Alcoota Aboriginal Corporation & Anor
v Gray J & Ors [2003] NTCA 14

PARTIES:	ALCOOTA ABORIGINAL CORPORATION and ARTHUR TURNER Appellants v GRAY J as ABORIGINAL LAND COMMISSIONER First Respondent CENTRAL LAND COUNCIL Second Respondent DAVE ROSS, KEN TILMOUTH, WALTER DIXON and LINDSAY BIRD Third Respondents
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 13 OF 2002 (9612165)
DELIVERED:	26 August 2003
HEARING DATES:	13, 14 and 15 May 2003
JUDGMENT OF:	ANGEL, MILDREN & BAILEY JJ

REPRESENTATION:

Counsel:

Appellant:	J. Reeves QC, P. McNab, R. Bruxner
Respondent:	T. Robertson SC, M. Allars

Solicitors:

Appellant:	Noonans Lawyers
Respondent:	Central Land Council

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

Alcoota Aboriginal Corporation & Anor
v Gray J & Ors [2003] NTCA 14
No. AP 13 of 2002 (9612165)

BETWEEN:

ALCOOTA ABORIGINAL CORPORATION and ARTHUR TURNER
Appellants

AND

GRAY J as ABORIGINAL LAND COMMISSIONER
First Respondent

CENTRAL LAND COUNCIL
Second Respondent

DAVE ROSS, KEN TILMOUTH, WALTER DIXON and LINDSAY BIRD
Third Respondents

CORAM: ANGEL, MILDREN & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 26 August 2003)

ANGEL J

[1] Where, as in the present case, a land claim pursuant to s 50(1)(a) Aboriginal Land Rights (Northern Territory) Act (Cth) is made to land in which an interest is held by or on behalf of Aboriginals:

(a) the consent referred to in s 50(2C) is a precondition to the Commissioner undertaking or continuing his function under s 50(1)(a);

(b) the consent referred to in s 50(2C) may be given before or after either the lodgment of a claim under s 50(1)(a) or the Commissioner undertaking his functions under s 50(1)(a);

(c) the jurisdiction of the Commissioner is enlivened by the lodging of a claim under s 50(1)(a) rather than the granting of consent pursuant to s 50(2C); that this is so, is evident, I think, from the terms of s 50(1)(a) in so far as one function of the Commissioner is to ascertain Aboriginal interests, if any, in the subject land, and the recognition that the Commissioner may have part performed his function before the need for consent is apparent;

(d) the jurisdiction of the Commissioner to perform or to continue to perform his functions under s 50(1)(a) can not be divested by the subsequent withdrawal of a consent once given under s 50(2C), for the reasons given by Mildren J;

(e) any estate or interest in the land held by ATSIC is held by the Crown in right of the Commonwealth for the purposes of s 50(1)(a) because ATSIC is subject to Ministerial direction and control in virtue of the provisions of the Aboriginal and Torres Straight Islander Commission Act 1989 (Cth).

[2] These conclusions are sufficient to dispose of this appeal.

[3] The appeal should be dismissed with costs.

MILDREN J:

[4] This litigation concerns the question of whether or not land which is the subject of a pastoral lease held by Alcoota Aboriginal Corporation (Alcoota) is able to be the subject of a land claim pursuant to s 50(1)(a) of the Aboriginal Land Rights (NT) Act (Cth) (the Act). The appellants claimed that the land could not be the subject of a claim, and sought declaratory relief and an order in the nature of prohibition against the first respondent from performing or continuing to perform any function as a Commissioner under the Act, in respect of a land claim lodged by the second respondent with the first respondent on behalf of the third respondents and others (including, oddly, the appellant Arthur Turner).

[5] The learned trial judge, Martin CJ, refused the relief sought. This appeal seeks to challenge his Honour's decision, but only on limited grounds, which may be briefly summarised as follows:

(1) it is asserted by the appellants that consent was not given by Alcoota prior to the making of the claim and, therefore, consent was not given as required by s 50(2C) of the Act (grounds 1 and 2);

(2) alternatively, consent was subsequently withdrawn (ground 3);

(3) it is asserted that the land was not available for claim because ATSIC (the Aboriginal and Torres Strait Islander Commission) held an equitable interest in the land, and that interest was not held by ATSIC as the Crown: see s 50(1)(a) of the Act (grounds 4, 5 and 6).

