**FEDERAL COURT OF AUSTRALIA**

**Northern Land Council v Quall [2019] FCAFC 77**

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| Appeal from: | *Quall v Northern Land Council* [2018] FCA 989  |
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| File number: |  |
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| Judges: | **GRIFFITHS, MORTIMER AND WHITE JJ** |
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| Date of judgment: | 20 May 2019 |
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| Catchwords: | **ADMINISTRATIVE LAW** – delegation of statutory functions and powers – distinction between authorisation and delegation – the *Carltona* principle – principles for determining whether a power or function is delegable – effect of delegation**NATIVE TITLE** – whether a representative body under the *Native Title Act 1993* (Cth) is able to delegate its power and function to certify an application for an area Indigenous Land Use Agreement (**ILUA**) under s 201BE(1)(b) – the process and alternative pathways for registration of an area ILUA – position of representative bodies under the *Native Title Act 1993* (Cth) – importance of representative body’s duty to promote and protect broad community interests of Aboriginal people who hold or may hold native title and not merely sectional interests – certification function under s 201BE(1)(b) is not delegable**STATUTORY INTERPRETATION** – interpretation of “necessary and convenient” powers such as s 201BK of the *Native Title Act 1993* (Cth) – such powers strictly ancillary and supplementary to other functions conferred on the statutory repository – scope and operation of a “necessary and convenient” power in a particular context depends on the primary power or function being supplemented  |
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| Legislation: | *Aboriginal Land Rights Act 1983* (NSW) ss 36, 243*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 4, 21, 21C, 22, 23, 28, 29*Aboriginal and Torres Strait Islander Heritage Preservation Act 1984* (Cth) s 31*Acts Interpretation Act 1901* (Cth) ss 13, 34A, 34AB*Australian Securities Commission Act 1989* (Cth) ss 11, 102*Australian Sports Anti-Doping Authority Act 2006* (Cth) s 20*Corporations Act 2001* (Cth)*Corporations Law* (NSW) s 597*Federal Court of Australia Act 1976* (Cth) s 27*Native Title Act 1993* (Cth) ss 24AA, 24AB, 24CA, 24CB, 24CD, 24CE, 24CG, 24CH, 24CL, 24CI, 24CJ, 24CK, 24CL, 24EA, 24EB, 190C, s 199C, 201A, 201B, 202, 203AA, 203AB, 203AD, 203AI, 203B, 203BA, 203BB, 203BD, 203BE, 203BG, 203BH, 203BI, 203BJ, 203BK, 227, 233, 251A, 251B*Native Title Amendment Act 1998* (Cth)*Native Title Amendment Act 2007* (Cth)*Social Services Act 1947* (Cth) ss 12, 14*Housing Act 1980* (UK) s 33 |
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| Cases cited: | *Anthony Horden & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1*Anthony Lagoon Station Pty Ltd v Aboriginal Land Commissioner* (1987) 15 FCR 565*Bayly v Municipal Council of Sydney* (1927) 28 SR (NSW) 149*Blackpool Corporation v Locker* [1948] 1 KB 349*Byrnes v R* (1999) 199 CLR 1*Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560*Edwards v Santos Limited* [2011] HCA 8; 242 CLR 421*Ellis v Central Land Council*[2019] FCAFC 1*Ex parte Forster; Re University of Sydney* [1963] SR (NSW) 723*George Wimpey & Co Ltd v British Overseas Airways Corp* [1955] AC 169*Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2015] FCAFC 7; 227 FCR 95*Kuru v State of New South Wales* [2008] HCA 26; 236 CLR 1*Mercantile Mutual Life Insurance Co Limited v Australian Securities Commission* (1993) 40 FCR 409*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24*New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)* [2014] NSWCA 377; 88 NSWLR 125*O’Reilly v The Commissioners of the State Bank of Victoria* (1983)153 CLR 1*Pilbara Aboriginal Land Council Aboriginal Corporation Inc v Minister for Aboriginal and Torres Strait Islander Affairs* [2000] FCA 1113; 103 FCR 539*Plaintiff S4/2014 v Commonwealth* [2014] HCA 34; (2014) 253 CLR 219*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355*Quall v Northern Land Council* [2018] FCA 989*R v Skinner* [1968] 2 QB 700*Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion, Ex parte Director-General of Social Services* [1979] AATA 34; 2 ALD 86*Shanahan v Scott* (1957) 96 CLR 245*Tickner v Chapman* (1995) 57 FCR 451*Wansbeck District Council v Charlton* (1981) 79 LGR 523 J C Altman and D E Smith in *Review of Native Title Representative Bodies* (1995, Aboriginal and Torres Strait Islander Commission)Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, Lawbook Co, 2017) at [6.130]Richard H Bartlett, *Native Title in Australia* (3rd ed, LexisNexis Butterworths, 2015) [34.8]Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (2nd ed, 2018, Lawbook Co) at [11.20]Professor John Willis, “Delegatus Non Potest Delegare” (1943) 21 *The Canadian Bar Review* 257 |
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| Date of hearing: | 21 February 2019 |
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| Division: | General Division |
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| National Practice Area: | Native Title |
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| Solicitor for the Intervener: | Solicitor for the Northern Territory |

**ORDERS**

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|  | **NTD 30 of 2018** |
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| **BETWEEN:** | **NORTHERN LAND COUNCIL**First Appellant**JOE MORRISON AS CHIEF EXECUTIVE OFFICER OF THE NORTHERN LAND COUNCIL**Second Appellant |
| **AND:** | **KEVIN LANCE QUALL**First Respondent**ERIC FEJO**Second Respondent |
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| **AND BETWEEN:** | **KEVIN LANCE QUALL** (and another named in the Schedule)First Cross-Appellant |
| **AND:** | **JOE MORRISON AS CHIEF EXECUTIVE OFFICER OF THE NORTHERN LAND COUNCIL** (and another named in the Schedule)First Cross-Respondent |
|  | **NORTHERN TERRITORY OF AUSTRALIA**Intervener |

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| **JUDGES:** | **GRIFFITHS, MORTIMER AND WHITE JJ** |
| **DATE OF ORDER:** | **20 May 2019** |

**THE COURT ORDERS THAT:**

* Within four weeks hereof, the parties are to file and serve short minutes of final orders, including as to costs, to give effect to these reasons for judgment.
* If the parties are unable to agree on the short minutes of final orders, each should within that time file and serve an outline of written submissions, not exceeding five pages in length, in support of their individual position.
* The terms of the final orders will be determined on the papers and without a further oral hearing.

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

**REASONS FOR JUDGMENT**

**GRIFFITHS AND WHITE JJ:**

1. The appeal and the crossappeal in these proceedings raise three principal issues:

whether the certification functions of a representative body under s 203BE(1)(b) of the *Native Title Act 1993* (Cth) (the ***NT Act***) may be delegated to the Chief Executive Officer of the representative body?

whether the Court should exercise the discretion under s 27 of the *Federal Court of Australia Act 1976* (Cth) (the ***FCA Act***) to admit evidence concerning the delegation on 18 October 2001 of functions of the first appellant (the **NLC**) to the second appellant, Mr Joe Morrison, who was formerly its Chief Executive Officer (**CEO**)?

whether, in the event that the Court does receive the evidence, the delegation of 18 October 2001 had been effective so as to authorise Mr Morrison to exercise the certification functions of the NLC under s 203BE of the *NT Act*?

1. The NLC and its CEO, who at relevant times was Mr Morrison, (collectively the **appellants**) were the respondents to the proceedings at first instance. They and the Northern Territory of Australia (the **Territory**), which was granted leave to intervene in the appeal, submitted that each of these three issues should be resolved in the affirmative. The respondents, who were the applicants at first instance, contend that each of the first two issues should be resolved in the negative and that, even if the second is resolved in the affirmative, the third should be resolved in the negative.
2. The first issue is squarely raised by the cross-appeal. If the cross-appeal is allowed, it is unnecessary to determine the second and third issues because they do not arise in that scenario.
3. For the reasons that follow the cross-appeal should be allowed.

**Introduction to the factual and statutory setting**

1. For the purposes of this introduction, we will identify the major relevant facts and outline in quite broad terms some of the relevant provisions of the *NT Act*. A more detailed analysis of those and other relevant provisions occurs later in these reasons for judgment.

**(a) The Kenbi ILUA**

1. The NLC is a representative body for the purposes of Pt 11 of the *NT Act*. It was established as a Land Council under s 21 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ***ALR Act***) and is a body corporate (*ALR Act* s 22). It has a number of functions and powers under the *ALR Act*. By s 28 of the *ALR Act*, it may delegate to identified persons many of its functions and powers under the *ALR Act*. It is common ground that the explicit power of delegation under s 28 of the *ALR Act* is not applicable to the certification functions of the NLC under s 203BE of the *NT Act*.
2. In 2016, the NLC and the Territory agreed upon an Indigenous Land Use Agreement (**ILUA**) concerning the Cox Peninsula near Darwin (the **Kenbi ILUA**). By a deed dated 2 February 2017, the NLC and the Territory agreed to a variation of the Kenbi ILUA.

**(b) ILUAs and relevant provisions of the *NT Act***

1. The Kenbi ILUA was made pursuant to and, if registered, will derive significance from Div 3 of Pt 2 of the *NT Act*. That Division provides for the validity of certain “future acts”, that is, (relevantly) certain acts occurring after 1 January 1994 when the *NT Act* came into operation which affect native title. The *NT Act* contemplates that ILUAs may be of three kinds: body corporate agreements (Subdiv B); area agreements (Subdiv C); and alternative procedure agreements (Subdiv D). The Court was not provided with a copy of the Kenbi ILUA, but it was common ground that it is an area agreement. It is likely to contain compensation, entitlements and other benefits to the native title parties in relation to the acts to which the ILUA relates. .
2. A future act will be valid if the parties to an ILUA consent to it being done and if, at the time the future act is done, details of the ILUA are on the Register of Indigenous Land Use Agreements (s 24AA(3)). This highlights one aspect of the importance of registration.
3. Section 24CG of the *NT Act* provides for applications to the Native Title Registrar (**Registrar**) for registration of area ILUAs. Subsection 24CG(3), which is an important provision in the proceeding, provides:

*Certificate or statement to accompany application in certain cases*

(3) Also, the application must either:

(a) 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; or

(b) include a statement to the effect that the following requirements have been met:

(i) all reasonable efforts have been made (including by consulting all representative Aboriginal/Torres Strait Islander bodies for the area) 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;

(ii) all of the persons so identified have authorised the making of the agreement;

Note: The word ***authorise*** is defined in subsection 251A(1).

together with a further statement briefly setting out the grounds on which the Registrar should be satisfied that the requirements are met.

1. It is plain from the terms of s 24CG(3) that before an ILUA can be registered either of two conditions must be met. The first, which is relevant in this case, is that the application for registration be certified by all representative bodies for the affected area in performing their functions under s 203BE(1)(b) in relation to the area. The second (for convenience, the **alternative condition**) requires the application to include the statement specified in s 24CG(3)(b) as well as a further statement which briefly sets out the grounds on which the Registrar should be satisfied that the requirements in s 24CG(3)(b) are met. These alternative conditions reflect the fact that while a representative body may be a party to an area ILUA, it is not essential that it be so.
2. Section 24CD specifies the persons who must be parties to an area ILUA (described as the “native title group” as defined in s 24CD(2) and (3)). This provision operates so as to ensure that the interests of all persons who hold or may hold native title are represented insofar as that is possible, even if not all persons who hold or may hold native title are parties to an area ILUA. Under s 24CD(7), where a representative body for any of the area the subject of an area ILUA is not proposed to be a party, a person in the native title group must inform the representative body of its intention to enter into the ILUA and may consult the representative body about the ILUA. Such notification then enables the representative body to take appropriate steps to ensure that all persons who hold or may hold native title have been identified and have authorised the making of the agreement or to allow consultation with the representative body in relation to these matters.
3. The provision of a certificate under s 203BE(1)(b) performs a significant function. It obviates the need for the Registrar to determine independently whether or not he or she is satisfied that the requirements specified in s 24CG(3)(b) are met. Those requirements are important as they concern the identification of all persons who hold or may hold native title in the area and whether such persons have authorised the making of the ILUA. The Registrar is not required to determine those matters independently as it is presumed the representative body has already done so. For that reason, subject to the objection process, the Registrar must register the ILUA if it is certified (s 24CK). The practical and legal significance of a valid certificate is reinforced by the fact that an application by a representative body for registration of an area ILUA, which is accompanied by a certificate, is not affected if the representative body subsequently ceases to be recognised as a representative body for the purposes of the *NT Act* (see s 24CG(5)).
4. The present proceedings concern a certificate provided with a view to satisfying the requirement in s 24CG(3)(a) (and thereby obviate the need to meet the requirements of the alternative (and arguably more complicated) pathway in s 24CG(3)(b)). In the present proceedings, the NLC is a party to the Kenbi ILUA. As a party to that ILUA the NLC was required, as far as was practical, having regard to the matters proposed to be covered by the Kenbi ILUA, to “consult with, and have regard to the interests of, persons who hold or may hold native title in relation to land or waters in that area” (s 203BH(2)).
5. Division 3 of Pt 11 of the *NT Act* provides for the functions and powers of representative bodies. Section 203B(1)(b) provides that a representative body has the “certification functions” referred to in s 203BE.
6. Subsection 203BE(1), provides for two certification functions of a representative body; the first relates to an application for a native title determination, while the second relates to an application to register an area ILUA (to which s 24CG refers). Subsection 203BE(1) provides (emphasis in original):

**Certification functions**

*General*

(1) The ***certification functions*** of a representative body are:

(a) to certify, in writing, applications for determinations of native title relating to areas of land or waters wholly or partly within the area for which the body is the representative body; and

(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.

