[2016] WASC 269

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	ABRAHAM -v- THE HON PETER CHARLES COLLIER MLC, MINISTER FOR ABORIGINAL AFFAIRS [2016] WASC 269
CORAM	**:**	PRITCHARD J
HEARD	**:**	29 JUNE 2016, FURTHER WRITTEN SUBMISSIONS 1 & 4 AUGUST 2016
DELIVERED	**:**	24 AUGUST 2016
FILE NO/S	**:**	CIV 1187 of 2016
BETWEEN	**:**	CORINA PATRICIA ABRAHAM Applicant AND THE HON PETER CHARLES COLLIER MLC, MINISTER FOR ABORIGINAL AFFAIRS First Respondent GAVIN FIELDING AM, RICHARD BROWNE, IAN MACLEOD, QUINTON TUCKER, CLIFF WEEKS & VANESSA KICKETT As Members of the Aboriginal Cultural Material Committee Second Respondent COMMISSIONER OF MAIN ROADS Third Respondent

Catchwords:

Judicial review - Jurisdictional error - Certiorari - *Aboriginal Heritage Act 1972* (WA) s 18 - Resolution of Aboriginal Cultural Material Committee to recommend that Minister grant his consent to construction of Roe Highway extension - Where construction of road would destroy or damage registered Aboriginal site - Whether denial of procedural fairness

Judicial review - *Rules of the Supreme Court 1971* (WA) O 56 r 4 - Application out of time - Whether leave to proceed should be granted - Where explanation for delay - Whether delay prejudiced respondents

Judicial review - Certiorari - Standing - Whether there is a standing requirement for certiorari

Judicial review - Natural justice - Where applicant was Aboriginal woman with physical and spiritual connection with impacted site - Whether obligation on Committee to consult with applicant personally - Where no evidence of relevant prior consultation with applicant - Relevance of ***Robinson v Fielding*** [2015] WASC 108

Judicial review - Natural justice - Procedural fairness - Where applicant deposed she was co-chair of certain committee - Where previous consultation with chair of that committee - Where chair was not party to these judicial review proceedings - Where applicant alleged denial of procedural fairness to the committee - Where large volume of documents provided with 14 days to comment - Whether time given to prepare submissions was adequate - Where no evidence to indicate that bulk of documents had not been provided on prior occasion - Denial of procedural fairness not established - Unnecessary to decide whether natural justice required that committee or chair be given opportunity to comment - Unnecessary to decide if applicant could complain of denial of procedural fairness to committee or chair

Legislation:

Aboriginal Heritage Act 1972 (WA)
Rules of the Supreme Court 1971 (WA)

Result:

Leave to bring the application out of time granted
Application dismissed

Category: B

Representation:

Counsel:

Applicant	:	Mr G McIntyre SC
First Respondent	:	Mr G Tannin SC & Mr C Bydder
Second Respondent	:	No appearance
Third Respondent	:	Mr G Tannin SC & Mr C Bydder

Solicitors:

Applicant	:	Corser & Corser
First Respondent	:	State Solicitor for Western Australia
Second Respondent	:	No appearance
Third Respondent	:	State Solicitor for Western Australia

Cases referred to in judgment:

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564
Annetts v McCann (1990) 170 CLR 596
Attorney General for New South Wales v Dawes [1976] 1 NSWLR 242
Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493
Australian Education Union v General Manager of Fair Work Australia [2012] HCA 19; (2012) 246 CLR 117
Century Metals and Mining NL v Yeomans (1989) 40 FCR 564
Commission for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576
CPCF v Minister for Immigration and Border Protection [2015] HCA 1; (2015) 255 CLR 514
Dunghatti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (2011) FCAFC 88; (2011) 195 FCR 318
Geelong Community for Good Life Inc v EPA (2008) 20 VR 338
Heatley v Tasmanian Racing and Gaming Commission (1977) 137 CLR 487
Isbester v Knox City Council [2015] HCA 20; (2015) 320 ALR 432
Jacob v Save Beeliar Wetlands (Inc) [2016] WASCA 126
Kioa v West [1985] HCA 81; (1985) 159 CLR 550
Minister for Immigration and Citizenship v SZGUR (2011) 241 CLR 594

Motor Accidents Authority of New South Wales v Mills [2010] NSWCA 82; (2010) 78 NSWLR 125

Ogawa v Minister for Immigration and Citizenship [2011] FCA 1358; (2011) 199 FCR 51

Plaintiff S10/2011 v Minister for Immigration and Citizenship [2012] HCA 31; (2012) 246 CLR 636

R v Justices of Surrey (1870) LR 5 QB 466

Re McBain; Ex parte Australian Catholic Bishops Conference [2002] HCA 16; (2002) 209 CLR 372

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6; (2003) 214 CLR 1

Re Refugee Tribunal; Ex parte Aala (2000) 204 CLR 82

Re Smith & the West Australian Development Corporation; Ex parte Rundle (1991) 5 WAR 295

Re Western Australian Planning Commission; Ex parte South Fremantle / Hamilton Hill Residents' Association Inc [2005] WASC 50

Regina v Thames Magistrates' Court; Ex parte Polemis [1974] 2 All ER 1219; [1974] 1 WLR 1371

Robinson v Fielding [2015] WASC 108

Saeed v Minister for Immigration and Citizenship [2010] HCA 23; (2010) 241 CLR 252

South Australia v O'Shea (1987) 163 CLR 378

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152

Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd [2000] HCA 11; (2000) 200 CLR 591

Waterside Workers' Fedreation of Australia v Gilchrist, Watt and Sanderson Ltd (1924) 34 CLR 482

Western Australia v Bropho (1991) 5 WAR 75

Table of Contents

1 **PRITCHARD J**: In this application for judicial review (Application), Ms Abraham seeks a writ of certiorari to quash a decision made by the Aboriginal Cultural Material Committee (ACMC) on 10 June 2015 (the Decision), pursuant to s 18 of the *Aboriginal Heritage Act 1972* (WA) (the AH Act).

2 The Decision had two components.[1] First, the ACMC resolved that two sites - identified as DAA 3296 and DAA 4107 - were not Aboriginal sites. Secondly, the ACMC resolved to recommend to the Minister for Aboriginal Affairs (Minister) that he consent, subject to certain conditions, to the construction of an extension of the Roe Highway from Kwinana Freeway to Stock Road in Coolbellup (the proposed works) which construction would impact on an Aboriginal site (identified as DAA 3709). DAA 3296, DAA 4107 and DAA 3709 (the Sites) are located at areas described as: Hope Road Swamp / Bibra Lake; Bibra Lake North and North Lake; and Bibra Lake, respectively. The proposed works would involve the extension of the Roe Highway through that area.

3 The sole ground of review in the Application is that the Decision is invalid because it was made without affording Ms Abraham procedural fairness.

4 Ms Abraham initially also sought an injunction to restrain the Minister from proceeding to give his consent to the proposed works. However, that part of the Application was not pursued at the hearing.[2]

5 A Notice of Intention to Abide by the Court's decision was filed on behalf of the ACMC. However, the Minister and the Commissioner of Main Roads (Commissioner) (collectively, the Respondents) were represented by counsel at the hearing and opposed the Application.

6 Ms Abraham filed the Application outside the six month period required under the *Rules of the Supreme Court 1971* (WA) (RSC).[3] As a result, she requires the leave of the Court to proceed with the Application.

7 For the reasons set out below, leave to proceed out of time should be granted, but the Application should be dismissed.

8 In these reasons for decision, I deal with the following matters:

[1] Strictly speaking, it may be that there were in fact two separate decisions but, in any event, both were challenged in the Application.
[2] ts 3.
[3] *Rules of the Supreme Court 1971* (WA) O 56 r 2(4).

1. The factual background and the statutory framework for the Decision;

2. Why leave to proceed out of time should be granted;

3. The basis for the Application;

4. The question of standing;

5. Whether Ms Abraham has established that the ACMC made the Decision without affording her procedural fairness;

6. Discretionary considerations.

1. The factual background and the statutory framework for the Decision

9 Ms Abraham filed two affidavits in support of the Application, sworn on 28 January 2016 and 21 June 2016, respectively.

10 The Respondents filed an affidavit sworn by Ms Tanya Maree Butler, the Director of Site Assessment in the Department of Aboriginal Affairs (Department), who formerly occupied the position of the Registrar of Aboriginal Sites (the Registrar). Ms Butler outlined the relevant factual background to the Decision and her affidavit annexed a copy of the minutes of the ACMC's meeting at which the Decision was made. None of the factual background was disputed. Save where I indicate otherwise, the facts set out below are drawn from Ms Butler's affidavit.

11 Before turning to the evidence, however, it is appropriate to outline briefly the statutory framework for the Decision.

The statutory framework for the Decision

12 The AH Act is, as its title suggests, concerned with the preservation of Aboriginal heritage, which is an important part of the heritage of the State as a whole. It does so by preserving, on behalf of the Western Australian community, places and objects customarily used by, or traditional to, Aboriginal people or their descendants.[4] The provisions of the AH Act establish a process by which places (known as 'Aboriginal sites'[5]) and objects of special significance to Aboriginal people, past or present, can be protected and made available to Aboriginal people for purposes which accord with Aboriginal tradition.

[4] See the long title to the *Aboriginal Heritage Act 1972* (WA).
[5] *Aboriginal Heritage Act 1972* (WA) s 4, s 5.

13 An Aboriginal site includes a place of importance and significance where persons of Aboriginal descent have, or appear to have, left objects used for any purpose connected with the traditional cultural life of Aboriginal people, past or present; any sacred, ritual or ceremonial site which is of importance and special significance to persons of Aboriginal descent; and any place associated with Aboriginal people which is of historical, anthropological, archaeological or ethnographical interest and which should be preserved because of its importance and significance to the cultural heritage of the State.[6]

14 Section 17 of the AH Act provides that a person who excavates, destroys, damages, conceals or in any way alters any Aboriginal site commits an offence unless he is acting with the authorisation of the Registrar under s 16, or the consent of the Minister under s 18 of the AH Act.

15 Central to the operation of the AH Act are the ACMC and the Minister. The ACMC is an advisory body,[7] whose functions include evaluating, on behalf of the community, the importance of places and objects alleged to be associated with Aboriginal persons, and recommending to the Minister places and objects which are of special significance to people of Aboriginal descent and which should be preserved.[8] The Minister has a variety of powers, including powers to recommend that an Aboriginal site be declared a protected area[9] and to consent to the use of Aboriginal sites for specified purposes.[10] These powers are required to be exercised having regard to, or in the general interest of, the community.

