Federal Court of Australia

Burarrwanga v Chief Executive Officer of the National Indigenous Australians Agency [2024] FCA 1476

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| File number: |  | | |
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| Judgment of: | **CHARLESWORTH J** | | |
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| Date of judgment: | 19 December 2024 | | |
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| Catchwords: | **ADMINISTRATIVE LAW** – application for judicial review of two decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) – applicant requiring an extension of time to commence an application in relation to the first decision – proposed application lacking in utility and merit – whether the decision-maker erred in failing to take into account mandatory relevant considerations when making the second decision – application dismissed  **NATIVE TITLE** – judicial review of a decision made under s 233FBA of the *Native Title Act 1993* (Cth) not to provide funding to Aboriginal respondents to native title proceedings – whether a registered representative body is also respondent to the proceedings and seeking their dismissal – relevance of difference in the defences to be presented by the Aboriginal respondents and a registered body corporate – no reviewable error – application dismissed | | |
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| Legislation: | *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3  *Acts Interpretation Amendment Substituted Reference Order 2019* (Cth)  *Acts Interpretation Substituted Reference Order 2017* (Cth)  *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 11  *Native Title Act 1993* (Cth) ss 61, 66, 84, 203AD, 203B, 203BB, 203C, 203FB, 203FBA, 203FE | | |
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| Cases cited: | *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344  *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291  *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24  *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248  *Norouzi v The Director of the Professional Services Review Agency* [2020] FCA 1524  *Northern Land Council v Quall* (2020) 271 CLR 394  *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173  *QGC Pty Ltd v Bygrave* (2010) 186 FCR 376  *Sullivan v Secretary of the Department of the Prime Minister and Cabinet* (2015) 233 FCR 239  *Young v Director, Professional Services Review* [2023] FCA 1186 | |
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| Counsel for the Applicants: | Mr J Waters SC with Mr N Boyd-Caine |
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| Counsel for the Respondent: | Mr B Kaplan with Ms D Mak |
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| Solicitor for the Respondent: | Clayton Utz |

ORDERS

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|  | | NTD 18 of 2023 |
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| BETWEEN: | LAYILAYI BURARRWANGA  First Applicant  BANDINGA WIRRPANDA  Second Applicant  GAMBARRAK KEVIN MUNUNGGURR (and others named in the Schedule)  Third Applicant | |
| AND: | CHIEF EXECUTIVE OFFICER OF THE NATIONAL INDIGENOUS AUSTRALIANS AGENCY  Respondent | |

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| order made by: | CHARLESWORTH J |
| DATE OF ORDER: | 19 DECEMBER 2024 |

THE COURT ORDERS THAT:

1. The applicants’ application for an extension of time to commence an application for review of the decision of the respondent made on 23 November 2020 is refused.
2. The application for review of the decision of the respondent made on 30 May 2023 is dismissed.
3. The originating application (as amended) is otherwise dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

CHARLESWORTH J

1. This is an application under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) for review of two decisions relating to the funding of native title proceedings.
2. The applicants are Aboriginal respondents in two proceedings pending in this Court, being an application for a determination of native title and an application for compensation under s 61 and s 66 of the *Native Title Act 1993* (Cth) (NT Act), each commenced on 28 November 2019. The native title proceedings were commenced on behalf of Aboriginal claimants known as the Gumatj clan and relate to land and waters at Gove Peninsula, Arnhem Land in the Northern Territory. The two proceedings may together be referred to as the **Gove Claims**:  Action No NTD42/2019, *Galarrwuy Yunupingu (on behalf of the Gumatj clan or estate group) v Commonwealth of Australia & Anor* and Action No NTD43/2019, *Galarrwuy Yunupingu on behalf of the Gumatj clan or estate group v Commonwealth of Australia & Anor*.
3. A person may seek funding to assist in their representation in a native title proceeding under the NT Act. That can be done by two means. First, a person may apply to a representative body for a region in which the land subject to the proceeding is located. The functions of a representative body include the “facilitation and assistance functions” referred to in s 203BB(1) of the NT Act, which must not be performed unless the representative body is requested to do so (see s 203BB(2)). The functions in s 203BB(1) include:

(b) to assist registered native title bodies corporate, native title holders and persons who may hold native title (including by representing them or facilitating their representation) in consultations, mediations, negotiations and proceedings relating to the following:

(i) native title applications;

…

(v) any other matters relating to native title or to the operation of this Act.

1. The representative body for the purposes of the Gove Claims is the Northern Land Council (NLC). It is a recognised representative body under s 203AD of the NT Act and receives its funding under s 203C.
2. Second, a person may make an application for funding directly to the Secretary of the Department under s 203FE(1) of the NT Act, which provides:

**203FE Provision of funding by the Commonwealth**

*Funding to perform functions of a representative body*

(1) The Secretary of the Department may make funding available to a person or body, by way of a grant or in any other way the Secretary considers appropriate, for the purpose of enabling the person or body to perform, in respect of a specified area:

(a) all the functions of a representative body; or

(b) specified functions of a representative body;

either generally or in relation to one or more specified matters.

