



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF
AUSTRALIA

BETWEEN:

Yanunijarra Aboriginal Corporation RNTBC

First Appellant

Walalakoo Aboriginal Corporation RNTBC

Second Appellant

Malarngowem Aboriginal Corporation RNTBC

Third Appellant

Kimberley Land Council Aboriginal Corporation

Fourth Appellant

and

State of Western Australia

Respondent

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APPELLANTS' REPLY

Part I: Certification

1. These reply submissions are in a form suitable for publication on the internet.

Part II: Reply

2. The State seeks to recast the issue on appeal not as whether a decision by a Government party under NTA s 29(7) to include a statement that it considers the act is an act attracting the *expedited procedure* (see s 237) is immune from judicial review (AS[2]), but instead as whether “anterior consideration of s 237 is a statutory decision or condition of legal efficacy”: RS[2]. On that recasting, the State’s case is “not ... that executive conduct associated with s 29(7) is categorically immune from judicial review” (RS[15]) and an absence of “express condition of legal efficacy” for including an expedited statement “is not to say that the Government party may truthfully make the statement if it does not in fact hold the view expressed, or that s 237 is irrelevant to the subject matter of that view” (RS[26]).
3. The attempt to recast the appeal as this “narrower question”, while accepting that “executive conduct associated” with s 29(7) might be reviewable (RS[15]), poses several dilemmas for the State’s opposition to the appeal that it does not confront and is a distraction. It is a distraction as the Appellants seek judicial review of the decision under s 29(7) to include an expedited statement on grounds that the antecedent step (condition) of consideration required by ss 29(7) and 237 miscarried, and rely upon the usual statutory implication that that step (consideration) be done reasonably, on a correct understanding of the law, on some material. The errors in that step may be challenged as an element in the review of that decision: AS[20]. Two contextual observations first need to be made.
4. *First*, while all statutory powers have limits,¹ it is helpful to focus on the purpose of the power in s 29(7) within the scheme of the NTA outlined at AS[21]–[27], [47]. The evident object is that the right of a native title party to negotiate an act that can impair their native title (property) may not be required where the act is “not likely” to have the effects upon native title stipulated in s 237(a), (b) and (c), and that object is attained by the mechanism that a Government party “may include” in the s 29 notice “a statement that it considers the act” meets those criteria, an evaluative

¹ The thought of an unfettered power “will induce a rash in a traditional administrative lawyer”: Aronson et al, *Judicial Review of Administrative Action and Government Liability* (7th ed) at [4.30].

judgment (compare say Sub-div L (s 24LA) low impact future acts that may be done, without notice, upon the facts of the act). And the notified act will only be *expedited* if there is no objection by a native title party, suggesting that the object and efficacy of the process is imperilled if a Government party decides to include a statement regardless of the s 237 criteria: AS[41].² The State “accepts that the words ‘if the Government party considers’ describe the view represented by the statement”: RS[39]. A Government party “may” include a statement (s 29(7)) if it decides to do so (FC[61]), and while that decision is conditioned by “anterior consideration of s 237”, that is not itself the decision: cf RS[2].

- 10 5. *Second*, while the State seems to accept that inclusion of an expedited procedure statement in a s 29 notice may be subject to review on some grounds, the basis and extent is obscure. In speaking of “truthfully”, “fraud, bad faith”, RS[26], [53] might suggest a *Futuris* type conscious maladministration ground, but public law impropriety is not a red blooded species of fraud, bad faith can import considerations of purpose without “moral obliquity”, and *Wednesbury* unreasonableness was developed by analogy to principles controlling trustees.³ And in saying that s 237, which scopes s 29(7)’s object, is “[not] irrelevant” to the view expressed in the expedited statement, RS[26] might extend to Aickin J’s second sense of bad faith in *Toohy* as improper purpose:⁴ cf AS[44].
- 20 6. In those settings, the State’s position poses (at least) these dilemmas.
7. *First*, if the State accepts that action under s 29(7) is reviewable on some grounds, then the construction at RS[40]–[44] collapses. Why would the supposed “syntax” and “contrast” in language (RS[40]–[42]) not preclude judicial review for fraud, or “actual bad faith”,⁵ or other grounds not presently pleaded (RS[53]), yet (and absent some express deeming provision)⁶ would preclude review where a Government

² Citing *Forrest & Forrest* (2017) 262 CLR 510 at [64]–[65] (Kiefel CJ, Bell, Gageler and Keane JJ).

