1 of 1 DOCUMENT: Unreported Judgments Federal Court of Australia

BEN WARD AND ORS ON BEHALF OF THE MIRIUWUNG GAJERRONG PEOPLE and ORS v STATE OF WESTERN AUSTRALIA AND ORS - BC9806200

FEDERAL COURT OF AUSTRALIA WESTERN AUSTRALIA DISTRICT REGISTRY
LEE J

WAG 6001 of 1995

17-20 February, 21-25 July, 29 July-1 August, 4-8, 18, 25-27 August, 1-5, 15-19, 22-25, 29 September-2 October, 3, 24-26 November, 1-5, 8-9, 12, 17 December 1997, 21-23, 27-30 January, 2-6, 9-13, 16-19 February, 30 March-3 April, 6-9 April, 23 October 1998 , 24 November 1998

NATIVE TITLE -- determination of native title under the Native Title Act 1993 (Cth) -- meaning of "native title" -- meaning of "identifiable community" -- existence of sub-groups ("estate groups") within an identifiable community -- meaning of "traditional laws and customs" -- capacity of traditional laws and customs to evolve -- boundaries of an identifiable community -- interaction and overlapping of communities.

EVIDENCE -- proof of native title -- rules of evidence -- proof of aboriginal connection with claim area at sovereignty -- proof of maintenance of connection -- historical evidence -- oral histories -- linguistic evidence -- "primary" evidence of witnesses -- anthropological evidence -- genealogical evidence -- need for proof of biological descent -- observance of traditional laws and customs -- dreaming evidence.

NATIVE TITLE -- extinguishment -- meaning of extinguishment -- distinction between regulation and extinguishment of native title -- onus of proof -- extinguishment by grant of freehold -- Crown grants -- permit to occupy Crown land prior to issue of Crown grant -- extinguishment by the grant of leases -- pastoral leases -- conditional purchase leases -- "special leases" -- leases of reserves -- extinguishment by the grant of licences -- extinguishment by the creation of reserves -- meaning of "vesting" -- extinguishment by use of reserves -- extinguishment by the grant of mining tenements -- mining leases -- general purpose leases -- exploration licences -- extinguishment by resumption and acquisition of Crown lands from pastoral leases -- extinguishment by legislation -- national parks legislation -- wildlife conservation legislation -- extinguishment by dedication of land for purpose of roads -- extinguishment by the vesting of a national park and leases to "Conservation Land Corporation" -- extinguishment by application of limitation periods -- extinguishment by the proclamation of an "Irrigation District" -- extinguishment by declaration of a townsite -- extinguishment by the creation of a lake.

NATIVE TITLE -- Native Title Act 1993 (Cth) -- effect of Act on concept of native title at common law -- meaning of "affects" native title -- jurisdictional limits of a determination under the Native Title Act 1933 (Cth) -- "past acts" -- effect of the Native Title Amendment Act 1998 (Cth) -- "previous exclusive possession acts" -- "previous non-exclusive possession acts" -- effect of the Titles Validation Act 1995 (WA).

Sale of Waste Lands Act 1842 (Imp)
Public Health Act 1875 (UK)

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Native Title Amendment Act 1998 (Cth) Sch 5, Pt5, Item 24
Judiciary Act 1903 (Cth) s39B(1A)(c)
Lands Acquisition Act 1955 (Cth) s6, s8
Aboriginal Affairs Planning Authority Act 1972 (Cth) PtIII; s20(3)(c), s23(b) s23(c) s23(e), s24, s27, s30(c)
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Acts Interpretation Act 1901 (Cth) s8, s8A
Racial Discrimination Act 1975 (Cth) s9
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Mining Act 1978 (WA) s8, s82(1)(b), s85, s86, s87, s88
Petroleum Act 1967 (WA) s5
Territory Parks and Wildlife Conservation Act (NT) s12(1) s12(7), s13(3) s13(4), s18, s122
Parks and Wildlife Commission Act (NT) s19, s20, s21, s22, s27, s29, s39(1), s39(6)
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Crown Lands Act 1992 (NT) PtIV
Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1978 (NT)
Jetties Act 1926 (WA)
Land Act 1933 (WA) PtIII (29(g), 29(1)(g), 31, 32, 33, 34B, 37, 37B); PtVI (102, 105, 106(1) (2), 109); PtVII (116, 116(14), 117, 118CA); s3, s7, s10, s13, s23, s46, s47, s56, s140, s141, s163, s164, s229; Schs 4, 19, 21
Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981 (WA) Pt4; s7, s8, s9, s10
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Land Act 1898 (WA) s3, s4, s9, s12, s13, s16, s39, s41, s41a, s42, s55(4) s55(6), s62, s75, s92, s107, s135, s145, s152; Schs 3, 9, 24, 29
Land Act Amendment Act 1934 (WA)
Mining Act 1904 (WA) s3
Petroleum Act 1936 (WA) s4
Land Drainage Act 1925 (WA) s6
Wildlife Conservation Act 1950 (WA) s6, s23, s32C
Conservation and Land Management Act 1984 (WA) s11
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Land Act Amendment Act 1963 (WA) s24
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Crown Lands Ordinance 1927 (NT) s21
Crown Lands Ordinance 1931 (NT)

