

FEDERAL COURT OF AUSTRALIA

Quall v Northern Land Council [2018] FCA 989

File numbers: NTD 45 of 2017
NTD 54 of 2017

Judge: **REEVES J**

Date of judgment: 29 June 2018

Catchwords: **NATIVE TITLE** – application for review of a representative body’s decision to certify an application for registration of an Indigenous Land Use Agreement under s 203BE of the *Native Title Act 1993* (Cth) (the NTA) – the history of amendments to the functions of representative bodies under the NTA – whether the certification function under s 203BE(1)(b) of the NTA is delegable – whether the power in s 203BK of the NTA operated to allow a valid delegation of the certification function – whether this certification function had been validly delegated in circumstances where the delegation occurred before the certification function came into existence – whether a certification was a valid certification for the purposes of s 24CG(3)(a) of the NTA

Legislation: *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
Acts Interpretation Act 1901 (Cth)
Acts Interpretation Amendment Act 1911 (Cth)
Australian Securities Commission Act 1989 (Cth)
Corporations Law
Native Title Act 1993 (Cth)
Clean Air Act 1961 (NSW)

Explanatory Memorandum, Acts Interpretation Amendment Bill 2011

Cases cited: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27; [2009] HCA 41
Australian Chemical Refiners Pty Ltd v Bradwell (unreported, New South Wales Court of Criminal Appeal, Street CJ, Slattery and Finlay JJ, 28 February 1986)
Carltona Ltd v Commissioners of Works [1943] 2 All ER 560

Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd
(2017) 251 FCR 404; [2017] FCAFC 75

*Commissioner of Taxation of the Commonwealth of
Australia v Consolidated Media Holdings Ltd* (2012) 250
CLR 503; [2012] HCA 55

*Mercantile Mutual Life Insurance Co Limited v Australian
Securities Commission* (1993) 40 FCR 409

Newcrest Mining Limited v Thornton (2012) 248 CLR 555;
[2012] HCA 60

*Northside Developments Proprietary Limited v Registrar-
General* (1990) 170 CLR 146

O'Reilly v State Bank of Victoria Commissioners (1983)
153 CLR 1

*Re Reference under section 11 of Ombudsman Act 1976 for
an advisory opinion; Ex parte Director-General of Social
Services* (1979) 2 ALD 86

Thiess v Collector of Customs (2014) 250 CLR 664; [2014]
HCA 12

Bartlett, Richard H *Native Title in Australia* (3rd ed,
LexisNexis Butterworths, 2015, p 953)

Date of hearing:	15 June 2018
Registry:	Northern Territory
Division:	General Division
National Practice Area:	Native Title
Category:	Catchwords
Number of paragraphs:	41
Counsel for the Applicants:	P McIntyre
Solicitor for the Applicants:	Matthews Legal
Counsel for the Respondents:	P Willis SC
Solicitor for the Respondents:	Northern Land Council

ORDERS

NTD 45 of 2017

BETWEEN: **KEVIN LANCE QUALL**
Applicant

AND: **NORTHERN LAND COUNCIL**
First Respondent

**JOE MORRISON AS CHIEF EXECUTIVE OFFICER OF THE
NORTHERN LAND COUNCIL**
Second Respondent

JUDGE: **REEVES J**

DATE OF ORDER: **29 JUNE 2018**

THE COURT DECLARES THAT:

1. The first respondent has not, by a certificate dated 13 March 2017 signed by the second respondent, certified for the purposes of s 24CG(3)(a) of the *Native Title Act 1993* (Cth), and in performance of its functions as a representative body under s 203BE(1)(b) of the *Native Title Act 1993* (Cth), an application for registration of the Indigenous Land Use Agreement (ILUA) dated 21 July 2016, as amended by a Deed of Variation dated 2 February 2017, known as the Kenbi ILUA.

THE COURT ORDERS THAT:

2. The first respondent pay the applicant's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

NTD 54 of 2017

BETWEEN: **ERIC FEJO**
Applicant

AND: **NORTHERN LAND COUNCIL**
First Respondent

**JOE MORRISON AS CHIEF EXECUTIVE OFFICER OF THE
NORTHERN LAND COUNCIL**
Second Respondent

JUDGE: **REEVES J**

DATE OF ORDER: **29 JUNE 2018**

THE COURT DECLARES THAT:

1. The first respondent has not, by a certificate dated 13 March 2017 signed by the second respondent, certified for the purposes of s 24CG(3)(a) of the *Native Title Act 1993* (Cth), and in performance of its functions as a representative body under s 203BE(1)(b) of the *Native Title Act 1993* (Cth), an application for registration of the Indigenous Land Use Agreement (ILUA) dated 21 July 2016, as amended by a Deed of Variation dated 2 February 2017, known as the Kenbi ILUA.

