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

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and

Kevin Lance Quall
First Respondent

Eric Fejo
Second Respondent

FIRST AND SECOND RESPONDENTS' JOINT SUBMISSIONS

Part I: Certification

20 1. It is certified that this submission is in a form suitable for publication on the internet.

Part II: The issue the appeal presents

2. This appeal presents an issue of statutory construction which determines whether the First Appellant lawfully exercised its power of certification under s 203BE(1)(b) of the *Native Title Act* 1993 (Cth) ("NT Act"). The issue is one of delegation (as it was in the Full Court[1]): if that power could not be exercised by the Second Appellant as delegate, then the purported certificate dated 13 March 2017 was invalid.

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[1] *Northern Land Council v Quall* [2019] FCAFC 77 (referred to by paragraph as "FC[xx]").

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3. The Appellants however rely on several quite different statements of principle each of which has previously been taken as, or might be taken as, a statement of a proposition of law. In particular, the Appellants rely on:

   a. *Huth v Clarke* (1890) 25 QBD 391 at 395, concerning a principle of "delegation" (referring also to "authority", although special leave was granted expressly on the basis that no issue arose about "authorisation": 15 November 2019, T14.574-589);

   b. *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 37-8, which states the issue there decided as "more accurately" about "act[ing] through the agency of others"; and

10 c. *Dainford Ltd v Smith* (1985) 155 CLR 342 at 349 (AS[12]), which is used to frame the issue in a much more general way, collapsing the distinction between delegation and authorisation or agency.

4. Whichever rubric ultimately prevails, the legal issue for this Court is defined by reference to the case as conducted in the Courts below. The Appellants' case below was that the Second Appellant was at all material times acting as a delegate of the First Appellant when he performed the certification function under s 203BE of the NT Act, and that the statutory source of power that made such delegation possible was s 203BK of the NT Act.[2] The narrow terms of the declaration made by the Full Court reflect the failure of that case.[3] The issues raised in this appeal can only reflect
20 those matters.

5. No issue arose in the Court below about s 28 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("ALR Act"). The Appellants did not there challenge the conclusion of the primary judge, Reeves J, at PJ[14] that s 28 does "not in terms address the delegation of its functions and powers under the NT Act". As the Appellants conceded in their special leave application (SLA[33]), "the position under the [ALR Act] does not bear upon the construction of Part 11 of the NT Act, especially when the governance structures of bodies will vary". In any event, there is no evidence here of any relevant delegation pursuant to s 28 (and see, eg, *Louinder v Leis* (1982) 149 CLR 509 at 518-19). Consequently, the submissions put at AS[56]-
30 [58] cannot be entertained.

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[2] FC[39].

[3] The declaration being framed in terms that the First Appellant "did not have power to delegate its certification functions... to its Chief Executive Officer", it was not a declaration that *no* representative body has power to delegate its functions to *any* other person, much less authorize an agent to perform any such function.

Part III: Section 78B notices

6. The Respondents have considered whether any notice should be given pursuant to s 78B of the *Judiciary Act 1903* (Cth). No notice is required.

Part IV: Material facts in contention

7. There are no material facts in contention. However, critical facts as framed in the Appellants' submissions sit awkwardly with the case the Appellants ran below.

8. At AS[7], it is asserted that the certificate "states that pursuant to s 203BE(1)(b) the NLC certifies…" and that the certificate "sets out the NLC's reasons for being of that opinion". Although the certificate signed by the Second Appellant[4] twice uses the phrase 'The NLC is of the opinion', and purports to provide reasons for those opinions, that can only be viewed in light of the case run by the Appellants below.

9. Both at first instance and in the Full Court, the factual position advanced by the Appellants was that the s 203BE(1)(b) certification was made "by the CEO as the delegate of the [First Appellant] pursuant to the authority conferred upon the position of CEO pursuant to the resolution of the Northern Land Council C70/1433 made on 1 October 1996, as recorded in the instrument of delegation dated 10 March 2000": see e.g. primary judge at TJ[9];[5] Griffiths and White JJ at FC[23]-[25]. It was not argued that the certification had been made by the First Appellant itself. There was also no evidence that the Second Appellant regarded himself as being "authorised" to sign as "CEO"; on the contrary, any such case was eschewed by the Appellants' senior counsel in the Full Court. Again, such a case could possibly have been made and answered by evidence at trial, so it cannot now be raised on appeal.

10. The proper approach therefore is to view the language of the certificate as inapt, because the Appellants' case below continues to bind them in this Court.

Part V: The Respondents' argument

The proper approach to addressing the delegation issue

11. There is no dispute that the issue here, as it was for the Full Court, was simply one of whether the power has been lawfully exercised by the person upon whom it was asserted to have been conferred (cf AS[12]). That was precisely the question the Full

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[4] See FC[22].

[5] *Quall v Northern Land Council* [2018] FCA 989 (referred to by paragraph as "TJ[xx]").

Court answered. However, their Honours did not do so by "invoking" (AS[12], [14], [29]) any Latin maxim, as if to treat such a maxim as sufficient to answer the question in itself.

