MINISTER FOR ABORIGINAL AFFAIRS v PEKO-WALLSEND LTD[1]

Aboriginals — Land Rights — Administrative Law — Inquiry by Aboriginal Land Commissioner — Party not disclosing information to inquiry — Ex parte representations to Minister by party detrimentally affected — Failure to take into account relevant considerations — Obligation of Minister to have regard to ex parte representation — Constructive knowledge of Minister of matters within his department's knowledge — Aboriginal Land Rights (Northern Territory) Act 1976 (C'th) ss 11, 50
Administrative Decisions (Judicial Review) Act 1977 (C'th) s 5(2)(b).

1. INTRODUCTION

The blend of uranium mining, Aboriginal Land Rights and environmental conservation in the Alligator Rivers Region of the Northern Territory provides a topical background for this comment.[2] Peko-Wallsend Ltd ("Peko") sought to have a decision of the Minister for Aboriginal Affairs set aside. The decision was one to grant certain land to a Land Trust for the benefit of an Aboriginal group in the Alligator Rivers Region. That land was also the location of Ranger 68, a valuable uranium deposit. Peko alleged that the Minister had exercised his power improperly[3] by failing to take into account a relevant consideration.[4] Peko successfully appealed to the Full Federal Court[5] and the Minister appealed to the High Court. The appeal was unanimously dismissed.

The High Court considered the questions of administrative law which arose out of the interpretation of the relevant sections of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and the associated issues which emerged from the facts of the case.

2. BACKGROUND

The Alligator Rivers Region is the location of the richest uranium deposits in Australia as well as being significant in respect of Aboriginal heritage and environmental conservation. The Ranger Uranium Project which is managed by Peko and its associates is situated 220 kilometres east of Darwin in the catchment area of Magella Creek, which flows into the East Alligator River. The whole region has been the subject of two Aboriginal land claims,[6] the

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[1] (1968) 66 ALR 299, 60 ALJR 560. High Court of Australia; Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.

[2] See J von Sturmer, "Aborigines in the Uranium Industry: Toward Self-Management in the Alligator Rivers Region? in R M Berndt (ed) *Aboriginal Sites, Rights and Resource Development* (1982) 69, also P Carroll "Uranium and Aboriginal Land Interests in the Alligator Rivers Region" in N Peterson and M Langton (eds) *Aborigines, Land and Land Rights* (1983) 339.

[3] Administrative Decisions (Judicial Review) Act 1977 (Cth), s 5(1)(e).

[4] *Ibid* s 5(2)(b).

[5] (1985) 59 ALR 51.

[6] *Supra* n 2.

second being the Alligator Rivers – Stage II Land Claim which resulted in the decision by the Minister which was challenged in this case.

The land claims are heard by the Aboriginal Land Commissioner who conducts a public inquiry to determine whether there are traditional Aboriginal owners of the claimed land. He then reports upon his findings, and makes recommendations to the Minister for or against a grant of land. The legislation which controls this process is set out in the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (The Act). The two sections of the Act which are relevant to this case determine the powers and functions of the Commissioner and the Minister in relation to land claims under the Act.

Section 50 of the Act sets out the powers and functions of the Commissioner. Briefly, it provides that upon an application, by or on behalf of Aboriginals who claim to have a traditional interest in an area of land, the Commissioner must ascertain whether those Aboriginals, or any others, are the traditional owners of the land.[7] This is achieved by way of an open inquiry in which all the interested or potentially affected parties are heard by the Commissioner. Following the inquiry the Commissioner must report on his findings and make recommendations to the Minister for the grant of the land claimed. Such a recommendation may be made only if the Commissioner is able to conclude that there were Aboriginals who were the traditional owners of the land.[8] Where the Commissioner has published a report and made recommendations he must have regard to the degree of traditional attachment to the land and he must also comment upon:

> (c) the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to in whole or in part;[9]

Section 11 of the Act provides for the powers and functions of the Minister in respect of granting land to Aboriginal groups. The section states that where the Minister is satisfied that the land claimed should be granted for the benefit of Aborigines who are the traditional owners or users of the land he should establish a Land Trust and recommend to the Governor-General that an estate in fee simple in the land is granted to the Land Trust.[10] The material upon which the Minister makes his decision includes the Commissioner's Report and his recommendations.