1. Subsection 203BE(5) imposes some important prohibitions on a representative body making a certification under s 203BE(1)(b). It provides:

*Certification of applications for registration of indigenous land use agreements*

(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.

Note: Section 251A deals with ***authority*** to make the agreement.

Thus the prohibition imposed by s 203BE(5) serves to underline the importance of the requirements imposed by s 24CG(3) concerning the identification of native title holders and authorisation for the making of the area ILUA.

1. The importance of identification and authorisation is further reinforced by the fact that s 203BE(6) imposes mandatory requirements relating to the certification of an application for registration of an ILUA by a representative body. It provides:

*Statement to be included in certifications of applications for registration of indigenous land use agreements*

(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.

1. Section 203BK, concerning the powers of representative bodies, is an important provision in the context of the present appeal and crossappeal. The primary Judge regarded this provision as providing the source of the power of the NLC to delegate the certification functions in s 203BE(1)(b) to the CEO. Section 203BK provides:

**203BK Powers of representative bodies**

(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.

*Assistance in performing dispute resolution functions*

(3) Without limiting subsection (1), in performing its dispute resolution functions in a particular case, a representative body may be assisted by the 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*.*

*Information obtained in providing assistance not to be used or disclosed in other contexts*

(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.

1. It is convenient at this point to refer also to ss 203B(2) and (3), which provide:

*Other laws may confer functions*

(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.

*Representative bodies to perform functions*

(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.

1. As will emerge, the terms of s 203B(3) provide the basis for one of the cross-respondents’ submissions on the crossappeal.

**(c) The certificate**

1. On 13 March 2017, Mr Morrison, in his capacity as CEO of the NLC, signed a certificate to be used in the making of the application for registration of the Kenbi ILUA. The certificate provided (relevantly):

**Certification of Application for Registration**

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

* 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

* 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

* 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 landowning 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 decisionmaking 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.

(Signed)

**Joe Morrison**

**CHIEF EXECUTIVE OFFICER**

**Northern Land Council**

**Date**: [13.3.17]

(Emphasis in original)

*Some relevant features of the certificate*

1. The following relevant features of the certificate should be noted at this juncture. First, although it is expressly stated in the paragraph numbered (1) that the NLC itself certified the Kenbi ILUA, the certification was in fact done by Mr Morrison in his capacity as CEO and purporting to act as the NLC’s delegate.
2. Secondly, although the paragraphs relating to the statement of opinion and reasons for that opinion (i.e. the paragraphs numbered (2) and (3) respectively), refer to the opinion of the NLC, there was no evidence in either the proceeding below or on the appeal which indicates that the NLC, as a representative body, had formed those opinions. Despite the language of the certificate (which presumably responded to the literal text of s 203BE(6)(a) and (b) of the *NT Act*), it was Mr Morrison acting as CEO who was certifying that these opinions were held, presumably by him purporting to act as the NLC’s delegate.
3. These particular features highlight the relevance of understanding the legal consequences where a function is performed by a validly appointed delegate, rather than by the person or body in whom the function is vested (or an authorised agent). This issue, along with some other relevant matters, was discussed by Brennan J (as the then President of the Administrative Appeals Tribunal) in *Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion, Ex parte Director-General of Social Services* [1979] AATA 34; 2 ALD 86 (***Reference under Ombudsman Act case***), which is discussed further below at [52].

**(d) The primary judgment relevantly summarised**

1. The hearing at first instance was conducted on the basis that Mr Morrison had made the certificate “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”. An assertion to that effect was made by an NLC employed lawyer and the respondents below did not dispute it.
2. The primary Judge considered that, on its face, Mr Morrison’s certificate contained a certification by the NLC in accordance with the requirements of s 203BE of the *NT Act* (at [6]).
3. In the proceedings below, the now respondents (and cross-appellants) sought judicial review of the decision of the NLC to certify the Kenbi ILUA. Their application for judicial review contained multiple grounds but, ultimately, they sought judicial review on the following two grounds only:
* the NLC’s certification function under s 203BE(1)(b) of the *NT Act* was not capable of being delegated; and
* if, contrary to that contention, the function was capable of being delegated, the resolution of the Governing Council of the NLC made on 1 October 1996 and the instrument of delegation of 10 March 2000 on which the appellants relied did not constitute a valid delegation of the NLC’s certification function to the CEO.
1. The respondents contended at first instance that, for either of these reasons, Mr Morrison’s certificate could not constitute a certification of the kind required by s 24CG(3)(a).
2. The primary Judge rejected the first of the respondents’ grounds, but upheld the second: *Quall v Northern Land Council* [2018] FCA 989. His Honour considered that s 203BK(1) of the *NT Act* vested power in the NLC to delegate the certification functions to its CEO. It is the primary Judge’s rejection of the first ground outlined above which is the subject of the crossappeal and which is summarised in the first issue identified at [1] above.
3. The primary Judge’s reasons for holding that the certification functions were delegable are summarised at [35] below.
4. In the current proceeding, the appellants do not appeal against the Judge’s decision concerning the second ground. Instead, they seek to introduce further evidence on the appeal. That evidence comprises a resolution of the Governing Council of the NLC on 18 October 2001 which, the appellants contend, is an express delegation by the NLC of its certification functions under s 203BE(1)(b) to the CEO, as well as the NLC’s explanation for the delegation not having been adduced in the evidence in the proceedings before the primary Judge. It is this evidence which gives rise to the second issue identified at the commencement of these reasons.
5. It is on the basis of the delegation dated 18 October 2001 that the appellants contend that Mr Morrison did have a delegation to provide the certification of the Kenbi ILUA on 13 March 2017, this being the third issue identified earlier.

**First issue: are the certification functions delegable?**

1. This is the sole issue raised by the crossappeal.
2. The primary Judge considered that four matters supported the view that s 203BK(1) should be construed as a power to delegate.

Section 203BK(1) is expressed in sufficiently broad terms to encompass the delegation of functions to the CEO, and there is nothing in its text, context or purpose requiring it to be read down in the manner for which the respondents contended. Further, the Judge considered that construction to be consistent with the approach taken in *Mercantile Mutual Life Insurance Co Limited v Australian Securities Commission* (1993) 40 FCR 409 (***Mercantile Mutual***) at 411-412 per Black CJ, at 427 per Lockhart J and at 441 per Gummow J. In that case, the Full Court of this Court considered that a similarly worded provision in s 11(4) of the *Australian Securities Commission Act 1989* (Cth) (the ***ASC Act***) was sufficiently broad to support an authorisation made by the Australian Securities Commission of certain of its functions under s 597 of the *Corporations Law* (NSW) (at [25]).

The requirement imposed by s 203BA(2) that a representative body perform its functions “in a manner that … maintains organisational structures and administrative processes” which promote the satisfactory and effective performance of its functions, taken together with the extent and complexity of the functions of representative bodies, supported a construction that a representative body has the ability to delegate its certification functions to its CEO (at [26]).

This construction of s 203BK(1) promotes the primary purpose of a representative body, namely, to represent native title holders, persons who may hold native title and Aboriginal people and Torres Strait Islanders living in the area for which it is the representative body (at [26]).

Other provisions in Div 3 of Pt 11 permit a representative body to employ the services of a range of third parties to assist in the performance of its functions. These include s 203BB (briefing out representation), s 203BD (entering into an agreement with other representative bodies), and s 203BK itself. The primary Judge considered that if representative bodies are permitted to obtain the assistance of all these third parties in the performance of their functions, it was difficult to see why they may not perform those functions directly via appropriate delegations to, amongst others, their staff (at [27]).

***Submissions on the cross-appeal***

1. In submitting that the NLC lacked the power to delegate the certification functions, the cross-appellants relied in particular on s 203B(3). They submitted that the primary Judge had been wrong to construe s 203BK(1) as authorising delegation of the NLC’s certification functions. Their submission was that s 203BK(1), on which the primary Judge relied, needed to be read harmoniously with s 203B(3). They submitted that the primary Judge’s conclusion on this issue inadvertently read down s 203B(3) so as to leave it with no work to do. They submitted that s 203BK(1) contemplated only that a representative body should have the power to enter into arrangement or appoint a person or body *to assist* in the performance of its functions, provided that those arrangements did not involve other persons performing those functions themselves.
2. The cross-appellants submitted that it is apparent that s 203B(3) and s 203BK distinguish between the performance of a function, on the one hand, and assistance in the performance of a function, on the other. When that distinction is kept in mind, s 203B(3) and s 203BK(1) can be understood as operating together harmoniously. A representative body may obtain assistance in performing functions provided that it itself exercises the responsibility and authority involved in that performance.
3. The cross-appellants also submitted that the reasons of the primary Judge reveal the following errors in approach:

his Honour focused on construing s 203BK(1) rather than on construing s 203B(3) and s 203BK(1) together;

his Honour’s construction meant that s 203B(3) was rendered otiose;

his Honour’s reliance on *Mercantile Mutual* was misplaced because that case addressed the question of the power of “authorisation” in s 11(4) of the *ASC Act* and not the power of delegation to which s 102 of the *ASC Act* referred. In any event, there were relevant differences between the statutory contexts; and

his Honour’s construction undermined the primary purpose of a representative body as it would permit performance of a representative body’s functions by employees, agents or others who had no indigenous cultural connection with the area of responsibility of the representative body.

1. The cross-respondents defended the primary Judge’s conclusion that the certification functions were capable of delegation to the CEO by virtue of the powers under s 203BK. In summary, their submissions were as follows:

the language of s 203BK(1) is wide and general enough to support “internal delegation” of the performance of a function;

nothing in the text, context and purpose of the relevant provisions or the *NT Act* as whole requires s 203BK to preclude such internal delegation;

the primary Judge’s construction is supported by *Mercantile Mutual*, on the basis that the words “do all things necessary and convenient” are the “functional equivalent of delegation”;

the cross-appellants’ submissions inverted the relationship between ss 203B(3) and 203BK. Implicitly referring to relevant observations in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 (***Project Blue Sky***) at [70] per McHugh, Gummow, Kirby and Hayne JJ, they submitted that the provisions needed to be read harmoniously and s 203B(3) is expressly subordinate to s 203BK, which is the lead provision;

internal delegation does “no violence” to the objects and purposes for which a representative body is recognised under the *NT Act* because whether the certificate functions are carried out by the Full Council of the NLC or by a selected delegate (such as the CEO), the function must be exercised by reference to the same criteria (controlled by s 203BE(5)) and will in practical terms rely on the same professional resources and advice; and

the primary purpose of a Land Council as a representative body under the *NT Act* does not direct that only the Full Council make decisions in performance of the representative body’s functions, partly because the criteria for the recognition of the Land Council as a representative body do not require that it have a governing board or membership of any particular extent.