³ *SZFDE v Minister for Immigration* (2007) 232 CLR 189 at [12]–[13] (the Court) quoting Wade and Forsyth, *Administrative Law* (9th ed) p. 416 “no moral obliquity”, a phrase used in *Futuris Corporation* (2008) 237 CLR 146 at [13]. Both cases note the different senses of bad faith essayed by Aickin J in *R v Toohy ex parte Northern Land Council* (1981) 151 CLR 170 at 232–3. And see *Eshetu* (1999) 197 CLR 611 at [124] (Gummow J) citing *Thomas on Powers* (1998) p.vii, [6.02]; now 2nd Ed p.xiv [11.01] on shared history with public law review and compare AS[44] public trusts, good faith.

⁴ (1981) 151 CLR 170 at 233, 247, 255; see also *Western Australian Planning Commission v Temwood Holdings Pty Limited* (2004) 221 CLR 30 at [93] (Gummow and Hayne JJ).

⁵ *Denlay v Commissioner of Taxation* (2011) 193 FCR 412 at [76] (Keane CJ, Dowsett and Reeves JJ) *Futuris* conscious maladministration as “actual bad faith, not...some form of ‘constructive’ bad faith”.

⁶ As in s 175 of the *Income Tax Assessment Act 1936* (Cth) considered in *Futuris Corporation*.

party has formed the view expressed in the statement not “according to law and to reason within the limits set by the subject matter, scope and purposes of the statute”?⁷ The two different outcomes do not cohere and the difference has no explanation in the text and structure. And if some review is available, then its complaints of alleged fragmentation also fall away: RS[43]–[44] cf AS[40].⁸

8. *Second*, as to the consequences of breaching (implied) conditions of legal efficacy, presumably a deliberate disregard of the s 237 criteria – to not in fact hold the view expressed in the statement – would not produce a statement within the meaning of s 29(7).⁹ The two express “counterfactual provisions” (RS[46]) in s 32(5) and (7) of when a s 29 notice is treated “as if” it did not include the expedited statement therefore do not provide the entire universe of when that is the result of exceeding limits. *Third*, if it is accepted that there are some implied limits to s 29(7), then it cannot be the mere fact of the inclusion of an expedited statement in a s 29(7) notice that is determinative: cf RS[42], [47], [52]¹⁰ contra AS[39].
9. *Fourth*, the State is left with the argument that a Government party under s 29(7) “does not itself determine the substantive s 237 question”: RS[28]; also [38], [51]–[52]. But that depends upon the proposition (at RS[38]) that a decision under s 29(7) is not “the source of later legal consequences” citing *Holt v Manzie* (2001) 114 FCR 282 at [23]–[25] (Olney J). The Full Court rightly disclaimed Olney J’s view that a decision under s 29(7) to include an expedited procedure statement is “determinative of nothing” (FC[66]) and, inconsistent with the State’s acceptance of some conditions, Olney J had expressed that view on the supposition that s 29(7) gives a Government party an “option” that is “entirely unfettered”.¹¹

⁷ The language in *Li* (2013) 249 CLR 332 at [90] (Gageler J) emphasis in original drawn from *Sharp v Wakefield* [1891] AC 173 at 179 (Lord Halsbury LC) referring to “the rules of reason and justice ... according to law ... legal and regular ... within the limit” cited, applied and developed in the line collected in fn (185) including *Connell* (1944) 69 CLR 407 at 431 (Latham CJ) as to which see AS[43]. That line stresses the limits set by the need to exercise power for the purpose of attaining the statutory object for which power was conferred (eg *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 620 (Latham CJ)) akin to Aickin J’s second sense of bad faith in *Toohy*; see also *Li* at [24] (French CJ), [65] (Hayne, Kiefel and Bell JJ) re *Sharp v Wakefield*.

⁸ Cf *Futuris Corporation* (2008) 237 CLR 146 at [48].

⁹ Cf *Futuris Corporation* (2008) 237 CLR 146 at [25], [55].

¹⁰ That aside, contra RS[47], *Minister for Immigration v Moorcroft* offers no analogy as the statutory criterion that a non-citizen has been deported involves a matter of public record, not evaluative judgment, and a separate event from the event of purported cancellation of the visa that gave rise to that historical fact of deportation: (2021) 273 CLR 21 at [17]–[19] (the Court).

¹¹ (2001) 114 FCR 282 at [25].

