

**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

NORTHERN TERRITORY OF AUSTRALIA
Intervener

**ATTORNEY-GENERAL FOR THE
COMMONWEALTH**
Proposed Intervener



(PROPOSED) INTERVENER'S SUBMISSIONS

Filed on behalf of the Proposed Intervener, the Attorney-General for
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PART I FORM OF SUBMISSIONS

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

PART II BASIS FOR INTERVENTION

2. The Attorney-General for the Commonwealth (**Attorney-General**) seeks leave to intervene in this proceeding in support of the Appellants.
3. The issues which arise in this appeal concern the interaction of three Commonwealth Acts and the proper interpretation of the *Native Title Act 1993* (Cth). The Commonwealth, through its Attorney-General, seeks to be heard in relation to those matters.
4. A similar issue to the one that arises in this appeal was considered by a differently constituted Full Court in *McGlade v South West Aboriginal Land and Sea Aboriginal Corporation* [2019] FCAFC 238. The Attorney-General appeared as intervener in that matter to make submissions consistent with those he will make in this appeal, if leave to intervene is granted.

PART III REASONS FOR LEAVE

5. The issues which arise in this proceeding concern the operation, and interaction, of three Commonwealth Acts: *Native Title Act*, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**Land Rights Act**) and *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**).
6. *McGlade* was handed down after special leave to appeal was granted in this matter. In that case, the Full Court reached a different conclusion as to the interpretation of s 203BE of the *Native Title Act* and the ability of a body corporate to perform the certification function other than through the members or directors of that body corporate as a whole. The Full Court in *McGlade* held that certification performed by an authorised officer as a delegate, was an act performed by the Representative Body; see also the Full Court decision of *Kemppi v Adani Pty Ltd (No 2)*¹ to the effect that if

¹ [2019] FCAFC 117, at [49] and [56]. The Attorney General had also intervened in *Kemppi* in order to make submissions as to *Quall* but withdrew its intervention after that Full Court refused an application to amend an appeal to challenge that authority.

authorised to certify, a Chief Executive Officer (CEO) of a Representative Body is the “controlling mind” of the body when forming the relevant opinions.

7. It is the Attorney-General’s position that *McGlade* correctly held that the *Native Title Act* does not prescribe who within a Representative Body must perform the functions of that body. If the decision in *McGlade* is correct, and the Attorney-General submits that it is, *Quall* cannot stand. As with *McGlade*, it must be a question of fact as to whether the CEO of the NLC had been delegated (meaning been authorised to act) the task of forming the necessary opinions required by s 203BE(5).
8. The Attorney-General seeks to be heard as to the interpretation of the *Native Title Act* in the context of the performance of functions by a body corporate representative body, particularly in light of the subsequent Full Court decisions in *Kemppi* and *McGlade*, which render the correctness of *Quall* highly doubtful .
9. The Attorney-General’s submissions develop in more detail matters raised by the Appellants, including how the *Native Title Act* overall does not support the Full Court’s interpretation of s 203BE as requiring the NLC to perform the certification function only through the Council of the NLC (and not any other director, employee or agent of the NLC).

PART IV ARGUMENT

The requirements of the *Native Title Act*

10. Insofar as the Full Court found that the certification functions in s 203BE(1) must be performed by the Aboriginal Torres Strait Islander Representative Body (**Representative Body**) itself, through its members or directors, because of the nature of the relevant opinions required by s 203BE(5) of the *Native Title Act*, (**CAB 84-85, 96-97 and 102**, at [98]-[100], [136] and [137], also [153]) such a construction is not plainly established by the words of the provision or otherwise supported by the terms of the *Native Title Act* as a whole.

Section 203FH of the *Native Title Act*

11. *First*, in determining whether the certification functions in s 203BE could only be performed by the Representative Body through its Council, the Full Court proceeded on

the basis that there was a (relevant) distinction between *delegating* to, and *authorising* an employee of a body corporate to act. (CAB 58, 67-68, at [25], [52]-[55]).

Accordingly, the Full Court concluded that where a certification was given by the Second Appellant (CEO) as distinct from the directors or council members, so much was not a certification by the First Appellant (NLC). (CAB 57-58, at [23] and [24] and 96, at [136] and [137]).

