I have indicated fairly fully for the commissioner's information the state of present information. What is not set out perhaps is the detail of the underlying geology within the large block of leases and we would regard that as confidential because it is the essential clue, if you like, to the continuance of seeking to

develop a further mineral." (Underlining added.)

The Appendix which Mr Elliston mentioned did not reveal the position of Ranger 68. It was only subsequent to the publication of the Commissioner's report that the respondents were to disclose the true "state of present information", namely, that Ranger 68 is not "in the centre of" the Barote area at all, but that it lies just inside the western boundary of Mirarr Kundjey'mi - a location close to the north-eastern corner of the Barote area.

2. In a submission made to the Minister for Aboriginal Affairs in September 1981, the respondents said with reference to the Ranger 68 prospect:

" ... because Peko and EZ did not reveal the exact location of this prospect at the hearing, the Commissioner was only aware that it was within the Barote block of leases, 90% of which are on land unsuccessfully claimed by the Dadjbaku. The Commissioner was not specifically aware that Ranger 68 turned out to be just within the western boundary of land recommended for grant to the Mirarr Kundjey'mi and the qualification in paragraph 320 must be read accordingly. Ranger 68 has only been partially drilled and awaits complete delineation, but there would appear to be no doubt that in it Peko and EZ have discovered a major uranium orebody. ... Of all of Peko and EZ's indicated prospects within the total claim area, at this stage of development it would appear Ranger 68 is by far the most valuable."

3. The Commissioner reported that the respondents' submission to him disclosed that 530 uranium mineral lease applications over land in the Alligator Rivers Stage II land claim areas had been lodged and recommended by the Mining Warden and that none had been granted. He noted that: "Most of these lie to the west of the land recommended in this report". The report continued:

" 302. One further major mineralised body (Ranger 68) has been partially drilled and awaits complete delineation. Although only preliminary drilling results are available, Mr Elliston estimated that the Ranger 68 site may include ore at grades suggesting a minimum U3O8 content of about 5500 tonnes, worth, at current prices, some $280 million (Exhibit 81, para.14). While the precise position of Ranger 68 was not indicated, part of the Barote areas to which it belongs falls within Mirarr Kundjey'mi, land recommended for a grant. (Underlining added.)
303. ...
If the mineral leases are eventually granted,

the first step will be to continue exploration to define the actual mineralisation and to reduce the areas presently under application; the leases marked are in blocks which 'are intended to cover mineral potential which as yet is rather poorly defined' (transcript, p.2227).
304. Mr Elliston added:
Even having regard to the enormous mineral potential of the area, the actual areas involved in mining and the mining facilities will not be very large ... I am sure further work will delineate the specific areas and leases of interest and many of the 530 leases will be surrendered. The applications were made just simply to preserve a sufficient area to properly conduct the search over the prospective horizons which had only been delineated in the broad (transcript, p.2235).
...
305. The companies have spent over $6 million in exploration work under exploration licences and some hundreds of thousands of dollars on pending lease applications to preserve their continuing rights to the area (transcript, p.2227)."

4. The respondents submitted to the Commissioner that the areas in which they held leases or applications for leases should be excluded from any grant of land to an Aboriginal Land Trust "so that further exploration and delineation of mineral resources be continued". The Commissioner commented:

" 317. It is true that much money and effort has been expended by Peko E-Z in exploring the region, money which Mr Elliston stressed was working capital and not risk capital, and that at the outset of its exploration work in the area the land was alienated Crown land held under pastoral lease. The work which was done apparently conformed to all the statutory requirements and the companies had a reasonable expectation that, in the ordinary course of events, mining leases and Commonwealth authority would be given for uranium mining in the area. Even if permission to mine were granted forthwith, mining would not commence in under five years; however, there are proven deposits within those areas under mining lease application and good prospects of further discoveries so that the interests of Peko E-Z are more than merely speculative. While the existence of s.40 of the

Land Rights Act is of itself not a detriment within s.50(3)(b), it is a potential source of detriment in the case of a miner who, as here, has incurred substantial expenditure in the reasonable expectation of obtaining mineral leases. It is not possible to be more precise, simply because it is not possible to predict the outcome of negotiations with the Land Council."

5. Section 40(1) of the Act provides that a mining interest in respect of Aboriginal land shall not be granted without the written consent of both the Minister and the Land Council for the area unless the Governor-General by Proclamation declares that the national interest requires the grant of the mining interest. The Commissioner commented on the detriment which the respondents might suffer in the construction of access roads to places in which they had interests. Then the Commissioner turned his attention to the respondents' submission on the effect of a grant on the proposed patterns of land usage in the region. He noted that it was assumed that the traditional Aboriginal owners would "veto the grant of further exploration or mining interests" and pointed out (par.319) that such an assumption -

" overlooks the possibility of negotiated agreements for mining and of a proclamation by the Governor-General declaring that the national interest requires that a grant of a mining interest be made (Land Rights Act s.40(1))."

After this wide-ranging consideration of the respondents' interests in the Alligator Rivers Stage II region, the Commissioner commented (par.320):

" Naturally, the Peko E-Z submissions were based on the possibility that all of the land claimed might become the subject of a grant to a Land Trust. In view of the recommendations in this report, most of the Barote block of mineral lease applications falls outside the land recommended for a grant as do any prospects further west. The prospects affected are those north of Jabiluka in Bunidj and those south of Jabiluka in Mirarr Kundjey'mi. All aspects of detriment must be qualified accordingly."

In par.321 the Commissioner summarized what he had said in the preceding paragraphs, the last two sub-paragraphs reading:

" (i) The power of a Land Council to refuse consent to mining on Aboriginal land is not of itself a detriment within s.50(3)(b) of the Land Rights Act.
(j) But the power is a potential source of detriment in so far as the companies have

incurred substantial expenditure in the reasonable expectation of obtaining mineral leases. That expenditure may be jeopardised and problems of access may arise if the land claimed becomes Aboriginal land. This possible detriment is considerably lessened by the fact that only the eastern prospects of the companies fall within the land recommended for a grant."