THE COURT ORDERS THAT:

1. The first respondent pay the applicant's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

REEVES J:

1 On 22 June 2018, I informed the parties that I had reached the following conclusions in these matters:

- (a) that the certification function under s 203BE(1)(b) of the *Native Title Act 1993* (Cth) (the NTA) is delegable to a member of an Aboriginal and Torres Strait Islander representative body's staff;
- (b) that the 1996 resolution of the Council of the Northern Land Council (the NLC) to delegate to, among others, the Chief Executive Officer (CEO) of the NLC "[t]he power to assist Aboriginal people in its capacity as a representative Aboriginal and Torres Strait Islander body in respect of the functions outlined in s.202 of the [NTA]" did not constitute a valid delegation of the NLC's certification function under s 203BE(1)(b) of the NTA;
- (c) that accordingly, the certification made by Mr Morrison, the CEO of the NLC, acting under that purported delegation, was not a valid and proper exercise of the NLC's certification function under s 203BE(1)(b) of the NTA; and
- (d) that therefore the certification made by Mr Morrison on 13 March 2017 with respect to the application to register the Kenbi Indigenous Land Use Agreement (ILUA) was not a valid certification for the purposes of s 24CG(3)(a) of the NTA.

2 Thereafter, the parties were requested to prepare and submit a set of orders in each matter to reflect these conclusions and I indicated I would publish my reasons in due course. The following are those reasons.

THE CERTIFICATE

3 The certification referred to above (which I will refer to hereafter as the certificate) was in the following terms:

This document is the certification by the Northern Land Council (NLC) of the attached application for registration of the Kenbi Indigenous Land Use Agreement as amended by the Deed of Variation dated 2 February 2017 (the **Agreement**) relating to areas of land and waters within the area for which the NLC is the representative Aboriginal/Torres Strait Islander body under the *Native Title Act 1993* (Cth) (the NTA).

Certification (s.203BE (1)(b)) NTA

- (1) Pursuant to paragraph 203BE(1)(b) of the NTA, the NLC hereby certifies the attached application for registration of the Agreement as an indigenous land use agreement.

Statement of Opinion (s.203BE (6)(a)) NTA

- (2) The NLC is of the opinion that the requirements of paragraphs 203BE(5)(a) and (b) of the NTA have been met, namely 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.

Reasons for Opinion (s.203BE (6)(b)) NTA

- (3) The NLC is of the opinion set out in paragraph (2) above for the following reasons:
 - (a) The NLC has undertaken extensive anthropological, archival, historical, archaeological and field research over a period exceeding forty years.
 - (b) This anthropological research has included detailed consideration of the system of traditional laws and customs which operates on the Cox Peninsula encompassing the land and waters in the area covered by the Agreement, including the composition of the traditional land-owning groups, and the identification of traditional and adopted decision making processes.
 - (c) The NLC has conducted meetings with all identified persons who hold or may hold native title in relation to land or waters in the area covered by the Agreement.
 - (d) All identified persons have authorised the making of the Agreement and the execution of the Agreement by the NLC as the *native title group* pursuant to paragraph 24CD(3)(b) of the NTA. This authorisation was in accordance with a decision-making process agreed to and adopted by all persons who hold or may hold the common or group rights comprising the native title, in relation to authorising the making of the Agreement or of things of that kind.

(Emphasis in original)

4 The signature of Mr Joe Morrison, in his capacity as the CEO of the NLC, appeared at the bottom of the certificate above where his name and position were printed. The date 13 March 2017 appeared below Mr Morrison's signature.

5 As its contents reveal, the certificate was issued under s 203BE(1)(b) of the NTA. That section describes the certification function of a representative Aboriginal and Torres Strait Islander body under the NTA. It relevantly provides:

- (1) The *certification functions* of a representative body are:
- ...
- (b) to certify, in writing, applications for registration of indigenous land use agreements relating to areas of land or waters wholly or partly within the area for which the body is the representative body.
- ...
- (5) 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.
- ...
- (6) A certification of an application for registration of an indigenous land use agreement by a representative body must:
- (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (5)(a) and (b) have been met; and
- (b) briefly set out the body's reasons for being of that opinion.