12. That distinction (so far as it applies to bodies corporate) is modified, and rendered irrelevant, by s 203FH of the *Native Title Act*.
13. By that provision, in order to establish the state of mind² of a Representative Body in relation to conduct engaged in for the purposes of Part 11 of the *Native Title Act* (which includes the certification function), it is sufficient to show that a director, employee or agent of a representative body with requisite authority had the relevant state of mind. It is neither relevant nor determinative whether a director, employee or agent was acting as a delegate or in some other authorised capacity. It is the authority (whether actual or apparent) conferred upon the director, employee or agent which is critical.
14. Having concluded that it was not lawful to delegate the performance of the certification to the CEO, the Full Court did not decide whether the CEO had been (actually or apparently) authorised by the NLC to perform that function (CAB 96 at [138] and [139]).
15. However, where the CEO had relevant authority when forming the opinions required by s 203BE(5)(a) and (b) of the *Native Title Act*, those opinions (and the certification itself) would be the NLC's opinions and certification.³

A Representative Body is not established by the Native Title Act

16. *Second*, the *Native Title Act* establishes a legislative scheme for the recognition of Representative Bodies which are bodies corporate that may be established under a

² *Native Title Act*, s 203FH(6) defines "state of mind" to include "opinion" and "belief".

³ *Native Title Act*, s 203FH(1) and (3); *McGlade v South West Aboriginal Land and Sea Aboriginal Corporation (No 2)* [2019] FCAFC 238, [333].

number of Acts,⁴ having their own rules and forms of governance. Critically, the *Native Title Act* does not establish any Representative Body. The responsible Minister may recognise an existing body corporate as a Representative Body if the Minister is satisfied, *inter alia*, that the body would be able to perform satisfactorily the functions of a representative body.⁵

17. Sections 203BA and s 203FH of the *Native Title Act* together prescribe how the functions of a Representative Body are, or may be, performed. Neither ss 203BA nor 203FH prescribe, or preclude, the natural persons within a body corporate who **must** perform those functions on behalf of, or for, a body corporate Representative Body.
- 10 18. Where a Representative Body will have its own rules, structures and operative legislation, it is unsurprising that the *Native Title Act* does not impose or establish the organisational structures or administrative processes that the Representative Body must comply with in performing its functions under the *Native Title Act*.⁶
19. In deciding to recognise the body corporate as a Representative Body, the responsible Minister considered that Body, with all its organisational structures and administrative processes, would be able to satisfactorily perform the functions prescribed by the *Native Title Act*.
- 20 20. It would be curious if, in those circumstances, an additional but unstated limitation or requirement was to arise by implication from the *Native Title Act* to prescribe who within a Representative Body may or must act in performing its functions under the *Native Title Act*.

The Full Court's contextual analysis does not have regard to the functions of the Native Title Registrar

30 ⁴ For example, *McGlade* concerned the South West Aboriginal Land and Sea Aboriginal Corporation (SWALSC), which is established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth); other body corporates may be established under the *Corporations Act 2001* (Cth); and the NLC was established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

⁵ *Native Title Act*, s 203AD(1)(d).

⁶ *McGlade*, [337].

21. *Third*, the Full Court reasoned that the exercise of the certification function was of such particular significance that, absent an express provision, it was not to be concluded that Parliament intended that function be “delegable” (CAB 69 – 70, at [59] to [61]).
22. Within that analysis, the Full Court placed emphasis upon, or had regard to:
- 22.1. the composition of the Council of the NLC as having a particular characteristic of being comprised of Aboriginal people living in the area of the Land Council (CAB 72, at [67] and [68]); and
- 22.2. the various subject matter that an ILUA may deal with, the effect that such agreements may have on native title holders or their native title rights and interests, and the role of representative bodies in relation to ILUAs (CAB 74 – 78, at [73] to [82]).
23. In that analysis, the Full Court identified that in the absence of certification by a Representative Body in relation to an application to register an ILUA, the Native Title **Registrar** will be required to be satisfied that the requirements in s 24CG(3)(b)(i) and (ii) have been met.⁷
24. Significantly, those paragraphs mirror paragraphs 203BE(5)(a) and (b) entirely.
25. The Registrar may, by signed instrument, delegate to one or more of the Deputy Registrars of the Tribunal, or the members of the staff assisting the Tribunal, all or any of the Registrar’s powers under the *Native Title Act*.⁸ Necessarily that includes the power or function to register ILUAs and to reach the requisite state of satisfaction for the purposes of s 24CG(3)(b)(i) and (ii). The Full Court did not consider the Registrar’s power of delegation.
26. There is no requirement as to any qualification, experience or other characteristic that a member of staff assisting the Tribunal must have.⁹ That is inconsistent with the Full Court’s analysis that the significance of certification (and authorisation) is such that it is not “delegable” within a representative body.