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Validation of Titles and Actions Act 1994 (NT) s7
Transfer of Land Act 1893 (WA) s18, s52, s68
Titles Validation Act 1995 (WA) s4, s5, s6, s7, s10, s19
Wyndham Freezing, Canning and Meat Export Works Act 1918 (WA)
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Local Government Act 1960 (WA) s266, s267, s288, s294A
Aboriginal Heritage Act 1972 (WA)
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Jetties Act 1926 (WA)

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Aborigines Act 1905 (WA) s39
Soil Conservation Act 1945 (WA)
Land Acquisition and Public Works Act 1902 (WA) s32
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ON BEHALF OF THE MIRIUWUNG AND GAJERRONG PEOPLE (First Applicants)

STATE OF WESTERN AUSTRALIA, ABORIGINAL AFFAIRS PLANNING AUTHORITY, ABORIGINAL LANDS TRUST, AGRICULTURE PROTECTION BOARD, COMMISSIONER OF MAIN ROADS, DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT, MINISTER FOR ABORIGINAL AFFAIRS, MINISTER FOR FISHERIES, MINISTER FOR LANDS, MINISTER FOR MINES, MINISTER FOR PRIMARY INDUSTRY, MINISTER FOR RESOURCES DEVELOPMENT, MINISTER FOR TRANSPORT, MINISTER FOR WATER RESOURCES, MINISTER FOR WORKS, MINISTRY OF JUSTICE, NATIONAL PARKS AND NATURE CONSERVATION AUTHORITY, STATE ENERGY COMMISSION OF WESTERN AUSTRALIA, STATE PLANNING COMMISSION, WATER AUTHORITY OF WESTERN AUSTRALIA, WESTERN AUSTRALIAN MUSEUM, WESTERN AUSTRALIAN WILDLIFE AUTHORITY (First Respondents)

Lee J

TABLE OF CONTENTS

Introduction

This is an application for determination of native title in respect of land and waters in the north of Western Australia ("the State") and adjacent land in the Northern Territory ("the Territory"). Three separate applicants seek the determination of native title. The first applicants made an application to the National Native Title Tribunal ("the Tribunal") under s13 and s61 of the Native Title Act 1993 (Cth) ("the Act"). After the application was lodged with the Federal Court by the Registrar of the Tribunal, pursuant to s74 of the Act, the second and third applicants, who sought determination of native title in respect of parts of the area for which the first applicants claimed native title ("the claim area"), were joined as applicants.

The main part of the claim area is in the north-east of the State. The remainder is a contiguous part in the Territory ("the Territory area"). The whole of the claim area may be said to be generally within the region known as the East Kimberley, the climatological and topographical detail of which has been described as follows:

"...the East Kimberley (represents)...a considerable variety of ecological niches, ranging from mangrove coastal flats and the drowned mouths of river valleys at the northernmost physical boundaries to...grassy alluvial plains supporting savannah forests and woodlands, deep gorges cut between sandstone divides and massive limestone outcrops associated with underlying basalt, and semi-desert savannah to the south and south-eastern edges of the Kimberley Division (Jutson, 1950:52-55)...

Climatically, the East Kimberley lies within the tropical and subtropical zones of the southern hemisphere but most of its land surface experiences arid to semi-arid conditions...predominantly 'tropical and sub-tropical steppe characterized by high temperatures and winter drought'. Using rainfall as the basis, the year is divisible into the Wet and the Dry seasons. The average rainfall ranges from 350 mm to 1000 mm or more annually, declining sharply as one proceeds southwards towards the beginning of the Great Sandy Desert near Halls Creek. The Dry season may be subdivided into a 'cool dry season' and a 'warm dusty season' (Maze, 1945:10-13). The former extends from around mid-April to early August and is characterised by warm days with maximum temperatures around 30(C accompanied by low humidity and virtually no rain. The air is dry, the sky usually cloudless, the nights cool. It is the most pleasant season. Economic life begins slowly following the Wet season, to build to a peak of activity by September/October. The warm dusty season starts around mid-August and continues to late October/early November when rain may begin. Outdoor temperatures in this period could reach the order of 42(C and frequent localised dust storms accompanied by a rise in humidity cause general discomfort for Aborigines and Europeans alike. The culmination of this period is the Wet season which lasts approximately from December to April of the following year, although it could vary from anything between three to six months."

(Dr B Shaw, "My Country of the Pelican Dreaming" (Canberra: Australian Institute of Aboriginal Studies, 1981.)) (Ex A16 p12)

In total the claim area is approximately 7,900 square kilometres. The land in the claim area is vacant Crown land; reserved Crown land; Crown land in a pastoral lease granted to the Aboriginal Lands Trust ("Glen Hill"); and several small areas of freehold land. Waters in the claim area include waters situated within the inter-tidal zone on the east side of Cambridge Gulf ("the Gulf").

To understand how the claim area is distinguished from other land in the region it is necessary to consider how European settlers came to the region and made use of the land.

