

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



**SUBMISSIONS OF THE NORTHERN TERRITORY OF AUSTRALIA**

**(INTERVENING)**

## **PART I      CERTIFICATION**

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

## **PARTS II & III      INTERVENTION**

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2. The Northern Territory of Australia intervenes in support of the appellants pursuant to the orders of Gageler and Nettle JJ made on 15 November 2019 (**CAB 130**).

## **PART IV      SUBMISSIONS**

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### **Introduction and summary of submissions**

3. Properly construed, the *Native Title Act 1993* (Cth) (**NTA**) intends and ensures that a representative body may perform its certification functions through others, including by way of delegation to its chief executive officer. The question is one of statutory construction. The Full Court addressed the question at a level of “specificity” focused upon the nature of the particular certification function (FC[60]: **CAB 69**) and the qualities of representative bodies constituted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**) (FC[68]: **CAB 71**, [95]: **CAB 82**, [130]: **CAB 93**). In holding that those representative bodies have to exercise the relevant function “personally” (FC[44]: **CAB 64**, [137]: **CAB 95**), the Court failed to take into account broader contextual matters which point decisively against that construction. Those matters are that:
  - (a) The certification functions are conferred upon bodies corporate, who cannot form opinions and make decisions other than through natural persons.
  - (b) The NTA contains express provisions which contemplate that a representative body may exercise its functions through its officers (principally, s203FH).
  - (c) The NTA permits the recognition of differently constituted representative bodies which may delegate their functions, including the certification functions.
  - (d) The NTA permits persons and bodies other than representative bodies to perform a representative body’s functions, including the certification functions.

4. When those contextual factors are combined with the ample power in s203BK(1) to do “*all things* necessary or convenient” to be done in connection with the performance of a representative body’s functions, the proper construction is that a representative body may perform its certification functions through delegation. That is consistent with the recent ruling of the Full Federal Court in *McGlade v South West Aboriginal Land & Sea Corporation (No. 2)* [2019] FCAFC 238 (**McGlade**) that a representative body, not constituted under the ALRA, could perform the function through its CEO.
5. The factual background and statutory context relevant to the issue are set out in the submissions of appellants.<sup>1</sup> The intervener adopts the submissions of the appellants generally and supplements them as follows.

### **Bodies corporate and the formation of opinions**

6. The Full Court held that the performance of the certification functions in s203BE(1)(b) upon the opinions contained in s203BE(5)(a) and (b) constitutes “a matter of particular significance” in determining Parliament’s intention that the function was to be exercised “by the repository of that power personally and not by anyone else” (FC[44]: **CAB 64**, [98]: **CAB 83**, [136]: **CAB 95**).
7. In so holding, the Full Court relied (FC[45]-[54]: **CAB 65-8**, [98]: **CAB 83**) upon three decisions,<sup>2</sup> each of which related to a statutory power conferred upon an *individual* (a Minister; the Commissioner of Taxation; the Director-General of Social Services) – a natural person with a natural capacity to form an opinion.
8. In contrast, representative bodies under the NTA are bodies corporate. The bodies eligible to be recognised by the Minister as representative bodies comprise: (i) a body corporate registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSIA**), (ii) a body corporate that is already a representative body, (iii) a company incorporated under the

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<sup>1</sup> Appellants’ Written Submissions dated 17 January 2020 at [5]-[11] and [16]-[28].

<sup>2</sup> *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2014) 88 NSWLR 125; *O’Reilly v The Commissioner of the State Bank of Victoria* (1983) 153 CLR 1; and *Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86.

*Corporations Act 2001* (Cth) (**CA**), and (iv) a body corporate established under a law of the Commonwealth or a State or Territory for that purpose (s203B(1)).