I have set out these passages at length in order to consider the significance of the representations which the respondents made to the Minister after the Commissioner had presented his report and in order to assess the accuracy of a summary presented by his Department to the Minister to which reference will presently be made.

6. On 2 September 1981, the respondents sent to the Minister (then Senator Baume) a lengthy submission on the Commissioner's report. An excerpt from this document has already been quoted. It was submitted -

" ... that you should not be satisfied that all land recommended for grant by the Commissioner be granted to a Land Trust; further, you should excise from any such land the land the subject of Peko and EZ's mineral lease applications and any land necessary to give access thereto."

In a letter to the Minister dated 25 September 1981 the respondents, in furtherance of a representation for the "excision of our Barote Mineral Lease Applications from any grant of land to be made to (A)boriginals", stated that the mineral prospect known as Ranger 68 lay within Mirarr Kundjey'mi. Two maps were enclosed. The letter describes one map as showing the Barote leases and lease applications in the Stage II area and the other as showing the drill holes in the Barote area "clearly indicating that the mineralized Ranger 68 drill holes are all within the area recommended for grant to (A)boriginals, by Toohey J". After reciting par.321(j) of the report the letter said:

" Thus we believe that the EZ/Peko detriment is far greater than was found in the Report by Toohey J., as, for various reasons, we did not specify in our evidence precisely where Ranger 68 is. Unless this area is excised from any grant, all our known mineralized areas within Barote will become (A)boriginal land, and then be subject to the veto power."

In effect the information conveyed to the Minister merely affirmed as fact that Ranger 68 is within the area of Mirarr Kundjey'mi. As has been seen, the Commissioner had adverted to such a possibility when he said -

" While the precise position of Ranger 68 was not indicated, part of the Barote areas to which it

belongs falls within Mirarr Kundjey'mi, land
recommended for a grant."

The Commissioner had been unable to find whether the prospect was in fact within that area because the respondents had failed to disclose that fact. The letter went on to discuss the respondents' desire that the areas covered by mineral lease applications be excised from any grant of land to an Aboriginal Land Trust. Senator Baume replied on 6 October 1981. Acknowledging receipt of the letter and enclosed submission of 2 September, the Minister said:

" I have noted the submission and will take it
into account when making my decision on the land
claim."

The Minister later advised the respondents that he was "prepared to defer (his) decision in relation to those parts of the Alligator Rivers Stage 2 claim area recommended for grant and over which Peko and EZ have made application for mining interests". He asked for "a listing and descriptions of the areas involved". The respondents furnished a list "of Peko and EZ's interests on land which has been recommended for grant by the Aboriginal Land Commissioner, Mr. Justice Toohey". Subsequent letters to the Minister reiterated the respondents' request for excision of the respondents' interests from any land grant. On 8 March 1982, Senator Baume announced that he had decided to grant to an Aboriginal Land Trust the areas recommended by the Commissioner except for nine blocks covered by the respondents' mineral lease applications in respect of which a decision was deferred.

7. Senator Baume was succeeded as Minister by Mr Wilson, to whom the respondents wrote on 24 December 1982. The Minister's attention was drawn to their "considerable interests in and about the land under claim" in five areas, one of which was the Alligator Rivers Stage II area. A meeting with the Minister was sought but the Minister declined. He replied:

" Let me assure you at the outset that the
group's interests will be carefully considered
when I make my decisions on these claims. I note
that Peko was represented by legal counsel, and
also made written submissions, at each of the
four completed land claim hearings mentioned in
your letter. I note also that the Aboriginal
Land Commissioner's reports on those land claims
include detailed comments on the detriment which
Peko companies might suffer if the areas claimed
are granted to Aboriginal Land Trusts.
In all the circumstances I am satisfied that a
meeting with representatives of Peko is not
necessary at this time, as the group's interests
have already been comprehensively articulated."

8. After a change of government, Mr Holding became the Minister on 11 March 1983. The Minister was furnished by his Department with a summary of land claims awaiting ministerial decision. The relevant part of the summary read as follows:
"

Claim	Date of Commissioner's Action	Commissioner's Comments on Recommended Detriment by
Report Department		
Alligator Rivers*	2.7.81 Potential detriment to Peko-EZ who have applied for a number of mineral leases, some of which will be subject to Aboriginal veto and all of which will require negotiation of an agreement with the Northern Land Council.	We recommend that the nine blocks of land Decision to be conveyed to NT Government, NLC and Peko-EZ.

*Decision outstanding only in respect of nine blocks of land covered by mineral lease applications lodged by Peko-EZ. Decision to grant remainder announced by Senator Baume 8 March 1982."

9. The mineral prospects within the nine blocks of land were not identified. Thus the summary did not refer to the Ranger 68 prospect, its value or location. It did not differentiate between the nine blocks which the respondents had sought to have excised from the land recommended for grant to a Land Trust. On 15 March 1983, the Minister wrote on the summary "approved for action". By letter dated 26 April 1983, the decision was conveyed to the respondents. The Minister wrote -

" I have decided that those areas should be granted to an Aboriginal Land Trust in accordance with the Commissioner's recommendation."

In response to a request made pursuant to s.13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the ADJR Act"), the Minister stated the reasons for his decision as follows:

" In accordance with S. 11 of the Aboriginal Land Rights (Northern Territory) Act 1976 (the Act) I am satisfied that this land should be granted to an Aboriginal Land Trust for the benefit of relevant Aboriginals because
(i) the relevant Aboriginals are entitled to have title to their traditional land;
(ii) the Act provides a scheme whereby persons wishing to use and occupy Aboriginal land can negotiate with a Land Council, acting on behalf of relevant Aboriginals, for the use and occupation of that land; and
(iii) the detriment, if any, which might result from the grant of this land is not sufficient to warrant refusing the grant recommended."