12. On the contrary, the Full Court's analysis of the relevance of that maxim at FC[41]-[42] is quite consistent with the reference to the maxim by Gibbs CJ in *Dainford Ltd v Smith*[6] (although one may doubt whether his Honour was there intending to state any particular approach as a matter of general principle, given that the context was of an exercise of legislative power under a strata scheme). The Full Court said, citing Professor Willis, that the answer to the relevant question "depends entirely on the
10 interpretation of the statute which confers the discretion".[7] It certainly does not depend on any analogy between private sector corporations and statutory corporations (cf AS[14]). Nor could it do so for obvious reasons.

13. Both at first instance and in the Full Court, the Appellants advanced an argument that there had been an effective delegation of powers from the First Appellant to the Second Appellant, in full cognizance of the absence of any express power of delegation.[8] What was urged upon the Full Court was that, in the absence of an express power to delegate, an implied power to delegate could be read into s 203BK[9]. The Appellants' focus was on s 203BK rather than on the particular power said to have been delegated (see Griffiths and White JJ at FC[39]).

20 14. However, when the question is whether a particular function or power may be delegated, inevitably attention will be focused "at a level of specificity" on the terms and nature of that function or power, viewed in the context of the legislative scheme as a whole,[10] rather than on the general nature and functions of the decision-maker (considerations which are apt to assume more significance where the question is one of authorisation or agency under the *Carltona* principle). The observations of Griffiths and White JJ to that effect at FC[60]-[61] are correct. Their Honours then addressed s 203BE at FC[98]-[100], followed by s 203BK at FC[101]-[105].

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[6] (1985) 155 CLR 342 at 349; see also Wilson J at 356.

[7] FC[42] citing Professor John Willis, "Delegatus Non Potest Delegare" (1943) 21 *The Canadian Bar Review* 257 at 259.

[8] See FC[39]; and transcript of Full Court hearing at 40.34-47; 41.1-21; 47.1-7 **[RFM40-41, 47]**.

[9] See FC[39(a)] and transcript of Full Court hearing at 23.7-8 **[RFM 23]**.

[10] *Alcan (NT) v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31, 46-47; cf *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 38-39 per Mason J.

15. That order of analysis reflects their Honours' later observation (at FC[128]) that s 203BK "will only provide a source of power to delegate if it is concluded that the certification functions in s 203BE are ones that can be delegated. That is a question of construction, the focus of which must be on the proper construction of the terms of s 203BE themselves". The analysis to that effect by Griffiths and White JJ was preceded by a detailed consideration of the broader context of the NT Act at FC[69]-[97] – including both a consideration of the complex provisions underlying the legal effect of the certification function, and the functions of representative bodies – and, before that, the provisions of the ALR Act (from FC[62]). That was the correct way to situate the central provision under consideration within the statutory context.[11]

The statutory context

16. The establishment of Aboriginal land councils is provided for by Pt III of the ALR Act (see also FC[62]). The ends of doing so are tied to those of the remainder of the ALR Act, including facilitating the holding of title to land by Aboriginal Land Trusts created under Pt II (see s 4(1)). As with land councils, the members of an Aboriginal Land Trust must be Aboriginals living in the area of the Land Council in the area of which the land of the Land Trust is situated (or whose names are set out on a register of members maintained by the Land Council): s 7(1).

17. A Land Council, however created (noting that it is possible for members of an Aboriginal community to initiate the process of creating a new Land Council, under s 21A), is endowed with legal personality and capacities by s 22 (see also s 27(1)). The fact that it is a "body corporate" is accompanied by other orthodox prescriptions – perpetual succession, a common seal, powers to deal with real property and an ability to litigate. The purpose of doing so is obvious: to enable the Land Council to engage in those kinds of ordinary dealings to facilitate the performance of its functions. Those functions, per s 23, emphasise "the wishes and the opinion of Aboriginals living in" the Land Council's area, consultation to ascertain those wishes and opinions, and the protection of the interests of the relevant traditional owners.

18. The terms of the ALRA indicate that the "council", so described, is principally constituted as a group of "members". Those persons must be "Aboriginals living in the area of the Land Council, or whose names are set out in" the relevant register, and who are chosen by the Land Council's constituency (s 29(1); see FC[67]).

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[11] See footnote 10 above.

19. Critically, under s 31, the "functions" of the Land Council are performed – its "affairs" are "conduct[ed]" – not *qua* body corporate, but in meetings of the members of the Land Council (in which a majority of those present and voting will decide any question arising: s 31(5)). The members as a whole may discharge those functions with the assistance of committees of members (s 29A). The register of interests (s 29AA) highlights the direct role that members of the Land Council are presumed to have in its decision-making.

20. That is consistent with the particular representative and other statutory functions described at s 23 of the ALRA, as well as with maintaining structures and processes "that promote the satisfactory representation by the Council of, and promote effective consultation with", traditional owners in the relevant area (s 23AA(2)): see FC[64]-[65]. That guiding consideration also explains the limited scope of the delegations permitted under s 28(1) and (2) of the ALRA – being even more limited for delegations to employees or individual Council members, than to committees of Council members. Although the Appellants and interveners[12] did not rely on that power of delegation below, its terms are thus relevant to the resolution of the appeal.