6 By its terms, section (1) of the certificate provided a certification in writing of the application for registration of an ILUA in accordance with s 203BE(1)(b) above. It is also apparent from section (2) of the certificate that the NLC held the necessary opinion about the two matters set out in s 203BE(5) above and was therefore able to provide a certification in compliance with the requirements of s 203BE(6)(a). Finally, section (3) of the certificate complied with the requirements of s 203BE(6)(b) in that it briefly set out the reasons why the NLC held that opinion. On its face, therefore, the certificate contained a certification by the NLC in accordance with the requirements of the relevant subsections of s 203BE of the NTA above.

THE ROLE OF THE CERTIFICATE

7 The role of the certificate was described in its introductory paragraph as follows. First, that paragraph identified the application for registration to which the certificate related, namely the one attached (the ILUA registration application). Secondly, it described the ILUA to which that application related, namely "the Kenbi Indigenous Land Use Agreement as amended by the Deed of Variation dated 2 February 2017" (the Kenbi ILUA). Thirdly, it stated why it was that the NLC was providing the certificate, namely that the land and waters to which the Kenbi

ILUA related were: “within the area for which the NLC is the representative Aboriginal/Torres Strait Islander body under the [NTA]”.

8 The significance of these pieces of information emerges from s 24CG of the NTA. Under that section, a person may apply to have an ILUA registered on the Register of ILUAs established under Part 8A of the NTA. Once registered, an area ILUA, such as the Kenbi ILUA, has the effect described in Subdivision E of Division 3 of Part 2 of the NTA, particularly ss 24EA and 24EB. Among other things, those sections provide that a future act undertaken with respect to the land and waters covered by a registered ILUA will be valid to the extent that it affects native title in those land and waters (s 24EB(2)). However, under s 24CG, one of the prerequisites for an application for registration of an area ILUA is that it must have been certified under s 203BE(1)(b) by all the representative bodies for the area in which the land and waters are located (see s 24CG(3)(a)). In other words, without a valid certification, an application to register an ILUA under Subdivision C of Division 3 of Part 2 of the NTA will not meet this mandatory requirement.

THE ISSUE – THE MANNER IN WHICH THE CERTIFICATE WAS MADE

9 The issue in contention in these matters does not concern the form of the certificate itself, but rather the manner in which it was made. That issue was highlighted in an email dated 7 June 2018 that Ms Cole, the NLC’s lawyer responsible for these matters, sent to the applicants’ lawyer, Mr Matthews. In that email, Ms Cole said that the certification:

was made ... by the CEO as the delegate of the NLC pursuant to the authority conferred upon the position of CEO pursuant to the resolution of the Northern Land Council C70/1433 made on 1 October 1996, as recorded in the instrument of delegation dated 10 March 2000.

10 Relevantly for present purposes, the 1 October 1996 resolution to which Ms Cole referred above was as follows:

Northern Land Council Resolution C70/1432
70th Full Council File No. 87/ 389
Mirambeena, Own 1-3 October 1996
Classification : Confidential
ITEM : Delegation of Northern Land Council powers

The NLC resolves:-

- (1) to revoke all existing delegations of its powers, and
- (2) to delegate its powers in accordance with the table attached [table 3 of the Agenda Paper] and that

appropriate written instruments of delegation under the NLC's common seal be executed.

...

Date of Resolution: 3 October 1996

(Emphasis in original)

- 11 The table attached to this resolution (Table 3) comprised seven pages and listed 17 items. Most of those items related to the NLC's powers or functions under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) and other similar pieces of legislation. However, the last item (item 17) was as follows:

Native Title Act 1992: The power to assist Aboriginal people in its capacity as a representative Aboriginal and Torres Strait Islander body in respect of the functions outlined in s.202 of the Act

The table stated that this power had been delegated to the Executive Council of the NLC, to its Chairman and to its CEO.

- 12 The instrument of delegation dated 10 March 2000 to which Ms Cole also referred above was as follows:

Native Title Act 1993 (Cth)

INSTRUMENT OF DELEGATION

WHEREAS

- A. The Northern Land Council is a Land Council established under Part III of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("the Land Rights Act")
- B. The Northern Land Council has, under the provisions of the *Native Title Act 1993* (Cth) ("the Act"), the power to assist Aboriginal people, in its capacity as a representative Aboriginal and Torres Strait Islander body, in respect of the functions outlined in Section 202 of the Act;
- C. The Executive Council of the Northern Land Council is a committee created pursuant to section 29A of the Land Rights Act by Resolution C70/1428 made on 1 October 1996.
- D. By Resolution C70/1432 made on 1 October 1996, the Northern Land Council resolved to delegate its powers under the Act.

DELEGATION TO EXECUTIVE COUNCIL

1. The Northern Land Council hereby confirms the delegation of all of its powers under the Act to the Executive Council of the Northern Land Council.