3. THE FACTS

The Alligator Rivers – Stage II Land Claim was heard by the Aboriginal Land Commissioner, Toohey J. Among the areas being claimed were two tracts of land known as Dadjbaku and Mirarr Kundjey'mi which were straddled on their common border by an area, known as the Barote block. The Barote block was being explored for extensive deposits of uranium by the companies involved in the Ranger and Jabiluka Uranium Projects. Peko-

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[7] s 50(1)(a)(i).
[8] s 50(1)(a)(ii).
[9] s 50(3)(b).
[10] s 11(1).

Wallsend Ltd (Peko) and its joint venturers had discovered a rich deposit of uranium, Ranger 68. The exact location of Ranger 68 is in the extreme eastern corner of the Barote block.

The Commissioner heard submissions from all interested parties, including Peko. Peko called evidence at the hearing giving details of the company's interests in the area. Peko's representative, who gave evidence, did not disclose to the Commissioner the precise location of Ranger 68. His vague answers to the Commissioner's questions indicated that Ranger 68 was located in the centre of the Barote area.[11]

On 2 July 1981 the Commissioner presented his report on the land claim to the Minister for Aboriginal Affairs and the Administrator of the Northern Territory. He recommended that certain areas including Mirarr Kundjey'mi be granted to a Land Trust. Part of that land specified for grant was the eastern corner of the Barote block.

Furthermore, as required by s 50(3) the Commissioner also made comments on the detriment which could be occasioned due to the land being granted. The potential source of detriment to Peko would be the possible veto of the grant of any further exploration or mining interests to it by the traditional Aboriginal owners.[12] The detriment occasioned by an exercise of the s 40 veto would be the substantial expenditure incurred by the companies in the expectation of obtaining mineral leases.[13] Upon the evidence before him, Toohey J concluded that any possible detriment was proportionately lessened by the fact that only the eastern prospects in the Barote area fell within the land recommended for a grant. In the light of the true location of Ranger 68 this was disastrous for Peko.

The publication of the Commissioner's report and recommendations prompted Peko to make urgent representations to the Ministers for Aboriginal Affairs (then Senator Baume). The true "state of present information" was now disclosed by Peko, that Ranger 68 was in fact in the eastern corner of the Barote area. Peko requested the Minister to reconsider the comments on detriment in light of this information and to excise the portion of land containing Ranger 68 from the area to be granted.

The Minister subsequently decided to make the land grant, but he reserved his decision in respect of the nine Barote blocks which were covered by Peko's lease applications. Senator Baume was then succeeded by Mr Wilson as Minister and Peko contacted Mr Wilson to bring their considerable interests on the land under claim to his attention. In March 1983 there was a change of government and Mr Holding became Minister. His department furnished him with a summary of land claims awaiting ministerial decision.[14] The summary did not refer to the Ranger 68 prospect, its location or its value or any of the post-hearing submissions made by Peko. On the basis of that summary the Minister approved the grant of the remaining Barote blocks upon a decision had been reserved.

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[11] For a more detailed account of the facts and the evidence given on behalf of Peko see 66 ALR 299, 315-320 per Brennan J.

[12] See s 40 of the Act.

[13] See (1986) 66 ALR 200, 317-318 per Brennan J.

[14] *Ibid* 320.

4. THE MAJOR ISSUES

The facts of the case gave rise to a number of important issues which are likely to appear again in different contexts. The Court was able to consider the principles of law governing judicial review of administrative action on the ground of failure to take into account relevant considerations in the context of these issues:
(a) whether the Minister is bound to have regard to the comments made on detriment by the Commissioner in his report pursuant to s 50(3) of the Act;
(b) whether the Minister is also bound to consider *ex parte* communications made to him or her following an inquiry and publication of the report which correct, elucidate or update matters relevant to the inquiry;
(c) whether constructive knowledge of facts and information before the department is attributed to a decision-maker who has no actual knowledge of those facts or information.

