

BETWEEN:

Northern Land Council

First Appellant

Joe Morrison as Chief Executive Officer of the Northern Land Council

Second Appellant

and

Kevin Lance Quall

First Respondent

Eric Fejo

Second Respondent



10

APPELLANTS' SUBMISSIONS

Part I: Certification as to form of submissions

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise statement of the issue

2. Does a representative Aboriginal/Torres Strait Islander body have power to delegate the performance of its function under s 203BE(1)(b) of the *Native Title Act 1993* (Cth) to certify, in writing, applications for registration of indigenous land use agreements relating to land or waters within the area for which the body is the representative body?

20

Part III: Notice under section 78B of the Judiciary Act

3. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Citation of reasons for judgment below

4. The reasons for judgment below are:
 - (a) Full Court: *Northern Land Council v Quall* [2019] FCAFC 77; 367 ALR 216; 164 ALD 63 (FC) and *Northern Land Council v Quall (No 2)* [2019] FCAFC 101 (FC2) (Griffiths, Mortimer and White JJ).
 - (b) Primary judge: *Quall v Northern Land Council* [2018] FCA 989 (Reeves J) (TJ).

30

Unless indicated otherwise, references are to the Full Court's first set of reasons.

Part V: Factual background

5. The Northern Land Council (the **NLC**) is recognised as a representative Aboriginal/Torres Strait Islander body under Part 11 of the *Native Title Act 1993* (Cth) (the **NTA**). It is a Land Council established under s 21 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the **ALRA**): FC [6] (**CAB 52**).
6. In 2016, the NLC and the Northern Territory made an indigenous land use agreement under Pt 2 Div 3 of the NTA in relation to land and waters at the Cox Peninsula near Darwin known as the **Kenbi ILUA**, as varied by a further agreement in February 2017: FC [7] (**CAB 52**).
- 10 7. On 13 March 2017, the Chief Executive Officer (the **CEO**) of the NLC signed a **certificate** for the making of an application for registration of the Kenbi ILUA pursuant to ss 24CG(3)(a) and 203BE(1)(b) of the NTA. The text of the certificate is set out at FC [22] (**CAB 56**) (also TJ [3] **CAB 9**).¹ It states that pursuant to s 203BE(1)(b) the NLC certifies the application and, as required by s 203BE(6), that it is of the opinion that the requirements of s 203BE(5) about identification of the native title holders and their authorisation of the agreement have been met, and sets out the NLC’s reasons for being of that opinion.
8. Mr Quall and Mr Fejo contended that the certification was made without jurisdiction because of an “absence of delegated authority” (**AFM 10, 18**). They argued that (1) the certification function under s 203BE(1)(b) was not delegable, alternatively, (2) the delegation relied upon — a resolution of 1 October 1996 and instrument of 10 March 2000 — did not in fact delegate that function: TJ [13] (**CAB 14**). The trial judge rejected the first argument (TJ [28] **CAB 19**) and accepted the second because the delegation pre-dated the commencement of s 203BE on 1 July 2000 (TJ [34]–[35] **CAB 22**). His Honour rejected reliance upon the *Carltona*² principle on the basis that because the delegation was ineffective, the CEO had not been authorised to act and, according to his Honour, as the function could be delegated, there was no practical administrative necessity to engage that principle in any event: TJ [36], [38]–[39] (**CAB 23–4**).
- 20
30 9. The trial judge declared that the NLC had not, by the certificate signed by the CEO, certified for the purposes of s 24CG(3)(a), and in the performance of its

¹ The certificate was received in the Full Court as ex 1 (**AFM 4**).

² *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA).

function as a representative body under s 203BE(1)(b), the application for registration of the Kenbi ILUA (**CAB 27, 30**).

10. An appeal from the declaration (**CAB 33**) was accompanied by an interlocutory application (**AFM 22**) to adduce evidence of a further act of delegation, being a resolution of 18 October 2001.³ Mr Quall and Mr Fejo cross-appealed that the certification function under s 203BE(1)(b) was not delegable (**CAB 39**), which the Full Court allowed: FC [59], [142] (**CAB 69, 98**). The Full Court considered the outcome on the cross-appeal to be decisive on the issues raised by the appeal, but added that if there was power to delegate and the fresh evidence was admitted, it was doubtful if the 2001 act of delegation would be effective because the certificate is in the name of the NLC rather than the CEO as a delegate: FC [138] (**CAB 96**) referring to [24]–[25]; also [23] (**CAB 57–8**).
11. The Full Court declared that the NLC did not have power to delegate its certification function under s 203BE(1)(b) to the CEO and dismissed the appeal and interlocutory application (**CAB 110**).

Part VI: Argument

A. Overview

12. In *Dainford Ltd v Smith*, Gibbs CJ remarked that:⁴

20 *I am not convinced that recourse to the maxim delegatus non potest delegare is of much assistance in deciding upon the validity of an exercise of statutory powers. It is simpler to ask directly whether the power has been exercised by the person upon whom it has been conferred and whether it has been exercised in the manner and within the limits laid down by the statute conferring the power.*

The Full Court, in contrast, invoked the maxim to hold that unless done by the members of the representative body in general meeting, the certification function has not been performed by the body “itself” in accordance with the NTA: FC [137], [147] (**CAB 95–6, 99**).

- 30 13. More recently, in *McGlade v South West Aboriginal Land & Sea Corporation (No 2)* another Full Federal Court held, consistently with the remarks of Gibbs CJ in *Dainford* (although not cited), that certification performed by an officer authorised to do so is properly characterised as having been performed by the

³ Affidavit Tamara Cole 27 September 2018 esp [11] and annexures TSC1, 3 (**AFM 32, 35, 45**).

