CITATION:	*Ex Parte Northern Land Council* [2024] NTSC 34
PARTIES:	EX PARTE NORTHERN LAND COUNCIL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2022-01810-SC
PRONOUNCED:	15 March 2024
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JUDGMENT OF:	Southwood J

CATCHWORDS:

LAND LAW—Dealings by Aboriginal Land Council—*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)—Order 54 *Supreme Court Rules 1987* (NT)—Application by the Northern Land Council for orders permitting transfer of funds received in connection with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)—Unallocated trust funds arising out of modernisation of accounting systems most likely comprised of interest—Inability of the Northern Land Council to attribute the unallocated funds to any sub ledger rendered compliance with s 35(11) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) impossible—Whether s 35(11) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) expressly or impliedly prohibits the proposed application of funds—No prohibition found—NLC justified in transferring funds as proposed.

LAND LAW—Dealings by Aboriginal Land Council—*Native Title Act 1993* (Cth)—Section 50A *Trustee Act 1893* (NT)—Application by the Northern Land Council for orders permitting transfer of funds received in connection with the *Native Title Act 1993* (Cth)—No conflict with constating statute—Northern Land Council justified in transferring funds as proposed.

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 23(1)(e), s 35, s 35(1), s 35(2), s 35(3), s 35(4) s 35(4A), s 35(8), s 35(10), s 35(11), s 36
Native Title Act 1993 (Cth) s 24CD, s 203BH, s 203DB, s 203BB(1)(b)(ii)-(iii)
Supreme Court Rules 1987 (NT) Order 54, Rule 54.02, Rule 54.03, Rule 54.04
Trustee Act 1893 (NT) s 49A, 50A, s 50A(1)(a), s 63, s 82, s 88
Trustee Act 1925 (NSW) s 63

Attorney-General v Trustees of the British Museum [2005] Ch 397; *British Medical Association v Commonwealth* (1949) 79 CLR 201; *Gagudju Association v Northern Land Council* [1995] FCA 304; *Re Application of Willoughby City Council* [2016] NSWSC 1717; *Re Australian Pipeline Limited* (2006) 60 ASCR 652; *Re Shipwrecked Fisherman and Mariners' Royal Benevolent Society* [1959]; *Rirratjingu Aboriginal Corporation v Northern Land Council* (2015 324 ALRA 240; *St Petka CA* (2006) 66 NSWLR 112; *Uelese v Minister for Immigration* (2015) 256 CLR 203, referred to.

REPRESENTATION:

Counsel:

Applicant	S Glacken KC with T Cole & K Frawley

Solicitors:

Applicant	Northern Land Council

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ex Parte Northern Land Council [2024] NTSC 34
No. 2022-01810-SC

IN THE MATTER of an application by the Northern Land Council under section 50A of the *Trustee Act*

EX PARTE NORTHERN LAND COUNCIL
Applicant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Pronounced 15 March 2024)

Introduction

[1] By originating motion filed on 25 July 2022 the Northern Land Council (NLC) sought the following orders:

1. In relation to the trust funds comprising the sum that is held by the NLC on a term deposit with the National Australia Bank, including interest accruing on the sum from time to time, and which forms part of the monies held by the NLC in the account styled as the Royalty Trust Account:

   (1) the NLC is authorised, *if a power of application is wanting*, pursuant to s 50A of the *Trustee Act 1893* (NT); *or*

   (2) the NLC is justified, if a power of application is *not* wanting, pursuant to Order 54 of the *Supreme Court Rules 1987* (NT);

   to apply the trust funds in the following manner:

   (a) to transfer the trust funds to the account maintained by the NLC styled as Funeral and Ceremonial Costs so that the trust

funds are applied to or for the benefit of Aboriginals living in the region of the NLC who are in need of assistance in the cost of funeral and burial services in accordance with NLC policy 078: *Financial Assistance for Funeral Policy* dated 1 October 2021;

(b) *alternatively*, to transfer the trust funds to the Northern Territory Investment Corporation established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to hold on trust and to be applied by the Corporation to or for the benefit of Aboriginals living in the region of the NLC.

2. An order that the costs of the application not be treated costs in the administration of the trust funds so that the NLC is to bear its costs of the application (and, if any party is joined to the application, an order that that party bear its costs of the application).