9. The notion that such bodies can form opinions and make decisions “personally” is artificial. A corporation is a legal fiction.<sup>3</sup> It can have no opinions “because it has no mind.”<sup>4</sup> It can only act,<sup>5</sup> acquire knowledge,<sup>6</sup> and form opinions<sup>7</sup> through individuals who are separate legal entities from the body corporate.<sup>8</sup>
10. A body corporate may potentially do such things through a number of organs, but action through a corporation’s managing director or CEO is the archetypal example.<sup>9</sup> Actual authority to act may be derived either directly from the corporation’s constitution or from some antecedent act (typically, and as here<sup>10</sup>, a resolution of the governing body).<sup>11</sup> When that occurs, the organ does not act as agent for the corporation - they act as the corporation itself.<sup>12</sup> Thus, in *Kemppi v Adani (No. 2)*, a differently constituted Full Federal Court held that it was open for the trial judge to conclude that, because the CEO of a representative body was entitled to form the opinion, “as the controlling mind of [the representative body]”, the requirements of s203BE(5) of the NTA had been met.<sup>13</sup> Similarly, in *McGlade*, delegation of the certification function to a representative body’s CEO did not have the effect of delegating the function to another person; it had the

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<sup>3</sup> *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 171-2 per Brennan J; *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713 per Viscount Haldane LC (Lords Atkinson, Parker and Parmoor agreeing).

<sup>4</sup> *Lloyd v David Syme & Co Ltd* [1986] AC 350 at 366 per Lord Keith of Kinkel (PC).

<sup>5</sup> *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 171-2 per Brennan J.

<sup>6</sup> *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 481 per Stephen J; *Pharmaceutical Coviety v London and Provincial Supply Association Ltd* (1880) 5 App Cas 857 at 870 per Lord Blackburn.

<sup>7</sup> *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 582-3 per Brennan, Deane, Gaudron and McHugh JJ.

<sup>8</sup> *McGlade* at [323] per Allsop CJ, McKerracher and Mortimer JJ.

<sup>9</sup> *Hamilton v Whitehead* (1988) 166 CLR 121 at 127 per Mason CJ, Wilson and Toohey JJ; *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 171 per Lord Reid.

<sup>10</sup> Northern Land Council Full Council Resolution C81/1671 dated 18 October 2001: Appellant’s Book of Further Materials at pp39-40.

<sup>11</sup> *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 172 per Brennan J.

<sup>12</sup> *McGlade* at [329] per Allsop CJ, McKerracher and Mortimer JJ; *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 170 per Lord Reid.

<sup>13</sup> *Kemppi v Adani (No. 2)* [2019] FCAFC 117 at [56] per Rares ACJ and Robertson J (Perry J agreeing).

limited effect of altering “*how and through whom* the [representative body] fulfils its function”.<sup>14</sup>

11. By conferring the certification function on bodies corporate, with their inherent need to think and act through natural persons, the legislature must be taken to have intended that they could act according to ordinary corporate practice.

**The NTA contemplates that a representative body will act through others**

12. The Full Court in *McGlade* held that bodies corporate acting through natural persons is “expressly reflected in the NTA”.<sup>15</sup> The NTA reflects that a representative body will have a typical corporate structure, including (s201A):
  - (a) a “governing body”, which is responsible for the executive decisions of the representative body;
  - (b) “directors”, being members of the governing body; and
  - (c) an “executive officer”, who takes part in the management of the body at a senior level.
13. Section 203FH contemplates how that corporate structure can operate. Section 203FH(2) deems certain actions by directors, employees and agents of the corporation to have been undertaken by the corporation itself. Section 203FH(1) provides that, 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 corporate within the scope of his or her actual or apparent authority and that the director, employee or agent had the state of mind. “State of mind” is defined to include their knowledge, intention, opinion, belief or purpose, and their reasons for it (s203FH(6)).
14. Three aspects of the provision’s scope are important.

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<sup>14</sup> *McGlade* at [330] per Allsop CJ, McKerracher and Mortimer JJ.

<sup>15</sup> *McGlade* at [332] per Allsop CJ, McKerracher and Mortimer JJ.

