

COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA NUMBER: 2558/25
Number. B.S. 9292/23

Appellant: **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT, SCIENCE AND INNOVATION**
(Respondent on cross-appeal)

AND

Respondent: **NAGANA YARRBAYN WANGAN AND JAGALINGOU CULTURAL CUSTODIANS LTD ACN 668 011 872**
(Applicant on cross-appeal)

**OUTLINE OF ARGUMENT ON CROSS APPEAL
QUEENSLAND HUMAN RIGHTS COMMISSION (INTERVENING)**

Introduction

1. Nagana's¹ application for leave to cross-appeal and DESI's notice of contention require the determination of the following matters pertaining to the application of the *JR Act* to the **decision** by DESI not to exercise its **powers** under the *EP Act* to restrain environmental **activities** by Carmichael to protect the Springs from harm:
 - (a) Did the decision bear the qualities of a "decision" in the sense discussed in *ABT v Bond*?²
 - (b) Was it a "decision to which [the JR Act] applies" within the meaning of s 4(a) *JR Act*, by meeting the second criterion identified by the High Court in *Griffith University v Tang*³ that the decision "*itself confer, alter or otherwise affect legal rights or obligations*"?
 - (c) Did the decision have a "*discernible or apparent legal effect upon rights*"⁴ to ground relief in the nature of a writ of certiorari under Part 5 *JR Act*?
 - (d) Is there a duty placed on DESI to determine Nagana's request to exercise its powers to ground relief in the nature of a writ of mandamus?
2. The Commission makes submissions in support of Nagana's contentions that each question be answered in the affirmative by addressing the following matters relevant to the application of the *HR Act*.
3. **First**, Nagana's members' rights, interests and obligations arising from their connection to, and obligations for the Springs, as traditional custodians under Indigenous law and custom fall within the protections in s 28 of the *HR Act* (**s 28 rights**). Section 28 rights impose a positive obligation on the State to protect against the denial of s 28 rights.
4. **Second**, s 48 *HR Act*, in its protection of s 28 rights, leads to a construction of the discretionary powers under the *EP Act* relied upon by Nagana, that requires DESI to consider

¹ These submissions adopt the terminology as explained in the Commission's appeal submissions.

² *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337-8.

³ *Griffith University v Tang* (2005) 221 CLR 99, [10], [89].

⁴ *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149, 159.

and determine whether, and if so, how those powers should be exercised, protectively of Nagana's s 28 rights "according to the rules of reason and justice".⁵ Section 58 obligations also attend that decision.⁶

5. **Third**, DESI's decision not to exercise its powers, in the context of its authorisation of the activities under the EA, has the effect of facilitating or failing to protect against, the denial of Nagana members' s 28 rights. It also contravened the obligations in s 58 *HR Act*.
6. **Fourth**, these effects are sufficient to meet the second *Tang* criterion and provide grounds for the issue of a writ of certiorari in respect of the decision. This follows from a human-rights compatible reading of s 4 *JR Act* under s 48 *HR Act* and more generally, the nature of the effects of the decision upon Nagana's s 28 rights and the obligation to properly consider them.
7. **Fifth**, it follows from the second point above that the decision is one DESI is obliged to at least consider, and a writ of mandamus would be available to that end.

Nature of the rights protected by s 28

8. Nagana set out in correspondence to DESI the nature of its members' rights, interests and duties in and for the Springs as traditional custodians under Indigenous law and custom, including that the Springs are sacred to them.⁷ They have also asserted, with scientific support, that irreparable harm to the Springs is being caused or seriously threatened.⁸ This compromises the survival of their cultural rights. Given the summary nature of the application below, this material ought be taken at its height.⁹
9. Common law courts have recognised the "special relationship"¹⁰ between First Nations people and 'country' going beyond cultural rights and interests to also encompass obligations as traditional custodians.¹¹ The loss occasioned by alienation or destruction of such rights has been recognised as permanent, with intergenerational impacts.¹²
10. The Queensland Parliament, in enacting the *HR Act* reflected this by acknowledging the "distinctive and diverse spiritual, material and economic" relationship between First Nations people and their lands and waters in the Preamble and with specific protection in s 28. As described in the secondary materials, s 28 is directed to "*ensuring the survival and continual development of culture*".¹³
11. Section 28 is not dependent on the recognition of native title.¹⁴ Rather, it is 'connection' under Aboriginal or Island custom which provides the entitlement to not be denied the right to maintain and strengthen the distinctive relationship with lands and waters provided for in s 28(2)(d), and to not be denied the right to conserve and protect the environment of their lands and waters, in s 28(2)(e). Such connection does not require residence.¹⁵ Nor does it require continued connection.¹⁶ The Inter-American Court (**IACHR**) has held that what is

⁵ *Murphyores* (1976) 136 CLR 1, 17-18, citing *R v Anderson, ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 197-199.

