

Johnson & Ors v Commissioner for Consumer Affairs NTA & Ors
[2012] NTSC 82

PARTIES: JOHNSON, Jan Patrick
TUNGUTALUM, Leslie
TUNGUTALUM, Richard
TIPUNGWUTI, Emmanuel
BABUI, Esther
KERINAIUA, Mavis Lear

V

COMMISSIONER FOR CONSUMER
AFFAIRS OF THE NORTHERN
TERRITORY OF AUSTRALIA

AND

REGISTRAR OF ABORIGINAL AND
TORRES STRAIGHT ISLANDER
CORPORATIONS

AND

NGUIU ULLINTJINNI ABORIGINAL
CORPORATION

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
ORIGINAL JURISDICTION

FILE NO: LA 36 of 2012 (21216407)

DELIVERED: 17 October 2012

HEARING DATES: 17 May 2012, 2, 3 July 2012

JUDGMENT OF: BLOKLAND J

CATCHWORDS:

APPLICATION FOR DECLATORY RELIEF– former Association deregistered as a consequence of being incorporated as an Aboriginal and Torres Strait Islander Corporation - orders sought declaring the proceedings of the special general meeting of the former Association void and resolutions made set aside - special general meeting void as a result of non-compliance with ss 37 and 57 (1) of the *Associations Act* (NT) and s 29-17 of the *Corporations (Aboriginal and Torres Strait Islander) Act* (Cth) –no opposition to relief sought by plaintiffs – effect of the declaration is to return the former Association to the entity it was immediately prior to the special meeting

Associations Act (NT) s 37, Pt 7, s 56, s 57, s 61, s 62

Corporations (Aboriginal and Torres Strait Islander) Act (Cth) Div 22, s 22.5, s 29.17, s 42.3, Div 540

Supreme Court Act (NT) s 18

Australian Competition and Consumer Commission v MSY Technologies Pty Ltd [2012] FCAFC 56; *IMF (Australia) Ltd v Sons of Gwalia Ltd* (admin apptd) (2004) 211 ALR 231; *Alderson, Margarula and Hunter v Finch (as administrator of Gagadju)*, *Alderson and Muir* No 254 of 1997; 23 December 1997 (unreported); *Rozenes v Belijajev* (1994) 126 ALR 481; referred to.

REPRESENTATION:

Counsel:

Plaintiffs: Mr Francis

First Defendant: Ms Smart

Solicitors:

Plaintiffs: David Francis and Associates

First Defendant: Solicitor for the Northern Territory

Judgment category classification: B

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

Johnson & Ors v Commissioner for Consumer Affairs NTA & Ors
[2012] NTSC 82
No. LA 36 of 2012 (21216407)

BETWEEN:

**IN THE MATTER OF AN
APPLICATION BY
JOHNSON, Jan Patrick
TUNGUTALUM, Leslie
TUNGUTALUM, Richard
TIPUNGWUTI, Emmanuel
BABUI, Esther
KERINAIUA, Mavis Lear**
Plaintiffs

V

**COMMISSIONER FOR CONSUMER
AFFAIRS OF THE NORTHERN
TERRITORY OF AUSTRALIA**
First Defendant

AND:

**REGISTRAR OF ABORIGINAL AND
TORRES STRAIGHT ISLANDER
CORPORATIONS**
Second Defendant

AND:

**NGUIU ULLINTJINI ABORIGINAL
CORPORATION**
Third Defendant

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 17 October 2012)

Introduction

- [1] The plaintiffs are former members of the Nguiu Ullintjinni Association Incorporated (the former Association) which was incorporated on 20 July 1971 pursuant to the provisions of the *Associations Act* (NT). The Association remained incorporated under that Act until 9 July 2010 when it was deregistered as an Association after its successful application to be incorporated as an Aboriginal and Torres Strait Islander Corporation. The new corporation is known as Nguiu Ullintjinni Aboriginal Corporation (the Corporation) and is incorporated under the provisions of the Commonwealth *Corporations (Aboriginal and Torres Strait Islander) Act* (“the CATSI Act”).
- [2] The plaintiffs seek orders declaring the proceedings of the special general meeting of the former Association held 23 June 2010 void and that resolutions made at the same meeting be set aside. At that meeting the members of the former Association resolved to:
- (a) Approve the Application to register the Association as an Aboriginal and Torres Strait Islander Corporation under the CATSI Act;

- (b) Apply for a new name for the Association of Nguiu Ullintjinni Aboriginal Corporation;
- (c) Adopt a rule book (constitution) that met the requirements of the CATSI Act.