10. The respondents applied to the Federal Court under the ADJR Act for an order of review in respect of the Minister's decision that the land recommended for grant by the Commissioner be granted to an Aboriginal Land Trust. The application was dismissed by Beaumont J. but an appeal to the Full Court was allowed (Bowen C.J. and Sheppard J., Wilcox J. dissenting) and the Minister's decision was set aside and the matter was remitted to him for reconsideration according to law. The Minister's decision was held to be void on the ground that he was bound to have regard to the information given to Senator Baume, though withheld from the Commissioner, as to the location of Ranger 68 within the boundary of Mirarr Kundjey'mi, and he had failed to have regard to that information in making his decision under s.11 of the Act. No evidence was tendered before Beaumont J. as to the reason why that information had been withheld from the Commissioner.

11. To support the order of review on the ground on which it was granted by the Full Court, it must appear that the Minister was bound to have regard to the information given to his predecessor in office as to the location of Ranger 68; the order cannot be supported if the Minister, though free to have regard to that information, was not bound to do so. The Court has no jurisdiction to visit the exercise of a statutory power with invalidity for failure to have regard to a particular matter unless some statute expressly or by implication requires the repository of the power to have regard to that matter or to matters of that kind as a condition of exercising the power. The principle was stated by Deane J. in Sean Investments v. MacKellar (1981) 38 ALR 363, at p 375, where his Honour cited the judgment of the English Court of Appeal in Elliott v. Southwark Council (1976) 1 WLR 499, at p 507; (1976) 2 All ER 781, at p 788:

" 'It is clear that the matters which the local authority should consider ... vary from case to case. It is not for the court to prescribe a list of matters which must always be considered or to prescribe which factors should be given more weight than others. It is worth repeating that the function of the court, where such issues are raised, is not to substitute its own opinion or decision on matters which Parliament has left to the judgment of the local authority but to decide whether the local authority in reaching its decision has acted in accordance with the statutory provisions.'
In a case such as the present, where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide."

Apart from express provision, a statute may impliedly require the repository of a power in deciding on its exercise to have regard to certain considerations. The subject matter, scope and purpose of the statute must be considered to determine whether the repository is bound to have regard to any and what matters (Water Conservation and Irrigation Commission (N.S.W.) v. Browning [1947] HCA 21; (1947) 74 CLR 492, at p 505; Kioa v. Minister for Immigration and Ethnic Affairs [1985] HCA 81; (1985) 60 ALJR 113, at pp 127,131,143; [1985] HCA 81; 62 ALR 321, at pp 346,354,373).

12. Section 11(1)(e) of the Act, which confers on the Minister the power to recommend to the Governor-General that a grant of an estate in fee simple in land be made to a Land Trust, is conditioned on the Minister's satisfaction that land recommended for grant by the Commissioner should be granted to a Land Trust (s.11(1)(b)). Section 11(1) does not expressly prescribe the matters, if any, to which the Minister is bound to have regard. If s.11(1) stood alone, it could be implied that the Minister is bound to have regard to the advantage that would accrue to some persons by the making of a grant of land to a Land Trust and the detriment to others that might result from the making of the grant. That is because the repository of the power ought not to exercise it without regard to the interests his decision is apt to affect. An exercise of the power conferred by s.11(1) is apt to affect, advantageously or detrimentally, the interests of persons who wish to have access to, or possession or use or ownership of, the land. But s.11(1) does not stand alone. It is part of a statutory scheme for the examination and disposition of claims for land grants made by or on behalf of traditional Aboriginal owners of unalienated Crown land. The statutory scheme was examined in Re Toohey; Ex parte Meneling Station P/L [1982] HCA 69; [1982] HCA 69; (1982) 57 ALJR 59; 44 ALR 63. The scheme provides for the Minister to give consideration to the comments in the Commissioner's report relating to the advantage to some people and the detriment to others which might follow from the making of a grant of land to a Land Trust. The essential features of the scheme are: first, the Commissioner must find whether there are traditional Aboriginal owners of the subject land (a finding which involves an inquiry into the boundaries of the land, the identity of the persons having a relationship with the land and the strength of the traditional attachment of those persons to that land). Secondly, if he finds that there are traditional owners of the land, the Commissioner must recommend that the land or part of the land be granted in accordance with ss.11 and 12. Thirdly, the Commissioner must inquire into and make a report containing his comments on the several matters mentioned in s.50(3), including advantage and detriment. Fourthly, where the Commissioner recommends the grant of land, the Minister is bound to have regard to the whole of the report, including the Commissioner's comments on the matters mentioned in s.50(3) as well as the Commissioner's findings and recommendation. Fifthly, the Minister decides whether he is satisfied that an area of land should be granted to a Land Trust for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of that area. And sixthly, if he is so satisfied, he makes the necessary recommendation to the Governor-General in Council and the grant is made. The scope and purpose of the Act make manifest the Parliament's intention that the Minister should have regard to the Commissioner's report which is presented to the Minister in accordance with the statutory scheme. And therefore, as I said in Meneling Station (at p.72; p.91) in reference to the Minister's consideration of the Commissioner's report:

" The Minister, having regard to the Commissioner's recommendation that it would be right for the Crown to grant the land in satisfaction of the traditional owners' needs and entitlement, must decide whether other factors warrant refusing the grant recommended, and in reaching his decision the Minister is bound to have regard also to the

Commissioner's comments upon the matters referred to in pars.(a) to (d) of s.50(3)."

