Amoonguna Community Inc & Ors v Northern Territory of Australia & Anor
[2014] NTSC 33

PARTIES:	AMOONGUNA COMMUNITY INC AND: PALMER, Tony Francis AND: ELLIS, Marie Elana AND: ELLIS, Roseanne Philomena v NORTHERN TERRITORY OF AUSTRALIA AND: MACDONNELL SHIRE COUNCIL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	135 of 2009 (20930144)
DELIVERED:	31 July 2014
HEARING DATES:	23 October 2013, 1 November 2013, 28 May 2014
JUDGMENT OF:	BARR J

CATCHWORDS:

PRACTICE AND PROCEDURE - Supreme Court Practice and Procedure - NT - pleadings - interlocutory application - Aboriginal land rights - defence - application to amend - proposed additional grounds of defence - whether proposed additional defence arguable - no prejudice to the plaintiffs - trial commencement date approximately eight months away - proposed amendment by insertion of paragraph (f) into paragraph 55 allowed - paragraph (g) bad in law and would be futile - proposed insertion of paragraph (g) into paragraph 55 refused - proposed paragraph 74(d) - contended sole purpose could not succeed - materials demonstrate other purposes - proposed insertion of paragraph (d) into paragraph 74 refused.

Aon Risk Services Australia Ltd v ANU (2009) 239 CLR 175; *Commonwealth v Verwayen* (1990) 170 CLR 394; *Gerhardy v Brown* (1985) 159 CLR 70; *MacDonnell Shire Council v Miller and Others* (2010) 161 NTR 27; *Maloney v The Queen* (2013) 87 ALJR 755; *Palmer and Another v MacDonnell Shire Council* [2011] 29 NTLR 90; *Sea Culture International v Scoles* (1991) 32 FCR 275; *Woodhead Australia (South Australia) Pty Ltd v The Paspalis Group of Companies and Another* (1991) 103 FLR 122, referred to

Aboriginal Land Rights (Northern Territory) Act 1976 s 4(1), s 4(3), s 5(1), 5(2), s 10(2), s 12, s 21, s 23, s 70(1), s 70(2A), 70(2A)(e), s 70(2A)(f), s 70(2A)(g).

Local Government Amendment Act 2007 (NT)

Racial Discrimination Act 1975 (Cth) s 8(1), s 10(3)(a), s 10(3)(b)

Supreme Court Rules 1987 (NT) r 13.02(2), r 13.09(1)

International Convention on the Elimination of All Forms of Racial Discrimination, Article 1(1), Article 1(4), Article 2

REPRESENTATION:

Counsel:

Plaintiff:	D Bennett QC, P McIntyre
Defendant:	R Bruxner, S Brownhill

Solicitors:

Plaintiff:	Midena Lawyers
Defendant:	Solicitor for the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Amoonguna Community Inc & Ors v Northern Territory of Australia & Anor
[2014] NTSC 33
No. 135 of 2009 (20930144)

BETWEEN:
AMOONGUNA COMMUNITY INC
First Plaintiff

AND:

TONY FRANCIS PALMER
Second Plaintiff

AND:

MARIE ELANA ELLIS
Third Plaintiff

AND:

ROSEANNE PHILOMENA ELLIS
Fourth Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
First Defendant

AND:

MACDONNELL SHIRE COUNCIL
Second Defendant

CORAM: BARR J

REASONS FOR DECISION

(Delivered 31 July 2014)

Application by defendants to amend their Defence

[1] For the purposes of this decision, it is not necessary to set out the background to this litigation, which was explained in *MacDonnell Shire Council v Miller and Others,*[1] and referred to also in *Palmer and Another v MacDonnell Shire Council.*[2]

[2] On 28 May 2014, following a lengthy period in which the plaintiffs proposed extensive amendments to their previously amended statement of claim, and met substantial opposition in relation to those proposed amendments, the plaintiffs obtained leave to file and serve an amended statement of claim, in the form and with the content of the document headed "Second Further Amended Statement of Claim". The amended pleading was subsequently filed on 2 June 2014, pursuant to the leave granted on 28 May 2014 and further leave granted on 2 June 2014. However, it is still identified as (and headed) "Second Further Amended Statement of Claim".

[3] The amendment to the plaintiffs' statement of claim triggered the need for determination of an application by the defendants to amend their Defence, which had been argued on 23 October and 1 November 2013.[3]

[4] The defendants press their proposed amendments. I have been informed by counsel for the defendants that it is still intended to plead the proposed

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1 [2010] NTSC 39; (2010) 161 NTR 27 at [6] – [19].
2 [2011] NTCCA 2; 29 NTLR 90 at [5] – [11].
3 The proposed amended Defence is the annexure "AKCF-1" to the affidavit of Allana Kathleen Chong Fong affirmed 6 September 2013 and was at that time the proposed Amended Defence of the First and Second Defendants to the Further Amended Statement of Claim dated 23 October 2009.

amendments (or grounds of defence very similar to the proposed amendments) in response to the Second Further Amended Statement of Claim. It is therefore still relevant for me to decide the issues argued for and against the proposed amendments to the Defence, although the paragraph numbering and other matters may need to change in response to the paragraphing and content of the Second Further Amended Statement of Claim now filed and served.