[3] A further subset of resolutions passed at the same meeting were as follows:

- (i) The Association was authorized to apply for such registration;
- (ii) The Association adopt a proposed rule book for such purpose when it became registered as an Aboriginal and Torres Strait Islander Corporation (“the Corporation”);
- (iii) A list of replaceable rules from the CATSI Act would apply to the Corporation when it became registered as an Aboriginal and Torres Strait Islander Corporation, save if such list of replaceable rules was changed or replaced in the said proposed rule book;
- (iv) The persons specified in the application would become directors of the corporation; and
- (v) The person/s specified (will “become contract on registration” (sic).

[4] Further orders sought are that the registration of the Association/Corporation as an Aboriginal and Torres Strait Islander Corporation under the *CATSI Act* be declared void and set aside and that the Commissioner for Consumer Affairs of the Northern Territory be directed to reinstate the registration of the former Association as an incorporated association pursuant to the *Associations Act* (NT).

Preliminary Procedural Orders

[5] During the course of a number of procedural hearings the Northern Territory Commissioner for Consumer Affairs consented to being joined as a defendant, having previously agreed at the request of the court to provide submissions on legal issues arising from the application on an *amicus curiae* basis. It is acknowledged here the submissions made by counsel for the Commissioner of Consumer Affairs have been of great assistance.

[6] It is essential in proceedings for declaratory relief that there be a real question, that the plaintiff have a real interest in the question and that there be a proper contradictor.¹ Given one aspect of the relief sought would require the Commissioner of Consumer Affairs to reinstate the registration of the former Association, the Commissioner has a genuine interest in the plaintiffs' claim, and is therefore a proper contradictor, even though the

¹ *Rozenes v Belijajev* (1994) 126 ALR 481 at 519.

relief sought is not opposed.² Absent a contradictor in these proceedings there would be no entity to be bound by the primary relief sought.³

- [7] The Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORIC) indicated in correspondence with the plaintiffs' solicitor that the Registrar would abide orders of the court. The court was advised the Registrar did not seek to appear or be represented, file any evidence, or make formal submissions. The Registrar neither consented nor opposed the relief sought. It was determined that in the circumstances, given the form of the relief sought, the Registrar should also be joined.⁴
- [8] Although the members of the Nguiu Ullintjinni Aboriginal Corporation are effectively the same persons as the members of the Nguiu Ullintjinni Association, it was clearly appropriate the new corporation be served with the Further Amended Originating Motion, the supporting material and be joined in the proceedings. The court was informed the Nguiu Ullintjinni Aboriginal Corporation, as the third defendant did not seek to be represented at the hearing and did not oppose the granting of the relief sought by the plaintiffs.⁵

² *Australian Competition and Consumer Commission v MSY Technologies Pty Ltd* [2012] FCAFC 56 at [16].

³ *IMF (Australia) Ltd v Sons of Gwalia Ltd* (admin apptd) (2004) 211 ALR 231, para [47].

⁴ See filed correspondence of 18 April 2012; 29 June 2012; 2 July 2012.

⁵ Affidavit, David Edward Francis, 2 July 2012, advising further that the first three named plaintiffs are former members of the former Association and are now directors of the new Corporation. Five other directors have signed statutory declarations challenging the process of transferring the registration of the former Association. Letter filed 2 July 2012 from the Chief Executive Officer, Nguiu Ullintjinni Aboriginal Corporation.

The Basis of the Claim and Evidence Before the Court

[9] The plaintiffs assert that the special resolution passed on 23 June 2010 was not a free and informed decision by members of the former Association.

They submit the transfer of the registration was done without the members of the former Association understanding the legal consequences of the transfer.

[10] Further, it is alleged the special general meeting was not properly convened in that notice of the special general meeting was not given to the overwhelming majority of the members of the former Association. Section 37 of the *Associations Act* provides as follows:

A resolution of an incorporated association must be taken to be a special resolution if:

- (a) it is passed at a general meeting of the association, being a meeting of which at least 21 days notice, accompanied by notice of intention to propose the resolution as a special resolution, has been given to the members of the association; and
- (b) it is passed by at least three-quarters of the votes of those members of the association who, being entitled to vote, vote in person or, if the constitution of the association permit voting by proxy, vote by proxy at the meeting.

Note for paragraph (b)

A special resolution must be passed by three-quarters of the votes actually cast (whether directly or by proxy) at the meeting. A special resolution is not required to be passed by three-quarters of all members eligible to vote.

[11] Although there is contradictory material before the court about certain background and historical issues, the overwhelming evidence indicates there

was no notice given of the special general meeting of 23 June 2010 nor any accompanying notice of intention to propose a special resolution in the terms required by s 37 of the *Associations Act* (NT).