1. References in the NT Act to the Secretary of the Department are to be read as references to the Chief Executive Officer (CEO) of the National Indigenous Australians **Agency**:  *Acts* *Interpretation Substituted Reference Order 2017* (Cth) as amended by the *Acts Interpretation Amendment Substituted Reference Order 2019* (Cth).
2. The two decisions presently under consideration were made by different delegates of the CEO.
3. In July 2020, the applicants applied to the NLC under s 203BB(2) for assistance in the form of funding to facilitate legal representation in the Gove Claims for the purposes of securing their dismissal. On 28 September 2020 they made a separate funding application to the Secretary under s 203FE(1) in relation to the same proceedings and for the same purpose.
4. By letter dated 23 November 2020, the delegate refused the second funding request. I will refer to that as the **November 2020 decision**.
5. By letter dated 30 May 2023, the Chief Executive Officer of the NLC notified the applicants of his decision not to grant the funding they had requested. That decision was affirmed on internal review by the Executive Council of the NLC. The applicants then applied to the CEO of the Agency for external review of the NLC’s decision. An external reviewer recommended to the Agency that the NLC’s decision be affirmed. By letter dated 30 May 2023 (accompanied by a statement of reasons) the CEO’s delegate notified the applicants of her decision to affirm the NLC’s decision. That decision was made in the exercise of the power of external review conferred by s 203FBA(7)(a) of the NT Act. I will refer to it as the **May 2023 decision**.
6. The November 2020 decision and the May 2023 decision are decisions to which the ADJR Act applies. Under s 5 of the ADJR Act, a person who is aggrieved by such a decision may apply to this Court for an order of review on one or more of the grounds specified in that section. The applicants bring this application for review of each of the decisions, naming the CEO of the Agency as the sole respondent.
7. An application for review must be made within the period specified in s 11(3) of the ADJR Act, or within such further time as the Court allows:   s 11(1)(c). The application for review of the May 2023 decision was made within time. The application for review of the November 2020 decision was made more than 30 months outside of the prescribed time. The respondent opposed the Court granting an extension of time to review that decision.
8. For the reasons that follow, I have concluded that the period for commencing the application for review of the November 2020 decision should not be extended. That part of the application will be dismissed on that basis alone. In the course of reaching that conclusion I have observed that the proposed ground of review relating to that decision lacks sufficient merit to justify the grant of more time and that the proposed application is of little practical utility.
9. The grounds of review relating to the May 2023 decision are likewise without merit.
10. It follows that the whole of the application should be dismissed.

# THE APPLICANTS’ STANDING

1. There is no dispute as to the applicants’ standing as aggrieved persons within the meaning of the ADJR Act. It is convenient to set out the basis for that standing because it provides some context for what follows.
2. As detailed within the Amended Originating Application (Amended OA), the applicants assert that they hold native title rights and interests in the areas to which the Gove Claims relate under the traditional laws and customs of the Yolngu people. They describe various clans as “subsets” of the Yolngu people. They allege that they belong to eight clans, being members of two moiety groups into which Yolngu people are divided, the Yirritja and the Dhuwa moieties. They allege that the people of the Gumatj clan are of the Yirritja moiety, as are the members of various other clans (including some of the applicants). They allege that the interaction between clans and moiety groups, specifically in connection with land and waters, is regulated under the traditional laws and customs of the Yolngu people, including matters such as the inter-generational transmission of traditional rights and interests in land. They assert that the Gove Claims wrongly postulate that the Gumatj clan is a community or society independent of other Yolngu people and so oppose a determination of native title and any award of compensation made solely to them. They allege that the Gove Claims fail to identify a claim group comprising an aggregation of clans of both Yirritja and Dhuwa moieties as the holders or former holders of native title rights and interests in the subject land and waters.
3. The applicants are concerned that if the Gove Claims are not actively opposed (including by lay and expert evidence) there is a very real risk that the claims will succeed, in which case their own rights and interests as native title holders (and the rights of other Yolngu people in a like position) will never be recognised. They allege that they have no financial resources to retain and instruct expert witnesses or to otherwise secure legal assistance in gathering evidence to present their case as respondents on the Gove Claims, so as to ensure that they are dismissed.
4. In accordance with s 66(3)(a)(iii) and s 84(3)(a)(i) of the NT Act, the NLC is named as a respondent to the Gove Claims. By their originating application in this Court, the applicants described the NLC’s position as a respondent as follows:

9. The NLC, the representative Aboriginal/Torres Strait Islander body for the region under NTA s.203AD, has elected to be a party to the Gove Claims. The NLC’s notice of election to become a party state only that ‘*the basis on which we want to become a party is that the Northern Land Council is the representative body for the whole of the area covered by the application per section 66(2A) of the Act.*’ The particular function of a representative body, (as listed in NTA s203B(1)(a) to (g)) that is to be performed by the NLC’s participation in the proceedings is unstated, as is, if the facilitation and assistance functions referred to in NTA s.203BB is relied on, the source and nature of any request(s) made of the NLC under NTA s203BB(2).

10. The NLC expresses the view (apparently its own) that different parts of the Gove claim area belong variously to Gumatj, Rirratjingu or Galpu clans, thus adopting the ‘single-clan’ ownership model in the Gove Claims, albeit contesting, to an unspecified degree, the Gove Claim to sole and exclusive ownership. Respondent members of the Rirratjingu clan appear to support a similar single-clan system of land holding, seeing their own clan however as owner of a substantial expanse.

1. The applicants say that the defence the NLC seeks to run is different from their own because it proceeds from an assumption that a native title determination can and should be made in favour of members of localised estate groups. They say the NLC will dispute only the identity of the estate groups who hold native title rights and interests in the area and will not put forward their case founded on a wider conceptualisation of the relevant traditional society.
2. That asserted difference between the defence to be run by the NLC and the defence to be run by the applicants is the foundation for much of the submissions relating to the CEO’s funding decisions.

# THE NOVEMBER 2020 DECISION

1. It is to be recalled that the November 2020 decision responded to the applicants’ second request for funding made directly to the CEO of the Agency under s 203FE(1) of the NT Act. At the time that the request was made, the applicants had a pending request for funding made to the NLC under s 203BB of the NT Act.
2. The letter notifying the applicants of the November 2020 decision relevantly stated:

The longstanding practice of the NIAA and predecessor agencies is not to fund individual matters under section 203FE(1) of the Act where a native title representative body or service provider is already funded to perform all the functions of a representative body. You would be aware that the NLC is funded to perform all representative body functions in the area of which your clients assert native title interests.

You have indicated that you have applied on your clients’ behalf for funding from the NLC and are awaiting their reply. The NLC has advised the NIAA that a response is imminent. The NLC has also advised the NIAA that it anticipates writing to all interested parties shortly to address issues around representation and management of relevant proceedings.