[5] The proposed amendments are to paragraphs 55 and 74.

Paragraph 55

[6] In relation to paragraph 55, the defendant sought to amend by inserting subparagraphs (f) and (g), such that the paragraph, if amended, would read as follows:

> 55. As to paragraph 55, the defendants:
>
> (a) say that by operation of the 2008 Act, the property, rights, liabilities and obligations of the first plaintiff had become property, rights, liabilities and obligations of the second defendant;
>
> (b) say that the second defendant's occupation and use of buildings on the land described in paragraph 14 hereof is in pursuance of the Commonwealth's leasehold interest over that land;
>
> (c) say that the second defendant is performing local government functions in respect of the Amoonguna community in accordance with the 2008 Act;
>
> (d) admit that the matters pleaded at (a), (b) and (c) above occurred without the consent of the traditional owners of

the land described in paragraph 14 hereof, the first plaintiff or the members of the first plaintiff; ~~and~~

(e) otherwise deny the allegations contained therein; and

(f) further, repeat and rely upon paragraphs 14 and 15 and say that:

I. only the Amoonguna Aboriginal Land Trust, as owner of the land described in paragraph 14, has authority to require the defendants or either of them to leave the land and only then upon a direction of the Central Land Council given pursuant to s 5(2) of ALRA; and

II. the Central Land Council has not, since the expiry of the leasehold interest referred to in sub-paragraph 50(b) above, directed the Amoonguna Aboriginal Land Trust to require the defendants or either of them to leave the land, or, in the case of the second defendant to cease performing its functions under the 2008 Act on or from the land and

(g) further and alternatively say that to the extent the defendants, their servants and agents have, in the circumstances alleged in paragraph 55, entered and/or remained on the land described in paragraph 14, they have done so:

(I) in performing functions, or exercising powers, under a law of the Northern Territory, namely the 2008 Act, within the meaning of s 70(2A)(e) of ALRA;

(II) in performing functions, or exercising powers, as a Commonwealth or Northern Territory officer, namely a person who is in the service or employment of the Northern Territory (the first defendant) or an Authority (the second defendant), within the meaning of s 70(2A)(f); and

(III) further, in the case of the second defendants, its servants and agents, in performing functions or exercising powers as an officer, member or employee of, or on behalf of, a local government body in the Northern Territory, namely the second defendant, within the meaning of s 70(2A)(g) of ALRA.

[7] Given the reference to and reliance on paragraphs 14 and 15, I set those out also:

14. As to paragraph 14, the defendants:

(a) say that the Amoonguna Aboriginal Land Trust is and was at all material times a body corporate established pursuant to ss 4(1) and 4(3) of the *Aboriginal Land Rights (Northern Territory)Act 1976* ("ALRA") to hold title to land in the Northern Territory for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of that land;

(b) say that by Deed of Grant dated 30 May 1980, the Amoonguna Aboriginal Land Trust was granted an estate in fee simple pursuant to s 12 of ALRA to Northern Territory Portions 461 and 568 excepting Lot 1 Townsite of Amoonguna and Lot 2 Townsite of Amoonguna;

(c) say that by Deeds of Grant dated 29 October 1986, the Amoonguna Aboriginal Land Trust was granted estates in fee simple pursuant to s 12 of ALRA to Lot 1 Townsite of Amoonguna and Lot 2 Townsite of Amoonguna with the Deeds of Grant to be held in escrow by the Central Land Council pursuant to s 10(2) of ALRA;

(d) say that on 3 November 2008, the Central Land Council requested Certificates as to Title to issue for Lot 1 Townsite of Amoonguna and Lot 2 Townsite of Amoonguna with the Amoonguna Aboriginal Land Trust as registered owner, which Certificates did issue;

(e) say that the Amoonguna Aboriginal Land Trust has and had at all material times the functions set out in s 5(1) of ALRA, which are and were subject to the requirements set out in s 5(2) of that Act; and

(f) otherwise admit the allegations contained therein.

15. As to paragraph 15, the defendants:

(a) say that the Central Land Council is and was at all material times a body corporate established pursuant to s 21 of ALRA;

(b) say that the Central Land Council has and had at all material times the functions conferred by s 23 of ALRA;

(c) repeat the pleading contained at paragraph 14 hereof; and

(d) otherwise admit the allegations contained therein.