[12] Although a meeting of the former Association took place on 23 June 2010, the consequences of the defective process were exacerbated by confusion amongst the members of the former Association about the purpose of the meeting. The context in which the meeting took place is relevant. Members of the former Association are almost exclusively from Nguiu in the Tiwi Islands, a relatively remote and in many respects a traditionally oriented Aboriginal community.

[13] Not all of the background facts will be summarised here, however some history is required to appreciate the significance of why the relief was sought and ultimately why the plaintiffs have succeeded.

[14] The former Association was in existence from 20 July 1971⁶ until it was deregistered as an Association on 9 July 2010, a consequence of being incorporated as an Aboriginal and Torres Strait Islander Corporation. Although at times the former Association experienced significant setbacks in its development, the plaintiffs attest to the fact that the former Association grew into a substantial business operation. Through its members, the former Association ran a general store, including an ATM facility, a fast food outlet, a mechanical workshop providing services to residents of Nguiu and

⁶ Affidavit, Jan Patrick Johnson, 18 April 2012; Affidavit of Leslie Tungutalum and Richard Tungutalum, 18 April 2012 paras [4] – [5].

a fuel outlet utilising electronic fuel cards. Thirty five to forty employees were employed; most were residents of the Tiwi Islands.⁷

[15] The former Association and now the new Corporation have attended to taxation obligations, superannuation obligations and have had their respective financial affairs monitored by an accountant and business advisor, Mr Mervyn Sullivan. Both the former Association and the new Corporation have been subject to annual statutory audits.⁸

[16] The evidence indicates that the existence and operation of the former Association relied solely on its trading and other income. It was not a government funded entity, although it has received government loans for capital expenditure. Generally the members of the former Association and the Nguiu community were proud of the former Association and its achievements.⁹ Membership of the former Association was restricted to Aboriginal persons 18 years and over who were usually resident in Nguiu. Elections of the executive committee were conducted by the Northern Territory Electoral Commission.

[17] The first named plaintiff, Mr Jan Patrick Johnson was the president of the former Association. With the exception of the general manager of the former Association, all of the members of the executive committee were elected. From time to time, the general manager was also a member of the

⁷ Affidavit, Jan Patrick Johnson, 18 April 2012, para [4]; Affidavit of Leslie Tungutalum and Richard Tungutalum, 18 April 2010, para [4].

⁸ Affidavit, Peter Mervyn Sullivan, 13 April 2012.

⁹ Affidavit, Jan Patrick Johnson, 18 April 2012 at 7.

executive committee.¹⁰ The general manager was appointed by the executive committee to carry out all aspects of the management of the affairs of the Association. The executive committee relied heavily on the general manager as the members of the executive committee did not possess professional qualifications or experience relevant to the management of the former Association. At times business training was provided to the executive committee members by the business advisor. As well as relying on the general manager, the executive committee relied on advice provided by its business advisor.¹¹

[18] The former general manager was appointed to the Association in November 2009. The appointment was made without the professional advice that historically the executive committee would have taken from the former Association's business advisor. The former general manager's employment was terminated on or about 13 August 2010 after concerns had been raised in relation to his performance.¹² In the usual course, the general manager would be responsible for advising the executive committee about relevant business information as required. The evidence indicates the former general manager received and answered correspondence on behalf of the former Association without reference to members of the executive committee or to the Association's business advisor. Strong dissatisfaction has been expressed in the material filed by three of the plaintiffs about the way the

¹⁰ Affidavit, Jan Patrick Johnson, 18 April 2012, para [10].

¹¹ This material is substantially confirmed in the affidavit of Peter Mervyn Sullivan, 13 April 2012, accountant and long term external business advisor to the former Association.

¹² Affidavit, Jan Patrick Johnson, 18 April 2012, paras [17] – [21]. Further background is detailed in the affidavit of Peter Mervyn Sullivan, 13 April 2012.

former general manager dealt with them and with the members of the former Association. This dissatisfaction arose over particular issues; for example, a change in the practice about communicating the minutes of meetings; of no longer reading minutes to members of the former Association and not distributing the minutes to the executive committee. Previous governance training that had been provided for executive committee members was ceased by the former general manager and was taken over by a consultant.¹³

[19] Dissatisfaction is also expressed in the affidavit material about the introduction of a ninety nine (99) year lease arrangement between the traditional owners of Nguiu and the Commonwealth. The lease included the land on which the buildings of the former Association stood. Mr Johnson's affidavit states that the buildings were acquired by the Commonwealth without compensation being paid to the former Association which he states had paid for these assets out of its own funds. An approximate value of the assets of the former Association was said to be 2.8 million dollars; the turnover was said to be 6.6 million dollars annually. By virtue of the acquisition it was suggested the former Association lost ownership and control of the buildings and was subject to what Mr Johnson describes as "considerable unwanted government bureaucratic pressure".¹⁴ Mr Sullivan raises a different concern, suggesting there had been no transfer of the

¹³ Affidavit, Jan Patrick Johnson, 18 April 2012, at [25].