21. The Appellants and interveners place weight on the fact that a precondition to operating as a representative body is that the "eligible body" must be "a body corporate": see, eg, AS[14] ("conferred on a body corporate"), AS[15] ("conferred on bodies corporate"; "such a body corporate will act through its directors, employees or agents"), AS[18] (regarding s 201B), AS[23] (regarding s 203FH), AS[26] (insofar as an Aboriginal land council is also created, by statute, "as a body corporate"), AS[28] (referring to the *Public Governance, Performance and Accountability Act 2013* (Cth), AS[31] ("the functions, and which are conferred on bodies corporate"), AS[41] ("an opinion being held by a body corporate").

22. However, the fact that representative bodies must be "bodies corporate" does not require or suggest that all such entities should perform their functions in the same way and the NT Act does not require that they do so. Rather, the drafting of Pt 11 of the NT Act recognizes that differently constituted representative bodies will perform their functions in different ways. The statement in s 203BA about how

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[12] Where the interveners (which expression includes the Attorney-General of the Commonwealth, subject to the grant of leave) have made submissions which in substance overlap with the submissions of the Appellants, for simplicity's sake these submissions have focused on the manner in which such points are addressed by the Appellants.

representative bodies' functions are to be performed is broadly expressed, focused on outcomes and purposive considerations rather than prescriptive administrative standards. The key definitions in s 201A are equally flexibly expressed, plainly allowing for representative bodies to be constituted and to operate in different ways.

23. However any given representative body is constituted – whatever particular "organisational structures and administrative processes" it has in place – the same objectives guide all representative bodies. But the structures and processes adopted will depend on the interests and requirements of the traditional owners of the particular represented area.

10 24. The fact that a power is vested in the representative body says nothing about how the representative body must exercise it – just that *the representative body* is to do so. Where the body is an Aboriginal Land Council, and the governing body comprises the members of that Council, it will be those persons collectively, acting in accordance with the ALRA, who exercise the s 203BE(1) power. Plainly, this particular representative body has human agents other than employees. There is therefore no element of impracticability here which requires recourse to s 203BK(1) as a source of power simply to ensure human agency.

25. The Full Court appropriately commenced its consideration of the NT Act by having regard to the native title regime as a whole, particularly the provisions relating to
20 future acts and indigenous land use agreements (FC[69]-[82]). It was correct to observe, as Griffiths and White JJ did at [76], that representative bodies have a "potentially important role" in relation to registration of area ILUAs, having regard to the relationship between that process and the carrying out of future acts.

26. That is the wider context within which Part 11 of the NT Act should be considered. Part 11 deals sequentially with the recognition of representative bodies, their functions and powers, finance and accountability, the conduct of directors and other executive officers, and other matters like review, liability and funding. From the start, in ss 201A-201B, it recognizes the diversity of constitutions of representative bodies, but in a way which is harmonious with the objective of, broadly speaking,
30 ensuring that such bodies are in a real sense representative.

27. That is a shorthand way of identifying the manner in which a representative body must perform its functions, as set out in s 203BA(2). The expressions "satisfactory representation", "effective consultation" and "fair manner", although somewhat

subjective and indefinite, ought not to be viewed as merely aspirational (see FC[95]-[97]). In that respect, Pt 11 of the NT Act is also harmonious with the provisions of the ALR Act described above.

The terms of s 203BE

28. Section 203BE concerns the certification of either applications for determinations of native title, or applications for registration of indigenous land use agreements. The relationship between the two processes – native title litigation and the agreement-making process – is reflected in the respective content of the opinions the representative body is required to reach before certifying each such document (cf s 203BE(2) for native title determination applications). While an application for a native title determination entails identification of persons comprising a "native title claim group" (cf s 61(1)), the ILUA process may take place outside of native title litigation and so efforts must be made to identify and procure authorization from "all persons who hold or may hold native title" in relation to the relevant area.

29. The critical expressions within the framework of each of those opinions are "identified" and "authorised". As Griffiths and White JJ described it at FC[17], this requirement "serves to underline the importance of the requirements imposed by s 24CG(3) concerning the identification of native title holders and authorisation for the making of the area ILUA". A considerable volume of litigation has arisen under the NT Act about each of those notions, judicial consideration of which frequently skirts invidious intramural questions.[13]

30. These are not objective procedural steps, simply discharging the formalities of identifying names of persons on lists, dispatching notices, and recording votes. "Identification" of persons within a native title claim group or group of prospective native title holders is a subjective and potentially delicate process turning on matters of traditional law and custom: see, eg, *Ellis v Central Land Council* [2018] FCA 35 at [231]-[232] per Mortimer J. Similarly, "authorisation" is a political process within such groups which may (or may not) take place within the framework of traditional decision-making processes (see ss 251A, 251B): see, eg, *Ward v Northern Territory* [2012] FCA 1477 at [12]-[14] per Mansfield J.