1. The Territory’s submissions on the cross-appeal may be summarised as follows:

representative bodies are created outside the framework of the *NT Act* and are likely to have their own particular organisational structures and administrative processes. The *NT Act* largely takes an “eligible body” as a “representative body” as it finds it, with those inherent organisational structures and processes;

the primary Judge was correct to find that the conferral of power in s 203BK(1) is sufficient to confer a power to delegate the NLC’s functions;

s 203B(3) does not prohibit the delegation of functions to a representative body’s CEO because:

the act of delegation is a unilateral act which involves the conferral of a function or power upon another person or body and is not readily understood as entering into “an arrangement” with another person;

the CEO is the “directing mind and will” of a body corporate and, when a function or power is performed by a delegate, s 34AB(1)(c) of the *Acts Interpretation Act 1901* (Cth) (***AI Act***)deems it to have been performed by the delegating body. Accordingly, the CEO is not readily understood in context as being “another person” within the meaning of s 203B(3);

the exercise of the certification functions by the representative body’s CEO does not undermine the primary purpose of the representative body, which is to represent native title holders and persons who may hold native title and Aboriginal peoples and Torres Strait Islanders living in its area;

the kinds of arrangements specified in ss 203BB, 203BD and 203BK (which form exceptions to the prohibition in s 203B(3)) indicate the kinds of arrangements which are prohibited by s 203B(3). Each of those exceptions do not involve delegation to a Land Council employee, but rather relate to an agreement or arrangement of a bilateral kind, with a person or body external to the representative body;

delegation to an officer or employee is a common practice of long-standing in the context of bodies corporate;

the power to delegate some or all of its functions to one or more of its directors or employees is “vital” to ensure the day to day functioning of a busy body corporate, save for the limited situations in ss 203BB, 203BD and 203BK;

in circumstances where the Full Council of the NLC has 78 members who represent 54 communities in the top part of the Territory, acceptance of the cross-appellants’ contention would mean that the NLC would be required to convene a meeting of its Full Council for each occasion of the performance of its certification functions under s 203BE; and

the proper construction of s 203B(3) is that it excludes from the power in s 203BK(1) (i.e. the power to do all things necessary or convenient for or in connection with the performance of the functions identified in s 203B(1), including the power to delegate that performance to any person or body), the power to enter into arrangements with persons external to the representative body under which they are to perform the functions, save those specified in ss 203BB(5), 203BD or 203BK(2) or (3).

**Consideration and disposition of the cross-appeal**

**(a) Some relevant legal principles summarised**

1. Whether or not a statutory function conferred on a particular person or body can only be performed by that person or body (and cannot be delegated) turns on the proper construction of the statutory provision which confers the function, as well as the statute as a whole (see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 37-8 Mason J (with whom Gibbs CJ and Dawson J agreed) and at 66 per Brennan J and *Tickner v Chapman* (1995) 57 FCR 451, noting that at 493 Kiefel J (as her Honour then was) emphasised that the Minister’s function under s 10 of the *Aboriginal and Torres Strait Islander Heritage Preservation Act 1984* (Cth) was expressly made non-delegable by s 31(1) of that legislation).
2. The core principle is reflected in the Latin maxim *delegatus non potest delegare*, which deals with the question whether an authority in whom is vested a statutory discretion can delegate to another person or body the exercise of that statutory power. A seminal and influential article on the subject was written by Professor John Willis, “Delegatus Non Potest Delegare” (1943) 21 *The Canadian Bar Review* 257. At 259, Professor Willis stated that the answer to the question as to when delegation is possible “depends entirely on the interpretation of the statute which confers the discretion”. He said that a discretion conferred by statute is *prima facie* intended to be exercised by the authority on whom it is conferred and no one else, “but this intention may be negatived by any contrary indications found in the language, scope or object of the statute”. He described the maxim as a “rule of construction”.
3. Professor Willis highlighted at 260 that the presumption that the person (or body) named in a statute was selected because of some aptitude peculiar to himself requires the authority named in the statute to use its own peculiar aptitude and forbids it from entrusting its statutory discretion to another who may be less apt than it, unless it is clear from the circumstances that some reason other than its aptitude dictated the naming of it to exercise the discretion. He made clear, however, that this is not the only relevant consideration in applying the rule of construction.
4. As part of his summary of the relevant principles, Professor Willis said at 264:

… The rule of construction prescribes that to any statute which confers a discretion upon a named authority, the word “personally” should be added after the name of the authority… To determine whether in place of the word “personally” the words “or any person authorized by it” should be read into the statute and thus permit the delegation, the court weighs the importance of maintaining in the particular situation the policy of requiring the named authority to exercise the discretion itself against the importance of maintaining in the particular situation the established procedure followed by the authority, and of furthering the most convenient method of achieving the object of the Act…

1. There is a helpful illustration of the application of these and other relevant general principles in the New South Wales Court of Appeal’s decision in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)* [2014] NSWCA 377; 88 NSWLR 125 (***Nelson Bay Claim case***). The focus of that case was on s 36(1)(b1) of the *Aboriginal Land Rights Act 1983* (NSW) (***NSW ALR Act***). Relevantly, that provision stated that “claimable Crown lands”, which could be claimed by an Aboriginal Land Council, meant lands which are vested in the Crown that, when a claim is made for the lands, “do not comprise lands which, **in the opinion of a Crown Lands Minister,** are needed or are likely to be needed as residential lands…” (emphasis added). A departmental officer purported to reject a claim over an area of land on the basis of the departmental officer’s opinion that the land was needed or likely to be needed as residential lands. The issue on appeal was whether, on the proper construction of s 36(1)(b1), the Minister personally was required to form the requisite opinion and whether that task could not be delegated or otherwise performed by the departmental officer as the Minister’s agent or in accordance with what is generally known as the *Carltona principle* (see *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560).
2. The Court of Appeal held that on the proper construction of s 36(1)(b1) it was only the opinion of the Minister personally which could preclude a successful land claim under that provision. Basten JA gave the primary judgment (with whom Beazley P and Preston CJ of LEC agreed). His Honour’s analysis may be summarised as follows (focusing upon the issue whether or not the formation of the opinion could be delegated and adding that while the judgment also contains a helpful analysis of the *Carltona principle*, no party relied upon that principle here).
3. First, where a power or function is conferred on a Minister in circumstances where, given administrative necessity, the Parliament cannot have intended the Minister to exercise the power or function personally, an implied power of delegation (or agency) may be inferred (at [12]).
4. Secondly, even where there is a statutory power of delegation, a principle of implied agency may operate in respect of authorised officers within both a Minister’s department as well as a statutory office-holder, such as the Deputy Commissioner of Taxation (see *O’Reilly v The Commissioners of the State Bank of Victoria* (1983)153 CLR 1 (***O’Reilly***)) (at 12-13).
5. Thirdly, there was an express power of delegation conferred on the Minister administering the *NSW ALR Act* in relation to the exercise of any of that particular Minister’s functions (s 243 of the *NSW ALR Act*) (at [17]). That is to be contrasted with the absence of an explicit power of delegation of the opinion of a Crown Lands Minister which is the office referred to in s 36(1)(1b).
6. Fourthly, it was significant to the issue of construction that it related to the formation of an opinion which had the effect of precluding an Aboriginal Land Council from claiming Crown lands and it was also important that the issue related to the formation of an opinion (at [17]).
7. Basten JA relied on the following six grounds for concluding that the opinion under s 36(1)(b1) had to be formed by a Crown Lands Minister personally and could not be delegated.

Importantly, the relevant opinion was that of a Crown Lands Minister (who was not the Minister with responsibility for administering the *NSW ALR Act*). Having regard to the functions and responsibilities of a Minister administering Crown lands legislation in NSW, and subject to any power of delegation, the Parliament may well have expected that decisions as to the use of particular Crown lands would be made by the Minister personally ([24]-[26]).

The historical purpose and structure of the *NSW ALR Act* militated in favour of an opinion being exercised personally by a Crown Lands Minister. This conformed with the beneficial purpose of granting land to Aboriginal claimants which was designed to address the wide dispossession of Aboriginal people of their lands following colonial settlement of NSW ([27]-[29]).

The subject matter of the statutory opinion favoured a personal decision by such a Minister because it will necessarily involve high government policy ([30]).

The nature of the opinion was “markedly different from that which might arise with respect to the circumstances of individuals who may be applicants for welfare benefits or recipients of tax assessments or in any other of a multitude of respects subject to government decision-making”, where in such areas, it might be expected that the exercise of relevant functions will be delegated by some means or other ([31]).

The history of the insertion of s 36(1)(b1) in 1986, in comparison with other provisions within s 36(1), was said to be “instructive”. A clear choice was made not to add a precondition which might be the subject of objective assessment by the court, but rather a precondition formulated by reference to ministerial opinion ([33]).

There was no express power of delegation with respect to decisions of a Crown Lands Minister under the *NSW ALR Act* and there was no basis for inferring that the absence of an express power of delegation was not “an informed and deliberate choice” ([34]-[36]).

1. Further helpful guidance concerning the maxim is provided by Brennan J’s decision in *The Reference under Ombudsman Act case*, which was described by Wilson J in *O’Reilly* at 30 as providing an “informative discussion”. Under s 12 of the *Social Services Act 1947* (Cth), the Director-General of Social Services was empowered to delegate to various persons all or any of his or her powers and functions under the Act (except the power of delegation itself), so that the delegate could exercise the powers and functions specified in the instrument of delegation. One of the issues in the request for an advisory opinion by the AAT was whether the Director-General had validly delegated the review function under s 14. Justice Brennan’s decision contains a detailed analysis of the distinction between the delegation of powers and the authorisation of another person to, in effect, act as a person’s agent, as is broadly reflected in the *Carltona principle*. As noted above, the latter concept is not relied upon in this proceeding so it is unnecessary to summarise that part of his Honour’s reasons in any detail.
2. At 93, Brennan J stated that the extent to which an authority may commit to other officials the performance of the authority’s duties “is primarily dependent upon the nature of the power to be exercised” (citing *Ex parte Forster; Re University of Sydney* [1963] SR (NSW) 723 at 733). His Honour then drew a distinction between the legal effect of acts done by an agent or authorised person as opposed to acts done by a delegate. At 93, his Honour stated that, in the former situation, i.e. where acts are done under authority (or agency), the acts have “the legal effect of acts done personally by that authority” (citing *R v Skinner* [1968] 2 QB 700 at 707 per Widgery LJ). This was to be contrasted with the position where a relevant power is delegable and has been delegated. His Honour stated at 94 that then the delegate may, without further authorisation, act in effective exercise of the power and that such acts “are not treated as acts vicariously done by the authority” (citing *Blackpool Corporation v Locker* [1948] 1 KB 349 at 377 per Scott LJ).
3. The distinction drawn by Brennan J between the legal effect of acts of an agent as opposed to the acts of a delegate are conveniently summarised as follows in Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, Lawbook Co, 2017) at [6.130] (emphasis added, footnotes omitted):

*Carltona* allows the agent to act in the principal’s name and use all of the principal’s powers. The agent is the principal’s ghost writer. **True delegates decide for themselves unless an Act provides to the contrary**, and they must obey any limits imposed by the instrument of delegation. **True delegates who purport to sign off for the principals act invalidly**. Agents need no delegation, although they do have either to be authorised, or possibly (in some cases) have ostensible authority…

1. Both the rule of construction and the legal effect of acts done by an agent as opposed to a delegate may be affected by relevant legislation. For example, the rule of construction may be displaced not only by an express power of delegation, but also by an implied legislative intent, as is illustrated by *Bayly v Municipal Council of Sydney* (1927) 28 SR (NSW) 149. There, the Council was incorporated under legislation which also required it to appoint a town clerk, a treasurer and other officers. Moreover, the legislation required the Council “assign to [such officers] such duties… as the council may deem right”. Perhaps unsurprisingly, it was held that this provision empowered the Council to delegate its duties and powers to its duly appointed officers.
2. The general principles may also be affected by provisions in the *AI Act*. For example, s 34A of the *AI Act* (whose operation is subject to the manifestation of a contrary intention) provides:

**34A Exercise of powers and performance of functions or duties that depend upon the opinion etc. of delegates**

If:

(a) under an Act, a person’s exercise of a power, or a person’s performance of a function or duty, is dependent upon the person’s opinion, belief or state of mind in relation to a matter; and

(b) that power, function or duty has been delegated under that or any other Act;

the delegate may exercise that power, or may perform that function or duty, upon the delegate’s opinion, belief or state of mind in relation to that matter.