[2] On 15 March 2024, I made the following orders:

THE COURT NOTES THAT:

A. By an Originating Motion filed 25 July 2022, the Plaintiff, the Northern Land Council (the NLC), seeks relief pursuant to Order 54 of the *Supreme Court Rules 1987* (NT) and section 50A of the *Trustee Act 1893* (NT) in relation to trust funds held by the NLC that relate to payments received by the NLC in connection with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Native Title Act 1993* (Cth).

B. In the circumstances, the Court has determined that it is appropriate to grant relief:

(1) pursuant to Order 54 of the *Supreme Court Rules 1987* (NT) to the extent that part of the funds relate to payments received by the NLC in connection with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); and

(2) pursuant to section 50A of the *Trustee Act 1893* (NT) to the extent that part of the funds relates to payments received by the NLC in connection with the *Native Title Act 1993* (Cth)

THE COURT ORDERS THAT:

1. In relation to the trust funds comprising the sum that is held by the NLC on a term deposit with National Australia Bank (…), including interest accruing on that sum from time to time, and which forms part of the monies held by the NLC in the account styled as the Royalty Trust Account:

(1) to the extent that part of the funds relate to payments received by the NLC in connection with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the Court directs pursuant to Order 54 of the *Supreme Court Rules 1987* (NT) that the NLC is justified in transferring; and

(2) to the extent that part of the funds relates to payments received by the NLC in connection with the *Native Title Act 1993* (Cth), the Court orders pursuant to section 50A of the *Trustee Act 1893* (NT) that the NLC is authorised to transfer,

the trust funds to the account maintained by the NLC styled as the Funeral and Ceremonial Fund so that the trust funds are applied to or for the benefit of Aboriginals living in the region of the NLC who are in need of assistance in the cost of funeral and burial services in accordance with NLC Policy 078: Financial Assistance for Funerals Policy dated 4 October 2021.

2. The NLC is to bear its costs of and in relation to the originating motion.

[3] Following are my reasons for decision.

Evidence

[4] In support of the application the NLC read the following affidavits:

- Affidavit of Kannan Chakravarti Raghunathan dated 30 June 2022.
- Affidavit of Tamara Simone Cole dated 30 June 2022.
- Affidavit of Tamara Simone Cole dated 19 July 2022.
- Affidavit of Service of Tamara Simone Cole dated 16 August 2022.
- Supplementary Affidavit of Kannan Chakravarti Raghunathan dated 30 August 2022.

- Supplementary Affidavit of Tamara Simone Cole dated 31 August 2022.

- Affidavit of Service of Tamara Simone Cole dated 14 September 2022.

- Affidavit of Service of Tamara Simone Cole dated 22 September 2022.

- Supplementary Affidavit of Tamara Simone Cole dated 8 February 2024.

- Supplementary Affidavit of Kannan Chakravarti Raghunathan dated 8 February 2024.

The facts

[5] The NLC maintains a Royalty Trust Account ("RTA") for the receipt and payment of amounts under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("ALRA") and the *Native Title Act 1993* (Cth) ("NTA") for the use of Aboriginal land. The amount of money received has grown over the years. As at March 2020, the account had 1200 ongoing sub ledgers for Aboriginal land and the NTA.

[6] In the course of modernising its accounting system, the NLC undertook a reconciliation trust project that had two outcomes. First, an amount of $12.814 million (comprised of interest received on monies in bank accounts over the period 31 December 2005 to 28 February 2019 for individual

dealings in land) was allocated across various sub ledgers, and then paid to relevant traditional owners and organisations. Second, after allocation of the $12.814 million, there remained a balance of interest received of $1.736 million, which the NLC could not attribute to any sub ledger for any particular dealing in land. The unallocated funds are most likely comprised of interest accrued on cash at bank as at 1 January 2006. As the amount of $1.736 million plus the interest earned thereon *could not be attributed to any sub ledger*, those monies could not be distributed in the manner provided by s 35(11) of the ALRA and the NTA. Consequently, the amount of $1.736 million together with further accruing interest was transferred to a term deposit pending the outcome of the application before the Court.

[7] Consequently, the NLC sought the orders at [2] above and directions for the benefit of Aboriginals living in the region of the NLC.

[8] Although amounts paid under the NTA are not within s 35 of the ALRA, they had been administered as part of the Royalty Trust Account in the same manner as amounts paid under the ALRA. There was only a small number of dealings under the NTA.

[9] Prior to the filing of the originating motion, the NLC notified the Northern Territory of Australia, the Commonwealth Minister responsible for the ALRA and the general public of the application and the directions sought from the Court. The Northern Territory Attorney General, Minister Paech, and the Commonwealth Minister for Indigenous Affairs, Minister Burney,

were notified by post and email on 5 July 2022. Public notices were printed in various local, regional and national newspapers between 8 July 2022 and 15 July 2022.

