

# Review of ATSIC's decision to refuse financial assistance

## *Tucker v Aboriginal and Torres Strait Islander Commission* [2004] FCA 134

French J, 24 February 2004

### Issues

This decision relates to an application for review under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) of a decision by ATSIC under s. 203FB of the NTA affirming the decision of a representative body to refuse financial assistance to a claimant group. Findings were made in relation to the nature of the ATSIC's review function under s. 203FB.

### Background

Those seeking review constituted the applicant in a claimant application on behalf of the Narnoobinya family group (Narnoobinya application). The Narnoobinya application was overlapped by a larger application made in behalf of the Ngadju People. The Goldfields Land and Sea Council (GLSC) provided the Narnoobinya claimants with some initial limited assistance under s. 203BB of the NTA but declined to provide further assistance on the basis that the Narnoobinya claimants were recognised as being part of the Ngadju claim group and could be included in the Ngadju application—at [10].

The Narnoobinya applicant sought internal review of the decision to refuse assistance. The GLSC review panel recommended that the Narnoobinya claimants be treated as 'persons who may hold native title' for the purposes of s. 203BB and that an independent facilitator be appointed to conduct discussions between the Narnoobinya and Ngadju claimants with the objective that the Narnoobinya claimants be recognised as part of the Ngadju claim group. The GLSC adopted the panel's recommendation (referred to as the implied decision to refuse assistance)—at [13] to [15].

The Narnoobinya applicant then sought review of GLSC's decision under s. 203FB. The reviewer appointed by ATSIC conducted a merits review and concluded that the implied GLSC decision should be affirmed. The reviewer had regard to:

- a draft anthropological report; and
- the policies and procedures of GLSC—at [28] to [37].

In May 2003, ATSIC advised the Narnoobinya applicant that it affirmed the implied decision of GLSC to refuse financial assistance. The statement of reasons provided by ATSIC made it clear that ATSIC accepted the findings and conclusions made by the reviewer and affirmed the decision on that basis—at [18] and [39] to [42].

The review application was made primarily on the ground that the ATSIC decision was an improper exercise of power—at [20].

### **Nature of external review by ATSIC under s. 203FB**

His Honour Justice French found that the process under s. 203FB is a review on the merits and noted that:

- the process involves substantive judgments by a relevantly skilled or knowledgeable person about whether a grant should be made or the refusal of assistance affirmed;
- the factual basis for an assistance decision does not require certainty as to the status of a person seeking assistance as a native title holder or the success of the relevant claimant application — judgments made in decisions about assistance will necessarily be based upon material which is provisional or incomplete;
- the statutory objectives set out in s. 203BC(3) must be observed by representative bodies in making assistance decisions, namely:
  - such decisions must be made in a way that promotes an orderly, efficient and cost effective process for native title applications; and
  - the representative body must make all reasonable efforts to minimise overlapping applications;
- while not bound to do so, it was appropriate for ATSIC and its reviewer, in exercising their functions under s. 203FB, to adopt the perspective of the representative body and have regard to its relevant policies and procedures—at [46] to [49].

### **Improper exercise of power**

The bases for review on this ground were:

- ATSIC had failed to turn its own mind to the question it had to decide under s. 203FB(7); and
- it was inappropriate for the reviewer or ATSIC to have regard to GLSC's priority criteria as these were within the special province of the relevant representative body—at [50] and [51].

French J held that:

- it would be wrong for ATSIC, in the exercise of its review function, simply to 'mindlessly' adopt the reviewer's report — it must consider the report and be satisfied that the report and its recommendations are appropriate;
- however, it is open to ATSIC to accept the report and make a decision in accordance with its recommendations and it can adopt the reasons set out in the report; and
- it is appropriate for both the reviewer and ATSIC to put themselves notionally in the position of the representative body, or at least to have regard to the considerations the representative body would need to bear in mind in allocating resources. There is no legal error in such approach, provided regard is had to the particular circumstances of the case—at [53].

**Decision**

It was held that none of the grounds of review were made out and, therefore, the application was dismissed with costs.