Preliminary — The principles of law

One important aspect of this decision of the High Court is Mason J's clear and definitive statement of the principles of law governing the ground of judicial review of failing to take into account relevant considerations.[15] This ground of review is embodied in s 5(2)(b) of the Administrative Decisions (Judicial Review) Act 1977 (Cth) which is substantially declaratory of the common law. His Honour identified five propositions which he considered to be established by the cases.[16]

The first proposition is that before the ground of failure to consider relevant matters can be made out the decision-maker must be bound rather than merely entitled to take a matter into account.[17] Being bound to consider certain matters implies a duty which must be performed by a decision-maker in order to properly exercise his or her discretionary power; any failure to perform the duty indicates an improper exercise of that power.

The factors which the decision-maker is bound to consider are determined by the construction of the statute conferring the discretionary power. This is Mason J's second proposition. Furthermore, His Honour reaffirmed earlier decisions of the Court which had laid down that where a statute confers a discretion which is apparently unconfined, the factors to be considered when exercising the discretion are likewise 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.[18]

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[15] D C Pearce (ed) *Australian Administrative Law Bulletin* (1986), 206.
[16] The relevant pages of Mason J's judgment are *supra* n 13, 308-311.
[17] *Ibid* 308, 321 per Brennan J; *Sean Investments Pty Ltd* v *MacKellar* (1981) 38 ALR 363, 375; *CREEDNZ Inc* v *Governor-General* [1981] 1 NZLR 172, 183, 196-197; *Ashby* v *Minister of Immigration* [1981] 1 NZLR 222, 225, 230, 232-233.
[18] *Supra* n 13, 309; see *Swan Hill Corporation* v *Bradbury* (1937) 56 CLR 746, 757-758; *Water Conservation and Irrigation Commission (NSW)* v *Browning* (1947) 74 CLR 492, 505; *R* v *Australian Broadcasting Tribunal; ex parte 2HD Pty Ltd* (1979) 27 ALR 321.

The third proposition stated by Mason J was that not every failure to take into account a consideration to which the decision-maker was bound to have regard would result in the decision being impugned because it might be so insignificant that the failure to consider it could not materially affect the decision.[19] Brennan J specifically addresses significance in his treatment of the *ex parte* communication.[20] His Honour points out that a decision-maker is not bound to consider all the minutiae.

> The facts to be brought to mind are the salient facts which gave shape and substance to the matter: the facts of such importance that, if they are not properly considered, it could not be said that the matter had been properly considered.[21]

Fourthly, Mason J emphasised the limited role of the courts when exercising judicial review. The role of the court is to set limits on the exercise of the discretion and not to substitute its own decision for that of the administrator.[22] His Honour added that what follows from this is that, in the absence of any statutory indication, the weight to be given to the consideration to which the decision-maker is bound to have regard is generally for the decision-maker and not the court to determine.[23] A qualification put by Mason J was that, in some cases, where excessive weight has been given to a factor of no great importance or no weight given to an important factor the court may review the decision. His Honour was of the opinion, however, that the preferred ground in dealing with such an issue is s 5(2)(g) and s 6(2)(g) of the Judicial Review Act: that the decision was so unreasonable that no reasonable person would have made it.[24] The test has been accepted in England and Australia but there has been considerable diversity in its application.[25] Mason J found some guidance in the close analogy between judicial review of administrative decisions and appellate review of judicial discretion where there has been a failure to give proper weight to a matter. His Honour said that a mere preference for a different result will not justify the court in reviewing the latter:

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[19] *Supra* n 13, 309; see also *Baldwin & Francis Ltd* v *Patents Appeal Tribunal* [1959] AC 663, 693; *Hanks* v *Minister of Housing and Local Government* [1963] 1 QB 999, 1020; *R* v *Chief Registrar of Friendly Societies; ex parte New Cross Building Society* [1984] QB 227, 260.

[20] *Supra* n 13, 325.

[21] *Ibid.*

[22] *Supra* n 13, 309; *Associated Provincial Picture Houses* v *Wednesbury Corporation* [1948] 1 KB 223, 228.

