



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' OUTLINE OF ORAL ARGUMENT

1. This outline is in a form suitable for publication on the internet.
2. The Chief Executive Officer of the Northern Land Council has the authority of the body's members, given by resolution in Full Council, to perform certain representative body functions under Part 11 of the *Native Title Act 1993* (Cth) (**JBA 3**), including the certification of agreements under s 203BE(1)(b): **AFM 39**.
3. *The Full Court erred in* holding that the Act evinces an intention that a representative body cannot delegate the certification function in s 203BE(1)(b), reasoning that ss 203B(3) and 203BK limit a body to obtaining assistance, certification is conditioned by an opinion about authorisation, and a recognised body has a representative role: FC [129]–[137], [145]–[146], [153]–[155] **CAB 93–5, 98–101**.
4. *Textually*, the function “to certify, in writing,” an application, if the body is “of the opinion” that it is authorised by the native title holders, does not require the certificate and opinion to be that of the body's members acting collectively in general meeting: s 203BE(1), (2), (5) cf FC [137], [147] **CAB 95, 99**.
5. The required opinion is about the existence of certain facts (not high policy) and it is reviewable (see [11] below: cf FC [51] **CAB 66**), and the Act tasks the Registrar with having to form the same opinion: ss 24CG(3), 24CK(2)(c), 24CL(1). Certification is the product of the facilitation functions done in consultation with native title holders: ss 203BB(1), 203BC(1)(a), 203BE(1). Facilitation and certification are both conditioned by a similar state of satisfaction. It will be addressed in the course of facilitation, often in the field: ss 203BC(1)(b), (2), 203BE(2), (5), 251A–251B; AS [44]–[47]; cf FC [98], [136], [152] **CAB 83, 95, 100**. To suggest one is delegable but not the other introduces incoherence: cf FC [148]–[149] **CAB 99–100**. The Full

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Court’s construction at “a level of specificity” decontextualizes things: FC [60]–[61], [128] (last sentence), [148]–[149] **CAB 69, 92, 99–100**; AS [33]–[39]; Reply [10].

6. **Structurally, s 203BK(1) attaches to ss 203B(4) and 203BA:** It is open to a representative body to decide that delegation is both necessary and convenient (s 203BK(1)) when determining priorities and allocating resources in the performance of functions (s 203B(4)), and for the timely performance of functions and maintaining structures and processes that promote satisfactory representation and effective consultation (s 203BA): TJ [25]–[26] **CAB 18** cf FC [101], [104(c)], [128], [135(b)], [146] **CAB 85–6, 92, 95, 98**; *Palmer v Australian Electoral Commission* (2019) 93 ALJR 947 at [44], [47], [65] (**JBA 23**); *Ex parte Forster*; *Re University of Sydney* [1963] SR (NSW) 723 at 726, 733 (**JBA 19**); AS [49], [62]; see also [9]–[10] below.
7. Delegation to an executive officer is consistent with conferring functions on a recognised body with provision on how functions must be performed, as the criteria for recognition, and without prescription of the body’s structure or processes: ss 203AI, 203B, 203BA. There is no positive provision requiring that functions be done by the body’s council of members or board of directors together as a deliberative assembly: cf FC [135], [137] **CAB 94–5**. Section 203B(3) is directed to arrangements with “another person”, not the body’s internal organisation: cf FC [102], [104(c)], [135(b)], [145]–[146] **CAB 85–6, 95, 98** (“itself” at [102], [135]); and see [10] below.
8. **Contextually, the Act assumes that senior management are engaged in the performance of functions** as indicated by (1) the performance criteria for recognition (s 203BA(2)(c)(iii)–(v)); (2) the internal review of decisions in the performance of functions (s 203BI); (3) restrictions on directors participating in decisions where they have a material personal interest (s 203EA); (4) the immunity of executive officers and members in connection with the performance of functions (s 203FD); (5) attribution of the conduct and state of mind of directors, employees and agents (s 203FH), dovetailing the certification conditions in s 203BE(2), (4), (5)–(6): Reply [5]–[8]; *McGlade* (2019) 374 ALR 329 at [332]–[333] (**JBA 21**).
9. The provisions reflect generic corporate structures with members and directors at the apex and operational decision-making devolved to management — the governing body being “responsible for the executive decisions” (s 201A). The provisions assume performance by executive officers or by members/directors (ss 203FD, 203FH(7)), if that is the manner in which the body determines priorities and allocate resources in the performance of functions and acts in order to meet the performance recognition

criteria: see [6]–[7] above, and noting that delegation does not prevent performance by the delegator: *Acts Interpretation Act 1901* (Cth) (**AIA**) s 34AB(1)(d) (**JBA 5**).

10. Whether certification is delegable turns upon construction of the Act conferring the function, not whether the particular repository has a constitutional power of delegation: cf *McGlade* (2019) 374 ALR 329 at [334] (**JBA 21**). An eligible body might or might not have a constitutional power to delegate: *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ss 274-1, 274-10 (**JBA 7**); *Corporations Act 2001* (Cth) ss 198A, 198D (**JBA 8**). The *Native Title Act* takes an eligible body as it finds it, with its existing internal governance structures, which might even restrict delegation of Part 11 functions (cf *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 27–28 **JBA 4**), but the Act does not treat the function as non-delegable.
11. ***Delegation does not undermine representation and accountability*** (cf FC [134] **CAB 94**), which the statute addresses (AS [55]) by (1) native title parties being able to seek the internal review of decisions and actions of a representative body in the performance of functions (s 203BI); (2) review of a body’s certification where the Registrar’s opinion on authorisation finds registration (ss 24CI, 24CK(2)(c)); (3) external investigation of satisfactory performance (s 203DF) and review of the performance of the (connected) facilitation and assistance functions (s 203FB); (4) Ministerial recognition of the body that takes into account its timely performance, satisfactory representation and effective consultation (ss 203AD(1), 203AH(2), 203AI, 203BA). Recognition is assessed against the effectuation of these purposes, not the body’s constitutional composition, illustrated by the eligibility of a body that has no indigeneity (s 201B). In any event, the representative role of a body recognised under s 203AD is not a reason to preclude delegation given the facility to confer Part 11 functions on a non-representative s 203FE person or body that then has the same obligations and powers (s 203FEA).
12. ***Remittal of the appeal on whether there was an effective delegation***: That the certificate is expressed to be in the name of the NLC does not preclude a conclusion that certification is duly authorised in accordance with the Act. The consequences of a delegate/agent distinction are modified by AIA s 34AB(1)(c) providing that where an Act confers power to delegate a function (express or implied), performance by a delegate is deemed to be performance by the authority: AS [59]–[62]; Reply [15]; **AFM 4** cf FC [24]–[25], [138]–[139] **CAB 58, 96**.

12 August 2020

Sturt Glacken
Rudi Kruse