[8] The proposed insertion of paragraph (f) into paragraph 55 was opposed by the plaintiffs. It was contended in written submissions that it was an attack on the locus standi of the plaintiffs. It was further contended that the proposed amendment was late and that the defendants had not explained or sought to justify the delay.[4] In oral argument, Mr Bennett QC submitted that the paragraph pleaded a matter of law. However, that is not a proper basis for objection, since SCR 13.02(2) permits a party to raise a point of law or plead a conclusion of law. Mr Bennett ultimately conceded (in effect) that the contention of law was arguable.

[4] The plaintiffs referred to *Aon Risk Services Australia Ltd v ANU* [2009] HCA 27; (2009) 239 CLR 275, at [102] – [103] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

[9] I allow the proposed amendment by the insertion of paragraph (f) into paragraph 55. In my opinion the ground of defence is arguable, and even though the amendment is sought some years into this litigation, I cannot see that there would be any prejudice to the plaintiffs, because their statement of claim has only relatively recently been pleaded in its fully considered and final form. The amendment to the defence was foreshadowed (by the service of a draft pleading) in September 2013, if not earlier. The anticipated trial commencement date is still some eight months off.

[10] With respect to the proposed insertion of paragraph (g) into paragraph 55, Mr Bennett argued that, as a matter of law, s 70(2A) ALRA only applies so as to provide a defence in criminal proceedings for an offence against s 70(1) (which makes it an offence to enter or remain on Aboriginal land), and that s 70(2A) ALRA has no relevance to civil proceedings. It cannot provide general justification for being on Aboriginal land.

[11] In my view, Mr Bennett is correct. Section 70(2A) ALRA is contained within a penal provision, the purpose of which (in brief) is to prevent entry etc. onto Aboriginal land by persons who do not have an estate or interest in that land. Even if a person does have such an estate or interest, he or she is only entitled to enter and remain on Aboriginal land for a purpose that is necessary for the use or enjoyment by the person of that person's estate or interest. Paragraphs (e), (f) and (g) of s 70(2A) contain specific defences available to a defendant in criminal proceedings for an

offence against s 70(1). Those paragraphs do not create a right of entry, a right to remain or any other rights; they simply provide statutory defences to protect persons who are performing certain government functions or powers. It might be that those paragraphs acknowledge or reflect the existence of rights which exist independently of the Act. However, the pleading does not allege the source of such rights beyond the paragraphs of s 70(2A) referred to.

[12] I cannot see that the proposed pleading raises an arguable alternative ground of defence in this civil case.[5] The proposed pleading is bad in law and would be futile.[6] I therefore refuse the proposed insertion of paragraph (g) into paragraph 55.

Paragraph 74(d)

[13] Paragraph 74 of the statement of claim pleads that the 2007 and 2008 'Acquisition Schemes' are invalid because of inconsistency with s 10(3)(a) and (b) of the *Racial Discrimination Act* (Cth).

[14] Section 10 of the *Racial Discrimination Act* was designed to overcome inequality before the law based on race, colour, or national or ethnic origin.[7] It was inserted into the Act to give effect to Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which requires each State Party to take effective

5 See *Woodhead Australia (South Australia) Pty Ltd v The Paspalis Group of Companies and Another* (1991) 103 FLR 122 as to the need for a party to establish at least an arguable case.
6 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 456.8, per Dawson J.
7 *Maloney v The Queen* (2013) 87 ALJR 755 at 762 [10], per French CJ.

measures to do away with or appropriately amend any of its laws and regulations which have the effect of creating or perpetuating racial discrimination. Section 10 relevantly provides that if a state law has the effect that persons of a particular race do not enjoy, or enjoy to a more limited extent, a right enjoyed by persons of another race, then, notwithstanding the state law, the person adversely affected shall, by force of s 10, enjoy that right to the same extent as the persons of the other race.

[15] Subject to certain exceptions not here relevant, States Parties to the Convention are required to take "special and concrete measures" to achieve the object of Article 2 of ICERD. Such "special measures" are excluded from the definition of "racial discrimination" in Article 1(1) of ICERD by Article 1(4), which provides as follows:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protections as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

[16] Consistent with ICERD, s 8 (1) of the *Racial Discrimination Act* protects "special measures". It provides that Part II of the Act (in which s 10 is contained) does not apply to or in relation to the application of "special measures".