Evidence on the unallocated amount

[10] The unallocated amount of $1.736 million was identified after a reconciliation done as part of a migration of accounting records where 244 sub ledgers within the RTA with a balance above zero were migrated to the "Sage" accounting system. Of the 244 migrated sub ledgers, six related to payments pursuant to agreements under the NTA to which the NLC was a party as agent for native title claimants with payment being made to the NLC on behalf of the native title claimants concerned.

[11] The NLC was unable to attribute the unallocated amount to individual contracts and allocate it to corresponding sub ledgers. It was not possible to assess whether any categories of RTA receipts did not contribute to the unallocated amount or whether any one category contributed more than another.

Further evidence on the six Indigenous land use agreements

[12] The supplementary affidavit of Tamara Cole dated 8 February 2024 confirmed the following in relation to the Indigenous land use agreements under the NTA:

- Three of the agreements were made in connection with both the ALRA and the NTA, the other three in connection only with the NTA.

- In so far as an agreement was made in connection with the NTA, the NLC was a party in accordance with certain provisions of the NTA dealing with the functions of a representative Aboriginal/Torres Strait Islander body for agreements about future acts that affect native title, in particular s 24CD (party to Indigenous land use agreements) and s 203BB (1)(b)(ii)-(iii) (facilitate other agreements).

- In so far as an agreement was made in connection with the ALRA, the NLC was a party in accordance with the function of a Land Council in s 23(1)(e) of the ALRA to negotiate with persons desiring to obtain an interest in Aboriginal land or land that is subject to a traditional land claim under that Act.

- The agreements provided that the NLC was a party as the agent or representative of the Aboriginal groups concerned and that payments were to be made to the NLC on behalf of the relevant Aboriginal groups.

[13] The supplementary affidavit of Kannan Chakravarti Raghunathan dated 8 February 2024 explained that:

- It was likely that interest on receipts within the RTA with respect to the six relevant migrated sub ledgers formed some part of the unallocated amount.

- It was not possible to estimate, with any accuracy, the extent or amount of any receipts within the RTA with respect to the six relevant migrated sub ledgers.

- At the time of the migration of the 244 sub ledgers (1 January 2006) the relative proportion of receipts referable to the six relevant migrated sub ledgers was about 4.4%.

The central issue

[14] The NLC submitted that this proceeding turned on the fact that it was unable to identify any sub ledger for a dealing in land to which any part of the unallocated amount of interest was received before 1 January 2006 and might be attributable and distributed in accordance with s 35(11) of the ALRA. As the NLC could not distribute the relevant amount of interest in accordance with s 35(11) it sought the orders in paragraphs [1] and [2].

[15] Subsection 35(11) of the ALRA requires that the monies received by the NLC, on behalf of traditional owners and Aboriginal people living on Aboriginal land, be invested and, *so far as practicable*, for any interest earned on the money to be paid to the body or persons to whom the money is paid.

[16] The relevant parts of s 35 of the ALRA being ss 35(1), (2), (3), (4A), (8), (10) and (11), state:

> (1) Subject to this section, money paid to a Land Council under subsection 64(3) must be paid, within 6 months of its receipt by the Land Council, to any Aboriginal and Torres Strait Islander corporation whose members live in, or are the traditional Aboriginal owners of, the area affected by those mining operations, in such proportions as the Land Council determines.
>
> (2) Subject to this section, within 6 months after money is paid to a Land Council under an agreement made under s 42, 43, 44, 46, 48, 48A, 48B or 48D, it must:
>
> (a) be applied by the Land Council in accordance with the agreement; or
>
> (b) if the agreement makes no provision in relation to the application of the money – be paid to any Aboriginal and Torres Strait Islander corporation whose members are affected by the agreement, in such proportion as the Land Council determines.
>
> (3) Where a Land Council receives a payment in respect of Aboriginal land (including a payment under section 15 or 16 or a payment under a lease or licence under section 19 or 20, but not including a payment under section 33A, 33B or 64 of this Act), the Land Council shall, within 6 months after that payment is received, pay an amount equal to that payment to or for the benefit of the traditional Owners of that land.
>
> …
>
> (4A) If:
>
> (a) a Land Council receives a payment as mentioned in subsection (4); and
>
> (b) the payment is made by the Commonwealth, the Northern Territory or an Authority; and
>
> (c) the payment is of a kind prescribed by the regulations for the purposes of this subsection; and
>
> (d) under subsection (4), the Land Council pays an amount equal to that payment to a person;
>
> the Land Council must, at the time it pays that amount, advise the person in writing that the amount is an accountable amount.
>
> …

(8) Each amount of money that is paid to a Land Council as mentioned in subsection (2), (3), (4) or (4B) shall be held in trust for the bodies to which or persons to whom that amount is eventually to be paid in accordance with this section until that amount is paid.

