

IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D21 of 2019

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



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APPELLANTS' REPLY

Part I: Certification as to form of submissions

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

Part II: Submissions in reply

2. These submissions adopt the defined terms used in AS filed on 17 January 2020.
3. The Respondents' case is that the *representative* character of a body recognised under s 203AD of the NTA is inconsistent with delegation of the performance of the function to certify an application for registration of an indigenous land use agreement under s 203BE(1)(b): RS [26]–[27], [32], [44]–[48] cf [14]; and see FC [129]–[134] (**CAB 93–4**), [147], [152] (**CAB 99–100**).
4. That case, and its subsidiary arguments, should not be accepted.
5. *First*, the functions in Part 11 of the NTA, including the certification functions, may be performed by a person or body other than a s 203AD recognised representative body under s 203FE. A (non-representative) s 203FE person or body has the same obligations and powers in relation to the performance of the functions as a recognised representative body (s 203FEA(1)).
6. *Second*, there is no indication in the NTA, at all, that functions generally, or the certification functions in particular, are to be performed by the relevant governing body (board, council or members) collectively. The construction of the NTA cannot be driven (erratically) by the “particular” represented area, representative body and local traditions: cf RS [23]–[24], [32], [36], [47]. The Respondents' case does not come to terms with the obligations imposed by s 203BA (cf RS [27]) for the timely

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performance of functions and the maintenance of processes for reviewing decisions and regulating the conduct of executive officers (s 203BA(1), (2)(c)(iii)-(iv)). The example to register a claimant application, with certification under s 203BE(1)(a) (see s 190C(4)(a)), within four months of notification of a future act, shows that delegation promotes what is required by s 203BA: AS [37]. Inconvenient and improbable constructions are not lightly to be imputed: cf RS [68]–[69].¹

7. *Third*, the statutory scheme does not accord a “primacy” to the opinion of a representative body on whether native title holders authorise the making of an indigenous land use agreement: cf RS [32]. To the contrary, it is the Registrar’s decision about authorisation that provides the foundation for its registration: ss 24CG(3), 24CJ–24CL; AS [44(2)].²

8. *Fourth*, there is no indication in the NTA, at all, that the opinion for certification of an agreement under s 203BE(5) requires an evaluation by Aboriginal peoples (collected together as a deliberative governing body) who observe the traditional laws and customs of the native title group concerned: cf RS [31]–[32], [35]–[36], [47]. There are several contrary indications, including: (1) the eligibility of a body that has no indigeneity (s 201B(1)(ba)–(c)); (2) the facility to confer Part 11 functions on a (non-representative) s 203FE person or body; (3) the prohibition on members of the governing body participating in matters in which they have a material personal interest (cf RS [36]);³ (4) the provisions dealing with the conduct of officers in the performance of functions: ss 203BA(2)(c)(iv)–(v); 203E–203EB, 203FD, 203FH; (5) the function for internal review: s 203BI cf RS [34].

9. *Fifth*, while a Land Council can be an eligible representative body (s 201B(1)(b)) or a s 203FE body, the ALRA does not view delegation to staff as being incompatible with Aboriginal governance and representation: see ss 23AA, 28(1)(b): cf RS [24]. The cases recognise that a Land Council is equipped to ascertain the wishes of Aboriginal peoples in its area having regard to its composition, expertise and functions, with power to employ staff and obtain expert assistance: s 27(1)(a)–(b) cf RS [30].⁴ The representative character of the recognised body in *McGlade v South*

¹ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

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

³ Section 203EA of the NTA where a representative body is neither an ATSI corporation or a company incorporated under the *Corporations Act*, as to which see *Corporations (ATSI) Act* ss 268-1, 268-5; *Corporations Act* s 191 and AS fn (35) contrasting PGPA Rule r 12(2) in the case of Land Council members’ traditional affiliations under the ALRA ousted by s 203EA(5).

⁴ *Alderson v Northern Land Council* (1983) 20 NTR 1 at 8–11 (Muirhead J); *Gondarra v Minister for Indigenous Affairs* (2014) 220 FCR 202 at [122] (Kenny J).