16 Where an owner of land requires to use the land for a purpose which, unless the Minister gives his consent, would be likely to result in a breach of s 17 in respect of any Aboriginal site that might be on the land, s 18 of the AH Act permits the owner to give the ACMC written notice that he requires to use the land for that purpose. Section 18 requires that as soon as it is reasonably able to do so, the ACMC must form an opinion as to whether there is any Aboriginal site on the land, evaluate the importance and significance of any such site, and submit the notice to the Minister, together with the ACMC's recommendation as to whether or not the Minister should consent to the use of the land for the purpose sought by

[6] *Aboriginal Heritage Act 1972* (WA) s 5.
[7] *Aboriginal Heritage Act 1972* (WA) s 28(1).
[8] *Aboriginal Heritage Act 1972* (WA) s 39(1).
[9] *Aboriginal Heritage Act 1972* (WA) s 19(3).
[10] *Aboriginal Heritage Act 1972* (WA) s 18(3).

the owner and (if applicable) the extent to which and the conditions upon which such consent should be given.[11] Pursuant to s 18(3), the Minister must consider the ACMC's recommendation and, having regard to the general interest of the community, either consent to the use of the land the subject of the notice, or part thereof, for the purpose proposed, with or without conditions, or wholly decline to consent to the use of the land for that purpose, and advise the owner of that decision.[12]

Main Roads submits a s 18 Notice

17 In September 2011, a notice pursuant to s 18 of the AH Act was submitted by Main Roads Western Australia (Main Roads), on behalf of the Commissioner. That notice indicated that the State government proposed to undertake the proposed works, and that the proposed works would be undertaken in an area where a number of potential or designated Aboriginal sites were located, including the Sites. Following a request that it provide some additional information, Main Roads submitted a revised s 18 Notice in November 2012 (the s 18 Notice).

18 The s 18 Notice was considered by the ACMC at its meeting on 13 February 2013. On that occasion, the ACMC did not assess any of the Sites, but resolved to recommend to the Minister that he not grant his consent (the 2013 Decision). The 2013 Decision was 'based on the ethnographic significance of the sites the subject of the [s 18] Notice and the objections raised by the majority of Aboriginal (sic) consulted'.[13]

19 However, the 2013 Decision was not conveyed to the Minister[14] because other events intervened. In May 2013, the Environmental Protection Authority (EPA) provided a notice to the Minister advising that the proposed works were being assessed by the EPA, with the result that the Minister could not make a decision which would have the effect of implementing the proposed works without the authority of the Minister for the Environment.[15] Ms Butler deposed that:[16]

> When the Minister receives a notice from the [EPA] ... it is standard practice for the Registrar and the Department to refrain from submitting the section 18 notice and recommendation of the ACMC to the Minister, until the Minister is served with an authority under … the [*Environmental Protection Act 1986* (WA)].

[11] *Aboriginal Heritage Act 1972* (WA) s 18(2).
[12] *Aboriginal Heritage Act 1972* (WA) s 18(3).
[13] Affidavit of Tanya Maree Butler, Annexure TMB46.
[14] Affidavit of Tanya Maree Butler [54] - [55].
[15] Affidavit of Tanya Maree Butler, Annexure TMB49.
[16] Affidavit of Tanya Maree Butler [53].

20 By May 2015, the EPA's assessment had been completed. Rather than submitting the 2013 Decision to the Minister, it appears that the ACMC decided to consider the s 18 Notice afresh. The evidence did not disclose any explanation for that approach.

Status of the Sites prior to the Decision

21 Ms Butler deposed that prior to June 2015, DAA 3296 had never been entered as an Aboriginal site on the register of Aboriginal sites maintained pursuant to the AH Act.[17] It had, however, been identified as a place where artefacts were scattered.[18]

22 Ms Butler deposed that DAA 4107 had been identified by the ACMC as an Aboriginal site in 2000, and again in 2011.[19]

23 Ms Butler further deposed that DAA 3709 was first considered by the ACMC in June 2000, at which time the ACMC determined that it was an Aboriginal site.[20] The ACMC also considered DAA 3709 in the context of a s 18 notice submitted by the City of Cockburn in 2011, at which time the ACMC simply proceeded on the basis that DAA 3709 was an Aboriginal site.[21]

24 A field inspection of DAA 3296 and DAA 4107 was conducted by officers of the Department in 2014. That inspection revealed that both sites had been subjected to high degrees of disturbance due to the construction of roads and a gas pipeline. As a result of that inspection, the Department's officers prepared a report (the 2014 Departmental Report) in which they concluded that there was no evidence to indicate that either DAA 3296 or DAA 4107 should be identified as an Aboriginal site, because each site was no longer a place of importance and significance (having been 'heavily disturbed by modern activity associated with recreation and other development activities'[22]); nor did the Sites meet any of the other criteria for an Aboriginal site under s 5 of the AH Act.[23]

Consultation with Aboriginal people in relation to the Sites

25 Ms Butler's evidence indicates that many individuals and Aboriginal groups have been consulted in the past in relation to the Aboriginal

[17] Affidavit of Tanya Maree Butler [13].
[18] Affidavit of Tanya Maree Butler [11].
[19] Affidavit of Tanya Maree Butler [30] - [31].
[20] Affidavit of Tanya Maree Butler [24].
[21] Affidavit of Tanya Maree Butler [25].
[22] Affidavit of Tanya Maree Butler, Annexure TMB52, 560, 563.
[23] Affidavit of Tanya Maree Butler, Annexure TMB52, 560, 563.

heritage significance of the Sites, including in relation to a number of notices submitted under s 18 of the AH Act.

26 The s 18 Notice submitted by Main Roads in the present case indicated that between August 2010 and May 2012, a number of Aboriginal people who were understood to have an interest in the Aboriginal heritage of the area surrounding the proposed works had been consulted by persons acting on behalf Main Roads. The individuals and groups consulted included the Cockburn Aboriginal Advisory Committee (CAAC) through its Chairman, Rev Sealin Garlett.[24] (I should mention at this point that there was no evidence about the CAAC, its legal status, its role or functions, or its officers or members, save in two respects. Rev Garlett was referred to throughout the annexures to Ms Butler's affidavit as the Chairman of the CAAC. (Whenever I refer to Rev Garlett in these reasons, I mean to refer to him in his capacity as the Chairman of the CAAC.) In addition, Ms Abraham deposed that she is a member of the CAAC, and is, or was, a co-chair of the CAAC along with Rev Garlett.[25])

27 Nothing in the evidence indicated that Ms Abraham was personally consulted in respect of the s 18 Notice.

Further consultation prior to the Decision

28 By letter dated 27 May 2015 (the May 2015 letter), Ms Butler, in her capacity as the Registrar (in which role she administered the operations of the ACMC), wrote to various individuals who, it appears, had previously been consulted in relation to the s 18 Notice, to advise that the s 18 Notice would be considered by the ACMC at its meeting on 10 June 2015. One of the people to whom the May 2015 letter was sent was Rev Garlett.

29 Enclosed with the May 2015 letter was a compact disc containing a very large number of documents, including the agenda papers for the ACMC's meeting of 10 June 2015, and previous reports relating to the Sites dating as far back as 1973, including the 2014 Departmental Report (the consultation documents).[26] Neither the compact disc, nor the totality of the consultation documents, was in evidence.

30 In the May 2015 letter, Ms Butler invited the recipients of the letter to provide further comments in relation to the s 18 Notice.[27] Any further

[24] Affidavit of Tanya Maree Butler, Annexure TMB39, 46 - 73, Annexure TMB41, 469.
[25] Affidavit of Corina Patricia Abraham sworn 21 June 2016 [4].
[26] Affidavit of Tanya Maree Butler [58].
[27] Affidavit of Tanya Maree Butler [57], Annexure TMB51.

comments were required to be provided by 9 June 2015 (that is, within 14 days of the date of the letter).

Departmental advice to the ACMC - the 'bluesheet'

31 On 28 May 2015, the consultation documents were provided to the members of the ACMC. On the same day, the ACMC was also provided with a document described `as a 'bluesheet' (the bluesheet), which Ms Butler deposed was prepared by the Department in order to assist the ACMC in its consideration of the s 18 Notice.[28] A copy of the bluesheet was annexed to Ms Butler's affidavit.[29] I will refer to this document in more detail later in these reasons.

Objections received by the ACMC prior to its meeting on 10 June 2015

32 On 9 June 2015, Ms Butler received two responses to the May 2015 letter. Each objected to the proposed works. Each also complained about a denial of procedural fairness.[30] Ms Butler's evidence was that she made arrangements for this correspondence to be tabled at the ACMC's meeting on 10 June 2015.[31]

The Decision

33 The ACMC held an ordinary meeting on 10 June 2015. At that meeting, the ACMC considered two items of present relevance. The first was whether DAA 3296 and DAA 4107 should be characterised as Aboriginal sites under the AH Act. The second was the s 18 Notice.

34 The minutes of the ACMC's meeting of 10 June 2015 (the Minutes).[32] indicate that '[f]ollowing discussion and based on the information provided and the Departmental advice received, the Committee made the site assessments listed at Table G4' (namely, that neither DAA 3296 nor DAA 4107 was an Aboriginal site for the purposes of the AH Act).[33]

35 In relation to the s 18 Notice, the Minutes indicate:[34]

> The Committee considered the Notice and following discussion, resolved to recommend to the Minister for Aboriginal Affairs that consent with conditions be granted, noting that the Applicant has indicated that the

[28] Affidavit of Tanya Maree Butler [53].
[29] Affidavit of Tanya Maree Butler, Annexure TMB53.
[30] Affidavit of Tanya Maree Butler [60] - [61], Annexures TMB54, TMB55.
[31] Affidavit of Tanya Maree Butler [62].
[32] Affidavit of Tanya Maree Butler, Annexure TMB56.
[33] Affidavit of Tanya Maree Butler, Annexure TMB56, 587.
[34] Affidavit of Tanya Maree Butler, Annexure TMB56, 588.

> [proposed works] will be designed and constructed in a manner to minimise the road footprint and impact on Aboriginal sites and places.