…

(10) While an amount of money referred in subsection (6B), (8) or (9) is held in trust in accordance with that subsection, the Land Council shall cause that amount to be invested in investments of the kind authorised by section 58 of the *Public Governance Performance and Accountability ACT 2013*.

(11) Where a Land Council pays out an amount of money that it has held in trust and invested in accordance with this section, the Land Council shall, *so far as is practicable*, pay to the body or person to whom that amount is paid the interest received by the Land Council in respect of the investment of the amount. [emphasis added]

[17] The NLC submitted that s 35(11) recognises the possibility that it may not be practicable to pay all interest received in accordance with that subsection as was the situation in this case. If and when that occurs the NLC submitted that the situation may be remedied in accordance with the provisions referred to in the originating motion.

Possible resolution of the issue under s 36 of the ALRA

[18] Before considering the NLC's substantive application it was necessary to consider whether a solution to the apparent conundrum could be found in s 36 of the ALRA which states:

> No payment, other than a payment in accordance with section 34 or 35, shall be made by a Land Council unless the payment has been approved by the Minister.

[19] Section 36 of the ALRA potentially precludes interest earnt on monies in the RTA being disbursed other than in accordance with s 34 or 35 without the

approval of the Minister. Therefore the section may preclude the need for the instant application and direct the NLC to resolve the matter by obtaining approval from the Minister. Section 34 of the Act is irrelevant for the purposes of this application.

[20] Accordingly, I requested that the NLC contact the Minister, inform her of this proceeding and the NLC's proposed use of the money, and enquire if the Minister would approve the unallocated interest being used for funeral and ceremonial costs and expenses.

[21] On 9 September 2022 the Chief Executive Officer wrote to the Minister in the following terms.

> …
>
> As you may be aware from the materials filed with the Court and provided to you and officers at the NIAA, the NLC's primary position is that there is power to pay the unallocated amount of interest in accordance with s 35 of the Land Rights Act in the ways specified in the Originating Motion. This is because the requirement of s 35(11) is conditional upon it being practicable to do so, and that condition has not been met.
>
> If, however, there is no power to make the payment in accordance with s 35 in those ways, a question may arise whether that payment is other than in accordance with s 35 and whether s 36 requires approval by the Minister.
>
> I note that, while s 36 is primarily directed to payment of administration costs, as a matter of prudence, we would formally seek approval by the Minister of the payments proposed in the Originating Motion should that be necessary.

[22] In an undated letter, which was received by the NLC on 17 October 2022, the Minister replied to the letter dated 9 September 2022 as follows:

> ...
>
> I consider it important to find a resolution to facilitate an appropriate use of the funds in question. I do not seek to join or be heard in these proceedings.
>
> Please keep me informed regarding the proceedings *and any approval you wish to seek* under s 36 of the *Aboriginal Land Rights (Northern Territory) Act 1976*.
>
> ... [emphasis added]

[23] On 21 September 2022, the Chief Executive Officer of the NLC wrote to the Minister as follows:

> ....
>
> With respect to my earlier correspondence and request, should it be necessary, for the Minister's approval in connection with this matter under s 36 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (Land Rights Act), I draw your attention to pages 25 to 30 of the transcript where this is discussed between Stuart Glacken KC and his Honour Justice Southwood.
>
> For clarity, I note that the NLC's primary position, as advanced by Mr Glacken (for example see pages 25, 26 and 30 of the transcript) is that there is power to the unallocated amount of interest in accordance with s 35 of the Land Right Act in the ways specified in the originating motion. This is because the requirements of s 35(11) are conditional upon it being practicable to do so, and that condition has not been met.
>
> Notwithstanding that s 36 of the Land Rights Act is primarily directed to payment of administration costs, as a matter of prudence in the originating motion, I formally seek approval by the Minister for the manner of payment proposed in the originating motion, should that be necessary.
>
> ....