[6] The other grounds in the notice of appeal were abandoned, except for ground 9 which depended upon the success of the other grounds.

Background facts

[7] The lease in question (pastoral lease 1032) is a pastoral lease held under the provisions of the Pastoral Land Act (NT). The lease was formerly held by Alcoota Nominees Pty Ltd (the former owner), which was also the registered proprietor. On 31 July 1992, Alcoota was incorporated as an Aboriginal association pursuant to the provisions of Part (IV) of the Aboriginal Councils and Associations Act 1976 (Cth). On 16 September 1992, ATSIC determined to grant $6 million to Alcoota to enable it to purchase the pastoral lease, the cattle business conducted thereon, including the stock, plant and equipment, and for initial operating costs. An offer by ATSIC containing the grant and its terms, dated 28 September 1992, was accepted by Alcoota on 2 October 1992. Contracts for the sale and purchase of the lease and other assets were exchanged between Alcoota and the former owner on 24 December 1992.

[8] Settlement took place on 18 March 1993 and registration of the transfer was effected at 9.36 am that day. At 10.57 am on the same day, an application to the Commissioner under s 50(1)(a) of the Act was sent by facsimile transmission to the Commissioner by the second respondent on behalf of the third respondents and others, and was received by the Commissioner.

[9] On the following day, Alcoota entered into a "purposes agreement" with ATSIC, as envisaged in the accepted offer of the grant. Under the terms of that agreement which was executed as a deed, Alcoota undertook to place the title documents in the custody of ATSIC within 30 days of the execution

of the deed. The duplicate certificate of title was uplifted from the Lands Titles Office by ATSIC's solicitors on 25 March 1993, presumably in accordance with a direction given by the second respondent which was, at that time, acting for Alcoota in the conveyance. There the duplicate certificate of title remains.

[10] By the terms of the purposes agreement, Alcoota also agreed that ATSIC could lodge a caveat over its interest in the lease "to protect the interest hereby created in the land", and further agreed not to take any action to have the caveat removed. On 21 April 1993, ATSIC lodged a caveat claiming an interest as equitable mortgagee over the lease. The grounds of the claim were stated to be an "equitable mortgage created pursuant to deed made 19 March 1993 between the caveator and Alcoota Aboriginal Corporation and by deposit of pastoral lease 1032."

[11] On 31 August 1995, Christopher Reginald Marshall [Marshall] was appointed administrator of Alcoota, pursuant to s 71 of the Aboriginal Councils and Associations Act 1976 (Cth). On 6 March 1996, Marshall, as administrator, signed a form of consent in the following terms:

> Alcoota Aboriginal Corporation being the Lessee of Pastoral Lease No 1032 being Northern Territory Portion 4029, hereby consents pursuant to section 50 (2C) of the Aboriginal Land Rights (Northern Territory) Act 1976 to the making of the land claim application dated the 18th day of March 1993 over all the land comprised in Pastoral Lease No 1032.

[12] By Notice of Cancellation of Appointment of Administrator, dated 6 March 1996, effective on 8 March 1996, the Registrar of Aboriginal Corporations cancelled the appointment of Marshall as administrator of Alcoota.

[13] On 13 May 1996, the Commissioner commenced the hearing of the land claim. The question as to the validity of the consent given by Alcoota was raised. On 15 May 1996, the Commissioner ruled that the consent was effective for the purposes of s 50(2C) of the Act. The following day the hearing resumed and a meeting of the committee of Alcoota was called, inter alia, to consider whether the consent had been validly given "and, if not, whether the committee should rectify *(sic)* or withdraw the consent." The meeting of Alcoota's committee, which was held on 20 May 1996, passed a resolution purporting to withdraw Alcoota's consent to the land claim. That resolution was drawn to the Commissioner's attention on 22 May 1996. His Honour ruled that the consent, once given, could not be retracted and that a document purporting to evidence the resolution of 20 May 1996 was of no effect. Notwithstanding these rulings, the Commissioner has not further proceeded with the hearing of the land claim pending the outcome of these proceedings.