⁶ DESI being a "public entity" under s 9(1)(a) *HR Act*.

⁷ Letter from Nixon Law to the Hon Ms Linard, dated 23 November 2023, pp 1, 3 (**November letter**); Letter from Ninox Law to Mr Lawrence, dated 22 December 2023, (**December letter**), pp 2-3, 5.

⁸ December letter, p5.

⁹ Judgment [22].

¹⁰ *Mabo v State of Queensland (No. 2)* (1992) 175 CLR 1, 99.

¹¹ *Love v The Commonwealth* (2020) 270 CLR 152, [276], [290], [362].

¹² *Northern Territory v Griffiths* (2019) 269 CLR 1, [153], [187], [230].

¹³ Explanatory Notes, *Human Rights Bill 2018* (Qld) (**EN**) 1, 23.

¹⁴ *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, [1540].

¹⁵ *Clark-Ugle v Clark* [2016] VSCA 44 at [143].

¹⁶ Cf. the strictures of the *Native Title Act 1993* (Cth).

required to establish a connection can vary,¹⁷ and human rights connection may be retained even if traditional access is temporarily lost due to factors outside of the control of traditional custodians.¹⁸

12. Here, connection is asserted¹⁹ and can be accepted, particularly in circumstances where a beneficial approach to the scope of the right must be taken.²⁰
13. Section 28 draws together concepts derived from Art 27 of the *International Covenant on Civil and Political Rights (ICCPR)*²¹ in its protection of minority rights, and from Art 8, 25, 29 and 31 of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*²² in its more particular protection of First Nations cultural rights.²³ Section 48(3) *HR Act* provides that regard may be had to international law and jurisprudence in interpreting the scope of rights *HR Act*, with the usual caution.²⁴
14. The United Nations Human Rights Committee (**HRC**) has recognised that the enjoyment of culture protected in Art 27 *ICCPR* includes “the close ties of indigenous peoples to the land... as the fundamental basis of their cultures, spiritual life, integrity and economic survival. Their relations to the land are a material and spiritual element which they must fully enjoy to preserve their cultural legacy and transmit it to future generations and are, therefore, a prerequisite to “prevent their extinction as a people”. Accordingly, Art 27, interpreted in light of the *UNDRIP*, protects “the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity...”²⁵
15. The introductory phrase in s 28(2) *HR Act*, “must not be denied the right”, derives from Art 27 *ICCPR*. This may indicate non-derogable²⁶ protection only against measures placing more substantial²⁷ restrictions on the right than those which would be found to limit other human rights.²⁸ However, whether that is so has not been determined under the analogue provisions in Victoria²⁹ and the ACT and the Commission submits that a strict approach ought not be taken to s 28 (albeit that this need not be determined in this case, given the nature of the infringement that has been asserted). This is because: (a) the language in s 28(1) states in positive terms that First Nations peoples hold distinct cultural rights and s 28(2) ought be read in that context;³⁰ (b) s 28 draws not only from s 27 *ICCPR* but also the

¹⁷ *Kichwa Indigenous Peoples of Sarayaku v Ecuador (Merits and Reparations)*, IACHR Series C No 245, 27 June 2012), 37 [148].

¹⁸ *Xakmok Kasek Indigenous Community v Paraguay (Merits, Reparations, and Costs)*, IACHR Series C No 214, 24 August 2010, 28 [114]-[115].

¹⁹ November letter pp 1, 3; December 2023 letter, pp 2-3.

²⁰ See footnote 32.

²¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**).

²² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) (**UNDRIP**).

²³ EN, 23.

²⁴ *Momcilovic v The Queen* (2011) 245 CLR 1, [18]-[19], [155]-[161].