36 The terms of the ACMC's resolution to recommend that the Minister consent to the proposed works indicate that:[35]

> On current knowledge the [proposed works] will impact on one Aboriginal site within the meaning of section 5 of the [AH Act] (Site) on the Land. The Site is DAA 3709 (North Lake and Bibra Lake).

37 There was no evidence that the Decision has been conveyed to the Minister. It appears that it has not, so that the Minister has not yet made a decision as to whether or not to consent to the proposed works.

2. Why leave to proceed out of time should be granted

38 The Decision was made on 10 June 2015. The six month period prescribed by the RSC as the period within which an application for judicial review may be made expired on 10 December 2015. The Application was filed on 5 February 2016, a little over seven weeks out of time.

39 Counsel for the Respondents submitted that the delay in commencing proceedings was compounded by Ms Abraham's delay in serving the Application. Although the Application was filed on 5 February 2016, it was not served on the ACMC and the Minister until 30 March 2016. Main Roads was not served until 5 April 2016.

40 In her affidavit sworn 28 January 2016, Ms Abraham explained the delay in bringing the Application. Ms Abraham deposed that she first became aware of the Decision on 17 October 2015, when she met with a group of people, including three Aboriginal elders, and discussed the possibility of challenging the Decision.[36] She then met with solicitors on 26 October 2015, provided preliminary instructions, and requested them to obtain counsel's advice in respect of the Application.[37] Ms Abraham deposed that she received formal legal advice on 19 January 2015.[38] (In other words, Ms Abraham did not receive legal advice until after the expiry of the six-month period for bringing the Application.)

41 Ms Abraham deposed that the reasons for her delay in bringing the Application are that: she suffers from a medical condition for which she

[35] Affidavit of Tanya Maree Butler, Annexure TMB56, 590.
[36] Affidavit of Corina Patricia Abraham sworn 28 January 2016 [24] - [25].
[37] Affidavit of Corina Patricia Abraham sworn 28 January 2016 [26].
[38] Affidavit of Corina Patricia Abraham sworn 28 January 2016 [27].

requires daily treatment; she suffered from a significant medical condition in October 2015 as a result of which she was unable to respond quickly to queries from her legal advisers; her solicitors and counsel were unavailable during the Christmas and New Year period; she was awaiting counsel's advice before commencing proceedings; and the death of a very close relative in early January 2016 meant that she was unable to turn her mind to the action at that time.[39]

42 The Respondents filed two affidavits in relation to the potential impact of any delay in resolving the Application.[40] Mr Peter Woronzow and Mr Leo Coci are senior officers of Main Roads. The evidence outlined the potential practical consequences of a delay in the completion of the project to extend Roe Highway, including the impact on the procurement process, and the financial implications of any delay in the construction and completion of the proposed works, having regard to the financial arrangements in place for the project.[41] It is unnecessary to say anything more about their evidence, other than to note that their concerns pertained to the consequences of future delay, and not to the consequences of the delay by Ms Abraham in commencing or prosecuting the Application.

43 The Respondents' concerns about the delay in bringing and prosecuting the Application must be seen in their context. There was no dispute that as at the date of the hearing the Respondents were not in a position to be able to proceed with the proposed works, having regard to a legal challenge to another aspect of the approvals process for the proposed works. A decision of the Court of Appeal in respect of that matter was delivered on 15 July 2016,[42] after the hearing of the Application. It was only at that point (subject to any further appeal) that that legal challenge ceased to pose an impediment to the progress of the proposed works.

44 Furthermore, mindful of the Respondents' concerns about delay in the proposed works as a result of the Application, I listed the Application for hearing at the earliest opportunity.

45 In all of those circumstances, I am not satisfied that the initial delay in commencing the Application, or the subsequent delay in prosecuting it, has given rise to any prejudice to the Respondents.

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[39] Affidavit of Corina Patricia Abraham sworn 28 January 2016 [28].
[40] Affidavit of Peter Woronzow affirmed 2 May 2016; Affidavit of Leo Coci affirmed 2 May 2016.
[41] Affidavit of Peter Woronzow affirmed 2 May 2016 [24] - [59]; Affidavit of Leo Coci affirmed 2 May 2016 [54] - [77].
[42] ***Jacob v Save Beeliar Wetlands (Inc)*** [2016] WASCA 126.

46 In all of the circumstances, in my view, it is appropriate for leave to be granted to proceed out of time.

3. The basis for the Application

47 The basis on which Ms Abraham contended that the ACMC was required to afford her procedural fairness in respect of the Decision, but that it failed to do so, was, at least initially, unclear. The confusion was to some extent compounded by the issue of standing, which is considered later in these reasons.

48 Initially, it appeared that Ms Abraham claimed that she was entitled to be afforded procedural fairness in her own right. To that end, Ms Abraham deposed that she is a Noongar Whadjuk person, that she has had 'a long history of frequent physical association with [the Sites]',[43] that she collects plants from the Sites for medicinal purposes,[44] that she performed a welcome to country at the Sites,[45] and that she conducts cultural awareness training programmes in which she speaks about 'the importance of the Lake as a creation site of the Waugyl'.[46] In addition, in Ms Abraham's initial written submissions, it was submitted that she had shown a special interest in the subject matter of the litigation, and that that interest had been demonstrated by Ms Abraham's 'physical, including ritual and ceremonial, interaction with the site'.[47]

49 However, in the course of the hearing, counsel for Ms Abraham confirmed that his client did not contend that she was entitled to be consulted in her own personal capacity, as an individual with particular knowledge of the significance of the Sites.[48]

50 It also appeared that perhaps the basis for Ms Abraham's claim to an entitlement to procedural fairness was that she has an interest in the Sites, as she and her family are Noongar Whadjuk people.[49] Ms Abraham deposed that she is a spokesperson for her family.[50] Ms Abraham also deposed that she has a family or genealogical 'connection with' other Noongar families who have custodial interests in the Sites.[51] In Ms Abraham's initial submissions, it was submitted that Ms Abraham has

[43] Affidavit of Corina Patricia Abraham sworn 21 June 2016 [9].
[44] Affidavit of Corina Patricia Abraham sworn 21 June 2016 [10].
[45] Affidavit of Corina Patricia Abraham sworn 21 June 2016 [12].
[46] Affidavit of Corina Patricia Abraham sworn 21 June 2016 [13].
[47] Applicant's submissions, 23 June 2016 [23(a)].
[48] ts 4, 6.
[49] Affidavit of Corina Patricia Abraham sworn 28 January 2016 [2].
[50] Affidavit of Corina Patricia Abraham sworn 21 June 2016 [3].
[51] Affidavit of Corina Patricia Abraham sworn 21 June 2016 [2], Annexure CPA-5.

'senior representative status of a group who have a special interest over and above that of the community in general in the preservation of the heritage value of the [Sites]'.[52] Ms Abraham deposed that the ACMC made the Decision without any prior notice to or consultation with her, that various family members were not consulted after the 2013 Decision in relation to the Decision, and that she has made enquiries with multiple other Noongar Whadjuk persons and they have advised her that they did not receive prior notice or consultation in relation to the Decision.[53]

51 Ultimately, however, it emerged at the hearing of the Application that Ms Abraham's claim was that she was entitled to be afforded procedural fairness by the ACMC because she is a member of the CAAC (and was, or is, a co-chair of the CAAC, along with Rev Garlett).[54] Further, it became clear that this was in fact the only basis upon which Ms Abraham claimed to be entitled to, and to have been denied, procedural fairness, although there remained some ambiguity about the precise basis on which Ms Abraham advanced that claim.

52 Ms Abraham contended that procedural fairness required that the ACMC provide her, personally, with an opportunity to provide comments, prior to the Decision. In Ms Abraham's written submissions of 4 August 2016, it was submitted:[55]

> The Applicant's *primary* contention, however, is that *she* was denied procedural fairness because, having been consulted as a member of the [CAAC] between August 2010 and May 2012 prior to the ACMC decision on 13 February 2013, *she* was not further consulted prior to the decision of the ACMC on 10 June 2015. (emphasis added)

53 Ms Abraham's claim in that passage appears to be that she was not afforded procedural fairness because she was not provided with a copy of the May 2015 letter and the consultation documents, or otherwise put on notice of the potential for the ACMC to grant consent to the proposed works the subject of the s 18 Notice.

54 However, Ms Abraham's claim also appeared to be that the ACMC had failed to afford procedural fairness to the CAAC, and consequently, to her (as a member of the CAAC). In the course of the hearing, counsel for Ms Abraham confirmed that 'the ultimate basis' for the claim of a denial of procedural fairness was an alleged deficiency in the ACMC's

[52] Applicant's submissions 23 June 2016 [23(b)].
[53] Affidavit of Corina Patricia Abraham sworn 28 January 2016 [9] - [10]; Affidavit of Corina Patricia Abraham sworn 21 June 2016 [5].
[54] Applicant's submissions, 1 August 2016 [1]; Applicant's submissions, 4 August 2016, [2(a)].
[55] Applicant's submissions, 4 August 2016 [3].

consultation with Rev Garlett, as Chair of the CAAC, arising from the provision of the May 2015 letter and the consultation documents.[56] In the end, it appeared that this was the only basis which was seriously advanced for Ms Abraham's claim of a denial of procedural fairness.[57]

55 In his further written submissions of 4 August 2016, counsel for Ms Abraham submitted that Ms Abraham was 'not bringing an application on behalf of others, including members of the [CAAC]'.[58] Despite that submission, it appeared that Ms Abraham's claim to an entitlement to procedural fairness was dependent upon the entitlement of Rev Garlett, as the Chair of the CAAC, or of the CAAC itself, to be afforded procedural fairness. For that reason, it was far from clear that Ms Abraham's claim was, in substance, any different from a claim that the CAAC or its members were entitled to, and were denied, procedural fairness in this case.

4. The question of standing

56 Before turning to consider the merits of Ms Abraham's claims, it is appropriate to mention a preliminary point upon which the Respondents placed considerable emphasis, namely the question whether it was necessary for Ms Abraham to demonstrate that she had standing to bring the Application.

57 Counsel for the Respondents submitted that in order to apply for a writ of certiorari, Ms Abraham must demonstrate that she had a special interest in the subject matter of the action, beyond that of the general public and beyond a merely intellectual or emotional concern.[59] The Respondents conceded that Ms Abraham had standing 'to the extent that she alleges a failure by the [ACMC] to accord procedural fairness to her personally'.[60] However, the Respondents denied that Ms Abraham had standing to bring the Application on behalf of others, or to complain about a denial of procedural fairness to others, including members of the CAAC.[61] Ms Abraham submitted that she had demonstrated an interest sufficient to establish standing to challenge the Decision.