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[13] See, eg, *Far West Coast Native Title Claim v South Australia* [2011] FCA 24; (2011) 191 FCR 381 at [29]; *Far West Coast Native Title Claim v State of South Australia (No 6)* [2013] FCA 1270 at [80]; *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255 at [60]; *Starkey v State of South Australia* [2011] FCA 456 at [55]-[69].

31. It is not the case that any person with access to procedural information is equally suited to evaluate and opine upon these matters. They are rather matters which are best suited to evaluation, where possible, by persons who themselves partake of those processes of identification and decision-making and thereby perform the applicable traditional law and custom. That is why Griffiths and White JJ at FC[98]-[100] made the point that, coupled with procedural requirements to enhance transparency and accountability, the subject-matter of the opinion lends itself to formation by the decision-maker personally. The purpose of the requirement for that opinion is to "maximise involvement by affected Aboriginal persons in the steps leading up to the making of an ILUA and its registration" (FC[100]). For such persons to lose the opportunity of participation arguably disempowers those persons and undermines at least one of the benefits that the NT Act seeks to confer.

32. Although (as their Honours acknowledged in the second last sentence of FC[100]) there are also provisions for the Registrar to revisit such matters (ss 24CI(1), 24CJ, 24CK(2)(c)), those processes are secondary and serve as safeguards in case the representative body's processes miscarry. The primacy of the representative body's opinion reflects its representative and accountable character (see further below). The benefit of that representativeness is diminished by delegation to staff, who need not themselves have connections with or duties to the represented community.

33. The Appellants rely on instances in which, under the NT Act, the Registrar may be called upon to form an opinion to a similar effect as that which a representative body will have been required to form (AS[44](1) and (2). It should be noted that the terms in which such opinions are described vary – for instance, s 190C(4)(b) refers only to the authorization of the applicant. In any case, the Registrar having to form any such opinion will only occur where there has been objection (in which case the material the Registrar takes into account will include the representative body's opinion and the material on which it was formed (s 24CK(4)), or else will only be necessary if no representative body has formed such an opinion (s 190C(4)(b)).

34. The Applicants also refer to the "internal review functions" of representative bodies, described in s 203BI (AS[44](c)). However, this is a generally expressed "function" not one relating to certification decisions. The only other references to it elsewhere in the NT Act are in relation to funding decisions, in s 203FBA(4) and 203FBB(4). The absence of similarly detailed provision for the review process in relation to certification decisions suggests that it does not in fact apply to those decisions. IN

any event, there is nothing in s 203BI which requires any particular process to be followed in any internal review, e.g. a requirement that the internal review be conducted by a 'more senior' officer of the representative body.

35. The submission made at AS[44](4) about an inability to delegate certification to committees or the Chair of the Land Council misses the point. The particular purpose and utility of constituting a Land Council lies in its deliberative and consultative character, its decisions being representative of the views of all interested Aboriginal persons. Delegating such a function to a subset of the Land Council would impair its ability to achieve those results and instead be apt to promote "merely sectional interests" (cf FC[100], [132]).

36. The Appellants also maintain that there is some inherent incompatibility in a member of a body such as a Land Council partaking of a decision on certification of a particular ILUA (or presumably of a native title determination application) if they have a traditional connection to the particular area of land (AS[44](5)). There is no occasion here to determine whether any particular traditional affiliation will or will not be a material personal interest (bearing in mind that such affiliations vary in content and amplitude, and one individual may by their descent, marriage or otherwise have affiliations to several areas). But it would be surprising if such a body, the purpose of which is to include persons likely to have *some* such connection to at least one area of land under the body's purview, should be unable to take direct input from such interested persons, through their ordinary powers of voting.

37. The Appellants make much of the "integrated" or "lineal" nature of Part 11 (e.g. AS[33]-[38]). Those terms both overstate and understate the nature and relationships between the different functions of representative bodies. The overstatement lies in the suggestion that all those functions are similar in their character and are so tightly tied together that they must be performed in the same way. The understatement lies in diminishing the day-to-day complexity of carrying out each of those tasks.

38. A particular illustration of this simultaneous overstatement and understatement is the Appellants' reference at AS[46] to an opinion required under s 203BC. Although the subject-matter of the opinion is broadly similar – being the state of mind of persons in whose interests the representative body acts – the purpose for which it is formed is different. The purpose for which an opinion is formed is as much a guide to the way in which it must be formed as is the content of the opinion itself. This state of

"satisfaction" is one which the representative body will have to reach on a regular (or ongoing) basis while performing any of its various "facilitation and assistance functions" (see s 203BB) "in relation to any matter" (which includes native title applications, including research into and preparation of them; consultations, mediations, negotiations and proceedings in relation to such applications as well as future acts, ILUAs or other agreements, rights of access, or "any other matters relating to native title or to the operation of this Act"). The variable subject-matter and potentially ongoing nature of that state of satisfaction contrasts to a discrete "opinion" formed for a particular native title determination application or ILUA.

