

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, NETTLE AND EDELMAN JJ

NORTHERN LAND COUNCIL & ANOR

APPELLANTS

AND

KEVIN LANCE QUALL & ANOR

RESPONDENTS

Northern Land Council v Quall
[2020] HCA 33
Date of Hearing: 12 & 13 August 2020
Date of Judgment: 7 October 2020
D21/2019

ORDER

1. *Appeal allowed.*
2. *Set aside the declaration and order 3 of the orders made by the Full Court of the Federal Court of Australia on 19 June 2019 and, in their place, order that the cross-appeal be dismissed.*
3. *Set aside orders 1 and 2 of the orders made by the Full Court of the Federal Court on 19 June 2019 and remit to the Full Court of the Federal Court the unresolved appeal to that Court and the unresolved application for leave to adduce fresh evidence in that appeal.*
4. *In accordance with undertakings given as a condition of the grant of special leave to appeal, the appellants are to bear the first and second respondents' costs of the appeal limited to one set of costs.*
5. *In accordance with undertakings given as a condition of the grant of leave to intervene, the Attorney-General of the Commonwealth and the Northern Territory are to bear jointly with the appellants the first and second respondents' costs of the appeal as limited pursuant to order 4.*

On appeal from the Federal Court of Australia

Representation

S A Glacken QC with R W Kruse for the appellants (instructed by Northern Land Council)

B W Walker SC with A K Flecknoe-Brown for the first respondent (instructed by Robert Welfare & Associates)

P F McIntyre for the second respondent (instructed by McQueens Solicitors)

R J Webb QC with C I Taggart for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

N Kidson QC with L S Peattie for the Northern Territory, intervening (instructed by Solicitor for the Northern Territory)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Northern Land Council v Quall

Aboriginal and Torres Strait Islander peoples – Native title – Representative Aboriginal/Torres Strait Islander bodies – Indigenous land use agreements ("ILUAs") – Where s 203BE(1)(b) of *Native Title Act 1993* (Cth) confers on representative body function of certifying applications for registration of ILUAs – Where s 203BE(5) prohibits representative body from certifying application for registration of ILUA unless satisfied that all reasonable efforts made to ensure all persons who hold or may hold native title have been identified and authorised making of agreement – Where s 27(1) of *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) provides that a Land Council may do all things necessary or convenient to be done for or in connection with performance of its functions – Where Northern Land Council ("NLC") a representative body – Where CEO of NLC signed certificate purportedly as delegate of NLC certifying application for registration of ILUA and stating NLC satisfied that identification and authorisation requirements met – Whether certification function conferred by s 203BE(1)(b) capable of delegation by NLC to CEO – Whether CEO can perform certification function conferred by s 203BE(1)(b) as agent of NLC.

Words and phrases – "Aboriginal and Torres Strait Islander peoples", "agency", "agent", "authorised", "body corporate", "certification", "certification function", "delegability", "delegable", "delegate", "delegation", "identified", "indigenous land use agreement", "Land Council", "native title", "natural person", "necessary or convenient", "power of delegation", "representative Aboriginal/Torres Strait Islander body", "representative body".

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), ss 27, 28.

Acts Interpretation Act 1901 (Cth), ss 34A, 34AB.

Native Title Act 1993 (Cth), ss 203BE, 203BK, 203FH.

1 KIEFEL CJ, GAGELER AND KEANE JJ. The ultimate question in this appeal is whether the Northern Land Council ("the NLC") has power to delegate to its Chief Executive Officer ("the CEO") the function conferred on it as a representative body by s 203BE(1)(b) of the *Native Title Act 1993* (Cth) ("the NT Act") of certifying an application for registration of an indigenous land use agreement ("ILUA") relating to an area of land or water wholly or partly within the area for which it is a representative body subject to satisfaction of the precondition imposed by s 203BE(5) of the NT Act that it is of the opinion that all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the ILUA have been identified and that all of the persons so identified have authorised the making of the ILUA.

2 The answer is that the NLC has that power of delegation under s 27(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("the ALR Act"). If the NLC exercises that power to delegate the certification function to the CEO, the CEO is empowered by s 34A of the *Acts Interpretation Act 1901* (Cth) ("the AI Act") to perform the certification function on the basis of the CEO's own opinion in relation to the matters in s 203BE(5) of the NT Act, and certification by the CEO in performance of the delegated function is attributed to the NLC by force of s 34AB(1)(c) of the AI Act.

Process for registration of an ILUA

3 Under Div 3 of Pt 2 of the NT Act, a future act affecting native title is valid if, but only if, the parties to the ILUA consent to it being done and, at the time it is done, the ILUA is registered on the Register of Indigenous Land Use Agreements¹. Registration of an ILUA that is an area agreement under Subdiv C of Div 3 of Pt 2 can occur only on application made by a party to the Native Title Registrar, who is also responsible for the Register of Indigenous Land Use Agreements².

4 One requirement for the making of an application for registration of such an ILUA concerns identification of persons who hold or may hold native title in relation to land or waters in the area covered by the ILUA and authorisation by

1 Section 24AA(3) of the NT Act.

2 Section 24CG(1) of the NT Act.

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those persons of the making of the ILUA³. The requirement can be met in either of two ways.

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The first way the requirement can be met is by the application for registration having been certified by all representative bodies for the area in the performance of their functions under s 203BE(1)(b)⁴. If the application has been so certified, any person claiming to hold native title in relation to land or waters in the area covered by the ILUA is entitled within a specified period to object to registration⁵ and the Registrar at the end of that period must make a decision⁶ to register the ILUA if specified conditions are met or not to register the ILUA if any specified condition is not met⁷. One of the specified conditions on which registration depends involves absence of any unwithdrawn objection⁸ or, in the face of an unwithdrawn objection, non-satisfaction on the part of the Registrar that the requirements as to identification and authorisation set out in s 203BE(5) were not met in relation to the certification of the application by any representative body⁹. Faced with an unwithdrawn objection, the question for administrative determination by the Registrar is whether (having regard to information provided by the person making the objection and the representative body concerned¹⁰) the Registrar is satisfied by the objector that all reasonable efforts have not been made to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the ILUA have been identified or that one or more

3 Section 24CG(3) of the NT Act.

4 Section 24CG(3)(a) of the NT Act.

5 Section 24CI of the NT Act.

6 Section 24CJ of the NT Act.

7 Section 24CK(1) of the NT Act.

8 Section 24CK(2)(a) and (b) of the NT Act.

9 Section 24CK(2)(c) of the NT Act.

10 Section 24CK(4) of the NT Act.

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of the persons who have been identified have not authorised the making of the ILUA¹¹. If the Registrar is so satisfied, the Registrar must not register the ILUA.

6 The second way the requirement can be met is by the application for registration including a statement to the effect that all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified and that all of the persons so identified have authorised the making of the agreement together with a statement briefly setting out the grounds on which the Registrar should be so satisfied¹². Where those statements appear in an application, the Registrar must decide either to register the ILUA if other specified conditions are met or not to register the ILUA if any specified condition is not met¹³. A specified condition then is that the Registrar affirmatively considers (having regard to the statements in the application and any information provided by any representative body or any other body or person¹⁴) that all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the ILUA have been identified and that all of the persons so identified have authorised the making of the ILUA¹⁵. If the Registrar does not affirmatively so consider, the Registrar must not register the ILUA.

7 Depending on how an application for registration of an ILUA is made the Registrar can therefore come under a duty to exercise either of two relevant powers as a precondition to registering the ILUA: a power to determine any unwithdrawn objection by re-examining the matters about which a representative body has formed an opinion under s 203BE(5), where an ILUA has been certified; or a power to form an independent opinion about the same matters as those about which a representative body would be required to form an opinion under s 203BE(5), where an ILUA has not been certified. Those powers can be exercised personally by the Registrar, who is a statutory officer appointed under the NT Act¹⁶. Those

11 Accord *Kemppi v Adani Mining Pty Ltd [No 2]* (2019) 271 FCR 423 at 454-455 [88].

12 Section 24CG(3)(b) of the NT Act.

13 Section 24CL(1) of the NT Act.

14 Section 24CL(4) of the NT Act.

15 Section 24CL(3) of the NT Act.

16 Section 95 of the NT Act.

powers can alternatively be exercised by a Deputy Registrar or by any member of the staff assisting the National Native Title Tribunal, who are persons engaged under the *Public Service Act 1999* (Cth)¹⁷, under delegation from the Registrar¹⁸. The nature and delegability of the powers so conferred on the Registrar bear on the nature of the certification function conferred on a representative body by s 203BE(1)(b) in ways to which it will be necessary to return.

The CEO's certification of the Kenbi ILUA

8 The NLC in 2016 made an ILUA in relation to land and waters at the Cox Peninsula near Darwin which was varied in February 2017. The ILUA as varied is known as the Kenbi ILUA. In March 2017, the CEO signed a certificate in connection with the making of an application for registration of the Kenbi ILUA.

9 The certificate signed by the CEO states that "the NLC hereby certifies" the application for registration of the Kenbi ILUA pursuant to s 203BE(1)(b) of the NT Act. The certificate goes on to state that "[t]he NLC is of the opinion" that the requirements of s 203BE(5) about identification of the native title holders and their authorisation of the agreement have been met, namely that all reasonable efforts have been made to ensure that all persons who hold native title in relation to land or waters in the area covered by the Kenbi ILUA have been identified and that all of the persons so identified have authorised the making of the Kenbi ILUA.