²⁵ Human Rights Committee, *Views: Communication No 2552/2015*, UN Doc CCPR/C/132/D/2552/2015 (21 September 2022) (*‘Pereira and the other members of the Campo Agua’ẽ indigenous community v. Paraguay’*) [8.6]. See also Human Rights Committee, *Views: Communication No. 3624/2019*, UN Doc CCPR/C/135/D/3624/2019 (18 September 2023) (*‘Billy and others v. Australia’*) [8.13].

²⁶ Without considering justified limits.

²⁷ *Länsman v Finland*, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (1995) 2 IHRR 287 (UNHRC 1994, 26 October 1994, United Nations Human Rights Committee (**UNHCR**) at [9.5]; *Länsman v Finland*, UNHCR *Views: Communication No 1023/2001*, UN Doc CCPR/C/83/D/1023/2001 (17 March 2005) [10.1], [10.3].

²⁸ Actual or potential limitation or restriction on, or interference with the right: *Innes v Electoral Commission of Queensland (No 2)* (2022) 5 QR 623 at [290]-[291].

²⁹ *Cemino v Cannon* (2018) 56 VR 280, 521-3 [139]-[148], referring to argument of VEOHRC at 515 [114].

³⁰ *Waratah Coal*, [1518], [1524].

UNDRIP which rights are framed in positive terms,³¹ a matter noted in the explanatory material³² with no indication of a distinct approach from other rights; (c) human rights are to be interpreted liberally and not technically;³³ (d) to ensure harmonious application of ss 8 and 13; and (e) even under Art 27 *ICCPR*, the UNHCR has recognised a positive obligation on states:

*... to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party... directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned... States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected...*³⁴

16. With respect to the environmental rights in sub-s(2)(d) and (e), the word “strengthen” in sub-s (2)(d) and the specific right to protect the environment in sub-s (2)(e) go further than comparative provisions in Victoria and the ACT. “Strengthen” in Art 25 *UNDRIP* indicates that the state duty is a positive one requiring active measures.³⁵ Art 29 *UNDRIP*, on which the right in sub-s (2)(e) is modelled, reflects the fact that there is a “profound relationship, even an interdependence, between the protection of the environment and the enjoyment of human rights”³⁶ such that Indigenous peoples may suffer particular, and devastating, impacts on their rights through environmental degradation.³⁷
17. In *Pereira and the other members of the Campo Agua’ẽ indigenous community v Paraguay*, large scale fumigation conducted by two farms, in systematic breach of domestic environmental laws, had destroyed natural resources on indigenous territory that were a source of food and the origin of ancestral cultural practices, exacerbated conditions of poverty, and had impacted the community’s health. The UNHRC accepted the State had violated Art 27, as the threat was reasonably foreseeable, the State had been notified of the impact on community members and had pressed charges, but nevertheless had not put a stop to the activities, provided an alternative explanation or demonstrated having taken any steps to protect the rights of the authors and other community members to their cultural life.³⁸
18. *Billy and others v Australia* concerned the effects of climate change and sea-level rise on the authors’ home in the Torres Strait Islands. The authors alleged Australia had, *inter alia*, breached Article 27 by failing to adopt adaptation measures (infrastructure to protect against the impact of climate change, especially sea-level rise) and mitigation measures (to reduce greenhouse gas emissions). The UNHRC agreed, noting that climate change impacts had already eroded traditional lands and resources used for cultural practices that could only be formed on the islands, and the authors’ claim that the health of the land and surrounding seas is closely linked to their cultural integrity. Threats due to climate impacts could have been reasonably foreseen by the State, which community members had began raising in the 1990s. On the information available, the Committee found “the State party’s failure to adopt

³¹ Articles 29 and 31 *UNDRIP* include express State obligations to take ‘effective measures’ to preserve rights.

³² EN, 23.

³³ *Owen-D’Arcy v Queensland Corrective Services* (2021) 9 QR 250, 296-7, and fn 60 and 61.

³⁴ Human Rights Committee, *CCPR General Comment No 23*: Article 27 (Rights of Minorities), *UN Doc CCPR/C/21/Revi.1/Add.5* (8 April 1994), [6.1], [9].

³⁵ Claire Charters ‘Rights to Land, Territories and Resources’ in *The UN Declaration of the Rights of Indigenous Peoples: A Commentary (UNDRIP Commentary)* Jessie Hohmann and Marc Weller (eds) 412.