As the NLC has yet to make a decision on your clients’ assistance application and as further communication from the NLC may assist in resolving issues of concern to your clients I am not inclined to depart from previous practice and I have decided not to make the funding you have requested available.

## The application for an extension of time

1. The Court’s power to allow an application for review to be made outside of the period prescribed in s 11(3) of the ADJR Act is said to be unfettered:  ***Norouzi*** *v The Director of the Professional Services Review Agency* [2020] FCA 1524 (at [18]). It is for the applicants to demonstrate that there is an occasion for granting an extension, although that does not equate to a requirement that special circumstances be shown:  *Norouzi* (at [19]). It is common on applications of this kind to apply the same principles that guide the Court’s discretion to grant an extension of time to commence an appeal. The Court may have regard to the explanation for the delay, the prejudice to the respondent should the application be granted, and the prejudice to the applicant should it be refused:  cf *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344; *Young v Director, Professional Services Review* [2023] FCA 1186 (at [12]).
2. In considering the prejudice that may be suffered by the applicants, it is necessary to consider the merits of the case the applicants wish to pursue.
3. There is a single ground of review set out at [1] of the applicants’ Amended OA. It is to the effect that the decision is “affected by jurisdictional error” in that the delegate either placed an unwarranted fetter on the exercise of a discretionary power or alternatively applied a practice in such a way that there was a constructive failure to exercise the power reposed. That argument falls within grounds for review of the kind referred to in s 5(1)(e) and s 5(2)(f) of the ADJR Act, namely that the making of the decision was an improper exercise of the power conferred under s 203BB of the NT Act in that it involved the exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case.
4. In submissions supporting that ground the applicants contended that there had been a “blanket adoption” of the “longstanding practice” referred to in the letter and that the delegate had therefore failed to have regard to the merits of their application.
5. The requirement that a decision-maker avoid the inflexible application of policy was emphasised by Gummow J (as his Honour then was) in *Khan v Minister for Immigration and Ethnic Affair* (1987) 14 ALD 291 (at 295):

… what [is] required of the decision maker, in respect of each of the applications, [is] that in considering all relevant material placed before [them], [they] give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy …

1. Section 203FE is directed to the provision of funding for the express purpose of enabling a person or body to perform in respect of the relevant area all or specified functions of a representative body either generally or in relation to one or more specified matters. The specific functions of a representative body that the applicants sought to perform remains unclear to the Court, but it was common ground between the parties that s 203FE was a mechanism that could be employed in the specific factual circumstances of the present case and I will proceed on that joint assumption, without questioning it further.
2. This Court has previously established that the funding mechanisms under s 203BB and s 203FE of the NT Act are separate and distinct:  ***Sullivan*** *v Secretary of the Department of the Prime Minister and Cabinet* (2015) 233 FCR 239 (at [4]). Accordingly, I accept that the mere availability of an alternate pathway for funding should not dictate the outcome of an application made under the other. However, it does not follow that in deciding an application made under one of the provisions a decision-maker must disregard the circumstance that an application has in fact been made under the other.
3. The policy referred to by the delegate was the “longstanding practice” of the Agency and its predecessors not to fund individual matters under s 203FE(1) of the NT Act where a native title representative or service body is already funded to perform all of the functions of a representative body. That policy is consistent with s 203FE(1). It is not the purpose of that provision to provide funding to a person or body for any purpose that may be considered desirable. A decision under s 203FE(1) of the NT Act is to be made in the context of the statute as a whole, including the circumstance that there may be a representative body already in receipt of funding provided under the NT Act to perform those very functions that the funding applicant wishes to perform. I did not understand the applicants to submit that the “longstanding practice” to which the delegate referred was inconsistent with s 203FE(1) (for example by introducing an irrelevant consideration). The policy referred to in the letter reflects a practical and sensible approach to the appropriate use of funding so as to avoid expenditure on functions that could be performed by bodies that already receive funding under the NT Act directed to that purpose.
4. The language of the letter does not support a finding that there was a blanket adoption of the policy or practice such that the delegate impermissibly fettered his discretion. The language of the letter discloses an awareness that there may be cases demonstrating reasons to depart from that practice, evidenced by the delegate asking himself whether he was inclined to depart from it. The letter disclosed an awareness not only that there existed a funded representative body, but also that the representative body was presently considering an application for funding under s 203BB of the NT Act. The delegate was also aware that a decision under that provision was imminent. From that part of the letter, it is evident that the delegate did not refuse the application merely because there existed a funded representative body for the relevant area. Rather, the existence of the NLC as a representative body was considered along with the additional circumstance that the applicants had made an application to the NLC for assistance by way of funding under s 203BB(2) to achieve the same objective to which funding under s 203FE would be directed, and that they would soon get an answer to that request.
5. The delegate said that the outcome of that earlier application might well address the applicants’ concerns. That of itself discloses an awareness of the nature of the concerns and identified that funding granted under s 203BB of the NT Act may well address them. That conclusion must be understood in the proper statutory and factual context. The application for funding under s 203FE(1) contained a paragraph about the position of the NLC in defending the Gove Claims but that was expressed in general and speculative terms alluding to a difference in approach. The principal concern of the applicants was to obtain funding to secure the dismissal of the Gove Claims, and the delegate was correct to identify that the provision of funding to the applicants by the NLC would assist them to meet their objectives and so address their concerns. The delegate did not say that the objectives of the applicants would be met by the mere circumstance that there existed a funded representative body in relation to the area. Accordingly, no occasion arose for the delegate to examine the differences between the respective defences of the applicants on the one hand and the NLC on the other.
6. In any event, it should not be inferred from the letter alone that the decision-maker failed to have regard to the underlying merits of the applicants’ funding application. The CEO was under no statutory obligation to give written reasons and the failure to expressly advert to something in reasons voluntarily provided does not alone support a finding that the CEO has ignored it:  *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173, French CJ, Bell, Keane and Gordon JJ (at [25]).
7. For the purposes of the application for an extension of time, I consider the substantive merits of the proposed ground of review to be fundamentally weak.
8. The explanation for the delay in commencing the application for review is that the applicants were awaiting the outcome of the internal and external review processes on their application under s 203BB which culminated in the May 2023 decision some two and a half years later.
9. The legal context was such that if the application for funding made under s 203BB was unsuccessful it remained open to the applicants to make a prompt renewed request to the CEO of the Agency under s 203FE of the NT Act making reference to that refusal. As the two funding pathways are discrete, there was nothing to prevent that further application being made, founded on the changed circumstance that the NLC had (rightly or wrongly) refused funding under s 203BB.
10. The factual context in which the November 2020 decision was made also assumes some importance when considered against the relief that the applicants now seek. That relief includes an order quashing or setting aside the November 2020 decision, together with the following:

3. An order directing the Respondent to make funding available to the Applicants for the purpose of enabling the Applicants to meet costs and disbursements incurred in presenting their cases as respondents in the Gove Native Title Claim and the Gove Compensation Claim …

1. The claim in [3] effectively invites this Court to remake the decision in respect of the second funding application based on its merits as the Court assesses them to be. The applicants have no prospects of securing such an order in respect of the November 2020 decision, given the nature of the Court’s jurisdiction on an application of this kind and the highly evaluative and discretionary nature of the task to be performed under s 203FE of the NT Act:  cf *Sullivan* (at [35(b)] and [36]). The setting aside of the November 2020 decision would have the effect that the application for funding made under s 203FE of the NT Act would then remain undetermined or possibly remitted to be decided in a changed factual landscape.
2. As I have mentioned, it has always been open to the applicants themselves to make an application under s 203FE relying upon the later event that the funding application made to the NLC was (rightly or wrongly) refused, but they have chosen not to do so. Nothing in the CEO’s letter foreclosed such an application and nothing in the delegate’s letter indicated that the same result would ensue under s 203FE if funding by the NLC under s 203BB were to be ultimately refused.
3. I accept that this delayed review application is subjectively explained by the applicants’ well-intentioned choice to await the outcome of the internal and external reviews of the NLC’s decision under s 203BB. However, viewed objectively, I do not accept that it was more efficient to await the outcome of all of the review processes attending that decision to be exhausted. The utility of the application for review of the November 2020 decision is questionable given the changed circumstances. It is also questionable because consideration of funding under s 203FE is required by the CEO in the performance of an external review function arising out the May 2023 decision (as discussed below), which in my view renders the review of the November 2020 decision an academic exercise. That is because in exercising the power of external review under s 203FBA of the NT Act, the reviewer (and hence the CEO) was required to consider whether funding under s 203FE should be made available to achieve the same purpose. No error is shown in that aspect of the May 2023 decision, as discussed below.
4. Those circumstances together with my assessment of the merits of the application lead me to the conclusion that the application for an extension of time should be refused.

# THE MAY 2023 DECISION

1. The May 2023 decision is challenged on multiple bases all subsumed under “Ground 2” on the Amended OA. Ten discrete errors are there set out. They variously allege that the delegate failed to have regard to relevant considerations and failed to “scrutinise or adequately scrutinise and/or take into account” the substance of certain claims by the NLC concerning the efficient use of its resources. Those contentions broadly reflect grounds of review available under s 5(1)(e) and s 5(2)(b) of the ADJR Act but, as will be seen, little attention was given to the grounds as articulated in the Amended OA in the applicants’ written and oral submissions.

## Legal context

1. The May 2023 decision was made in the exercise of the CEO’s external review function conferred under s 203FBA of the NT Act. Under s 203FB(1), an Aboriginal person or Torres Strait Islander affected by a decision of a representative body not to assist him or her in the performance of its facilitation and assistance functions under s 203BB may apply to the Secretary of the Department (ie; the CEO) for review of the decision. Section 203FB(2) provides that upon receiving such an application, the CEO must review the decision or appoint another person to do so. If another person is appointed, the external reviewer is subject to the requirements in s 203FBA. It relevantly requires that the person appointed to conduct the review provide a report to the CEO about whether the decision should be affirmed or whether the CEO should make funding available under s 203FE “to a person or body for the purpose of performing specified facilitation and assistance functions of a representative body in relation to the matter to which the representative body’s functions relate”.
2. Section 203FBA(3) has the subheading “Matters to be taken into account when conducting review”. It provides:

(3) In reviewing the representative body’s decision, the person appointed must have regard to:

(a) whether it would be consistent with priorities determined by the representative body under paragraph 203B(4)(a) to provide the assistance sought; and

(b) whether, to provide the assistance sought, the representative body would need to allocate or re-allocate resources in a way that interferes with the efficient performance of its functions; and

(c) whether the representative body would breach a condition imposed under section 203CA if the representative body were to provide the assistance sought; and

(d) if the assistance sought was in relation to an application under section 61:

(i) whether the provision of that assistance would promote an orderly, efficient and cost-effective process for making such applications; and

(ii) in a case where one or more other applications have been made or are proposed to be made in relation to land or waters covered by the application—whether the provision of the assistance sought would be reasonable given the need to minimise the number of applications covering the land or waters; and

(e) any other matter relevant to the merits of the decision.

1. The external reviewer’s report provided under s 203FBA(2) must be given to the relevant representative body and the body must be invited to make submissions in respect of it:  NT Act, s 203FBA(6).
2. As can be seen, the matters that must be taken into account on external review include “whether it would be consistent with priorities determined by the representative body under paragraph 203B(4)(a) to provide the assistance sought”. Section 203B(4) provides:

*Priorities of representative bodies*

(4) A representative body:

(a) must from time to time determine the priorities it will give to performing its functions under this Part; and

(b) may allocate resources in the way it thinks fit so as to be able to perform its functions efficiently;

but must give priority to the protection of the interests of native title holders.