[17] The existing defence pleads, in paragraph 74(b), that the property of the first plaintiff was not owned by an Aboriginal person. I infer from that pleading that the defendants will contend that s 10 *Racial Discrimination Act* does not apply to an incorporated association. The existing defence also pleads, in paragraph 74(c), a denial of the allegations contained in paragraph 74 of the statement of claim. This denial puts in issue the plaintiffs' allegations that: (1) the 2007 and 2008 Acquisition Schemes constitute a law to which s 10(1) *Racial Discrimination Act* applies; (2) the Acquisition Schemes offend against s 10(3)(a) and (b) of the Act, and (3) the Acquisition Schemes are therefore invalid. In addition, in paragraph 74(a), the existing defence repeats and incorporates the pleading in paragraph 73 of the defence. Paragraph 73 pleads that the reduction in the number of local government bodies from 61 to 16 brought about by the 2007 and 2008 Acts were "for purposes which included regional economies of scale and overall reduction in administration costs". Paragraph 73 also alleges, in brief, that the original 61 local government bodies included both 'Aboriginal' and 'non-Aboriginal' (my shorthand) councils and bodies.

[18] In their "Second Further Amended Statement of Claim" dated 2 June 2014, the plaintiffs deleted paragraph 73 contained in their "Further Amended Statement of Claim" dated 23 October 2009. It is therefore unclear what the defendants will do in relation to paragraphs 73 and 74(a) of their existing defence. For present purposes, however, bearing in mind

what was indicated in [4] above, I will assume that the defendants still propose to plead the content of paragraph 73 of the existing defence (possibly, but not necessarily, in paragraph 74(a) of their defence).

[19] The proposed paragraph 74(d) pleads "further, and in the alternative" that if the legislation did have the claimed adverse effect on the enjoyment of rights protected by the *Racial Discrimination Act*, it was for the sole purpose of securing adequate advancement of people requiring protection, those people being the small and predominantly Aboriginal populations in remote communities, in order to ensure their equal enjoyment of specified human rights and fundamental freedoms. The legislation was therefore a "special measure" as discussed in [15] and [16] above, and hence protected by s 8(1) of the *Racial Discrimination Act*.

[20] For completeness, I set out below paragraph 74 of the defence with proposed subparagraph (d) and its sub-paragraphs (I), (II), (III) and (IV) underlined:

> 74. As to paragraph 74, the defendants:
>
> (a) repeat the pleading at paragraph 73 hereof;
>
> (b) say that at no material time was the property of the first plaintiff owned by an Aboriginal person; ~~and~~
>
> (c) otherwise deny the allegations contained therein; <u>and</u>
>
> <u>(d) further, and in the alternative say,</u>

(I) that the reforms effected by the 2007 Act and the 2008 Act were a legislative response to administrative and economic inefficiencies resulting from the fact that local government functions in the Northern territory, being those described in Schedule 2 to the 2007 Act, were being discharged by the 61 local government bodies referred to in paragraph 73(b);

(II) that the administrative and economic inefficiencies referred to in paragraph 74(d)(I) had meant that local government functions were not being discharged effectively, efficiently and consistently across the Northern Territory;

(III) that the effect described in paragraph 74(d)(II) was at its most acute in remote centres with small predominantly Aboriginal populations largely comprised of people with limited or no independent financial means who were, in the circumstances, both highly dependent upon the effective and efficient discharge of local government functions and themselves ill-equipped to ameliorate the consequences of the ineffective and inefficient discharge of such functions; and

(IV) that in the premises if (which is denied) the 2007 Act and/or the 2008 Act affected or affects the enjoyment of a right or rights protected by the *Racial Discrimination Act 1975* (Cth), any such effect upon that right or rights was and is for the sole purpose of securing adequate advancement of people requiring protection (namely the people referred to in paragraph 74(d)(III) in order to ensure those people equal enjoyment or exercise of human rights and fundamental freedoms – more particularly the rights identified in paragraphs (c) (equal access to public service), (e)(iii) (Housing), (e)(iv) (public health, medical care and social services), (e)(v) (education) of Article 5 of the *International Convention on the elimination of all forms of racial discrimination* – and is accordingly a special measure within the meaning of s 8 of that Act.

[21] The plaintiffs opposed the amendment. Mr Bennett argued that the proposed paragraph 74(d) pleads an 'alternative positive' inconsistent with a statement made by the Northern Territory Solicitor-General in the High Court on 24 June 2008, in related litigation between the parties.[8] Accordingly, Mr Bennett contended, this Court should refuse the amendment in the exercise of its discretion.