⁴ (1985) 155 CLR 342 at 349.

corporation; delegation was viewed as having the limited effect of altering how and through whom the corporation fulfils its function.⁵ *McGlade* purports to distinguish *Quall* on the basis that in *Quall* the representative body is a Land Council established under the ALRA.⁶ However, *McGlade* accepts, correctly, that the NTA itself reflects the “entirely conventional corporate behaviour” that a representative body corporate acts and thinks through natural persons.⁷

14. The stark difference in outcome in *Quall* and *McGlade* – yet in each case the certificate was signed by the CEO under delegated authority⁸ – illustrates the limited utility of the maxim invoked in *Quall* where statutory functions are conferred on a body corporate. It is of limited utility because the affairs of a corporation are, for the most part, carried on under authority from its governing body by subordinate organs and officers⁹ and their actions bind the corporation when done under (actual or ostensible) authority on its behalf.¹⁰ While agency principally concerns private law transactions and delegation is largely a concern of public law, there are obvious analogies between private sector corporations and governmental institutions endowed with corporate status.¹¹ Hence, the proper inquiry is that noted by Gibbs CJ in *Dainford* as to whether the function has been performed by the entity upon which it is conferred.¹²
15. The certification and other representative body functions (listed in s 203B) are, in that respect, conferred on bodies corporate, which may be a company, or as in this case, a statutory corporation (s 201B). There is no express provision by which a representative body may delegate the performance of its functions, but Part 11 is replete with indications that such a body corporate will act through its

⁵ [2019] FCAFC 238 at [329]–[330] (Allsop CJ, McKerracher and Mortimer JJ).

⁶ [2019] FCAFC 238 at [246]–[247], [250], [337].

⁷ [2019] FCAFC 238 at [332]–[333].

⁸ *McGlade* [2019] FCAFC 238 at [266], [309].

⁹ For example, *Ex parte Forster; Re University of Sydney* [1963] SR (NSW) 723 at 733 (Sugerman, Else-Mitchell and Moffit JJ); *Bayly v Municipal Council of Sydney* (1927) 28 SR (NSW) 149 at 154 (Street CJ; Gordon and Ferguson JJ concurring); *Provident Mutual Life Assurance v Derby City Council* [1981] 1 WLR 173 at 181 (Lord Roskill), and on use of the *Carltona* principle for local authorities, see Lanham, “Delegation and the Alter Ego Principle” (1984) 100 *Law Quarterly Review* 587 at 608-9.

¹⁰ *Crabtree Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72 at 78 (the Court) endorsing *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA); and see *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 158-60 (Mason CJ), 172-4 (Brennan J), 198-9 (Dawson J), (207) (Toohey J), 210 (Gaudron J).

¹¹ Campbell, “Ostensible Authority in Public Law” (1999) 27 *Federal Law Review* 1 at 2, 6.

¹² (1985) 155 CLR 342 at 349.

directors, employees or agents. It is necessary to detail the statutory scheme, but before doing so, the three key (but overlapping) points as to why a power to delegate certification is a necessary implication of the scheme should be noted:

(1) *First*, the functions are integrated; certification follows facilitation and assistance done in consultation with native title holders, which are generally not amenable to being done by the members of the representative body in general meeting. The Full Court's isolation of certification fragments the scheme and decontextualises the part certification plays.

10 (2) *Second*, the Full Court considered that the opinion required for certification about who are the native title holders and whether they authorise the claim or agreement implied that certification is non-delegable, but they are actually matters upon which the body must be satisfied in the course of performing its preceding (and delegable) facilitation and assistance functions.

20 (3) *Third*, rather than prescribing particular structures and processes, the statutory scheme confers an elastic power to do all things necessary or convenient for the performance of representative body functions, with various provisions acknowledging that the body acts (and thinks) through its directors, employees and agents acting with authority.

B. Applicable statutory provisions

16. Part 11 of the NTA provides for the recognition (Div 2), functions and powers (Div 3), finance (Div 4) and accountability (Div 5) of representative bodies, the conduct of their officers (Div 6), with miscellaneous provisions (Div 7).

17. Division 1 has key definitions. A *director*, in relation to a representative body, means a member of the *governing body*, being the group of persons who are responsible for the executive decisions of the representative body. An *executive officer* is a director or any other person who takes part in the management of the representative body at a senior level. The *functions* of a representative body by the NTA include the obligations imposed on the body by that Act (s 201A).

30 18. Section 201B(1) provides that an *eligible body* that may be recognised is: (a) a body corporate registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (the ***Corporations (ATSI) Act***); (b) a body corporate that is already recognised as a representative body; (ba) a company incorporated

under the *Corporations Act 2001* (Cth); or (c) a body corporate established under a Commonwealth, State or Territory law prescribed for that purpose.