10 It is common ground that the CEO signed the certificate purporting to act as a delegate of the NLC. The decision to issue the certificate was in fact made by the CEO alone and the opinion set out in the certificate was in fact formed by the CEO alone.

Judicial review of the CEO's certification of the Kenbi ILUA

11 Mr Quall and Mr Fejo each brought judicial review proceedings against the NLC and the CEO in the Federal Court of Australia challenging the efficacy of the certificate on grounds that the NLC's certification function under s 203BE(1)(b) of the NT Act is not delegable or, if delegable, was not validly delegated by the NLC to the CEO.

12 The primary judge (Reeves J)¹⁹ rejected the first ground but accepted the second, finding that the instruments on which the NLC and the CEO then relied as

17 Section 130(1) and (3) of the NT Act.

18 Section 99 of the NT Act.

19 *Quall v Northern Land Council* [2018] FCA 989.

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instruments of delegation were ineffective. His Honour in each application made a declaration to the effect that the certificate signed by the CEO did not amount to certification pursuant to s 203BE(1)(b).

13 The NLC and the CEO appealed to the Full Court. They did not challenge the finding that the instruments on which the NLC and the CEO had relied before the primary judge were ineffective. Instead, they applied for leave to adduce fresh evidence to attempt to prove the existence of other effective instruments of delegation. Mr Quall and Mr Fejo cross-appealed, reiterating their primary argument that the NLC's certification function is not delegable.

14 The Full Court (Griffiths, Mortimer and White JJ)²⁰ was persuaded that, as a matter of the construction of the NT Act, the certification function conferred on a representative body by s 203BE(1)(b) of the NT Act is incapable of delegation. The Full Court on that basis allowed the cross-appeal and made an additional declaration to the effect that the NLC "did not have power to delegate" its certification function to the CEO.

15 The cross-appeal being allowed, the issues in the appeal did not arise. The Full Court on that basis dismissed the appeal without addressing the merits of the application to adduce fresh evidence.

Appeal to this Court

16 The NLC and the CEO now appeal to this Court. The sole ground of appeal on which special leave to appeal has been granted²¹ is that the Full Court erred in holding that the NLC did not have power to delegate the performance of the certification function conferred on it under s 203BE(1)(b) of the NT Act.

17 Determination of the appeal on that ground necessitates consideration of two overlapping issues. One concerns the extent, if at all, to which any delegation of the certification function is compatible with the scheme of the NT Act. The other concerns the source of the power, if any, for the NLC to delegate the certification function to the CEO.

18 The public importance of the issue of the compatibility of delegation of the certification function with the scheme of the NT Act has led to the Attorney-General of the Commonwealth and the Northern Territory seeking and being

20 *Northern Land Council v Quall* (2019) 268 FCR 228; *Northern Land Council v Quall [No 2]* [2019] FCAFC 101.

21 *Northern Land Council v Quall* [2019] HCATrans 232.

granted leave to intervene in the appeal. The interveners broadly support the NLC and the CEO in arguing that there is no applicable impediment to delegation. They differ between themselves as to the source of the power to delegate.

Scheme of Pt 11 of the NT Act

19 Consideration of whether, and if so to whom, delegation of the certification function conferred by s 203BE(1)(b) might occur consistently with the scheme of the NT Act cannot be undertaken without close attention to the text and structure of Pt 11. Introduced as part of the NT Act as originally enacted in 1993, Pt 11 was substantially amended in 1998²² and again in 2007²³.

20 Eligibility for the status of a representative body is governed by the definition of "eligible body" located within Div 1 of Pt 11²⁴. Within that definition is a "body corporate" registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) the objects of which enable it to perform the functions of a representative body²⁵, a "body corporate" established by or under any other law of the Commonwealth or of a State or Territory prescribed by regulation for the purpose of the definition²⁶, any "company" incorporated under the *Corporations Act 2001* (Cth)²⁷, as well as a "body corporate" that is already a representative body²⁸. Two features of the definition are significant.

21 The first significant feature of the definition is that an eligible body, as either a "body corporate" or a "company", is in every case a corporation constituted by or under other Commonwealth, State or Territory legislation. Being a

22 *Native Title Amendment Act 1998* (Cth).

23 *Native Title Amendment Act 2007* (Cth).

24 Section 201B of the NT Act.

25 Section 201B(1)(a) of the NT Act.

26 Section 201B(1)(c) of the NT Act.

27 Section 201B(1)(ba) of the NT Act.

28 Section 201B(1)(b) of the NT Act.

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corporation, an eligible body is an "artificial person"²⁹ which (leaving prospective advances in artificial intelligence out of account) is inherently constrained to perform its functions through natural persons who act within the scope of authority granted to them by or under its constating statute. Any repository of a statutory function can delegate performance to a natural person *if*, but *only if*, permitted by statute³⁰. In the absence of permitted delegation, however, a corporate repository *can only* perform a statutory function through natural persons who constitute the corporation, or who constitute emanations or authorised agents of the corporation, acting in the manner and within the limits set by or under the constating statute of the corporation³¹.

22 The second significant feature of the definition stems from the capacity for Commonwealth, State or Territory legislation to "create a juristic person without identifying an individual or a group of natural persons with it, as the living constituent or constituents of the corporation"³². There is simply no reason to consider that an eligible body constituted by or under other Commonwealth, State or Territory legislation must be constituted by natural persons. Much less is there reason to consider that it must be constituted by natural persons in a manner that is representative of persons holding or claiming to hold native title in an area.

23 How an eligible body becomes a representative body for an area or areas is in consequence of applying to and being recognised by the Commonwealth Minister administering the NT Act as a representative body in a legislative instrument under Div 2 of Pt 11³³. Once recognised, the eligible body remains a

29 See Co Lit 2a; Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 1 at 119; Maitland, "The Corporation Sole" (1900) 16 *Law Quarterly Review* 335 at 335.

30 *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Q)* (1979) 142 CLR 460 at 481.

31 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 171-172. See also *Dainford Ltd v Smith* (1985) 155 CLR 342 at 349.

32 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 361. See also *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171 at 193-195 [54]-[58].

33 Section 203AD(1) of the NT Act.

representative body for a period specified in the instrument of recognition³⁴ unless the Commonwealth Minister sooner withdraws its recognition by further legislative instrument³⁵.

24 The Commonwealth Minister cannot recognise an eligible body as a representative body for an area or areas unless the Commonwealth Minister is satisfied that it would be able to perform satisfactorily the functions of a representative body³⁶ and, in the case of a renewal of or change to the recognition of an existing representative body, that it is currently satisfactorily performing its functions as a representative body³⁷. The Commonwealth Minister is correspondingly empowered to withdraw recognition of a representative body for an area if the Commonwealth Minister is satisfied that it is not satisfactorily performing its functions³⁸. In considering for the purpose of recognition or withdrawal of recognition whether an eligible body will satisfactorily perform its functions as a representative body or is satisfactorily performing its functions as a representative body, the Commonwealth Minister is required to form and take into account an opinion as to whether it will comply with or is complying with s 203BA³⁹, which deals with how the functions of a representative body are to be performed and to which it will be necessary in due course to turn.

25 For so long as an eligible body is recognised as a representative body, Div 3 of Pt 11 confers on it functions that are cumulative upon any functions it might have under any other law of the Commonwealth or of a State or Territory⁴⁰. Leaving to one side the "certification functions" referred to in s 203BE, which will be examined separately in more detail, the functions conferred on a representative body are remarkable for the expansiveness and practicality of their content. Prime amongst them are "facilitation and assistance functions" (involving representing and otherwise assisting native title holders and persons who may hold native title

34 Section 203AD(3A) of the NT Act.

35 Section 203AH of the NT Act.

36 Section 203AD(1)(d) of the NT Act.

37 Section 203AD(1)(c) of the NT Act.

38 Section 203AH(2)(a) of the NT Act.

39 Section 203AI of the NT Act.

40 Section 203B(2) of the NT Act.

in consultations, mediations, negotiations and proceedings relating to native title applications and to ILUAs)⁴¹, "dispute resolution functions" (involving promoting agreement and mediating between native title holders and persons who may hold native title)⁴² and "notification functions" (involving ensuring that relevant notices are brought to the attention of native title holders and persons who may hold native title)⁴³. A representative body also has an "agreement making function" (involving itself being a party to ILUAs)⁴⁴ and "internal review functions" (involving providing and publicising a process for native title holders and persons who may hold native title "to seek review by the representative body of its decisions and actions, made or taken in the performance of its functions or the exercise of its powers, that affect them")⁴⁵.

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Section 203B(3) provides that, except as mentioned in s 203BB (which relevantly allows a representative body performing facilitation and assistance functions to "brief out" the representation of a person or body by entering into an arrangement with another person⁴⁶) or as mentioned in s 203BD (which allows a representative body to perform facilitation and assistance functions in relation to an adjoining area if it is acting in accordance with a written arrangement with the representative body for that area) or as mentioned in s 203BK, "a representative body must not enter into an arrangement with another person under which the person is to perform the functions of the representative body". Section 203BK, which s 203B(3) flags as mentioning an exception to its operation, relevantly provides:

- "(1) A representative body has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.
- (2) Without limiting subsection (1), a representative body has power to enter into arrangements and contracts to obtain services to assist in the performance by the representative body of its functions."