58 After the hearing of the Application, in view of the somewhat ambiguous basis for the Application and in light of High Court authority

[56] ts 5.
[57] Cf ts 6 - 7.
[58] Applicant's submissions, 4 August 2016 [1].
[59] Respondents' submissions, 10 June 2016 [59] ff.
[60] Respondents' submissions, 27 June 2016 [3].
[61] Respondents' submissions, 1 August 2016 [3].

to which the parties had not referred, I invited the parties to file further submissions on the question of standing. The parties both filed further written submissions in response to that invitation.

59 Counsel for Ms Abraham submitted that because she sought a writ of certiorari, Ms Abraham had the benefit 'of a more liberal standing test than for declaratory or injunctive relief'.[62]

60 Counsel for the Respondents acknowledged that while there was recent High Court authority to the effect that an applicant for a writ of certiorari need not demonstrate standing, 'there is some doubt as to the correctness of that view'[63] and that 'defining precisely the standing requirements, if any, for the prerogative writs of certiorari (and prohibition) is difficult'.[64]

61 The Respondents maintained their initial position with respect to standing in this case, namely, to concede that Ms Abraham had standing to the extent that she alleged a failure by the ACMC to afford procedural fairness to her personally, but to deny that Ms Abraham had standing to bring an application on behalf of others, or to complain about a denial of procedural fairness to others, including members of the CAAC.[65]

62 In view of the latter contention, it is appropriate to explain briefly why, in my view, threshold questions of standing have no place in determining an application for a writ of certiorari.

63 In ***Australian Education Union v General Manager of Fair Work Australia***,[66] Gummow, Hayne and Bell JJ concluded that a 'stranger' to a decision - that is, a person who was not a party to the decision, whose rights or interests are not affected by it, and who does not otherwise have some 'special interest' in the decision - may apply for a writ of certiorari to quash that decision.[67] The same conclusion had been reached by McHugh J and Hayne J in ***Re McBain; Ex parte Australian Catholic Bishops Conference***,[68] by Kirby J and Callinan J in ***Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management***

[62] Applicant's submissions, 4 August 2016 [7].
[63] Respondents' submissions, 1 Augusts 2016 [5] citing ***Australian Conservation Foundation Inc v Commonwealth*** (1980) 146 CLR 493, 509 (Aickin J).
[64] Respondents' submissions, 1 August 2016 [5].
[65] Respondents' submissions, 1 August 2016 [3].
[66] ***Australian Education Union v General Manager of Fair Work Australia*** [2012] HCA 19; (2012) 246 CLR 117.
[67] ***Australian Education Union v General Manager of Fair Work Australia*** [2012] HCA 19; (2012) 246 CLR 117 [70] - [71] (Gummow, Hayne & Bell JJ).
[68] ***Re McBain; Ex parte Australian Catholic Bishops Conference*** [2002] HCA 16; (2002) 209 CLR 372 [89] (McHugh J), [260] (Hayne J).

Ltd[69] and by Isaacs and Rich JJ in ***Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd***.[70] The principle in each case was traced back to ***R v Justices of Surrey***.[71] The principle is also consistent with the well-established principle that an Attorney General, when representing the Crown in cases within his or her jurisdiction, has standing to apply for a writ of certiorari in relation to an order of an inferior court or tribunal even though he or she was not party to the proceedings in that court or tribunal.[72]

64 In ***McBain***, McHugh J explained that the rationale for the absence of a standing rule was that 'permitting strangers to apply for certiorari helps to ensure that "the prescribed order of the administration of justice" is not disobeyed'.[73] To similar effect, Hayne J in ***McBain***,[74] and Gummow, Hayne and Bell JJ in ***Australian Education Union v General Manager of Fair Work Australia***,[75] each referred, with approval, to the following observation by Professor Wade:[76]

> [C]ertiorari is not confined by a narrow conception of *locus standi*. It contains an element of the *actio popularis*. This is because it looks beyond the personal rights of the applicant: it is designed to keep the machinery of justice in proper working order by preventing inferior tribunals and public authorities from abusing their powers.

65 It is true that the absence of any requirement for an applicant for certiorari to establish standing has not been endorsed by a majority of the High Court in any recent case. Aronson and Groves have also criticised the approach taken by members of the High Court (in the cases to which I have referred) on the basis that it involves a 'selective history' of older authorities.[77] Nevertheless, it is apparent that the prevailing view is that an applicant for a writ of certiorari need not establish standing to bring that application. That that is so has been recognised by the New South

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[69] ***Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*** [2000] HCA 11; (2000) 200 CLR 591, 652 - 653 [162] (Kirby J), 669 - 670 [211] (Callinan J).
[70] ***Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd*** (1924) 34 CLR 482, 517 - 518 (Isaacs & Rich JJ).
[71] ***R v Justices of Surrey*** (1870) LR 5 QB 466, 473.
[72] ***Re McBain; Ex parte Australian Catholic Bishops Conference*** [2002] HCA 16; (2002) 209 CLR 372 [91] (McHugh J), referring to ***Attorney General for New South Wales v Dawes*** [1976] 1 NSWLR 242.
[73] ***Re McBain; Ex parte Australian Catholic Bishops Conference*** [2002] HCA 16; (2002) 209 CLR 372 [89] (McHugh J).
[74] ***Re McBain; Ex parte Australian Catholic Bishops Conference*** [2002] HCA 16; (2002) 209 CLR 372 [260] (Hayne J).
[75] ***Australian Education Union v General Manager of Fair Work Australia*** [2012] HCA 19; (2012) 246 CLR 117 [70] (Gummow, Hayne & Bell JJ).
[76] Wade HRW, 'Unlawful Administrative Action: Void or Voidable? Part 1' (1967) 83 *LQR* 499, 503.
[77] Aronson M and Groves M, *Judicial Review of Administrative* Action (5th ed, 2013) [11.210].

Wales Court of Appeal.[78] That conclusion is also consistent with earlier authority from this State to the effect that a more liberal approach to standing should be taken in relation to an application for certiorari.[79]

66 However, the absence of any interest in, or connection to, the decision under review on the part of the applicant for relief, of the kind which would suffice to establish standing to seek declaratory or injunctive relief, will still be relevant in relation to an application for a writ of certiorari. That is because certiorari is a discretionary remedy.[80] It is not the case that the Court will, in the exercise of its discretion, refuse to issue certiorari simply because the applicant was not a party to the decision. However, the fact that the applicant for the writ is a 'stranger' to the decision will be relevant to the exercise of the Court's discretion whether to issue the writ.[81] As McHugh J explained in ***McBain***:[82]

> [A]lthough a stranger to the proceedings may apply for certiorari or prohibition to issue, a stranger's lack of standing will frequently result in the Court refusing to issue either writ on discretionary grounds. If the applicant is not the person aggrieved, the court will consider 'whether the interest of the applicant is so small, or his grievance so like that of the rest of Her Majesty's subjects, as to leave no sufficient ground for the issue of the writ'.

67 An additional factor that will be relevant to the grant of certiorari to a 'stranger' to the decision under review is the attitude of the parties to that decision. If those parties do not seek to disturb the decision under review, that will be a factor that weighs in favour of the exercise of discretion against the issue of certiorari.[83]

5. Whether Ms Abraham has established that the ACMC made the Decision without affording her procedural fairness

68 As I outlined above at [51] - [55], the ultimate basis for Ms Abraham's claim was that she was entitled to procedural fairness as a

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[78] ***Motor Accidents Authority of New South Wales v Mills*** [2010] NSWCA 82; (2010) 78 NSWLR 125 [82] (Giles JA, Tobias JA & Handley JA agreeing).
[79] ***Re Smith & the West Australian Development Corporation; Ex parte Rundle*** (1991) 5 WAR 295, 305 - 306 (Malcolm CJ, Pidgeon J & Walsh J agreeing).
[80] ***Re McBain; Ex parte Australian Catholic Bishops Conferenc****e* [2002] HCA 16; (2002) 209 CLR 372 [95] (McHugh J).
[81] ***Re McBain; Ex parte Australian Catholic Bishops Conference*** [2002] HCA 16; (2002) 209 CLR 372 [96] (McHugh J); ***Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd*** (1924) 34 CLR 482, 517 - 518, 519 (Isaacs & Rich JJ).
[82] ***Re McBain; Ex parte Australian Catholic Bishops Conference*** [2002] HCA 16; (2002) 209 CLR 372 [109] (McHugh J), citing ***R v Nicholson*** [1899] 2 QB 455, 472.
[83] See ***Re McBain; Ex parte Australian Catholic Bishops Conference*** [2002] HCA 16; (2002) 209 CLR 372 [124] (McHugh J) [229] (Kirby J); ***Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson*** (1924) 34 CLR 482, 499, 501 (Isaacs & Rich JJ).

member of the CAAC. However, in the submissions made on Ms Abraham's behalf, very little attention was given to the question why the ACMC was obliged to afford procedural fairness to the CAAC and, in turn, to her as a member of the CAAC. In his oral submissions, counsel for Ms Abraham simply contended that a requirement to afford procedural fairness to Ms Abraham arose from 'the way in which the [ACMC] and the Department had gone about their consultation process historically' and that the requirement to afford procedural fairness arose 'essentially because of [Ms Abraham's] membership of that Committee'.[84] Those submissions appeared, implicitly, to be founded on the decision of Chaney J in ***Robinson v Fielding***.[85]

(a) The decision in *Robinson v Fielding*

69 It is necessary to be clear about precisely what was established in ***Robinson***.

70 Diane and Kerry Robinson were a sister and brother who were part of the Marapikurrinya family group and part of the Kariyarra native title claim group. They made an application for judicial review, seeking a writ of certiorari in relation to a decision of the ACMC pursuant to s 18(2) of the AH Act. The ACMC had concluded that a particular site, known as the Marapikurrinya Yintha (the MY site) was not an Aboriginal site for the purposes of the AH Act, and resolved to recommend that the Minister give his consent to a proposed development at the Port Hedland harbour, which would impact on land on which the MY site was located. One of the grounds of judicial review was that the ACMC had failed to afford procedural fairness to the Robinsons.