15. First, s203FH creates substantive rules of attribution<sup>16</sup> with more than merely evidentiary effect.<sup>17</sup> Those rules form part of the legal structure, necessary in the recognition of any body corporate, which determines how and through whom the body may act.<sup>18</sup> Like analogue provisions in other Commonwealth legislation, s203FH extends the general rules of corporate attribution which have developed at common law.<sup>19</sup>
16. Secondly, the rules of attribution created by s203FH(1) and (2) contemplate a representative body acting through a broad class of persons, namely directors, employees or agents. CEOs such as the second appellant will be directors or employees of a representative body, depending on the circumstances of their appointment.
17. Thirdly, s203FH(1) applies to the performance of a representative body's certification functions. Although potentially of application to other bodies corporate, s203FH was introduced to apply to representative bodies specifically.<sup>20</sup> Its effects are not limited to the determination of criminal guilt or civil wrongdoing by a representative body.<sup>21</sup> It is expressed to apply "for the purposes of this Part [Part 11]". Part 11 contains all the functions of a representative body, including the certification functions in s203BE(1). Section 203FH was inserted into the NTA through the same enactment as s203BE.<sup>22</sup> Further, the only specific references in Part 11 to a representative body being required to form an opinion or to provide a statement of its reasons for being of an opinion are contained in s203BE(2), (4), (5) and (6). Accordingly, s203FH(1)

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<sup>16</sup> *Director General, Department of Education and Training v MT* (2006) 67 NSWLR 237 at [17] per Spigelman CJ (Ipp JA and Hunt AJA agreeing).

<sup>17</sup> *Environment Protection Authority v Wollondilly Abattoirs Pty Ltd* [2019] NSWCCA 312 at [32] per Brereton JA (Harrison and Bellew JJ agreeing).

<sup>18</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506B-C per Lord Hoffman.

<sup>19</sup> *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at [109] per Edelman J.

<sup>20</sup> *Explanatory Memorandum to the Native Title Amendment Bill 1997*, [33.68].

<sup>21</sup> Contrast *Competition and Consumer Act 2010* (Cth), s84(1). The Explanatory Memorandum to the Bill introducing s203FH said that the provision affected the way in which the state of mind of a body corporate can be established in relation to compliance with "statutory provisions" generally: *Explanatory Memorandum to the Native Title Amendment Bill 1997*, [33.75].

<sup>22</sup> *Native Title Amendment Act 1998* (Cth), Schedule 3, Part 1 (s203FH) and Schedule 3, Part 2 (s203BE).

contemplates, *inter alia*, the formation of the prerequisite opinions for the performance of the certification functions through an officer or agent of a representative body. In *McGlade*, the Full Court said s203FH “explicitly reflected” that a representative body, as a body corporate, must act through others.<sup>23</sup>

18. The intention apparent in s203FH is also reflected in s203FD, which provides that an executive officer or member is not personally liable to an action or other proceeding for damages in relation to an act done “by the person in the capacity of executive officer or member” in connection with the performance of the representative body’s functions or the exercise of its powers.
19. Thus, the NTA expressly contemplates that representative bodies may adhere to what the Full Court in *McGlade* described as the “entirely conventional corporate behaviour” (at [332]) of performing their functions through others.

#### **Other representative bodies may delegate their functions**

20. The Full Court’s specific focus meant it did not consider the position of representative bodies other than those constituted under the ALRA. Those other bodies’ constituting legislation confers an express power of delegation, creating (on the Full Court’s construction) a functional asymmetry between ALRA bodies on the one hand and other representative bodies on the other.
21. For bodies corporate registered under the CATSIA, the corporation’s business is to be managed by or under the direction of the corporation’s directors<sup>24</sup>, who may exercise all the powers of the corporation except any powers that the CATSIA or the corporation’s constitution require the corporation to exercise in a general meeting (s274.1, CATSIA), and who may delegate any of their powers to a committee of directors, a single director, an employee or any other person (s274.10, CATSIA).

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<sup>23</sup> *McGlade* at [333] per Allsop CJ, McKerracher and Mortimer JJ.

<sup>24</sup> There is a minimum of one, two or three directors (CATSIA, s243.1) and a maximum of twelve directors (CATSIA, s243.5).