[24] On 9 October 2023, I listed the matter for mention to enquire about the Minister's involvement under s 36 in light of the undated letter. The NLC maintained their primary position that they did not require Ministerial approval under s 36 for application of the monies as they had power to apply

interest monies under s 35(11). Notwithstanding this, on 2 November 2023, the NLC provided the Minister with the transcript of the 9 October 2023 mention and sought approval under s 36 of the ALRA for the proposed application of the unallocated amount. It was noted by the NLC in this letter that the approval under s 36 could be provided solely for those monies which relate to payments received in connection with the ALRA and not for any monies received in connection with the NTA. By letter dated 30 November 2023, the Minister provided such approval, if necessary for resolving the issue, for the application of what the letter refers to as the "relevant unallocated money" in either of the two ways stated in the Originating Motion.

[25] Subsequently, I asked the NLC to provide written submissions on whether the Minister's approval under s 36 could resolve this issue. Counsel for the NLC submitted that the ability of Ministerial approval under s 36 to resolve the issue turned on an analysis of the correct interpretation of s 36. The NLC submitted that s 36 may be interpreted in one of two ways:

(1) Does s 36 require the Minister to approve a payment (disbursement) by a Land Council of an amount for a payment it receives that is otherwise within the subject matters of ss 34 and 35 when the payment cannot be disbursed by the Land Council in the ways described in the sections?

(2) Does s 36 only require the Minister to approve a payment (disbursement) by a Land Council of amounts it receives when the

Council receives payments that are not within the subject matters of ss 34 and 35?

[26] The NLC submitted that the second interpretation should be preferred as it better conforms to the statutory text, structure, and context. The NLC gave the following reasons for preferring this reading:

1. It is consistent with sub-ss 34(1A)-(1B) which specify the types of payments received by a Land Council in reference to fees and other income (sub-s (1A)) that are to be included in estimates of expenditure on administrative costs under s 34 and payments and interest received under s 35 which are not included for that purpose (sub-s (1B)). This is an indication that s 36 is concerned with other types of payments that are not within the subject matters of ss 34 and 35.

2. It is consistent with the terms of s 35 that confer a range of qualified powers with respect to the ways in which money received by a Land Council covered by the section is to be applied. The qualifications in ss 35(2), (3) and (11) ("any" and "practicable"), as well as the evaluative task of forming an opinion as to who are the traditional Aboriginal owners[1], recognise the possibility that a Land Council may not be able to apply monies in the ways described in the section. There is no prohibition (expressed or implied) against any action outside those specific powers with respect to money received by a Land

1 *Rirratjingu Aboriginal Corporation v Northern Land Council* [2017] FCFCA48, (2017) 248 FCR 349 at [37] and [79].

Council covered by the section. A payment other than in the ways described may still be a payment in accordance with the section. At the least, as is presently relevant, that must be so in the case of money within s 35(11).

3. The preceding point is exemplified by s 35(11) providing that a Land Council "shall, so far as is practicable", pay interest received in the manner described in the sub-section. The provision contemplates that interest may not be paid in that way if it is not practicable to do so. A payment of an amount of interest other than in the way described in s 35(11), that is, to the body or person to whom a principal amount is held in trust is to be paid, when it is not practicable to do so, would still be a payment "in accordance with" s 35(11) by a Land Council within the meaning of that phrase used in s 36. In that event, s 36 and the power it confers on the Minister is not engaged.

4. In cases where a Land Council is unable to make a payment in the manner or way described in the various sub-sections of s 35, to construe s 36 as requiring the Minister to approve each and every other manner of payment, no matter the circumstances or amount involved, would be impracticable. The consequences should be avoided if the provisions are susceptible to an alternative construction.[2] It is not to be

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2 Herzfeld and Prince, *Interpretation* (2nd Ed) at [9.30]; Pearce, *Statutory Interpretation in Australia* (9th Ed) at [2.37]-[2.39].

inferred that the provisions were intended to require something that may prove to be impracticable.[3]

5. This reading of s 36 is consistent with the legislative history. Section 36 has been unaltered since the commencement of the ALRA while ss 34 and 35, and related provisions, have been substantially altered, particularly by the 1987 Act and the 2006 Act. Section 36 predated the insertion of ss 35(5) to (11) by the 1987 Act. The equivalent of s 36 was within sub-clause 35(5) of the original Bill for the ALRA. The Clause Notes (explanatory memorandum) stated that clause 35 distinguishes "types of revenue received by Land Councils and specifies the manner of disbursement for each type of revenue", and that "Sub-clause (5) provides that any other moneys received by a Land Council shall be dispersed in a manner approved by the Minister"[4], that is, moneys other than the "types of revenue" within ss 34 and 35.