41 Section 203BB of the NT Act.

42 Section 203BF of the NT Act.

43 Section 203BG of the NT Act.

44 Section 203BH of the NT Act.

45 Section 203BI of the NT Act.

46 Section 203BB(5) of the NT Act.

27 Section 203B(4)(b) allows for a representative body to "allocate resources" in the way it thinks fit in order "to be able to perform its functions efficiently", giving priority to the protection of the interests of native title holders, and s 203BA mandates how the functions of a representative body are to be performed. To the detail of s 203BA it is now appropriate to turn.

28 Section 203BA(1) provides that "[a] representative body must use its best efforts to perform its functions in a timely manner". Section 203BA(2) provides:

"A representative body must perform its functions in a manner that:

- (a) maintains organisational structures and administrative processes that promote the satisfactory representation by the body of native title holders and persons who may hold native title in the area for which it is the representative body; and
- (b) maintains organisational structures and administrative processes that promote effective consultation with Aboriginal peoples and Torres Strait Islanders living in the area for which it is the representative body; and
- (c) ensures that the structures and processes operate in a fair manner, having particular regard to:
 - (i) the opportunities for the Aboriginal peoples or Torres Strait Islanders for whom it might act to participate in its processes; and
 - (ii) the extent to which its processes involve consultation with those Aboriginal peoples or Torres Strait Islanders; and
 - (iii) its procedures for making decisions and for reviewing its decisions; and
 - (iv) its rules or requirements relating to the conduct of its executive officers; and
 - (v) the nature of its management structures and management processes; and
 - (vi) its procedures for reporting back to persons who hold or may hold native title in the area, and to the Aboriginal peoples or Torres Strait Islanders living in the area."

29 The "organisational structures and administrative processes" of the representative body to which s 203BA(2) refers are the structures and processes through which natural persons or groups of natural persons perform its functions within the scope of the authority conferred on them (whether as delegates or as agents or emanations of it) by or under its constating statute. The "executive officers" of the representative body, to which s 203BA(2)(c)(iv) refers, are defined to extend beyond the members of its "governing body" (in turn defined to mean the group of persons who are responsible for its "executive decisions") to include any person who is concerned or takes part in its management at a senior level⁴⁷.

30 The considerations required by s 203BA(2)(c)(iii), (iv) and (v) to inform assessment of the fairness of the manner in which the organisational structures and administrative processes of a representative body operate tell against a representative body being confined to perform its functions only through such group of natural persons as may constitute its membership or as may constitute its governing body. Those considerations tell rather in favour of those functions being able to be performed by persons or groups at other levels within its organisational structure. So too do the internal review functions, the very existence of which implies that the other functions of the representative body might be exercised and re-exercised by persons or groups at multiple levels within its organisational structure.

31 Having regard to the range and content of the functions conferred on a representative body under Div 3, to the recognition in s 203B(4)(b) of the need for a representative body to allocate resources to enable efficient performance of those functions, and to the standards imposed by s 203BA(2), the distinction drawn in s 203B(3) between "a representative body", on the one hand, and "another person" with whom the representative body must not enter into an arrangement under which the person is to perform its functions, on the other hand, cannot be a distinction between the representative body as an artificial person and all other natural or artificial persons. Nor can it be a distinction between the membership or governing body of the representative body and all other persons.

32 The distinction drawn in s 203B(3) between a representative body and another person must instead be a distinction between the representative body, including all natural persons or groups of natural persons having authority to perform its functions within the organisational structures and administrative processes established by or under its constating statute, and all persons (natural or artificial) who are external to the organisational structures and administrative processes established by or under its constating statute. The natural persons or

47 Section 201A of the NT Act, definitions of "director", "executive officer" and "governing body".

groups of natural persons who can perform the functions of a representative body are limited by s 203B(3) to the former category.

33 The power conferred on a representative body by s 203BK(1) in the familiar terms of a power "to do all things necessary or convenient to be done for or in connection with the performance of its functions", though "broad"⁴⁸, is "strictly ancillary", authorising "the provision of subsidiary means of carrying into effect what is enacted in the statute itself" and encompassing "what is incidental to the execution of its specific provisions"⁴⁹. The power does "not support the doing of a thing which departs from the scheme of the enactment by which the power is conferred"⁵⁰.

34 That limitation is important. The scheme of Pt 11 of the NT Act, as has been seen, involves taking an eligible body recognised as a representative body as it exists under its constating statute subject to the organisational structures and administrative processes established by or under that constating statute for the performance of its functions as a representative body complying, or at least being seen by the Commonwealth Minister to comply, with the requirements of s 203BA(2). And the scheme of Pt 11, as has been seen, involves confining by s 203B(3) the natural persons or groups of natural persons through whom the eligible body can perform its functions as a representative body to those within its organisational structures and administrative processes upon whom authority is conferred by or under its constating statute to perform those functions as its delegates or as its agents or emanations.

35 Section 203BK(1) does not empower a representative body to transgress those limits. Section 203BK operates as an exception to s 203B(3) only to the extent that s 203BK(2) makes clear that s 203B(3) does not prevent a representative body from engaging external service providers to assist natural persons within the organisational structures and administrative processes established by or under its constating statute to perform its functions.

48 *Palmer v Australian Electoral Commission* (2019) 93 ALJR 947 at 955 [44]; 372 ALR 102 at 112.

49 *Shanahan v Scott* (1957) 96 CLR 245 at 250.

50 *Palmer v Australian Electoral Commission* (2019) 93 ALJR 947 at 958 [65]; 372 ALR 102 at 115, citing *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410.

13.

36 Contrary to the view of the primary judge⁵¹ and contrary to the principal arguments of the NLC and the CEO and of the Northern Territory, s 203BK(1) cannot be treated as an independent source of power to delegate the performance of a function of a representative body. If the representative body has power under its constating statute to delegate performance of the function within its organisational structures and administrative processes, no further power is needed. If the representative body has no power under its constating statute to delegate performance of the function, s 203BK(1) cannot overcome that limitation on its power.

37 The conclusion to which that leads is that, unless the certification function conferred by s 203BE(1)(b) can be seen to exhibit some special feature confining performance of that function to the members or governing body of a representative body, delegation of the certification function to a natural person within the organisational structures and administrative processes established by or under its constating statute is not incompatible with the scheme of the NT Act but the power to delegate must be found, if at all, in the constating statute.

38 Before turning to examine whether the certification function can be seen to exhibit some such special feature, something needs to be said of s 203FH in deference to the prominence given to that provision in the arguments of the interveners. For anything meaningful to be said about s 203FH, more must first be said about the structure of Pt 11.

39 Following on from Div 3 within Pt 11 are four more Divisions which impose numerous obligations on a representative body. Division 4 deals with provision of Commonwealth funding. Division 5 deals with financial accounting and corporate accountability. Division 6 deals with conduct of directors and other executive officers. Division 7, headed "Miscellaneous", contains provisions explaining those obligations and facilitating their enforcement. Section 203FH is within Div 7.

40 Within that context, s 203FH(1) imputes to a body corporate the "state of mind" of a director, employee or agent of the body corporate who engaged in "conduct" within the scope of his or her "actual or apparent authority". Section 203FH(2) deems "conduct" engaged in by a director, employee or agent of the body corporate within the scope of his or her "actual or apparent authority" to have been also engaged in by the body corporate unless the body corporate can establish that it "took reasonable precautions and exercised due diligence to avoid the conduct". The imputation in s 203FH(1) and the deeming in s 203FH(2) are both expressed to be "for the purposes of this Part". Section 203FH(6) specifies that an

51 *Quall v Northern Land Council* [2018] FCA 989 at [23]-[28].

opinion is a "state of mind" within s 203FH(1). Section 203FH(8) specifies that "conduct" within the whole of s 203FH includes failing or refusing to engage in conduct.

41 It is noteworthy that, in a piece of legislation that makes express reference to the "executive officers" and the "governing body" of a representative body, the certification function is not reposed in either of these groups of natural persons but in the representative body itself. Beyond the obvious point that s 203FH is framed on the assumption that an eligible body will do things related to the performance of its functions as a representative body through natural persons, s 203FH has no bearing on the question of which natural persons are authorised to perform any function of a representative body or on the question of by which natural person or persons an opinion required to be held by a representative body as a precondition to the exercise of a function might be formed⁵². As is indicated by its placement within Div 7, its unqualified references to an "agent" of a body corporate (who might well be an external service provider such as an accountant), its similarly unqualified references to "conduct" (which need not be the doing of anything in the actual performance or purported performance of any function conferred under Div 3 and can be the doing of nothing at all), its extension beyond "actual authority" to "apparent authority" (a concept based on estoppel which cannot give legal efficacy to a purported exercise of authority that is in excess of a statutory limitation on the permitted scope of authority⁵³), and its inclusion within s 203FH(2) of a "due diligence" defence, not to mention its provenance in earlier provisions of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth)⁵⁴ which were unmistakeably directed to corporate responsibility, s 203FH is directed not to the capacity of any natural person to perform any function conferred on a representative body under Div 3 but to the liability of a representative body

52 *Contra McGlade v South West Aboriginal Land & Sea Aboriginal Corporation* [No 2] (2019) 374 ALR 329 at 419 [333].