Land in the East Kimberley was not made available to settlers by the Crown until late in the 19th century when a report on an expedition to the region, prepared by explorer and Crown surveyor Alexander Forrest and published in 1879, indicated that the area would be suitable for pastoral activities. Forrest stated that the Aboriginal people were friendly and in his view they were unlikely to be hostile to settlers, although he noted that they would "have to learn" that the cattle that would come with settlers would not be available for hunting. As Sir Paul Hasluck commented in his work "Black Australians", Aboriginal people in the north of Western Australia were left to "learn" of the effects of European settlement in their region without guidance or protection from the Crown:

"No attempt was made in entering into this vast new region to prepare the natives for contact, to instruct them, to give them special protection or to ensure either their legal equality or their livelihood.

As settlement spread to remote corners of the colony the difficulty of doing anything became an excuse for forgetting that it was ever hoped to do something. Official intentions shrank. The local government ignored situations that were awkward or beyond its capacity to handle and the Colonial Office also overlooked or was unaware of any need for a positive policy."

(P Hasluck, "Black Australians", (2nd Ed) (Melbourne: Melbourne University Press, 1970) at 63.)

The first grants of rights to depasture stock in the region were for land undefined by survey. Pastoral rights were applied for by marking on maps the approximate positions of the areas sought. In 1881 two speculators acquired pastoral rights to approximately 800,000 hectares by "marking off" an area that was assumed to follow the Ord River, on the "understanding" that when the course of the Ord River was eventually mapped the pastoral areas would be "transferred" to match the course of the river. Shortly thereafter, a group of pastoralists from the eastern colonies, among them Durack, Emanuel and Kilfoyle, "reserved" approximately 1 million hectares, including land on the Ord River, wherever the course of that river may be shown to be by subsequent survey and mapping. (M Durack "Kings in Grass Castles", (Great Britain: Corgi Books, 1973 (first published 1959) at 209-210.) To discourage speculators the Land Regulations for the Kimberley District 1880 (WA) had provided that lands unstocked or understocked after the first two years of a pastoral lease be forfeited. By the end of 1883 approximately 20 million hectares of the Kimberley had been included in pastoral leases. Within six months of that date pastoral leases covering almost one quarter of that area had been surrendered or forfeited. Further leases were abandoned over the next two years and by the end of 1885 the core of the Kimberley pastoral industry remained. That was further reduced in the 1920s when a downturn in the industry caused approximately four million hectares of pastoral lease land to be abandoned or forfeited for non payment of rent or non compliance with conditions. The only town in the region was the port of Wyndham founded in 1886. For many years settlers depended upon sea transport for travel to and from the East Kimberley and for delivery of supplies and export of cattle and frozen meat. An abattoir and meat freezing works operated at Wyndham from 1919 until 1985. The East Kimberley pastoral industry was based on small areas of land of high quality surrounded by large areas of land of very low potential. After one hundred years of pastoral activity, it would be reported that over 60 per cent of the pastoral area of the East Kimberley had very low cattle carrying capacity, in excess of 125 hectares being required to support each head of cattle. Further, much of the Crown land used for pastoral leases was grossly degraded by the impact of cattle on the soil and pasture and by the high rates of soil erosion which followed in each wet season. (S Graham-Taylor, "The Ord River Scheme" (Ex 23 pp 6-7)).

Soon after the pastoral industry was established in the East Kimberley it was realized that profitability and sustainability of pastoral activities in the area were subject to a number of limitations:

"At all times pastoralists had to contend with extreme isolation, a severe climate, communication and transport difficulties, access problems in the wet season, shortage of stock feed in the long dry season and the low carrying capacity of much of the area. Consequently, settlement of the Kimberley region was sparse and the early hopes for the development of the region were not realised."

(W J Wilkin, "The Ord Irrigation Project".) (Ex 21(a) p2)

Development of irrigated land for tropical agriculture was given early consideration. By 1926 surveys of the Ord River environs had identified approximately 60,000 hectares of land as suitable for irrigated agriculture. That land began at the Packsaddle and Ivanhoe Plains on the Ord River and extended to the north-west to Carlton Plains and Mantinea Flats on the Ord River and to the north-east to the Weaber, Knox Creek and Keep River Plains, part of which was in the Territory. In 1941 potential dam sites on the Ord River were identified. In the same year the Department of Agriculture began trial plots of irrigated pastures on approximately five hectares of land on the Ivanhoe pastoral lease situated near the Ord River, now an area of vacant Crown land by Lake Kununurra. In 1945 an agricultural experiment and research station ("the Kimberley Research Station") was established on the east bank of the Ord River on land excised from the Ivanhoe pastoral lease. Engineering studies for construction of a diversion dam, main storage dam, and an irrigation system for an area of irrigated land of 60,000 hectares began in the same year. Eventually, an Ord River Irrigation Project ("the Project") comprising "three stages" was proposed. The "first stage" involved construction of the diversion dam near the Packsaddle and Ivanhoe Plains, irrigation of approximately 10,000 hectares of land on those plains, and creation of a new town to serve the area. The "second stage" was the construction of the main dam and irrigation works to irrigate the remaining 50,000-60,000 hectares. The "third stage" was the construction of a hydro-electric power station on the main dam and reticulation of electrical power.