Grounds 1 and 2 – Whether consent required by s 50(2C) must be given before a valid claim can be lodged

[14] Section 50(1)(a) of the Act provides:

> (1) The functions of a Commissioner are:
>
> (a) on an application being made to the Commissioner by or on behalf of Aboriginals claiming to have a traditional

land claim to an area of land, being unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals:

(i) to ascertain whether those Aboriginals or any other Aboriginals are the traditional Aboriginal owners of the land; and

(ii) to report his findings to the Minister and to the Administrator of the Northern Territory, and, where he finds that there are Aboriginals who are the traditional Aboriginal owners of the land, to make recommendations to the Minister for the granting of the land or any part of the land in accordance with sections 11 and 12;

[15] Section 50(2C) provides:

(2C) Where:

(a) an application referred to in paragraph (1)(a) has been made to a Commissioner; and

(b) it appears to the Commissioner that an estate or interest in the land is held by or on behalf of Aboriginals;

the Commissioner shall not perform, or continue to perform, a function under that paragraph in relation to the application as it relates to that land unless the Aboriginals who hold that estate or interest have, or the body which holds that estate or interest on their behalf has, consented, in writing, to the making of the application.

[16] The question is whether the consent referred to in s 50(2C) is required to be given prior to the making of the application to the Commissioner, or whether such a consent may be validly given after the application has been made to the Commissioner. The learned Chief Justice decided that the relevant consent may be given before, at the time of or after the application is made under s 50(1)(a). The appellants submit that his Honour's decision was in error and that, on the true construction of the Act, the relevant consent must be given before the application to the Commissioner is made. Inherent in

the appellants' submission is the proposition that an application to the Commissioner made before such consent is given (where it is required) is invalid. The respondents support the decision of the learned Chief Justice.

[17] There are a number of authorities to which the court was referred by counsel which it was submitted bear upon the question of construction thus raised, although none are decisive. In *The Queen v Kearney; Ex parte Northern Land Council* (1983-84) 158 CLR 365, the High Court held (Wilson J, dissenting) that, so long as land answered the description contained in s 50(1) at the time the application was made, a subsequent change in the description of the land did not deprive the Commissioner of jurisdiction over the land. The reasoning of Gibbs CJ and Murphy J was based on questions of jurisdiction: see pp 373-4; Murphy J at 376. The reasoning of Brennan J (with whom Deane J concurred) was based on "high policy" rather than on whether or not it was a question of jurisdiction, but implicit in his Honour's reasoning is that the Commissioner was not deprived of jurisdiction by subsequent planning laws which affected whether or not the land fell within the description of "unalienated Crown land" as defined in s 3(1) of the Act. But his Honour also used language which suggests that the *validity* of the claim is also to be determined at the time at which it is lodged with the Commissioner (see references to land "having been validly claimed" at p 394, and to "a claim validly made" at p 392).

[18] Subsequently, in *The Queen v Kearney*; *Ex parte Japanangka* (1983-1984) 158 CLR 395, the Northern Territory granted leases to the Northern

Territory Development Land Corporation over areas the subject of an existing land claim. The Northern Territory argued that it was inconsistent with the plenitude of power which self-government is understood to confer, to regard land under claim as frozen and the power of alienation as sterilised until the claim is disposed of. The majority (Wilson J, dissenting) held that, except for one area which had been alienated before the applications were made, the land the subject of the applications was still open to claim and the Commissioner had not been deprived of jurisdiction under s 50(1)(a). Gibbs CJ and Murphy J applied the same reasoning as they had used in *R v Kearney*; *Ex parte Northern Land Council*. Brennan and Deane JJ held that the purported granting of the leases was invalid. It is not possible to easily paraphrase the reasoning of Brennan J, with whom Deane J substantially agreed, as it depended upon a number of considerations, but the prime argument rested upon the notion that a subordinate legislature could not make laws or cause laws to operate in a manner inconsistent with or repugnant to the laws of the paramount legislature. Suffice it to say, these opinions do not, in my opinion, throw any light on the question of construction now to be determined.

[19] In *Attorney-General for the Northern Territory v Hand, Minister for Aboriginal Affairs & Others* (1989) 25 FCR 345, a majority of the Federal Court came to the same conclusion. I do not find that decision particularly enlightening as it rested upon the judgments of Brennan and Deane JJ in *Japanangka*, and upon the same considerations of inconsistency which I

have already mentioned. In the present case no question of inconsistency arises.

[20] Nevertheless, there is dicta that shows that a claim, in order to be valid, must fall within the description of s 50(1)(a) at the time it is lodged with the Commissioner. In addition to what was said by Brennan J in *The Queen v Kearney; Ex parte Northern Land Council*, supra, reference should also be made to his Honour's judgment in *Japanangka*, especially at 418, and to the observations of Deane J at 424. The question then is whether, in the case of a claim over land where all the estates and interests are held by or on behalf of Aboriginals, s 50(2C) must also be complied with at the time of lodgment of the claim in order for the claim to be valid.