1. Section 34AB(1) of the *AI Act* (which is relied upon by the Territory), deals with the effect of delegation (its operation is also subject to the manifestation of a contrary intention). It provides:

**34AB Effect of delegation**

*General*

(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.

…

1. It is notable that both these provisions in the *AI Act* only operate if it is established that an Act confers power on a person or body to delegate a function, duty or power. The power of delegation may presumably be explicit or implicit but neither s 34A nor s 34AB operates unless such a power exists. These provisions can, therefore, have no relevance if, on the proper construction of the relevant provisions of the *NT Act*, the NLC has no power to delegate its certification functions.

**(b) Application of the relevant legal principles**

1. Applying the relevant legal principles outlined above, we will now explain why we respectfully disagree with the primary Judge’s view that the certification functions in s 203BE(1)(b) of the *NT Act* are delegable.
2. We consider that the issue should be addressed at a level of specificity which focusses upon the certification functions themselves and not by reference to other functions which the *NT Act* vests in a representative body. That is because, as the *Nelson Bay Claim case* exemplifies, the nature and character of the particular statutory function is an important consideration in determining whether or not the function is delegable.
3. We also consider that it is appropriate to focus first on the text, context and purpose relating to the vesting of certification functions on a representative body, rather than immediately focussing on s 203BK as did the primary Judge. The approach may be different if there was an explicit power of delegation in the *NT Act*, similar to that in s 28 of the *ALR Act*, but that is not the case. Of course, there is an important question whether s 203BK should be construed as containing an **implicit** power of delegation, but that issue is more meaningfully addressed and determined after consideration is given to the role and responsibilities of a representative body, the nature and character of the certification functions which are vested in it and the role and significance of the registration of area ILUAs to which the relevant certification functions relate. This requires careful consideration of the legislative history pertaining to representative bodies, which is rather lengthy and complex. It is necessary to now consider in greater depth than the outline in the introductory section to these reasons for judgment relevant provisions in both the *ALR Act* and the *NT Act*. It is also necessary to consider more closely relevant provisions in the *NT Act* relating to ILUAs.

***(i) Relevant features of the ALR Act***

1. In common with several other Aboriginal Land Councils, the statutory foundations of the NLC are to be found in the *ALR Act* and not the *NT Act*. The Minister is obliged by s 21 of the *ALR Act* to establish an Aboriginal Land Council for each of at least two areas into which the Northern Territory has to be divided. Detailed provisions deal with applications by an Aboriginal group or body for the Minister to establish a new Land Council and the Minister’s assessment of any such application. Under s 21C, if the Minister gives a notice stating that he or she supports the establishment of a new Land Council, the Minister is obliged to ask the Australian Electoral Commission (**AEC**) to hold a vote on the proposed establishment, which the AEC is obliged to arrange. Under s 21C(3) a person is entitled to vote in the AEC arranged process if the person is an adult Aboriginal and is entitled to vote by one of two methods as specified in the provision. If at least 55 per cent of the formal votes cast by persons who are entitled to vote favour the proposal, the Minister has a discretion under s 21C(5) to establish the new Land Council.
2. Under the *ALR Act*, the functions of a Land Council include:

ascertaining and expressing the wishes and the opinion of Aboriginals living in the area of the Land Council as to the management of Aboriginal Land in that area and as to appropriate legislation concerning that land (s 23(1)(a)); and

to protect the interests of traditional Aboriginal owners of, and other Aboriginals interested in Aboriginal Land in the area of the Land Council (s 23(1)(b)).

1. By virtue of s 23(3), a Land Council is obliged, in carrying out its functions with respect to any Aboriginal Land in its area, to have regard to the interests of, and to consult with, the traditional Aboriginal owners (if any) of the land and any other Aboriginals interested in the land. Furthermore, the Land Council is prohibited from taking any action in any matter in connection with land held by a Land Trust (see s 4 of the *ALR Act*), including the giving of consent or the withholding of consent, unless the Land Council is satisfied that:

the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed action and, as a group, consent to it; and

any Aboriginal community or group that may be affected by the proposed action has been consulted and has had adequate opportunity to express its view to the Land Council.

1. The operation and significance of some of these provisions of the *ALR Act* and, in particular, s 23(3), was recently discussed by the Full Court in *Ellis v Central Land Council*[2019] FCAFC 1.
2. Under s 27 of the *ALR Act*, which deals with the powers of a Land Council, it is provided that, subject to the Act, a Land Council may “do all things necessary or convenient to be done for or in connexion with the performance of its functions”, including employing staff and obtaining the advice and assistance of persons who are expert in any matter with which the Council is concerned. As noted above, there is also an express statutory power of delegation in s 28. A Land Council is explicitly empowered to delegate to the Chair or another member of the Council or a member of the Council’s staff any of the Council’s functions or powers **under the *ALR Act*** with some specified exceptions. It is common ground that this power of delegation has no relevance to the proceedings here, which relate to the performance of the NLC’s functions not under the *ALR Act*, but rather the certification functions under s 203BE of the *NT Act*.
3. Another relevant provision in the *ALR Act* is s 29, which deals with the membership of a Land Council. It provides that members of a Land Council shall be Aboriginals living in the area of the Land Council, or whose names are set out in a register maintained by the Land Council in accordance with s 24, who are chosen by Aboriginals living in the area of the Land Council in accordance with such methods as are approved from the Minister (s 29(1)). Under s 29(2), with the approval of the Minister, a Land Council may also co-opt Aboriginals living in the area of the Land Council as additional members, but this is capped at five such members at any one time.
4. The significance of these provisions lies in the fact that the *ALR Act* makes clear that only Aboriginal people are entitled to be members of a Land Council. Moreover, the *ALR Act* enfranchises Aboriginal people in the process of electing members of a Land Council. Equally significantly, while the *ALR Act* contemplates that a Land Council may have members of staff to assist in the performance of many of the Council’s powers under the *ALR Act*, the legislation is entirely silent on whether or not such members of staff, including executive officers who are not members of the Council, have to be Aboriginal persons. Accordingly, it is possible that, for example, the CEO of a Land Council may not be Aboriginal.

***(ii) Relevant features of the NT Act***

1. In determining whether or not the certification functions of the NLC are capable of delegation, it is important to focus on two important aspects of the *NT Act*. The first relates to the importance of provisions in that legislation which relate to the interrelationship between the doing of a “future act” as defined in s 233 of the *NT Act* (which essentially is an act which affects native title, including non-legislative acts taking place on or after 1 January 1994) and the validity of such a future act where it is covered by a registered ILUA. The second matter relates to relevant provisions pertaining to the criteria for the recognition of representative bodies under the *NT Act* and their role as representatives of their Aboriginal constituents. It is convenient to deal with each of these matters in turn.

*A. Future acts and ILUAs*

1. Division 3 of Pt 2 of the *NT Act* contains important provisions relating to “future acts” and the significance of registered ILUAs. These provisions were inserted into the Act in 1998. Relevantly, a “future act” is defined in s 233(1)(a)(ii) to be any other act that takes place on or after 1 January 1994 (which does not consist of the making, amendment or repeal of legislation that takes place on or after 1 July 1993) which affects native title. An act “affects” native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise (s 227). Because an act can only be a “future act” if it affects native title, there may be some doubt as to whether a particular act is a “future act” before the act is carried out. That is the case, for example, where no determination has been made that native title exists before the future act is carried out. Partly in recognition of this uncertainty, Div 3 contains various provisions which have the effect that future acts which are carried out in accordance with the provisions in Div 3 are valid and may be performed even though it may later emerge that native title exists in relation to the land or waters which are affected by the carrying out of the future act.
2. The Explanatory Memorandum to the *Native Title Amendment Bill 1997* (Cth) makes plain that the proposed amendments relating to future acts and ILUAs were intended to provide greater certainty, as well as to allow the parties to an ILUA to agree on compensation. The function of an ILUA was described by Heydon J (with whom French CJ, Gummow, Crennan, Kiefel and Bell JJ agreed) in *Edwards v Santos Limited* [2011] HCA 8; 242 CLR 421 at [24] (footnote omitted):

24. The function of the ILUA was to deal with problems arising from the fact that native title can be difficult to prove, and the processing of native title claims can take a long time. To use the words of the Explanatory Memorandum to the *Native Title Amendment Bill 1997*:

over most of mainland Australia, governments and others seeking to use land do not know if native title exists, and if it does, who holds it. It is difficult in such circumstances to have agreements which provide the necessary level of legal certainty. These provisions [including what is now Pt 2 Div 3 subdiv C of the NTA] are designed to give security for agreements with native title holders, whether there has been an approved determination of native title or not, provided certain requirements are met.

Not only did the ILUA give security to the petroleum defendants in dealing with native title claimants who may become native title holders, but it gave the plaintiffs, as native title claimants, the opportunity to obtain immediate advantages which would otherwise be postponed until a perhaps distant day when their native title claim succeeds. …

1. One way in which greater certainty is provided is where the future act is covered by a registered ILUA. Detailed provisions relating to area ILUAs are set out in Subdiv C of Div 3 of Pt 2 of the *NT Act*. For an agreement to be an area ILUA, the agreement must meet the requirements of ss 24CB to 24CE (see s 24CA). One of those requirements is that all persons in the native title group in relation to the area the subject of the ILUA must be parties to the agreement (s 24CD).
2. Registration is significant for at least five reasons. First, registration is necessary so as to ensure that future acts affecting native title, as performed pursuant to the ILUA, are valid. Secondly, registration gives the ILUA contractual effect among the parties to it in addition to any effect that it may have otherwise (see s 24EA(1)). Thirdly, and importantly, once registered, an ILUA binds all native title holders in relation to the land and waters affected by it, and not merely those who are parties to the agreement (s 24EA(1)(b)). The notice and objection procedures under ss 24BH, 24CH and 24CI are intended to ensure that native title holders who are not parties to the agreement are able to challenge the proposed registration. Fourthly, an ILUA will almost certainly contain provisions which provide benefits to native title parties. The benefits might be financial payments by way of compensation, employment, business or education opportunities, cultural and heritage protection and access to land. Fifthly, where a future act is carried out pursuant to a registered ILUA its terms take precedence over any other provisions of Div 3 which would otherwise apply (see s 24AB(1)).
3. Section 24CG provides for any party to an area ILUA, with the agreement of all other parties, to apply in writing to the Register for the ILUA to be registered on the Register of Indigenous Land Use Agreements. It is well to set out s 24CG in full:

**24CG Application for registration of area agreements**

*Application*

* Any party to the agreement may, if all of the other parties agree, apply in writing to the Registrar for the agreement to be registered on the Register of Indigenous Land Use Agreements.

*Things accompanying application*

* The application must be accompanied by a copy of the agreement and any other prescribed documents or information.

*Certificate or statement to accompany application in certain cases*

* Also, the application must either:

(a) 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; or

(b) include a statement to the effect that the following requirements have been met:

(i) all reasonable efforts have been made (including by consulting all representative Aboriginal/Torres Strait Islander bodies for the area) 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;

(ii) all of the persons so identified have authorised the making of the agreement;

Note: The word ***authorise*** is defined in subsection 251A(1).

together with a further statement briefly setting out the grounds on which the Registrar should be satisfied that the requirements are met.

*Registrar may assist parties*

(4) The Registrar may give such assistance as he or she considers reasonable to help a party to the agreement prepare the application and accompanying material.

*Certification not affected if Aboriginal/Torres Strait Islander body subsequently ceases to be recognised*

(5) To avoid doubt, the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected merely because, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

1. As previously noted, s 24CG(3) requires that an application for registration of an area ILUA must either have been certified by all representative bodies for the area in performing their functions under s 203BE(1)(b) in relation to the area or, alternatively, include a statement that all reasonable efforts have been made to identify all persons who hold, or may hold, native title in the area, and that all of the persons who have been identified have authorised the making of the agreement (as to which, see s 251A of the *NT Act*).
2. These provisions highlight the potentially important role of representative bodies where an area ILUA is sought to be registered (and thereby *inter alia* provide protection for the carrying out of a future act). Where an application for registration relies upon certification, all representative bodies for the affected area must certify the application for registration. They are prohibited from so certifying unless each of the representative bodies is of the opinion that all reasonable efforts have been made to ensure that all persons who hold, or may hold, native title have been identified, and that all of them have authorised the making of the agreement in accordance with s 251A (see s 203BE(5)). The certification(s) must state that the relevant representative body is of the opinion that the requirements of s 203BE(5) have been met. Brief reasons for holding that opinion must also be included in the certification (see 203BE(6)).
3. As noted above, where an application for registration is not accompanied by such a certification(s), the application must be accompanied by a statement as required by s 24CG(3)(b), as well as the further statement which sets out the grounds on which the Registrar should be satisfied that the requirements specified in s 24CG(3)(b) are met.
4. As is evident from the terms of s 203BE, certification is relevant to either or both of two matters specified in s 203BE(1)(a) and (b) respectively:

an application for a **determination** of native title and, in particular, as to the important question whether the application has been properly authorised (see ss 190C(4) and 251B); and

as arises in this proceeding, an application for the **registration** of an area ILUA and, in particular, as to whether persons affected by the registration of such an agreement have authorised the making of the agreement (see ss 24CG(3) and 251A).