Between 1959 and 1962 land was resumed by the State from the Ivanhoe pastoral lease for the "first stage" of the Project. In 1961 a town plan was prepared and the townsite of Kununurra declared at which time the sale of freehold lots for businesses and residences within the townsite began. The diversion dam was completed in 1962. The water impounded behind the dam, Lake Kununurra, covered an area of approximately twenty square kilometres. By the end of 1965 almost the whole of the 10,000 hectares of irrigated land had been divided into lots and "leased" by the State on terms which included a right to purchase the freehold interest in the lots upon performance of certain conditions.

In 1963 and 1967 more land was resumed from the Ivanhoe pastoral lease to expand the area of the Agricultural Research Station and to provide for limited enlargement of the irrigated land on the Ivanhoe Plains.

In 1969 the State began to implement the "second stage" of the scheme, by constructing the main dam at a site approximately fifty kilometres up-stream from the diversion dam on the Argyle Downs pastoral lease and by making a small expansion of irrigated land on the Packsaddle and Ivanhoe Plains. Included in the modified "second stage" were steps to protect the catchment area of the main dam from silt and pollution and to commence re-generation of areas badly eroded by pastoral activities surrounding the main dam. The main dam was completed in 1971 and in the same year the State acquired the whole of the Argyle Downs pastoral lease (a lease of approximately 4,000 square kilometres), and a small area of freehold land on which the Argyle Downs homestead had been established. In 1972 the State resumed parts of the Lissadell and Texas Downs pastoral leases in the catchment area. The reservoir behind the main dam, Lake Argyle, covers an area of 700 square kilometres and at times of maximum flood may spread over 2,000 square kilometres.

The area of land now under irrigation is approximately 14,500 hectares. The hydro-electric power station was constructed on the main dam in 1996 and power is reticulated across the claim area to Kununurra and Wyndham and to the Argyle Diamond Mine south of Lake Argyle.

The Project was conceived as a major production area for cotton and rice but neither crop succeeded. Production of rice ceased in 1966 and cotton in 1974. Growers turned to seed crops, nuts, sugar and horticultural ventures such as melons and other fruits, and vegetables with success. In recent years trial crops of cotton have been reintroduced. The creation of Lake Argyle and the development of the Argyle Diamond Mine has increased public awareness of the East Kimberley region, its striking landscapes and connection with Aboriginal pre-history. Tourism is now an important part of the region's economy. It was estimated in 1991 that the contribution of tourism was approximately $30m per annum, a sum equivalent to the value of the agricultural products produced under the Project. (Ex 23 p51)

The claim area

In broad terms the claim area in the State applies to Crown land on the Ord River near the Gulf and on the coast from the east side of the Gulf to the State/Territory border and to the balance of Crown land resumed or taken from pastoral leases for the Project and not alienated by the Crown thereafter.

More particularly, the land and waters within the State in respect of which native title is claimed are as follows:

o Crown land in or about the town of Kununurra, the Ord River irrigation area, and Lake Argyle and several freehold lots;

o Crown land in the Glen Hill pastoral lease south-west of Lake Argyle;

o Crown land and waters in the inter-tidal zones and mud flats on the eastern side of the Gulf and on the north coast of the State between the Gulf and the State/Territory border;

o Crown land in three small islands "Booroongoong" (Lacrosse), "Kanggurryu" (Rocky) and "Ngarrmorr" (Pelican) near the mouth of the Gulf; and

o Crown land, in an area loosely described as "Goose Hill", east of Wyndham and south of the Ord River.

The only part of the claim area in the State that includes land in which a freehold interest was granted prior to 31 December 1993 is:

o a small area near Lake Argyle on which a telephone exchange is operated by Telstra Corporation Ltd ("Telstra"); and

o the area of the former Argyle Downs homestead.

Other freehold land included in the claim area is land that was alienated by the Crown after 31 December 1993 but, it is said, not in compliance with the "future act" provisions of the Act and, therefore, without affecting native title.

Crown land in the claim area in the vicinity of Kununurra, Lake Argyle and the Ord River irrigation area, is vacant and reserved Crown land formerly used for pastoral leases. Most of that land is the land covered by Lake Argyle and the land which surrounds it, formerly part of the Argyle Downs, Lissadell and Texas Downs pastoral leases, and the balance consists of small areas of land in and around Kununurra, or bordering the irrigated land north of the town and formerly part of the Ivanhoe pastoral lease. A small area of vacant Crown land near Kununurra is subject to a special lease for cultivation and grazing purposes. The reserved Crown land, in the main, is vested in the Shire of Wyndham East-Kimberely ("the Shire"), or in statutory authorities, for purposes which include conservation, recreation, parkland, agricultural research, gravel, quarry, drainage, preservation of Aboriginal paintings, the use and benefit of "Aborigines" and purposes connected with the Project. Some of the reserved Crown land has been leased to Aboriginal corporations and some to community organizations. Crown land to the south-east of Lake Argyle is reserved for "government requirements". Part of that land is leased for grazing purposes. Some parts of that Crown land are subject to tenements granted under the Mining Act 1978 (WA) and the Petroleum Act 1967 (WA) and gravel and stone is quarried on Crown land at several sites in and around Kununurra. A small part of the area on which diamond mining operations are carried out on Crown land south-west of Lake Argyle by the Argyle Diamond Mine Joint Venture is included in the claim area.