³⁶ Stefania Errico, ‘Natural Resources and Environment’ in *UNDRIP Commentary* 452. See International Court of Justice, *Obligations of States in Respect of Climate Change*, *Advisory Opinion* (23 July 2025) [373].

³⁷ *Advisory Opinion* [382].

³⁸ *Pereira* [8.8.]

timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture."³⁹

19. Regional human rights courts have also found that states are under the obligation to take preventive and positive action to ensure environmental harm does not compromise a range of human rights of Indigenous peoples.⁴⁰ The CERD Committee has called on a state party to take positive measures to respect and protect the rights of Indigenous peoples, in particular the right to health and cultural rights, that may be infringed by activities threatening their environment and/or disregarding the spiritual and cultural significance they give to their ancestral lands.⁴¹
20. The IACHR has emphasised that these positive measures must include ensuring compliance with national environmental standards imposed on resource projects and imposing sanctions for non-compliance.⁴² It has stated that:

*Compliance with the State duty to implement and enforce existing environmental standards is required in order for extractive projects not to compromise the exercise of human rights: 'The Commission recognizes that the right to development implies that each state has the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment. However, the Commission considers that the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention'.*⁴³

21. This requires ensuring both that the state's own actors comply with their domestic obligations, and that they enforce their own standards and regulations in relation to non-State actors.⁴⁴

Construction of the obligations under the *EP Act*

22. The *EP Act* definitions of 'environment' (s 8(a), (d) and (e)) and 'environmental value' (s 9(d)), folded into the definitions of 'environmental harm' (s 14) and 'environmental nuisance' (s 15) indicate that the protective object (s 3) and powers of the *EP Act* are also directed at the human and cultural components of the environment, and specifically the "*cultural and spiritual values of water*"; including its significance to past, present and future generations of First Nations peoples.⁴⁵ The protection of these rights and interests is an important public power reposed in DESI.
23. Section 6 *EP Act*, which requires "*as far as practicable*" consultation with, *inter alia*, First Nations peoples, is consistent with and strengthened by the application of s 58 *HR Act* to DESI decisions which together provide a statutory source for DESI's stated policy to seek to

³⁹ *Billy* [8.14].

⁴⁰ African Commission on Human and Peoples Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (Communication No 155/96) [2001] ACHPR 35 (27 October 2021) (**Ogoni People case**) [52]-[53] (in the context of the African Charter's recognition of the right to a general satisfactory environment and the right to health); IACtHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands*-Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II, Doc 56/09 (30 December 2009) [194]-[197].

⁴¹ CERD Committee, Early Warning and Urgent Action Procedure CERD/USA/DEC/1 [8].

⁴² IACtHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands* [198]-[200].

⁴³ *Ibid* [201].

⁴⁴ IACtHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands* [201], [203].

⁴⁵ Rule 6(2)(k) and (3) of the *Environmental Protection (Water and Wetland Biodiversity) Policy* 2019.

meet its obligations under the *UNDRIP* and the *HR Act* with respect to First Nations peoples irrespective of the application of the *NTA*.⁴⁶

24. The powers in the *EP Act* sought to be engaged by Nagana's application included ss 358 (EPOs), 363A-E (directions notices*), 363F-L (clean up notices*), 465-6 (information-gathering), 467 (emergency powers), 505 (restraint proceedings) and 507 (enforceable undertakings). These are each discretionary powers, but fall within an 'integrated management program' (s 4(1)) that imposes environmental duties on those conducting activities (Ch 7 Part 1) including notification requirements (in Div 2) and grants powers to DESI to assess, audit and investigate suspected environmental harm (Ch 7 Part 2) including a mandatory investigation power triggered by satisfaction there has been an event causing environmental harm during an activity (in Div 3, s 326B). The *EP Act* requires the exercise of functions in a way to best achieve the protective object of the Act (s 5).
25. Section 48 supports a construction of the powers relied upon by Nagana as conferring both a power and duty, so as to read compatibly with the s 28 rights.⁴⁷ Properly construed in this light, including the positive obligations inhering in s 28, the protective suite of powers reposed in DESI by the *EP Act* are of the kind that Parliament can be taken to have intended to be exercised where the occasion arises,⁴⁸ such that a mandatory order may issue requiring DESI to consider the exercise of such powers according to law, including by the due application of s 58. This is unaffected by the availability to Nagana of bringing enforcement action under s 505 *EP Act*.