DELEGATION TO CHAIRMAN

- 2. The Northern Land Council hereby confirms the delegation of all of its powers under the Act to the Chairman of the Northern Land Council.

DELEGATION TO CHIEF EXECUTIVE OFFICER

- 3. The Northern Land Council hereby confirms the delegation of all of its powers under the Act to the Chief Executive Officer of the Northern Land Council.

...

The Common Seal of the)	[Signature]
NORTHERN LAND COUNCIL)	Chairman
was hereto duly affixed)	
by authority of the)	[Signature]
NORTHERN LAND COUNCIL)	Member
in the presence of:)	
		[Signature]
[Signature]		Member

...

13 Mr Quall and Mr Fejo, the applicants in these matters, made two contentions about the manner in which the certificate was made. First, they contended that the NLC’s certification function under s 203BE(1)(b) of the NTA was not delegable. Secondly, even if that function were delegable, they contended, in the alternative, that the resolution of 1 October 1996 and the instrument of 10 March 2000 did not effect a valid delegation of that function to the CEO of the NLC. On either alternative, Mr Quall and Mr Fejo contended that the certificate did not constitute a valid certification for the purposes of s 24CG(3)(a) of the NTA. That being so, they contended that the application for registration of the Kenbi ILUA did not meet the critical prerequisite mentioned earlier, essentially because it did not reflect the opinion of the NLC. For the reasons that follow, I consider Mr Quall and Mr Fejo are wrong in their primary contention, but correct in their alternative contention. It should be noted that, at the hearing of these matters, Mr Quall and Mr Fejo ultimately abandoned all of their other grounds of challenge to the certificate.

THE NLC’S STATUS AS A REPRESENTATIVE BODY

14 The NLC was originally established as a Land Council under s 21 of the ALRA. Under s 22 of the ALRA, it was given the status of a statutory body corporate. Its governing body is its Council. Its functions as a Land Council are described in s 23 of the ALRA and its powers in performance of those functions are described in s 27. Under s 28 of the ALRA, its Council has the power, subject to certain constraints, to delegate any of its function or powers to its Chair,

or to another member of its Council, or to a member of its staff. It should, however, be noted that those provisions do not in terms address the delegation of its functions and powers under the NTA.

15 Part 11 of the NTA sets out a series of provisions with respect to the recognition of representative Aboriginal and Torres Strait Islander bodies, their functions and powers, the source of their funding and the manner in which they are accountable for that funding. The NLC has been recognised as such a representative body under that Part. Indeed, it is one of a small number of bodies that has retained that status from soon after the passage of the NTA in 1993.

THE FUNCTIONS OF A REPRESENTATIVE BODY

16 Since its introduction in the NTA as passed in 1993, Part 11 has undergone a series of changes, the most significant of which occurred with the amendments to the NTA in 1998. The original form of Part 11 was quite brief. It contained two sections: ss 202 and 203. The original functions of a representative body (subsequently described as a facilitation and assistance function) were discretionary and were quite limited. They were set out in s 202(4) as follows:

A representative Aboriginal/Torres Strait Islander body may:

- (a) facilitate the researching, preparation or making of claims, by individuals or groups from among Aboriginal peoples or Torres Strait Islanders, for determinations of native title or for compensation for acts affecting native title; or
- (b) assist in the resolution of disagreements among such individuals or groups about the making of such claims: or
- (c) assist such individuals or groups by representing them, if requested to do so, in negotiations and proceedings relating to the doing of acts affecting native title, the provision of compensation in relation to such acts or any other matter relevant to the operation of this Act.

17 The 1998 amendments to the NTA significantly altered and expanded Part 11. Those amendments occurred in two stages: the first stage from 30 September 1998 and the second from 1 July 2000. The two stages are summarised in Bartlett, Richard H *Native Title in Australia* (3rd ed, LexisNexis Butterworths, 2015, p 953) as follows:

Under the first stage of the commencement of the 1998 amendments (Sch 3 Pt 1 of the Native Title Amendment Act 1998 (Cth)), the functions of representative bodies were augmented to include:

- certification of applications for determinations of native title;
- certification of applications for registration of ILUAs; and

- becoming a party to indigenous land use agreements (ILUAs): NTA 1993 s 202(4)(d), (e), (f).

These provisions were repealed on 30 June 2000 and replaced on 1 July 2000 by the functions declared in Sch 3 Pt 2 of Native Title Amendment Act 1998.