[27] Consequently, s 36 does not apply because a Land Council can apply interest other than in the way described in s 35(11), when it is not practicable to do so. Therefore, the application of the funds as directed by the Court was a "payment in accordance with" s 35 and as such s 36 is not engaged. I accepted this construction of s 36 as correct. Consequently, the major part of the unallocated amount is unable to be resolved through application of s 36.

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3 *Uelese v Minister for Immigration* [2015] HCA 15, (2015) 256 CLR 203 at [100].

4 Clause Notes, Aboriginal Land Rights (Northern Territory) Bill 1976 (NT).

[28] Additionally, the NLC submitted that, in so far as the minor part of the unallocated amount was received by the NLC under the NTA, s 36 of the ALRA can have no application. I accept this submission. It is not possible to disentangle or disaggregate any parts of the unallocated amount to payments received under the ALRA and NTA or across sub ledgers for transactions done under each Act. For the minor part of the unallocated amount the NLC was required to apply payments (and any accrued interest) in accordance with six Indigenous land use agreements. However, it was unable to do so due to the impossibility of disentangling/disaggregating any parts of the unallocated amount.

Primary submission

[29] As s 36 does not provide a solution to this issue, it was necessary to consider the NLC's primary submission. As to the major part of the unallocated amount received by the NLC under the ALRA, the NLC's primary submission was that relief under Order 54 of the *Supreme Court Rules 1987* (NT) is appropriate because it is in the interests of the trust for the Court to resolve any doubt by direction. Relief under s 50A of the *Trustee Act 1893* (NT) is not appropriate because a power of alternative application by the NLC is not wanting. As to the minor part of the unallocated amount likely received by the NLC in connection with the NTA, the NLC submitted that relief under Order 54 is not appropriate as a power of alternative application of that part by the NLC is wanting. Instead, they submitted that relief under s 50A of the *Trustee Act 1893* (NT) is

appropriate. I accepted the NLC's submission that the relief sought is appropriate for the reasons outlined herein.

Construction of ALRA s 35

[30] The NLC submitted that the proposed application of the interest received in connection with the ALRA was a payment in accordance with s 35(11). This submission relied upon s 35(11) being construed as not expressly or impliedly prohibiting the application of the unallocated interest in the manner suggested by the NLC.

[31] There is an obligation inherent in s 35(11) of the ALRA that where a Land Council disburses monies held in trust and invested, it shall "so far as practicable" pay to the body or person to whom that amount is paid the interest received for the investment of that amount. Noting that "impracticable" does not mean "impossible".

[32] The NLC submitted that, due to the circumstances outlined at [5]-[13], it was not practicable for the NLC to pay interest in the manner stipulated by s 35(11). However, the NLC had a power under s 35(11) to pay the interest received in other ways, provided it did so in a manner consistent with the purpose of s 35 and the NLC's obligations under the ALRA.

[33] Section 35 confers limited and qualified powers on a Land Council to apply interest other than in the manner stipulated. The words "any" and "practicable" recognise that a Land Council may apply interest other than in the ways stipulated by the section. The NLC submitted that, if s 35 was

construed as precluding the payment of interest other than in the way stipulated in s 35(11) in cases where it is not practicable to do so, there would be a substantial, if not total, impediment to a Land Council's function under s 35. Such an impediment would be particularly prominent in cases where an amount of interest was *de minimis*. I accepted this submission. In my opinion, s 35(11) only requires a Land Council to pay interest where it is practicable to do so and does not expressly or impliedly prohibit alternative action when such a course is not practicable.

Statutory trusts and the Court's powers under Order 54

[34] As recognised by Mansfield J in *Rirratjingu Aboriginal Corporation v Northern Land Council*[5], s 35(8) of the ALRA establishes a statutory trust, recognising that a Land Council has "no beneficial interest in moneys received under s 35(4) and must deal with funds received under s 35(4) in accordance with its terms."[6] No entitlement to the money is created before a determination is made by the Land Council to whom an amount is eventually to be paid.[7] Pursuant to s 35(4), a payment that is to or for the benefit of traditional Aboriginal owners involves an application of an amount to purposes that promotes their wellbeing.

[35] Consistent with *Rirratjingu Aboriginal Corporation v Northern Land Council*[8], the NLC submitted that the proposed application of the

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5 [2015] FCA 36, (2015) 324 ALR 240.