[23] *Ibid* 309. *Sean Investments Pty Ltd* v *Anderson; ex parte Ipec-Air Pty* (1985) 113 CLR 177, 205; *Elliott* v *Southwark London Borough Council* [1976] 1 WLR 499 at 507; *Pickwell* v *Camden London Borough Council* [1983] QB 962, 990.

RLD2.1[24] *Supra* n 13, 310. See per Lord Greene M R *Wednesbury Corporation supra* n 21, 230, 233-234.

[25] *Ibid; Parramatta City Council* v *Pestell* (1972) 128 CLR 305, 327; *Bread Manufacturers of NSW* v *Evans* (1981) 56 ALJR 89, 96; 38 ALR 93, 106; *Re Moore; ex parte Co-Operative Bulk Handling Ltd* (1982) 56 ALJR 697; 41 ALR 221, 221-222; *Hall and Co Ltd* v *Shureham-by-Sea Urban District Council* [1964] 1 WLR 240, 248, 255, *R* v *Hillingdon London Borough Concil; Ex parte Royco Homes Ltd* [1974] QB 720, 731-732; *Newbury District Council* v *Secretary of State for the Environment* [1981] AC 578, 599-600, 608. For recent Federal Court applications of s 5(2)(g) Judicial Review Act see *Donelly* v *Telecom* (1983) 6 ALD 134, 144; *Prasad* v *Minister for Immigration and Ethnic Affairs* (1968) 65 ALR 549; *Willarra Ltd* v *McVeigh* (1984) 54 ALR 65, 106-110, 57 ALR 344, 353. *Alexandra Private Geriatric Hospital* v *Blewett* (1985) 8 FLR 167.

> 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.[26]

The fifth proposition emphasises that the preceding four propositions apply to the review of administrative decisions made by Ministers of the Crown when exercising discretionary powers.[27] However, in the context of the subject matter scope and purpose of the statute, the Minister may be entitled to take into account broader policy considerations.[28]

Detriment

The first issue to be resolved by the Court was whether the Minister was bound to consider the comments on detriment, made by the Commissioner, when making his decision under s 11(1). This point had already been addressed in a previous case, *Re Toohey; ex parte Meneling Station Pty Ltd*,[29] where Gibbs CJ considered that the Minister was entitled, but not bound, to take those matters enumerated in s 50(3) into account.[30] Brennan J was clearly of the opinion that the Minister was bound to consider those matters.[31] On this occasion the Court unanimously adopted the conclusion of Brennan J in *Meneling Station* and the reasoning of the Court provides a helpful illustration of how Mason J's five propositions operate in practice.

The Court's decision was arrived at by way of the second proposition put forward by Mason J. A consideration of the subject matter, scope and purpose of the Act indicated to Mason J that the conclusion that the Minister was bound, was necessarily implied by the statute.[32] His Honour was helped to this conclusion because the Commissioner was required to comment on the matters in s 50(3):

> That provision recognises that the granting of land to a Land Trust may adversely affect the interest 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 and outweigh the fairness and justice of granting the land when making this 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.[33]

Brennan J arrived at the same conclusion for much the same reasons, the obligation to consider detriment arose from the statutory scheme of the Act which provided for the examination and disposition of land claims.[34] His Honour made some interesting comments which would be applicable to situ-

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[26] *Supra* n 13, 310.
[27] *Supra* n 13, 310-311.
[28] *Ibid* and see 326-327 per Brennan J.
[29] (1982) 44 ALR 63.
[30] *Ibid* 67.
[31] *Ibid* 91.
[32] Agreed to by Gibbs CJ & Dawson J. Deane J agreed with Brennan J.
[33] *Supra* n 13, 312.
[34] *Ibid* 321-322.

ations where the statutory framework is not as comprehensive as in this case. Furthermore, his comments provide a rationale for why certain matters ought to be seen as relevant considerations in the context of the statute in question.