13. It is one thing to say that the Minister is bound to have regard to the Commissioner's report made in accordance with the statutory scheme and containing his comments on detriment; it is another thing to say that the Minister is bound to have regard to information relating to detriment subsequently furnished to him by a party who had appeared before the Commissioner. Where a matter submitted to an open inquiry involves a conflict between the interests of parties and the decision is apt to affect some parties advantageously and to affect others detrimentally, an ex parte communication between one party and the decision-maker offends the requirements of natural justice: it deprives the opposing party of an opportunity to be heard on a matter affecting his interests and the integrity of the administrative process is eroded by partiality on the part of the decision-maker. If the fact of the communication is at first kept secret and later becomes known, there is an inevitable appearance of bias in the decision-maker. The general rule, founded firmly on the requirements of natural justice, is that information furnished by an ex parte communication must not be taken into account without giving the parties whose interests might be affected by the information an opportunity to correct or contradict it.

14. The effect of ex parte communications on administrative procedures has been clearly seen in the United States (see, for example, Schwartz Administrative Law (1976), par.127, p.361) and it has received judicial consideration in England. In Errington v. Minister of Health (1935) 1 KB 249, where the Minister confirmed a local authority clearance order after receiving an ex parte communication from the local authority subsequent to a public local inquiry, the Minister's order was quashed. Maugham L.J. said (at pp.272-273):

" In my opinion, had it been intended by the legislature to authorise the Minister after having caused a public inquiry to be held and after having received the report, then to hold a private inquiry of his own - with regard to something which was the subject of an objection which was being considered before the Inspector, I should have expected the legislature to say so in plain terms. My conclusion is, that on the fair construction of this clause he has no right to do anything of the kind. That is not to say that there may not be matters which were not in dispute at all at the inquiry, and which were not the subject of anything dealt with at the inquiry, with regard to which he might, if he thought fit, inform himself. I am dealing with a case where something which is the subject of an objection definitely put and urged before the gentleman who holds a public inquiry is before the Minister after the report has been made, and with regard to which he subsequently obtains ex parte information from one side or the other. My conclusion is that although the act of affirming a clearance area order is an administrative act,

the consideration which must precede the doing of that act is of the nature of a quasi-judicial consideration, and the Minister is bound to the extent mentioned by the House of Lords in the Board of Education v. Rice ((1911) AC 179)."

That is, the Minister is bound to give the parties to the controversy a fair opportunity for correcting or contradicting any relevant statement prejudicial to their view: per Lord Loreburn, L.C. in Board of Education v. Rice, at p 182. The principle laid down in Errington does not depend on a statutory prohibition against taking account of information that is not contained in the report of an inquiry; it depends on the tendency of an ex parte communication to affect adversely the interests of another party. Thus in Reg. v. Registrar of Building Societies. Ex parte A Building Society (1960) 1 WLR 669; (1960) 2 All ER 549, Lord Parker C.J. said (at p 678; p 555):

" The principle laid down in Errington's case is still good law, and it is beyond doubt that when there is a lis or a quasi-lis, matters being dealt with inter partes, it is wrong for a Minister or a tribunal to hear evidence from one party in the absence of the other, or to get outside information which may tell against one of the parties without giving that party an opportunity of dealing with it."

It is well established that the basis of the Errington principle is the requirement of natural justice: see R v. Milk Board; Ex parte Tomkins (1944) VLR 187, at p 193; Reg. v. Lilydale Magistrates' Court (1973) VR 122, at p 127; Attorney-General (N.S.W.) v. Hunter (1983) 1 NSWLR 366, at p 374; Connolly v. Palmerston North City (1953) NZLR 115, at p 119; Low v. Earthquake Commission (1959) NZLR 1198, at p 1208; Kane v. Board of Governors of U.B.C. (1980) 110 DLR(3d) 311, at pp 322-323; Anti- Fascist Committee v. McGrath (1951) 341 US 123, at pp 170-171 (95 Law.Ed.817, at p 853). Other cases show that the principle is of general application to administrative inquiries where there is a contest of fact: see Lamond v. Barnett (1964) NZLR 195, at p 203; Denton v. Auckland City (1969) NZLR 256, at p 260; Re Magnasonic Canada Ltd. and Anti-Dumping Tribunal (1973) 30 DLR(3d) 118; Fairmount Ltd. v. Environment Sec. (1976) 1 WLR 1255; (1976) 2 All ER 865; Shareef v. Comr. for Registration of Indian and Pakistani Residents (1966) AC 47.

15. The principles of natural justice, embracing the Errington principle, govern the procedure for ascertaining facts for consideration; but, statute apart, they do not finally shut out from consideration information acquired by means of an ex parte communication from one party. A decision-maker is entitled to take into consideration relevant information contained in an ex parte communication and any response by the other party; he is not entitled to take such information into consideration without giving the other party an opportunity to respond. Under the Act, the Minister can receive from one party information to correct, elucidate or add to what is in the Commissioner's report - for there is nothing in the Act to prevent his doing so - but he cannot take that information into account unless he gives the parties whose interests might be affected an opportunity for correcting or contradicting it. The Minister can give that opportunity by referring the information to the Commissioner for his advice pursuant to s.50(1)(d) of the Act. Or he can give a more informal opportunity by seeking the other parties' response by letter. A fair opportunity to deal with

information can be given without resort to the procedures employed by courts of law. The Minister's power to give one party an opportunity to deal with an ex parte communication with respect to a matter on which the Commissioner has commented pursuant to s.50(3) is not in doubt. The questions are whether the Minister is bound to take steps to inquire into any information so obtained by giving all parties whose interests might be affected by it an opportunity to deal with it and whether a decision made under s.11(1) is invalid if the Minister fails to do so before making the decision.

16. The answer to the question whether the Minister is bound to inquire (that is, to inquire of the affected parties) determines the answer to the question whether a s.11(1) decision made without prior inquiry is valid. If the Minister is bound so to inquire before deciding, a decision without prior inquiry is void; if the Minister is not bound so to inquire before deciding, he is free to make the decision without taking account of the information contained in the ex parte communication. The Minister is bound to inquire before deciding if, in the circumstances of the case, a failure to inquire would "thwart or run counter to the policy and objects of the Act", to adopt Lord Reid's phrase in Padfield v. Minister of Agriculture, Fisheries and Food [1968] UKHL 1; (1968) AC 997, at p 1030. The Minister is bound to inquire into information furnished to him in an ex parte communication if (i) the information is credible; (ii) it is significant to a matter to which the Minister is bound to have regard in exercising his power; (iii) an adequate reason for non-disclosure of the information to the Commissioner during his inquiry has been disclosed; and (iv) the Minister does not decide that, even if the information be true, the information would not affect his decision. It will be convenient to consider these four criteria seriatim.
(i) Credibility.