53 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 159-160, 172-175. See also *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 17.

54 Section 199 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). See Australia, House of Representatives, *Aboriginal and Torres Strait Islander Commission Bill 1989*, Explanatory Memorandum at 116; Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 306-307. See earlier s 84 of the *Trade Practices Act 1974* (Cth), as discussed in *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719 at 738-739; *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27 at 35-37.

for non-compliance with an obligation imposed on the representative body by or under Div 4, 5, 6 or 7 by reason of any act or omission of a natural person.

Certification function or functions

42 The function of certifying an application for registration of an ILUA relating to an area of land or water wholly or partly within the area for which it is a representative body conferred by s 203BE(1)(b) is one of two certification functions conferred on a representative body by s 203BE. The other is the function conferred by s 203BE(1)(a) of certifying an application for a determination of native title relating to such an area.

43 The precondition set out in s 203BE(5) to performance of the certification function conferred by s 203BE(1)(b) is mirrored by an equivalent precondition set out in s 203BE(2) to performance of the certification function conferred by s 203BE(1)(a). Section 203BE(5) provides:

"A representative body must not certify under paragraph (1)(b) an application for registration of an indigenous land use agreement unless it is of the opinion that:

- (a) all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified; and
- (b) all the persons so identified have authorised the making of the agreement."

44 Persons holding native title in relation to land or waters "authorise" the making of the ILUA within the meaning of the NT Act if those persons authorise its making in accordance with a process of decision-making required by their traditional laws and customs or otherwise in accordance with a process of decision-making agreed to and adopted by them⁵⁵. Likewise, persons in a native title claim group "authorise" the making of an application for a determination of native title within the meaning of the NT Act if those persons authorise its making in accordance with a process of decision-making required by their traditional laws and customs or otherwise in accordance with a process of decision-making agreed to and adopted by them⁵⁶.

55 Section 251A of the NT Act.

56 Section 251B of the NT Act.

45 The Full Court was persuaded to the conclusion that the certification function conferred by s 203BE(1)(b) is incapable of delegation having regard to two main considerations. The first was an apprehension, which would logically apply equally in relation to all other functions conferred on a representative body under Div 3, that s 203B(3) read together with s 203BK(2) tells against delegation⁵⁷. That apprehension is not well founded for reasons that have been addressed⁵⁸ and that need not be revisited.

46 The second was an apprehension addressed by the Full Court specifically to the certification function conferred by s 203BE(1)(b) having regard to the precondition set out in s 203BE(5), although there appears to be no reason to think that it would not apply equally to the certification function conferred by s 203BE(1)(a) having regard to the equivalent precondition set out in s 203BE(2). The apprehension was that the nature of the opinion required to be formed as a precondition to performance of the function is peculiarly adapted to performance by the members of a representative body in plenary session by reason of the representative nature of the membership of the representative body⁵⁹. That apprehension is also not well founded.

47 The Full Court's conception of the representative nature of the membership of a representative body resonates with the regime of Pt 11 of the NT Act in its original form, which allowed the Commonwealth Minister to determine any "body" to be a "representative Aboriginal/Torres Strait Islander body for an area" if satisfied that the body was "broadly representative of the Aboriginal peoples or Torres Strait Islanders in the area"⁶⁰. The 1998 and 2007 amendments combined to replace the regime for determination of a "body" to be a "representative Aboriginal/Torres Strait Islander body for an area" with the current regime of recognition of an "eligible body" as a "representative body" and made provisions for bodies which had been determined to be representative Aboriginal/Torres Strait

57 *Northern Land Council v Quall* (2019) 268 FCR 228 at 257-259 [101]-[104], 265 [135], 267-268 [145]-[146].

58 See above at [26]-[35].

59 *Northern Land Council v Quall* (2019) 268 FCR 228 at 256-257 [98]-[100], 266 [136]-[137], 269 [153]-[155].

60 Section 202(3)(a) of the NT Act as originally enacted.

Islander bodies to apply as eligible bodies for recognition as representative bodies⁶¹.

48 To continue to conceive of a representative body as taking its essential character from the representative make-up of its membership fails to accommodate the range of eligible bodies now capable of being recognised by the Commonwealth Minister as representative bodies. It also fails to accommodate the range of organisational structures and administrative processes by which a representative body might perform its representative functions consistently with s 203BA(2). The decisions of differently constituted Full Courts in *Kemppi v Adani Mining Pty Ltd [No 2]*⁶² and *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation [No 2]*⁶³ illustrate that a certification function performed by a representative body that is a company incorporated under the *Corporations Act* might in practice fall to be performed through its chief executive officer.

49 Moreover, the subject matter of the opinion required by s 203BE(5) to be formed by a representative body as a precondition to performance of the certification function conferred by s 203BE(1)(b) is a question of fact. As has already been explained⁶⁴, it is a question of fact about which the Registrar or a delegate of the Registrar may be required to form his or her own opinion, which can prevail over that of a representative body in the event of objection to a certified application for registration, and a question of fact about which the Registrar or delegate of the Registrar must form his or her own opinion in the event of an uncertified application for registration of an ILUA.

50 The process of making and registering an application for a determination of native title has complexities which are unnecessary to explore. Suffice it to note that the subject matter of the opinion required by s 203BE(2) to be formed by a representative body as a precondition to performance of the certification function conferred on it by s 203BE(1)(a) is a similar question of fact, about which each of

61 See Sch 3 to the *Native Title Amendment Act 1998* (Cth); Sch 1 to the *Native Title Amendment Act 2007* (Cth).

62 (2019) 271 FCR 423 at 447 [56].

63 (2019) 374 ALR 329 at 419 [329]-[330].

64 See above at [5]-[7].

the Federal Court⁶⁵, the Registrar or delegate of the Registrar⁶⁶ and the National Native Title Tribunal⁶⁷ can be required to form and act on their own opinions.

51 Not only is a question of fact of the nature posed by s 203BE(5) and by s 203BE(2) not peculiarly adapted to determination by the membership or governing body of a representative body, but there are reasons to consider that such a question of fact might be peculiarly ill-adapted to determination by the membership or governing body of a representative body. The burden of receiving and assessing extensive and potentially contentious evidence is one. The potential for conflicts of interest to occur is another.

52 The notion that some special feature of the certification functions conferred by s 203BE or of the specific certification function conferred by s 203BE(1)(b) confines performance to the membership or governing body of a representative body must therefore be rejected.

Delegation under the ALR Act

53 Axiomatically, a statutory corporation's "power and authority to do any particular thing" is to be found, if at all, "in the language of the statute, in what it expressly provides and what it inferentially provides as a matter of necessary implication"⁶⁸. Proceeding upon that premise, there remains finally to examine the ALR Act to determine whether the NLC can delegate to the CEO a function conferred on the NLC as a representative body by the NT Act.

54 The NLC is one of four Land Councils that have long been established under Pt III of the ALR Act each for a distinct area of the Northern Territory⁶⁹. Three of those Land Councils were determined under the NT Act to be representative Aboriginal/Torres Strait Islander bodies for an equivalent area in

65 Section 84C of the NT Act. See eg *Quall v Risk* [2001] FCA 378; *Bodney v Western Australia* [2003] FCA 890.

66 Section 190C(4) of the NT Act.

67 Section 190E(12) of the NT Act.

68 *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 130.

69 Section 21 of the ALR Act. They are the NLC, the Central Land Council, the Tiwi Land Council and the Anindilyakwa Land Council.

1993⁷⁰. Two of those Land Councils (the NLC and the Central Land Council), on application, were recognised as representative bodies under Div 2 of Pt 11 of the NT Act in its current form in 2018⁷¹.

55 Under Pt III of the ALR Act, a Land Council is a body corporate with perpetual succession⁷², the functions of which include but are not confined to functions conferred by Pt III of the ALR Act⁷³, the members of which are Aboriginal people living in the area or who are registered as traditional owners of the area⁷⁴ who have been chosen by Aboriginal people living in the area in accordance with a method or methods of choice from time to time approved by the Minister or who are co-opted by the Land Council with the approval of the Minister⁷⁵, and the Chair of which is a member chosen by members at a meeting of the Land Council⁷⁶.

56 The Chair of a Land Council is obliged to convene such meetings of the Land Council "as are, in his or her opinion, necessary for the efficient conduct of its affairs"⁷⁷. At a meeting of the Land Council, attendance by at least half of its

70 *Determination of Representative Aboriginal/Torres Strait Islander Bodies* (Commonwealth of Australia Gazette, No S 402, 30 December 1993 at 9-12). Those Land Councils were the NLC, the Central Land Council and the Tiwi Land Council. The determination took effect on 1 January 1994.

71 *Native Title (Recognition as Representative Body – Northern Land Council) Instrument 2018*; *Native Title (Recognition as Representative Body – Central Land Council) Instrument 2018*.

72 Section 22 of the ALR Act.

73 Section 23 of the ALR Act.

74 Under s 24 of the ALR Act.

75 Section 29 of the ALR Act.

76 Section 30 of the ALR Act.

77 Section 31(1) of the ALR Act.

members is needed to constitute a quorum⁷⁸ and any question arising is required to be decided by a majority of the votes of members present and voting⁷⁹.