71 The Court held that procedural fairness was owed to the Robinsons, and had not been afforded. In reaching that conclusion, Chaney J had regard to three key considerations. First, his Honour considered the language of the AH Act. He noted that in ***Western Australia v Bropho***[86] the Full Court of this Court confirmed that nothing in the AH Act evinces a legislative intention to displace the common law requirement for procedural fairness in the decision-making process under s 18.[87] He also noted that there is nothing in the process set out in s 18 of the AH Act which expressly requires consultation with Aboriginal people with interests in sites on the land which is the subject of a s 18 notice,[88] and

[84] ts 5.
[85] ***Robinson v Fielding*** [2015] WASC 108.
[86] ***Western Australia v Bropho*** (1991) 5 WAR 75, 79 (Malcolm CJ), 92 (Anderson J, Franklyn J agreeing at 82).
[87] ***Western Australia v Bropho*** (1991) 5 WAR 75, 79 (Malcolm CJ), 92 (Anderson J, Franklyn J agreeing at 82).
[88] ***Robinson v Fielding*** [2015] WASC 108 [123] (Chaney J).

that the focus of the AH Act was on the 'interest of the community' in the preservation of places of significance to Aboriginal people. Nevertheless, his Honour noted that it was 'plain that the effective operation of the AH Act requires input of some kind from Aboriginal people'[89] because they are the principal source of information as to the existence and significance of sites to which the AH Act applies.

72 Having taken these matters into account, his Honour concluded:[90]

> The scheme of the AH Act is such that the ACMC is obliged, as a matter of procedural fairness to ensure that it has sufficient information from the Aboriginal persons who might be affected by a decision as to the existence, significance and importance of sites which might be affected by a proposal under s 18. That does not mean that it is necessary, as a general rule, to specifically invite persons who might be affected by the decision to make either written or oral submissions before a s 18 decision is made. It may be sufficient to meet the obligation of the ACMC that it invites the proponent to provide appropriate reports which canvass the inquiries made of, and views expressed by, those Aboriginal groups with a connection to the land. Whether anything more might be required in any particular case is a matter to be considered in light of the individual circumstances of each case.
>
> …[R]egard must be had to all the circumstances of a case, including, relevantly for present purposes, 'the stage the proceedings have reached when the repository of the power learns of' the interests which are to be affected. (citations omitted)

73 Secondly, his Honour had regard to the manner in which previous s 18 notices pertaining to the MY site had been handled by the ACMC. The ACMC had recognised the need to have input from Aboriginal groups which would be affected by the proposed works. That information had been put before it through the provision of anthropological reports commissioned and provided by the s 18 proponent. His Honour concluded that that was 'an appropriate and practical way of addressing the performance of the ACMC's statutory function under s 18'.[91]

74 Thirdly, his Honour had regard to the nature of the particular decision made by the ACMC in that case. As his Honour observed, that decision reversed earlier decisions in relation to previous s 18 notices, and was inconsistent with the registration of the MY site as a protected Aboriginal site under the AH Act.[92] He noted that when the MY site was

[89] ***Robinson v Fielding*** [2015] WASC 108 [129] (Chaney J).
[90] ***Robinson v Fielding*** [2015] WASC 108 [140] - [141] (Chaney J).
[91] ***Robinson v Fielding*** [2015] WASC 108 [139] (Chaney J).
[92] ***Robinson v Fielding*** [2015] WASC 108 [134] (Chaney J).

first accepted as an Aboriginal site in 2008, the Robinsons had provided significant input through a process of consultation leading to the preparation of an anthropological report, had made an oral presentation to the ACMC, and had been given the opportunity to respond to another anthropologist's report in relation to the MY site.[93] However, several years later, an anthropologist employed by the Department prepared a report which recommended that the MY site should no longer be recognised as an Aboriginal site under the AH Act. The decision of the ACMC which was under challenge confirmed that assessment of the MY site.

75 Having taken these matters into account, his Honour concluded:[94]

> In this case, the ACMC was confronted with a decision which, in effect, changed the basis upon which it had approached the earlier s 18 notices which related to the [MY site]. As a result of the process undertaken in 2008, the earlier s 18 notices had all been dealt with on the basis that the [MY site] was a site for the purposes of the [AH] Act, and recommendations were made to the Minister to consent to the proposal notwithstanding that fact.
>
> The applicants were entitled to expect that the 2013 s 18 notice would be dealt with on that basis. They had played a significant part in the identification and acceptance of the [MY site] as a site for the purposes of the AH Act. The ACMC was well aware of the identity of the representatives of the affected Aboriginal group. The practical problems identified [namely how to identify people within the class to whom procedural fairness should be afforded, how they might be told of the issues, and how they might be given an opportunity to respond] did not arise in the circumstances confronting the ACMC. In my view, the ACMC was bound to provide an opportunity to the applicants as representatives of the … family group to respond to the proposal contained in the Department report to cease to recognise the [MY site] as a site for the purposes of the [AH] Act.

76 Several observations can be made in relation to the relevance of the decision in ***Robinson*** to this case.

77 **First**, ***Robinson*** does not establish any general principle about the application, or content, of the rules of natural justice in relation to decisions made by the ACMC under s 18 of the AH Act. Justice Chaney observed that the ACMC was obliged, as a matter of procedural fairness, to ensure that it had sufficient information from the Aboriginal people who might be affected by a decision as to the existence, significance and

[93] ***Robinson v Fielding*** [2015] WASC 108 [134] (Chaney J).
[94] ***Robinson v Fielding*** [2015] WASC 108 [142] - [143] (Chaney J).

importance of sites the subject of a notice under s 18. As I read his Honour's observation, it was simply intended as a reference, by way of obiter dicta, to the general principles concerning when a requirement to afford procedural fairness will arise. Those principles are well established. When a statute confers power upon a public official to destroy, defeat or prejudice a person's rights or interests, the common law rules of natural justice will, by implication, apply to the exercise of that power unless they are excluded by a clear manifestation of a contrary statutory intention.[95] Furthermore, the requirement to afford natural justice is not dependent upon the existence of a legal right which may be affected. The presumption that the principles of natural justice condition the exercise of a statutory power 'may apply to any statutory power which is apt to affect any interest possessed by an individual whether or not the interest amounts to a legal right or is a proprietary or financial interest or relates to reputation'.[96]

78 **Secondly**, Chaney J's conclusion that the Robinsons were entitled to procedural fairness very clearly depended upon the particular facts of that case: the Robinsons had been identified as representatives of the Marapikurrinya group who had a spiritual connection with the MY site; in the course of earlier consultations with anthropologists, the Robinsons had played a significant role in the identification and recognition of the site as an Aboriginal site under the AH Act; and the decision of the ACMC represented a significant change to the status of the site in question (namely that it should no longer be recognised as an Aboriginal site under the AH Act) and a marked departure from the approach taken in respect of that site in determining a number of previous applications under s 18 of the AH Act.

79 Although not stated in such terms, his Honour's conclusion is reminiscent of other cases which have suggested that a departure from a practice or promise of consultation may of itself constitute a breach of the

[95] ***Saeed v Minister for Immigration and Citizenship*** [2010] HCA 23; (2010) 241 CLR 252, 258 - 259 [11] - [13] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ); ***Plaintiff S10/2011 v Minister for Immigration and Citizenship*** [2012] HCA 31; (2012) 246 CLR 636 [97] (Gummow, Hayne, Crennan & Bell JJ); ***Annetts v McCann*** (1990) 170 CLR 596, 598 (Mason CJ, Deane & McHugh JJ).

[96] ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 619 (Brennan J); ***Plaintiff S10/2011 v Minister for Immigration and Citizenship*** [2012] HCA 31; (2012) 246 CLR 636 [66] (Gummow, Hayne, Crennan & Bell JJ); cf ***Isbester v Knox City Council*** [2015] HCA 20; (2015) 320 ALR 432 [30] (Kiefel, Bell, Keane & Nettle JJ) for what appears to be an even wider concept of what constitutes an 'interest' sufficient to give rise to a requirement for procedural fairness; and see also Cook E 'Natural Justice: For every man and his dog' (2016) 23 *AJ Admin L* 102.

requirements of natural justice, at least if the interests of a small identifiable group or class of individuals is involved.[97]

80 The factual differences in the present case mean that the decision in ***Robinson*** is not directly applicable in this case.

81 **Thirdly**, although the Respondents submitted that the formulation of the procedural fairness obligation by Chaney J in ***Robinson*** was 'not without difficulty'[98] and that it is doubtful that there is any obligation to afford procedural fairness to Aboriginal people or groups in the context of dealing with notices under s 18,[99] the Respondents did not invite a finding that ***Robinson*** was wrongly decided. Rather, counsel for the Respondents submitted that it was unnecessary to resolve that question in this case because even on the reasoning in ***Robinson***, the ACMC was not required to afford procedural fairness to Ms Abraham. I accept that submission.

(b) Why Ms Abraham's claim that she was entitled to procedural fairness fails

82 For present purposes, I am content to proceed on the assumption, without deciding, that ***Robinson*** was correctly decided, having regard to its very specific factual context. Despite the factual differences in this case, some analogy can arguably be drawn with the facts in ***Robinson***.

83 The facts in this case are that Main Roads, as the proponent of the s 18 Notice, had apparently identified Rev Garlett, as Chair of the CAAC, as a person able to provide information relevant both to the significance of the Sites to Aboriginal people, and to the question whether the proposed works could be undertaken in a manner which preserved the Aboriginal heritage of the Sites. Rev Garlett had been consulted by Main Roads on several occasions in the course of its consultations in relation to the s 18 Notice. In addition, since those consultations had been carried out, the Department had received the Departmental Report, which was to be provided to the ACMC. The Departmental Report recommended that sites DAA 3709 and DAA 4107 did not warrant recognition as Aboriginal sites. That was a position, at least in respect of DAA 4107, that differed from the position which had been adopted prior to that point.

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[97] Cf Aronson M and Groves M, *Judicial Review of Administrative* Action (5th ed, 2013) [7.230], and the cases cited therein, including ***Re Western Australian Planning Commission; Ex parte South Fremantle / Hamilton Hill Residents' Association Inc*** [2005] WASC 50; ***Century Metals and Mining NL v Yeomans*** (1989) 40 FCR 564; ***Geelong Community for Good Life Inc v EPA*** (2008) 20 VR 338, 349 (Cavenough J).