17. A decision-maker is not required to inquire into information which is not credible on its face. Parliament may be taken to intend a decision-maker to be able to act on his impartial and reasonable view of the facts without pursuing a fresh inquiry into what should on its face be rejected as unreliable information. In the present case, the information as to the location of the Ranger 68 prospect within Mirarr Kundjey'mi appears to be credible, though the information is inconsistent with Mr Elliston's evidence that it was in the centre of the Barote area.
(ii) Significance to a matter required to be taken into

account.

18. A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his knowledge relating to the matter. The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered. When information contained in an ex parte communication appears to be credible and to be of such significance that a matter which must be taken into account would not be properly considered if the information were disregarded, prima facie the decision-maker is bound to make an inquiry of the affected parties about that information before he makes his decision. If, being bound to make such an inquiry, the decision-maker does not do so, he is unable to make a valid decision. However, it would be futile and against common sense to require a decision-maker to delay the making of a decision to inquire into further information supplied ex parte by one party if he concludes that, on the assumption that the information is true, it will not tip the balance against the making of a decision contrary to the interests of the party presenting it. A particular example of this is considered subsequently under the heading "Information and policy".

19. Is the respondents' advice as to the location of the Ranger 68 prospect information significant to the "detriment" to which the Minister was bound to have regard? The answer is not beyond doubt. The matter to which the Minister was bound to have regard was the detriment to the respondents that might result if the whole of Mirarr Kundjey'mi were granted to a Land Trust. The respondents' representations had concentrated on the excision of all mineral lease application areas rather than on the excision of the area of the Ranger 68 prospect. The respondents did not furnish the Minister with a metes and bounds description of the Ranger 68 prospect, nor did they explain the inconsistency between Mr Elliston's evidence that the prospect was located in the centre of the Barote area and their subsequent assertion that it lay within Mirarr Kundjey'mi. On the other hand, the Commissioner had drawn attention to the value of the uranium deposits in the Ranger 68 prospect and the absence of clear evidence as to its location. On balance, it seems to me that the Commissioner's references to the location of the Ranger 68 prospect show that the information subsequently furnished to the Minister was significant. Therefore there was, prima facie, a duty to inquire into that information. But a prima facie duty to inquire is subject to at least two exceptions, to which I now turn.

(iii) Unreasonable failure to disclose.

20. A statutory scheme for inquiry and report would be undermined if a party could withhold information from the person conducting the inquiry and then communicate that information to the decision-maker so as to compel the decision-maker to institute a further inquiry into it. The decision-maker is entitled to say to such a party: "You have had an opportunity to be heard at the inquiry; if you chose to withhold information then, I will not receive it from you now". The decision-maker is not bound to inquire into the information, though he is free to do so. It does not "thwart or run counter to the policy and objects of the Act" to allow a decision-maker a discretion to insist on adherence to a scheme of public inquiry and report prescribed by the Act when a party comes along afterwards and supplies ex parte information which that party had no adequate reason for failing to place before the inquiry. On the other hand, if there is an adequate reason why credible and significant information was not disclosed to an inquiry (for example, if it relates to facts occurring after the inquiry closed) the decision-maker is under a prima facie duty to inquire into it. In this case no adequate reason was disclosed for failing to place the information as to the true location of the Ranger 68 prospect before the Minister. The Minister therefore had a discretion to exercise.

21. To exercise the discretion, the Minister had to determine whether the policy and objects of the Act would be better served by insisting on adherence to the statutory scheme or by inquiring into the information. The Minister could not have determined which course to follow unless he knew the nature of the information and whether any adequate reason for failing to place it before the public inquiry had been disclosed. The Minister would have been entitled to insist that the respondents, who had sought to defeat a land claim by traditional Aboriginal owners by pointing to the detriment to the respondents which might result if the claim were granted, should have submitted the information available to them to the Commissioner for inquiry and comment. But the Minister, not knowing of the information subsequently furnished by the respondents, did not decide to disregard it because it had not been supplied to the Commissioner. He was therefore under a prima facie duty to inquire into the information, unless he decided that that information, even if true, would not affect his decision.

(iv) Information and policy.

22. The power conferred by s.11(1) of the Act is not conferred for the purpose of deciding between competing claimants for title, possession or use of unalienated Crown land. A decision under s.11(1)

is a political decision: see Meneling Station, at pp.67,72; 80,90. That is, it is a decision which the Minister might make having regard to considerations of the public interest as he sees it, whether or not that interest coincides with the interests of any party. The Minister is not acting as a judge; he is entitled to act upon his view of the public interest - which requires neither evidence nor the Commissioner's comments to prove it - and thus to make a decision which may be contrary to the weight of evidence at the Commissioner's inquiry or contrary to the comments made by the Commissioner pursuant to s.50(3). Although the Minister is bound to have regard to detriment in exercising his powers under s.11(1), the weight if any which he gives to detriment (or to any other matter mentioned in s.50(3)) or to information relevant to detriment is entirely within his discretion.