DESI's decision affected rights and obligations for the purposes of the *JR Act*

26. DESI's decision not to exercise its powers under the *EP Act* occurred in the context of its earlier authorisation of Carmichael's activities under the EA. The power to authorise environmental activities having already been exercised, the decision not to take steps to police the boundaries of that authorisation through the exercise of one of its suite of 'integrated management program' powers can thus more readily be seen as facilitating the denial of Nagana members' cultural rights by Carmichael or at least failing to protect against that denial. That the activities of Carmichael amount to such at denial is asserted by Nagana⁴⁹ and supported by the scientific reports provided. It ought to be assumed for the purposes of this application, taking that material at its height.
27. The primary judge with respect correctly determined the first limb of *Tang* was satisfied, namely that the decision was a 'decision' of a final or operative character (J [29]).⁵⁰ *Tang* did not decide that a decision *not* to exercise a statutory power where the opposite decision would affect relevant rights, is not made under an enactment.⁵¹
28. In respect of the second limb of *Tang*, the plurality recognised that, while the *decision* must be made under an enactment, the affected legal rights or obligations may be founded

⁴⁶ Department of Environment and Science, *The Gurra Gurra Framework 2020-2026* 9, 12.

* Since repealed.

⁴⁷ See obiter statements in *Kheir v Secretary to the Department of Justice and Regulation* [2019] VSC 76 at [21] and *Dudley v Secretary, Department of Justice & Community Safety* (2021) 66 VR 403, 438-9 [87].

⁴⁸ *Murphyores*, 17-18; *Yasmin v Attorney-General* (2015) 236 FCR 169, [68], [74]-[75], [79], [110]; *Pyrenees Shire Council v Day* (1998) 192 CLR 330, [23]; *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214, 222-223; *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 88.

⁴⁹ December letter, p5.

⁵⁰ *Bond*, 336.

⁵¹ *Agriwealth* (2019) 163 ALD 541, [64]; *WorldAudio Ltd v Australian Communications and Media Authority* (2006) 149 FCR 462, [30]-[32], [50], [56], [60].

elsewhere⁵² or may arise anew as a consequence of the decision made.⁵³ Gummow, Callinan and Heydon JJ expressly recognised “[A]ffection of rights or obligations derived from the general law or statute will suffice.”⁵⁴ The relevant ‘rights’ with which the second limb of *Tang* is concerned is thus broad enough to include the rights cited by Nagana.

29. There must, of course, be some nexus between the rights or obligations and the decision made under the enactment.⁵⁵ That is, does the *affect* on rights arise because of the decision made under the empowering statute? This question can be answered affirmatively due to: the statutory protection of the s 28 rights, the consistency of the recognition of such a right within the protective purposes of the *EP Act*, and construing the requirement in s 4 *JR Act* compatibly with human rights under s 48(1).⁵⁶
30. The *JR Act*, unlike the federal statute, must be interpreted in the Queensland context as a human rights jurisdiction. The Victorian decision in *Noone*⁵⁷ is of no assistance as the interpretive process is always confined by the statutory provision in issue. The Court there found it significant that both the state and cognate federal statute “already possessed a well-understood and settled meaning”, but in that case, the *mens rea* requirement sought to be implied using s 32 of the *Charter* would have defeated the purpose of that section.
31. The term ‘decision’ is not expressly defined in the *JR Act*, indicating a constructional choice. This is supported by s 5 which identifies the making or failure to make ‘a decision’ is to be given broad ambit, including (g) “doing or refusing to do anything else”. It is contended that Parliament’s statutory recognition of s 28 rights in the *HR Act* cloak an infringing effect upon them with the necessary legal quality, at least for the purposes of decisions under the *EP Act*, which expressly includes protections for such rights.
32. For the same reason, even absent the application of s 48, apparent infringement of s 28 rights should now be sufficient to ground orders in the nature of certiorari in respect of decisions under the *EP Act*.
33. To so hold does not give s 28 ‘freestanding’ operation; but rather, recognises that the infringement of the rights it protects is sufficient to ground administrative law relief in respect of decisions under the *EP Act*, which expressly includes protecting cultural rights associated with the environment.⁵⁸ There is no justification for corraling the impact on statutory human rights from that of other rights and interests, simply because they are recognised in the *HR Act*. Section 59 will still operate to require that unlawfulness under non-s 58 grounds be available before a remedy on human rights grounds can be obtained.
34. Further, the decision affects procedural fairness rights, both those existing at common law and arising under s 58. Section 58(1) makes it unlawful for a public entity to (a) make a decision in a way that is not compatible with human rights and, (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision. Consequently, the obligations under s 58(1) are a precursor statutory step imported into acts or decisions

⁵² *Tang* at [85].