West Aboriginal Land & Sea Corporation (No 2) was not undermined by certification being done by its Chief Executive Officer: cf RS [32].⁵

10. *Sixth*, the Respondents do not dispute that there can be delegation of the performance of the facilitation functions that precede certification, which is similarly conditioned by satisfaction as to authorisation by the native title holders: ss 203BC(1)(b), (2), 203BE(5), 251A. If facilitation on the making of a native title agreement (s 203BB(1)(b)(iii)) is done by a delegate representing the native title holders, on being satisfied that that they consent to that course (s 203BC(1)(b)), there is no evident reason why the later certification of their authorisation of the making of the agreement cannot be done by the delegate. To argue that the other functions say nothing about certification (RS [39]) is to decontextualize its place: see AS [39] cf RS [14]. Regard to context and purpose is part of the task of ascertaining the meaning of the statutory text.⁶ If performance can be done in that way, then delegation is within the incidental power in s 203BK: RS [15]; AS [49]; FC [128] (**CAB 92**).
11. *Seventh*, the submission at AS [47] that on the Full Court's reasoning the opinion of those thereby armed with knowledge about authorisation is not good enough is not fact dependent: cf RS [44]–[45]. And contrast the Respondents' supposition that members of the governing body will observe or be familiar with the traditional laws and customs of the native title group concerned: cf RS [32], [47]. The submission at AS [47] is one of construction⁷ that if the performance of the preceding facilitation functions can be done under delegation, and require a like state of satisfaction, then no different state of affairs is mandated for certification.
12. *Eighth*, likewise the place of s 203FH is not fact dependant: cf RS [40]. If, as the Full Court holds, the opinion for certification has to be formed collectively by the members of the governing body, that will require aggregating their knowledge. The attendant difficulties lie not in ascertaining the fact of the opinion, but rather in reviewing its formation where the s 203BE(6) statement is impugned: cf RS [41]; see AS [54] and par (3) of the certificate (**AFM 4** set out at FC [22] (**CAB 57**)).
- Section 203FH extends attribution where a director, employee or agent (who might

⁵ SWALSC is recognised under s 203AD as is the case here for the NLC: [2019] FCAFC 238 at [325].

⁶ *SZTAL v Minister for Immigration* (2017) 262 CLR 362 at [14] (Keifel CJ, Nettle and Gordon JJ), [35]–[37] (Gageler J), [82] (Edelman J).

⁷ Citing *Provident Mutual Life Assurance v Derby City Council* [1981] 1 WLR 173 at 181 (Lord Roskill) on the machinery of local government authorities.

not be a directing mind or will) acts within the scope of actual or apparent authority.⁸ The section is consistent with Part 11 functions being performed by an individual under delegation, rather than only by the corporation's governing body collectively, and facilitates the operation of s 34A of the *Acts Interpretation Act 1901* (Cth) where performance depends upon the opinion of the delegate: cf RS [42].

13. *Ninth*, that point about s 203FH is made in *McGlade* and in the context of delegation: cf RS [53]. RS [50] quotes *McGlade* at [330]–[331] that delegation had the limited effect of “altering how and through whom the ATSI corporation fulfils its function”, but at [332]–[333] the Full Court goes on to say:

10 *Even if this were exclusively an issue of delegation (and it is not), properly construed s 274-10 and r 11.6 of the Rules are not limited to the delegation by directors of their powers in a restricted sense. That a body corporate (as an artificial legal entity) acts through natural persons, and that its state of mind is ascertained by reference to the acts and state of mind of natural persons (which is entirely conventional corporate behaviour), is explicitly reflected in the NTA.*

20 *If it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show that the conduct was engaged in by a director, employee or agent of the body within the scope of his or her actual or apparent authority and that the director, employee or agent had that state of mind. This is reflected in s 203FH(1) of the NTA.*

The reference to s 274-10 and r 11.6 concerns the power of directors of an ATSI corporation to delegate their powers (see next), but the reference to s 203FH of the NTA confirms the point that Part 11 of the NTA acknowledges that the persons through whom a corporate representative body acts (and thinks) are not confined to those of its governing body (board, council etc) acting collectively: AS [48], [50].