[21] The argument of the appellants rests upon a number of considerations. First, it is submitted that the word "consent" in s 50(2C) of the Act implies prior agreement. In support of this argument, reliance was placed upon the difference between the word "consent" and the word "approve" which, had it been used instead, might carry with it the notion of ratification after the event. There is some force in this argument. As a matter of ordinary language one does not usually speak of consenting to something after it has already happened. However, as long ago as 1834, the Court of Common Pleas was not prepared to accept the notion that a power to consent could never be validly given ex post facto. In *Greenham v Gibbeson and Others* (1834) 3 LJCP 128, Tindal CJ said, at 135:

> Whether, in all cases, a consent, where necessary, must be given *before* the execution of a power, or whether it will, in some cases, be sufficient to ratify the execution of the power by a subsequent consent, it is unnecessary at present to determine. It is sufficient to lay it down, that where the nature and object of the power, and circumstances of the case, point to a previous consent, there such previous consent is necessary, although not required by the terms of the power.

[22] In further support of their argument, the appellants submitted that s 50(2C) uses the word "unless" and not "unless and until". Reliance was also placed on the tense of the verb "has consented". However, if s 50(2C) is interpreted as purely jurisdictional, whilst compliance with s 50(1)(a) is interpreted as going to the validity of the claim at the time of lodgment, the appellants' interpretation is of no avail. The respondents contend that the consent required by s 50(2C) merely goes to the jurisdiction of the Commissioner. The language of s 50(2C) supports this conclusion because sub-para (a) refers to "where an application under paragraph (1)(a) has been made". So construed, the jurisdiction of the Commissioner is not enlivened under s 50(1)(a) until the requisite consent is given, but this does not affect the validity of the claim as lodged.

[23] In answer to this construction, counsel for the appellants relied upon s 67A(2) and (5) of the Act. Section 67A(2) provides:

> (2) Where an application referred to in paragraph 50(1)(a) in respect of an area of land is made on or after the day of commencement of this section, any grant of an estate or interest in that area of land, or in a part of that area of land, that is purportedly effected on a day before that traditional land claim, insofar as it relates to the area of land to which the grant relates, is finally disposed of, being the day on which the application is made or a later day, shall be of no effect.

Section 67A(5) provides:

> (5) A traditional land claim shall be taken not to have been finally disposed of insofar as it relates to a particular area of land until:
>
> (a) the claim, or the claim, insofar as it relates to the area of land, is withdrawn;
>
> (b) the Governor-General executes a deed of grant of an estate in fee simple in the area of land, or in an area of land that includes the area of land, under section 12;
>
> (c) the Commissioner informs the Minister, in the Commissioner's report to the Minister in respect of the claim, that the Commissioner finds that there are no Aboriginals who are the traditional Aboriginal owners of the area of land; or
>
> (d) where the Commissioner finds that there are Aboriginals who are the traditional Aboriginal owners of the area of land, or of an area of land that includes the area of land – the Minister determines, in writing, that the Minister does not propose to recommend to the Governor-General that a grant of estate in fee simple in the area of land, or in an area of land that includes the area of land, be made to a Land Trust.

[24] The appellants contend that if s 67A(2) applies to a claim over alienated Crown land in which all estates or interests not held by the Crown are held by or on behalf of Aboriginals, but no consent has been given as required by s 50(2C), s 67A(2) would prevent the owners of the land, or of any lease, from mortgaging or otherwise dealing with the land until the claim "is finally disposed of". But, under the terms of s 67A(5), if the Aboriginal Land Commissioner has no jurisdiction to deal with the claim because of s 50(2C), the interests of the owners would be held in limbo as s 67A(5) makes no specific provision for claims which fall outside of the Commissioner's jurisdiction. It was submitted that this result was such an interference with the property rights of the Aboriginal owners that, in the

absence of a clear expression of intention, it must be presumed that the legislature did not intend this result: see the discussion in Pearce and Geddes, *Statutory Interpretation in Australia*, 5th Edition para [5.15] to [5.16], and the cases therein cited.