⁷ *Native Title Act*, s 24CL (3).

⁸ *Native Title Act*, s 99.

⁹ cf, *Quall FC*, [68] (CAB 72).

27. Where the legislature has confirmed that the Registrar (being a natural person) may delegate their powers (including those relating to registration of ILUAs) to members of staff, so much provides a (further) answer against the Full Court's analysis that, given the importance of certification and authorisation, Parliament did not intend that an (authorised) employee of a Representative Body may exercise the certification function for or as the Representative Body (CAB 72, at [69]).
28. No purpose or intention could reasonably be attributed to the legislature to confirm that delegation by the Registrar was permissible but the authorisation (by delegation) by a Representative Body to its director(s), employee(s) or agent was not.
- 10 29. For the reasons set out at [16] to [20] above, the absence of an equivalent power of delegation by Representative Bodies expressly prescribed in the *Native Title Act* does not command a contrary conclusion.

A body corporate acts through natural persons

30. Subsequent to *Quall FC*, the Full Court in *McGlade* found that certifications made by the then CEO(s) of the SWALSC were certifications made for the purposes of s 203BE of the *Native Title Act*.¹⁰
- 20 31. In so finding, the Full Court in *McGlade* expressly found that the *Native Title Act* did **not** preclude those CEOs from forming the necessary opinions.¹¹ Respectfully, for the reasons set out at [10] to [29] above, that conclusion is correct.
32. As it concerns this appeal, there was otherwise no prohibition or preclusion on the CEO, if properly authorised, from acting as the controlling mind of the NLC and forming the opinions required by s 203BE(5).
33. As acknowledged in *McGlade*, the issue of delegation to the CEO arises in a context of considering how a corporate body may act. That is to be distinguished from how a natural person conferred with a power may act, or who may exercise that power as or for that natural person.

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¹⁰ *McGlade*, [340] – [343].

¹¹ *McGlade*, [330] – [336].

34. A natural person empowered to act in a particular way is, in the ordinary course, able to personally act. That is not the case for a body corporate. A body corporate as the entity empowered to act in a particular way must always act through a natural person or persons. How, or who, may act in that way will be a matter for the body and its organisational structures and administrative arrangements (unless a written law expressly provides differently).

10 35. The *Native Title Act* recognises that distinction between natural persons and bodies corporate. Both the Registrar and a Representative Body may be required to form the same opinions: those required by ss 203BE(5) and those required by 24CG(3)(b)(i) and (ii). The legislative task is the same. However, the Registrar, a natural person, is conferred an express power of delegation whereas a Representative Body, a body corporate, is not. That is not because the task to be performed differs as a matter of fact, it is because the persons performing that task have essentially different characteristics.

36. In a given case, it may be that there is some limitation or confirmation as to who within (or even outside) a body corporate must exercise or perform a particular power. If it exists, that limitation or confirmation will not be displaced by the *Native Title Act*. It will not, however, be *created* by the *Native Title Act*.

20 37. The Full Court in *Quall* did not make relevant findings of fact as to the ability of the NLC to delegate to (or authorise) the CEO the requirement of forming the opinions specified in s 203BE(5) (**CAB 96**, [138] and [139]). Where it is necessary to make those findings of fact before the authority of the CEO to perform those functions can be determined, the matter is appropriately to be remitted to the Full Court.

The CEO is not precluded from forming the requisite opinion

30 38. The *Native Title Act* takes a body corporate as it finds it. So much is confirmed by s 203BA. In the absence of a limitation or confirmation as to who within a body corporate must perform the certification function, the proper conclusion is that it is a matter for the body corporate to determine in accordance with its organisational structures and administrative processes.

39. In this way, it is immaterial that the *Aboriginal Land Rights Act* does not confer an express entitlement to the NLC to delegate the performance of the certification function to a director, employee or agent of the NLC (CAB 52 and 71 at [6] and [66]).