> 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.[35]

The conclusion may be drawn the construction of the statute will invariably require the interests apt to be affected by an administrative decision to be taken into account. This is more compelling if the interests of an individual are apt to be affected in a way substantially different from the interests of the public at large.[36] The concern with an individual's interests provides a common thread which runs through the application of the rules of natural justice as well as the requirements of *locus standi* at common law for declaratory and injunctive relief.[37] It is logical for it to be seen to apply to other administrative law grounds of relief.

Ex parte Communications

The affirmative conclusion in respect of the first issue led the court to consider the central issue, whether the Minister was bound to take into account the *ex parte* communications made by Peko after the publication of the Commissioner's report concerning the true location of Ranger 68.

The Court answered this question affirmatively. However, Mason and Brennan JJ treat this issue differently in their judgments. Mason J approaches the problem of *ex parte* communications as an extension to the issue of whether the decision-maker is bound to consider detriment. Thus, by applying the principles set out in his second proposition Mason J is able to arrive at the conclusion that a decision-maker is bound to take into account information which corrects, update or elucidates relevant considerations. His Honour recognises a general principle that an administrative decision-maker is required to make his decision on the basis of the material available to him at the time of making his decision; he says:

> . . . 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.[38]

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[35] *Ibid* 321-322.

[36] *Kioa* v *Minister for Immigration and Ethnic Affairs* (1985) 62 ALR 321, 373 per Brennan J who takes up this idea in relation to natural justice.

[37] "Special Interest" test propounded by Gibbs and Mason JJ in *Australian Conservation Foundation Inc* v *Commonwealth* (1980) 140 CLR 493, 530-531, 547-548. *Onus* v *Alcoa of Australia Ltd* (1981) 149 CLR 27, 35-36, 42-43, 44, 60-61, 68-69.

[38] *Supra* n 13, 313.

Therefore, on the facts before him it is a "short and logical step" to the conclusion that the Minister ought to have considered the material which corrected, updated or elucidated the location of Ranger 68 once it had been established that the detriment that may be occasioned by a land grant was a matter that the Minister was bound to take into account.[39]

Mason J's approach requires the most "current material available" to be in respect of a matter to which the decision-maker is bound to have regard when making his decision. It is also noted that the updated material must also be significant so that a failure to take it into account could result in the decision being materially affected.[40]

Brennan J's treatment of this issue is significantly different. His Honour considered the problem in two parts. First, he analysed the rules which govern procedures for ascertaining facts for the purpose of making administrative decisions and the application of these to *ex parte* communications. Secondly, he considered whether a decision-maker is bound to inquire into information placed before him.

The rules of natural justice provide the basis for the first part of Brennan J's analysis. The underlying principle is that where there is an open inquiry in which the conflicting interests of the parties are apt to be affected differently by the decision, any *ex parte* communication between one party and the decision-maker would breach the rules of natural justice, as Brennan J stated:

> 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.[41]

His Honour relies upon the English authority of *Errington* v *Minister of Health*[42] in which Maugham LJ laid down a similar principle.[43] Brennan J then points out that it is the *Errington* principle embraced in the rules of natural justice which governs the procedure for ascertaining the facts for consideration in administrative decision-making. The rules do not entirely preclude a decision-maker from taking *ex parte* information into account, but if he intends to do so, the other parties must be informed and given an opportunity to respond.[44] Mason and Deane JJ endorse this natural justice obligation[45] and Gibbs CJ agreed with the principle but considered the matter to be "academic" in this case.[46] Addressing the natural justice aspect, Mason J states that although a Minister could be under an obligation to give other parties an opportunity to respond to *ex parte* communications it does not remove the obligation to take such a communication into account. His Honour was doubtful whether there would be any necessity for

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[39] *Ibid* 312.
[40] *Ibid*, and see Mason J's third proposition at 309.
[41] *Ibid* 323.
[42] [1935] 1 KB 249.
[43] *Ibid* 272-273 quoted in full by Brennan J *supra* n 13, 323.
[44] *Supra* n 13, 324.
[45] *Ibid* 313, 333.
[46] *Ibid* 302.

the natural justice obligation where the communication relates to an undisputed fact.[47] Brennan J would be unable to make this concession on his strict application of the rules of natural justice.