1. Section 203BB(4) of the NT Act relevantly provides that if a person who may hold native title requests that a representative body represent the person in relation to a particular matter relating to land or waters, and the representative body is already representing another person in relation to the same matter, then the representative body must not represent the new person unless it has obtained consent from the original person to do so.
2. The obligation to have regard to the matters referred to in s 203FBA(3) of the NT Act is one reposed in the external reviewer. By implication however, the CEO’s delegate (as the ultimate decision-maker) will have regard to the external reviewer’s report. In what follows I may for convenience refer to the CEO’s delegate as the person who did or did not have regard to those matters in coming to the May 2023 decision.

## Reasons for the May 2023 decision

1. The reasons for the May 2023 decision are best understood against the original decision of the NLC and its decision on internal review.
2. The NLC’s original refusal of the applicants’ funding request was expressed in letters of 20 April 2022 and 20 May 2022. The first of those letters begins with a reference to earlier correspondence and a summary of the applicants’ position in the Gove Claims. The author stated that the NLC held “a similar view” to the applicants in its defence of the claims. It referred to different areas of country belonging “variously to at least the Gumatj, Rirratingu [sic] or Galpu clans”. The author went on to state that for that reason, the NLC had joined the proceedings in its own right as the native title representative body for the claim area on behalf of the Arnhem Land Aboriginal Trust “to contest the claim and assist the Court identify all persons who hold native title over the Gove Peninsula”, and that it had agreed to fund the Galpu clan in a related arbitration under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALR Act) relating to the same land for the purpose of determining its “owners” under s 3(1) of that Act. The author continued:

It is not an efficient use of the NLC’s native title resources to fund either applicants or respondents to native title proceedings where:

* it is known that the claim group is significantly incomplete or misdescribed; and
* multiple separately-represented indigenous parties seek to advocate fundamentally identical or similar positions on factual and/or legal issues.

For the NLC to provide the assistance requested would necessitate the re-allocation of financial resources away from matters to which the NLC’s operational budget has been allocated and, potentially, to the detriment of matters which the NLC has prioritised.

1. The letter of 20 May 2022 repeated the NLC’s view that the traditional owners of the claim areas were the Yolgnu clans of the Gumatj, Rirratjingu and Galpu. It continued:

16. The NLC’s view is that the traditional Aboriginal owners of the claim areas are the Yolgnu clans of the Gumatj, Rirratjingu and Galpu. If the NLC is to consider who the persons are that hold or may hold native title in the same area, it may be the case that other clans beyond those three hold rights and interests. However. on any view, the NLC’s position is, for the purposes of the NTA, there are persons who hold native title at common law in the areas of the Gove Proceedings who are not Gumatj, including some or all of your clients.

1. The NLC said that it would advocate its view in the proceedings, “thereby seeking to achieve the same or similar outcome as is sought by [the applicants]” and that it would oppose a determination naming only the Gumatj as native title holders.
2. It added:

18. As a respondent party advancing the same position. your clients will not receive any separate or additional benefit to that which can be achieved by the NLC because the Court cannot make a determination of native title or award of compensation in favour of your clients as a respondent pai1y.

19. It is neither appropriate nor efficient for the NLC to fund any native title applications or proposed applications that are significantly inconsistent with the NLC’s view of who holds native title at common law. Further, it is an inefficient use of resources, and contrary to the NLC’s obligations under the NTA, to fund separately-represented parties who seek to advocate fundamentally identical or similar positions on issues of law and fact as the NLC.

20. Further. the NLC does not have sufficient funds available in its native title budget to fund your clients to participate in the Gove Proceedings.

21. If the NLC agreed to fund your clients, it would require the re-allocation of financial resources away from matters to which the NLC’s operational budget has been allocated, potentially at the expense of prioritising other native title work being completed within its region. This would be in contravention of the NL’'s obligations under section 203BC NTA.

1. A decision made on internal review repeated the essence of what was said in the previous correspondence. It elaborated on the arbitration processes then underway to identify the “traditional owners” for the purpose of the ADJR Act. Among other things, the internal reviewer said that it was an inefficient use of resources and contrary to the NLC’s obligations under the NT Act to fund separately represented parties who advocated for fundamentally identical “or similar” positions on issues of fact and law as those run by the NLC. The internal reviewer otherwise expressed agreement about the conclusions of the original decision-maker concerning the matters considered under s 203FBA(3) of the NT Act.
2. The applicants’ application for external review was referred to Ms Leah Cameron (Marrawah Law) for a report, and that report was then provided to the CEO’s delegate for the purpose of making the May 2023 decision now under review. As with the November 2020 decision, it is convenient to refer to the decision-maker as the CEO.
3. The CEO’s delegate was provided with a brief that contained Ms Cameron’s report as well as other materials contained in an annexure.
4. In her reasons for decision, the delegate extracted and otherwise summarised the position of the NLC as articulated in its earlier correspondence to the applicants, which in turn had been extracted in Ms Cameron’s report.
5. The delegate recorded that the NLC had been provided with an opportunity to comment on Ms Cameron’s report but had declined the invitation. It recorded that Ms Cameron had then sought additional information from the NLC in relation to its priorities. That information was provided and the applicants were given an opportunity to respond to it. The additional information and the applicants’ response were summarised in Ms Cameron’s report and copies were provided to the delegate. The delegate also had before her the NLC’s **Operational Plan**, which formed a part of its funding agreement with the Agency for the performance of native title representative body functions for the 2021/2022 financial year.
6. The delegate recorded the scope and purpose of the request for assistance, finding that the assistance had been sought to enable the applicants’ lawyer to assist the applicants to assert, as respondents to the Gove Claims, that native title in the area was held by a wider group than the Gumatj clan or estate group. The delegate then turned to consider whether Ms Cameron’s conclusions in relation to the relevant considerations were appropriate and expressed agreement with Ms Cameron in respect of each of them.
7. The delegate said this of any differences between the content of the NLC’s defence and the applicants’ defence in the Gove Claims:

51. I further agree with the Reviewer’s findings at paragraph 77 of the Review Report to the effect that the NLC’s position as respondent to the Gove proceedings includes (or at least does not exclude) coverage for the arguments the Applicant indicated that it wished to make in those proceedings in the period preceding the assistance decision.