22. For companies incorporated under the CA, the company's business is to be managed by or under the direction of the directors<sup>25</sup>, who may exercise all the powers of the company except any powers that the CA or the company's constitution require the company to exercise in general meeting (s198A, CA), and who may delegate any of their powers to a committee of directors, a single director, an employee of the company or any other person (s198D, CA).
23. By allowing CATSIA and CA corporations to be eligible to be representative bodies, Parliament must be taken to be aware of their capacity to delegate their powers and functions. That is confirmed by the legislative history. Section 247.10 of the CATSIA and s198D of the CA were in existence when Parliament amended the NTA to include CATSIA and CA corporations as eligible bodies.<sup>26</sup> Parliament could have amended, but did not amend, those general powers of delegation to exclude the delegation of functions under the NTA.
24. Consistent with that, the Full Court in *McGlade* concluded that representative bodies incorporated under the CATSIA *may* delegate the performance of their certification functions.<sup>27</sup> That reasoning rested principally on the terms of the express power of delegation itself (at [335]) and the nature of corporate capacity generally ([326]-[330]). Because of the similarities between s274.10 of the CATSIA and s198D of the CA, the same result would apply to representative bodies incorporated under the CA. Given that the NTA does not relevantly distinguish between performance of the certification functions and performance of the other representative body functions in s203B, the reasoning also applies with equal force to all the representative body functions.
25. Functional asymmetry between representative bodies incorporated under the ALRA and those incorporated under the CATSIA or CA has no coherent legislative purpose, nor any textual basis in the NTA. Subject to presently

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<sup>25</sup> There is a minimum of one, two or three directors (s201A, CA) and no maximum number of directors unless the number is approved by the company in general meeting (s201P, CA).

<sup>26</sup> As to CA bodies, see *Native Title Amendment Act 2007* (Cth), Schedule 1, s5. As to CATSIA bodies, see *Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006* (Cth), Schedule 1, s5.

<sup>27</sup> *McGlade* at [323]-[332] per Allsop CJ, McKerracher and Mortimer JJ.

irrelevant exceptions,<sup>28</sup> the NTA refers to “representative bodies” without discrimination. All representative bodies perform the same functions under the NTA (s203B(1)). They are also subject to the same imperatives to perform their functions in a timely manner (ss203BA(1), and see also 203BC(3)(a) and 203BG(c)), and in a manner that maintains organisational structures and administrative processes that promote satisfactory representation and effective consultation and ensures the structures and processes operate in a fair manner (s203BA(2)).

26. The Full Court’s construction undermines the ability of ALRA bodies to adhere to those obligations by denying to them one of the mechanisms conventionally used by corporations to function. It is well recognised that a board cannot be expected to discharge all the functions of a corporation through resolutions at a general meeting.<sup>29</sup> That practical difficulty is self-evident where, as here, the executive body comprises 83 members from 54 communities across the Top End, exercising numerous, lineal and intersecting statutory functions (Cf. FC[137]: **CAB95-6**).<sup>30</sup> Functional asymmetry also undermines the objective of the new representative body regime introduced in 1997 to manage “representative bodies across Australia in a *nationally consistent manner*.”<sup>31</sup>

### **Representative bodies do not have a special aptitude’**

27. Rather than considering the position of those other representative bodies, the Full Court focused on the characteristics of an ALRA body in isolation. Their Honours considered that only the members of such bodies had, under their constituting legislation requiring members to be Aboriginal people elected by Aboriginal people living in the Land Council’s area, a particular “aptitude” which uniquely equipped them to address and determine the matters to which the certification functions are directed (FC [68]: **CAB 71-2**, [130]: **CAB 93**). The broader statutory context is inconsistent with this approach. That context is also

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<sup>28</sup> See NTA, ss203EA(1) and 203EB.

<sup>29</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506F per Lord Hoffman.

<sup>30</sup> See Appellant’s Written Submissions at [15](1) and [35].

<sup>31</sup> *Explanatory Memorandum to the Native Title Amendment Bill 1997*, [34.1]. See also at [34.105].

inconsistent with the Full Court's conclusion that the significance of the certification function is such that it is not delegable within a representative body (FC[131]-[133]: **CAB 93-4**).