[25] The respondents contended that the legislation was beneficial and, therefore, must be construed so as to give the widest remedy available to the respondents and those in the position of claimants as the language of the provisions reasonably bear, and, therefore, it must have been intended by the Parliament that, once a valid claim was lodged, the Aboriginal owner's rights in respect of the land were frozen, notwithstanding that the owner did not consent to the claim. I am unable to accept the respondents' contention which I think goes too far. If the respondents are correct, the provision is not only an unfair interference with the enjoyment of the full rights of proprietorship of the Aboriginal owners, including the loss of the right to create other interests in the land for which no compensation is payable, but is discriminatory upon racial grounds as the provisions have no application to alienated land owned by non-Aboriginals. Moreover, the result would be to place undue pressure on the owners to give consent. I do not consider that the consent required by s 50(2C) was meant to be anything other than consent freely given. It cannot be presumed that the existing Aboriginal owners are traditional owners of the land and would wish to consent to a land claim.

[26] In my opinion, s 67A(2) must be read down so that it has no application to cases where the Commissioner has no jurisdiction. This would be consistent with s 50(2C) and, more importantly, with s 67A(5) which assumes, in s 67A(5)(b), (c) and (d), that the Commissioner did have jurisdiction. In my opinion, an application is not "made" within the meaning of s 67A(2), even if it has been previously lodged with the Commissioner, until the consent required by s 50(2C) has been given.

[27] However, this does not necessarily mean that the relevant consent cannot be given after the claim has been lodged with the Commissioner. It may not become apparent to the Commissioner that consent is required under s 50(2C) until after the Commissioner has embarked upon a hearing. The language of s 50(2C) specifically deals with that possibility in that it uses the expression "shall not perform, or continue to perform, a function". Counsel for the appellants submitted that the words "or continue to perform" were meant to have a transitional effect only, but I am unable to accept that submission. Transitional provisions in my experience are never contained in the text of a section of general application, but are usually specifically provided for and readily recognisable as such.

[28] There is no reason in logic or convenience why a consent must inevitably accompany an application. There is, however, the difficulty that unless it is held that the consent must accompany the lodging of the application with the Commissioner, the expression "application is made" in s 67A(2) will be given a different meaning to the expressions "application being made" in

s 50(1)(a) and "application referred to in paragraph (1)(a) has been made" in s 50(2C). Whilst it is a general rule of construction that a word or expression used in an Act should be given a consistent meaning, that approach is readily rebuttable, and I consider that the context of s 67A(2) makes it clear that a different meaning is there required: see *Mort v Bradley* [1916] SASR 129; Pearce and Geddes, supra, at para [4.4] to [4.5].

[29] In the result I agree with the conclusion reached by Martin CJ. Grounds 1 and 2 of the appeal fail.

Ground 3 – Whether consent can be withdrawn

[30] The learned Chief Justice decided that the meeting of Alcoota held on 20 May, at which the resolution to withdraw the consent to the land claim was passed, was validly held. His Honour also held that that consent could not be withdrawn once it had been acted upon and that the Commissioner had already acted upon the consent. His Honour relied upon the following statement of principle from the dissenting judgment of Jordan CJ in *NSW Trotting Club Ltd v Glebe Municipal Council* (1937) 37 SR (NSW) 288 at 305-306:

> Where the necessity to obtain the consent of some person in order to validate an act arises from the fact that the person's ordinary legal rights would be infringed if the act were done without his consent, any consent given by him may be retracted at any time before something has occurred to make it irrevocable. This may occur where, for example, there has been a binding agreement not to revoke the consent, or where the consent has been acted on.

[31] The findings of fact made by his Honour are not challenged. However, it is contended that, in the absence of any provision in the Act to the contrary, such consent could be validly withdrawn at any time. In support of this submission, the appellants contended that Jordan CJ was in dissent; that the majority view was that the consent could be withdrawn; that there may be legal consequences if that occurred, but those consequences fitted comfortably with the underlying purpose of s 50(2C); that planning cases, such as *Townsend v Evans Shire Council* (2000) 109 LGERA 336, which hold that development consents are beyond recall once communicated with statutory formalities to an applicant are distinguishable; and that consent must be able to be withdrawn in order to avoid the impasse created by s 67A of the Act.