52. I accept the Reviewer’s finding at paragraph 75 of the Review Report to the effect that the ‘fresh concerns’ raised by the Applicant in the 13 April 2023 material do not give rise to other matters relevant to the assistance decision. I will, however, address these concerns for completeness.

53. The NLC has not squarely addressed the question of whether it takes a different view to the Applicant regarding how native title is held in the area of the Gove proceedings (although, as the Applicant has noted, some of its statements suggest this may be the case). Rather, it has implied (and I take its position to be) that any difference is not presently relevant for the purposes of responding to Gove proceedings given the NLC, like the Applicant, is seeking to have the proceedings dismissed for failure to identify all persons who possess native title rights and interests over the claim area (which would not require the Court to make findings as to who holds native title or how it is held).

1. The delegate went on to say (at [56]):

On balance, I have concluded that in seeking to have the Gove proceedings dismissed, and in foreshadowing further research if connection becomes a live issue in the proceedings, the NLC’s actions take reasonable account of the interests of all native title holders and accordingly, it would be an inefficient use of the NLC’s resources to provide funding for the Applicant to separately respond to the proceedings.

1. In her conclusion, the delegate said that in affirming the decision under review, she had given the most weight to two considerations, namely (at [57]):

a. To provide the assistance sought, the NLC would need to allocate or reallocate resources to provide the assistance sought in a way that interferes with the efficient performance of its functions (paragraph 203FBA(3)(b) of the Act).

b. In seeking to have the Gove proceedings dismissed, and in foreshadowing further research if connection becomes a live issue in the proceedings, the NLC’s actions take reasonable account of the interests of all native title holders and accordingly, it would be an inefficient use of the NLC’s resources to provide funding for the Applicant to separately respond to the proceedings.

## Alleged errors

1. It is not necessary to set out in full the ten alleged errors as they are articulated in the Amended OA. In their written submissions the applicants summarised their position into three primary contentions contained at [30] – [32] extracted below.
2. In respect of all grounds, the applicants submit that an error will arise where the external reviewer fails to consider any one of the matters in s 203FBA(3), and where the matters are not otherwise considered by the CEO in electing whether to affirm the representative body’s decision not to provide funding. I accept that submission and add that the reviewer’s report is important (but not exhaustive) evidence as to what the CEO has taken into account.
3. Submissions in support of the applicants’ three broad contentions overlapped to such an extent that it is convenient to consider them together. They are as follows:

30. In considering the obligation in s 203FBA(3)(a) of the *NT Act*, the reviewer and delegate failed to consider:

a. how the overarching priority in s 203B(4) to protect the interests of native title holders may be engaged by the application; and

b. whether the Applicants’ particular circumstances warranted the changing of NLC’s priorities and allocation of resources under s 203B(4)(a) – (b).

31. In considering the obligation in s 203FBA(3)(b) of the *NT Act*, the reviewer and delegate failed to consider whether the reallocation of resources was ‘efficient’, because the:

a. Applicants and NLC hold a fundamentally dissimilar view as to native title ownership in the area of the Gove Claims, such that the NLC’s presence as a respondent to those claims does not protect the Applicants’ position as to who hold native title rights for those areas; and

b. Applicants seek to advocate for a position on native title ownership that is separate and distinct from any other First Nations party or parties currently represented in the Gove Claims.

32. In considering other relevant matters under s 203FBA(3)(e) the reviewer and the delegate accepted that the NLC’s position as respondent to the Gove Claims took reasonable account of the interests of ‘all native title holders’. Such a position failed to consider:

a. the capacity of the NLC to protect or advance the specific interests of the Applicants in response to the Gove Claims, consistent with its obligations under s 203B(1) and s 203BB(2) of the *NT Act*, given the Applicants have not requested the provision of ‘facilitation or assistance functions’ from the NLC in relation to this matter, as is required to enliven those powers of the representative body, under s 203BB(2); and

b. ‘connection issues’ have already been enlivened by the commencement of the Gove Claims such that the Applicants are currently in a position by which they need to be preparing the evidence for which the assistance is sought, rather than awaiting a future decision of the NLC.

1. For the purposes of what follows, I accept that the considerations identified in s 203FBA(3) of the NT Act (extracted at [45] above) may be characterised as mandatory relevant considerations for the purposes of the ground of review in ADJR Act in accordance with the principles stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24. However, as is made plain from my summary of the delegate’s reasons, consideration was expressly given to each of those matters in turn and conclusions expressed in relation to each of them. There is a distinction between a failure to have regard to a mandatory relevant consideration and a failure to refer to evidence that might bear on the consideration. It is otherwise for a decision-maker to determine the relative weight to be afforded to each consideration. As the Full Court explained in *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248:

61 We respectfully agree with Sackville J in *Singh* where his Honour pointed out that the expression ‘have regard to’ is capable of different meanings depending on its context. As his Honour said at [54]:

… a statutory obligation to have regard to specified matters when making an administrative decision may require the decision-maker to take the matters into account and ‘give weight to them as a fundamental element in making his [or her] Determination’:  *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 per Mason J. Indeed, this is the meaning that was given to the predecessor of s 501(6)(c) of the *Migration Act* (relating to the character test):  *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187 at 194. But the phrase ‘have regard to’ can simply mean to give consideration to something (*Shorter Oxford English Dictionary*). In this sense a direction to a decision-maker to have regard to certain factors may require him or her merely to consider them, rather than treat them as fundamental elements in the decision-making process.