28. First, the NTA provides that the Commonwealth may fund *any person or body* to perform any or all of a representative body's functions (s203FE(1)).<sup>32</sup> The Secretary does not need to be satisfied of any matter before approving that funding and, in particular, does not need to be satisfied that the person or body has the characteristics identified by the Full Court of the members of ALRA bodies. Nevertheless, persons and bodies so funded have all of the powers and obligations of a representative body (s203FEA(1)) and, historically, those bodies have been funded to perform the full range of representative body functions.<sup>33</sup> When introducing amendments made to s203FE in 2007, it was expressly contemplated that such bodies would perform a representative body's certification functions in particular.<sup>34</sup> Further, Parliament specifically amended s203FE(1) to allow persons and bodies to be funded to perform representative body functions even where there was a representative body for the area.<sup>35</sup> The purpose of the 2007 amendments was to ensure that "persons or bodies funded under subsections 203FE(1) and 203FE(2)...can operate *in the same way as representative bodies*".<sup>36</sup>
29. Secondly, the NTA confers similar functions on the Native Title Registrar (**Registrar**). If an application to register an ILUA is not certified, the Registrar must consider and form their own opinion about the matters described in s203BE(5) (ss24CG(3)(b) and 24CL(3)). Similarly, if an application to register an ILUA is certified, the Registrar must form a view about those matters if an objection to registration of the ILUA is lodged (s24CK(2)(c)). That latter function

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<sup>32</sup> See also *Explanatory Memorandum to the Native Title Amendment Bill 1997*, [34.4], stating that "representative bodies will *not* have a monopoly on representing indigenous people who hold or claim to hold native title" (emphasis in original).

<sup>33</sup> See *Explanatory Memorandum to the Native Title Amendment Bill 2006*, [4.79].

<sup>34</sup> See *Explanatory Memorandum to the Native Title Amendment Bill 2006*, [4.82](c).

<sup>35</sup> *Native Title Amendment Act 2007*, Schedule 1, s42. Section 203FE(1) originally provided that funding could only be provided if there was no representative body for the area: *Native Title Amendment Act 1998* (Cth), Schedule 3, s33.

<sup>36</sup> See *Explanatory Memorandum to the Native Title Amendment Bill 2006*, Schedule 1 "Overview". See also and [4.75] and [4.85].

requires full consideration of the merits of whether the requirements of s203BE(5)(a) and (b) have or have not been met.<sup>37</sup> As such, in respect of both powers, the Registrar will form opinions about the same matters as the representative body in performing the certification functions.

30. The Registrar will not have the characteristics identified by the Full Court as creating the special “aptitude”. The Registrar is not elected by Aboriginal people; they are appointed by the Governor-General (s95(2)). The Registrar need not be an Aboriginal or Torres Strait Islander person. They need only be a legal practitioner (s95(3)(a)) and have one or more of the qualifications in s95(3)(b), namely substantial experience in Aboriginal or Torres Strait Islander societies, the law, administration, or any other activities relevant to the duties of the Registrar.<sup>38</sup> Further, in the performance of their powers, the Registrar is subject to the directions of the President (s96). The President is similarly not elected by Aboriginal people nor required to be an Aboriginal or Torres Strait Islander. They are appointed by the Governor-General (s111) and need only be a judge, former judge or legal practitioner (s110).
31. Critically, the Registrar may delegate any of their powers under the Act (s99). That includes the Registrar’s powers or functions in relation to ILUAs and the formation of the states of satisfaction referred to in ss24CK(2)(c) and 24CG(3)(b). The delegation may be made to a Deputy Registrar or any member of the staff assisting the Tribunal. There are no requirements about the qualifications or characteristics that the Deputy Registrars and members of staff assisting the Tribunal must have (s130). That the Registrar may delegate functions essentially identical in nature to the ILUA certification function to a broad range of people demonstrates that the Full Court’s construction of the NTA is anomalous.
32. Thirdly, there is no uniformity of membership requirements across representative bodies. For example, there is no requirement that the members or directors of CA corporations be Aboriginal or Torres Strait Islander persons, be elected by

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<sup>37</sup> *Kemppi v Adani Mining Pty Ltd (No. 4)* [2019] FCAFC 117 at [88] and [102] per Rares ACJ and Robertson J (Perry J agreeing).

<sup>38</sup> Section 95(3)(b) is plainly disjunctive, such that a Registrar might be appointed if they had substantial experience in the law, but no experience in relation Aboriginal or Torres Strait Islander societies.

Aboriginal people, or have any knowledge or experience relevant to Aboriginal or Torres Strait Islander societies, anthropology, or native title.

33. Fourthly, the Full Court's reasoning overlooks that Land Council members are precluded from participating in decisions for which they may have a personal interest by their traditional affiliations to the land concerned (s203EA(1) and (3)).