Mason J's consideration of the natural justice obligation arose out of his conclusion that the Minister was bound to have regard to the *ex parte* information for the reasons discussed above, which are a straight forward application of the principles of law he lays down. Brennan J on the other hand, takes a broader view. He considers the issue to be closely related to the natural justice obligation so that the question to be asked is whether the decision-maker is bound to inquire of all the parties whose interests might be affected by the information obtained in the *ex parte* communication.[48]

Brennan J considered the issue of *ex parte* communications in the context of broader implications which might arise from the Court's decision. His Honour sees the principles of law governing judicial review as containing a common basis and he attempts to view the grounds of review as a composite whole as opposed to being merely component parts. There is a danger that parties could use the *ex parte* communications as a means of circumventing inquiry procedure and perhaps obtain an unfair advantage over the other parties. One way to protect the rights of the other parties is to emphasise the existing obligations upon decision-makers under the rules of natural justice. The result is that irrelevant and unfairly withheld information should be disregarded, that relevant, significant and proper information is taken into account and other parties are afforded an opportunity to respond and that a Minister's power to make political decisions in the appropriate circumstances can be properly exercised.

If the Minister is bound to inquire by giving all affected parties a chance to respond, a decision without inquiry would be void. If he is not bound then he would be free to make the decision without taking account of the information contained in the *ex parte* communication. This reasoning leads to the conclusion that an *ex parte* communication must be taken into account when making a decision if the decision-maker is also bound to inquire into it. The result should be the same as that reached using Mason J's reasoning.

When is the Minister bound to inquire (and hence, bound to take *ex parte* communications into account)? Brennan J states:

> 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;
> (iv) the Minister does not decide that, even if the information be true, the information would not affect his decision.[50]

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[47] *Ibid* 313.
[48] *Ibid* 324-325.
[49] *Ibid*
[50] *Ibid* 325.

The first criterion, credibility, reflects the view that a decision-maker has the power to reject information which is on its face unreliable.[51]

The second criterion may be seen as a reflection of the second and third propositions put forward by Mason J. It is also similar to Mason J's reasons on this point. The *ex parte* information must be relevant to a matter which the decision-maker is bound to consider and must also be significant in the sense that the matter would not be properly considered if the new information was disregarded.[52]

The reason for non-disclosure may give the Minister a discretion whether to inquire or not, however, information which only comes into existence after a report or inquiry would cause the decision-maker to be under an obligation to inquire.[53]

As to the fourth criterion, Brennan J discusses the issues of the weight to be attached to considerations and policy. These matters are also addressed by Mason J when he discusses the propositions of law established by the cases.[54] He emphasises that the weight to be given a consideration to which a decision-maker is bound to have regard is entirely in the decision-maker's discretion; this is typical for political decisions such as the one the Minister had to make under s 11(1). Brennan J says that no weight could be accorded to detriment, so long as proper regard had been attached to that matter and "[t]o determine the weight to be given to a matter, however, the decision-maker must consider the significant information which he has about the matter".[55] His Honour qualifies this by stating that if the decision-maker decides upon broad policy grounds and accords no weight to the matter to which the information relates he is not bound to inquire further into that information.

Thus, giving full recognition to the political/policy aspects of the power the Minister must make a decision whether to inquire into the *ex parte* information or not. He may refuse to do so if no adequate reason for non-disclosure has been given or if he decides that irrespective of the truth of the information it will not affect his decision because he proposed to make it on broad policy grounds.

If these decisions are not made and the information is credible and significant to a relevant matter then the Minister is bound to submit the information to the other parties, and take it into account and their responses to it in making his decision.[56] Brennan J was able to conclude that the information furnished by Peko was credible on its face and significant to a relevant matter, that being detriment.[57] However, as Peko had not disclosed an adequate reason for not supplying the information to the Commissioner the

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[51] *Ibid.*
[52] *Ibid* 325-326.
[53] *Ibid* 326.
[54] *Ibid* 309-310.
[55] *Ibid* 328.
[56] *Ibid* 329.
[57] *Ibid* 325-326.