62 In our opinion, the prescribed circumstances to which the Minister must have regard in the present case are of the latter kind. There are 10 different criteria that are prescribed by reg 2.41 for the purposes of s 109(1)(c) of the Act. It is hard to see why a decision-maker should be required to treat each and every one of them as fundamental for the purposes of s 109. Although the Minister must have regard to each and every one of the prescribed circumstances, not all of them will be central or fundamental to every case in which the Minister is called upon to make a decision under s 109(1) of the Act.

63 In *Lafu v Minister for Immigration and Citizenship* (2009) 112 ALD 1, at [47]-[54], the Full Court held:

(a) In circumstances where a decision-maker is required to have regard to several specified or prescribed mandatory considerations, he or she must genuinely have regard to each and every one of those considerations and must engage actively and intellectually with each and every one of those considerations by thinking about each of them and by determining how and to what extent (if at all) each of those criteria might feed into the deliberative process and the ultimate decision; and

(b) The reasons for decision published by a decision-maker who is obliged to have regard to mandatory considerations should show such an active intellectual engagement with all mandatory criteria although such reasons are:

… meant to inform and [are] not to be scrutinised by over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed [see *Minister for Immigration and Ethnic Affairs v Liang* (1996) 185 CLR 259 at 272].

## The applicants’ submissions

1. In relation to the NLC’s priorities, Counsel for the applicants referred to the Operational Plan for the financial year 2022/2023 which identified the “Gove compensation claim” (as priority 3) having an operational budget of $171,000.00. A note to that entry reads:

Claimants and Indigenous respondents are externally represented by various private lawyers. Applications to NLC for funding have been refused. NLC active in proceedings in its own right and on behalf of Arnhem Land Aboriginal Land Council.

1. It was submitted that the Operational Plan could not form the basis of a finding that there could be no money found for the applicants’ purposes because it was only a budget relating to the prioritisation of certain matters and did not include operational expenses or contingencies. Counsel alleged that the delegate had not otherwise engaged intellectually with the document when accepting the NLC’s submission that there was no available money to divert to the applicants’ representation. Counsel referred to a Performance Report for the period 1 January 2022 to 30 June 2022 which he said indicated that actual expenditure in that period was less than that budgeted for. Counsel referred to financial information in the prior financial year that he submitted evidenced the availability of some funds. He acknowledged that the applicants could not point to positive evidence of the existence of funds sufficient to meet their request (being for funding in excess of $1 million), but submitted that the documents before the delegate were in the “nature of a stimuli” that ought to have been given greater scrutiny and prompted the delegate to question the NLC’s assertion that there were insufficient funds. In addition, Counsel submitted that efforts to find funds could be made by the NLC, including by re-examining and re-apportioning amounts that had been directed to other pursuits.
2. Further, it was submitted that the delegate was wrong to observe that the NLC had not squarely addressed the question of whether it took a different view to the applicants regarding how native title was held in the area subject to the Gove Claims. It was submitted that the NLC had been quite clear about that difference, by referring to native title being held in different parts of the area by different clans, thus advancing a case founded on there being different native titles in different locales. Two errors were said to arise from that:  first, the delegate was wrong to accept the NLC’s submission that it would be inefficient to provide funding to the applicants by reference to the NLC’s own status and intentions as a respondent to the Gove Claims and, second, the difference in those positions meant that the priorities the NLC had determined under s 203B(4) did not accord with the statutory requirement that it “must give priority to the protection of the interests of native title holders”.

## Consideration

1. The applicants’ submissions do not disclose reviewable error for seven reasons. The reasons largely encompass the respondent’s submissions which I consider to be correct.
2. First, the complaint that the delegate did not adequately scrutinise the NLC’s claim that it did not have sufficient funds to accede to the funding request is in my view a complaint about a factual finding that does not otherwise disclose reviewable error. The delegate was entitled to accept the NLC’s assertion about the limits on its own funds. The financial documents referred to by the applicants do not contradict that assertion in such a way that obliged the delegate to investigate the topic further. The circumstance that there might have been a budgetary surplus in a different period did not require a finding or any further investigation about the surplus of funds in the particular period to which the funding request related. That is especially so given that the applicants had sought funding in excess of $1 million. The assertion that the external reviewer (and hence the delegate) did not consider the Operational Plan must be rejected in any event. The document is given express consideration in the reviewer’s report and the delegate in turn referred to that part of the report. The delegate correctly identified that the report set out the activities that the Agency had agreed to fund and that the NLC had agreed to implement during the relevant financial year. The applicants’ submissions amounted to a complaint that the delegate failed to make factual findings by reference to the document that they considered should have been made. That ground of review is not available to them, nor was it or asserted by them.
3. Second, to some extent the applicants’ submissions amounted to an argument that the NLC should have determined its priorities under s 203B(4) of the NT Act differently, or that it should have changed its priorities in order to accommodate their funding request. That submission proceeds from an incorrect construction of the considerations in s 203FBA(3)(a) and (b). Under subs (a) the task of the reviewer was to consider whether the provision of funding would be consistent with the priorities in fact determined by the NLC under s 203B(4)(a), not to second guess where those priorities should lie. Under subs (b) the task of the reviewer was to consider whether, by providing the assistance sought, the NLC would need to allocate resources in a way that would interfere with the efficient performance of its functions. Again, that task neither required nor permitted the reviewer to second guess and adjust the priorities a representative body had itself determined in accordance with s 203B(4) of the NT Act. Rather, it required consideration to be given to the NLC’s functions and whether the efficient performance of those functions would be interfered with by the direction of funding to the applicants. As Nettle and Edelman JJ observed in *Northern Land Council v Quall* (2020) 271 CLR 394 (at [90]):

…  The representative body must itself determine its priorities for the performance of its functions and may allocate resources for the performance of functions but must give priority to the protection of the interests of native title holders. There is no hint of a suggestion that these functions could, or should, be performed by any person other than the representative body.