### **Express power of delegation**

34. The Full Court placed reliance on the absence of an express power conferred upon representative bodies to delegate their functions under the NTA (FC[135](a): **CAB 94**). That absence is unsurprising given that representative bodies and bodies funded to perform those functions generally have the power to delegate in their constituting legislation (see above). The Full Court's view that the NTA requires the certification functions to be exercised by representative bodies "personally" makes the NTA inconsistent with the provisions referred to above empowering those bodies to delegate.
35. Unlike the Full Court's view that it is implicit in the NTA that the certification functions cannot be delegated, this explanation for the absence of an express power to delegate recognises that the bodies performing those functions, including the ILUA certification function, necessarily do so through others, including delegates.
36. If a particular representative body lacks what the NTA otherwise presumes (the power to delegate its functions in its constituting legislation), s203BK(1) of the NTA confers "power to do all things necessary or convenient to be done for or in connection with the performance of its functions". The Full Court rejected this section as the source of the power to delegate (FC[128]: **CAB 92**), on the basis that it would only provide a source of power to delegate if it is concluded that the certification functions are ones that can be delegated. So much may be accepted, but the existence of an express power of delegation in the constituting legislation of the classes of bodies corporate from which representative bodies may be selected makes it unlikely, in the absence of an express provision in the NTA, that the Parliament intended the NTA to deny that power to representative bodies in respect of their certification functions under the NTA.

37. The language of s203BK(1) is broad<sup>39</sup> and its ambit must be construed in conformity “with the width of the language in which it is expressed.”<sup>40</sup> Parliament commonly uses provisions like s203BK to ensure statutory bodies have sufficient power to discharge their functions. Read in that beneficial light, a power to do “*all things necessary or convenient*” for or in connection with an enumerated list of functions (s203B(1)) is of considerable width.<sup>41</sup>
38. Accepting the Full Court’s summary of the principles in *Shanahan v Scott* (1957) 96 CLR 245 relevant to provisions like s203BK(1) (FC[106]-[107]: **CAB 87-8**), if it is not found in a particular body’s constituting provisions, a power of delegation of functions to a director or employee is precisely the kind of “strictly ancillary” power necessary or convenient to the performance of statutory functions by a body corporate, an entity which must, of necessity, act through its organs or agents.
39. Further, an important consideration in determining the breadth of such powers is the degree to which the legislature has disclosed an intention of dealing with the relevant subject matter.<sup>42</sup> Here, the NTA is prescriptive about *what* the functions of a representative body are and the *criteria* for their exercise, but is general about the internal organisation of a representative body and *how* a representative body is to perform its functions. For example, s203BA(2)(a) requires a representative body to maintain organisational structures and administrative processes that promote the satisfactory performance of its functions, but leaves it to the representative body to determine what those structures and processes should be. That was a deliberate legislative choice. Because of their differing circumstances, it was considered “impracticable for the [NTA] to prescribe the particular structures and administrative processes for representative bodies.”<sup>43</sup>

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<sup>39</sup> *Palmer v Australian Electoral Commission* (2019) 93 ALJR 947 at [44] per Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ, and the authorities cited therein.

<sup>40</sup> *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679 per Mason J (Barwick CJ and Aickin J agreeing).

<sup>41</sup> *Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2015) 227 FCR 95 at [210] per Kenny, Besanko and White JJ, and the authorities referred to therein.

<sup>42</sup> *Morton v Union Steamship Co. of New Zealand Ltd* (1951) 83 CLR 402 at 410 per Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.

<sup>43</sup> *Explanatory Memorandum to the Native Title Amendment Bill 1997*, [33.66].

In that statutory context, there is no reason to read s203BK(1) narrowly to deny representative bodies the ability to organise themselves as they see fit to perform their functions effectively and efficiently.

40. The same point is made by the various obligations placed on representative bodies to ensure their functions are performed in a *timely* manner, without any prescription as to how that is to be achieved (ss203BA(1), 203BC(3), 203BG(c)).