18 By the completion of the second stage, Part 11 contained approximately 50 sections. By that time, s 202 had been repealed and instead the functions of a representative body were set out in s 203B as follows:

- (1) A representative body has the following functions:
 - (a) the *facilitation and assistance functions* referred to in section 203BB;
 - (b) the *certification functions* referred to in section 203BE;
 - (c) the *dispute resolution functions* referred to in section 203BF;
 - (d) the *notification functions* referred to in section 203BG;
 - (e) the *agreement making function* referred to in section 203BH;
 - (f) the *internal review functions* referred to in section 203BI;
 - (g) the functions referred to in section 203BJ and such other functions as are conferred on representative bodies by this Act.
- (2) The functions conferred on a representative body by this Act are in addition to, and not instead of, any functions conferred on the representative body (whether in its capacity as a representative body or otherwise) by or under:
 - (a) any other law of the Commonwealth; or
 - (b) a law of a State or Territory.
- (3) Except as mentioned in section 203BB, 203BD or 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.
- (4) A representative body:
 - (a) must from time to time determine the priorities it will give to performing its functions under this Part; and
 - (b) may allocate resources in the way it thinks fit so as to be able to perform its functions efficiently;but must give priority to the protection of the interests of native title holders.

(Headings omitted)

19 The original facilitation and assistance function in s 202 was retained (see ss 203B(1)(a) and 203BB), but it was augmented to require a representative body to assist in, among other things, negotiations and proceedings relating to: “indigenous land use agreements or other agreements in relation to native title” and “rights of access conferred under this Act or otherwise” (see s 203BB(1)(b)(iii) and (iv)). As well as this facilitation and assistance function, representative

bodies were vested with six new functions (see 203B(1) above). The certification function was initially introduced to s 202 (s 202(4)(e)) in the first stage of the 1998 amendments in essentially the same form as it is now (see at [5] above). It was then moved to s 203BE in the second stage.

20 It is also important to note one further effect of the 1998 amendments. It was that the functions of a representative body became mandatory functions. That was achieved under s 203BA(1), as follows:

- (1) A representative body must use its best efforts to perform its functions in a timely manner, particularly in respect of matters affected by:
 - (a) the time limits under this Act; or
 - (b) time limits, under another law of the Commonwealth or a law of a State or Territory, that are relevant to the performance of its functions.

THE CERTIFICATION FUNCTION IS DELEGABLE

21 The dispute between the parties on Mr Quall and Mr Fejo's primary contention revolved around s 203BK of the NTA. That section was introduced in the second stage of the 1998 amendments. In its current form, it 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.
- (3) Without limiting subsection (1), in performing its dispute resolution functions in a particular case, a representative body may be assisted by the [National Native Title Tribunal (NNTT)], but only if the representative body and the NNTT have entered into an agreement under which the representative body is liable to pay the Commonwealth for the assistance.
- (4) The NNTT must not use or disclose information to which it has had access only because it provided assistance under subsection (3) for any purpose other than providing that assistance without the prior consent of the person who provided the NNTT with the information.

(Headings omitted)

22 There was no equivalent provision in Part 11 of the NTA as originally legislated. Despite this history, this issue was argued by reference to the provisions of Part 11 of the NTA that have applied since 1 July 2000. Accordingly, I will consider it on that footing.

23 The NLC contended that this section is broad enough to give the NLC the power to delegate its functions to a staff member such as its CEO. Mr Quall and Mr Fejo contended that s 203B(3) prevented such a delegation. That section provides:

Except as mentioned in section 203BB, 203BD or 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.

24 Mr Quall and Mr Fejo contended that the exception provided for in s 203BK(1) (among others) of the opening words to s 203B(3) above, only encompassed a power of a representative body to appoint a person or body to assist in the performance of its functions, and it was not a power to delegate the performance of those functions to another person. For the reasons that follow, I do not accept these contentions.

25 First, there is nothing in the text, context or purpose of s 203BK (see *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, [2009] HCA 41 at [47]; *Newcrest Mining Limited v Thornton* (2012) 248 CLR 555, [2012] HCA 60 at [70]; *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, [2012] HCA 55 at [39]; and *Thiess v Collector of Customs* (2014) 250 CLR 664, [2014] HCA 12 at [22]) which requires it to be read down in the way postulated by Mr Quall and Mr Fejo. The words “all things necessary or convenient to be done” are expressed in the broadest of terms. In my view, they are sufficiently wide to extend to the delegation of a representative body’s functions to a member of its staff, such as its CEO. Furthermore, as the NLC pointed out in its submissions, in *Mercantile Mutual Life Insurance Co Limited v Australian Securities Commission* (1993) 40 FCR 409, the Full Court considered that similar wording in s 11(4) of the *Australian Securities Commission Act 1989* (Cth) was sufficiently broad to support a delegation the Australian Securities Commission had made of certain of its functions under s 597 of the *Corporations Law* (see Black CJ at 411 to 412, Lockhart J at 427 and Gummow J at 441).