39. The fact that there is a logical order in which a representative body's various functions are likely to (although need not always) be performed does not mean that all such functions need be performed in the same manner. Some more sensitive aspects of processes of consultation, dispute resolution or other facilitation and assistance might best be performed by the members of the Land Council personally, while others might be just as well (or better) performed by staff (e.g. genealogical or historical analyses, or convening and conducting large and complex meetings of native title claimants, or drafting documents for approval). None of those other functions says anything about what is required of a decision on certification under s 203BE. Since certification is the only function at issue in this appeal, it is an error to begin by considering those other functions, and then assert that there "is no logical reason to approach certification differently" (AS[36]). Division 3 of Part 11 NTA itself identifies practical permissions and restrictions on the way in which the exercise of the various functions may vary from each other. It would be a curious interpretation that reads s 203BK(1) as rendering these variations otiose.

40. The Appellants and interveners also seek to call in aid s 203FH of the NT Act (AS[50]-[55]). As the Appellants acknowledge at AS[51], s 203FH is a provision in a familiar form which ordinarily deals with matters of civil and criminal liability. Even if s203FH(1) can be interpreted as providing a mechanism permitting a director, employee or agent of a representative body, on its behalf, to form the opinions referred to in s 203BE(1)(b), the Appellants would need to have, but have not established, "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".[14]

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[14] Cf *McGlade v South West Aboriginal Land & Sea Corporation (No 2)* [2019] FCAFC 238 at [333].

41. However, s 203FH is not, contrary to the Appellants' paraphrasing, "in terms... apt" to cover the "conduct involved in" a s 203BE certification or the antecedent opinion (AS[53]). Section 203FH(1) deals with questions about whether a body corporate has a state of mind "in relation to particular conduct", in the sense that conduct was engaged in by a natural person and that natural person had that state of mind. But the "opinion" required by s 203BE(5) is not a mere "state of mind"; it is a jurisdictional fact. There is no subjective inquiry needed, turning on inferences from a person's statements, actions and circumstances, in the way which can create difficulties of proof in cases of corporate liability. The "opinion" required here is an objective legal construct; it may be found to exist or not to exist as a matter of law, within ordinary administrative law principles, but its existence is not confined within the head of an individual. Similarly, it is not apt to describe the certification "function" as "conduct" in the sense of s 203FH(2). A lawful discharge of a statutory function is not merely an act, omission to perform an act, or a state of affairs (cf *Criminal Code* (Cth) s 4.1(2)). Whether or not the act of certification, in the sense of creating a physical certificate, is in law a performance of the certification function will depend on whether, for instance, the opinion required by s 203BE(5) has lawfully been formed, and on matters of procedural fairness and reasonableness and the like. Thus, s 203FH has no role at all to play in "facilitate[ing] judicial review" (AS[54]).

42. The Attorney-General's submission about s 203FH (AGS [12]-[13]) seems to be that the existence of that provision makes delegation otiose, by treating s 203FH as being a prescriptive or permissive statement that all bodies corporate may always perform their functions through a director, employee or agent within the scope of their authority. That is not what s 203FH does. In any event, if it were permissible to delegate a function, and the function was indeed exercised by the delegate, then for the purposes of the legislation creating that function it would be necessary only to examine the conduct or state of mind *of the delegate*: *Acts Interpretation Act* 1901 (Cth) s 34A. It ceases to be relevant to consider the conduct or state of mind of the body corporate (contrary to the way a question of authorisation under the *Carltona* principle would be addressed), and so s 203FH would not need to be engaged at all.

43. Insofar as the Attorney-General makes comment on the option of "authorising" the CEO to perform the certification function (AGS [14]-[15]), that point is simply irrelevant because it was not within the scope of the case determined in the Full Court, and any issue of authorisation was excised from the grant of special leave: see above at para [3](a) and *Louinder v Leis* (1982) 149 CLR 509 at 518-19.

Representation

44. At AS[47], the Appellants reduce the Full Court's reasoning to an erroneous conclusion, based on propositions of fact for which there is no evidence. It is asserted that representative bodies' staff are persons who are "qualified and armed with knowledge about authorisation by the native title holders", whereas members of the representative body "may or may not be similarly qualified and knowledgeable".

45. Neither of those propositions can be sustained (or were found by the primary judge or the Full Court) as a matter of fact. There is no evidence about the qualifications or experience of any particular member of staff of the First Appellant, much less about *all* staff of *any* representative body (which appears to be the scope of the assertion). And the claim that members of the governing body of a representative body are *less* knowledgeable and qualified as to their functions than their staff overlooks the legislative assumption of the ALR Act that the members of a Land Council will indeed be appropriately qualified, by reason of their traditional affiliations to the subject-matter of the Land Council's functions.[15] As Mortimer J said at FC[147], "however many individuals comprise the Board or Council of a representative body, that body has been recognised under s 203AD(1), according to specific criteria, as being capable of performing, and appropriate to perform, the functions of a representative body for the purposes of the NT Act."