1. The latter certification functions (i.e. those under s 203BE(1)(b)) relate to two important aspects of the *NT Act* as it applies to area ILUAs. The first is the requirement that all reasonable efforts have been made to identify all persons who hold or may hold native title in the area. The second is the requirement that there be authorisation under the *NT Act* for the making of such an agreement (see s 251A). Under s 251A, native title holders and claimants are able to rely upon traditional laws and customs in giving authorisations under the *NT Act* where such laws and customs are capable of dealings with authorising “things of that kind”. Where there is no applicable traditional process, the persons concerned must agree to and adopt a process for decision-making (see s 251A(b)). The authorisation of an ILUA affects the capacity of the persons giving the authorisation to receive compensation under the *NT Act* (see s 24EB(5)). In particular, if an ILUA covers an area over which persons who did not give authority for the ILUA hold native title, the Registrar is required to remove the agreement from the Register of Indigenous Land Use Agreements (see s 199C(1)(b)) unless such native title holders ratify the agreement (see s 199C(1A)).
2. That is not to say, however, that it is essential for the registration of an ILUA for there to be a certification under s 203BE(1)(b). As noted above, even if there is no such certification, the ILUA may still be registered but only if the Registrar is satisfied that the criteria specified in ss 24CG(3)(b) and 24CL are satisfied. In substance, the production of a valid certification establishes that the relevant requirements have been met such that the Registrar must accept the ILUA for registration, as opposed to the potentially more complicated path to registration which depends upon the Registrar reaching an independent satisfaction that the relevant requirements have been met.
3. The Registrar is obliged to give notice of an area ILUA which is sought to be registered. Notice of the ILUA is to be provided to various persons and bodies as specified in s 24CH(1)(a) who are not a party to the ILUA, as well as to the public. The content of the notice is specified in s 24CH(2) and includes a requirement that, if the application for registration is certified by representative bodies for the area affected (i.e. under s 24CG(3)(a)), within the period of three months after the notification day (as defined in s 24CH(3)), any person claiming to hold native title in relation to any of the land or waters in the area covered by the ILUA may object, in writing to the Registrar, against registration of the ILUA on the ground that the requirements of s 203BE(5)(a) and (b) were not satisfied in relation to the certification. Section 24CJ operates to prevent registration of an area ILUA until expiration of the notice period referred to in s 24CH(2)(d). The mandatory three-month notice period is an effective acknowledgment that the identity of all persons who hold or may hold native title may not always be clear and some may not have been identified before the application of a registration is made to the Registrar, but such people should have an opportunity to protect their native title rights and interests. The same comments may be made in respect of the related matter concerning authorisation. Provisions relating to the lodging of objections against registration of an area ILUA are set out in s 24CI. Section 24CJ imposes an obligation on the Registrar to decide whether or not to register an ILUA in the circumstances specified therein. In the case of an application for registration of an area ILUA which has been certified by representative bodies, s 24CK defines the circumstances in which the Registrar must or must not register the ILUA.
4. Even where no representative body is a party to an area ILUA which is provided to the Registrar for registration, before it can be registered the Registrar must give notice to any representative body for the area covered by the agreement (s 24CH(1)(a)(iii)). This requirement is plainly designed to ensure that the representative body is aware of the proposed registration and is placed in a position so that it can take appropriate steps such as those provided in s 24CH(2)(d)(ii). The representative body is also placed in a position to determine what other functions it might perform in respect of the proposed registration, including its notification functions as set out ins 203BG.

*B. Representative bodies and the NT Act*

1. Drawing in part on the analysis by Richard H Bartlett in ch 34 of *Native Title in Australia* (3rd ed, LexisNexis Butterworths, 2015) (***Native Title in Australia***) as well as the commentary in Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (2nd ed, 2018, Lawbook Co) at [11.20],the following relevant features may be noted.
2. When the *NT Act* initially commenced, the Commonwealth Minister responsible for Indigenous Affairs was empowered to determine that a body was a “representative Aboriginal/Torres Strait Islander Body” for a specified area (s 202(1)). The functions of a representative body were initially quite limited. They were confined to facilitating the researching, preparation and making of claims for determination of native title or for compensation, assisting in the resolution of disagreements among claimants and assisting claimants by representing them, if requested, in negotiations or proceedings (s 202(4)).
3. In 1996, the Federal Government accepted many of the recommendations made by J C Altman and D E Smith in *Review of Native Title Representative Bodies* (1995, Aboriginal and Torres Strait Islander Commission) including the recommendation that mandatory obligations be imposed on representative bodies concerning the performance of their functions, their accountability and representation. In 1996, the Office of Indigenous Affairs, Native Title Branch of the Department of the Prime Minister and Cabinet published a document which described the Government’s proposals to amend the *NT Act*. The document is titled *Towards A More Workable Native Title Act: An Outline of Proposed Amendments.* The document describes the proposed amendments as including making the functions of representative bodies mandatory, requiring broadly representative organisational structures, imposing a greater role in the notification and identification of claimants, providing for the certification of claims as a pre-condition to registration and requiring participation in negotiations. These proposed amendments were part of the objective of enhancing accountability to native title holders and to the public generally.
4. The proposed amendments were ultimately implemented by two tranches of amendments to the *NT Act* in 1998. The first tranche was in Sch 3 of Pt 1 of the *Native Title Amendment Act 1998* (Cth), which commenced on 30 September 1998. It was under this first tranche that the functions of a representative body were expanded for the first time to include certification of applications for determinations of native title, as well as certification of applications for registration of area ILUAs. The first tranche also included amendments which provided for a new process of recognition of representative bodies.
5. The second tranche of amendments was in Pt 2 of the *Native Title Amendment Act 1998* (Cth). These amendments commenced on 1 July 2000. They included the conferral of a wider range of functions on representative bodies and provisions to enhance their accountability. As noted above, although the function of certifying applications for registration of ILUAs formed part of the first tranche of amendments, (s 202(4)(e)), that provision was repealed on 30 June 2000 and replaced by the functions declared in the second tranche. The much wider functions (while retaining the certification functions) were set out in s 203B (which is in Div 3 of Pt 11 of the *NT Act*). Section 203B is in the following terms (emphasis in original):

**203B Functions of representative bodies**

*General*

(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.

*Other laws may confer functions*

(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.

*Representative bodies to perform functions*

(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.

*Priorities of representative bodies*

(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.

1. The effect of s 203BA should also be noted. It is another provision introduced as part of the second tranche. The primary Judge described this provision as having the effect of making the functions of a representative body “mandatory functions”. It is desirable to set out s 203BA in full, noting the prominence given to the representative role of a representative body and the constituents whose interests must be promoted and safeguarded by the relevant representative body, including by active participation in the body’s processes:

**203BA How functions of representative bodies are to be performed**

*Functions to be performed in a timely manner*

(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.

*Maintenance of organisational structures and processes*

(2) 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.

1. The second tranche of the 1998 amendments (which all commenced on 1 July 2000) also included s 203BK, which is a central provision on the cross-appeal and on the question whether or not the certification functions are delegable. The primary Judge noted at [21] of his Honour’s reasons for judgment that the dispute between the parties as to whether the certification functions were delegable “revolved around s 203BK”. The full terms of s 203BK are set out at [19] above. We will return below to address the proper construction of s 203BK and explain why we respectfully disagree with the primary Judge’s construction.
2. Under the amendments which came into effect on 30 September 1998 for recognition of representative bodies, priority was given to recognising existing representative bodies (which included the NLC). During the transition period from 30 September 1998 to 1 July 2000, the Commonwealth Minister was empowered to invite an existing representative body to be recognised as a representative body for a particular area and it was only if no such application was received that the Minister could invite applications from other relevant bodies (see ss 203AA(3) and (4)). Under s 203AD(1), as originally enacted, an eligible body could only be recognised as a representative body if the Commonwealth Minister was satisfied that the body would:

satisfactorily represent native title holders and persons who hold or may hold native title;

be able to consult effectively with Aboriginal peoples and Torres Strait Islanders living in the area;

if the body was an existing representative body, the body satisfactorily performs its existing functions; and

the body would be able to perform satisfactorily the functions of a representative body.

1. Additional matters to which the Commonwealth Minister is required to have regard in deciding whether or not to recognise a representative body are set out in s 203AI. Those matters relate to whether the body’s organisational structures and administrative processes would operate in a fair manner. Without limiting that particular matter, various criteria were explicitly specified in s 203AI(2) as bearing upon the Minister’s assessment of the fairness of the body’s organisational structures and administrative processes. Section 203AI(2) has now been repealed but the Minister is required to have regard to those same matters by reference to s 203BA within s 203AI(1). Those criteria include the opportunities for Aboriginal peoples or Torres Strait Islanders for whom the body might act to participate in its processes, the body’s rules or requirements relating to the conduct of its executive officers and the nature of its management structures and management processes. The operation of these provisions was described by Merkel J in *Pilbara Aboriginal Land Council Aboriginal Corporation Inc v Minister for Aboriginal and Torres Strait Islander Affairs* [2000] FCA 1113; 103 FCR 539 at [14]-[15] and [52]. His Honour described at [52] how, prior to the end of the transition period referred to in [89]-[90] above, the Minister was required to decide whether to recognise the Pilbara Land Council (as an existing representative body) for the new invitation area.
2. In his book, *Native Title in Australia*, Mr Bartlett describes at [34.8] the importance of the criteria for recognising an eligible body to be a representative body in the following terms (emphasis in original, footnote omitted):

The criteria introduced an emphasis on representation of native title holders and consultation with Aboriginal peoples or Torres Strait Islanders *living* in the area, and not just representation of Aboriginal peoples or Torres Strait Islanders generally. In considering the newly introduced criteria, the minister was required to take into account whether “the bodies’ organisational structures and administrative processes will operate in a fair manner”: NTA 1993 s 203AI(1) (as it was then), the minister was required to have particular regard to opportunities to participate in processes, levels of consultation, procedures for making decisions, rules relating to conduct of executive officers, the nature of its management structures, and the procedures for reporting back to native title holders and Aboriginal peoples or Torres Strait Islanders living in the area: former NTA 1993 s 203AI(2).