19. Division 3 deals with the functions and powers of a representative body. The functions, listed in s 203B(1), are to: (a) facilitate native title claims and agreements (s 203BB); (b) certify native title claims and agreements (s 203BE); (c) resolve disputes about native title claims and agreements (s 203BF); (d) notify actions affecting native title (s 203BG); (e) be a party to native title agreements (s 203BH); (f) provide for internal review of the performance of its functions (s 203BI); and (g) certain other functions (s 203BJ). The functions are in addition to any functions conferred on the body (whether in its capacity as a representative body or otherwise) by or under any other law (s 203B(2)).
20. Section 203B(3) provides that a representative body must not enter into an arrangement with another person under which the person is to perform the functions except as mentioned in s 203BB(5) (briefing out facilitation), s 203BD (overlap areas) and s 203BK(3) (assistance in dispute resolution). Section 203BK provides that a representative body has power to do all things necessary or convenient in connection with the performance of its functions (sub-s (1)), including power to enter into arrangements to obtain services to assist in that performance (sub-s (2)).
- 20 21. Section 203BA deals with how functions are to be performed. It requires performance in a timely manner, particularly in respect of matters affected by time limits under the NTA (s 203BA(1)), and in a way that maintains organisational structures and processes that promote representation and consultation (s 203BA(2)). Section 203BC adds particular consultation obligations to facilitation and assistance (s 203BB), including that the body be satisfied that the native title holders understand and consent to any course of action the body takes on their behalf (s 203BC(1)(b), (2)).
22. Division 6 applies to the conduct of directors and officers when related to the performance of a representative body's functions (s 203E). If the body is not a corporation under the *Corporations (ATSI) Act* or the *Corporations Act*, s 203EA deals with conflicts of interest. If the body is a corporation under the *Corporations (ATSI) Act*, s 203EB modifies powers to indemnify officers.
- 30 23. Division 7 has miscellaneous provisions. They include s 203FD which provides that an executive officer is not personally liable for actions in connection with the performance of the body's functions, and s 203FH which attributes to a body

corporate the state of mind and conduct of its directors, employees and agents when acting within the scope of their authority. Another is s 203FE by which a person or body may be funded to perform the functions of a representative body, including as a result of external review, in which event the obligations imposed on a representative body attach (ss 203FEA–203FED).

- 10 24. **The certification functions** of a representative body under s 203BE(1) are “to certify, in writing” (a) applications for determinations of native title (native title claims) and (b) applications for registration of indigenous land use agreements. A representative body must not certify an application “unless it is of the opinion” that certain requirements are met in relation to identification of the native title holders and their authorisation of the claim or agreement (s 203B(2), (5), with authorisation being in accordance with ss 251A–251B). The certificate is to include a statement to the effect that the body is of the opinion that the requirements have been met and set out the body’s reasons for being of that opinion (s 203BE(4), (6)).
25. The Full Court’s decision is on the certification of an application for registration of an agreement under s 203BE(1)(b), but their Honours’ reasoning applies equally to certification of a native title application under s 203BE(1)(a).
- 20 26. **ALRA:** The NLC is an eligible body within s 201B(1)(b) of the NTA. It is a Land Council established under the ALRA (s 21) as a body corporate (s 22) with functions listed in s 23(1) of that Act, and power to do all things necessary or convenient to be done in connection with the performance of its functions, including to employ staff (s 27). The members of a Land Council are Aboriginals living in its area and chosen by those Aboriginals (s 29). Provision is made for the appointment of committees of members to assist a Council in the performance of its functions (s 29A) and for convening meetings of a Council considered necessary for the conduct of its affairs (s 30).
- 30 27. Section 28 of the ALRA provides that a Land Council may delegate to a member of the Council, to staff or to a Council committee, “any of the Council’s functions or powers under this Act” other than certain specified exceptions. The proceedings below were conducted on the assumption that s 28 of the ALRA does not provide a source for the delegation of functions conferred by the NTA because s 28 refers to functions “under this Act”: FC [66] (**CAB 71**). Although the point is not decisive, the Appellants seek to contend otherwise, as indicated in the special leave application filed 25 July 2019 at [16], [33], and the reply filed

19 August 2019 at [14] (see [56]–[58] below), as the point is one of construction.¹³

28. The NLC has 83 Aboriginal members; 78 representing 54 communities chosen by Aboriginals living in its area, and five co-opted. The members in Full Council normally meet twice a year: ALRA s 29; FC [137], [147] (**CAB 95–6, 99**). The NLC, as a Land Council, is a corporate Commonwealth entity within the *Public Governance, Performance and Accountability Act 2013* (Cth) (the **PGPA Act**). The Chair and the CEO of a Land Council comprise the accountable authority, that is, the governing body charged with the duties to govern the entity imposed by that Act: PGPA Act ss 10–12; *Public Governance, Performance and Accountability Rule 2014* (Cth) (the **PGPA Rule**) r 7A.

C. Delegation of performance is a necessary implication of the statutory scheme

29. As the maxim invoked by the Full Court is a rule of construction, a facility to delegate the performance or exercise of a statutory function or power may exist by necessary implication.¹⁴ The meaning of “delegation”, as conferral of authority to act, is most often traced to the remarks of Wills J in *Huth v Clarke* that:¹⁵

Delegation ... does not imply a parting with powers by the person who grants the delegation, but points to the conferring of an authority to do things which otherwise that person would have to do himself ... [and] the word “delegate” means little more than an agent.

In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, Mason J spoke of “an implied power to delegate or, to express it more accurately, to act through the agency of others”¹⁶ and noted that the cases in which the principle in *Carltona* had been applied, such as *O’Reilly v State Bank of Victoria Commissioners*:¹⁷

... are cases in which the nature, scope and purpose of the function vested in the repository made it unlikely that Parliament intended that it was to be exercised by the repository personally because administrative necessity indicated that it was

¹³ *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* (2010) 241 CLR 576 at [19]–[20] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

¹⁴ *Dainford Ltd v Smith* (1985) 155 CLR 342 at 356 (Wilson J) referring to *Hawke’s Bay Raw Milk Producers Co-operative Co Ltd v New Zealand Milk Board* [1961] NZLR 218 at 223 (NZCA).

¹⁵ (1890) 25 QBD 391 at 395 cited, for example, in *O’Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 at 17 (Mason J); and see Willis, “Delegatus Non Potest Delegare” (1943) 21 *Canadian Bar Review* 257 at 257–8.

¹⁶ (1986) 162 CLR 24 at 37–8 (Gibbs CJ and Dawson J agreeing).

¹⁷ (1986) 162 CLR 24 at 38 citing *O’Reilly* (1983) 153 CLR 1 at 11 (Gibbs CJ).

impractical for him to act otherwise than through his officers or officers responsible to him.