[22] The statement made by the Solicitor General was as follows:

> Finally, your Honour, the third reason why that argument does not satisfy the threshold test is that the Amendment Act 2007 and the administrative action taken pursuant to that legislation, forms part of a general scheme that applies without regard to race and your Honour will see paragraphs 2 to 6 and 17 to 19 of the Robinson affidavit makes reference to the general application. So there are many constituent councils, your Honour, throughout the Territory that are subject to the operation of the legislation without regard to race. It is a standard general application.[9] [underlining emphasis added]

[23] Notwithstanding Mr Bennett's reference to the inconsistent alternative positive, his objection was not based on the principles or rules of pleading. I note in this respect that SCR 13.09(1) permits a party to make inconsistent allegations of fact in a pleading if the pleading makes it clear that the allegations are pleaded in the alternative.[10] The plaintiffs' contention is not that some part of the defendants' pleading is inconsistent with some other part of the same pleading, or with an earlier pleading, but

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8 *Amoonguna Community Incorporated v Northern Territory of Australia*, No D3 of 2008.

9 [2008] HCA Trans 254 par 1205.

10 A permissible amendment in such a case would plead "In the alternative …", but not "Further, and in the alternative …". The inclusion of the words "Further, and …" would offend against the requirements of SCR 13.09(1).

rather that the defendants' pleading is inconsistent with the statement extracted above.

[24] It is not immediately apparent that legislation which is said to operate "without regard to race" might logically also be characterized as a special measure within the meaning of Article 1(4) of ICERD, that is, a measure taken for the sole purpose of securing adequate advancement of Aboriginal people to ensure their equal enjoyment or exercise of equal rights and fundamental freedoms. However, leaving aside the requirement for *sole* purpose, it is possible that legislation which is intended to achieve the better enjoyment or exercise by a racial group of equal rights and fundamental freedoms could apply to the whole community without regard to race, in order to achieve its purpose. There is a distinction between 'application' and 'purpose'.[11] For that reason, I am not satisfied that the pleading in the proposed paragraph 74(d) is inconsistent with the Solicitor-General's statement.

[25] If, contrary to my preliminary view, the statement made by the Solicitor General were inconsistent with the proposed pleading that the legislation is a special measure, the ground of defence pleaded in paragraph 74(d) would not necessarily fail on the basis of that inconsistency. It would still be necessary for the Court to consider all the evidence or material placed before it to determine whether the sole purpose of the law was to secure

[11] In this respect, I agree with the oral submission of Ms Brownhill, counsel for the defendants – Transcript 1/11/2013, p 11.2.

adequate advancement of Aboriginal people to ensure their equal enjoyment or exercise of equal rights and fundamental freedoms. The fact-finding process may be somewhat different to that in ordinary litigation,[12] but I would expect that the statement made by the Solicitor General would be evidence or material against which any other evidence or material led by the parties would be considered.

[26] In *Sea Culture International v Scoles,*[13] French J dealt with an abuse of process application brought because of inconsistency between a party's pleading in the Western Australian Industrial Relations Commission and that person's pleading in the Federal Court proceedings. After making some observations in relation to the court's power to stay or dismiss a proceeding where it appeared to be an abuse of process, his Honour continued as follows:

> Underlying the power that courts have assumed to stay or dismiss proceedings for abuse of process is a policy of preventing waste of judicial resources and their use for purposes unrelated to the determination of genuine disputes. There is, in my opinion, another element to be considered and that is the necessity to maintain confidence in and respect for the authority of the courts. If a party in litigation in this Court makes a formal and public allegation by way of its pleading which is inconsistent with a formal and public allegation in another forum, then such an issue may arise. No doubt most questions of statements made by a party out of court inconsistent with its plea in court are to be resolved as matters of evidence going to credit and not upon an application for summary disposition. In most such cases there will, in any event, be room for debate about the precise extent and significance of the alleged inconsistency which can only be resolved by a consideration of all

[12] As explained in *Gerhardy v Brown* (1985) 159 CLR 70 at 88, per Gibbs CJ; see also *Maloney v The Queen* (2013) 87 ALJR 755 at [21] per French CJ; [351] - [356], per Gageler J.

[13] (1991) 32 FCR 275 at 279.8.

> the evidence and the circumstances surrounding the alleged inconsistent statement.

[27] When a court has to determine whether legislation is properly to be characterised in law as a special measure for the purposes of the *Racial Discrimination Act*, the fact-finding process may be different to that in other litigation, as I mentioned in [25]. Credit becomes irrelevant, or at least less significant. Nonetheless, I agree with the view of French J in *Scoles* that most questions in relation to a party's pre-trial statements, whether made in or out of court, and which are said to be inconsistent with that party's pleading, are to be resolved as part of the necessary fact-finding at trial. They ought not to be resolved on an application for summary disposition or by (in effect) prejudging the issue by the refusal of an amendment.

[28] For reasons stated at [23] to [27], I reject Mr Bennett's contention that this Court, in the exercise of its discretion, should refuse the amendment because of the suggested inconsistent alternative positive. However, that is not the end of the matter.