26 Secondly, as to context, it is to be noted that a representative body is required by s 203BA(2) to perform its functions “in a manner that ... maintains organisational structures and administrative processes” that promote the satisfactory and effective performance of its functions. Given the extent and complexity of those functions as outlined above, the administrative processes mentioned in these provisions support the conclusion that a representative body should be able to delegate some, or all, of those functions to, among others, a member of its staff. Thirdly, such a construction promotes the primary purpose of a

representative body, as reflected in these and other provisions of Part 11, to represent native title holders, persons who may hold native title and Aboriginal Peoples and Torres Strait Islanders living in the area for which it is the representative body.

27 Finally, as a further matter of context, it is also to be noted that there is a number of provisions in Division 3 of Part 11 that permit representative bodies to employ the services of a range of third parties to assist them in the performance of their functions. They include s 203BB (briefing out representation), s 203BD (to enter into arrangements with other representative bodies) and the exceptions set out in s 203BK itself to enter into arrangements to obtain services (203BK(2)), or to enter into an agreement to obtain the assistance of the NNTT in the performance of its dispute resolution functions (203BK(3)). If representative bodies are permitted to obtain the assistance of all these third parties in the performance of their functions, it is difficult to see why they may not perform those functions directly via appropriate delegations to, among others, their staff.

28 For these reasons, I consider a representative body's certification function under s 203BE may be delegated under s 203BK to, among others, a member of its staff such as its CEO.

THE DELEGATION RESOLUTIONS WERE NOT VALID

29 I turn now to Mr Quall and Mr Fejo's alternative contention above: that, even if the certification function under s 203BE of the NTA was delegable, the resolution of 1 October 1996 and the instrument of 10 March 2000 did not effect a valid delegation of that function to the NLC's CEO. It is convenient to begin by considering a relatively recent amendment to the *Acts Interpretation Act 1901* (Cth) (the AIA), to which reference was made by both parties in argument. In 2011, s 34AB was introduced to the AIA by s 89 of the *Acts Interpretation Amendment Act 2011* (Cth). Section 34AB provides:

- (1) Where an Act confers power on a person or body (in this section called the **authority**) to delegate a function, duty or power:
 - (a) the delegation may be made either generally or as otherwise provided by the instrument of delegation;
 - (b) the powers that may be delegated do not include that power to delegate;
 - (c) a function, duty or power so delegated, 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;
 - (d) a delegation by the authority does not prevent the performance or exercise of a function, duty or power by the authority; and

(e) if the authority is not a person, section 34A applies as if it were.

(2) If:

(a) a person (the *delegator*) or body (also the *delegator*) delegates all the person's or body's functions, duties or powers under an Act, or a provision of an Act, to another person or body; and

(b) the Act is amended to give the delegator one or more additional functions, duties or powers under the Act or provision; and

(c) the delegation is in force immediately before the amendment takes effect;

then, on and after the amendment taking effect, the delegation is taken to include the additional functions, duties or powers.

(3) If:

(a) a person or body delegates one or more of the person's or body's functions, duties or powers under an Act, or a provision of an Act, to another person or body; and

(b) the Act is amended to alter the scope of one or more of those functions, duties or powers under the Act or provision; and

(c) the delegation is in force immediately before the amendment takes effect;

then, on and after the amendment taking effect, the delegation is taken to include the functions, duties or powers as altered.

(Headings omitted)

30 If this provision had applied retrospectively, it could well have affected the outcome in this matter. However, item 8 of Schedule 3 of the amending Act provided:

The amendment made by item 89 of schedule 1 applies in relation to alterations or additions that are made on or after the commencement of that item (regardless of whether the delegation referred to in [s 34AB] as inserted by this Act, is made before, on or after that commencement).

31 It was therefore common ground in this matter that s 34AB does not apply to the resolution of 1 October 1996 or the instrument of 10 March 2000. The Explanatory Memorandum to the Acts Interpretation Amendment Bill 2011 set out the reason why s 34AB was introduced in the following terms:

216. Item 89 adds a new subsection (2) to section 34AB (which deals with the effect of a delegation) that makes it clear that a delegation expressed to extend to all the powers, functions or duties under a given Act or part of an Act extend to a power, function or duty included in that Act or part that has come into existence after the delegation is made. This provides greater certainty for delegated functions, duties and powers.