30. *O'Reilly* illustrates that the conferral of a statutory power may carry with it the necessary implication that the repository of the power may act through others whether styled as delegation or agency.¹⁸ There Gibbs CJ remarked that “Ministers are not alone in that position”¹⁹ and instanced *Ex parte Forster; Re University of Sydney*,²⁰ where the University Senate, a body corporate, had authorised faculty committees to decide upon the exclusion of students on grounds of academic failure and the New South Wales Full Court held that there had not been “an invalid delegation – whether in the sense of delegation at all or *qua* the body to which the delegation was made”.²¹
- 10
31. As noted in Part A, the proposition that a facility to delegate representative body functions, including certification, is a necessary implication of the statutory scheme can be referenced to three overlapping points. *First*, the integrated nature of the functions, and which are conferred on bodies corporate. *Second*, the subject matter of the opinion upon which certification depends is required to be addressed when performing the preceding (and delegable) facilitation and assistance functions. *Third*, the scheme takes an eligible body as it finds it with its existing internal governance structures and acknowledges that it acts through its directors, employees and agents.
- 20
32. Recently, in *McGlade* another Full Federal Court disclaimed that it would be anomalous if one kind of representative body (a Land Council) could not delegate certification but another (an ATSI corporation) could do so. That Full Court reasoned that the range of entities mean that uniformity of outcome cannot be assumed, and purported to distinguish *Quall* because the affairs of an ATSI corporation are managed by the directors with provision to delegate their powers

¹⁸ (1983) 153 CLR 1: Gibbs CJ (Murphy J agreeing) at 11 “act through a duly authorized officer”, 12 “acting as his authorized agents”; Wilson J at 30 “through servants or agents”, 33 “acting for”; cf Mason J in dissent at 18 “appoint agents to act ... in his name”; see Bayne, “Delegation, Agency and Just Assisting” (1988) 62 *ALJ* 721 at 722. A delegate/agent dichotomy has been criticised if it assumes an absence of an implied power to delegate: De Smith, *Judicial Review of Administrative Action* (3rd ed) at 266, repeated in later editions and see now (8th ed) at [5-165]. The *Carltona* principle is, in substance, an implied authority or power to delegate, being the position in Canada: *R v Harrison* [1977] 1 SCR 238 at 245.

¹⁹ (1983) 153 CLR 1 at 11.

²⁰ Citing [1963] SR (NSW) 723 at 733.

²¹ [1963] SR (NSW) 723 at 734 (Sugerman, Else-Mitchell and Moffitt JJ).

(*Corporations (ATSI) Act* ss 246-1(3), 274-1, 274-10).²² But *Quall* holds certification to be non-delegable as a necessary implication of the NTA, chiefly because of the nature of the opinion by which s 203BE conditions certification (FC [98]–[100], [136]–[137]; also²³ [153] (**CAB 83–4, 95, 100–1**). The result in *Quall* cannot, with respect, be read away as turning on the terms of the ALRA.

33. **The integrated scheme of representative body functions:** The Full Court approached the issue at “a level of specificity” focusing only upon the certification functions in s 203BE (FC [60]–[61] (**CAB 69–70**), leaving open the question whether any of the other functions of a representative body listed in s 203B(1) may be delegable. Mortimer J (at [148] **CAB 99**) put it this way:

10
20
*Finally, it is not necessary for the purposes of resolving the cross-appeal to determine whether any of the other functions set out in s 203B(1) may be of such a nature that it is appropriate to construe them as impliedly delegable, whether through s 203BK(1) or otherwise. Indeed, it may well be that the Carltona principle enables a CEO to sign the documentary certification of an Indigenous Land Use Agreement (ILUA) on behalf of a representative body. Where that occurs, that is because Parliament is not presumed to have intended that all members of a representative body actually provide evidence of the certification by affixing a signature, and Parliament may be taken to have intended that an officer of the representative body, such as its CEO, can be authorised to do so.*²⁴

34. The Full Court reasoned that the function to certify could not be delegated because it is conditioned by formation of an opinion about the identity of the native title holders and their authorisation of the agreement: FC [98]–[100], [137] (**CAB 83–4, 95**); also [153] (**CAB 101**). However, it is in the course of carrying out the other functions, particularly by facilitation and assistance, that a representative body will, through its officers, acquire knowledge of those subject matters: s 203BB(1)(b), (2) considered at [45]–[46] below. There is no reason to suppose that those other functions cannot be performed by authorised officers.

35. The structure of Part 11 of the NTA involves the conferral of multiple functions (s 203B) on a body corporate (s 201B), which can only act through natural persons. All of the functions concern the making of native title claims and agreements (s 203B). The functions intersect with lineal connections – notification to native title holders of acts that affect native title (s 203BG),

²² [2019] FCAFC 238 at [337] (Allsop CJ, McKerracher and Mortimer JJ).

²³ In what follows, unless indicated otherwise, references to the Full Court’s reasons in *Quall* are to the joint reasons of Griffiths and White JJ, and “also” refers to the additional reasons of Mortimer J.

²⁴ Citing for the last sentence *Re Reference Under Section 11 of the Ombudsman Act 1976; ex-parte Director-General of Social Services* (1979) 2 ALD 86 at 94 (Brennan J).

facilitation and assistance in making native title claims and agreements on consultation with native title holders (ss 203BB–203BC), dispute resolution to promote consensus among native title holders about claims and agreements (s 203BF), agreement making by a body (s 203BH), the certification of applications to register claims and agreements (s 203BE), and internal review of a body’s performance of its functions (s 203BI).