#### **Distinction between actions as a delegate and actions as an agent**

41. The Full Court held (FC[139]: **CAB 96**) that the appeal must necessarily be dismissed because (FC[138]: **CAB 96**) it was “most doubtful”, in effect, that the certificate was authorised by the instrument of delegation. This was held because in the certificate the Second Applicant identified the s203BE(2) opinions as those held by the First Appellant, whereas a delegate, who acts in their own name, would be required to hold the opinions themselves, by virtue of the traditional distinction between agency and delegation (FC[24]-[25]: **CAB 58**, [53]-[54]: **CAB 67**, [138]: **CAB 96**).
42. In so concluding, the Full Court erroneously failed to apply s34AB(1)(c) of the *Acts Interpretation Act 1901* (Cth), holding that the provision can have no relevance if, on the proper construction of the NTA, there was no power to delegate the certification functions (FC[58]: **CAB 69**). In a context where it was being assumed that there was power to delegate (FC[138]: **CAB 96**), the Court’s failure to consider the effect of s34AB(1)(c) was erroneous.
43. Section 34AB(1)(c) provides that, where an Act confers power to delegate a function, duty or power, the function, duty or power, when performed or exercised by the delegate, is deemed to have been performed or exercised by the delegating authority.
44. It has been held that s34AB(1)(c) has the effect of altering the principle in *Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 (**Re Reference**) by treating a decision of a delegate as being equivalent to that of the delegator,

such that the act is deemed to have been done by and in the name of the authority.<sup>44</sup>

45. In *Re Reference*, the relevant power was purportedly exercised by a delegate of the Director-General. However, in the letter to the claimant advising him of the outcome of the decision, the delegate signed the letter in the name of the Director-General, thereby making it appear that it was the Director-General who exercised the power. Brennan J considered that, by signing the letter in that way, the delegate had confused the source of the validity of the decision and effectively denied the power that was vested in him as a delegate.<sup>45</sup> That had important practical consequences, misrepresenting to the claimant that the decision was made by the Director-General personally and thereby obscuring the claimant's statutory appeal rights.<sup>46</sup> On that basis, the decision was held to be an "attempted but invalid" exercise of the delegate's powers.
46. Justice Brennan's opinion in *Re Reference* was given on 29 March 1979. Section 34AB(1)(c) was inserted into the *Acts Interpretation Act* with effect from 18 December 1987. The extraneous materials for the *Statute Law (Miscellaneous Provisions) Act 1987* (Cth) give no indication of the purpose of the new provision, but clearly the section is designed to overcome the administrative inconvenience of the consequences of the delegate / agent distinction referred to by Justice Brennan in that opinion.
47. That distinction has no relevant legal consequence where s34AB(1)(c) deems the acts done by a delegate to have been done by the delegator. The effect of that deeming is to create a "statutory fiction" that a function, duty or power of an authority, when performed by the authority's delegate, is taken to have been

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<sup>44</sup> See, for example, *Giddings v Australian Information Commissioner* [2017] FCA 677 at [4] per Tracy J, citing *Forest Marsh Pty Ltd v Resource Planning and Development Commission* (2007) 16 Tas R 280 at 289 per Underwood CJ; *Minister for Home Affairs v CSH18* [2019] FCAFC 80 at [79] per Jagot, Robertson and Stewart JJ; *Russell v Abbey* [2018] VSC 259 at [33]-[34] per Ierodiaconou AsJ; *Frangieh v Deputy Commissioner of Taxation* [2018] NSWCA 337 at [148] per White JA (Beazley P and Meagher JA agreeing); *Re Western Australian Planning Commission, Ex parte Leeuwin Conservation Group Inc* [2002] WASCA 150 at [27] per Wheeler J (Anderson and Steytler JJ agreeing).

<sup>45</sup> *Re Reference* at 94-95 per Brennan J.

<sup>46</sup> Section 15 of the *Social Services Act 1947* (Cth) provided that an affected person could appeal to the Director-General from a decision of any other officer under the Act: *Re Reference* at 95 per Brennan J and the analysis of that decision in *Deputy Commissioner of Taxation v Armstrong Scalisi Holdings Pty Ltd* [2019] NSWSC 129 at [206]-[214] per Ward CJ in Eq.

performed or exercised by the authority.<sup>47</sup> By reason of s34A of the *Acts Interpretation Act*, that statutory fiction extends to the formation of an opinion or state of mind upon which the performance or exercise of the function, duty or power by the authority depends.