The land in the inter-tidal zones and mud flats on the north coast of the State, described as vacant Crown land, is land between the low and high watermarks and a forty metre strip of land between the high watermark and the boundary of the Carlton Hill pastoral lease. Whether the land included in any earlier pastoral lease extended to the high watermark or into parts of the inter-tidal zone is disputed. The mud flats and inter-tidal zones on the eastern side of the Gulf are Crown lands reserved for conservation purposes. The Goose Hill area is reserved Crown land part of which is used for grazing purposes under a special purpose lease. "Booroongoong" (Lacrosse) which expression excludes an area described as King Location 230, and "Kanggurryu" (Rocky) Islands are vacant Crown lands and "Ngarrmorr" (Pelican) Island is Crown land reserved for the purpose of a nature reserve.

With respect to the Territory area part of that land is the Keep River National Park, declared a park in 1981 under the Territory Parks and Wildlife Conservation Act (NT). The land contained in the Park was excised from the Newry pastoral leases in 1979 and leased to the Conservation Land Corporation ("the Corporation") for the purpose of "carrying out the functions of the Conservation Commission" ("the Commission"). Under the Parks and Wildlife Commission Act (NT) the Commission (now known as the Parks and Wildlife Commission) has the care, control and management of all land "acquired" by the Corporation. Also within the Territory area is land adjacent to the Park excised from the Newry pastoral leases in 1987 and leased to the Corporation for the purpose of "carrying out the functions of the Conservation Commission".

Other land in the Territory area is freehold land, contiguous with, or formerly within, the Keep River National Park, being three areas granted as freehold land to Aboriginal corporations under the Land Acquisition Act 1978 (NT) and PtIV of the Crown Lands Act 1992 (NT) and the Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1978 (NT). The grants were made in 1990 and 1993.

The application

The application was presented to the Tribunal in April 1994 by "Miriuwunga Gajerronga Ningguwung Yawurrung Inc (Miriuwung and Gajerrong Families and Heritage Land Council)". After the application had been accepted by the Tribunal, the description of the claim area was amended, and the name of the first applicants changed by substituting for the corporate applicant natural persons who bring the claim on behalf of the Miriuwung and Gajerrong people.

After notice of the claim was published, the Tribunal received notices from 127 persons with interests in the claim area said to be likely to be affected by a determination of native title. Pursuant to s68 of the Act those persons became parties to the application.

Two of those parties, the State and the Territory, commenced a proceeding in this Court seeking a declaration that the Registrar had erred in accepting the application. It was contended that the application did not comply with the requirements of the Act in that the application had been made by a body corporate. Further, it was submitted that replacement of the body corporate by the named applicants did not cure lack of competency in the application. In August 1995 those issues were determined by a Judge of this Court who held, inter alia, that the Registrar had neither erred in accepting the application nor in accepting an amendment to the description of the applicant. (See: Northern Territory v Lane (1996) 138 ALR 544.)

The Court was informed that two other applications for the determination of native title in respect of land adjacent to the claim area had been lodged with the Tribunal by the first applicants. No application was made to the Court for a direction that the claim area in this matter be expanded to include the land referred to in those applications.

The first directions hearing in the matter was held in March 1995 at Kununurra. To provide for efficient management of the litigation orders were made that parties who had given notice to the Tribunal of their interest in the application be grouped as respondents according to common interests. The orders were were designed to encourage the grouped parties to adopt a common address for service and, if possible, give common instructions to obviate multiple representation and unnecessary expense.

The respondents

The respondents to the application are as follows:

The State as first respondent represents State departments, Ministers and statutory authorities named as interested parties when the application was before the Tribunal. The State opposes the application in respect of the whole of the claim area in Western Australian.

The Territory is the second respondent. The Territory opposes the application in respect of the Territory area with the exception of the three freehold areas granted to Aboriginal corporations and associations.

The third respondent is the Corporation as lessee of the land contained in the Keep River National Park and of the adjacent land.

Cecil Ningarmara and other named Aboriginal people were the fourth respondents as persons who claimed an interest in the Territory area separate from that of the first applicants. In due course, the fourth respondents sought leave to be joined as claimants seeking a determination of native title in their favour in respect of that land. They were given leave to be removed as fourth respondents and joined as second applicants.

The fifth respondents are the Kimberley Land Council and the Kununurra Waringarri Aboriginal Corporation. The Kimberley Land Council is a representative body under the Act. In this proceeding it represents Aboriginal people other than the applicants who have interests in the claim area. In February 1997 leave was given to some of the fifth respondents, known as the Balanggarra Peoples, to become the third applicants, that group having lodged with the Tribunal an application for a determination of native title for an area of land and waters which included part of the land in the claim area, namely, Lacrosse Island.