[32] In my opinion, the principle applied by the learned Chief Justice and the conclusion his Honour reached were correct. The approach of Jordan CJ in the *NSW Trotting Club* case has been followed on other occasions: Re *Isherwood* (1991) 1 Qd R 13 at 22-23; Re *Amalgamated Engineering Union* [No 2] (1962) 3 FLR 267. I do not see any reason to doubt it. Clearly, the question of withdrawal of consents in planning cases is instructive and generally follows the line of reasoning in the *NSW Trotting Club* case: see, for instance, *The Queen v District Council of Berri* (1984) 36 SASR 404; (1984) 55 LGRA 119.

[33] I consider, also, that the decision of the Chief Justice is consistent with the approach of Gibbs CJ, Brennan and Deane JJ in *R v Kearney; Ex parte*

Northern Land Council, supra, and with the majority opinion in *Japanangka*, supra, to the effect that the jurisdiction of the Commissioner, once validly conferred, cannot be divested by the acts of the Northern Territory. Those decisions are inconsistent with the view that jurisdiction, once conferred, could be divested by the withdrawal of consent. In my opinion, ground 3 must also fail.

Grounds 4, 5 and 6 – The land was not available for claim because ATSIC held an equitable interest in the land otherwise than as the Crown

[34] It is not necessary, in my opinion, to decide whether or not ATSIC held an equitable interest in the land because, in my opinion, the learned Chief Justice was plainly correct when he concluded that any estate or interest in the land held by ATSIC was held by the Crown in the right of the Commonwealth for the reasons expressed by his Honour.

[35] The appellants conceded that a number of authorities did not support their contentions: *Yanner v Minister for Aboriginal Affairs* (2000) 100 FCR 551 at 587, 590 (Dowsett J); (2001) 108 FCR 543 (FC) at 566 (Kiefel J); *National Aboriginal & Torres Straight Islander Legal Services Secretariat Ltd v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 287 (Hely J) at [17] and [18].

[36] It is clear that the central question is the extent to which the Crown in the right of the Commonwealth is able to control the activities of ATSIC, whether directly or indirectly: see *Bradken Consolidated Ltd v The Broken Hill Pty Co Ltd* (1979) 145 CLR 107; *Superannuation Fund Investment Trust*

v Commissioner of Stamps (SA) (1979) 145 CLR 330; *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 at 288-289; *NT Power Generation v Power & Water Authority* [2002] FCAFC 302 (BC200205789).

[37] As counsel for the respondents pointed out in written submissions, there is no nice question of degree involved in the question of whether ATSIC represents the Crown. ATSIC is subject to ministerial direction and control in numerous respects: see Aboriginal and Torres Strait Islander Commission Act 1989 (ATSIC Act), ss 7(1)(f), (k) and (m); 7(2); 8; 9; 10(3); 11(1) and (3); 12; 18(3); 19(3) and (5); 27(1) and (4); 35(1A); 36(2), (4) and (6); 40; 44(2); 46(1); 53(1); 59. Money for its functions is appropriated from Consolidated Revenue (s 57(1)). The Minister for Finance may give directions as to the amounts in which, and the times at which, money so appropriated is to be paid to the Commission (s 57(2)). The Minister is to approve the estimates of expenditure of ATSIC (s 59). Its funds cannot be spent otherwise than in accordance with the approved estimates (s 61(2)). The Minister is intimately involved in the draft budget and can alter the draft budget: see ss 63, 64 and 65. The Treasurer may limit ATSIC's borrowings (s 69(2)). ATSIC is accountable to Parliament by reporting to the Minister annually (s 72). It is subject to the Audit Act 1901 (Cth) (see s 73), as well as to Ministerial finance directions (s 74). The strongest indicia that ATSIC is the Crown is to be found in s 12 (Minister may give general directions), s 8 (Prime Minister may confer a departmental function

on the Commission) and s 40 (Minister's power to terminate the appointment of a Commissioner).

[38] Although, as the appellants have explained, ATSIC Commissioners are substantially elected rather than appointed by the Minister, ATSIC's statutory functions are to implement government policy for the benefit of Aboriginal persons and Torres Strait Islanders. It is not independent of government in any real sense. It is not, as the appellants suggest, a measure of self-government for Aboriginal people. Accordingly, grounds 4, 5 and 6 cannot succeed because, even if ATSIC held an interest in the land, that interest was held by the Crown in the right of the Commonwealth.

Conclusion

[39] The appeal therefore must fail. I would order that the appeal be dismissed with costs.

BAILEY J:

[40] I agree that the appeal should be dismissed with costs for the reasons of Mildren J and I have nothing to add.

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