- 10 36. The obligations to consult and advise (ss 203BC, 203BF, 203BG) are part of the functions (s 201A definition of *functions*) by which the representative quality posited at FC [100] (**CAB 84**) is attained. The impracticability of that being done by the (83 NLC) members of a representative body in general meeting is self-evident: cf FC [137] (**CAB 95–6**). Discharge of the obligation to consult in the course of notification, facilitation, assistance and dispute resolution may reasonably be expected to be done at the officer level and, most often, in the field. There is no logical reason to approach certification differently.
- 20 37. The context by which the *functions* include the *obligations* imposed on the body (s 201A) includes the requirement for timely performance of functions, having regard to the time limits in the NTA (s 203BA(1)). An example is the requirement for the making and registration of a claimant application within four months of notification of a future act (s 233) that affects native title (s 227) to engage the right to negotiate (ss 28(1)(a), 29(4)(b) and 30(1)(a)). The difficulty in meeting those time limits if certification is to await a general meeting of members is obvious.
- 30 38. The obligations also require the maintenance of structures that promote representation and consultation (s 203BA(1)–(2)), aided by the specific function for *internal* review of decisions and actions in the performance of functions (s 203BI), which presupposes performance at different levels. The internal review function with respect to all representative body functions, coupled with merits review of the certification function where the Registrar’s opinion on authorisation by the native title holders is the ultimate decision that founds registration,²⁵ illustrates that an act of certification is not final or conclusive, such that a presumption against its delegation is unwarranted.²⁶

²⁵ *Kemppi v Adani Pty Ltd (No 2)* [2019] FCAFC 117 at [79], [83] (Rares ACJ and Robertson J, Perry J agreeing).

²⁶ *Provident Mutual Life Assurance v Derby City Council* [1981] 1 WLR 173 at 181 (Lord Roskill).

39. This is an instance where, as was said in *Forster*, “[w]ithout the most ample facility for delegation the affairs of [the body] could not be carried on at all”.²⁷ The Full Court’s focus on the certification functions reduces Part 11 of the NTA, and the other functions it vests in a representative body, to incoherence.²⁸ So approached, certification is severed from the statutory context and purpose that connects it with the facilitation of claims and agreements.
40. **Conditioning certification with an opinion about the native title holders’ authorisation does not preclude delegation:** According to the Full Court, the “proper discharge” of the certification function under s 203BE(1)(b) requires the representative body “itself to hold and state the requisite opinion” stipulated in s 203BE(5) and, so their Honours reasoned, this mandated certification by the body’s members in general meeting and precluded certification by an authorised officer: FC [137] (**CAB 95–6**); also [153] (**CAB 101**).
41. It is artificial to speak of an opinion being held by a body corporate other than through natural persons.²⁹ The Full Court in *Quall* holds that the opinion required by s 203BE(5) must be held by the (83 NLC) members in general meeting, but later in *Kemppi v Adani Pty Ltd* a differently constituted Full Court considered that if authorised to certify, an executive officer is the “controlling mind” of the representative body when doing so.³⁰ And in *McGlade* another Full Court held that certification by an authorised officer as a delegate can properly be characterised as being performed by the body itself.³¹
42. In this case, the CEO is an executive officer of the representative body (s 201A), that is, a person who takes part in the management of the body at a senior level (s 201A), in a statutory setting where provision is made for the conduct, liability and attribution of such officers (ss 203E, 203FD, 203FH: see further [48]–[55] below). The Chair and the CEO of a Land Council comprise the governing body charged with the duties to govern the Land Council, as a Commonwealth corporate entity, imposed by the PGPA Act: see ss 10–12 and PGPA Rule r 7A.

²⁷ [1963] SR (NSW) 723 at 733 (Sugerman, Else-Mitchell and Moffitt JJ).

²⁸ *R v Independent Broad-based Anti-Corruption Commissioner* (2016) 256 CLR 459 at [76] (Gageler J).

²⁹ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 170 (Lord Reid); *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 582–3 (Brennan, Deane, Gaudron and McHugh JJ).

³⁰ *Kemppi v Adani Pty Ltd (No 2)* [2019] FCAFC 117 at [49]–[50], [56] (Rares ACJ and Robertson J, Perry J agreeing), having refused an application based on *Quall FC* to amend on appeal to challenge that authority: *Kemppi v Adani Pty Ltd* [2019] FCAFC 94.

³¹ [2019] FCAFC 238 at [329] (Allsop CJ, McKerracher and Mortimer JJ).

43. The pre-condition to certification that the representative body be of the opinion that the native title holders have been identified and authorise the claim or agreement (s 203BE(2), (5)) does not require that the opinion be formed by the members of the body in general meeting: cf FC [137] (CAB 95–6). The *Nelson Bay Claim Case* (cited at FC [50]–[51], [98] CAB 66–7, 83–4) does not assist as that concerned a power conferred upon an individual Minister, not a corporation, and the subject matter required evaluation of “high government policy.”³² And the view of Mason J in *O’Reilly* that if a power is conditioned by an opinion the power must, absent express power of delegation, ordinarily be exercised personally, did not command a majority.³³
- 10
44. The reasoning at FC [68], [95], [100], [130] [135] (CAB 71–2, 82–3, 84, 93–5) that the members of a Land Council, rather than the CEO or staff, as representative and elected Aboriginals have an “aptitude” ([130], [135]) to form the opinion about authorisation upon which certification and later registration depends faces further difficulties:
- (1) *First*, agreements and claims can be registered that are not certified and where the Registrar instead forms that opinion (ss 24CG(3)(b), 24CL, 190C(4)(b), (5)).
 - (2) *Second*, where there is objection to registration of an agreement certified by a representative body (ss 24CI, 24CK(2)) it is the Registrar’s ultimate decision (s 24CJ) about authorisation that provides the foundation for registration.³⁴
 - (3) *Third*, the function of internal review (s 203BI) implies performance by officers and organs other than the members or directors in general meeting.
 - (4) *Fourth*, the Full Court’s decision precludes delegation to the Chair and Committees of a Land Council who are Aboriginal members of the Council (ALRA ss 28, 29A, 30).
- 20

³² *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)* (2014) 88 NSWLR 125 at [30] (NSWCA Basten JA).