23. The functions of the Minister under s.11(1) are similar to the functions of a Minister as a confirming authority of a compulsory purchase order which Lord Greene M.R. considered in Johnson & Co. v. Minister of Health (1947) 2 All ER 395, at p 399, in a passage which Lord Diplock in Bushell v. Environment Secretary [1980] UKHL 1; (1981) AC 75, at p 95, described as a "neglected but luminous analysis". Lord Greene said:

" It is in respect of the public interest that the discretion that Parliament has given to the Minister comes into operation. It may well be that, on considering the objections, the Minister may find that they are reasonable and that the facts alleged in them are true, but, nevertheless, he may decide that he will overrule them. His action in so deciding is a purely administrative action, based on his conceptions as to what public policy demands. His views on that matter he must, if necessary, defend in Parliament, but he cannot be called on to defend them in the courts. The objections, in other words, may fail to produce the result desired by the objector, not because the objector has been defeated by the local authority in a sort of litigation, but because the objections have been overruled by the Minister's decision as to what the public interest demands."

Before Ridge v. Baldwin [1963] UKHL 2; (1964) AC 40, the duty to act judicially was seen to depend on the existence of a proceeding like a lis inter partes and a distinction was drawn between the exercise of a purely administrative discretion and the performance of a quasi-judicial function. The distinction was sometimes drawn between two stages of one continuing process of ministerial decision-making. Echoes of the old distinction can be heard in modern times (see, for example, Rea v. Minister of Transport (1982) 48 P & CR 239, at p 245) although nowadays we are not concerned to attribute the character of a quasi-lis to an administrative decision involving a conflict of interests. Now we look to the statute and its subject matter to determine whether or not a decision can be validly made according to the policy of government without giving weight to the issues which opposing parties have fought out in administrative proceedings leading to the decision. If the Minister's decision may be founded on policy for which the Minister is responsible to the parliament (see Robinson v. Minister of Town and Country Planning (1947) KB 702, at pp 716-717, 720), the court does not review decisions affecting the interests of contending parties on the ground that no

weight or insufficient weight has been given to evidence or information favouring one party. As Lord Diplock reminds us in Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd. [1981] UKHL 2; (1982) AC 617, at p 644, Ministers are accountable to the parliament for policy and to the courts for lawfulness.

24. As the Act reposes in the Minister the power to make a political decision under s.11(1), he may refuse to give weight to any comment made by the Commissioner pursuant to s.50(3) or to any other information communicated to him with respect to a matter mentioned in s.50(3). He may make his decision under s.11(1) on broad policy grounds if he chooses to do so. His decision cannot be attacked on the ground that the Minister has not given sufficient weight to detriment but it can be attacked if the Minister fails to have regard to detriment. The Minister may deny any weight to detriment, but only if he has first had proper regard to that matter. When a decision-maker is bound to have regard to a matter, part of his function is to determine whether to give any weight to it. He does not make a valid decision if he does not perform that function.

25. To determine the weight to be given to a matter, however, the decision-maker must consider the significant information which he has about the matter. But if the decision-maker is empowered to make his decision on broad policy grounds without giving any weight to the matter to which the information relates, and he thinks it appropriate not to give weight to that matter or to the information, he is not bound to inquire further into that information.

26. Had the Minister in fact known of the information as to the location of the Ranger 68 prospect contained in the respondents' ex parte communications, he may nevertheless have decided without making further inquiry into the information that the remaining nine blocks of land within Mirarr Kundjey'mi should be granted to a Land Trust. He might have been satisfied (indeed, his statement of reasons suggest that he would have been satisfied) that those blocks should be granted whether or not the Ranger 68 prospect is within Mirarr Kundjey'mi. The Minister's statement of reasons shows that he decided that, as "the relevant Aboriginals are entitled to have title to their traditional land" and as "persons wishing to use and occupy Aboriginal land can negotiate with a Land Council, acting on behalf of relevant Aboriginals", "the detriment, if any, which might result from the grant of this land is not sufficient to warrant refusing the grant recommended". He was entitled to make that decision but only if he had had regard, in general terms, to the nature and extent of the detriment which might result to the respondents from granting to a Land Trust land containing the Ranger 68 prospect. Had he made that decision, inquiring into the information about the location of the Ranger 68 prospect would have been otiose. But he did not make that decision, because he did not know about the information. His Department did not tell him.

The Department and the Minister's knowledge.

27. The Department does not have to draw the Minister's attention to every communication it receives and to every fact its officers know. Part of a Department's function is to undertake an analysis, evaluation and precis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and precis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not

protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being assisted to make the decision by departmental analysis, evaluation and precis of the material relevant to that decision.

28. Although the Minister is the repository of the power conferred by s.11(1) of the Act and although he may not delegate that power to his departmental officers, the Minister cannot be regarded in his exercise of the power as unaware of information possessed by his Department. As Lord Diplock said in Bushell v. Environment Secretary, at p 95:

" To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament's intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise."

29. In the present case, the first decision which the Minister had to make was whether to refuse to inquire into the information as to the location of the Ranger 68 prospect contained in the respondents' ex parte communications. The Minister was entitled to refuse to have regard to the information contained in the ex parte communications either because it had been withheld by the respondents from the Commissioner without adequate reason or because the truth of the information was not going to affect the decision under s.11(1) which the Minister proposed to make on broad policy grounds. But the Minister did not make that decision. Had he decided, for any of the reasons open to him, to refuse to inquire into the information and to submit it to the Aboriginal claimants for their response, his decision under s.11(1) could not have been challenged on the ground that he had not had regard to the information. But unless the Minister, having had his attention drawn to the information contained in the respondents' ex parte communications, had decided to refuse to consider it or had decided that, even if it were true, it would not affect his decision under s.11(1), he was bound to submit it to the Aboriginal claimants for their response and to have regard to it and to their response in making that decision. The Minister did not make either of the decisions which would have avoided the necessity to inquire into the information. He failed to inquire into the information and his decision under s.11(1) is therefore invalid. It is immaterial that the Minister might well have reached the same decision under s.11(1) had he known of the information. It is immaterial that the Minister may, upon his decision being set aside, decide to exercise his power

anew in the same way as he did before. In that event, the difference between the old invalid decision and a new valid decision would be this: the old decision was not an informed decision, the new decision will be an informed decision. The Act requires an informed decision, and none has yet been made. The Minister's decision must be set aside, though for reasons somewhat different from those which found favour with the Full Court.