Minister was entitled to refuse to consider the information.[58] The Minister did not make that decision, nor did he make the other decision mentioned above; therefore he was bound to inquire into the information before him. As he did not do that the decision under section 11(1) was invalid.[59]

Constructive Knowledge

The facts reveal that the Minister, Mr Holding, was unaware of the submissions made by Peko to his predecessors when he made his decision to grant the land to the Land Trust. The departmental summary upon which he based his decision[60] made no mention of the importance of the nine Barote blocks or of the exact location of Ranger 68. The issue raised by these facts is whether a decision-maker is fixed with constructive knowledge of the material which his department possesses.

Only Gibbs CJ and Brennan J addressed the issue and concluded that a decision-maker is fixed with constructive knowledge of the facts before his department. Mason J did not discuss the issue but seems to assume the same conclusion.[61] The Chief Justice[62] referred to *Daganayasi* v *Minister for Immigration*,[63] a New Zealand case which was discussed in the Federal Court.[64]

Brennan J[65] relied upon the speech in *Bushell* v *Environment Secretary*[66] by Lord Diplock as authority for his conclusion, where he said:

> 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.[67]

The rationale for this conclusion is based upon the functions of the department and the Minister. Part of a department's function is to analyse, evaluate and present a precis of material to which the Minister is bound or entitled to have regard when making a decision. If the department fails to draw the Minister's attention to salient facts and the validity of the decision depends upon his having considered them, his lack of actual knowledge of the facts does not protect the decision.[68]

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[58] *Ibid* 326.
[59] *Ibid* 327-329.
[60] *Ibid* 320 reproduced by Brennan J.
[61] *Ibid* 312.
[62] *Ibid* 302.
[63] [1980] 2 NZLR 130, 148.
[64] See 59 ALR 51, 59 per Bowen CJ, per Sheppard J, 81 per Wilcox J. There have been a number of immigration cases where information has been withheld from a decision-maker by his department and the issue of constructive knowledge has arisen, *Sezdirmezogliu* v *Minister for Immigration and Ethnic Affairs* (1985) 8 FLR 167, 178-179 (per Toohey J) and *Singh v* Minister for Immigration and Ethnic Affairs Federal Court of Australia 4/12/85 unreported decision of Wilcox J.
[65] *Supra* n 13, 329, per Brennan J.
[66] [1981] AC 75.
[67] *Ibid* 95.
[68] *Supra* n 65, 325 per Brennan J.

Thus, the case is to be judged as if the Minister had actual knowledge of the facts. This enabled Gibbs CJ, Mason and Dawson JJ to draw the conclusion that the Minister had not had regard to the information which was constructively before him. Brennan J was able to conclude that the Minister was bound to inquire into the information because he had constructive knowledge of it and had not decided to refuse to inquire.

5. CONCLUSION

The decision of the Court in this case may be seen to lay down some firm guidelines for ministerial decision-making in situations other than the particular statutory framework which was subject to the decision. Mason J clearly stated the principles of law which govern the ground of review of failure to take into account relevant considerations and all of the judges were in concurrence with these. The facts brought out three issues which could arise in many other contexts. The first was a determination of what matters are relevant, in this case detriment. Mason J gave a clear example of how the principles of law should be applied as did Brennan J who added some thought provoking comments concerning the obligation on a decision-maker to take the interest apt to be affected by the decision into account. The main issue, of whether the Minister was bound to have regard to the *ex parte* communications is important. In deciding that the Minister is so bound the Court laid down its reasons in terms of general application albeit by two different routes. Mason J's reasoning (agreed with by Gibbs CJ and Dawson J) is based squarely on the principles he enumerates; however, Brennan J explores the issues in the context of when a decision-maker is bound to inquire into such information to satisfy the requirements of the rules of natural justice. This natural justice argument is soundly based and the Court has appeared to require that all interested parties must have an opportunity to properly present their case. The last issue seems to be settled as a general rule, that a decision-maker will be imputed with constructive knowledge of facts and information before his department. Throughout the judgments there is an awareness of giving full effect to the political and policy aspects of exercising such a power. However, the bottom line is that a decision must be an informed decision, the Minister must be properly advised.

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