³³ (1983) 153 CLR 1 at 18. The power in *Carltona* depended upon an opinion of expediency [1943] All ER 560; compare *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [171]–[176] (Gummow and Hayne JJ) where the section expressly required the Minister to exercise power “personally”. If the exercise of power is delegable, then the delegate may so exercise upon the delegate’s opinion: see *Acts Interpretation Act 1901* (Cth) s 34A.

³⁴ *Kemppi v Adani Pty Ltd (No 2)* [2019] FCAFC 117 at [79], [83] (Rares ACJ and Robertson J, Perry J agreeing).

(5) *Fifth*, s 203EA(3), which would apply to a Land Council recognised as a representative body (s 203EA(1)), provides that a director of a representative body, defined as a member of its governing body (s 20A), must not participate in decisions in which the director has a material personal interest, which may include an interest by traditional affiliations to the land concerned.³⁵

(6) *Sixth*, the position under the ALRA does not, in any event, bear upon the construction of Part 11 of the NTA, especially when the governance arrangements of bodies will vary and other bodies may or may not have the particular structures of a Land Council as a body with members comprising and chosen by the Aboriginals concerned: cf FC [130] (**CAB 93**).

10

45. Of importance to the construction of Part 11, and whether it evinces an intention that certification is not delegable, is the link between facilitation and assistance in the making of a claim or agreement (s 203BB), required to be done by consultation with the native title holders (s 203BC), and the subsequent certification of the making of the claim or agreement (s 203BE): cf FC [131]–[133], [135], also [152] (**CAB 93–4, 100**). When representing native title holders in facilitating and assisting the making of a claim or agreement, the representative body must be “satisfied” that the native title holders understand and consent to any general course of action it takes on their behalf, and that they have consented to the action in accordance with traditional or adopted decision making processes of the native title group: see ss 203BC(1)(b), (2).

20

46. The state of satisfaction required by s 203BC in the course of facilitation is substantially the same as the opinion required as a condition to the later step of certification, that is, that the native title holders authorise the making of the claim or agreement in accordance with traditional or adopted decision making processes: see 203BE(2), (5), 251A–251B. If facilitation can be performed by authorised officers, and is subjected to substantially the same state of satisfaction as is certification, there is no reason to hold that the opinion for certification must and can only be held by the members of the representative body in general meeting: cf FC [137], also [153] (**CAB 95–6, 100**).

30

³⁵ Contrast PGPA Rule r 12(2), made under s 29 of the PGPA Act, generally excepting a Land Council’s member’s traditional affiliations to land for the purposes of the PGPA Act governance regime, but displaced by s 203EA(5) of the NTA in the case of NTA functions.

47. The Full Court’s reasoning reduces to the proposition that the opinion of those qualified and armed with knowledge about authorisation by the native title holders is not good enough, but the opinion of the members of the governing body, who may or may not be similarly qualified and knowledgeable, and based on a report and recommendation from those so qualified and knowledgeable, is good enough: FC [136], [147] (CAB 95, 99).³⁶
48. **The scheme acknowledges that a body corporate acts (and thinks) through natural persons:** Part 11 acknowledges that the character and structures of eligible bodies will differ (s 201B). It does not establish representative bodies or prescribe what their structures should be, but instead makes provision for how the existing structures of an eligible body corporate should, on recognition as a representative body, be applied in the performance of functions (ss 203AI, 203BA), it being otherwise impractical to prescribe particular processes as the governance structures of eligible bodies will vary.³⁷ As the body is a legal entity with corporate capacity, it does not need specific statutory authorisation to do those things required by the Act.³⁸ In the case of a Land Council, the conferral of corporate capacity by s 22 of the ALRA in itself operates as a grant of power to effectuate the purposes for which the body exists.³⁹
49. The general power in s 203BK of the NTA to do all things necessary or convenient in connection with the performance of functions directs the exercise of corporate capacity or power to the furtherance of the functions conferred by that Act upon recognition of the body corporate as a representative body.⁴⁰ Section 203BK is an ample power with a dimension of elasticity,⁴¹ bearing in mind that Part 11 confers functions on a body corporate without prescription of

³⁶ Cf *Provident Mutual Life Assurance v Derby City Council* [1981] 1 WLR 173 at 181 (Lord Roskill).

³⁷ And see *Explanatory Memorandum to the Native Title Amendment Bill 1997* at [33.66], [34.51] in reference to ss 203AI and 203BA that it would be impractical to prescribe particular structures and processes.

³⁸ *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 124 (Taylor J).

³⁹ *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 141–2 (Stephen J).

⁴⁰ *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 136–8 (Gibbs J), 141–2 (Stephen J).