46. Part 11 of the NT Act assumes (indeed requires) that the bodies exercising power under it are *representative* bodies, not independent agencies run by professionals giving effect to their own ideas of what is in the best interests of those who are purportedly represented. That assumption extends into Pt 2 of the NT Act also; as Mortimer J put it at FC[154], Pt 2 "assumes the representative body will be acting to protect the interests of the native title holders and claimants, and intends its conduct will be protective of their interests".

47. There are several good reasons why bodies exercising power under Pt 11 should have such a representative nature. One reason of particular significance in relation to the certification function) is the important role of the representative body where "there is

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[15] This Court has recently recognised how difficult it has proven to be for the common law of Australia to appreciate the complexities of Aboriginal political and legal society: *Love v Commonwealth* [2020] HCA 3: at [70] per Bell J, at [276] per Nettle J, at [339]-[341] per Gordon J, and [451] per Edelman J). It would be an unfortunate and regressive step to conclude that the NT Act permits the First Appellant's employees, agents or others; unimbued with personal, spiritual and cultural connection to the relevant land; to be responsible for forming legally powerful opinions of the sort contemplated by s 203BE.

no registered native title claimant or registered native title body corporate which is a party to the ILUA and it is the representative body which is the party to the ILUA" (FC[152]). Registered native title claimants will have undertaken a self-administered (though often assisted) process of authorisation by the native title claim group or holding group in question (ss 24CD(1), (2), 24CG(3)(b)(ii)); similarly, a registered native title body corporate will have internal processes by which its members endorse its decision-making (cf NT Act ss 24BC-24BI). The self-determined nature of those processes is important; it is not a mere external observer's opinion as to whether authorisation has taken place, but an opinion formed by the group itself in light of first-hand knowledge and experience of the group's traditional laws and customs. Absent such a process, an external observer's opinion will be a poor substitute, unless it is ensured that the opinion is formed with direct input from those who practise the group's traditional laws and customs.

48. Those are sound reasons why, as Mortimer J observed at FC[146], "it is only in very limited circumstances that the scheme contemplates a representative body will be able to arrange for another person or body to perform any aspect of the functions conferred on it by Div 3 of Pt 11 of the NT Act." Those are the limited circumstances described in s 203BK(2) and (3), where an *external* service provider is engaged, but that is only to assist in the performance *by the representative body* of its functions. The staff of a representative body also exist to assist in the performance by the representative body of its functions. Those staff, at any level of seniority, do not exist to determine the representative body's policy, nor to determine which input from the represented native title claimants or holders will be taken into account or acted on, nor to make decisions for themselves irrespective of all such input.

***The decision in* McGlade**

49. The Appellants make reference by way of contrast to the recent decision of a Full Court of the Federal Court in *McGlade v South West Aboriginal Land & Sea Corporation (No 2)* [2019] FCAFC 238.

50. The nub of the Full Court's conclusion in *McGlade* was that (at [330]-[331]):

> That a function is that of the ATSI corporation itself is so, irrespective of whether the directors delegate a power to an employee or agent such as the CEO, and irrespective of whether under the replaceable rules in the CATSI Act or the rules of the ATSI corporation. Such a delegation does not amount to the delegation by the ATSI corporation of its function or a power to another person; rather, it has the limited effect of altering how and through whom the ATSI corporation fulfils its function (or an aspect of the function).
>
> On this basis, it was [the representative body] itself which certified.

51. This was based on a consideration of the legal capacity and powers of the particular representative body, including under the CATSI Act and its own constitution (see at [326]-[329], and [298]-[301]) as well as on the facts of the particular case (see at [305]-[322]). The argument presented to the Full Court in *McGlade* was thus fundamentally different from the argument below in this case – as it had to be, since in this case no reliance could be placed on the legislative scheme applicable to CATSI Act corporations (or for that matter *Corporations Act* corporations).

52. In stark contrast with this matter, the Court in *McGlade* was able, on the evidence before it, to determine that the controlling organ of the representative body, the SWALSC Board, "was closely involved throughout the process of negotiation of the ILUAs, was advised at relevant times of legal obligations and acted in all relevant respects in accordance with its Rules" (at [322]) and that "the SWALSC Board by majority resolved 'to authorize the current [CEO] to take all steps necessary to certify each of the four [ILUAs] for registration" ([314]). A detailed history of the formation of the relevant opinion by the SWALSC is set out at [305]-[314]. Moreover, the SWALSC Board authorized its CEO to attend to the "certification", not to the antecedent formation of the requisite statutory opinions.

53. In any event, the Full Court in *McGlade* was right to consider that its conclusion did not cut across the decision of the Full Court in this matter. The holding that the certification function at issue in *McGlade* had been performed by the representative body itself made it unnecessary to address the issue about delegation. The correctness of *McGlade* therefore does not need to be decided in this appeal.