(footnote omitted)

1. The task of the delegate was not to ask merely whether it would be “efficient” to fund the applicants’ defence. That is an oversimplification of the language in s 203FBA(3)(b). The task is one directed to the efficiency of *all* of the NLC’s functions which necessarily will involve the management of competing priorities. In other respects the applicants’ submissions were directed to whether it was desirable to fund the applicants given the differences between their defence and the NLC’s defence. But that it is not the test.
2. Third, to the extent that it was argued that the NLC’s priorities (as set out in its Operational Plan) fell foul of the requirement that a representative body “give priority to the protection of the interests of native title holders”, it formed no part of the delegate’s task to identify whether the priorities fixed by the NLC fell foul of that requirement and there is no discrete ground of judicial review challenging the lawfulness of the NLC’s priorities as set out in the Operational Plan. The reviewer’s task did not require a form of merits review of the NLC’s priority-setting function under s 203B(4). Contrary to the applicants’ submissions, the delegate was not required to ask how the overarching priority in s 203B(4) of the NT Act may be engaged by the applicants’ funding application.
3. In any event, as Reeves J said in *QGC Pty Ltd v Bygrave* (2010) 186 FCR 376 (at [81]):

Finally, as to s 203B(4), I do not consider that provision currently applies to the Iman People because they are not yet ‘native title holders’ as defined in s 224 of the Act. It may be otherwise if that provision extended to ‘persons who may hold native title’ (cf, for example, the terminology s 203BB(1)(b)), or if the Iman People had already succeeded to a determination of native title under the Act.

1. Fourth, the applicants’ submissions about the efficient allocation of the NLC’s resources must be considered in light of the amount of funding sought and the reasons put forward by the NLC as to how inefficiency might occur. The assessment was to be made in the context of the NLC’s existing funding allocation, being a limited resource. The NLC proceeded on the assumption that the defences were identical *or similar*. The difference in the two defences is apparent to the Court. However, it has not been shown that the delegate ignored that difference. Rather, the delegate identified (correctly) that allocation of funding would involve inefficiency because the NLC was seeking to have the Gove Claims dismissed, being the same ultimate outcome sought by the applicants. The NLC’s position was understood in light of the applicants being parties defending an extant application for a determination of native title, not as applicants bringing a determination application under s 61 of the NT Act in their own name and right. The delegate correctly understood the NLC’s submission that there would be inefficiency irrespective of any differences in the content of its defence *vis a vis* that of the applicants as to why the Gove Claims should be dismissed.
2. Fifth, it is apparent from the delegate’s reasons, considered as a whole, that it considered any difference in the defences of the NLC and the applicants not to warrant the grant of the funding sought by the applicants when weighed against other considerations. The delegate was aware of the applicants’ submissions about the difference, as evidenced by her observation that the NLC had not “squarely” countered them. The delegate did not deny the differences. Rather, she reached a conclusion based on an evaluation of a number of factors, with more weight given to the circumstance that separately funding the applicants would interfere with the efficient performance of the NLC’s functions and that the NLC’s defence of the proceedings would reasonably account for the interests of all native title holders. There is no error in the attribution of weight to those factors, given that the object of the applicants as parties to the Gove Claims was to seek their dismissal, and not to seek a determination of native title under s 61 of the NT Act in their own name and right. The conclusion that their interests would reasonably be accounted for was not affected by reviewable error when considered in that legal context.
3. Sixth, the contentions in [32] of the applicants’ written submissions that they had not requested that the NLC perform “facilitation or assistance” functions is incorrect to the extent that an application for assistance by way of funding was in fact made. The submission may in fairness be understood to mean that the NLC was joined as a respondent in its own right and was not a legal representative of the applicants, and nor had the applicants asked the NLC to represent them. So much may be accepted. But that does not disclose error in the delegate’s reasons. As I have already concluded, the delegate should be understood as concluding that the defence the NLC would run as a party in its own right was directed to achieving the dismissal of the Gove Claims on the grounds that the Gumatj clan were not the sole holders of native title rights and interests in the area. That finding was open irrespective of whether the NLC and the applicants may raise different factual and legal arguments to persuade the trial judge to that ultimate conclusion.
4. Seventh, the delegate concluded that due consideration of the applicants’ position as to how native title is held would be given in a report on connection to be commissioned by the NLC. That finding is not the subject of a discrete challenge other than a complaint that the delegate should have found that the connection issues did in fact arise. The finding adds additional support to the delegate’s conclusion that the interests of the applicants would be accounted for in the preparation and presentation of the NLC’s defence.
5. I have mentioned that the applicants’ written and oral submissions did not refer back to the errors articulated on the face of their Amended OA. In these reasons I have addressed the case as the applicants presented it in their submissions which I consider subsume the issues that might have arisen had each of the particulars to ground 2 been specifically addressed.
6. There will be an order refusing the grant of an extension of time to review the November 2020 decision and a further order dismissing the application for review of the May 2023 decision.

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| I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Charlesworth. |

Associate:

Dated: 19 December 2024

SCHEDULE OF PARTIES

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| --- | --- |
|  | NTD 18 of 2023 |
| Applicants |  |
| Fourth Applicant: | GAWURA JOHN WANAMBI |
| Fifth Applicant: | GAYILI BANUNYDJI JULIE MARIKA |
| Sixth Applicant: | GENDA DONALD MALCOLM CAMPBELL |
| Seventh Applicant: | LIPAKI JENNY DHAMARRANDJI |
| Eighth Applicant: | MANGUTU BRUCE WANGURRA |
| Tenth Applicant: | MARATJA ALAN DHAMARRANDJI |
| Eleventh Applicant: | MARRPALAWUY MARIKA |
| Twelfth Applicant: | MILMINYINA VALERIE DHAMARRANDJI |
| Thirteenth Applicant: | NAYPIRRI BILLY GUMANA |
| Fourteenth Applicant: | RILMUWMURR ROSINA DHAMARRANDJI |
| Fifteenth Applicant: | WURAWUY JEROME DHAMARRANDJI |