¹⁴ Affidavit, Jan Patrick Johnson, 18 April 2012, paras [25] – [27]. See also affidavit of Peter Mervyn Sullivan, 13 April 2012, para [27].

former Association's business, its assets and liabilities.¹⁵ It may be, as is submitted on behalf of the Commissioner for Consumer Affairs that the effect of s 62 of the *Associations Act* (NT) and s 42-3 of the *CATSI Act* was not appreciated at that time. Under each of the respective Acts those provisions mean that the rights and liabilities of the former Association move without alteration to the new Corporation. The question of the 99 year lease is an entirely separate question.

[20] Further concerns raised are in relation to regulations involving licensing the community store. Mr Johnson described his understanding over various periods of time of the rights and obligations on the part of both the Commonwealth and managers of community stores. He states he came to understand that a notice can be given on behalf of the Commonwealth to the owner of a community store requiring the owner to become registered under the *CATSI Act*; he understood that if there was no registration, the store license could be revoked and the store would not be eligible to participate in the income management scheme after such a revocation. Mr Johnson states no such notice was given to the former Association.¹⁶

[21] Mr Johnson states that in early 2010 he and other members of the executive committee were advised of discussions between the former general manager and the Office of the Registrar of Indigenous Corporations (ORIC) about the attendance of members of the former Association at training sessions

¹⁵ Affidavit, Peter Mervyn Sullivan, 13 April 2012, Annexure MS3 at page 2 of the document marked 'attachment'.

¹⁶ Affidavit, Jan Patrick Johnson, 18 April 2012, paras [28] – [30]; See also, Affidavit, Leslie Tungutalum and Richard Tungutalum, 18 April 2012, [30].

conducted by ORIC in Darwin. He understood the training to be about the operation of general stores in communities. He states he was advised the training program was specifically designed to assist community store committees about corporate governance of their community stores. At that time Mr Johnson says there was no suggestion by the former general manager of any proposal to the effect that the former Association should become registered as an Aboriginal and Islander Corporation under the provisions of the *CATSI Act*.

[22] Although Mr Johnson acknowledges the executive committee minutes of 14 April 2010 note there was a requirement to attend training sessions “with the impending change for Indigenous communities from the Northern Territory *Associations Act* to the Federal *CATSI Act*”, he informed the court that despite this, the plaintiffs were not aware of the proposed change at that time. All of the executive members of the former Association believed the training workshops were about the management of the community store, not about a change of governance. It is acknowledged by the plaintiffs, that there was a Memorandum of 15 April 2010 referring to a “governance session”; other correspondence which has been located and produced is indicative of a transfer of the registration of the Association, however, Mr Johnson states he had not sighted this correspondence at the relevant time; his inspection of the records was well after 15 April 2010.

[23] Although acknowledging that at one of the workshops a copy of a rule book was summarised and members of the executive committee were told “we

need to make a new rule book for the change of the Association to an Aboriginal Corporation”, the plaintiffs maintain that it was not stated at that workshop that it was proposed the former Association would be converted into an Aboriginal and Torres Strait Islander Corporation under the *CATSI Act*. The plaintiffs however acknowledge there was discussion at the training sessions about a change of name of the Association. Executive committee members who were present state the former general manager told them the change of name was necessary under the *CATSI Act* and was necessary in order to increase the Association’s funding. A number of members of the Association advised the workshop conveners they did not want a name change; in particular they did not want the word ‘Aboriginal’ included.¹⁷

[24] Mr Johnson states he understood that by registering under the *CATSI Act* the former Association would have access to government funding for various developments. He maintains no mention was made of the implications of conversion of the former Association into an Aboriginal and Torres Strait Islander Corporation, however he acknowledges there was some mention at a training session of the former Association being replaced by a corporation. Mr Johnson states that as this discussion was not at a formal meeting he understood no decision on conversion of the former Association could properly be taken.

¹⁷ Affidavit, Leslie Tungutalum and Richard Tungutalum, 18 April 2012, [43].