[98] Respondent's submissions, 10 June 2016 [49].

[99] Respondent's submissions, 10 June 2016 [50], [52].

84 In circumstances where the ACMC proposed to consider the s 18 Notice afresh, after a considerable period of time, the ACMC clearly took the view that it should not proceed to make a decision without giving Rev Garlett (along with the other parties previously consulted by Main Roads) the opportunity to make further submissions, including submissions which had regard to the 2014 Departmental Report, should he wish to do so. (I note that the 2014 Departmental Report was among the consultation documents provided with the May 2015 letter.)

85 Even if the decision in ***Robinson*** can arguably be applied, by analogy, to support the conclusion that the ACMC was obliged, as a matter of procedural fairness, to provide Rev Garlett with the opportunity to provide further comments on the s 18 Notice, ***Robinson*** provides no support for Ms Abraham's claim that the ACMC was also required to afford procedural fairness to her, as a member of the CAAC. The consultations with the CAAC prior to that point had been with Rev Garlett, as the Chair of the CAAC and not with Ms Abraham.

86 Ms Abraham submitted that she was denied procedural fairness because *she* had been consulted 'as a member of the [CAAC] between August 2010 and May 2012 prior to the ACMC decision on 13 February 2013' but she 'was not further consulted prior to the [Decision]' being made. [100] I am unable to accept that submission. There was no evidence at all to suggest that Ms Abraham had been personally consulted by Main Roads, as a member of the CAAC or otherwise, in respect of the s 18 Notice. There was also no evidence that the ACMC was even aware that Ms Abraham was a co-Chair of the CAAC. Counsel for Ms Abraham accepted that that was the case.[101] And counsel for Ms Abraham ultimately conceded that Rev Garlett, as the Chair of the CAAC, was the person to whom documentation for the CAAC should have been sent.[102]

87 For completeness, I should mention that in 2011 a s 18 notice was submitted to the ACMC by the City of Cockburn, in relation to DAA 3296, DAA 3709 and DAA 4107 (the 2011 s 18 Notice). Consultations were undertaken by the City of Cockburn in respect of the proposed development the subject of the 2011 s 18 Notice. Ms Butler deposed that Ms Abraham 'was listed as a member of the City's Aboriginal Reference group, which was consulted [by the City of Cockburn] at the first, exploratory stage, and was represented at least once

[100] Applicant's submissions, 4 August 2016 [3].
[101] ts 3.
[102] ts 8.

at a Project Working Group meeting'.[103] However, Ms Butler deposed that Ms Abraham was 'not subsequently listed as a person consulted in the remaining stages'.[104]

88 In the course of his submissions, counsel for Ms Abraham appeared to place reliance on the fact that Ms Abraham was consulted by the City of Cockburn in relation to the 2011 s 18 Notice, as providing support for the conclusion that the ACMC was required to afford procedural fairness to Ms Abraham in respect of the Decision.[105] In my view, that earlier consultation provides no support for the existence of any obligation on the ACMC to afford procedural fairness to Ms Abraham personally in relation to the Decision. Quite apart from the fact that that consultation pertained to an entirely different notice under s 18 of the AH Act, the consultation took place in 2011 and nothing in the evidence suggested that Ms Abraham's contribution was so significant to the recognition of Aboriginal heritage in the sites the subject of the 2011 s 18 Notice as to warrant her being provided with an opportunity to provide comments on a different decision under consideration by the ACMC some years later. Indeed, the fact that Ms Abraham was initially consulted by the City of Cockburn, but not subsequently consulted by it, in relation to the 2011 s 18 Notice, militates against that conclusion.

89 Counsel for Ms Abraham did not offer any other explanation, or reasoning, to explain why Ms Abraham, as a member of the CAAC, was entitled to procedural fairness when the May 2015 letter was distributed.

90 In those circumstances, Ms Abraham's case must fail in so far as she contends that, in her capacity as a member of the CAAC, she was denied procedural fairness because she was not provided with a copy of the May 2015 letter and its attachments, and was not permitted the opportunity to provide comments on the s 18 Notice at that point.

(c) Whether Ms Abraham has established that the ACMC failed to afford procedural fairness to Rev Garlett, Chair of the CAAC

91 I turn to consider that aspect of Ms Abraham's case which is based on the contention that the ACMC failed to afford procedural fairness to Rev Garlett, as the Chair of the CAAC. For the purpose of considering this aspect of her case, I have proceeded on the assumption (without deciding) that the ACMC was required to afford procedural fairness to Rev Garlett, as Chair of the CAAC.

[103] Affidavit of Tanya Maree Butler [17].
[104] Affidavit of Tanya Maree Butler [17].
[105] ts 8.

92 There was no dispute that Rev Garlett had been consulted by Main Roads in the past in relation to the s 18 Notice (as discussed at [26] above). Counsel for Ms Abraham also conceded that Rev Garlett received the May 2015 letter in his capacity as the Chair of the CAAC.[106] Ms Abraham contended that there was a denial of procedural fairness on four bases, namely, that Rev Garlett was provided with an inadequate opportunity to provide a response to the May 2015 letter; was not provided with a copy of the bluesheet; was not put on notice that the ACMC was considering whether to recommend to the Minister that he consent to the proposed works identified in the s 18 Notice; and was not put on notice that at the time of the Decision the ACMC did not have a member who was an anthropologist. Each of these complaints raises a question about the content of the requirement to afford procedural fairness in this case.

93 For the reasons set out below, I am not persuaded that Rev Garlett was denied procedural fairness on any of the bases asserted by Ms Abraham.

(i) Whether there was a denial of procedural fairness because Rev Garlett was provided with an inadequate opportunity to respond to the May 2015 letter

94 As I have already noted above at [54], counsel for Ms Abraham submitted that the 'ultimate basis' for the claim of a denial of procedural fairness was that in all of the circumstances, the provision of documents to Rev Garlett, as Chair of the CAAC, on 27 May 2015 constituted an inadequate opportunity to provide a response.[107] It was submitted that that consultation was inadequate because of the quantity of materials provided and the time in which a response was required.[108]

95 Natural justice requires that a decision-maker give a person whose interests are liable to be adversely affected by a decision the opportunity to be heard. The question whether natural justice has been denied will depend on whether the procedures adopted by the decision-maker in relation to the opportunity to be heard were fair. The term 'procedural fairness' (in contradistinction to 'natural justice') has thus been used to describe 'the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case'.[109]

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[106] ts 3, 5.
[107] ts 5.
[108] ts 6. See also Affidavit of Corina Patricia Abraham sworn 21 June 2016 [7].
[109] ***Kioa v West*** (1985) 159 CLR550, 585 (Mason J).

96 The requirements of procedural fairness are essentially practical, and will depend upon the legislative framework and all the circumstances of the particular case.[110] In very general terms, procedural fairness will encompass considerations of how the party should be heard (for example, orally or in writing), the adequacy of the opportunity to be heard (for example, in terms of the provision of adequate notice of a hearing date or of the deadline for the provision of a written response)[111] and the identification of issues on which the party may wish to be heard (including, in particular, whether the party concerned has been alerted to any critical issue not apparent from the nature of the decision or the terms of the statutory power,[112] or any potential adverse conclusion which would not obviously be open on the known material[113]).

97 Without attempting any exhaustive list, the factors that may be relevant,[114] cumulatively,[115] to determining what constitutes an adequate opportunity to provide a response to a decision-maker will include the importance of the matter being determined, or the consequences of the exercise of power; the number and complexity of the legal and factual issues involved; whether the issues involve legal (or other) expertise and if so, whether the party is legally represented; the volume of materials involved; any opportunity previously provided to assemble any factual materials relevant to the party's case, and to provide any submissions in relation to that case; in a case where there has been an earlier opportunity to present the case, whether any further materials need to be obtained, or whether new issues or materials have been raised before the decision maker to which the party needs to respond; and any statutory time limit, or other time constraint, applicable to the decision-maker's exercise of power.

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[110] ***Heatley v Tasmanian Racing and Gaming Commission*** (1977) 137 CLR 487, 513 - 514 (Aickin J); ***Re Refugee Tribunal; Ex parte Aala*** (2000) 204 CLR 82 [60]; ***Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*** [2003] HCA 6; (2003) 214 CLR 1 [37] (Gleeson CJ), [48] (McHugh & Gummow JJ); ***CPCF v Minister for Immigration and Border Protection*** [2015] HCA 1; (2015) 255 CLR 514 [306] (Kiefel J).

[111] ***Regina v Thames Magistrates' Court; Ex parte Polemis*** [1974] 2 All ER 1219; [1974] 1 WLR 1371, 1375 (Lord Widgery CJ);

[112] ***Minister for Immigration and Citizenship v SZGUR*** (2011) 241 CLR 594, 599 (French CJ & Kiefel J, Heydon & Crennan JJ agreeing).

[113] ***Commission for Australian Capital Territory Revenue v Alphaone Pty Ltd*** (1994) 49 FCR 576, 592; ***SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*** [2006] HCA 63; (2006) 228 CLR 152 [29] ff.

[114] Cf ***Dunghatti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations*** (2011) FCAFC 88; (2011) 195 FCR 318 [84] - [90] (in the context of the requirement that a response to a 'show cause' notice, issued under s 487-10 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), be provided within a 'reasonable period specified in the notice').

[115] Cf ***Ogawa v Minister for Immigration and Citizenship*** [2011] FCA 1358; (2011) 199 FCR 51 [37] (Flick J) (in the context of the requirement for 'reasonable notice' of an invitation to appear before the Migration Review Tribunal under the *Migration Act 1958* (Cth) s 360A(4)).

98 Ms Abraham's contention in relation to the May 2015 letter and its attachments concerned the adequacy of the opportunity afforded to Rev Garlett to be heard. As I have already observed, the May 2015 letter was in evidence, but its attachments were not. However, there was evidence that the consultation documents which accompanied that letter 'amounted to half a metre in depth once printed and included over 1,000 pages of material, including historical research reports.'[116] At first blush, the submission that a two week period was inadequate to respond to such a large volume of material had some attraction. However, in the end, I am not persuaded that the provision of the May 2015 letter and its attachments, in circumstances where a response was required in two weeks, constituted a denial of procedural fairness to Rev Garlett or the CAAC. I have reached that view for five reasons.