48. Therefore, the effect of s34AB(1)(c) is to avoid invalidity of the performance of statutory functions and the exercise of statutory powers for what are, at base, matters of form. That is consistent with the decision in *Re Western Australian Planning Commission, Ex parte Leeuwin Conservation Group Inc* [2002] WASCA 150, where the Court of Appeal held a provision analogous to s34(1)(c) removed any invalidity which would otherwise have flowed from a delegate making a decision in the authority's name.<sup>48</sup>
49. Applying s34AB(1)(c) to the certificate in this case, there was no confusion or misrepresentation as to the source of the power exercised, which was the gravamen of the error identified in *Re Reference*.<sup>49</sup> Similarly, no relevant right of appeal or other consequence flowed from whether the certificate referred to the statement of opinion and reasons for that opinion being those of the First Appellant or those of the Second Appellant as delegate of the First Appellant.<sup>50</sup> The certificate referred to the function being performed by the First Appellant and to the opinions and reasons being those of the First Appellant, consistent with the statutory fiction effected by s34AB(1)(c).
50. Therefore, if s34AB(1)(c) had been applied (on the assumption that delegation of the certification functions was open as made at FC[138]: **CAB 96**), the identification in the certificate of the opinions as those held by the First Appellant and not the Second Appellant would be irrelevant because the certification would

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<sup>47</sup> Pearce DC & Geddes RS, *Statutory Interpretation in Australia*, 9<sup>th</sup> ed, (2019), [4.57].

<sup>48</sup> *Re Western Australian Planning Commission, Ex parte Leeuwin Conservation Group Inc* [2002] WASCA 150 at [27] per Wheeler J (Anderson and Steytler JJ agreeing).

<sup>49</sup> *Re Reference* at 94-95 per Brennan J; *Schierholter v County Court of Victoria* (2006) 15 VR 583 at [14] per Chernov JA and at [20] per Nettle JA (Warren CJ agreeing).

<sup>50</sup> *Deputy Commissioner of Taxation v Armstrong Scalisi Holdings Pty Ltd* [2019] NSWSC 129 at [206]-[210] and [214] per Ward CJ in Eq; *Giddings v Australian Information Commissioner* [2017] FCA 677 at [4] per Tracy J.

be deemed to have been performed by the First Appellant, holding those opinions.

**PART V      TIME ESTIMATE**

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51. The intervener estimates that 30 minutes will be required for the presentation of the intervener's oral argument.

Dated: 31 January 2020



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.....  
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## ANNEXURE OF STATUTORY PROVISIONS

<b>Act</b>	<b>Version</b>	<b>Sections</b>
<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>	Compilation 41 (4 April 2019)	
<i>Acts Interpretation Act 1901 (Cth)</i>	Compilation 36 (20 December 2018)	34A, 34AB
<i>Competition and Consumer Act 2010</i>	Compilation 123 (12 December 2019)	84
<i>Corporations Act 2001 (Cth)</i>	Compilation 94 (6 April 2019)	198A, 198D, 201A, 201P
<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i>	Compilation 16 (6 April 2019)	243.1, 243.5, 274.1, 274.10,
<i>Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006 (Cth)</i>	(1 March 2010)	Schedule 1
<i>Explanatory Memorandum to the Native Title Amendment Bill 1997</i>		33.66, 33.68, 33.75, 34.1, 34.4, 34.105
<i>Explanatory Memorandum to the Native Title Amendment Bill 2006</i>		4.75, 4.79, 4.82, 4.85, Schedule 1
<i>Native Title Act 1993 (Cth)</i>	Compilation 44 (29 December 2018)	24CG, 24CK, 24CL, 95, 96, 99, 110, 111, 130, 201A, Part 11, 203B, 203BA, 203BC, 203BK, 203BE, 203BG, 203EA, 203EB, 203FD, 203FE, 203FEA, 203FH,
<i>Native Title Amendment Act 1998 (Cth)</i>	(1 September 2007)	Schedule 3
<i>Native Title Amendment Act 2007 (Cth)</i>	(1 September 2007)	Schedule 1
<i>Social Services Act 1947 (Cth)</i>	(19 December 1973)	15