⁴¹ *Anthony Lagoon Station Pty Ltd v Aboriginal Land Commissioner* (1987) 15 FCR 565 at 585 (Full Ct Ryan J) cited in *Palmer v Australian Electoral Commission* (2019) 93 ALJR 947 at [44] fn (39) (Keifel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

particular powers.⁴² The implication of a facility to delegate is comparable to *Forster* where the Senate's general power was to act in such manner that is best calculated to promote the purposes of the University, which was held to be consistent with its affairs being carried on by its authorised officers.⁴³

50. That the functions of a representative body will be performed through authorised officers is recognised by the sections of Part 11 dealing with the material interests and indemnity of executive officers (ss 203E–203EB), providing that executive officers are not personally liable for acts done in the performance of representative body functions (s 203FD), and in attributing to a representative body the state of mind and conduct of directors, employees and agents when acting within authority (s 203FH). In that respect, sub-s 203FH (1) reads:

If, for the purposes of this Part, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:

(a) *that the conduct was engaged in by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; and*

(b) *that the director, employee or agent had the state of mind.*

[emphasis added]

Sub-section 203FH(2) reads:

Any conduct engaged in on behalf of a body corporate by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority is taken, for the purposes of this Part, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct. [emphasis added]

Sub-section 203FH(6) defines the state of mind of a person to include the opinion of the person and the person's reasons for the opinion.

51. One effect of s 203FH is that the attribution rules it prescribes will apply to the offences in Part 11 (ss 203DG(4), (7), 203FG) instead of Part 2.5 of the *Criminal Code 1995* (Cth): see NTA s 8A(2).⁴⁴ But s 203FH is more generally expressed.

⁴² *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* (1993) 40 FCR 409 at 422–3 (Full Ct Lockhart J).

⁴³ [1963] SR (NSW) 723 at 726, 733 (Sugerman, Else-Mitchell and Moffitt JJ).

⁴⁴ Part 2.5 of the *Criminal Code 1995* (Cth) has its origins in the *Review of Commonwealth Criminal Law* chaired by Sir Harry Gibbs: see *Interim Report: Principles of Criminal Responsibility and Other Matters*, Part V Offences by Corporations (July 1990) referring (at 25.12) to s 84 of the *Trade Practices Act 1974* (Cth) as “a notable example” of a Commonwealth law providing for the criminal liability of corporations, as to which, see the references in next footnote.

It is an enlarging and deeming provision of general application in both criminal and civil proceedings, designed to facilitate the proof of the responsibility of a representative body.⁴⁵

52. So, if, *for the purposes* of Part 11, which provides for the functions of a representative body (s 203B) and deals with the manner of their performance (s 203BA), it is necessary to establish the state of mind of a body corporate, it is *sufficient* to show the conduct was engaged in by a director, employee or agent with authority and that the director, employee or agent had the state of mind (sub-s (1)), defined to include an opinion and reasons for the opinion (sub-s (5)).
- 10 53. In terms, s 203FH is apt to cover formation of the requisite opinion and the conduct involved in certification (s 203BE(2), (5)), likewise the state of satisfaction required in facilitation and assistance (s 203BC)).⁴⁶ The effect of s 203FH is that the mind and conduct of a body corporate will be that of its directors, employees or agents when acting within the scope of their authority. As noticed in *McGlade*, s 203FH explicitly reflects the “entirely conventional corporate behaviour” that a body corporate acts through natural persons.⁴⁷
54. Section 203FH overcomes the artificiality of s 203BE(2) and (5) referring to the “opinion” held by the body corporate, or for that matter, the collective of its members or directors. Attribution by s 203FH facilitates judicial review of certification in relation to the formation of the opinion that conditions that function,⁴⁸ which would otherwise be frustrated by difficulties in proof if, as the Full Court holds, the opinion needs to be that held by the members or directors of the body in general meeting (in this case the 83 NLC members).⁴⁹
- 20

⁴⁵ Cf *Houghton v Arms* (2006) 225 CLR 553 at [37] (the Court) referring to *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27 at 36, 38 (Lockhart J) dealing with s 84 of the *Trade Practices Act 1974* (Cth), now s 84 of the *Competition and Consumer Act 2010* (Cth).

⁴⁶ Other examples of general application are the functions in s 203BJ(d) and (e) turning on what a representative body “knows” or “considers”.

⁴⁷ [2019] FCAFC 238 at [332]–[333].

⁴⁸ As to which see *Buck v Bavone* (1976) 135 CLR 110 at 118–9 (Gibbs J); *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303 (the Court); *Plaintiff M70/2011 v Minister for Immigration* (2011) 244 CLR 144 at [57] (French CJ).

⁴⁹ Compare the problems of proof of improper purpose when the impugned decision has been reached by a body with more than one member, especially where members of a body had different purposes, discussed in Aronson et al, *Judicial Review of Administrative Action and Government Liability* (6th Ed) at [5.580].

- 10 55. Thus, contrary to the Full Court’s reasoning, a representative body would not part with its powers or control over the process upon delegation,⁵⁰ nor lack accountability on delegation, and there is nothing in the NTA that suggests that certification must be done by the members of the body in general meeting: FC [134], also [147] (**CAB 94, 99**). Section 203FH indicates otherwise and Part 11 provides for accountability by: (a) the distinct function of *internal* review (s 203BI); (b) linking recognition to satisfactory performance of the s 203BA obligations to consult (ss 203AD(1), 203AH(2), 203AI); (c) external audit and review processes (ss 203DF, 203F–203FB); (d) and for certification, the checks in the registration process by objection and merits review (ss 24CI, 24CK).
- 20 56. *There is a further point about s 28 of the ALRA* which would arise only if, contrary to the foregoing, power to delegate the performance of a representative body’s certification functions could not be found in the NTA.
57. The expression “this Act” in s 28 of the ALRA prima facie includes that Act as amended, altered or modified by later laws:⁵¹ cf FC [66] (**CAB 71**). Section 28 is facultative in character rather than restrictive, such that there is no warrant to confining the “functions or powers under this Act” referred to in s 28 as those expressly conferred by that Act.⁵² On recognition of the NLC as a representative body (s 203AD), the NTA representative body functions are added to its functions that are listed in s 23 of the ALRA: see NTA s 203B(2). Part 11 of the NTA as a later law thereby changes what would otherwise be the continued operation of the ALRA respecting the functions of the NLC. The two texts are to be conflated to produce a composite legal meaning⁵³ and read as one.⁵⁴
58. This result would ensure consistency in circumstances where the affairs of other eligible bodies within s 201B(1)(a) and (ba) are managed under the direction of

⁵⁰ *McGlade* [2019] FCAFC 238 at [329]; see *Bayly v Municipal Council of Sydney* (1927) 28 SR (NSW) 149 at 154 (Street CJ) that to talk of a “denudation of power or authority in connection with a delegation of authority ... is ... a misuse of language”, referring to *Huth v Clarke* (1890) 25 QBD 391 at 395 (Wills J); see also s 34AB(1)(d) of the *Acts Interpretation Act 1901* (Cth) that delegation does not prevent performance of the function by the authority.