1. In 2007, by the *Native Title Amendment Act 2007* (Cth), s 203AD(1) was amended so as to delete the first two of the four criteria as summarised in [90] above. That explains why the two remaining criteria in s 203AD(1) in its current form are numbered as paragraphs (c) and (d) (which refer respectively to the need for the Minister to be satisfied that, if the body seeking recognition is already a representative body, the body satisfactorily performs its existing functions and that the body would be able to perform satisfactorily the functions of a representative body). No explanation was provided in the Explanatory Memorandum to the *Native Title Amendment Bill 2006* (Cth) as to why the first two criteria were deleted from s 203AD(1). It should be noted, however, that the Minister is still required to take these two criteria into account when considering whether the representative body does or will satisfactorily perform the functions of a representative body (see s 203BA(2)(a) and (b)), which deal with the manner in which a representative body is required to perform its functions. We will have something more to say about this shortly.
2. Only an “eligible body”, as defined in s 201B, may seek recognition as a representative body under Pt 11 (see s 203AB). All existing representative bodies are eligible, as provided for in s 201B(1)(b). There are four categories of body which qualify as an “eligible body”. To be an “eligible body” the body must be a body corporate as described in s 201B(1)(a), (b) or (c), or otherwise be a company incorporated under the *Corporations Act 2001* (Cth) (see s 201B(1)(ba)). The *NT Act* contemplates that a representative body may have a “governing body” and an “executive officer”, which concepts are both defined in s 201A. The “governing body” means “the group of persons (by whatever name called) who are responsible for the executive decisions of the representative body”. The definition of “executive officer” includes a director of a representative body or any other person who is concerned in, or takes part in, the management of the representative body at a senior level. This is plainly broad enough to include a person who is the chief executive officer of a representative body.
3. As is evident from the analysis above, a body may be an “eligible body” for recognition as a representative body even though it is not a Land Council established under the *ALR Act*. Thus it is possible that a representative body, which is not a Land Council established under the *ALR Act*, will have a governing body which is not constituted by persons who are Aboriginal. There are, however, several provisions in the *NT Act* which are designed to ensure that every representative body performs its functions in the manner which promotes the satisfactory representation of native title holders and persons who may hold native title in the relevant area and which promotes effective consultation with, relevantly, Aboriginal peoples who live in the area for which the body is the representative body.
4. Some such provisions operate when the Minister is determining whether or not to recognise an eligible body as a representative body (see, for example, ss 203AD(1)(c) and (d), 203AI and 203BA). Thus, in considering whether a body will satisfactorily perform, or is satisfactorily performing its functions as a representative body as required by s 203AD(1)(c) and (d), the Minister must take into account whether, in his or her opinion, the body will comply with, or is complying with, s 203BA (see s 203AI(1)). Section 203BA is an important provision which is intended to ensure that representative bodies act in the interests of their constituents. Thus the Minister is required to assess whether a body maintains organisational structures and administrative processes that promote the satisfactory representation of native title groups and effective consultation with, relevantly, Aboriginal people living in its area. The full terms of s 203BA are set out in [88] above.
5. Other provisions are included in the *NT Act* which are intended to ensure that, in performing their statutory functions, a representative body acts in the interests of its Aboriginal constituents by satisfactorily representing their interests and consulting effectively with them. Examples of such provisions are s 203BA (how functions of representative bodies are to be performed) and the requirements pertaining to the performance of various individual functions including, for example, the certification functions in s 203BE, the notification functions referred to in s 203BG, the agreement making function in s 203BH and the text of s 203BJ which identifies the other or additional functions to be performed by a representative body in addition to those set out in ss 203BB to 203BI.

***(iii) The nature and significance of the opinion required under s 203BE(5)***

1. As noted in the summary above of the *Nelson Bay Claim case*, a matter of particular significance in determining the Parliament’s intention as to whether or not a statutory power should be exercised by the repository of that power personally and not by anyone else is whether the subject of the power involves the formation of an opinion. The nature and character of the opinion is also important. The statutory scheme under the *NT Act* is such that the certification functions vested in the representative body under s 203BE(1)(b) are subject to the two express preconditions in s 203BE(5)(a) and (b). The certification functions cannot be exercised unless the representative body has formed a positive opinion on two critical matters, namely that:

all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to the area covered by the ILUA have been identified; and

all the persons so identified have authorised the making of the agreement, as provided for in s 251A.

1. These two preconditions are important constraints on the exercise of the certification functions. Their important constraining role is further reinforced by the related requirements in s 203BE(6). The effect of these requirements is that a representative body must not only hold the opinion in relation to the two matters specified in s 203BE(5)(a) and (b), the representative body must ensure that the certification it gives includes an express statement to the effect that it is of the opinion that those requirements have been met, and also briefly set out its reasons for being of that opinion. These additional requirements serve to promote transparency and accountability in relation to the relevant opinion.
2. The subject matter of the opinion is also significant and revealing. It concerns two matters, both of which are designed to maximise involvement by affected Aboriginal persons in the steps leading up to the making of an ILUA and its registration. Thus, before certifying an area ILUA for registration the representative body must be 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 the affected area have been identified. This is designed to minimise the possibility that some relevant persons, whose rights and interests may be affected by the registration of the ILUA, have not been identified. The second matter is related to the first. It requires a representative body to be of the opinion that **all** persons who have been so identified have **authorised** the making of the ILUA. These matters are important because they serve to maximise the likelihood that the interests of all persons who hold or may hold native title in the affected area have had their interests taken into account in the making of the ILUA and that they have authorised its making. The need to protect the rights and interests of all persons who hold or may hold native title in the affected area is further reflected in the provisions concerning notice by the Registrar, objections against registration and the constraints upon the Registrar in deciding whether or not to register an area ILUA as summarised in [80]-[81] above. All these requirements and provisions serve to maximise the likelihood that an area ILUA reflects broad Aboriginal community interests and not merely sectional interests.

***(v) The proper construction and effect of s 203BK of the NT Act***

1. The next issue is whether, despite the matters outlined above which suggest that the certification functions in s 203BE(1)(b) are to be performed by the representative body itself, on its proper construction s 203BK empowers the representative body to delegate those functions to someone else, including the CEO, as found by the primary Judge. For the following reasons, and with great respect, we do not consider that the provision is properly construed in that manner.
2. First, the heading to s 203B(3) (the full terms of which are set in [87] above) is significant. It simply states “*Representative bodies to perform functions*”. The heading is a part of the *NT Act* and is therefore to be taken into account in the proper construction of the provision to which it relates (sees 13 of the *AI Act*). The heading to s 203B(3) confirms the conclusion reached above to the effect that other relevant legislative features point to the representative body itself performing the functions conferred upon it under s 203B(1) and (2), including the certification functions.
3. Secondly, the body of s 203B addresses the question whether a representative body can enter into “an arrangement with another person under which the person is to perform the functions of the representative body”. We do not consider that the act of delegation falls within the concept of “entering into an arrangement with another person etc”. The latter seems to contemplate a bilateral or mutual agreement or arrangement between the representative body and another person. This is to be contrasted with the act of delegation, which is a unilateral act. Thus we do not consider that s 203B is directed at all to the act or power of delegation.
4. In our view, this conclusion is reinforced by the three express exceptions to the prohibition in s 203B(3) on a representative body entering into arrangements, namely the matters “mentioned” in ss 203BB, 203BD and 203BK. It is necessary to give close consideration to each of these exceptions, to which we now turn.

Section 203BB deals with a representative body’s facilitation and assistance functions, which include (but are not limited to) acting on behalf of registered native title bodies corporate, native title holders and potential native title holders. The representation could include matters such as negotiations and consultations concerning native title applications and ILUAs (see s 203BB(1)). The scheme of s 203BB is to prohibit a representative body from performing its facilitation and assistance functions in relation to a particular matter unless it is requested to do so (see s 203BB(2)). The representative body is also confined to carrying out these functions in relation to land and waters that are wholly or partly within its area (s 203BB(3)). Subsections 203BB(4) and (5) are then directed to the situation where a representative body is requested by a registered native title body corporate (or person who holds or may hold native title) to carry out its facilitation and assistance functions but the representative body is already representing another body or person (**the original body or person**) in the performance of those functions. In that scenario, the representative body must first obtain the consent of the original body or person before agreeing to also represent the new body or person. Subsection 203BB(5) then makes explicitly clear that the requirement of consent in this scenario does not prevent a representative body from “facilitating” the representation of a body or person by entering into an arrangement with another person for that person to represent the new body or person. Plainly, the relevant “arrangement” contemplated by these provisions is intended to avoid the representative body having a conflict of interest. We would not describe such an arrangement as involving a delegation of the representative body’s facilitation and assistance functions. As the heading to s 203BB(5) suggests, the arrangement is in the nature of a “briefing out” of the facilitation and assistance functions, so as to avoid a conflict of interest.

Similarly, the “arrangement” which is referred to in s 203BD is not in the nature of a delegation. This provision enables two representative bodies to enter into an arrangement by which one of them carries out the facilitation and assistance functions in respect of land and waters which are outside the area for which the representative body is responsible.

The third exception is s 203BK, which empowers a representative body to “enter into arrangements and contracts to obtain services to assist in the performance by the representative body of its functions”. Again, to our mind, this provision does not suggest that it is dealing with delegation. The references to “arrangements” and “contracts” strongly suggest that bilateral or mutual agreements or arrangements are involved, not the unilateral act of delegation. Furthermore, the reference to “**obtain services to assist**” in the performance of the representative body’s functions also suggests that the performance of the functions is not being handed over or passed to someone else, as ordinarily occurs under a delegation. Rather, the provision contemplates a representative body obtaining assistance from other people in the performance by the representative body of its functions. Such assistance is very different from delegation of the performance of a function.

1. As noted above, the primary Judge considered that his Honour’s construction of s 203BK(1), as conferring a power of delegation, was supported by *Mercantile Mutual*. The cross-respondents defended that view and, in addition, submitted that further support was provided by the Full Court’s decision in *Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2015] FCAFC 7; 227 FCR 95 (***Hird***). In our respectful view, neither of these authorities supports his Honour’s construction. To explain why that is so, it is necessary to address some general principles applying to powers described as “necessary or convenient” or “necessary and expedient” such as that contained in s 203BK(1).

*(A) Shanahan v Scott*

1. The leading authority on the proper construction of a “necessary or convenient” power is the High Court’s decision in *Shanahan v Scott* (1957) 96 CLR 245 (***Shanahan v Scott***) and, in particular, the following passage at 249-250:

But his Honour also relied upon the general power with which s 43(1) begins. That general power authorises the Governor in Council to make regulations providing for all or any purposes (whether general or to meet particular cases) necessary or expedient for the administration of the Act or for carrying out the objects of the Act. Powers of this kind have been discussed in more than one case in this Court: see *Carbines v Powell* (1925) 36 CLR 88; *Gibson v Mitchell* (1928) 41 CLR 275; *Broadcasting Co of Australia Pty Ltd v The Commonwealth* (1935) 52 CLR 52; *Grech v Bird* (1936) 56 CLR 228; *Morton v Union Steamship Co. of New Zealand Ltd* (1951) 83 CLR 402, 409, 410.

The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.

1. The following general points emerge from the passage in *Shanahan v Scott* and the authorities referred to therein:

“Necessary or convenient” powers are “strictly ancillary” powers.

This means they do not extend the general operation or scope of an enactment. The scope of their operation is tied to the specific functions conferred on the repository under other parts of the enactment (see Ryan J in *Anthony Lagoon Station Pty Ltd v Aboriginal Land Commissioner* (1987) 15 FCR 565 at 585)).

By definition, incidental or ancillary powers provide a source of power that is in addition to the existing powers conferred on a repository under an enactment. However, the power provided is supplementary to some other existing object or function conferred by the enactment.

Ancillary powers are not a freestanding source of power to expand the objects of the enactment, or to circumvent the means provided for in the enactment for pursuing the relevant statutory objects.

In summary, when one asks whether a person or body has statutory power to engage in an activity, the starting point is the powers and functions conferred on that person by the legislation – not the presence of a “necessary or convenient” power or any other collocation used to describe incidental or ancillary powers conferred on the person or body.

*(B) Mercantile Mutual*

1. *Mercantile Mutual* concerned whether the Commissioner of the Australian Securities Commission had validly authorised a trustee to be a prescribed person for the purposes of the *Corporations Law* (NSW), thereby enabling the prescribed person to make an application for court orders in relation to misconduct or possible misconduct in a company’s affairs.
2. The cross-respondents’ submission relying on *Mercantile Mutual* was as follows:

The case concerned the validity and efficacy of the acts of a delegate in exercising a function – the question was whether a provision in the same terms as s 203BK(1) was a source of power for an officer of the body rather than the governing organ to grant an ‘authorisation’ (here, certification). The relevance of Mercantile Mutual is that the words ‘do all things necessary and convenient’ were held to be sufficient to empower the exercise of the relevant statutory function by a person other than the body itself, notwithstanding the absence of an express statutory reference to it being so exercised.

1. This submission mischaracterises the Full Court’s reasoning in *Mercantile Mutual*, for reasons which will now be explained.

*(1) The legislation in Mercantile Mutual*

1. The relevant parts of s 11 of the *ASC Act* read:

…

(4) The Commission has power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions.

…

(7) The Commission has any functions and powers that are expressed to be conferred on it by a national scheme law of another jurisdiction.