99 **First**, there was no evidence at all to suggest that Rev Garlett considered that the opportunity to respond was inadequate. Nothing in the evidence before the Court suggests that Rev Garlett made a submission in response to the May 2015 letter, or complained about a denial of procedural fairness arising from either the circumstances in which the May 2015 letter was sent or the time frame in which a response to the May 2015 letter was required. Counsel for Ms Abraham submitted that 'it cannot be assumed to be the case that Rev Garlett or the [CAAC] … [is] "content with" the [Decision]'[117] as '[t]here may be a variety of reasons … as to why Rev Garlett and others who received the [May 2015 letter and consultation documents] … did not commence or join in proceedings'.[118] However, I note that Ms Abraham did not give evidence that she had even attempted to speak with Rev Garlett to obtain his views in relation to whether he had had an adequate opportunity to respond to the May 2015 letter. Given that there was no evidence that Ms Abraham had attempted to obtain Rev Garlett's views, in respect of the Decision or the circumstances relating to the May 2015 letter, or any explanation as to his silence on the question, I do not see why significance cannot be attached to the absence of any evidence of his views.

100 **Secondly**, the May 2015 letter cannot be considered in isolation. It is well established that where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice will be satisfied 'if the decision-making process, viewed

[116] Affidavit of Tanya Maree Butler, Annexure TMB55 (email from Ms Carolyn Feeney, SWALS), 583.
[117] Applicant's submissions, 4 August 2016 [9].
[118] Applicant's submissions, 4 August 2016 [10].

in its entirety, entails procedural fairness'.[119] As I have already observed, on its face, the May 2015 letter clearly constituted the provision of an opportunity to provide further comments on the s 18 Notice, additional to those which had already been provided by interested parties, in the course of what appears to have been an extensive consultation process by Main Roads.

101 **Thirdly**, a fundamental consideration relevant to whether the May 2015 letter gave rise to any procedural unfairness is whether the consultation documents had previously been provided to the recipients of that letter. With two exceptions - the agenda for the ACMC's meeting on 10 June 2016 and the Departmental Report - all of the consultation documents enclosed with the May 2015 letter predated the ACMC's 2013 Decision. Had the balance of the consultation documents already been provided to those consulted, including Rev Garlett, there could hardly be cause for complaint about the provision of two further documents, in circumstances where a two week period was given in which to respond.

102 There was some limited evidence which suggested that the substance of the material provided may have already been made known to those consulted by Main Roads. Counsel for Ms Abraham pointed to correspondence from two other parties who were consulted, namely, Mr Hayward-Jones and Ms Carolyn Fennelle of the South West Aboriginal Land and Sea Council (SWALSC), who had complained that they were provided with inadequate time to respond. He submitted that that constituted evidence to support Ms Abraham's contention that the consultation with the CAAC was inadequate.[120] The evidence was hardly conclusive. Mr Hayward-Jackson noted that the Department had 'sent a huge amount of material to myself to study and comment on'.[121] However, his complaint was that he was being singled out as 'the other persons consulted attended meetings where the material was summarised and presented verbally to them.'[122] On the other hand, the other complaint was from Ms Carolyn Fennelle, a legal officer for SWALSC, who submitted that in the time frame the SWALSC had 'not had the opportunity to take instructions from our clients on the [s 18 Notice]'.[123]

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[119] ***South Australia v O'Shea*** (1987) 163 CLR 378, 389 (Mason CJ); ***Ainsworth v Criminal Justice Commission*** (1992) 175 CLR 564, 579 (Mason CJ, Dawson, Toohey & Gaudron JJ).
[120] ts 7; Applicant's submissions, 4 August 2016 [12], [13].
[121] Affidavit of Tanya Maree Butler, Annexure TMB54 (email from Mr Iva Hayward-Jackson), 576.
[122] Affidavit of Tanya Maree Butler, Annexure TMB54 (email from Mr Iva Hayward-Jackson) 576.
[123] Affidavit of Tanya Maree Butler, Annexure TMB55 (email from Ms Carolyn Feeney, SWALS), 583.

103 It was regrettable that neither Ms Abraham, nor the Respondents, provided the Court with evidence to clarify whether any of the consultation documents attached to the May 2015 letter had previously been provided to those consulted. The consequence is that no conclusion can be drawn, in the circumstances, that Rev Garlett had not seen, or been made aware of the substance of, those documents which pre-dated the ACMC's 2013 Decision. Having regard to the other matters to which I have referred, it is not possible to conclude that the provision of such a large volume of material, with a two week response period, of itself gave rise to an inadequate opportunity to respond.

104 **Fourthly**, the issue at the heart of the s 18 Notice, which Rev Garlett and the other recipients of the May 2015 letter were given the opportunity to address, was a matter peculiarly within their knowledge, namely, the importance and significance of the Sites from an Aboriginal heritage perspective. The views of those consulted on that issue, and on the question whether consent to the proposed works should be given, or given subject to conditions, had already been the subject of previous consultations. That factor suggests that a further two week period was adequate to provide any comments additional to those which had already been provided in response to the s 18 Notice. Some confirmation of that inference can be derived from the fact that the submissions from both Mr Hayward-Jackson and Ms Fennelle of the SWALSC set out in very clear terms, and in some detail, the opposition of both of those groups to consent being given to the proposed works and the basis for that opposition (namely, the impact of the proposed works on sites of significance to the traditions, observances, customs and beliefs of Whadjuk Noongar people).

105 **Finally**, the ACMC is required by s 18(2) of the AH Act to form its opinion in respect of the s 18 Notice 'as soon as it is reasonably able'. The s 18 Notice (in its revised and final form) was submitted in November 2012. The ACMC's consideration of it had been interrupted for a significant period by the EPA's assessment. Once that assessment had concluded, the ACMC was required to proceed to complete its consideration of the s 18 Notice as soon as it was reasonably able to do so. In view of the previous consideration given to the s 18 Notice, and the lengthy delay, the requirement that any further comments be provided within two weeks of the May 2015 letter does not of itself appear to be unreasonable.

(ii) Whether there was a denial of procedural fairness because Rev Garlett was not provided with a copy of the bluesheet

106 Counsel for Ms Abraham submitted that the bluesheet was 'the document which indicated to the [ACMC] how it should make its decision'[124] and that neither the bluesheet, nor a summary of the factors which it identified as crucial relevant considerations were 'identified to those who received the Notice and whose comments were sought in relation to the [Decision]'.[125] In order to assess this submission, it is necessary to consider the content of the bluesheet.

The content of the bluesheet

107 The bluesheet noted that the s 18 Notice had been considered by the ACMC in February 2013 and that its view at that stage was that the Minister's consent to the proposed works should be declined.

108 The bluesheet noted that DAA 3709 had already been assessed as an Aboriginal site and, therefore, did not require a resolution by the ACMC,[126] but that the ACMC had to consider whether DAA 3296 and DAA 4107 should be identified as Aboriginal sites. It made reference to the 2014 Departmental Report, in which departmental officers had assessed the sites and found that they had been subject to high degrees of disturbance due to previous development activities. The bluesheet pointed out that if DAA 3296 and DAA 4107 were not recognised as Aboriginal sites, and if the proposed works were to proceed, Aboriginal site DAA 3709 '[would] be impacted'.[127]

109 The bluesheet confirmed that if the proposed works were to be carried out on the land in question without the Minister's consent there would be a breach of s 17 of the AH Act.

110 The bluesheet summarised the consultation that had been undertaken in respect of the s 18 Notice and noted, amongst other things, that the 'Cockburn Aboriginal Advisory Committee (Rev Garlett)' had been consulted. The bluesheet summarised the outcome of the consultations and noted that:[128]

> Twenty-eight Aboriginal people consulted objected to the placement of the Roe Highway extension through the Bibra Lake / North Lake area [that is,

[124] ts 6.
[125] Affidavit of Corina Patricia Abraham sworn 21 June 2016 [8].
[126] Affidavit of Tanya Maree Butler, Annexure TMB53, 570.
[127] Affidavit of Tanya Maree Butler, Annexure TMB53, 572.
[128] Affidavit of Tanya Maree Butler, Annexure TMB53, 571.

> the Sites] on the basis that the proposed works were incompatible with existing heritage and environmental values. Twenty-six Aboriginal people were prepared to offer their support if certain conditions were met. All Aboriginal people consulted reinforced the high level of cultural significance accorded to the Bibra Lake area due to its association with a sacred narrative, its regular use as a traditional camping-resource gathering area and as a favoured location for traditional Aboriginal women to give birth.

111 The division of opinion which had emerged during the consultation was expressly noted. It was stated that:

> [O]pinions amongst the groups as to the effect the [proposed works] would have on the Aboriginal heritage values of the [Sites] differed substantially. At one end of the spectrum, one Aboriginal group acknowledged that previous disturbance had already occurred and that the [proposed works] would not result in any impact to the association of the Waugal with Bibra and North Lakes, however, another group likened the [proposed works] to the 'desecration of a cathedral'.[129]

112 The bluesheet also set out a number of 'common requests' which had emerged from the 54 Aboriginal people consulted, such as the need for Aboriginal monitors to be present during ground-disturbing activities to observe archaeological material that may be uncovered and to salvage and relocate any objects discovered; marking the highway extension with signage, plaques and artwork commemorating the use and occupation of the area by Aboriginal people and the association of the Waugal with the area; the revegetation of the area with native plants upon completion of the works; and that Aboriginal heritage places not be disturbed and be retained in public open space.

113 The bluesheet then set out a number of 'Points to Consider'. These included that Main Roads had indicated that the proposed works would be constructed to minimise the impact on the Aboriginal sites, that Aboriginal monitors would be engaged during ground-disturbing activities, and that signage, plaques and artwork would be placed along the highway extension to commemorate the area's original Aboriginal owners.

114 Finally, the bluesheet suggested a number of conditions which could be imposed if the Minister's consent were given to the proposed works in the s 18 Notice.

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[129] Affidavit of Tanya Maree Butler, Annexure TMB53, 572.

Whether the failure to provide the bluesheet constituted a denial of procedural fairness

115 In my view, there are four reasons why no procedural unfairness arose by virtue of the fact that the bluesheet was not provided to Rev Garlett.