57 Part III of the ALR Act empowers a Land Council to "appoint a committee or committees of its members to assist [it] in relation to the performance of any of its functions"⁸⁰. A committee so appointed must consist of a minimum number of members⁸¹ and must operate under rules for the convening and conduct of meetings that are made by the Land Council⁸², given to the Minister⁸³, and open to inspection by the traditional Aboriginal owners of Aboriginal land in its area and by other Aboriginal people living in the area⁸⁴.

58 Mirroring the permission given to a representative body by the NT Act, the ALR Act permits a Land Council to allocate resources in the way it thinks fit in order to be able to perform its functions efficiently⁸⁵. And mirroring the requirements of the NT Act as to how the functions of a representative body are to be performed, the ALR Act obliges a Land Council to use its best efforts to perform its functions in a timely manner⁸⁶ and in a manner that "maintains organisational structures and administrative processes that promote the satisfactory representation by [it] of, and promote effective consultation with, the traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in [its] area" and that "ensures that the structures and processes operate in a fair manner"⁸⁷.

78 Section 31(4) of the ALR Act.

79 Section 31(5) of the ALR Act.

80 Section 29A(1) of the ALR Act.

81 Section 29A(3) of the ALR Act.

82 Section 29A(4) of the ALR Act.

83 Section 29A(5) of the ALR Act.

84 Section 29A(7) of the ALR Act.

85 Section 23AA(2) of the ALR Act.

86 Section 23AA(4) of the ALR Act.

87 Section 23AA(5) of the ALR Act.

59 Section 27(1) of the ALR Act provides that "[s]ubject to this Act, a Land Council may do all things necessary or convenient to be done for or in connexion with the performance of its functions and, without limiting the generality of the foregoing, may: (a) employ staff ...". The CEO is a member of the staff of the NLC employed in the exercise of the specific power conferred by s 27(1)(a).

60 Section 28(1) provides that a Land Council may delegate to its Chair, to another of its members, or to a member of its staff "any of the Council's functions or powers under this Act" other than functions which that sub-section specifically excludes. Section 28(2) provides in materially identical terms that a Land Council may delegate to a committee that it has appointed "any of the Council's functions or powers under this Act" other than functions which that sub-section specifically excludes.

61 Understanding the scope and interrelationship of ss 27(1) and 28(1) and (2) is assisted by reference to two well-established principles of statutory construction. One is that "when a statute confers both a general power, not subject to limitations and qualifications, and a special power, subject to limitations and qualifications, the general power cannot be exercised to do that which is the subject of the special power"⁸⁸. The other is that "a court construing a statutory provision must strive to give meaning to every word of the provision"⁸⁹.

62 Having regard to the first of those principles of statutory construction, the general power conferred on a Land Council by s 27(1) to "do all things necessary or convenient to be done for or in connexion with the performance of its functions" is to be read as excluding any power to delegate "any of the Council's functions or powers under this Act" which s 28(1) and (2) identify as the subject matter of the special powers of delegation which they confer subject to the limitations and qualifications they specify. Having regard to the second of those principles of statutory construction, however, the unqualified reference in s 27(1) to a Land Council's "functions" is to be read as extending beyond the references in s 28(1) and (2) to a Land Council's "functions ... under this Act" to include functions conferred on a Land Council by or under another Commonwealth Act.

88 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678, referring to *Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

89 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71]. See also *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679.

63 The result is that no impediment appears on the face of the ALR Act to the power conferred by s 27(1) being available to support delegation of a function conferred on a Land Council by or under another Commonwealth Act if delegation of that function can be characterised as something "necessary or convenient to be done for or in connexion with the performance" of that function or other functions of the Land Council. A "necessary or convenient" power of that nature has already been emphasised to be ancillary, subsidiary or incidental.

64 That which is necessary or convenient to be done for or in connection with the performance of one or more functions conferred on a Land Council by or under one or more Commonwealth Acts extends, but is limited, to that which conduces to "the more effective administration"⁹⁰ of one or more of those functions. Whether the doing of a thing meets that requirement of conducing to more effective administration is an objective question of fact and degree⁹¹. The bounds of the power conferred by s 27(1) are set by the need for the circumstances of its exercise to yield a positive answer to that question. There is no *a priori* reason why delegation of a function to a member of staff engaged under s 27(1)(a) cannot fall within those bounds.

65 The presumption of statutory interpretation reflected in the maxim *delegatus non potest delegare*, that a statutory function is to be performed by none but the statutory repository of the function, yields to "any contrary indications found in the language, scope or object of the statute"⁹². In *Bayly v Municipal Council of Sydney*⁹³ the Supreme Court of New South Wales held that a statutory provision conferring power on a Municipal Council to engage and assign duties to officers and servants⁹⁴ permitted the Council to delegate to a senior officer the appointment and discharge of junior employees, observing that the provision "cannot be construed so as to impose upon the Council the duty of itself appointing every officer or servant that may be necessary from the highest to the lowest" given

90 cf *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410.

91 *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 145-146, 153-154, 160; *Palmer v Australian Electoral Commission* (2019) 93 ALJR 947 at 958 [68]; 372 ALR 102 at 116.

92 Willis, "Delegatus Non Potest Delegare" (1943) 21 *Canadian Bar Review* 257 at 259.

93 (1927) 28 SR (NSW) 149.

94 Section 59(1) of the *Sydney Corporation Act 1902* (NSW).

that "[s]uch a requirement would be intolerable and impracticable in the management of the affairs of a corporation such as that of the City of Sydney"⁹⁵. Much later, in *Ex parte Forster; Re University of Sydney*⁹⁶, the Supreme Court held that a power conferred on the Senate of the University of Sydney to "act in such manner as appears to them to be best calculated to promote the purposes of the University" in the "management of and superintendence over the affairs ... of the University"⁹⁷ empowered the Senate to delegate to committees established within Faculties of the University specific power to exclude students who repeatedly failed courses of study within those Faculties. In so holding, the Supreme Court observed that "the application of the maxim, and its extent, must be considered with due regard to the purpose and objects of the statute, the character of the power which is conferred, the exigencies of the occasions which may arise with respect to its exercise, and other relevant considerations"⁹⁸.

66 That the power conferred on a Land Council by s 27(1) encompasses power to delegate to a member of its staff a function conferred on the Land Council by or under another Act, to the extent that delegation conduces to the more effective administration of that function or other functions, is indicated by the constitution of the Land Council as a corporation and by the specific power conferred on the Land Council by s 27(1)(a) to engage staff. The specific power necessarily carries with it power to assign responsibilities to members of staff. Power to delegate such functions to a member of its staff is further indicated by the concurrent ability of the Land Council under s 28(1) to delegate to a member of its staff functions conferred on the Land Council under the ALR Act itself, by the variety of functions which might potentially be conferred on the Land Council under other Acts, and by the capacity for those other Acts to exclude or limit delegation in a manner tailored to the achievement of their specific objects.

67 More specifically, power to delegate to a member of the staff of a Land Council functions conferred on the Land Council as a representative body under Div 3 of Pt 11 of the NT Act is indicated by the complementary provision that is made in Pt III of the ALR Act and in Div 3 of Pt 11 of the NT Act for a Land

95 (1927) 28 SR (NSW) 149 at 153-154.

96 [1963] SR (NSW) 723.

97 Section 14(2) of the *University and University Colleges Act 1900* (NSW).

98 *Ex parte Forster; Re University of Sydney* [1963] SR (NSW) 723 at 733. See also *Re Reference under Section 11 of the Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 at 93.

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Gageler J
Keane J

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Council that is also a representative body to allocate resources in the way it thinks fit in order to enable efficient performance of the totality of its functions.

68 The power conferred on a Land Council by s 27(1) is therefore to be interpreted, consistently with the argument of the Attorney-General of the Commonwealth, as encompassing power to delegate to a member of staff engaged under s 27(1)(a) a function conferred on the Land Council under Div 3 of Pt 11 of the NT Act to the extent that delegation of that function is objectively necessary or convenient to be done for or in connection with the performance of that function or other of the Land Council's functions.

69 Whether delegation of the certification function by the NLC to the CEO is or was at any relevant time objectively necessary or convenient to be done for or in connection with the performance of the certification function or of any other function or functions of the NLC is beyond the scope of the issues raised in the appeal.

70 To the extent that s 27(1) encompasses such a power of delegation, exercise of the power of delegation attracts the operation of ss 34AB and 34A of the AI Act. By operation of s 34AB(1)(c), a function performed by a member of staff as delegate of the Land Council is deemed for the purposes of the ALR Act to have been performed by the Land Council. And by operation of s 34A, if performance of the function is dependent upon the Land Council's opinion in relation to a matter, the member of staff as delegate can perform that function upon his or her own opinion in relation to that matter.

Conclusion

71 The result is that the NLC has power under s 27(1) of the ALR Act to delegate to the CEO the certification function conferred on the NLC as a representative body by s 203BE(1)(b) of the NT Act if and to the extent that delegation is objectively necessary or convenient to be done for or in connection with performance of the certification function or other functions of the NLC.

72 If the certification function is duly delegated by the NLC to the CEO under s 27(1) of the ALR Act, the CEO in performing that function is allowed by s 34A of the AI Act to form his or her own opinion about the subject matter of s 203BE(5) of the NT Act. Performance of the certification function by the CEO is then deemed by s 34AB(1)(c) of the AI Act to amount to performance of that function by the NLC for the purposes of the ALR Act. Because performance of the certification function by the CEO amounts to performance of the certification function by the NLC for the purposes of its constating statute, performance by the CEO also amounts to performance of the certification function by the NLC for the purposes of the NT Act.