1. In *Mercantile Mutual*,Gummow J explained at 439 that a function or power expressed by s 597 of the *Corporations Law* (NSW) to be conferred upon the ASC was a function or power conferred upon the ASC by a national scheme law of another jurisdiction, within the meaning of s 11(7) of the *ASC Act*. The reason for this peculiar legislative drafting was the constitutional inability of the State Parliament to confer functions upon a Commonwealth statutory authority. However, this did not mean that it was impermissible for a Commonwealth law to confer functions and powers on the Commonwealth statutory authority, by reference to the State law. In other words, although the content of the power comes from s 597 of the *Corporations Law* (NSW), the power was actually conferred by s 11(7) of the *ASC Act*.
2. Subsection 597(2) provided for a specific function of making applications for court orders, in aid of a broader function concerned with misconduct or possible misconduct in the affairs of corporations. The Australian Securities Commission (**ASC**) was able to make the application itself, but s 597(2) also provided that applications could be made by a “prescribed person”. Section 597(1) provided that ‘prescribed person’ included persons authorised by the ASC to make applications under s 597.
3. Therefore, s 11(4) was read in conjunction with s 597 (as conferred on the ASC by s 11(7)) as empowering the ASC to authorise a person as a prescribed person for the purposes of s 597. This was because “[t]he taking of that step by the ASC [was] reasonably incidental, within the meaning of s 11(4) of the ASC Act, to the discharge by the ASC of its functions under s 597(2)” (at 441).
4. Justice Gummow also raised at 440 the possibility that, even without s 11(4) of the *ASC Act* the power to make such an authorisation (i.e. to authorise someone as a prescribed person for the purposes of s 597) may have been implied from the terms of s 597(2) which implicitly assume that ASC is able to authorise a person to be a prescribed person for the purposes of the section (referring to s 33 of the *Housing Act 1980* (UK) as considered by the Court of Appeal in *Wansbeck District Council v Charlton* (1981) 79 LGR 523). This analysis is in some ways analogous to the drafting device referred to as a “double function” provision (see *Byrnes v R* (1999) 199 CLR 1 at [37]-[38]).

*(2) Delegation to the Commissioner in Mercantile Mutual*

1. That said, the foregoing analysis in *Mercantile Mutual* went to whether the ASC had the power to authorise a person as a prescribed person for the purposes of s 597. It did not touch on the issue of delegation – i.e., whether the ASC had validly delegated its power under s 11(4) to the Commissioner.
2. No real issue was raised on this matter because the ASC had an express power of delegation in s 102(1) of the *ASC Act*. As Gummow J said at 441, the key point of contention was not whether the ASC was permitted to delegate the power, but whether it had succeeded in doing so. The dispute on this question focussed on the terms of the instruments of delegation and whether they properly delegated the ASC’s power under s 11(4) when read with s 597 to the Commissioner.
3. *Mercantile Mutual* reaffirms that powers such as s 203BK are incidental powers and it is necessary to determine to which substantive power the incidental power is to attach (see Black CJ at 412-413, Lockhart J at 422-423 and Gummow J at 437, 440-441).
4. As Lockhart J said at 422 (emphasis added):

Since the ASC has many diverse functions conferred on it from various statutory sources, obviously there is a need for it to be invested with incidental powers, the logical repository of which is the ASC Act itself. Hence, s 11(4) is a provision of the kind one would expect to find. **Before the incidental power conferred by s 11(4) can arise, however, it must be attached to a function of the ASC conferred on it by or under some statutory provision other than s 11(4) itself.** It is clear from the language of s 597(1), (2) and (3) of the *Corporations Law* that the Parliament envisaged that the functions, purposes or activities of the ASC would include the authorisation of persons, other than an official manager, liquidator or provisional liquidator of a corporation, to make application to a court under s 597 in relation to that corporation.

1. Accordingly, *Mercantile Mutual* is consistent with the principles derived from *Shanahan v Scott* set out above at [107] and does not support the cross-respondent’s contention that s 203BK(1) provides a free standing source of power for delegation of the certification function under s 203BE(1)(b). We reiterate that the appeal in the current proceeding did not raise any issue of the CEO being authorised to exercise the certification functions, as opposed to him being a delegate.

*(C) Hird*

1. Turning now to consider why we do not accept the cross-respondents’ submission that *Hird* supports the primary Judge’s construction, it is appropriate to set out [210] of *Hird* upon which the cross-respondents relied in submitting that “a necessary or convenient” power such as that set out in s 203BK(1) should be construed broadly and so as to include a power of delegation:

The Parliament has commonly used provisions like s 22 of the ASADA Act to ensure that a statutory body has sufficient power to discharge its functions in circumstances that the Parliament could not practically set down, although they lie within the contemplation of its enactment. The authorities that have discussed the scope of a ‘necessary’ or ‘convenient’ power such as that in s 22 of the ASADA Act support the general proposition that s 22 is to be construed in conformity “with the width of the language in which it is expressed”: *Leon Fink* at 679 (Mason J; Barwick CJ and Aickin J agreeing). As Ryan J stated in *Anthony Lagoon* at 585, “[t]he language of a grant of power to do ‘all things necessary or convenient to be done for or in connexion with the performance of’ an enumerated list of functions is of considerable width”. (Although Ryan J was in dissent in the result of the case, Sweeney J agreed with this point: 567.) Plainly enough, the scope of a grant of power of this kind should be interpreted in light of the functions that the Parliament has conferred on the body in question: see *Leon Fink* at 677-679; *Kathleen Investments* at 143, 145-146 (Stephen J) and 153-155 (Mason J); *Botany Municipal Council v Federal Airports Authority* (1992) 175 CLR 453 at 462; and *Anthony Lagoon* at 585 (Ryan J). Where, as here, the legislature confers a function in general terms, a grant of power in the terms of s 22 will, generally speaking, have a commensurably wide scope: *Anthony Lagoon* at 590 (Ryan J) and *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410. In this case, the functions given to the CEO in s 21(1) of the ASADA Act (relevantly in ss 21(1)(b) and (o)) and in cl 3.27 of the NAD Scheme are conferred in general terms, and the CEO is given a wide discretion as to the means by which these functions are fulfilled, including in relation to the conduct of investigations into possible anti-doping rule violations. Having regard to the foregoing, we are confirmed in our conclusion that s 22 is to be construed broadly, and should not be read as subject to an implied prohibition against collaborating or cooperating with a SAB in the interviews conducted with sports participants during an anti-doping investigation.

1. Under s 21 of the *Australian Sports Anti-Doping Authority Act 2006* (Cth) (***ASADA Act***), the Chief Executive Officer (**CEO**) of the Australian Sports Anti-Doping Authority (**ASADA**) had the following functions:
* such functions as are conferred on that position by the *ASADA Act* (s 21(a));
* such functions as are conferred on that position by the National Anti-Doping scheme (s 21(b)); and
* to do anything incidental to or conducive to the performance of any of the above functions (s 21(o)).
1. Section 22 provided that the CEO has “the power to do all things necessary or convenient to be done for or in connection with the performance of his or her functions”.
2. The central question in *Hird* was whether ASADA was able to conduct a collaborative investigation with the Australian Football League (**AFL**) into doping within the Essendon football team. The specific submission made by Mr Hird was that s 22 of the *ASADA Act* (i.e. the necessary or convenient provision) did not authorise ASADA’s investigation in cooperation with the AFL..
3. Mr Hird first relied on *Anthony Lagoon Station Pty Ltd v Aboriginal Land Station* (1987) 15 FCR 565 and the principle of legality. This case was held to be distinguishable as it concerned a regulator’s power to interfere with a ‘fundamental common law’ right. Justice Sweeney held that any statutory provision that conferred such a power had to be expressed with irresistible clarity, citing *George Wimpey & Co Ltd v British Overseas Airways Corp* [1955] AC 169 at 191 per Lord Reid.
4. The next authority relied upon in *Hird* was *Plaintiff S4/2014 v Commonwealth* [2014] HCA 34; (2014) 253 CLR 219 which applied the *Anthony Hordern* principle (*Anthony Horden & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7) . This principle provides that where legislation has provided a specific power subject to particular conditions or limitations on its exercise, a general power will not be construed as authorising the same action or conduct, without also being subject to the limitations or restrictions provided for in the specific power. This principle was held to be inapplicable in *Hird* as there was no specific power subject to limitations that could be identified as a source of limitation on the general power.
5. The focus in *Hird* was on whether any negative implication should be drawn from the statutory scheme that could reduce the ordinary operation of s 22 of the *ASADA Act*. This was the context for the passage in *Hird* at [210], upon which the cross-respondents relied in this appeal.
6. Read in this context, *Hird* provides no assistance to the submission that seeks to locate a power of delegation in s 203BK(1) of the *NT Act*. The passage in *Hird* at [210] emphasises that the scope of provisions such as s 22 of the *ASADA Act* is largely determined by the substantive power or function to which the incident power attaches. Applying that approach here, *Hird* simply brings one back to an analysis of the certification functions provision in s 203BE of the *NT Act*, to which s 203BK(1) adds nothing. Section 203BK(1) will only provide a source of power to delegate if it is concluded that the certification functions in s 203BE are ones that can be delegated. That is a question of construction, the primary focus of which must be on the proper construction of the terms of s 203BE themselves.

***(iv) Summary of significance of these features of the ALR Act and the NT Act***

1. The key points from the analysis above may be summarised as follows. First, as the very expression suggests “representative bodies” have a significant and central representative role under the scheme of the *NT Act*. They represent Aboriginal persons who hold or may hold native title in the area of responsibility of the particular representative body.
2. Secondly, in the case of Land Councils who have become recognised as representative bodies for the purposes of the *NT Act*, the qualifications for membership of the Land Council are designed to ensure that the members of the body have an aptitude to perform their representative roles and functions. The members are Aboriginal people who have been elected by Aboriginal people who are entitled to vote in Land Council elections for that purpose. However, Land Councils established under the *ALR Act* are not the only bodies who are “eligible bodies” for the purposes of the *NT Act*. Other eligible bodies may have corporate structures which do not require Aboriginal membership of their governing body. Significantly, however, all representative bodies are subject to provisions in the *NT Act* which are designed to ensure that they satisfactorily perform their representative roles in the interests of the Aboriginal constituents whom they represent and that such constituents have an opportunity to be consulted about matters which affect their native title rights and interests. Some of those provisions are summarised in [95] to [97] above.
3. Thirdly, under the *NT Act*, representative bodies must perform a range of important functions, all of which are primarily designed to protect and advance the interests of Aboriginals who hold or may hold native title in the area which is the responsibility of the representative body. Those functions include the certification functions under s 203BE. Those functions relate to the important processes of (a) making applications for a determination of native title; and (b) seeking registration of area ILUAs which relate to land or waters within the area for which the body is the representative body.
4. Both these processes may lead to outcomes which could have a significant effect on the legal rights and interests of many people, not the least being Aboriginals who hold or may hold native title in the area. The potential significance and ramifications of either an application for native title determination or an application to register an area ILUA is reflected in provisions in the *NT Act* which require a representative body to have regard to the views of **all** persons who are identified in accordance with s 203BE(5)(a) and whose authorisation for the making of the application is required in the manner provided for in s 251A. That is not to say that the outcome of the registration of an area ILUA must necessarily favour or disfavour every such affected person. The legislative scheme is designed, however, in a conventional democratic manner, to maximise the prospects that all potentially affected Aboriginal persons who hold or may hold native title have an opportunity to participate in the relevant decision-making processes so as to minimise the danger that actions and decisions of a representative body are focused on sectional and not wider Aboriginal community interests. That includes actions and decisions preceding the registration of an area ILUA.
5. The desire to ensure that all Aboriginal persons who hold or may hold native title have an opportunity to be involved in the steps which precede the registration of an area ILUA is also manifest in the alternative mechanism under s 24CL, which requires the Registrar to be satisfied that the requirements specified in s 24CG(3)(b) are met before an ILUA can be registered.
6. Fourthly, in recognition of all these matters, there are provisions in both the *ALR Act* and the *NT Act* which are designed to protect the interests of Aboriginal persons in relation to Aboriginal Land (i.e. the *ALR Act*) and the interests of Aboriginal persons who hold or may hold native title (i.e. the *NT Act*). They include provisions which are designed to enhance the accountability and transparency of actions and decisions of Land Councils and representative bodies respectively in performing their important statutory functions. The certification functions in s 203BE(1)(b) of the *NT Act* should be viewed through that prism. They are intended to promote accountability and transparency on the part of relevant representative bodies, while simultaneously protecting the rights and interests of Aboriginal persons who hold or may hold native title in land or waters which are affected by the proposed registration of an area ILUA.
7. Fifthly, apart from the aptitude of representative bodies which should equip them to address and determine the matters to which the relevant certification functions are directed, there are other signs in the *NT Act* which strongly support the view that those functions are to be performed by the representative body itself and not someone else. They include the following matters.