10. *Fifth*, the State says a *Bond* type “substantive determination” and *Tang*’s two criteria cohere because they “return to the anterior question of what the statute has made legally operative” (RS[11], [13]), and the ADJR Act is unavailable because the Government party’s “view” for s 29(7) is not “the source” of “later legal consequences” (RS[38]) or “the statement’s legal operation” (RS[52]), so *Tang*’s criteria are not met. But *Tang*’s first criterion is met because the NTA is the source of the decision’s legal effect¹² (AS[50]), and its second criterion is met because the decision affects legal rights or obligations by engaging ss 28(1)(c) and 32(2) (in a case such as the second YAC notice: AS[6(4)], [9(4)], [17]), or requiring that the native title party object (s 32(3)): AS[50]. The capacity of the decision under s 29(7) to affect a native title party’s rights and obligations derives from the NTA, the power to include the expedited statement is conditioned by consideration of the s 237 criteria, and the consequences turn upon the purported validity of the decision to include the statement and not the fact of the statement.¹³ If a decision to include a statement under s 29(7) were found to exceed the statutory limits, on one or more grounds in s 5 of the ADJR Act, the court would declare the rights of the parties in respect of the matter to which the decision relates (s 16(1)(c)) namely that NTA s 32 does not apply but s 31 does: proposed amended OA[3(c)], [5(a)] **AFM187**.
11. *Sixth*, recasting the issue on appeal as a “narrower question” of “anterior consideration” of the s 237 criteria (RS[15]) could only possibly bear upon the failure to consider ground of review in proposed amended CS[24A(b)] **AFM195**. RS[39] glosses the grounds and it must be kept in mind that summary judgment was on the basis that a decision to include an expedited statement in a s 29 notice is not “amenable to judicial review” (FC[44], [53]; PJ[8], [69], [125], [131], [163]), not on the basis of particular grounds: cf RS[53]. That said, the grounds of review to add the claim on the second YAC notice (amended CS[24A] **AFM195**) were:
- ... the State failed to perform the task required by sections 29(7) and 237 of the [NTA]. In particular:
- (a) the State applied the 2022 Policy;

¹² (2005) 221 CLR 99, [29], [75], [76] (Gummow, Callinan and Heydon JJ). Cf *Glasson v Parkes Rural Distributions Pty Ltd* (1984) 155 CLR 234 at 241 (the Court) (“neither the Commonwealth Act nor the scheme is ... the source of the decision’s legal effect”); *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [54] (McHugh, Hayne and Callinan JJ) distinguishing the position of AWB (International) Limited from that of a public authority; Gleeson CJ at [29] and Kirby J at [99], [115] opined the corporation was exercising public power despite being a private corporation.

¹³ Cf *Fuller v Lawrence* (2024) 282 CLR 646 at [16], [19]–[22] (the Court).

- (b) the State failed to actively consider, on material reasonably available to it, whether each of the criteria in section 237 was satisfied; and
- (c) if the State formed the state of mind required by sections 29(7) and 237, it failed to do so reasonably, on a correct understanding of the law (as described in [4] above)¹⁴ on the basis of some material.

Further particulars may be provided following discovery.

10 The 2022 Policy is alleged to involve assessing the risk that the Tribunal might find an act did not meet the s 237 criteria and to not require the State to undertake the functions conferred by ss 29(7) and 237: amended CS[8], [25] **AFM192, 195**. The grounds on the second YAC notice and the 2022 Policy went to the claimed declaratory relief, including that the 2022 Policy was inconsistent with the requirements of the NTA: proposed amended OA[3(c)], [5] **AFM187**. The primary judge held that his conclusion that a decision to include an expedited statement in a s 29 notice “is not amenable to judicial review” precluded declaratory relief in relation to the 2022 Policy and that the outcome of the summary judgment made it unnecessary to determine the application for leave to amend: PJ[160], [163], [176].

20 The State’s articulation of potential grounds (RS[26], [39]) is consistent with the usual statutory implication of reasonableness in formation of the view expressed in the statement in the second YAC notice that the act does attract the expedited procedure within ground [24A(c)]¹⁵ as well as grounds [24A(a)] and [25] that the use of the 2022 Policy wrongly precluded the Government party from undertaking the consideration required by ss 29(7) and 237.¹⁶ There remains a triable issue for remittal (AS[51] cf RS[54]) unless the only ground of review is actual bad faith to include the statement in the notice, which the Appellants (and any native title party) could not plead without a basis on discovery from the Government party.¹⁷

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¹⁴ Paragraph [4] **AFM 192** sets out the terms of ss 29(7) and 237 and goes on to state: “This requires active consideration, on material reasonably available to the Government party. In making a section 29(7) decision, a Government party must form the requisite state of mind reasonably, on a correct understanding of the law, and on the basis of some material.”

¹⁵ See *Li* (2013) 249 CLR 332 at [90] (Gageler J).

¹⁶ See *Green v Daniels* (1977) 51 ALJR 463 at 465-7 (Stephen J); *Re Drake; Minister for Immigration* (1979) 2 ALD 634 at 640 (Brennan J).

¹⁷ *Futuris Corporation* (2008) 237 CLR 146 at [60]; *Denlay* (2011) 193 FCR 412 at [76]-[78].