The sixth respondents are persons and corporations who carry on business on, and have interests in, land in the claim area. Principal among them are the horticultural or agricultural businesses which take water from the Ord River irrigation scheme. The claim area does not include the land on which the businesses operate but does include Crown land over which that water is pumped. Also included as sixth respondents are tourist-oriented businesses which use facilities on reserved or vacant Crown land within the claim area. For example, Ultimate Adventures operates a tourist and travel-stop facility under a lease of reserved land near Goose Hill. Alligator Airways Pty Ltd is the holder of a permit to operate float aircraft from Lake Kununurra, and install and maintain float landings and moorings, and is the holder of a

jetty licence under the Jetties Act 1926 (WA). Triple J Tours holds a permit to construct and use landing steps on the shore of Lake Kununurra and a licence to use a tour boat on the lake. Other respondents hold fishing boat licences or tour boat licences for use on Lake Argyle. Lake Argyle Fisheries holds a fish farm or acquaculture licence for breeding and harvesting fish in Lake Argyle. Also included as sixth respondents are persons who hold licences permitting them to collect, for commercial use, seeds of native flora on reserved or vacant Crown land, and persons who acquired, after 31 December 1993, freehold interests in residential lots in Kununurra.

Included in the group of sixth respondents, but separately represented, is Telstra which operates telephone facilities involving an exchange, repeater stations, underground cables and solar power sites, on reserved or vacant Crown land, and in one case freehold land, in the claim area.

The seventh respondents are pastoral enterprises. Crosswalk Pty Ltd is entitled to graze cattle on reserved land in the claim area as lessee under a lease granted to it under the Land Act 1933 (WA). Similarly, Baines River Cattle Co Pty Ltd as lessee under a lease from the Minister for Works is permitted to graze cattle on an area of reserved land vested in the Waters and Rivers Commission.

The eighth respondents are parties engaged in mining in, or near, the claim area. Included are Argyle Diamond Mines Pty Ltd and other Joint Venturers, together referred to as "Argyle", who operate the Argyle Diamond Mine as lessees under a mining lease ("the Argyle mining lease") granted pursuant to a Joint Venture Agreement made with the State ("the Agreement"), ratified by the Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981 (WA) (formerly Diamond (Ashton Joint Venture) Agreement Act 1981) (WA) ("the ratifying Act"). Argyle hold other mining leases and miscellaneous licences granted under the Mining Act 1978 (WA) within the claim area. Normandy Bow River Diamond Mine Ltd ("Normandy") holds exploration licences, a miscellaneous licence and mining leases within the claim area to the south of Lake Argyle and to the east of the Argyle Diamond Mine.

The ninth respondents are other parties who hold mining tenements under the Mining Act 1978 (WA), for example, exploration licences or the rights to quarry gravel or metal on Crown land within the claim area.

The tenth respondents are incorporated associations which occupy reserved Crown land within the claim area under leases granted by the Shire, the reserved land being vested in the Shire under the Land Act 1933 (WA). They include a sport-fishing club which represents persons interested in recreational fishing in waters in the claim area and a water-ski club and a sailing club which represent recreational users of Lake Kununurra.

The eleventh respondent is the Shire, the primary interest of which is in the reserves vested in it in the claim area.

The twelfth respondent, Pacific Hydro Group Two Pty Ltd, produces hydro-electric power at the main dam. It did not take any part in the proceedings.

The thirteenth respondent, Innes Holdings Pty Ltd, carries on the business of irrigated agriculture. Part of the land on which that business is conducted is freehold land in the claim area granted by the Crown after 31 December 1993.

The Attorney General for the Commonwealth, later replaced by the Minister for Aboriginal and Torres Strait Islander Affairs, was given leave to intervene in the proceedings. No submissions were made pursuant to that leave.

Pre-trial directions and conduct of trial

Preparation of the matter for trial between 1995 and 1997 was controlled by detailed directions made at case management hearings held at Kununurra and Perth. The directions had regard to the novel nature of the litigation. The directions provided, inter alia, for documents to be filed which -

o set out the tenure history of the land;

o outlined the facts to be relied upon by the applicants to show the historical connection of the applicants with the land and water claimed;

o outlined the facts to be relied upon by the applicants to show contemporary connection of the applicants with the land and water claimed;

o outlined the facts to be relied upon to show the applicants were members of an identifiable group which observed or acknowledged traditional laws and customs;

o provided the reports of expert witnesses and any documents referred to in those reports not available to experts instructed by other parties; and

o set out particulars of dealings with the land and waters on which respondents would rely to argue there had been extinguishment of native title and any documents relevant thereto.

In lieu of pleadings the parties were directed to file statements which set out the relevant issues, facts and contentions as perceived by the parties. In addition directions were made dividing the trial process by requiring counsel for the applicants to open their cases in detail after which the trial would be adjourned to allow the respondents to analyse the cases to be presented by the applicants and prepare their cases in response. Further directions were made for the appropriate manner of conducting the hearing having regard to the requirements indicated by the opening statements.