6 Ibid at [110].

7 *Gagudju Association v Northern Land Council* [1995] FCA 304 per Olney J.

8 (2015) 324 ALR 240.

unallocated amount of interest to the Funeral and Ceremonial Fund is consistent with the purpose of s 35, as the application is for the benefit of Aboriginal people living in the region of the NLC. A payment will be for the benefit of persons if it facilitates the provision of material aid for their welfare. The Funeral and Ceremonial Fund provides direct support for Aboriginal people in need of assistance and serves to ameliorate their distress in the burial of kin. This support promotes the well-being of Aboriginal people in the relevant areas and that of the wider Aboriginal community to whom they belong.

[36] The NLC submitted that three points arise from s 35(8) which establishes a statutory trust:

1. Those who may be affected by the actions of a Land Council under s 35, such as any traditional Aboriginal owners of the land concerned, have standing to secure performance of the statutory obligations.[9] The NLC have accepted that it is within the competence of both the Commonwealth Minister responsible for the ALRA and the Northern Territory Attorney-General to ensure the discharge of the statutory obligations imposed by s 35. The NLC have given notice of the application to those officers as well as public notification.

2. Given the terms of s 35(8) in establishing a trust over amounts paid to a Land Council, the Supreme Court has statutory jurisdiction in this

9 *Rirratjingu Aboriginal Corporation* v *Northern Land Council* (2015) 324 ALR 240 at [104].

proceeding. Decisions of the Supreme Court of New South Wales accept that a trustee of a statutory trust has standing to seek directions under s 63 of the *Trustee Act 1925* (NSW), which is the functional equivalent of Order 54 of the *Supreme Court Rules 1987* (NT)[10] and that a statutory trust is a trust as defined in the same terms of s 82 of the *Trustee Act 1893* (NT).[11]

3. In the case of a statutory trust, the power to authorise transactions conferred by s 50A of the *Trustee Act 1893* (NT) cannot be exercised in a manner so as to conflict with the terms of the statute. If the relevant act impliedly prohibits what is sought to be done, then the Court cannot assist. The Court can, however, aid the trustee in providing supplementary power where there is no such implied statutory prohibition. As discussed at [33], there is no express or implied prohibition in s 35(11) against the relief sought by the NLC.

[37] Rule 54.02 of the *Supreme Court Rules 1987* (NT) confers a power on the Court to advise whether a trustee is justified in exercising powers in particular ways even though it does not advise the trustee to do so.[12] The process is a summary procedure where the trustee places all relevant circumstances before the Court and seeks a direction that in those circumstances the trustee would be justified in taking a certain course.

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10 *Re Application of Willoughby City Council* [2016] NSWSC 1717 at [84].

11 *Re Australian Pipeline Limited* [2006] NSWSC 1316, (2006) 60 ASCR 652 at [2] per Barret J.

12 Heydon and Leeming, *Jacobs' Law of Trusts in Australia* (8th ed) at [21]-[34].

Consistent with the terms of rules 54.03 and 54.04, giving notice of an application may be appropriate so that the Court may be assisted by having the views of those persons who are likely to be affected by the directions.[13] The NLC have provided public notification of the application as outlined at [9].

[38] Given the finding of a residual power in s 35(11) contemplated at [33], there was some doubt over whether this rendered the matter inappropriate for directions by the Court. This is because the existence of the residual power arguably permits a Land Council to exercise such a power without being required to approach the Court for directions. The NLC submitted that, despite the existence of the residual power in s 35(11), these are not matters free of doubt and where there is a doubt as to the extent of a trustee's powers it is appropriate for a prudent trustee to approach the Court for directions under Order 54. The NLC submitted that the doubt in these proceedings arises because there is a doubt surrounding the interaction of s 35(11) and s 36 of the ALRA. Such doubt surrounding the interpretation of s 36 and its relation to s 35(11) was discussed at [25]-[26]. The NLC also submitted that, were the NLC to be sued for a breach of trust for their proposed disbursement of the monies, their obtaining of directions from the Court would be taken into account in a determination of whether to excuse the breach of trust under s 49A of the *Trustee Act 1893* (NT).

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13 *St Petka CA* [2006] NSWCA 160, (2006) 66 NSWLR 112 at [56].

[39] I was satisfied that, for the reasons set out above, this was an appropriate matter for a direction under Order 54 in relation to the funds received by the NLC in connection with the ALRA.