30. There is no ground for refusing relief in the exercise of a judicial discretion. The relief sought is in the nature of mandamus to compel the Minister to make a decision according to law and, as such a decision has not been made, the relief must be granted. The failure of the respondents to disclose to the Commissioner the information as to the location of the Ranger 68 prospect may affect the Minister's reconsideration of the matter in the manner indicated, but that is not a reason for the Court to refuse relief requiring the Minister to perform his duty according to law.

31. It follows that the order made by the Full Court must stand. The appeal should be dismissed. I would order the Minister to pay the costs.

DEANE J.: In Re Toohey; Ex parte Meneling Station Pty. Ltd. [1982] HCA 69; (1982) 57 ALJR 59; 44 ALR 63, it was decided that, in determining whether "to make recommendations to the Minister for the granting" of land pursuant to the provisions of s.50(1) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ("the Act"), the Aboriginal Lands Commissioner was confined to having regard to the strength or otherwise of the traditional attachment of the claimants to the land claimed. Possible detriment to others, and the other matters mentioned in s.50(3)(a)-(d) of the Act, were required to be made the subject of comment by the Commissioner in his report. Otherwise, he was neither bound nor entitled to have regard to them (see Murphy, Wilson and Brennan JJ. at pp.65-66, 66-67 and 72; pp.77, 79-80 and 90-91 of A.L.R.). Thus, for example, even if the Commissioner's assessment of detriment to others were such as would lead him to conclude that a particular parcel of land should be excised from a grant of an overall area which would otherwise be warranted by reason of the claims of traditional Aboriginal owners, he would nonetheless be constrained to recommend a grant of the overall area including that parcel.

2. This confinement of the matters to which the Commissioner is entitled to have regard in determining whether to recommend a grant of land under the Act has the (in my view unfortunate) effect of constricting the significance of such a recommendation by limiting the extent to which the Minister can properly rely upon it in deciding whether a grant should actually be made. The Commissioner's "recommendation" is not what it would seem to the uninitiated to be. It is not a recommendation that a grant of land claimed by its traditional Aboriginal owners should in fact be made to them in all the circumstances of the case. Its function is essentially that of an identification and certification of any such traditional owners and of the strength of their claims. It is for the Minister, and not for the Commissioner, to weigh against the claims in justice and morality of those traditional owners any competing claims or considerations, including specific and identified detriment to others, which might militate against a grant: the Commissioner's function, in relation to detriment to others, is "to make an evaluation of the evidence"; "the resolution of competing interests" is left to "government" (see Brennan J. in Meneling Station at p.73; p.92 of A.L.R. quoting from Toohey J's report in relation to the Finniss River Land Claim). Even if it be assumed that it would have been competent for the Commissioner in his comments on detriment to others to have indicated a personal view about whether, in relation to the land involved in the present case, the likely detriment to the respondents was such as to outweigh the claims in justice and morality of the traditional owners, the only entitlement of the respondents to have that likely detriment to them taken into account on the ultimate question whether the particular blocks should in fact be excised

from any grant made under the Act was at the stage where that question arose for ministerial decision.

3. That being so, the Minister was not entitled to adopt the approach that the Commissioner had taken account of detriment to the respondents in deciding to "recommend" a grant of an area including the relevant blocks. Nor does it appear that the Minister mistakenly adopted that approach. To the contrary, the departmental minute which was before the Minister at the time he decided that a grant should be made to the traditional owners carefully described (pars. 2-5) the respective functions of the Commissioner and the Minister in accordance with what had been held by this Court in Meneling Station and pointed out (pars. 3 and 4) that it was for the Minister, and not for the Commissioner, to decide whether other factors, including the matters under s.50(3) of the Act upon which the Commissioner had commented but which he had not been entitled to take into account in making his "recommendation", outweighed "the fairness and justice of making a grant" to the traditional owners.

4. On the other hand, the Minister was, in assessing the significance of any likely detriment to others, bound to advert to, and entitled to rely upon, the comments made in the Commissioner's report. Those comments had been made by the Commissioner after a public inquiry before which interested parties had been represented and free to call evidence on relevant matters. The material which the respondents had seen fit to place before that inquiry about the position of Ranger 68 had been incomplete and, to a significant extent, positively misleading. Indeed, the evidence of Mr. Elliston, a director of Peko-Wallsend Ltd., to the effect that "Ranger 68 is in the centre" of the Barote area would appear to have been simply wrong. It is plain from the letter of 25 September 1981 written on behalf of the respondents to the Minister that any failure by the Commissioner specifically to identify in his comments the full extent of the likely detriment to the respondents involved in a grant of the relevant parcels to the traditional owners was, at best from the respondents' point of view, the result of a deliberate decision, made by the respondents for "various" but unidentified reasons, to refrain from specifying in the evidence before the Commissioner "precisely where Ranger 68 is".

5. In these circumstances, there is obviously great force in the conclusion reached by the learned trial judge (Beaumont J.) that the Minister was not bound to advert to the additional material furnished by the respondents about the true location of Ranger 68. The respondents, for reasons best known to themselves, had deliberately withheld that additional material from the open inquiry held for the purpose, among other things, of receiving and assessing evidence about any detriment to others which would result from a grant of the land claimed. In the absence of any satisfactory explanation of why the additional information had been deliberately withheld from the Commissioner, it was, in my view, open to the Minister to examine the information when it was furnished direct and ex parte to him (or his predecessors in office) after the Commissioner had completed his inquiry and made his report and to conclude that he was not prepared to act upon it either to correct or override the Commissioner's assessment of likely detriment to the respondents or to initiate further inquiries by himself, his Department or the Commissioner (under s.50(1)(d) of the Act).