The absence of an express power of delegation in the *NT Act* (in contrast with the position under the *ALR Act*).

The structure of Div 3 of Pt 11 of the *NT Act* is revealing. It is made explicitly clear in the very provision which specifies the particular functions of a representative body that the representative body is to perform those functions, as is reflected in the terms of the heading to s 203B(3). Moreover, the text of that provision reinforces the significance of the heading by stating that, with three specified exceptions to the prohibition on a representative body entering into “an arrangement” with another person under which the person is to perform the functions of the representative body. This provision focuses directly on the **performance** of the functions. One of the three exceptions is s 203BK, which is the “necessary or convenient” power. Section 203BK(2) makes plain that the representative body can enter into contracts or other arrangements to obtain services to **assist** the body in the performance of its functions. This is not a power to delegate the performance of those functions. It permits the representative body to obtain services to **assist** it in performing its functions. It is sufficiently broad to permit the representative body to enter into arrangements such as contracts of employment with its staff (including executive officers), as well as contracts with external service providers, to obtain such services. It does not permit the representative body to **delegate** the performance of its functions to its staff, any executive officer who is not a member of the Council of the representative body or to an external service provider.

All these statutory indicia, together with the other matters described above relating to the representative role of representative bodies (and the rights and interests of persons affected by the performance of a representative body’s certification functions under s 203BE(1)(b)) strongly favour a construction of the legislation which does not permit such a body to delegate to anyone else, including its CEO, the performance of those particular functions.

1. The upshot of this analysis is that while the NLC is able to obtain assistance from its staff (including its CEO), as well as external service providers, in the performance of its certification functions under s 203BE(1)(b), it cannot delegate or otherwise “outsource” the actual performance of those functions. In particular, it is the NLC’s opinion (and not someone else’s) on the matters specified in the certification under s 203BE(1)(b) which counts. The NLC can obtain assistance in relation to the gathering of information and material upon which the formation of the requisite opinion may be based but, ultimately, it is the NLC which has to be satisfied on the basis of all relevant material available to it that it is in the position to give its opinion on the relevant matters.
2. The proper discharge of the certification functions under s 203BE(1)(b) requires the NLC itself to hold and state the requisite opinion. No doubt this may present practical and logistical difficulties in the case of a body such as the NLC, which has 78 members, and which currently normally meets twice a year as a Full Council. The NLC will need to follow its established processes for passing resolutions, including any relevant governance and procedural requirements which apply to the conduct of NLC meetings, including such matters as the provision of notice, quorum requirements and the number of votes required for a resolution to be passed.

**Issues 2 and 3**

1. Issue 1 having been determined in this fashion, issues 2 and 3 do not arise. They would only arise if, contrary to the above, the certification functions under s 203BE(1)(b) were capable, as a matter of law, of being delegated, including to the CEO. While acknowledging the observations in *Kuru v State of New South Wales* [2008] HCA 26; 236 CLR 1 at [12], this is an unusual case because the cross-appeal is decisive on the issues raised by the appeal and the interlocutory application. Moreover, if there was a power to delegate those certification functions and the fresh evidence was admitted, it is most doubtful that the instrument of delegation dated 18 October 2001 would be effective in authorising the certificate dated 13 March 2017 having regard to the matters raised in [24] and [25] above.
2. Necessarily, therefore, the appeal must be dismissed. That is because, even if the fresh evidence were admitted as sought in the interlocutory application, an alternative instrument of delegation would be immaterial in providing a basis for the CEO’s action in performing the certification functions where there is no power to delegate in the first place.

**Conclusion**

1. For these reasons, the cross-appeal should be allowed and the appeal dismissed. The appellants’ interlocutory application dated 27 September 2018 seeking leave to adduce further evidence should also be dismissed. Declaratory orders should be made along the lines of those sought in the notice of cross-appeal. It is noted that, although the cross-appellants did not seek costs in the notice of cross-appeal, the respondents sought their costs in the appeal as well as below. It should further be noted that, as a condition of the Territory’s intervention, it was ordered that there be no costs order in the proceedings in favour of or against it.
2. Within four weeks hereof, the parties should seek to agree the terms of final orders which give effect to these reasons for judgment, as well as costs. If they are unable to agree, each should, within that time, file and serve an outline of written submissions not to exceed five pages in length in support of their individual position. The terms of the final orders will then be determined on the papers and without a further oral hearing.

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| I certify that the preceding one hundred and forty-one (141) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Griffiths and White. |

Associate:

Dated: 20 May 2019

**REASONS FOR JUDGMENT**

**MORTIMER J:**

1. I have had the considerable advantage of reading the comprehensive joint reasons of Griffiths and White JJ. I agree with the conclusions their Honours have reached on both the appeal and the cross-appeal, and I agree generally with the reasoning their Honours have adopted, including their Honours’ reasons as to why it is not necessary to determine the issues on the appeal, given the conclusion the Court has reached on the cross-appeal. I wish to emphasise some particular matters which have led me to agree with their Honours’ conclusions regarding the construction of ss 203BK(1) and 203BE(1)(b) of the *Native Title Act 1993* (Cth).

**Section 203BK(1)**

1. Both the NLC and the Northern Territory relied on s 203BK(1) as the source of the implied power of delegation of the certification function in s 203BE(1)(b).
2. I respectfully agree with the joint reasons at [107] that statutory powers which are conferred using the language of “necessary or convenient” are generally construed as conferring ancillary powers on a repository, in circumstances where there is a principal function or power (but often a function) whose performance and exercise might need to be supplemented or assisted.
3. In context, that is precisely the purpose of s 203BK(1). The provision sits at the end of Pt 11, Div 3 of the NT Act, after all of the specific provisions dealing with each of the functions conferred on a representative body. It sits immediately after s 203BJ, which confers additional functions on representative bodies. The language within the provision is that of “assistance”: see, for example, ss 203BK(2) and 203BK(3). As I note below, the cross-reference to s 203BK in s 203B(3) supports this construction, with a focus on ancillary arrangements and assistance, albeit that the circumstances in which the need for such ancillary and supplemental assistance might arise should be broadly construed. If that be the correct construction of s 203BK(1), then there is no basis to imply a power of delegation, because the nature of an implied power of delegation goes well beyond the ancillary.
4. I agree for the reasons given in the joint reasons at [103]-[104] that s 203B, and in particular s 203B(3), is not relevant to the question whether the certification function in s 203BE(1)(b) is delegable. The cross-reference in s 203B(3) to s 203BK indicates that the subject-matter of that provision concerns a different activity altogether: namely, to what extent a representative body may make external arrangements to have others assist it in performing its functions, or substitute another person (by arrangement or agreement) to perform an aspect of its functions. In relation to the latter point, in my opinion the terms of s 203B(3), read with ss 203BB, 203BD and 203BK, make it clear that it is only in very limited circumstances that the scheme contemplates a representative body will be able to arrange for another person or body to perform any aspect of the functions conferred on it by Div 3 of Pt 11 of the NT Act.
5. Contrary to the suggestions made during oral argument, there is nothing unworkable or improbable about a conclusion that s 203BK(1) does not extend to an implied delegation of the certification function in s 203BE(1)(b). In its written submissions, the Northern Territory placed some reliance on the size of the Full Council of the NLC, being 78 elected members and five “co-opted” members, making a total of 83 members. The size of the Full Council is not prescribed by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Nevertheless, however many individuals comprise the Board or Council of a representative body, that body has been recognised under s 203AD(1), according to specific criteria, as being capable of performing, and appropriate to perform, the functions of a representative body for the purposes of the NT Act. The recognition granted by the Minister is to the body as a whole, as having the capacity to perform the functions conferred. While a representative body may be assisted by its employees and officers, in terms of recommendations and information-gathering, in my opinion the NT Act, and Pt 11 in particular, intends that control of the certification function remains with the body itself as the repository of the power, and responsibility for the performance of the certification function also remains with that repository: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 66 (Brennan J).
6. Finally, it is not necessary for the purposes of resolving the cross-appeal to determine whether any of the other functions set out in s 203B(1) may be of such a nature that it is appropriate to construe them as impliedly delegable, whether through s 203BK(1) or otherwise. Indeed, it may well be that the *Carltona* principle enables a CEO to sign the documentary certification of an Indigenous Land Use Agreement (ILUA) on behalf of a representative body. Where that occurs, that is because Parliament is not presumed to have intended that all members of a representative body actually provide evidence of the certification by affixing a signature, and Parliament may be taken to have intended that an officer of the representative body, such as its CEO, can be authorised to do so: see *Re Reference Under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* [1979] AATA 34; 2 ALD 86 at 94 (Brennan J).

**Section 203BE(1)(b)**

1. If, contrary to the opinion I have expressed above, s 203BK(1) were to be construed as including a power to delegate one or more of the functions or powers conferred on a representative body, then I would not draw any such implication in relation to the certification function in s 203BE(1)(b), even if it might be drawn in relation to other functions in s 203B(1). That is because of the nature of that certification function, and its important role in the legislative scheme.
2. The certification function in s 203BE(1)(b) is critical to the registration of an ILUA, and in turn to the validity of future acts: that is, acts affecting native title (see, for example, ss 24AA(3) and 24EB of the NT Act).
3. Certification under s 203BE(1)(b) is one of two methods by which it can be demonstrated that an application for registration of an area ILUA has been authorised: see s 24CG(3). The accuracy and reliability of the certification by a representative body about the matters in s 203BE(5) (extracted at [17] of the joint reasons) is critical to the resolution of any objections to the registration of the area ILUA which may be lodged: see s 24CI(1).
4. Performance of the certification function, and the resulting registration of an area ILUA, has a significant effect on the rights and interests of native title holders, or native title claimants. One of the most significant effects is that each person who is a native title holder, or is in the native title group, is deemed to be contractually bound by the area ILUA: see s 24EA. Although the scheme does not expressly make this link, in my opinion, it is likely that Parliament’s intention in prescribing this outcome reflected the requirements (present in provisions such as ss 203BE(5), 24CG(3)(b) and 24CL(3)) concerning identification of the correct native title holders or claimants, and authorisation by those people of the making of the ILUA. In certifying that the requirements of s 203BE(5) are met, a representative body plays a central role in what leads to the native title holders or claimants being, as individuals, bound by an ILUA. The importance of this role is illustrated where, as here, there is no registered native title claimant or registered native title body corporate which is a party to the ILUA and it is the representative body which is the party to the ILUA.
5. The text of s 203BE(1)(b), and its context, in particular reading it with the precondition in s 203BE(5), demonstrates that the opinion to be formed by the representative body is the key opinion necessary to satisfy the Registrar that the area ILUA put forward for registration is an agreement endorsed by the native title holders or claimants themselves. As the joint reasons point out at [18], the text of s 203BE(6) imposes a requirement on the representative body to substantiate the basis on which it, and it alone, formed the critical opinion in s 203BE(5).
6. In all these matters, the scheme in Pt 2 of the NT Act assumes the representative body will be acting to protect the interests of the native title holders and claimants, and intends its conduct will be protective of their interests, as they have been expressed through the authorisation process set out in s 251B. This is evident from the terms of ss 203B(4) and 203BA(2).
7. The nature of the certification function being performed by the representative body as expressed in the statutory text, its central role in the creation of enforceable interests pursuant to area ILUAs and the protective responsibilities conferred on a representative body under the legislative scheme all contribute in my opinion to the conclusion that there is no implied intention by Parliament that the function in s 203BE(1)(b) should be performed by any person other than the representative body. In this case, the Kenbi ILUA had been many years in the making; the issue of native title claims to the area was of long standing, and obviously the resolution of those native title claims was of fundamental significance to the claim group and other stakeholders. It is an example of the importance of the certification function in s 203BE(1)(b) of the NT Act.

**Conclusion**

1. I agree with the orders and directions proposed by Griffiths and White JJ.

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| I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer. |

Associate:

Dated: 20 May 2019

**SCHEDULE OF PARTIES**

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|  |  |
| **Cross-Appellants** |  |
| Second Cross-Appellant: | ERIC FEJO |
| **Cross-Respondents** |  |
| Second Cross-Respondent | NORTHERN LAND COUNCIL |