54. With that in mind, the Respondents agree with the Attorney-General's submission that, per *McGlade*, the NT Act "does not prescribe who within a Representative Body must perform the [certification] functions of that body" (AGS[7]). All the NT Act prescribes is that *the representative body* must perform that function. The question here is about delegation – and the Attorney-General's point does not answer that question. A delegate is not to be viewed as a person performing a function "within" a larger body. So, "curious" though the notion of an unstated limitation might be (AGS[20]), the issues in this case simply are not concerned with who "within" a representative body may perform its functions, and so there is actually no issue at all about any such limitation, stated or unstated.

Section 28 of the ALR Act

55. As submitted above, the Appellants' contention at AS[56]-[58] was not raised in the Full Court and ought not to be entertained. However, in the event that they are entertained, close scrutiny must be applied.

56. The submission turns on the reasoning described in *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 376 [68], positing a "need" to "conflate" the one statute with the other "to arrive at the combined legal meaning". Here, the submission is that the enactment of Part 11 of the NT Act impliedly amended the ALR Act, because there is a "need" to read the ALR Act has having been so amended.

10 57. The submission assumes the answer to the question the Court is invited to decide. Why does Part 11 of the NT Act "need" to engage the operation of s 28 of the ALR Act in relation to, relevantly, the certification function? The terms of Part 11 point to the contrary, for all the reasons set out above: far from there being a "need", such an outcome is undesirable.

58. Section 203B of the NT Act does not state that the functions conferred on representative bodies are "added" to the functions those bodies have under their own constituting statute, in the sense of being incorporated into that other statute on the same terms as all other functions. Rather, it presupposes that, if the other statute confers other functions, they will be dealt with on their own terms. Those other
20 functions will reflect the differing constitutions of differing representative bodies.

59. There is no reason to read s 203B distributively as picking up a power of delegation *if* the other statute contains one. Thus, if anything, the existence of s 28 of the ALR Act points against an implication of a power for representative bodies to delegate under Part 11 of the NT Act. If Parliament had intended a power of that kind to be applicable to all representative bodies under Pt 11, it would have said so. After all, it said exactly that in relation to various powers of the Secretary, in s 203FI.

Delegation as opposed to authorisation in legislative drafting

60. As observed earlier, the Appellants' submissions attempt to argue the issue in this Court as if the distinction between delegation and authorisation (or agency or
30 attribution) can be avoided, or as if there is no such distinction. This is achieved by framing the issue as merely being one of "whether the function has been performed

by the entity upon which it is conferred" (AS[14]), while also intermittently sliding between references to the different classes of case.

61. That more general question is apt to describe any question of either delegation or authorisation. However, it is a simplistic question which cannot suffice of itself, because the logically posterior distinction between delegation and authorisation is not otiose. On the contrary, the distinction conveys administrative considerations which, if overlooked, could lead to serious ongoing inconvenience for government.[16]

62. Sections 34AA and 34AB of the *Acts Interpretation Act* 1901 (Cth) each deal with powers to delegate a function, duty or power.[17] These provisions effectively elaborate on aspects of a statutory power of delegation, such as to make certain what would otherwise not be plain on the face of a bare power to "by written instrument, delegate to" particular persons particular functions, duties and powers – for instance, s 203FI of the NT Act.[18] These are provisions which would be inapplicable to any case of authorisation – they plainly apply only to delegation.

63. Although s 34AB(1)(c) of the *Acts Interpretation Act* appears intended to remove one consequence of the distinction between delegation and authorisation under the *Carltona* principle,[19] in another critical respect the distinction is preserved. As noted earlier, s 34A makes plain that a delegate exercises power by reference to the delegate's own opinion, belief or state of mind where such is required. Thus, although a Minister or other official who is assisted in decision-making under the *Carltona* principle is treated as having made the decision based on her or his own consideration of the matter, the same does not apply where a delegation is in effect. Contrary to the submissions of the Northern Territory (NTGS[47]), one does not combine s 34A with s 34AB(1)(c) so as to deem the opinion or other state of mind to

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[16] A distinction between delegation and authorisation is widely drawn in Commonwealth legislation: see, eg, *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* (1993) 40 FCR 409; *Australian Citizenship Act* 2007 (Cth) ss 27(4)-(5), 40 (3)-(4), 42(3), 45A, 49(2)-(3), 53; *Telecommunications (Interception and Access) Act* 1979 (Cth) ss 5AB, 91. These are only examples of legislation in which both concepts are used for particular purposes.

[17] Sections 33AA-33A also deal quite separately with powers of "appointment", as to which see *Minister for Home Affairs v CSH18* [2019] FCAFC 80 at [84]-[87].

[18] As with numerous other provisions of the *Acts Interpretation Act*, these are presumptive prescriptions which may be displaced, but which otherwise exist to simplify legislative drafting. If, however, a power of delegation is implied, then the scope and incidents of the implied power will be able to be discerned from the legislative provisions in which the implication is found. One would expect there to be no need for provisions such as ss 34AA and 34AB.

[19] See, eg, *Re Western Australian Planning Commission, Ex parte Leeuwin Conservation Group Inc* [2002] WASCA 150 at [27].

be that of the delegator – it remains in fact and law the opinion of the delegate, notwithstanding that the exercise of power is that of the delegator.