[29] I turn to consider the defendants' other grounds of opposition to the proposed amendment, which were set out in the written submissions of Mr McIntyre. In addition to arguments as to prejudice and unexplained delay, Mr McIntyre submitted as follows:[14]

[14] Written submissions dated 11 October 2013, paragraphs 46 to 51.

> The proposed pleading is futile; it being impossible for the defendants to establish that the 'sole purpose' of the legislation was a 'special measure' as that expression is understood for the purposes of the RDA.
>
> Neither the legislation, the explanatory memorandum nor the second reading speech when the Bill was before the Legislative Assembly; nor any other matters before the Parliament, make any reference to the legislation having as its sole purpose a 'special measure' for either 'indigenous people', 'aboriginal people' nor any other race of people; nor do they refer to any of the matters alleged in paragraph 74(d)(III) or (IV) of the proposed Defence.
>
> If the contrary were true then the defendants would have included reference to such matters in their proposed amended pleadings. They have not.
>
> On the contrary, the purposes of the legislation appear on its face, and as the Parliamentary record demonstrates and the Court must accept, bore upon various matters concerning the economic rationalisation of the delivery of local government services across the NT.
>
> Neither the relevant second-reading speeches nor the explanatory memoranda refer to the existence of any, nor provide support for any relevant inference in regard to, constitutional facts necessary to attract the assistance of s 8 RDA.

[30] Mr McIntyre also submitted that the defendants' contention in the proposed paragraph 74(d) that the sole purpose of the legislation was to introduce a special measure pursuant to the *Racial Discrimination Act* was "an idea of recent invention bearing no relationship to the history of the legislation and contrived in a late attempt to defend racist legislation."[15] The submission that the defendants are retrospectively seeking to attribute a sole purpose to the impugned legislation is a proper submission.

[15] Written submissions dated 11 October 2013, paragraph 44.

However, it is not necessary for the success of that submission to characterise the legislation as 'racist', and I find that description unhelpful to me in the assessments I need to make.

[31] The defendants accepted that they needed to provide some material to demonstrate that the proposed amendment was at least arguable, and not futile as contended by the plaintiffs. In relation to the requirement that the impugned legislation had the sole purpose of securing adequate advancement of its beneficiaries in order for them to enjoy and exercise human rights and fundamental freedoms equally with others, the defendants relied on a number of statements made by government ministers to the Northern Territory Legislative Assembly and in public media releases in the period February 1999 to February 2008.[16] I extract relevant parts of those statements below:

> A key issue for the government is the sustainability of local government in rural and remote areas. It is the government's view that there should eventually be fewer councils in the Territory. These councils should ideally provide access to services for the entire Territory population. … It seems, ... that councils with a population of less than about 2000 people encounter greater difficulties in maintaining adequate levels of administration and service delivery over the long term than those with larger populations.[17]

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[16] Affidavit of Kathleen Chong-Fong, sworn 23 October 2013; Oral submissions of Ms Brownhill, 1 November 2013, Transcript p 7.9.

[17] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 February 1999, (Loraine Braham).

… For years, Aboriginal people have been saying that their communities are facing disaster, but not just because of a lack of government resources. …

… it is almost impossible to find a functional Aboriginal community anywhere in the Northern Territory. I do not just mean the 10 or 15 communities that my Department tells me that, at any one stage, are managerial or financial basket cases. The fact that a community may not get their quarterly statements in on time is only part of the story …

Since self-government, successive governments in the Northern Territory have seen various forms of local government as the primary interface between Aboriginal community members, their representative structures and government agencies.

The primary focus of government has been through the *Local Government Act* and, in particular, Part 5 of the Act concerning community government councils. It has been said by many people over the years that the legislation has been innovative and progressive, allowing as it does for the incorporation of at least some traditional decision-making structures in the constitutions and operations of these councils.

It has also been said by many people over the years that the community government council structures have allowed Aboriginal people on those communities the freedom to make decisions about a very broad range of services that are provided in their communities. It has also been said that these structures have allowed the potential for great strides towards self-determination.

All of this may well be true, but I believe we must now openly and honestly acknowledge that the community government process has failed in these objectives.

… at any one point in time, a significant number of community government councils are in dire straits, and virtually every one of the other local government structures in the Territory are heavily dependent on external support by government agencies and their officers. None are self-reliant financially or structurally, and as government subsidies have shrunk or been frozen, the capacity for self-determination has withered. Local government in the Northern Territory, as the principal focus of service delivery, or interfaced

with other service deliverers in the Northern Territory, has failed abjectly in improving people's lives.

It is my intention that the reform and development agenda be completely recast to look at regional governance issues relating to specific service delivery functions, rather than narrowly looking at the amalgamation of community government councils.[18]

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The Building Stronger Regions, Stronger Futures Strategy is about the whole of the Territory and will have an impact on all Territorians. While its major immediate effect will be on Indigenous Territorians, the regional social and economic developments we envisage will benefit all citizens of the Northern Territory.