⁵¹ *R v Wheeldon [No 1]* (1978) 33 FLR 402 at 406 (Full Ct Bowen CJ, Blackburn and Fisher JJ); *Acts Interpretation Act 1901* (Cth) s 11B.

⁵² *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at 471–2 (Mason CJ, Deane, Toohey and Gaudron JJ), 476 (Brennan J); affirming *Newman v Australian National Airlines Commission* (1985) 2 NSWLR 573 at 577D (Samuels JA), 583G (Mahoney JA).

⁵³ *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [66]–[68] (Gummow and Hayne JJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [160]–[162] (Gummow and Hayne JJ).

⁵⁴ *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463 (Brennan CJ, Dawson and Toohey JJ).

the directors with provision to delegate their powers, which *McGlade* holds to be sufficient to empower delegation of a representative body's certification functions.⁵⁵ *Corporations (ATSI) Act* ss 246-1(3), 274-1, 274-10; *Corporations Act* ss 198A, 198D, 201B.

- 10
59. **Remittal and the Full Court's delegate/agent dichotomy:** Had it been held that there was power to delegate the performance of the certification functions, the Full Court was still inclined to refuse the appeal and the interlocutory application to adduce evidence of a later act of delegation. Their Honours reasoned that a distinction between a delegate and an agent meant that proof of delegation would not assist because the certificate is in the name of the NLC rather than in the name of the CEO as delegate: FC [139] (**CAB 96**) referring to [24]–[25] (**CAB 58**); see also [23] (**CAB 57**).
- 20
60. Remittal by this Court might therefore be futile if a defect in the form of the certificate means that the inevitable result would be for the Full Court to hold that the fact of delegation is immaterial.⁵⁶ However, the consequences of the delegate/agent distinction adverted to by the Full Court are modified by s 34AB(1)(c) of the *Acts Interpretation Act 1901* (Cth) providing that where an Act confers power on an authority to delegate a function, which it is submitted includes implication of such a power, a function performed by a delegate is deemed to have been performed by authority.⁵⁷
61. That the certificate is signed by the CEO and expressed to be in the name of the NLC does not therefore preclude a conclusion that certification is duly authorised in accordance with the NTA. The certificate is no different to that in *McGlade* signed by the CEO of the body concerned under authority as a delegate and expressed to be certification by that body.⁵⁸
62. To return to the remarks of Gibbs CJ in *Dainford*, if the CEO was authorised by the NLC to certify the application for registration of the Kenbi ILUA, then the

⁵⁵ [2019] FCAFC 238 at [335].

⁵⁶ Cf *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [157]–[159] (Heydon J).

⁵⁷ Noted in *Giddings v Australian Information Commissioner* (2017) 156 ALD 601 at [4] (Tracey J); also *Newcastle Airport Pty Ltd v Chief Commissioner of State Revenue* (2014) 99 ATR 748 at [52]–[58] (White J) (referring to *Interpretation Act 1987* (NSW) s 49(6)). In the case of delegation by directors, to similar effect see *Corporations (ATSI) Act* s 265-50 and *Corporations Act* s 190 in treating the exercise of power by a delegate as if done by the directors.

⁵⁸ Set out in [2019] FCAFC 238 at [309].

certification function in s 203BE(1)(b) has been performed by the NLC as the body in which the function is reposed.⁵⁹

Part VII: Orders sought

63. The Appellants seek the orders set out in the notice of appeal.

Part VIII: Length of oral argument

64. The Appellants estimate that they require approximately 1.5 hours to present oral argument in chief.

Dated: 17 January 2020

10



Sturt Glacken

Telephone: (03) 9225 8171

Facsimile: (03) 9225 7728

Email: glacken@vicbar.com.au

Rudi Kruse

Telephone: (03) 9225 6182

Facsimile: (08) 9225 8668

Email: kruse@vicbar.com.au

⁵⁹ (1985) 155 CLR 342 at 349.

ANNEXURE OF STATUTORY PROVISIONS

Statute	Version	Sections
<i>Acts Interpretation Act 1901</i> (Cth)	Compilation 36 (20 December 2018)	11B, 34AB, 34A
<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)	Compilation 41 (4 April 2019)	Part IV
<i>Corporations Act 2001</i> (Cth)	Compilation 94 (6 April 2019)	190, 198A, 198D, 201B
<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth)	Compilation 16 (6 April 2019)	246-1, 265-50, 274-1, 274-10
<i>Native Title Act 1993</i> (Cth)	Compilation 44 (29 December 2018)	8A, 24CG–24CL, 28–30, 190A, 190C, Part 11, 227, 233, 251A, 251B
<i>Public Governance, Performance and Accountability Act 2013</i> (Cth)	Compilation 4 (23 August 2017)	10–12, 29
<i>Public Governance, Performance and Accountability Rule 2014</i> (Cth)	Compilation 20 (1 January 2018)	7A, 12