64. The Northern Territory's submissions also overstate the significance of s 34AB(1)(c) to the resolution of the issue at hand. The existence of that provision does not mean that any power or function can be delegated even where that is not provided for in the governing statute expressly or by necessary implication. Nor does it mean that any statutory provision which accommodates an agency analysis also accommodates an implied delegation analysis. Nor is the only relevant consideration in any such construction analysis the notion of administrative necessity. In the end, s 34AB(1)(c) is about consequences of delegation, not whether delegation can occur; as such it does not affect the question of whether a power purportedly exercised by, here, *a delegate* could lawfully have been so exercised. None of the authorities relied upon at NTGS[44] footnote 44 establish any such thing, and all are readily distinguishable. The absence of "confusion or misrepresentation as to the source of the power exercised" (NTGS[49]) also has no effect on the resolution of the construction issue by this Court. That issue was alive at trial before the primary judge.

65. Delegation and authorisation are thus two quite different kinds of circumstances in which a power reposed by legislation in one official might, either in law or in fact, be exercised by another. But the distinction is material in many contexts (as illustrated above) and cannot be collapsed[20]. To do so would create confusion in identifying the extent to which one kind of conferral of power or another does or does not attract the consequences described above.

66. For those reasons, insofar as it is suggested there that the principle of administrative authorisation lend support to the analysis of whether delegation is permissible by implication, that suggestion should not be accepted. The distinct utility of the two kinds of principle can be seen from the facts of *O'Reilly v Commissioner of Taxation*, wherein the "administrative necessity" issue arose in relation to the question of whether a (Deputy) Commissioner of Taxation could exercise powers by way of authorized agents: see (1983) 153 CLR 1 at 13 per Gibbs CJ. The validity of a delegation from the Commissioner of Taxation to the Deputy Commissioner had been conceded, and there was no power of sub-delegation. In circumstances of that kind, the administrative apparatus and statutory powers of delegation have simply

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[20] *Re Reference under s 11 of the Ombudsman Act 1976* (1979) 2 ALD 86.

failed to accommodate effective public administration. But the official in whom the power is vested remains responsible for the agent's actions, such that the performance of the function is "shared ... short of delegation" (*O'Reilly* (1983) 153 CLR 1 at 30 per Wilson J). The distinction between "delegation" and "authorisation" was central to the outcome in the *Mercantile Mutual* case[21] (*supra*).

"Administrative necessity"

67. The Appellants appear to have reduced the emphasis they previously placed, while seeking special leave to appeal, on the broad concept of "administrative necessity" at the heart of the *Carltona* principle. Those points have now been redirected so as to feed into the broader rubric the Appellants attempt to derive from *Dainford*, as discussed above, thereby supporting by some sort of analogy the distinct point that *delegation* may be permissible by necessary implication (AS[29]-[30]).

68. As discussed above, considerations of practical necessity have been used to support the sharing of labour between an official and the administrative apparatus supporting the official, while not detracting from the personal accountability of the official for the performance of the functions and powers vested in her or him[22]. But such considerations are not proper points of reference in a statutory construction analysis. And it is a statutory construction analysis which must be undertaken to answer the question of whether the First Appellant's certification function could be delegated.

69. The practical considerations on which the Appellants place weight concern the number of individuals comprising the First Appellant's governing body (the Council as such), and the frequency with which the Council has routinely met to date. Neither of those considerations affects any representative body other than the First Appellant. Neither of those considerations is a reflection of any aspect of the requirements of the NT Act (not least s 203BE). And both are within the capacity of the First Appellant to manage. Whether or not it wishes to alter its composition or normal practices, or whether it is likely to secure funding in order to conduct more frequent meetings of the same number of members of the Council, are separate and irrelevant considerations. The scheme of the NT Act ought not to be altered to suit the convenience of a particular representative body.

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[21] (1993) 40 FCR 409.

[22] *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) CLR 24 at 38-39 per Mason J.

Conclusion

70. For the reasons give above, the submissions of the Appellants and interveners should not be accepted. The reasoning of Mortimer J together with Griffiths and White JJ was correct. The appeal should be dismissed with costs. It then remains unnecessary for the Full Court to deal with the remaining issue which arose below concerning fresh evidence.

Part VI: Notice of contention or cross-appeal

71. There is no notice of contention or cross-appeal.

Part VII: Estimate of oral argument

10 72. The Respondents estimate that two to three hours will be required for presentation of their oral argument.

Dated 21 February 2020

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ANNEXURE OF STATUTORY PROVISIONS

Statute	**Version**	**Sections**
Acts Interpretation Act 1901 (Cth)	Compilation 36 (20 December 2018)	34AA, 34AB, 34A
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)	Compilation 41 (4 April 2019)	7, 21-39
Native Title Act 1993 (Cth)	Compilation 44 (27 December 2018)	24AA-24EC, 61, 199A-199F, 201A-203FI, 222-253