Changes to the Local Government Act are to be made to enable Regional Authorities in those regions of the Northern Territory that have the capacity to negotiate such arrangements with the Northern Territory Government.

This is not a new tier of government, but an enhanced form of local government comprising a number of regional communities voluntarily coming together to achieve a critical mass of competent staffing and professional advice, with increased accountability and economies of scale....

As I announced last year, the Government is looking to a greater use of funds pooling for regional service delivery, and bodies such as Regional Authorities will provide an ideal vehicle for pooling local, Territory and Commonwealth funds.[19]

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… as part of the Stronger Regions, Stronger Futures policy our focus has been on strengthening and expanding the capacity of local governance, especially in our towns in remote regions. Consistent with this in 2004-05, we allocated $3 million to the developing regional authorities at Thamarurr, Nyirranggulung Mardrulk Ngadberre and the Tiwi Islands Local Government. In the coming

[18] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 7 March 2002, (John Ah Kit).
[19] John Ah Kit, 'Building Stronger Regions – Stronger Futures' (Media Release, 14 May 2003).

year, the support will be continued as other regional authorities develop as voluntary associations of towns and communities. This quiet revolution in the bush offers enormous hope for regional development in the Territory, and our continued financial support will maximise the potential for success for the towns and communities that our emerging regional authorities will represent.[20]

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Current legislation for local government outside the municipalities of our major towns, specifically community government councils, is 20 years old. Over that period much has changed, not least the size of many of the towns and communities to which the legislation applies, and the level of responsibility and the compliance these bodies must embrace. … it has been pointed out that many of our remote area community councils have functional responsibility over areas far in excess of what they are equipped to do …

It is readily recognised and accepted that municipal councils such as the Darwin City Council, Katherine Town Council, Tennant Creek Town Council, and Alice Springs Town Council have great financial and corporate capacity; quite different from what we apply to those communities out bush. It is in this context, and as part of the 20 year vision as enunciated by the Chief Minister, we are looking to major reforms of local government throughout the Northern Territory. These reforms will be geared to carry local government through to the 2020s with clear identified outcomes to be achieved over that period. Clearly, increased regionalisation of local governments will be a focus of these major reforms. [While] some advances have been made in the last few years in establishing regional structures such as Nyirranggulung, they have not been without problems. Such bodies are [a step in] the right direction but not necessarily the whole solution.

We have 63 local community government councils. We must acknowledge that many are too small and lack the capacity to ever fulfil their proper roles, and for obvious reasons. Recruitment into the bush is always difficult. Imagine how difficult it is to recruit 63 CEOs and 63 financial officers across so many disparate organisations. Local Government ministers both under the CLP and the present government – and I have referred to this before – quite

[20] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 4 April 2005, (John Ah Kit).

honestly have very conveniently oversighted this under the guise of self-determination... .[21]

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In March this year, the Department of Local government, Housing and Sport conducted a risk assessment of 56 councils; that is, the 30 community government councils, the 23 association councils and the 3 ORAC councils. The risk assessment classified 50% of the councils as either high risk or dysfunctional.

In the last six months, 22 councils – 38% of all community government and association councils – have advertised or readvertised for a chief executive, and eight of those chief executive positions have again been advertised within the last 12 months. In other words, we are still seeing high numbers of newly recruited CEOs resigning within a year.

In the last six months, the department has been required to make 17 major interventions into the affairs of councils due to financial administrative and/or governance irregularities. These interventions include four show cause notices to chief executives, involving allegations of serious financial mismanagement. The problem is, basically, one of scale. There are insufficient funds at the local level to attract the best people for skilled positions, particularly in management. That means those currently involved on councils are spending much of their time at meetings with government officials and others, instead of focusing on the standard of service delivery in the community.

We have been addressing this problem through the gradual introduction of regional authorities.

There have been improvements, but the changes have been slow, so we have decided to take action. I advise the House that, as a major reform of local government – the biggest reform since self-government – we intend moving to a shire system in the bush, with municipal councils remaining unchanged. We will have fewer local government bodies, and that means that these new organisations will be strong, deliver good services, and exhibit good governance.

[21] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 4 April 2005, (Elliot McAdam).

