



IN THE HIGH COURT OF AUSTRALIA No. D21 of 2019
DARWIN REGISTRY

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

**NORTHERN TERRITORY OF AUSTRALIA'S OUTLINE OF ORAL
SUBMISSIONS**

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PART I: INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. The Full Court held the certification function in s 203BE(1)(b) of the *Native Title Act 1993* (Cth) (NTA) to be a non-delegable function, primarily because of the nature of the opinion by which s 203BE conditions certification: FC [98]-[100] (CAB 83-84), [135]-[137] (CAB 94-96); FC [153] (CAB 100-101).

Representative bodies do not have a special aptitude (Northern Territory Submissions (NTS) [27]-[33])

3. The legislative history of the criteria for recognition of representative bodies points against Parliament intending that any of the functions in Division 3 of Part 11 must be performed by a body that is composed representatively of the native title holders or other Aboriginal people of the area in question, because:

(a) the NTA as originally enacted contained a criterion to that effect and Parliament deliberately chose to remove it: s 202 as enacted (Northern Territory Supplementary Bundle (NTSB) 5-6); cf. Respondents' Submissions (RS) [30]-[32], [35], [45]-[47];

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(b) since 1 July 2000, the NTA has not imposed any requirement for a representative body to be representative in its composition: FC [85]-[97] (CAB 77-82); NTSB 9-13.

4. The NTA requires the Native Title Registrar to form opinions of the same nature and character as a representative body in performing the certification functions, including as a form of merits review for persons dissatisfied with a representative body's certification: NTS [29]-[31]; *Kemppi v Adani Mining Pty Ltd (No 2)* (2019) 271 FCR 423; [2019] FCAFC 117 at [94]-[99] (JBA Vol. 2, 788-790).

The NTA contemplates that a representative body will act through others (NTS [12]-[19])

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5. Section 203FH is a rule of attribution that is expressed to apply for the purposes of Part 11 of the NTA. The significance of the rule is that it operates on a statutory assumption that directors, employees or agents of a representative body may form and hold opinions for the purposes of the Part. That is inconsistent with a construction of s 203BE that requires the representative body alone to form the opinions prescribed by that provision.

Scope of power in s 203BK (NTS [34]-[40])

6. The Full Court's emphasis on the absence of an express power of delegation for representative bodies was misplaced: FC [135(a)], CAB 94). Part 11 of the NTA

deals with multiple representative bodies with different constituting statutes and ways of operating. That provides context for the use of a broad power like s 203BK(1) in circumstances that Parliament “could not practically set down, although they lie within the contemplation of its enactment”: *Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2015) 227 FCR 95 at [210]; FC [121] (CAB 91); Explanatory Memorandum to the Native Title Amendment Bill 1997 (Cth) at [33.66] (JBA Vol. 3, 992).

7. The Full Court erred in construing s 203B(3), read with s 203BK(2), as requiring a representative body itself to perform all of its functions: FC [102], [135(b)] (CAB 95); FC [145] (CAB 98). The context provided by the other exceptions in s 203B(3) indicate that the target of the prohibition in s 203B(3)—and the meaning to be accorded to the heading to the section—is arrangements to obtain services from *external* service providers, except as expressly permitted.

Form of certificate (appropriateness of remittal) (NTS [41]-[50])

8. If the Court accepts that the First Appellant had power to delegate its certification functions to the Second Appellant, then remittal is appropriate notwithstanding that the form of the certificate identifies the relevant opinions as being those of the First Appellant, rather than as the Second Appellant as delegate. The combined effect of ss 34A and 34AB of the *Acts Interpretation Act 1901* (Cth) (demonstrated by the express link between the provisions in s 34AB(1)(e)), would deem the First Appellant to have performed the certification function and to have formed the opinion upon which performance of the function depends: *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 125-126.

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