Orders

- 73 The appeal to this Court must be allowed. The declaration made by the Full Court must be set aside and with it the order made by the Full Court allowing the cross-appeal. They are to be replaced with an order dismissing the cross-appeal. The orders made by the Full Court dismissing the application for leave to adduce fresh evidence in the appeal to it and dismissing the appeal to it must also be set aside. The unresolved appeal to the Full Court, including the unresolved application for leave to adduce fresh evidence in that appeal, is to be remitted to the Full Court.
- 74 Lest there be any doubt, it should be made clear that the issue remaining for determination in the remitted appeal is whether the certification function conferred on the NLC as a representative body by s 203BE(1)(b) of the NT Act was in fact duly delegated by the NLC to the CEO under s 27(1) of the ALR Act.
- 75 In accordance with undertakings given as a condition of the grant of special leave to appeal, the NLC and the CEO are to bear Mr Quall's and Mr Fejo's costs of the appeal limited to one set of costs. In accordance with undertakings given as a condition of the grant of leave to intervene, the Attorney-General of the Commonwealth and the Northern Territory are to bear jointly with the NLC and the CEO Mr Quall's and Mr Fejo's costs of the appeal as so limited.

NETTLE AND EDELMAN JJ.

Introduction

76 We have had the benefit of reading in draft the joint reasons of Kiefel CJ, Gageler and Keane JJ, which set out, in considerable detail, the legislative provisions and the history of this litigation, which need not be repeated. We agree that if it is consistent with the Northern Land Council's ("NLC's") constitutive statutes and instruments, the NLC can perform the functions conferred upon it as "a representative body" under s 203BE(1)(b) of the *Native Title Act 1993* (Cth) to certify in writing particular applications for registration of indigenous land use agreements ("ILUAs") through its Chief Executive Officer ("CEO").

77 This conclusion was expressed in the reasons of the primary judge, and in submissions of the appellants in this Court, in the language of "delegation". The proper expression, and process of reasoning, however, should be in terms of agency. As Brennan J has explained⁹⁹, the terms "agency" and "delegation" have a "confusing similarity". He added that they are sometimes used in a loose and interchangeable manner that is "radically mistaken"¹⁰⁰ as they connote different sources of validity for acts. An agent, in a strict or precise sense, acts on behalf of another and generally in the name of that other. The agent's acts are attributed to the other. A delegate, in a strict or precise sense, acts on their own behalf and generally in their own name. Hence, a non-delegable duty or function is one that must only be performed by the nominated person or their agent.

78 The functions conferred by the *Native Title Act* upon a representative body are substantial and specialised. One specialised function is the certification of ILUAs in an area for which the specific representative body has been recognised by the Commonwealth Minister. Unsurprisingly, apart from some instances of facilitation and representation or obtaining services to assist in the performance of its functions, or an incidental power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions, a representative body is prohibited from "enter[ing] into an arrangement with another person under which the person is to perform the functions of the

99 *Re Reference under Section 11 of the Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 at 94.

100 *Re Reference under Section 11 of the Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 at 94, quoting *Blackpool Corporation v Locker* [1948] 1 KB 349 at 377.

representative body"¹⁰¹. Even without such an express non-delegation provision, the functions of the representative body, including certification, are almost a textbook example of functions that would be non-delegable by implication¹⁰². However, the power to act personally through an agent is a different matter. A representative body can, and indeed must, act through natural persons, as agents. In the case of the NLC, those persons include the CEO if its constituting statutes and instruments so permit.

79 At times the submissions in this Court were like ships passing in the night. With the exception of the precisely tailored submissions made by the respondents, the parties and intervenors oscillated in their use of "delegation" from the loose sense that includes agency to the precise sense in which the delegate does not act for another. Re-expressed in the more precise language of agency, the essential submission made by the Attorney-General of the Commonwealth, intervening in support of the appellants, should be accepted. That submission relied by analogy upon the following reasoning of the Full Court of the Federal Court of Australia in *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation [No 2]*¹⁰³ concerning an Aboriginal and Torres Strait Islander corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth):

"In conducting its business, which includes performing any functions conferred on it and exercising its powers, an ATSI corporation does so through its directors and/or its authorised employees and agents. A function so performed is properly characterised as the performance of the function by the ATSI corporation itself, not a CEO or anyone else ...

[Such performance] 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".

80 A recognition that the representative body can perform its certification function through agents removes the need to draw an implication from s 27(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("the ALR Act") of a power to delegate the functions of a Land Council under the *Native Title Act*.

¹⁰¹ *Native Title Act*, s 203B(3), read with ss 203BB, 203BD, 203BK.

¹⁰² See and compare *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Q)* (1979) 142 CLR 460 at 481.

¹⁰³ (2019) 374 ALR 329 at 419 [329]-[330].

Such an implication of delegation, in its precise sense, would contradict the scheme and the terms of both the ALR Act and the *Native Title Act*.

Agency and delegation

81 In *Kennedy v De Trafford*¹⁰⁴, in an observation repeated in this Court by Dixon J¹⁰⁵, Lord Herschell said that "[n]o word is more commonly and constantly abused than the word 'agent.'" A close second might be the word "delegate".

82 In its most precise description, the concept of "agency" should be used "to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties"¹⁰⁶. As suggested by the maxim *qui facit per alium facit per se*¹⁰⁷ the acts of an agent are, in law, attributed to the principal¹⁰⁸. A company director or chief executive who has authority to bind the company in its legal relations with third parties is an agent in this strict sense. Since a company "'cannot act in its own person for it has no person' ... it must of necessity act by directors, managers, or other agents"¹⁰⁹. Rules of attribution such as those in s 203FH of the *Native Title Act*, considered below, are concerned with attributing the acts of agents to the company. These rules of

104 [1897] AC 180 at 188.

105 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50. See also *Scott v Davis* (2000) 204 CLR 333 at 408 [227].

106 *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652. See also *Scott v Davis* (2000) 204 CLR 333 at 408 [227].

107 "He, who acts by another, acts by himself". See Story, *Commentaries on the Law of Agency*, 9th ed (1882) at 517, 548; Dal Pont, *Law of Agency*, 4th ed (2020) at 5 [1.2]; Watts and Reynolds, *Bowstead and Reynolds on Agency*, 21st ed (2018) at 20 [1-027]. See also *Christie v Permewan, Wright & Co Ltd* (1904) 1 CLR 693 at 700; *Petersen v Moloney* (1951) 84 CLR 91 at 94.

108 The maxim is also expressed as *qui facit per alium, per seipsum facere videtur*. See Story, *Commentaries on the Law of Agency*, 9th ed (1882) at 2.

109 *O'Brien v Dawson* (1942) 66 CLR 18 at 32, quoting *Ferguson v Wilson* (1866) 2 Ch App 77 at 89. See also *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 198-199; Watts and Reynolds, *Bowstead and Reynolds on Agency*, 21st ed (2018) at 21-24 [1-028]; Dal Pont, *Law of Agency*, 4th ed (2020) at 30 [1.41].

attribution for corporate acts have been said to be "completely irrelevant" to any vicarious liability of a company¹¹⁰. Any liability of the representative body that arises from attribution of the acts of agents is primary, not derivative or vicarious¹¹¹.

83 As to delegation, that concept is sometimes used loosely to describe only an authorisation to act. In that loose sense, a delegation to act in a way that will bind another can sometimes be indistinguishable from agency. Hence, in a passage relied upon by the appellants from *Huth v Clarke*¹¹², Wills J said that "the word 'delegate' means little more than an agent". That definition has been subject to polite expressions of great doubt¹¹³. In a more precise sense, the concept of delegation involves an authorisation to act personally rather than as an agent. As Stevens J said in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*¹¹⁴, a delegate exercises "power as their own. They do not exercise the delegator's power through the delegator ... The delegate must exercise their own independent discretion in the exercise of their delegated power." That is why a delegate exercises the powers delegated to them by acting in their own name¹¹⁵ but an agent acts in the name of the authority¹¹⁶. That is also why the lack of a high

110 Worthington, "Corporate Attribution and Agency: Back to Basics" (2017) 133 *Law Quarterly Review* 118 at 125.

111 *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* (2016) 250 FCR 136 at 147-149 [48]-[56], cited in *IL v The Queen* (2017) 262 CLR 268 at 285 [34].

112 (1890) 25 QBD 391 at 395.

113 *Blackpool Corporation v Locker* [1948] 1 KB 349 at 391.

114 [2013] 2 NZLR 679 at 702 [61].

115 *Owendale Pty Ltd v Anthony* (1967) 117 CLR 539 at 562, 611; *Re Reference under Section 11 of the Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 at 94; *R (King) v Secretary of State for Justice* [2016] AC 384 at 410 [49].

116 *London County Council v Agricultural Food Products Ltd* [1955] 2 QB 218 at 223-224; *Re Reference under Section 11 of the Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 at 94.

degree of legal control over the person exercising the act will mean that the person exercises it as a delegate and not as an agent¹¹⁷.