The new system will lead to real local jobs, better services for core local government responsibilities, and better use of plant and equipment meaning better roads. Larger and more robust organisations will provide stable administration with higher quality management, opportunities for more local jobs and training, and have more money spent on services instead of administration. Further details of the new local government model will be presented to the House in the near future.[22]

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The issues that government, in conjunction with the advisory board, will be taking into consideration establishing a new system of municipal and regional shire councils will include: that communities of interest and geographic cohesion be considered in the establishment of a regional shire; the identification and prioritisation of core local government services; what could constitute adequate, equitable and appropriate delivery of services and provision of facilities and, the ability to mandate minimum standards and service levels so that remote community residents can expect and demand a better service; the type of representative decision-making and planning arrangements that will be required at both the community and shire level; the potential for resource sharing and cooperative arrangements among shires and municipalities in the administrative regions of the Northern Territory; the need for a comprehensive indigenous employment and business development strategy in every community across the Territory; the need for ongoing cooperation and agreement between the three spheres of government; the extent to which legislation can be amended to clarify and improve the functions, powers and responsibilities of local government; the need for orderly transitional and implementation arrangements; and, most importantly, the long-term sustainability and viability of communities within regional shires established under the framework.[23]

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The Australian government has said that it supports the (Local Government) reforms and is providing important financial support for the reform process. We have jointly committed to improving local government in the Territory and this process will not be compromised by the emergency interventions. Rather, the long-term success of many interventions will, in turn, enhance local

[22] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 4 April 2005, (Clare Martin).
[23] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 19 October 2006, (Elliot McAdam).

> government. My department is working hard to implement a local government model that includes nine shire councils: [*names deleted*]; and the MacDonnell Shire.
>
> These will join our municipal councils in Darwin, Palmerston, Alice Springs, and an expanded Katherine Town Council to see full incorporation of the Northern Territory for the first time.[24]
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> ————————
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> We have an opportunity here as a parliament to put in place a model, not only for indigenous communities but for non-indigenous communities, that is going to provide certainty into the future.[25]

[32] The last-extracted statement was made by Minister McAdam in relation to the Local Government Amendment Bill passed by the Legislative Assembly on 30 August 2007.[26]

[33] Ms Brownhill, counsel for the defendants, submitted that the statements extracted above demonstrate that the purpose of the legislative reforms was to alleviate disadvantage and 'issues' under pre-existing local government legislation and rectify the inefficiencies and ineffective operation of that legislation in remote communities including Aboriginal communities or communities made up of mostly Aboriginal people.[27] Ms Brownhill did not in that context assert sole purpose. Indeed, Ms Brownhill later acknowledged that the defendants could not point to

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[24] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 21 August 2007, (Elliot McAdam).
[25] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 30 August 2007, (Elliot McAdam).
[26] *Local Government Amendment Act 2007* (NT).
[27] Transcript 1/11/2013, page 8.5.

any specific document which suggested that the measures were enacted for the sole purpose sought to be pleaded.[28]

[34] There is no material in evidence before me which expressly states that the 2007 and 2008 amendments to local government legislation were special measures enacted for the sole purpose of securing adequate advancement of Aboriginal people to ensure the enjoyment by them of human rights and fundamental freedoms as pleaded: the right of equal access to public service, housing, public health, medical care, social services and education. Significantly, when Minister McAdam made a statement in the Legislative Assembly on 19 October 2006, listing the issues that the government would be taking into consideration in establishing a new system of municipal and regional shire councils, he did not mention that the legislative scheme would have the purpose, let alone the sole purpose, of securing adequate advancement of Aboriginal people to ensure the enjoyment by them of human rights and fundamental freedoms, as pleaded. Moreover, consistently with what are generally regarded as the usual responsibilities of local government, the Minister did not suggest that the new regional shires would be responsible for housing, public health, medical care, social services or education, all of which would be the responsibilities of the Northern Territory and possibly the Commonwealth governments, but not those of a regional shire.

[28] Transcript 1/11/2013, page 11.6.

[35] Given the absence of any express statement as to sole purpose, I take the view that, if there is evidence in the materials that there was any purpose other than the suggested sole purpose, then the proposed sole purpose pleading could not succeed, and would be doomed to fail.

[36] The material extracted in [31] and [32] above emphasises a number of significant themes and purposes: the failure of community government councils to be financially self-reliant and to achieve the goal of Aboriginal self-determination; the inability of community government councils to effectively and economically deliver services; the opportunity for regional social and economic development for the benefit of all citizens of the Northern Territory; the need to have fewer local government bodies and to establish larger regional or "shire" authorities in order to achieve stable, higher quality administration, improved governance and greater financial and operational efficiency in delivery of services.

[37] It is clear, from the materials tendered in evidence by the defendants, that there were purposes other than the contended sole purpose. It follows that the proposed alternative sole purpose plea could not succeed, and thus would be doomed to fail. The application by the defendants to amend the defence to insert paragraph 74(d) is refused.

Conclusion

[38] The defendants' application to amend their defence to insert the proposed paragraph 55(f) is allowed. The defendants' application to amend the defence to plead proposed paragraphs 55(g) and 74(d) is refused.