217. This amendment specifically addresses the concern raised by Chief Justice

Street in the unreported decision of the New South Wales Court of Criminal Appeal case of *Australian Chemical Refinery (sic – Refiners) Pty Ltd v Bradwell* (28 February 1986). Street CJ indicated that there was a strong common law presumption that a delegation does not extend to a power that comes into existence after the delegation is made, even if within the literal words of the delegation.

218. This was in contrast to the generally accepted position under the Acts Interpretation Act that delegations could encompass subsequently enacted powers based on section 10 of the Acts Interpretation Act which allows from ‘time to time’ references which, under section 46 of the Acts Interpretation Act, can be included in instruments. Given the importance of delegations to Commonwealth administration, it was important that this issue be dealt with explicitly.

219. Item 89 also adds a new subsection 34AB(3) to provide that when an Act amends the scope of a function, duty or power that has been delegated, the delegation is taken to include the altered function, duty or power.

220. This provision does not prevent a delegate from reviewing a delegation when new powers, functions or duties are enacted and amending the delegation if they want to ensure that that new or altered function, duty or power remains solely with them.

32 The judgment mentioned in paragraph 217 of the Explanatory Memorandum above (*Australian Chemical Refiners Pty Ltd v Bradwell* (unreported, New South Wales Court of Criminal Appeal, 28 February 1986) (*Bradwell*)) dealt with a prosecution under the *Clean Air Act 1961* (NSW). After describing the factual background to the proceeding, Street CJ (with whom Slattery and Finlay JJ agreed) identified two questions that fell to be determined as follows:

... The first is whether the Instrument of Delegation of December 1974 could in its terms operate to delegate to the Commissioner powers of the Commission which did not exist at December 1974, but which only came into existence in May 1975-- that is to say to consent to the institution of proceedings for an offence against the Clean Air Act. The second question is whether the delegation to the Director to give that consent is ambulatory, so as to avail the person who may for the time being and from time to time hold that office within the Commission.

33 It was the answer to the first of these questions that is of particular relevance in the present matter. In providing that answer, the Chief Justice said:

In considering the first of the matters, that is to say whether the delegation of December 1974 could catch up powers which did not then exist and which only came into existence some five months later, it is difficult to see any valid argument to support an affirmative answer. **The delegation plainly enough must speak at the date at which it is executed.** So far as it purports to delegate powers, authorities, duties and functions conferred or imposed on the Commission by or under the Clean Air Act, the intention of the instrument which is carried into effect by its terms is a delegation of those powers as they existed at that date. **There is an old maxim that is in point-- “one does not give what one does not have”. It would indeed be surprising to contemplate such a solemn act as the delegation of statutory powers to a permanent officer being made, so to speak per incuriam, that is to say without specific awareness and consideration of the content and significance of the delegation.** I would hesitate long before recognising that the delegation could be construed as operating in future in this way. **The delegation requires a conscious and deliberate exercise by the**

Commission of its delegating powers. It is to be construed as confined to those powers that can be fairly said to have been before it for consideration at the time of its decision to delegate.

(Emphasis added)

34 In my view, these observations compel the conclusion that the resolution of 1 October 1996 did not constitute a valid delegation of the NLC’s certification function under s 203BE to the CEO of the NLC. That is so because, at the time of that resolution, neither the NLC nor any other representative body was vested with a certification function under the NTA. As is recorded above, that function was first introduced to the NTA in the first stage of the 1998 amendments to that Act. Since the NLC did not have that function in October 1996, the ruling in *Bradwell* establishes that it could not delegate it.

35 As for the 10 March 2000 instrument, it purported to confirm the delegation of all the NLC’s powers under the NTA to, among others, its CEO. The delegation being confirmed was described in recital clause D of that instrument as that made by the 1 October 1996 resolution. Furthermore, the power under the NTA that was being referred to was that described in recital clause B as: “the power to assist Aboriginal people, in its capacity as a representative Aboriginal and Torres Strait Islander body, in respect of the functions outlined in Section 202 of the Act”. This power was therefore described in substantively identical terms to the power described in the 1 October 1996 resolution (see at [11] above), namely the NLC’s then extant facilitation and assistance function under s 202 of the NTA. There was, therefore, nothing in the 10 March 2000 instrument to indicate that the NLC had undertaken a considered delegation of its newly acquired certification function. That is to say that it had applied any “specific awareness and consideration of the content and significance of the delegation” it was purportedly making (see *Bradwell* above at [33]). That all the more so, where the certification function under s 202(4)(e), and, subsequently, s 203BE, was quite different in content to the facilitation and assistance function of a representative body under s 203BB and where the former function could only be performed if the representative body held the opinions prescribed by s 203BE(5) and gave brief reasons for being of that opinion under s 203BE(6)(b).