116 **First**, it must be remembered that the ACMC is not a tribunal. It does not conduct an adversarial process. It is an inquisitorial body whose role is to form an opinion as to whether there is any Aboriginal site on given land, to evaluate the importance and significance of any such site, and to consider whether or not the Minister's consent to a development should be given, and any conditions which should be imposed in the event that consent is given. Consequently, it cannot be said that the ACMC was required to provide the persons consulted with a copy of every document to which it might have regard in forming its opinion. Failure to provide the bluesheet could not be said to constitute a denial of procedural fairness in those circumstances.

117 **Secondly**, the basis for the submission by counsel for Ms Abraham that the bluesheet should have been provided to Rev Garlett appears to have been his characterisation of that document as containing a recommendation to the ACMC as to the opinion which it should form in respect of the s 18 Notice. However, there is no general requirement for a decision-maker 'to expose his or her thought processes or provisional views for comment before making a decision'.[130]

118 **Thirdly**, and in any event, the bluesheet does not contain any recommendation as to the decision that the ACMC should make. In the course of the hearing, counsel for Ms Abraham accepted that that was so.[131] In my view, on a fair reading of the bluesheet it constitutes an overview of the issues the ACMC had to determine and what material and information was before the ACMC. The overall tenor of the bluesheet does not appear to be weighted in favour of recommending consent.

119 Viewed in the context of the totality of the bluesheet, the inclusion of 'suggested conditions' appears to have been intended to cover the contingency that the ACMC might decide to recommend that approval be given, in which case it would have needed to give consideration to whether that consent should be conditional.

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[130] ***Minister for Immigration and Citizenship v SZGUR*** (2011) 241 CLR 594, 599 (French CJ & Kiefel J, Heydon & Crennan JJ agreeing).
[131] ts 15.

120 **Fourthly**, I do not accept the submission by counsel for Ms Abraham that because the bluesheet discussed the conditions which could be imposed if the Minister gave his consent to the work, the provision of the bluesheet would have drawn to the attention of those consulted that it was possible that the ACMC would decide to recommend to the Minister that his consent should be given to the work.[132] As I have already observed, procedural fairness will require that a party be alerted to any critical issues relevant to a decision, to the extent that those are not apparent from the nature of the decision or the terms of the statutory power. In my view, the possibility that the ACMC might recommend that the Minister grant consent and, if so, that he do so subject to certain conditions, was apparent from the terms of s 18(2) of the AH Act itself. Furthermore, in so far as it dealt with the conditions that could be imposed, the bluesheet largely reflected the content of a previous report on consultations undertaken with Aboriginal people in 2012.[133] Ms Abraham deposed that she was aware of that report.[134] In addition, a copy of that document was among the consultation documents provided with the May 2015 letter. For those reasons I am not persuaded that the bluesheet would have alerted those consulted to any critical issue about which they were not already aware.

121 **Finally**, I note that the emphasis placed by counsel for Ms Abraham on the significance of the bluesheet derived from the fact that in his view, having regard to the documentation which was before the ACMC, it was not possible to identify 'any rational basis for the change in [the ACMC's] position, other than what was in the blue sheet'.[135] (There was no explanation in the Decision itself, nor were any reasons subsequently provided, as to why the Decision was diametrically opposed to the 2013 Decision.) As no challenge is made to the Decision on any basis related to the rationality of the conclusion reached by the ACMC it is not necessary to say anything further about that matter. For present purposes, the point is that nothing in the bluesheet supports the conclusion that any unfairness resulted from the fact that it was not provided to those to whom the May 2015 letter was sent.

[132] ts 23.
[133] Affidavit of Tanya Maree Butler, Annexure TMB41, 414.
[134] Affidavit of Corina Abraham sworn 28 January 2016 [15].
[135] ts 18.

(iii) Whether there was a denial of procedural fairness because it was not drawn to Rev Garlett's attention that the ACMC was considering whether to recommend that the Minister consent to the proposed works

122 Counsel for Ms Abraham submitted that the possibility that the ACMC could reach a decision different from the 2013 Decision was a 'critical issue or factor' which should have been drawn to the attention of the CAAC so that the CAAC could have an opportunity to respond to it.[136] He submitted that the Aboriginal people consulted:[137]

> [H]ad no reason to believe that the ACMC, when it considered the [s 18 Notice] again on 10 June 2015 … would reach any other decision than it had on 13 February 2013; certainly not without providing them with an opportunity to comment upon the issues which it was likely to take into account in reaching its decision.

123 Counsel submitted that without the possibility of a change in position being expressly drawn to their attention, those consulted would have expected that the ACMC would reach the same conclusion that it had previously reached in the 2013 Decision.[138]

124 I am unable to accept that submission, for three reasons.

125 **First**, the submission by counsel for Ms Abraham appeared to be based on the premise that the ACMC's 2013 Decision (to recommend that the Minister refuse his consent to the proposed works in the s 18 Notice) had been made public.[139] Counsel for Ms Abraham submitted that the CAAC:[140]

> [W]ere already aware that there had been a decision on 13 February 2013, which said that the site should be protected and so it gave them an expectation that that decision might be the same. And so that combination of factors meant that they were not apprised of what the [ACMC] might critically take into account to effectively reverse its decision.

126 However, there was no evidence that the 2013 Decision had in fact been publicly disclosed, or disclosed to Rev Garlett. Ms Abraham did not depose to having any knowledge of the 2013 Decision prior to the Decision (in 2015). To the extent that there was any evidence in relation to public knowledge of the 2013 Decision, the evidence tends to suggest

[136] ts 9; Applicant's submissions, 23 June 2016 [29].
[137] Applicant's submissions, 23 June 2016 [28].
[138] ts 22.
[139] ts 9.
[140] ts 9, 10.

that that decision had not been publicly disclosed. Ms Butler deposed that on 20 February 2013, an officer of Main Roads had made an enquiry of the Department as to the outcome of the ACMC's consideration of the s 18 Notice at its meeting on 13 February 2013.[141] The officer was told that the ACMC had considered the s 18 Notice but that the outcome of the recommendation would not be disclosed as the Minister had not made a decision, and was not in a position to do so at that stage as the government was then in 'caretaker mode'.[142]

127 **Secondly**, as I have already noted, procedural fairness will require that a decision maker alert a party to any critical issue relevant to the decision, but only to the extent that such issues are not apparent from the nature of the decision or the terms of the statutory power. In my view, it was apparent from the terms of s 18(2) of the AH Act that the ACMC was required to consider whether there was an Aboriginal site or sites on the land on which the proposed works were to be undertaken, the importance and significance of any such site, and whether the Minister should consent to the proposed works, and if so, the conditions upon which his consent should be given. As such, in my view, it was unnecessary for the ACMC to expressly draw those issues to the attention of those to whom the May 2015 letter was sent.

128 **Thirdly**, the May 2015 letter made clear that although the s 18 Notice had been presented to the ACMC in February 2013, it was to be considered again by the ACMC at its meeting on 10 June 2015, at which time all information previously provided by those consulted, and any other information provided in response to the May 2015 letter, would be considered. In my view, it was apparent that the ACMC intended to consider the s 18 Notice afresh and to make a decision at its meeting on 10 June 2015. That of itself was sufficient to make clear that it was open to the ACMC to recommend that the Minister consent to the proposed works.

(iv) Whether there was a denial of procedural fairness because Rev Garlett was not put on notice that at the time of the Decision, the ACMC did not have a member who was an anthropologist

129 In the course of his submissions, counsel for Ms Abraham advanced an additional argument, namely, that in February 2013, when the ACMC made its decision, one of its members was an anthropologist. Counsel for Ms Abraham submitted that at the time of the Decision, that individual

[141] Affidavit of Tanya Maree Butler [50].
[142] Affidavit of Tanya Maree Butler, Annexure TMB47.

was no longer a member of the ACMC and despite the fact that the AH Act requires that an anthropologist be a member of the ACMC,[143] no anthropologist had been appointed to the ACMC to replace that former member.[144] He submitted that in circumstances where no person with anthropological experience would be participating in reaching the Decision, it was important that those consulted were so advised and given the opportunity to make submissions about the significance of the Sites, and a submission that the ACMC should not proceed in making a decision.[145]

130 I do not accept that procedural fairness required that those matters be drawn to the attention of Rev Garlett. The composition of the ACMC at the time of the Decision could not be described as a 'critical' issue which should have been brought to the attention of those to whom the May 2015 letter was sent. Nothing in the AH Act requires that when the ACMC makes a decision under s 18, its anthropologist member must participate in that decision. Although the AH Act requires that one of the appointed members of the ACMC have specialised experience in anthropology as related to the Aboriginal people of Australia,[146] the requirements for a quorum to constitute a meeting of the ACMC do not mandate the participation of that member in any or all decisions of the ACMC.[147] Furthermore, the performance of the functions of the ACMC is not affected by reason of there being a vacancy in the office of a member.[148]

6. Discretionary considerations

131 Ms Abraham has not established that the ACMC owed her a duty to afford procedural fairness, or that there was a breach of any requirement to afford procedural fairness to Rev Garlett, as the Chair of the CAAC.

132 In those circumstances, it is unnecessary to deal with the Respondents' submissions that even if a denial of procedural fairness was found to have occurred, a writ of certiorari should be refused in the exercise of the Court's discretion. (A key consideration in those discretionary factors would have been whether Ms Abraham should be regarded as a 'stranger' to the proceedings for the purpose of the issue of a writ of certiorari.)

[143] *Aboriginal Heritage Act 1972* (WA) s 28(3).
[144] ts 25.
[145] ts 26.
[146] *Aboriginal Heritage Act 1972* (WA) s 28(3).
[147] *Aboriginal Heritage Act 1972* (WA) s 32(1).
[148] *Aboriginal Heritage Act 1972* (WA) s 33(3).

133 However, it is appropriate to make one final observation, namely, that had I concluded that a basis for certiorari had been established, I would have sought the parties' submissions in relation to the question whether certiorari should issue. That is because the Minister has not yet made a decision in respect of the s 18 Notice. The Minister may conclude that he should refuse to give consent, notwithstanding the Decision. The existence of that possibility would have raised the question whether a writ of certiorari would be an appropriate form of relief, or whether some alternative form of relief, such as a declaration, might have been more appropriate.[149]

Conclusion

134 Leave to bring the Application out of time should be granted but the Application should be dismissed.

[149] Cf ***Ainsworth v Criminal Justice Commission*** (1992) 175 CLR 564, 580 - 581 (Mason CJ, Dawson, Toohey & Gaudron JJ).