In the course of preparation of the matter for hearing the State and the Territory sought an order from the Court that the issue whether, and, if so, to what extent, native title had been extinguished in the claim area by grants of pastoral leases be answered as a preliminary question of law pursuant to O29 r2(a) of the Federal Court Rules. That order was refused and the reasons for that decision are reported as Ward v The State of Western Australia (1995) 40 ALD 250.

The trial commenced at Perth on 17 February 1997 with the opening statements of counsel for the first and second applicants and consequent directions, and adjourned on 20 February 1997.

After the cases of the first and second applicants had been opened the Balangarra Peoples sought leave to be joined as third applicants. Leave was granted as noted earlier in these reasons. The third applicants were directed to file a written opening prior to the resumption of the hearing and to comply with similar orders to those that had applied to the first and second applicants in respect of filing of documents relevant to their case.

Whilst the proceedings stood adjourned further directions were made setting out a protocol to be followed in respect of any evidence to be adduced that may require an order restricting the persons present at the time the evidence was given or access to the evidence after it had been received, having regard to cultural and customary concerns of Aboriginal people and to the requirement that the trial proceeding be fair and just. The State appealed from those directions. The terms of the directions were clarified by an order of the Full Court, reported as State of Western Australia v Ward (1997) 145 ALR 512.

The trial resumed at Kununurra on 21 July 1997. The hearing occupied eighty-three days. Evidence taken in the claim area (the "primary" evidence) was heard at various sites in, or proximate to, that area, the substance of evidence to be adduced from witnesses at each site being provided to parties beforehand. A number of witnesses were called on more than one occasion to give evidence at different sites. On each occasion those witnesses were subject to cross-examination.

In addition to receiving evidence at those sites, views were taken, or inspections made, of places that had significance as landmarks, or for connection with ancestors, events referred to in the evidence, or spiritual beliefs. The Court also viewed demonstrations of traditional activities, ceremonies, dances and songs, and inspected rock art, and artefacts in the claim area.

As far as was possible the hearings of the Court in the claim area were conducted in an informal manner. On several occasions evidence was heard when those present were restricted to males and restrictions were placed on distribution of the record of that evidence. On one occasion evidence was given to the Court by female witnesses after an order was made that, with the exception of myself, other persons present be restricted to persons of the same gender as the witnesses. Like restrictions were made in respect of distribution of, and access to, that evidence.

Evidence was usually given in English, but most often it was in broken form, using words of the Miriuwung or Gajerrong languages for names of people, places, objects, animals and for description of cultural matters. The language amalgam has been described as "Kimberley Kriol" by linguists and anthropologists. Appropriate spellings of Aboriginal words used in evidence were compiled in an agreed orthography for use in the transcript of proceedings.

The difficulties Courts face in receiving and dealing with evidence of Aboriginal witnesses is well known, particularly when English is at best a second, or lesser, language and the grasp of it is limited. A transcript cannot convey nuances of gesture, movement or expression that bear upon an understanding of the evidence received in such circumstances. Similarly, a transcript which presents as a seamless continuum of questions and answers may suggest more comprehension of the process by a witness than the Court observes.

It was apparent that for a number of witnesses the adversarial system of trial, and a limited ability to express themselves fluently in English, hindered articulation of their evidence. On some occasions it appeared that restricting oral evidence to responses to questions put by counsel left part of the story untold and where the questions of counsel relied on unstated or latent assumptions the full import of the questions was not understood by some witnesses and the responses were not directed to issues raised indirectly. The remarks of Blackburn J in Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141 at 179 were equally pertinent to this case.

The approach of counsel to the conduct of the proceeding and, in particular, to the application of the rules of evidence, observed, in effect, the requirement expressed by Lamer CJ in Delgamuukw v British Columbia (1997) 153 DLR (4th) 193 at 229-230 that evidence presented by, or on behalf of, Aboriginal claimants not be undervalued. Objections on points of evidence were limited.

After the "primary" evidence of the applicants had been completed the trial was adjourned with a direction that the respondents administer notices to admit such facts as were considered appropriate for admission in an endeavour to reduce the Court time required for the taking of evidence. Counsel for the parties and their instructing solicitors attended to those directions with diligence and vast areas of fact were reduced to agreed facts and admissions. As a result the respondents were able to present almost the whole of their "primary" evidence in admissions, documents, and uncontested affidavits. Substantial hearing time that would have been required to receive oral evidence on those issues was avoided and the "primary" evidence of the respondents occupied only several days.

With regard to expert evidence, a direction was made that the testimony of experts be heard after all "primary" evidence had been adduced by the parties and notices to admit facts completed. It was also directed that where possible anthropologists be present to hear evidence given by their colleagues. The Court returned to Perth to hear the expert evidence of linguists, historians, archeologists and anthropologists.

The cases of the applicants and the respondents involved the presentation of numerous historical documents, texts and records and chains of enactments. In addition to taking judicial notice of the facts of history, whether past or contemporaneous, the Court, of course, was entitled to rely on its own historical knowledge and research. (See: Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker [1949] AC 196 at 234; Reid et al v Lincoln [1892] AC 644 per Lord Halsbury at 652-654; Calder v Attorney-General (British Columbia) [1973] SCR 313 per Hall J at 346.)