⁵³ *Tang* at [89].

⁵⁴ *Tang* at [89].

⁵⁵ *Tang* at [79]-[87].

⁵⁶ *Hunt v Gerard* [2025] QCA 126 at [102]-[104] (Bond JA) c.f. at [127]-[129] (Brown JA and Ryan J). cf. also *BZN v Chief Executive Department of Children* [2023] QSC 266 at [65]-[66].

⁵⁷ *Noone v Operation Smile Inc* (2012) 38 VR 569, 573 at [18]-[10], (Warren CJ and Cavanough AJA), 617 [166] (Nettle JA).

⁵⁸ Definitions of ‘environment’ in s 8, ‘environmental values’ in s 9, and consultation obligation in s 6.

affecting human rights made by DESI under the *EP Act*. This separately gives rise to an impact on rights sufficient to invoke the application of the *JR Act*.

35. A precursor step to a decision, such a step itself affecting rights, may satisfy the second limb of *Tang*.⁵⁹ As Toohey and Gaudron JJ observed in *Bond*⁶⁰ (more recently affirmed in High Court in *Fuller v Lawrence*⁶¹):

*If an enactment requires that a particular finding be made as a condition precedent to the exercise of or refusal to exercise a substantive power [in that case a decision to suspend or cancel a commercial broadcasting licence], a finding to that effect is readily characterized as a decision ‘under an enactment’.*⁶²

36. As a corollary of this, the decision affects the substantive right under s 28 of the HR Act, due to the apparent failure to comply with the s 58 obligations. It is well settled that proper consideration of substantive rights will not have occurred if the right is not identified and the compatibility assessment (per s 8 and 13) is made.⁶³
37. This understanding of s 58 is consistent with the fundamental principles of procedural fairness. Procedural fairness and the principles of natural justice regulate the exercise of statutory powers which can destroy, defeat, or prejudice a person’s rights, interests or legitimate expectations.⁶⁴ Procedural fairness may only be excluded by “plain words of necessary intendment”.⁶⁵ Thus, there is a clear link between the impact on the *legal* or procedural rights under s 58, and the substantive *human rights* protected by the HR Act. In the absence of proper consideration of human rights, those rights will naturally be impacted by a decision.
38. “*Consideration of the exercise of [a statutory] power must be procedurally fair to the persons in respect of whom that consideration is being given. And likewise, the consideration must proceed by reference to correct legal principles, correctly applied.*”⁶⁶ That is so, even if the ‘consideration’ is a step in determining whether to exercise the statutory power at all.⁶⁷
39. The requirement under s 58 that human rights be properly considered is such a condition precedent to the exercise of statutory power under the *EP Act*. A failure to do so is unlawful, and the effect of not doing so affects rights and obligations in satisfaction of the second limb in *Tang*.

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15 September 2025

⁵⁹ See, for example, *Guss v Deputy Commissioner of Taxation* [2006] FCAFC 88 per Gyles J at [5] and *Fuller v Lawrence* (2024) 184 ALD 386 at [16].

⁶⁰ *Bond*, 377.

⁶¹ *Fuller v Lawrence* at [16].

⁶² See Mason CJ’s similar comments at 337, where his Honour considered that a conclusion reached as a step as part of the course of reasoning leading to an ultimate decision could, if the statute provided for the making of a finding or ruling on that point, be considered a decision under an enactment.

⁶³ *Johnston v Carroll* (2024) 329 IR 365 at [284]; *Owen D’Arcy* at [134]-[141].

⁶⁴ *Plaintiff M61 2010E v Commonwealth* (2010) 243 CLR at 352-353 [74]-[75].

⁶⁵ *Ibid*, 352 [74].

⁶⁶ *Plaintiff M61 2010E*, 354 [78].

⁶⁷ *Ibid*.