- [25] The plaintiffs say that in April 2010 the former general manager asked one of the Association workers to pass the word around about another training workshop. No decision was made at that workshop to proceed with steps to incorporate the former Association under the provisions of the *CATSI Act*.
- [26] The minutes of the executive committee meetings throughout May 2010 indicate discussions took place to plan for a special general meeting and that there were generally discussions about governance. The minutes were not however sighted by the various members of the executive committee until after the termination of the former general manager's employment. The evidence indicates the executive committee believed that the purpose of calling a special general meeting was to discuss the advantages and disadvantages of conversion of the former Association into an Aboriginal and Torres Strait Islander Corporation under the *CATSI Act*.
- [27] On behalf of the plaintiffs the court was told throughout these proceedings that the usual process at Nguiu would be for the people concerned to talk at length between themselves before making any decisions of this significance. The thrust of the evidence was that the executive committee had little or no understanding of the consequences of converting the former Association into an Aboriginal and Torres Strait Islander Corporation. The complexity of the operation of the *CATSI Act* was not appreciated by them until well after the transfer.

[28] The plaintiffs state they did not recall any notices for the special general meeting being posted around Nguiu or elsewhere on Bathurst Island notifying particulars of the special general meeting.¹⁸ The only evidence of some form of notification that there was to be a special general meeting was a discussion between the former general manager and executive members on 4 June 2010 when it was agreed there would be a special general meeting convened on 23 June 2010.¹⁹

[29] On 23 June 2010 Mr Johnson attended the general store where he was employed to commence work as usual. He states he was told by the then general manager that the store would be closed that morning as a special general meeting was to be held at the store. Referring to the discussion about a Special General Meeting on 4 June 2010 at the Executive Committee meeting, Mr Johnson said nothing was said at that time about where the meeting would take place. Other elected members of the executive committee arrived at the general store on the same day to participate in a special general meeting. Only thirty (30) of the non-executive members of the former Association were present at the meeting. All stated they had not been aware of the fact that the special general meeting was to be held. They had only attended at the general store in order to purchase goods and use the ATM facility.²⁰ Other members said they were not aware that the general

¹⁸ Affidavit, Esther Anne Marie Babui, 18 April 2012, at [5].

¹⁹ Affidavit Jan Patrick Johnson, 18 April 2012, paras [58] – [67]; Affidavit Leslie and Richard Tungutalum, 18 April 2012, paras [58] – [66].

²⁰ See eg Affidavit of Esther Anne Marie Babui, 18 April 2012; Affidavit of Emmanuel Paul Tipungwuti, 18 April 2012, paras [5] – [6].

store would be closed until completion of the special general meeting.²¹ At that time the former Association had approximately 164 members.²²

[30] Mr Johnson states it was obvious that most members of the Association were not in attendance at the meeting. As President he opened the meeting and told the persons present that the purpose of the special general meeting was to consider whether or not to register under the provisions of the *CATSI Act*. The then general manager took over control of the meeting and stated that by registering the Association under the provisions of the *CATSI Act*, the Association would become eligible for large amounts of Commonwealth funding. Consultants who were engaged by the Commonwealth advised Association members at the meeting it was in their interests to become registered under the *CATSI Act*. They also addressed the meeting about the new rule book. According to Mr Johnson much of the discussion was about anticipated financial benefits the former Association would receive once it registered under the *CATSI Act*. Mr Johnson states he did not understand or recall any discussion or suggestion that the Association would be deregistered as an Association under the provisions of the *Associations Act* (NT). He says that at the time of the meeting he had not considered the

²¹ Affidavit of Emmanuel Paul Tipungwuti, 18 April 2012, paras [5] – [6].

²² Affidavit, Jan Patrick Johnson, 18 April 2012, [60] – [67].

proposed new rule book in detail.²³ The resolutions the subject of this application, were passed by a show of hands.²⁴

[31] Mr Johnson explained that he was unaware of any written notice of the special general meeting having been posted, advertised or distributed prior to the date on which the special general meeting was convened. Copies of the proposed rule book were not made available for inspection by the members who were present.²⁵ He states he has no knowledge of having sighted a “list of replaceable rules from the *CATSI Act*”.

[32] Subsequently, concerns were raised by Mr Sullivan, the business advisor to the former Association, about the complexity of the *CATSI Act*. After some discussion members of the executive committee decided they wanted to stop the process of registration under the *CATSI Act*. Further discussions between both the business and legal advisers of the former Association clarified that neither the elected members of the executive committee nor the members of the former Association had had opportunity to consider the contents of the new rule book, nor had they understood that the former Association had been deregistered.

[33] For some time after the purported special general meeting it appears there was a belief on the part of some of the plaintiffs that the former Association could continue to operate as an Association. Formal advice was later

²³ Affidavit, Jan Patrick Johnson, 18 April 2012, [68] – [71]. See also affidavit, Emanuel Paul Tipungwuti, 18 April 2012.

²⁴ The special resolution is documented in annexure B of the Affidavit of Jan Patrick Johnson, 16 May 2012.