Native Title Payments

[40] As to the part of the funds arising out of payments received by the NLC in connection with the NTA, the NLC submitted that this Court has jurisdiction under s 50A of the *Trustee Act 1893* (NT) to authorise the NLC to transfer the funds to the Funeral and Ceremonial Fund.

[41] It is accepted that from time to time, the RTA holds monies paid to the NLC both in its role as trustee under s 35(8) of the ALRA and as a party to Indigenous land use agreements under s 203BH of the NTA.

[42] As noted above at [6] the unallocated funds, which most likely comprise interest accrued on cash at bank as at 1 January 2006, *cannot* be attributed to any individual contract and corresponding sub ledger within the RTA. Therefore, it was unknown whether such funds were referrable to payments received pursuant to the NTA or the ALRA, and in what proportion either payment channel may have contributed to the pool of unallocated funds.

[43] However, the NLC submitted that even if NTA monies did contribute to the unallocated amount, the six sub ledgers referrable to agreements under that Act constituted a small proportion of the total 244 sub ledgers migrated. Further, the NLC submitted that historically they have administered

payments under the NTA and the ALRA in a similar fashion, as a result of both being included in the RTA.

[44] As such, it was submitted that a practical and equitable resolution is offered by treating the funds in the same manner regardless of their potential origin, rather than attempting to distinguish the funds as referrable to a specific act where the necessary data is not available to do so.

The Court's jurisdiction to grant relief with respect to any NTA money

[45] The NTA does not have a provision equivalent to s 35 of the ALRA dealing with the application of money received by a representative Aboriginal/Torres Strait Islander body for Aboriginal groups who hold or claim native title. Nor is there any provision in the NTA like s 36 of the ALRA conferring Ministerial powers in relation to payments.

[46] Section 203DB of the NTA provides that a representative body must do "all things necessary to ensure that payments out of the money of the body are correctly made and properly authorised." A payment received by a representative body for Aboriginal groups under an agreement made in connection with the NTA may not, if impressed by a trust or a trust like obligation, be "money of the body" within s 203DB, but nothing would appear to turn on the terms of that section.

[47] Rather, each of the six agreements provided that the NLC was a party to the agreement as an agent or representative of the Aboriginal groups concerned and that payments were to be made to the NLC "on behalf of" those groups.

Also, as detailed in the affidavits of Mr Raghunathan dated 30 June 2022 and 30 August 2022, payments received by the NLC in connection with both the ALRA and NTA were not mixed with the NLC's own money and were separated from the NLC's money through the maintenance of the RTA and its sub ledgers.

[48] In the circumstances, the NLC is in a position of trustee, or at least is subject to a trust like obligation, with respect to the payments it received under the agreements, rather than being a debtor of the relevant Aboriginal groups in an agent/principal relationship. The terms of each agreement imply a duty on the NLC to hold the money specifically for the relevant groups, and which it assumed through maintenance of the RTA and its sub legers. That duty has the same effect as if the payments (including interest received on payments) were trust money.[14]

[49] Therefore, the NLC submitted that, to the extent a part of the unallocated amount may be referrable to payments received by the NLC in connection with the NTA, as with payments covered by s 35 of the ALRA, the Court has jurisdiction to grant the relief sought. I accepted this submission. In my opinion, the NLC is subject to a trust like obligation in relation to the NTA funds.

[50] Section 50A(1)(a) of the *Trustee Act 1893* (NT) provides that the Court may by order authorise a trustee "either generally or in a particular case" to make

14 Heydon and Leeming, *Jacobs' Law of Trusts in Australia* (8th Ed) at [2.11]; *Walker v Corboy* (1990) 19 NSWLR 382 at 383-3, 389, 397.

a disposition "as the Court thinks fit and for which the trustee has no power under trust instrument or a law in force in the Territory". However, in the case of statutory trusts, this power ought not to be exercised in a way that conflicts with the statute.[15] A Court may only intervene where no statutory prohibition bars the proposed action and the trustee seeks permission to go beyond what is expressly authorised by the statute or the trust.[16]

[51] As there was no statutory prohibition barring the proposed action, in relation to the funds received by the NLC in connection with the NTA this Court has jurisdiction under s 50A of the *Trustee Act 1893* (NT) to order that the NLC is justified in transferring the funds to the Funeral and Ceremonial Fund.

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15 *Re Shipwrecked Fisherman and Mariners' Royal Benevolent Society* [1959] Ch 220 at 227 per Danckwerts J.

16 *Attorney-General v Trustees of the British Museum* [2005] Ch 397 at [28].