14. *Tenth*, *McGlade* itself conflates two statutory texts, rejecting the argument that s 274 of the *Corporations (ATSI) Act* is confined to directors' powers and does not extend to the functions added by Part 11 of the NTA.⁹ The delegable directors' powers are the powers to exercise the legal capacity of an ATSI corporation, a body corporate that exists for objects: *Corporations (ATSI) Act* ss 66-1(2), 72-10, 96-1, 274-1, 274-10. The conferral of corporate capacity operates as a grant of power to effectuate the corporation's objects¹⁰ to which are added the NTA functions on recognition as a

⁸ Cf *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at [63]–[66] (Allsop CJ), [81]–[82] (Besanko J), [106]–[111] (Edelman J) in relation to s 84 of the *Trade Practices Act 1974* (Cth).

⁹ [2019] FCAFC 238 at [335], and see the argument at [282]–[283].

¹⁰ See AS [48] referring to ALRA s 22 and *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 141–2 (Stephen J).

representative body. Here, if power to delegate the performance of Part 11 functions cannot be found in the NTA, similar to *McGlade*, the need to conflate the power to delegate in s 28 of the ALRA with the NTA functions arises on those functions being added to the functions of a Land Council on recognition as a representative body: NTA ss 203AD, 203B(2); AS [57] cf RS [57]. This is a point of construction not dependent upon evidence and the parties should not be held to erroneous assumptions upon legal issues of public importance: cf RS [5].¹¹

15. *Eleventh*, as the passage in *McGlade* [330] quoted at RS [50] illustrates, an authority does not part with power upon delegation: see cases at AS [55] fn (50). A delegation/authorisation dichotomy (RS [54], [63], [66]) does lack vitality where the authority is a body corporate (AS [14]) and should not assume absence of an implied power to delegate.¹² What presently matters, as RS [64] (line 10) appears to acknowledge, is that s 34AB(1)(c) of the *Acts Interpretation Act 1901* (Cth) reverses the “consequences” of any general law distinction so that a function performed by a delegate is treated as having been performed by the authority. The certificates in *McGlade* record that the board “resolved to delegate to the ... [CEO] authority to certify (on behalf of SWALSC, and pursuant to SWALSC’s functions under s 203BE(1)(b)....)” [emphasis added].¹³ Here, the Full Court considered that a like blurring of delegation and authorisation was fatal to the appeal and application to adduce evidence of a later act of delegation (FC [25], [138] (**CAB 58, 96**)), but failed to consider the terms of s 34AB(1)(c). If, as is submitted, there is power to delegate performance of the certification function, the effect of s 34AB(1)(c) is that the form of the certificate should not stand in the way of remittal: AS [59]–[61] cf RS [4], [9].

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Sturt Glacken

Telephone: (03) 9225 8171

Email: glacken@vicbar.com.au

Rudi Kruse

Telephone: (03) 9225 6182

Email: kruse@vicbar.com.au

¹¹ *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); and see the s 28 point raised in the special leave application 25 July 2019 [16] (AB 110), reply 19 August 2019 [14] (AB 254).

¹² AS fn (18) referring to De Smith, *Judicial Review of Administrative Action* Third Edition (1973) at 266, the point also being in the First Edition (1959) at 176.

¹³ [2019] FCAFC 238 at [309], and perhaps for that reason the case was not “exclusively an issue of delegation”: see [330] quoted above.

ANNEXURE OF STATUTORY PROVISIONS

Statute	Version	Sections
<i>Acts Interpretation Act 1901</i> (Cth)	Compilation 36 (20 December 2018)	34AB, 34A
<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)	Compilation 41 (4 April 2019)	23AA, 27, 28
<i>Corporations Act 2001</i> (Cth)	Compilation 94 (6 April 2019)	191
<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth)	Compilation 16 (6 April 2019)	66-1, 72-10, 96-1, 268-1, 268-5, 274-1, 274-10
<i>Native Title Act 1993</i> (Cth)	Compilation 44 (29 December 2018)	24CG, 24CJ–24CL, 190C, 201B, 203AD, 203B–203BC, 203BE, 203BI, 203BK, 203E–203EB, 203FD–203FEA, 203FH, 251A
<i>Public Governance, Performance and Accountability Rule 2014</i> (Cth)	Compilation 20 (1 January 2018)	12