²⁵ See also Affidavit of Emmanuel Paul Tipungwuti, 18 April 2012, [9].

received that the former Association had been deregistered. The significance of this was not fully comprehended by members of the former Association until legal advice was sought and received in 2011.²⁶

[34] During August 2011, fifty seven (57) members of the former Association signed separate statutory declarations confirming that they did not receive notice of the special general meeting, they were not present at the meeting and were unaware of the meeting taking place. Those members also state they did not give their consent to become members of the new Corporation and that they were unaware of and did not give their approval for the former Association to be deregistered. These statutory declarations are before the court.²⁷

[35] Further, twenty seven (27) separate statutory declarations are before the Court from members who attended the special general meeting and voted in favour of the resolutions.²⁸ Those declarations state that the declarants were not informed or made aware of the full implications of the special resolution; they did not receive independent advice from the former Association's professional advisors; that they were unaware registration of the new Aboriginal and Torres Strait Islander Corporation would cause the former Association to be deregistered; that they did not complete an application form consenting to be members of the new Corporation and they wanted to have the deregistration of the former Association set aside. At the

²⁶ See generally, affidavit, Peter Mervyn Sullivan, 13 April 2012; David Edward Francis, 27 April 2012.

²⁷ Exhibit JJ 18 of affidavit of Jan Patrick Johnson.

²⁸ Exhibit JJ 19 of affidavit Jan Patrick Johnson.

time, the former Association had one hundred and sixty four (164) members. Some members of the executive committee did not appear to understand the substance of consent forms signed by them indicating their consent to be directors of the new Corporation.²⁹

[36] At a meeting of the executive committee of the former Association on 13 March 2012 a proposal was endorsed to apply to the Court to set aside the special resolution of 23 June 2010 and seek reinstatement of the former Association.

Relevant findings

[37] In accordance with the evidence, I find that no notice complying with s 37 of the *Associations Act* was given to the members of the former Association notifying them of holding a Special General Meeting on 23 June 2010. No notice was given of the intention to propose a special resolution. In my view s 37 *Associations Act* (NT) anticipates written notice. The discussion referred to previously in these reasons between the former general manager and several of the executive members on 4 June 2010 did not constitute notice under s 37 *Associations Act* (NT). In any event, only thirty (30) of the one hundred and sixty four (164) non-executive members attended and mostly attended by accident. At least fifty seven (57) of the members who did not receive notice and were not present would not have voted in favour of the transfer to the *CATSI Act*.

²⁹ Explained in further affidavit of Jan Patrick Johnson 16 May 2012. See also affidavit of Leslie Tungatulum of 16 May 2012.

[38] In as much as the plaintiffs have raised “breach of trust” as a basis for the relief, there is insufficient evidence to make such a finding. I accept the executive committee and members did not fully appreciate the consequences of incorporation under the *CATSI Act*, however that appears largely as a result of misunderstanding about the meaning of the subject matter at various meetings and the meaning of various documents. There was a failure on the part of the former general manager to properly communicate the details of documents relevant to the application. There was confusion about the purpose of the meeting of 23 June 2010. There was a belief for example, among the executive committee that much of the governance training offered was bound up with obtaining a license to run the community store. It is likely this was due to unfamiliarity with the processes, further complicated by the circumstances of the members of the executive committee, all residents of a relatively remote Aboriginal community.

[39] I find the members of the former Association, including the executive committee did not appreciate that one outcome of the overall process was that the former Association would be deregistered. I accept there were a number of irregularities and there was a lack of comprehension on the part of the members and executive members about the process they were engaged in. As noted in the summary of the evidence, there was dissatisfaction and mistrust on the part of the plaintiffs with respect to various government officials and consultants over issues relevant to the ninety nine year lease and the acquisition of property but nothing of substance relevant to the

issues here turns on the question of the justice or otherwise of the acquisition.

[40] I find the executive members did rely substantially on the former general manager for advice on the conduct of the business. The former general manager failed to keep the Executive Committee fully informed on the effect of each stage in the process of the transfer of registration under the *CATSI Act*. This failure extends to the purported adoption of the new 'Rule Book'. The executive members and ordinary members did not appreciate the significance of the contents of the 'Rule Book'. Neither had time to examine its contents properly. I find that once the plaintiffs were aware of the transfer to the Corporation, they had legitimate concerns about the new, and from their perspective, complex obligations.

[41] In any event, the finding is that s 37 of the *Associations Act* (NT) was not complied with. On the same basis, s 29-17 of the *CATSI Act* was not complied with. That is clear, not only from the plaintiff's evidence about their own recollection, but also from the separate statutory declarations tendered and referred to above. Had the fifty seven (57) persons who have signed statutory declarations been able to participate in the meeting of 23 June 2010, it is likely the resolutions the subject of this claim would have been defeated.