6. Where I respectfully disagree with the learned trial judge's conclusion that the Minister's decision was unaffected by identifiable error is that it does not appear to me that the Minister was, in the circumstances of the present case, entitled simply to ignore, or to remain uninformed about, the very existence of the additional material. That material was credible on its face. It was obviously of considerable significance to an assessment of the extent of the detriment to the respondents which

was likely to flow from a grant of the relevant blocks of land to the traditional owners; the Minister, acting reasonably, could not have been of the view that it was either irrelevant or unimportant to any such assessment or that such an assessment was irrelevant to the function he was performing. As I have indicated, the Minister was, in my view, entitled to consider the information and decide that, in the circumstances of the present case, including the absence of any satisfactory explanation of the failure to have placed the additional information before the Commissioner, he should not himself pay regard to it in determining whether a grant should be made. Furthermore, he was entitled to consider the additional material and conclude that, however important it might be to a precise assessment of likely detriment to the respondents, he need not be troubled by it for the reason that, even if it be assumed to be completely genuine and accurate, it would not have the effect of weighing the scales against the claims in justice and morality of the traditional Aboriginal owners to a grant of the relevant blocks. It seems to me, however, that the proper inference to be drawn from the evidence is that the Minister did neither of those things. He simply failed to advert at all to the existence of the additional material. This he was not, as I see the matter, entitled to do.

7. Subject to the foregoing and to a further comment, I am in general agreement with the reasons of Brennan J. for concluding that the appeal should be dismissed. The additional comment is that it should be apparent from the foregoing that I consider that, when the matter comes again before the Minister, he will be entitled to decide that, in the absence of any sufficient explanation of the respondents' deliberate failure to place the additional material before the Commissioner, he should not reopen one of the subjects of the Commissioner's public inquiry (i.e. detriment to others under s.50(3)(b)) to correct or override the Commissioner's comments based on the evidence which the parties had seen fit to place before that public inquiry. It will, in my view, also be open to the Minister summarily to conclude (as his statement of reasons under s.13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) suggests) that a grant of the relevant land should in any event be made for the reason that, even if the additional material be taken into account on the basis of an assumption that it is completely genuine and accurate, the claims in justice and morality of the traditional owners should nonetheless prevail. Otherwise, I agree, for the reasons given by Mason J. and Brennan J., that the Minister will not, in accordance with the requirements of natural justice, be free to pay regard to the additional material without first extending to other interested parties an adequate opportunity of dealing with it.

DAWSON J.: I agree with Mason J., for the reasons which he gives, that the appellants ought not to succeed in this appeal. The Minister was bound to take into account the submission containing information that Ranger 68 was located wholly within the area recommended for grant. He did not do so and for that reason failed to take a relevant consideration into account in the exercise of the power vested in him by the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

2. I desire only to add a few words upon the way in which appellate courts will refuse to interfere with the exercise of a discretion by the court below except upon the basis of well-established principles.

3. In this case the discretion was that conferred by s.16 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) to grant or withhold relief and it was exercised on appeal by the Full Court of the Federal Court rather than by the primary judge, judgment at first instance having been given against the respondents upon the merits so that the question of the exercise of the discretion was not reached.

4. In considering whether there should be any interference with a discretionary judgment it is

ordinarily the judgment of the judge at first instance which is in question, although that is not necessarily so as this case demonstrates. The principles to be applied have frequently been stated and are to be found in House v. The King [1936] HCA 40; (1936) 55 CLR 499, at pp 504-505:

"It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

See also Australian Coal and Shale Employees' Federation v. The Commonwealth [1953] HCA 25; (1953) 94 CLR 621, at p 627; De Winter v. De Winter (1979) 23 ALR 211, at pp 216-217; Gronow v. Gronow [1979] HCA 63; (1979) 144 CLR 513, at pp 519-520; Mallet v. Mallet [1984] HCA 21; (1984) 58 ALJR 248, at pp 252, 255, 260-261; [1984] HCA 21; [1984] HCA 21; 52 ALR 193, at pp 200-201, 206-207, 216-217; Norbis v. Norbis [1986] HCA 17; (1986) 60 ALJR 335, at pp 336-337, 344; [1986] HCA 17; 65 ALR 12, at pp 14-15, 27.

5. Where an exercise of discretion has taken place in an appellate court no different rule applies upon appeal to this Court: see King v. Ivanhoe Gold Corporation Ltd. [1908] HCA 75; (1908) 7 CLR 617, at pp 621, 625; Kroehn v. Kroehn [1912] HCA 45; (1912) 15 CLR 137, at pp 143, 146; Leeder v. Ellis [1952] UKPCHCA 2; (1952) 86 CLR 64, at pp 70-71. As a matter of law, the appellate jurisdiction of this Court would extend to the reversal of a discretionary judgment: Judiciary Act 1903 (Cth) s.37, cf. Kent Coal Concessions, Limited v. Duguid (1910) AC 452, at p 453. But it is in accordance with well-recognized practice that it will only exercise its jurisdiction for such a purpose where there has been some identified error or manifest injustice in the exercise of the discretion. The real reason for the practice is that there can be no justification for the mere substitution of one discretion for another and that reason applies equally whether the exercise of the discretion is by a judge at first instance or an appellate court (see Storie v. Storie [1945] HCA 56; (1945) 80 CLR 597, at p 600; Lovell v. Lovell [1950] HCA 52; (1950) 81 CLR 513, at p 519). Of course, there may be an additional reason for the practice where the judgment is that of a primary judge in that he may have had the advantage of seeing and hearing witnesses and forming an

estimate of their credibility: Lovell at p.534, per Kitto J. But the latter consideration can have no relevance in the present case where the observance of witnesses played no part in the exercise of the discretion. The practice nevertheless applies and this Court will not merely substitute the exercise of its discretion for that of the court below. I should add that, for my part, I have no reason to think that were this Court to do so, it would come to any different conclusion.

6. I would dismiss the appeal.

ORDER

Appeal dismissed.

Order that the first appellant pay the costs of the respondents in this Court.

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