36 To attempt to counter these conclusions, the NLC relied upon various provisions of the AIA and the *Carltona* principle (*Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563 (Lord Green MR)). First, while it accepted that s 34AB of the AIA did not relevantly apply before that section came into effect in 2011, it sought to rely upon, what it claimed was, a common law presumption to similar effect. It contended that presumption operated in a similar

way to s 34AB to expand a function or power to correspond to the expansion by amendment of the original statutory provision vesting that function or power. To address the observations of Street CJ in *Bradwell* which are to the opposite effect, it attempted to distinguish that judgment by claiming those observations were confined to delegations involving criminal prosecutions, or which gave rise to criminal liability. I do not consider this distinction is valid. The Chief Justice's observations in *Bradwell* were, in my view, expressed in general terms and were plainly intended to state the pre-existing common law position with respect to delegations generally, namely that one cannot delegate a function or power that one does not possess.

37 Secondly, the NLC sought to rely upon ss 46(1)(a) and 10(c) of the AIA to contend that the delegation achieved by the resolution of 1 October 1996 and confirmed by the 10 March 2000 instrument continued in operation and extended to the re-enactment of ss 202(4)(e), (8) and (9), as s 203B(1)(b) and 203BE. In my view, this contention encounters a similar difficulty. It is that the certification function inserted into s 202 of the NTA in the first stage of the 1998 amendments, and later moved to s 203BE in the second stage, was an entirely new and distinct function from the facilitation and assistance function vested in the NLC by the original version of s 202. Sections 203B(1)(b) and 203BE did not, therefore, constitute a re-enactment of the originally vested facilitation and assistance function in s 202, rather they constituted the enactment of a completely new function.

38 Thirdly, the NLC claimed that s 203BK(1) permitted the NLC to authorise an internal officer such as its CEO to act in the NLC's name in performing its certification function. For the reasons I have given above, this proposition may be accepted as broadly correct. However, it does not avail the NLC in this matter because it has not produced any evidence that its Council provided such an authorisation to its CEO, aside from the resolution of 1 October 1996 and the instrument of 10 March 2000 which by their terms purported to "delegate" the certification function to its CEO. In other words, I do not consider that failed attempt to delegate that function can, in the circumstances, be taken to, in effect, evidence or constitute an authorisation to similar effect.

39 Finally, the NLC sought to rely upon the *Carltona* principle. As the High Court explained in *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 (at 12–13 per Gibbs CJ and 31–32 per Wilson J), that principle applies where "practical administrative necessity" dictates that a person such as a Deputy Commissioner of Taxation has to exercise his or her functions by the actions of authorised officers because he or she has no power to delegate those

functions. That is not the situation in which the NLC found itself in this matter. First, for the reasons given above, the NLC's Council did have the power to delegate its certification function under the NTA to its CEO. As Brennan J said in *Re Reference under section 11 of Ombudsman Act 1976 for an advisory opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 at 94:

... The practical administrative necessity which warrants an authority's exercising his power by the acts of another disappears when the authority is empowered to delegate all of his powers and functions to that other.

40 Secondly, while the NLC exercises certain functions under Part 11 of the NTA, I do not consider it is, in that capacity, exercising those functions as a statutory authority. Rather it does so as a statutory body corporate. In those circumstances, aside from cases concerning the indoor management rule which does not arise in this matter, the actual authority of its Council members and CEO is more analogous to that of a body corporate where: "A director's normal power is to bind the company only by joining with other directors in a resolution of the board of directors" (see *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* (2017) 251 FCR 404; [2017] FCAFC 75 at [150] citing *Northside Developments Proprietary Limited v Registrar-General* (1990) 170 CLR 146 at 198 and 205).

CONCLUSION – THE CERTIFICATE WAS NOT VALID FOR THE PURPOSES OF SECTION 24CG(3)(a)

41 As has been noted above, the certificate purported to comply with the requirement of s 24CG(3)(a) of the NTA that the ILUA registration application "must ... have been certified by all representative Aboriginal/Torres Strait Islander bodies for the area in performing their functions under paragraph 203BE(1)(b) in relation to the area". As has also been noted above, Mr Morrison issued the certificate "as the delegate of the NLC pursuant to the authority conferred upon the position of CEO" under the resolution of 1 October 1996 and as confirmed by the 10 March 2000 instrument. Since I have concluded that neither of those acts of the NLC conferred that delegated authority on the CEO, it necessarily follows that the ILUA application

has not been duly certified by the NLC “performing [its] functions under paragraph 203BE(1)(b)” of the NTA.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves.

Associate:



Dated: 29 June 2018