Legal Consequences Flowing From the Findings

- [42] Part 7 of the *Associations Act* (NT) provides the legal framework for an incorporated association to apply to become incorporated under the *Corporations Act 2001* “or another Act”.³⁰ The *CATSI Act* is such an Act.
- [43] Section 57 of the *Associations Act* requires that certain preliminary steps must be taken before an application is made to incorporate under another Act. Relevant here is that under s 57(1) *Associations Act*, there must be a special resolution of the Association dealing with approval of the proposed application, the determination as to the name of the proposed incorporated Association and the adoption of a constitution. A special resolution is one passed in accordance with s 37 of the *Associations Act* (NT), that is, with at least 21 days notice of the meeting and intention to propose a special resolution. The resolution must be passed by at least 75 percent of the votes cast at the meeting. As no notice was given in accordance with s 37 and no notice was given of the intention to propose a special resolution, s 37 was not complied with.
- [44] The process established under the *CATSI Act* to permit registration of an existing body corporate as an Aboriginal and Torres Strait Islander Corporation complements the transfer requirements in Part 7 of the *Associations Act* (NT).

³⁰ S 56(1) *Associations Act* (NT).

[45] Division 22 of the *CATSI Act* sets out the required information that must be provided when application is made for registration under the Act. In particular, s 22-5(1)(h) of the *CATSI Act* provides there must be evidence that under the law of the body's place of origin:

- (i) the transfer of the body's incorporation is authorised; and
- (ii) the body has complied with the requirements (if any) of that law for the transfer of its incorporation

[46] The effect of s 22-5(1)(h)(i) of the *CATSI Act* in this case is that evidence is required of a special resolution of the former Association that complied with s 57 *Associations Act*. The requirements of s 57 *Associations Act* are reflected in similar provisions in the *CATSI Act* that deal with "Pre-Transfer of registration requirements". Section 29-17(1) of the *CATSI Act* provides the criteria that must be met: the resolution must be passed by 75 percent of the votes cast; the resolution must authorise the applicant to apply for registration, approve a proposed constitution, agree on rules, and nominate persons who will be directors. In relation to small or medium corporations, notification must be given of the contact person and in the case of a large corporation, notification must be given of the secretary. Importantly for this case s 29-17(1)(b) of the *CATSI Act* requires members to be given at least 21 days notice of the meeting and the proposed resolution.

[47] Section 61 of the *Associations Act* (NT) provides a certificate of incorporation of the new body issued by the appropriate officer (here

ORIC), is conclusive evidence that all of the requirements of Part 7 of the *Associations Act* have been complied with. I agree with the submission made on behalf of the Commissioner for Consumer Affairs that there was no basis upon which the Commissioner could or should have undertaken an investigation of the defective process. Any such investigation would undermine the clear intention of s 61 of the *Associations Act* (NT), that the certificate of incorporation issued by ORIC be evidence conclusively of compliance.

[48] Once ORIC have accepted an application for the transfer of incorporation of an association under the Commonwealth scheme, pursuant to s 59 of the *Associations Act* (NT), the existence of an incorporated association ceases on the transfer. Here, the application for registration was granted; therefore the certificate of incorporation³¹ is evidence that the new corporation came into existence on 9 July 2010. By operation of law the former Association therefore ceased to be on the same day. The Commissioner for Consumer Affairs did not require any further authorisation to deregister the former Association. Further, as a consequence of the operation of both statutes, the new corporation must be considered the same entity as the former Association.³² As has been noted above, and contrary to the beliefs expressed in some of the material before the court, the rights and liabilities

³¹ Affidavit, Jan Patrick Johnson, sworn 18 April 2012, annexure JJ 13.

³² S 62 *Associations Act* (NT); s 42-3 *CATSI Act*.

continue without alteration from the former Association to the new corporation.³³

[49] The plaintiffs are unable to rely on Division 540 of the *CATSI Act* that in some cases provides a basis for reversing the process from an Aboriginal and Torres Strait Islander corporation to registration under a law of the Commonwealth, a State or Territory. To utilise this process would require a special resolution and would require ORIC to be satisfied of the continuation of the corporation's legal personality after transfer and the preservation of any rights or claims against the corporation that accrued while the corporation was registered under the *CATSI Act*.³⁴ The *Associations Act* (NT) does not contain such provisions, consequently the Registrar could not be satisfied of the necessary pre-conditions for transfer back to the *Associations Act* (NT).

[50] As a result of the non-compliance with s 57(1) of the *Associations Act* (NT) and s 29-17 of the *CATSI Act* it is open to the Court to declare the purported special general meeting void. Section 18 of the *Supreme Court Act* (NT) authorises the Court in relation to any matter in which it has jurisdiction to make binding declarations of right, whether or not consequential relief is or could be claimed.