40. Although the NLC was established under the *Aboriginal Land Rights Act*, the extent of its functions and powers, and who is responsible for performing them, is not prescribed or determined by that Act.

41. That is so because, *inter alia*:

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41.1. there is no requirement that a body established under the *Aboriginal Land Rights Act* only perform the functions prescribed by, or engage in business which arises under, that Act;

41.2. the *PGPA Act* prescribes that the NLC is a Commonwealth entity,¹² and that the ‘accountable authority’ for the NLC is (together) the Chair and CEO;¹³ and

41.3. the NLC is a Representative Body charged with the obligation to perform various functions under the *Native Title Act*.

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42. Neither the *PGPA Act* nor the *Aboriginal Land Rights Act* prescribes that only the members of the Land Council must perform the functions of that body. Similarly, neither the *PGPA Act* nor the *Aboriginal Land Rights Act* prescribes that only the Chair and CEO must perform the functions of that body. Nonetheless, those Acts require the NLC as the body corporate to perform various functions in particular ways or manner.¹⁴

43. The *Native Title Act* operates in the same way. It requires the NLC to perform various functions, including in a way or manner:

43.1. that is timely;¹⁵

¹² *PGPA Act*, s 10(1)(e); *Public Governance Performance and Accountability Rule 2014 (PGPA Rule)*, r 7A.

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¹³ *PGPA Act*, s 12(2); *PGPA Rule*, r 7A Item 3.

¹⁴ *Aboriginal Land Rights Act*, s 23AA; *PGPA Act*, ss 15 – 19.

¹⁵ *Native Title Act*, s 203BA (1).

43.2. that maintains organisational structures and administrative processes that promote the satisfactory representation by the body of native title holders;¹⁶ and

43.3. that ensures the body's structures and processes operate in a fair manner, having particular regard to, relevantly, its rules or requirements relating to the conduct of its executive officers¹⁷ and the nature of its management structures and management processes,¹⁸

but does not prescribe who within the NLC *must* perform those functions.

10 44. In the case of the NLC, those organisational structures include that its Chair and CEO, as the "accountable authority", are required to govern the NLC in a way that "promotes the proper use and management of public resources for which the [NLC] is responsible" and "promotes the achievement of the purposes of the [NLC]."¹⁹

45. Those purposes are not limited to those prescribed by the *Aboriginal Land Rights Act*. They include all of the NLC's purposes and all of the public resources for which the NLC is responsible.

46. There is no basis under the *Native Title Act* to exclude that effect of the *PGPA Act*. That is particularly so where the *Native Title Act* expressly provides when it prevails over the *PGPA Act*.²⁰

20 47. Finally, as noted above, s 203FH confirms that the authorised actions of a director, employee or agent will be sufficient to establish the state of mind of the Representative Body. A construction of s 203BE of the *Native Title Act* as found by the Full Court is not consistent with s 203FH and does not on a proper construction provide a basis for concluding that the CEO could not form the necessary opinions.

¹⁶ *Native Title Act*, s 203BA(2)(a).

30 ¹⁷ *Native Title Act*, s 201A defines "executive officer" to mean a director of the governing body ("director" and "governing body" are also defined by s 201A) or "any other person who is concerned in, or takes part in, the management of the representative body at a senior level".

¹⁸ *Native Title Act*, s 203BA(2)(c)(iv) and (v).

¹⁹ *PGPA Act*, s 15

²⁰ *Native Title Act*, s 203EA(5) and (6).

PART V ESTIMATE OF ORAL ARGUMENT

48. If leave to intervene is given, the Attorney-General would require 20 minutes to present his oral argument.

Dated: 31 January 2020

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ANNEXURE OF STATUTORY PROVISIONS

Act	Version	Sections
<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>	Compilation 41 (4 April 2019)	23AA
<i>Native Title Act 1993 (Cth)</i>	Compilation 44 (29 December 2018)	24CG, 24CL, 99, Part 11
<i>Public Governance, Performance and Accountability Act 2013 (Cth)</i>	Compilation 4 (23 August 2017)	10, 12, 15-19
<i>Public Governance Performance and Accountability Rule 2014 (Cth)</i>	Compilation 20 (1 January 2018)	7A

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