84 A case that illustrates the difference between agency and delegation in their more precise senses is *O'Reilly v State Bank of Victoria Commissioners*¹¹⁸. In that case it was common ground that (i) the Commissioner of Taxation and his delegate, the Deputy Commissioner, had power to issue a particular notice in writing but (ii) the Deputy Commissioner could not further delegate that power¹¹⁹. Gibbs CJ, with whom Murphy J agreed, accepted that the notice in writing could nevertheless be issued "through a properly authorized officer", named Mr Holland, who acted "on behalf of the Deputy Commissioner" with his acts being the acts of the Deputy Commissioner¹²⁰. Mr Holland was an agent. He was not a delegate. As Wilson J said¹²¹:

"There has been no transfer to Mr Holland of any power vested in the Deputy Commissioner. The power which Mr Holland has been authorized to exercise remains a power delegated to the Deputy Commissioner; it can be exercised only in his name and on his behalf."

85 Some of the most significant potential differences between an agent and a delegate at common law have been removed by the *Acts Interpretation Act 1901* (Cth). For instance, it had been held at common law that a delegation of substantial power by an authority prevents the exercise of that power by the authority while the delegation subsists¹²². The consequences of that conclusion are ameliorated by s 34AB(1)(d) of the *Acts Interpretation Act*, which provides that "a delegation by the authority does not prevent the performance or exercise of a function, duty or power by the authority". Further, since a power exercised by a delegate is exercised personally, the usual common law rule was that it be exercised in the name of the delegate, and not on behalf of the delegating authority

117 *Ex parte Forster; Re University of Sydney* [1963] SR (NSW) 723 at 733.

118 (1982) 153 CLR 1.

119 *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1 at 10, 30.

120 *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1 at 13. See also *Lee v Commissioner of Taxation* (1962) 107 CLR 329 at 335.

121 *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1 at 30.

122 *Blackpool Corporation v Locker* [1948] 1 KB 349 at 377-378; *Department for Environment Food and Rural Affairs v Robertson* [2004] ICR 1289 at 1321 [45].

as principal¹²³. But the consequences of this conclusion are ameliorated by s 34AB(1)(c) of the *Acts Interpretation Act*, which provides that the statutory power, "when performed or exercised by the delegate, shall, for the purposes of the Act, be deemed to have been performed or exercised by the authority".

86 Notwithstanding the narrowing of the difference in legal effect between an act of an agent and that of a delegate, the distinction can be important. It is important to the analysis in this case. There is a long-established principle – *delegatus non potest delegare* – which has the effect that a repository of statutory power has no power to delegate that statutory power. Although the principle is subject to express or implied statutory provision to the contrary, it is very unlikely to be displaced by implication where, as here, a specialised power is vested in a specific person, namely a representative body, chosen due to its capacities and attributes. But before that analysis is undertaken, an anterior question must be how the repository of the statutory power would itself exercise its powers. For instance, if the *Native Title Act* permits a representative body, consistently with its constitution, to exercise its certification functions through its CEO as agent then there could be little room for any statutory implication of a power to delegate its specialised functions to its CEO. In short, where the repository of a statutory power is a body corporate, which can only act through natural persons, issues of agency should generally be considered before issues of delegation.

87 No issue arises in this appeal as to what is sometimes described as the *Carltona* doctrine¹²⁴, by which legislation is sometimes construed, for reasons including administrative necessity, to permit one person to perform the acts assigned by statute to another. Whether the person who so performs is properly regarded as an agent or a delegate need not be considered. No argument based on this principle was run before the Full Court of the Federal Court of Australia¹²⁵, and this principle was not ultimately pressed in the application for special leave to appeal to this Court.

123 *Owendale Pty Ltd v Anthony* (1967) 117 CLR 539 at 562, 611; *Re Reference under Section 11 of the Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 at 94; *R (King) v Secretary of State for Justice* [2016] AC 384 at 410 [49].

124 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563. And see *R v Adams* [2020] 1 WLR 2077.

125 *Northern Land Council v Quall* (2019) 268 FCR 228 at 242 [46], 243 [52].

The specialist functions of a representative body and its agents

The specialist functions of a representative body

88 As originally conceived by the *Native Title Act*, a representative body was required to be "broadly representative of the Aboriginal peoples or Torres Strait Islanders in the area" for which it was determined that the body was representative¹²⁶. The current regime is a careful process, subject to ongoing protections, which requires the selection of a representative body with requirements that it be an "eligible body" with a continuing entitlement to perform specialist functions including facilitation and assistance, dispute resolution, notification, agreement making, internal review, and certification¹²⁷.

89 To be a representative body, the first requirement is that the body is a corporation that falls within s 201B, including a company incorporated under the *Corporations Act 2001* (Cth)¹²⁸ and, as in this case, a body corporate established by or under a law of the Commonwealth¹²⁹. The NLC was established under the ALR Act. Before a corporation can become a representative body that can perform these specialist functions it must apply for recognition in relation to a particular area and must be recognised for that area by the Commonwealth Minister after the Minister is satisfied that the body would be able to perform satisfactorily the functions of a representative body¹³⁰. It will remain a representative body for the period provided by the instrument of recognition, which cannot exceed six years¹³¹, or until the Minister withdraws recognition, for reasons which include the Minister's satisfaction that the body is not satisfactorily performing its functions¹³². These detailed rules cast serious doubt upon the submission that the functions of a representative body could be performed personally by any other body.

126 *Native Title Act*, s 202(3)(a) (as originally enacted).

127 *Native Title Act*, s 203B(1). See ss 203BB, 203BE, 203BF, 203BG, 203BH, 203BI, 203BJ.

128 *Native Title Act*, s 201B(1)(ba).

129 *Native Title Act*, s 201B(1)(c).

130 *Native Title Act*, s 203AD(1)(d).

131 *Native Title Act*, s 203AD(3A).

132 *Native Title Act*, s 203AH(2)(a).

90 The *Native Title Act* does not merely regulate the manner in which a representative body is to be selected and the conditions of it remaining as a representative body. It also requires that its functions be performed in a timely manner¹³³, and that it maintain "organisational structures and administrative processes" which promote satisfactory representation of native title holders and persons who may hold native title in the area for which the body is representative, promote effective consultation with Aboriginal peoples and Torres Strait Islanders living in that area, and operate in a fair manner¹³⁴. The representative body must itself determine its priorities for the performance of its functions and may allocate resources for the performance of functions but must give priority to the protection of the interests of native title holders¹³⁵. There is no hint of a suggestion that these functions could, or should, be performed by any person other than the representative body.

91 The certification function conferred upon a representative body is a substantial undertaking. It requires certification in writing of applications for determinations of native title as well as applications for registration of ILUAs. The process for registration of an ILUA is described in the reasons of Kiefel CJ, Gageler and Keane JJ. The certification function of a representative body is not a mere rubber-stamping function. Its certification function is confined to the particular area for which a representative body is certified¹³⁶. It requires the representative body, amongst other things, and if requested to do so¹³⁷, to consult with persons including native title holders, to be satisfied they understand and consent to the course of action taken on their behalf in accordance with the traditional decision-making customs of that group¹³⁸, and to make all reasonable efforts to achieve agreement, relating to native title applications over the land or waters, between the persons in respect of whom applications would be made¹³⁹.

133 *Native Title Act*, s 203BA(1).

134 *Native Title Act*, s 203BA(2).

135 *Native Title Act*, s 203B(4).

136 *Native Title Act*, s 203BE(1).

137 *Native Title Act*, s 203BB(2).

138 *Native Title Act*, s 203BC(1) and (2).

139 *Native Title Act*, s 203BE(3).

The representative body is required to be a party to an ILUA that is proposed to be registered¹⁴⁰.

92 Section 203BE(5) provides that a representative body must not certify an application for registration of an ILUA unless it is of the opinion that:

- "(a) all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified; and
- (b) all the persons so identified have authorised the making of the agreement."

In certifying an application for registration of an ILUA, a representative body must include a statement of its opinion that these requirements have been met, with brief reasons for that opinion¹⁴¹.

The specialist functions can be performed by agents including the CEO

93 During oral argument on this appeal, the respondents conceded that where a representative body was a company incorporated under the *Corporations Act* the representative body could perform many, if not all, of its important functions by agents, including its managing director or CEO. That concession was properly and rightly made. Given the myriad functions of a representative body, there exists a practical necessity that those functions be performed by officers of the corporation acting as its authorised agents rather than requiring those functions to be performed by the corporation in general meeting or always by decision of its entire governing body¹⁴². It would reduce the exercise of a representative body's functions to chaos if a representative body could not perform its functions by its duly authorised officers, and the Parliament must be taken to have known that this was so when it enacted s 203B(3).

94 The respondents' concession is also supported by s 203FH. That section provides for rules of attributing to a body corporate the conduct and state of mind of its agents. It relevantly provides as follows:

140 *Native Title Act*, s 24CK(3).

141 *Native Title Act*, s 203BE(6).

142 See and compare *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1 at 12.

"State of mind of directors, employees or agents of bodies corporate"

- (1) If, for the purposes of this Part, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:
 - (a) 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
 - (b) that the director, employee or agent had the state of mind.

Conduct of directors, employees or agents of bodies corporate

- (2) Any conduct engaged in on behalf of a body corporate by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority is taken, for the purposes of this Part, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct."