[51] In my view the consequences of the non-compliance with the *Associations Act* (NT) and the *CATSI Act* are not matters of mere procedure in this

³³ S 62 *Associations Act* (NT); s 42-3 *CATSI Act*.
³⁴ Div 540-10(c) *CATSI Act*.

particular case. An overwhelming number of members of the former Association in addition to the plaintiffs did not have the opportunity of properly considering the resolution for the transfer of registration. The plaintiffs perceived their obligations under the *CATSI Act* to be more onerous than those they were familiar with. Even if their perspective is not correct, the plaintiffs and other member of the former Association deserved to be able to properly consider their position before transferring the former Association to a new and unfamiliar legal regime.

[52] The irregularity is analogous with the problem confronting His Honour Bailey J in *Alderson, Margarula and Hunter v Finch (as administrator of Gagadju), Alderson and Muir*.³⁵

[53] In the course of considering whether failure to give due notice of a Directors' meeting under the *Corporations Act* meant a purported meeting was void, His Honour considered whether a 'procedural irregularity' amounted to a "substantial injustice". His Honour emphasised that the question is whether the irregularity itself has led (or may lead) to injustice, *not* whether the resultant meeting or resolutions had amounted to substantial injustices.

[54] In this case the plaintiffs in their capacity as executive committee members and ordinary members of the former Association have demonstrated that the failure to give the appropriate notice deprived the members of the former

³⁵ No 254 of 1997; 23 December 1997 (unreported).

Association from properly understanding the resolutions associated with the transfer of the former Association. As noted above, fifty seven (57) members of the former Association did not receive notice and did not attend the meeting. Because of the absence of notice, they were deprived of the opportunity to put their views to other members or to vote. They are clearly aggrieved about the consequential deregistration of the former Association. They would have voted against the resolutions. This alone amounts to a substantial injustice flowing from the failure to give notice. This is particularly so given the membership was approximately one hundred and sixty four (164) persons. It is a real and not merely a theoretical injustice that has been done to those members. In my view this is a sound reason to grant the relief.

[55] Given the new corporation does not oppose the relief sought by the plaintiffs it is difficult to envisage whether any other person would suffer prejudice as a result of granting the relief sought.

[56] I conclude a sound reason to grant relief has been demonstrated by the plaintiffs such that the meeting of 23 June 2010 should be declared void. Both counsel for the plaintiffs and counsel for the Commissioner for Consumer Affairs agree that the effect of the declaration is to return the former Association to the entity it was immediately prior to the special general meeting of 23 June 2010. I agree with those submissions. It is therefore unnecessary to direct the Commissioner for Consumer Affairs to reinstate the registration of the Association or to declare the registration of

the Nguiu Ullintjinni Aboriginal Corporation void or to be set aside. The status of Nguiu Ullintjinni Association Incorporated will be as it was prior to 23 June 2010. I note as a practical matter the Commissioner for Consumer Affairs will need to ensure the entry of Nguiu Ullintjinni Association be displayed again as registered on the Australian Securities and Investments Commission's database. It has been indicated on behalf of the Commissioner that this can be attended to administratively.

[57] I have considered the detailed material on delay in bringing these proceedings. In my view delay has been properly explained in the circumstances.³⁶ The plaintiffs attempted to have the registration reversed administratively, however as discussed, that was not possible as a matter of law.

[58] The Declaration will be in terms of paragraph (1) of the Further Amended Originating Motion namely:

1. The proceedings at the special general meeting of the members of Nguiu Ullintjinni Association Incorporated ("the Association") held 23 June 2010 are declared void. The special general resolution of the members of the Association passed 23 June 2010 whereby for the purposes of the Associations Act, the member of the Association resolved the following is set aside:-

³⁶ Plaintiff's submissions, para 12. Affidavits, David Francis, 27 April 2012; Mervyn Sullivan, 13 April 2012.

- (a) Approve the Application to register the Association as an Aboriginal and Torres Strait Islander Corporation under the CATSI Act;
- (b) Apply for a new name for the Association of Nguuu Ullintjinni Aboriginal Corporation:
- (c) Adopt a rule book (constitution) that met the requirements of the CATSI Act.
 - a. The Association was authorized to apply for such registration;
 - b. The Association adopt a proposed rule book for such purpose when it became registered as an Aboriginal and Torres Strait Islander Corporation (“the Corporation”);
 - c. A list of replaceable rules from the CATSI Act would apply to the Corporation when it became registered as an Aboriginal and Torres Strait Islander Corporation, save if such list of replaceable rules was changed or replaced in the said proposed rule book;
 - d. The persons specified in the application would become directors of the corporation; and
 - e. The person/s specified (will “become contract on registration” (sic).