95 This is a general attribution provision in similar terms to provisions in many Commonwealth statutes¹⁴³. The provision is concerned with attribution for all purposes, not merely for the purposes of establishing liability of the representative body. The *Native Title Act* avoids the alternative common form of drafting where the only relevant purposes for attribution might be establishing liability for the attributed act: "Where, in proceedings for an offence against this Act ... it is necessary to establish the state of mind of a body corporate ..." ¹⁴⁴.

96 It was, however, contended on behalf of the respondents that this general principle should not apply here for two reasons: (i) the NLC is not a company or other corporate body to which the s 203FH attribution principles of agency apply; and (ii) the importance of the certification function places that function in a separate category from other functions. The respondents submitted that the certification function, including the opinion to be formed by the representative body, should be carried out at the most "nuanced level", namely a consensus by a

¹⁴³ For example, *Disability Discrimination Act 1992* (Cth), s 123(1) and (2); *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 498B(1) and (2); *Water Act 2007* (Cth), s 170(1) and (2).

¹⁴⁴ For instance, *Migration Act 1958* (Cth), s 493; *Privacy Act 1988* (Cth), s 99A; *Therapeutic Goods Act 1989* (Cth), s 55. See also *Air Navigation Act 1920* (Cth), s 24A.

majority vote of Council, rather than through the agency of a person such as the CEO.

97 The difficulty with the latter submission concerning the specialised nature of the certification function is that there is no textual foundation for treating the attribution rules for a representative body that is a company or other corporation falling under s 201B(1)(ba) differently from the attribution rules for a corporation, such as the NLC, established by or under a Commonwealth law falling under s 201B(1)(c). Both must have been intended to be subject to the same attribution rules of agency in s 203FH. That conclusion conforms also to the expressed goal of Div 3 of Pt 11 for a representative body to "use its best efforts to perform its functions in a timely manner"¹⁴⁵ and, in doing so, to have choice as to how it maintains its organisational structures and administrative processes, albeit that they must be maintained in a manner that: promotes "the satisfactory representation by the body of native title holders and persons who may hold native title in the area for which it is the representative body"¹⁴⁶; promotes "effective consultation with Aboriginal peoples and Torres Strait Islanders living in the area for which it is the representative body"¹⁴⁷; and "ensures that the structures and processes operate in a fair manner" having regard to a variety of matters¹⁴⁸.

98 As for the former submission, it can be immediately accepted that the NLC is not a company or akin to some of the other classes of eligible body identified in s 201B. But there is no basis in the ALR Act from which a conclusion could be drawn that the s 203FH attribution principles of agency should not apply to the NLC in its certification or other functions. The NLC is a gazetted Land Council and body corporate under the ALR Act¹⁴⁹ and recognised as a representative body for its area in the Northern Territory¹⁵⁰. Its functions under the ALR Act include ascertaining and expressing "the wishes and the opinion of Aboriginals living in

145 *Native Title Act*, s 203BA(1).

146 *Native Title Act*, s 203BA(2)(a).

147 *Native Title Act*, s 203BA(2)(b).

148 *Native Title Act*, s 203BA(2)(c).

149 *Determination of Representative Aboriginal/Torres Strait Islander Bodies* (Commonwealth of Australia Gazette, No S 402, 30 December 1993 at 9, 11). See ALR Act, ss 21, 22.

150 *Native Title (Recognition as Representative Body – Northern Land Council) Instrument 2018*.

the area of the Land Council as to the management of Aboriginal land in that area and as to appropriate legislation concerning that land"¹⁵¹. The ALR Act provides for the performance of those functions in very similar terms to the provisions in the *Native Title Act*, including the performance of functions in a timely manner¹⁵² and the maintenance of organisational structures and administrative processes for very similar purposes as in s 203BA of the *Native Title Act*¹⁵³. And, perhaps most relevantly, s 77B of the ALR Act contains the same attribution rules of agency, in very similar language, as the rules contained in s 203FH of the *Native Title Act*.

The inability of a representative body to delegate its functions

99 The application of the scheme of Pt 11 of the *Native Title Act* to representative bodies, described in broad terms above, requires that the functions of those bodies are non-delegable. The functions are specialised. The priorities for the performance of those functions, and the allocation of resources for the performance of functions, are expressly provided to be matters for the representative body. The representative body must be recognised by legislative instrument before it can perform those functions. The recognition can be withdrawn in circumstances including the unsatisfactory performance by the representative body of its functions. There is no necessity for delegation of the functions of a representative body since its functions can be performed by agents. All of these matters point unequivocally to the inability of any other person to perform the functions of a representative body as a delegate.

100 Although it would otherwise have been implied, the *Native Title Act* provides expressly for the non-delegation of the specialist functions of a representative body: a representative body "must not enter into an arrangement with another person under which the person is to perform the functions of the representative body"¹⁵⁴. The plain contrast is between the performance of functions by "a representative body" and "another person". This express prohibition on delegation by representative bodies can be contrasted with the position of the Native Title Registrar, who is required to register ILUAs in some circumstances where they have not been certified by a representative body. The *Native Title Act* provides for a power of delegation by the Registrar of all or any of the Registrar's powers under the Act, "by signed instrument" and only to "one or more of the

151 ALR Act, s 23(1)(a).

152 ALR Act, s 23AA(4).

153 ALR Act, s 23AA(5).

154 *Native Title Act*, s 203B(3).

Deputy Registrars of the Tribunal, or the members of the staff assisting the Tribunal"¹⁵⁵.

101 Section 27 of the ALR Act neither contradicts nor alters the requirement in the *Native Title Act* of non-delegability. Section 27 provides that, subject to the ALR Act, a Land Council has power to "do all things necessary or convenient to be done for or in connexion with the performance of its functions", citing examples without limiting the generality of the provision, including the employment of staff and obtaining (presumably by arrangement or contract) the advice and assistance of experts. Section 27 thus makes very similar provision for these incidental powers to s 203BK of the *Native Title Act*, which provides that a representative body has power "to do all things necessary or convenient to be done for or in connection with the performance of its functions" with an example given of entering "into arrangements and contracts to obtain services to assist in the performance by the representative body of its functions". The inclusion of s 203BK in the *Native Title Act* is consistent with the realisation on Parliament's part that some bodies might lack power under their constitutive statutes to appoint officers and agents to discharge functions and thus Parliament taking the precaution of expressly providing power by way of s 203BK in order to place such bodies in the same position as those with power under their constitutive statutes to do that. For what is likely to be the avoidance of any doubt, this limited incidental "necessary or convenient" power in s 203BK is expressly excluded by s 203B(3) from its prohibition against delegation.

102 Unlike the limited, incidental power in s 27 of the ALR Act, s 28 of the ALR Act confers an express power of delegation to a limited set of people within or employed by a Land Council in precise terms in relation to a limited range of functions. In that respect, s 28 contrasts with the prohibition against delegation in s 203B(3). But the powers of delegation in s 28 do not extend to those functions of a representative body that s 203B(3) prohibits from delegation. In particular, the power of delegation concerns the Land Council's functions or powers "under this Act" (ie the ALR Act, not the *Native Title Act*). It follows that the enumeration of delegable powers and functions under the ALR Act does not extend to the power of certification under s 203BE of the *Native Title Act*. Hence, even if the limited, incidental power in s 27 were capable of being construed as a general delegation provision, the natural implication arising as a "necessary elaboration intended by

155 *Native Title Act*, s 99.

the legislator"¹⁵⁶ would be that the power to delegate other functions is excluded¹⁵⁷. That inference would be fortified by the absence from s 28 of any express stipulation that s 28 does not limit the generality of s 27¹⁵⁸.

The CEO of the NLC purported to act as agent, not as delegate

103 The CEO of the NLC did not perform the certification function as a delegate in the precise sense in which that term should be used. The certification began with the words "This document is the certification by the Northern Land Council (NLC) ...". It contained a statement that "the NLC hereby certifies the attached application for registration of the Agreement as an indigenous land use agreement". It described the opinion required by s 203BE(6)(a) as having been formed by the NLC. The reasons for that opinion were described as being held by the NLC. Although the document was signed by the CEO, it plainly purported to be a certification made by him as agent for, and on behalf of, the NLC.

Conclusion

104 The appeal should be allowed, and orders made as proposed by Kiefel CJ, Gageler and Keane JJ. Consistently, however, with the manner in which submissions were made on behalf of the appellants and those intervening in support of the appellants, the appellants' ground of appeal, that the Full Court erred by holding that the NLC did not have power to delegate the performance of its certification function, should be understood as using "delegate" in the imprecise sense which includes acting through an agent. It is plain that the CEO of the NLC purported to act only as an agent and not personally in accordance with a delegated power, properly so understood. Thus, the unresolved question in the Full Court, of whether the NLC had effectively "delegated" its certification function to its CEO, should be understood as being whether the NLC's constitutive statutes and instruments permitted its CEO to exercise that function, and, as so understood, should be remitted to the Full Court for determination.

156 *Eastman v Commissioner for Superannuation* (1987) 15 FCR 139 at 148.

157 Bailey and Norbury, *Bennion on Statutory Interpretation*, 7th ed (2017) at 576 [23.12]; Pearce, *Statutory Interpretation in Australia*, 9th ed (2019) at 174-175 [4.43]-[4.44].

158 *cf Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679, quoted in Pearce, *Statutory Interpretation in Australia*, 9th ed (2019) at 183 [4.53].