The meaning of "native title"

Before dealing with the evidence and the issues to be resolved it is necessary to set out what is understood by the term "native title".

Native, or aboriginal, title is a concept of the common law. It is the means by which the common law recognizes rights enjoyed by indigenous inhabitants of land by reason of their occupation of that land and reconciles the rights of those inhabitants with rights obtained by the Crown upon claiming sovereignty over the land. (See: R v Van der Peet (1996) 2 SCR 507 per Lamer CJ at 547-548.) Upon the Crown asserting sovereignty indigenous inhabitants became subjects of the Crown and their interests, including interests in the land so acquired by the Crown, protected by operation of the common law. (See: Mabo v The State of Queensland (No 2) (1992) 175 CLR 1 per Toohey J at 182.)

As explained in Western Australia v The Commonwealth (1995) 183 CLR 373 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ (at 485-486), a previous erroneous perception and declaration of the common law was corrected by the High Court in Mabo (No 2) by the judicial pronouncement that the common law principle of native title has been part of, and enforceable under, the common law of Australia since formation of the Australian colonies. Such a principle was part of the law of other colonies of the United Kingdom which received the common law upon formation, in particular, the United States of America, Canada and New Zealand. The jurisprudence of those countries, referred to by the High Court in Mabo (No 2), accepted that whether a colony was formed by settlement, acquisition or conquest, the common law recognized prior interests of indigenous inhabitants in the colonized land. Pre-existing interests in land were presumed at law to survive the assertion of sovereignty unless expressly confiscated at that time, or extinguished or expropriated by legislation thereafter. (See: Amodu Tijani v Secretary, Southern Nigeria [1921] 2 AC 399 per Viscount Haldane at 407; Guerin v The Queen (1984) 2 SCR 335 at 378-379; R v Symonds [1847] NZPCC 387 at 390-391; Mabo (No 2), per Brennan J at 58; per Deane, Gaudron JJ at 99-100; per Toohey J at 183; Western Australia v The Commonwealth at 433.) In short, indigenous inhabitants who had rights in land as the occupiers thereof did not become trespassers on that land by the establishment of a colony and assertion of sovereignty by the Crown. (See: Calder per Hall J at 414.)

Such indigenous interests are not defined by reference to, nor moulded to equate with, the estates, rights or interests in land which form the law of real property at common law. Native title does not conform to traditional common law concepts and is to be regarded as unique, or "sui generis". (See: Mabo (No 2) per Deane, Gaudron JJ at 89.) In particular the right or interest of indigenous people in land may be the right of a community to use the land and not an individual proprietary right. (See: Amodu Tijani per Viscount Haldane at 403.)

Indeed, native title recognized by common law, will be ordinarily a communal interest in land and the rights exercised under it will be communal rights. (See: Mabo (No 2) per Brennan J at 59-62; per Deane, Gaudron JJ at 85, 100; per Toohey J at 179.)

"A communal native title enures for the benefit of the community as a whole and for the sub-groups and individuals within it who have particular rights and interests in the community's lands."

(Mabo (No 2), Brennan J at 62)

"A further dimension of aboriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is sui generis and distinguishes it from normal property interests. [emphasis in original]

(Delgamuukw per Lamer CJ at 242)

As Gummow J pointed out in Wik Peoples v Queensland (1996) 187 CLR 1 at 177, a communal interest in land, based on custom, was not an unknown concept for the common law. Incorporeal customary rights held communally, not severally, such as rights of pasturage over commons or wasteland, had been included in the law of property since the formation of the common law. (See also: Fejo v Northern Terrritory of Australia, (1998) 156 ALR 721 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 739.)

In particular, customary rights not involving a profit , exercisable in respect of land by a local community but not the public at large, analogous to the character of some of the rights that arise under native title, were recognised at common law if they were ancient, certain, reasonable and continuous. They did not depend upon origin in grant, presumed grant or prescription and could not be lost by disuse or waiver. (A W B Simpson, "A History of The Land Law" (2nd Ed), (Oxford: Oxford University Press, 1986) at 107-108; R E Megarry & H W R Wade, "The Law of Real Property" (5th Ed), (London: Stevens & Sons Ltd, 1984) at 849-850.)

From the time sovereignty was asserted the radical title in the land of a colony thereby obtained by the Crown was burdened by any native title that existed prior to sovereignty. (See: Mabo (No 2) per Brennan J at 57-58; per Deane, Gaudron JJ at 87; per Toohey J at 182; Amodu Tijani at 403-404, 407; St Catherine's Milling and Lumber Company v R (1888) 14 App Cas 46 at 58.) Formal recognition or affirmative acceptance of native title by the Crown was not required. (See: Mabo (No 2) per Brennan J at 57; Western Australia v The Commonwealth per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at 433; Calder per Hall J at 393.)

Native title may be extinguished by the Crown but continues until the Crown takes such action by legislature or executive as reveals a clear and plain intention to extinguish it. (See: Mabo (No 2) per Brennan J at 64; per Deane, Gaudron JJ at 111; per Toohey J at 195; Calder per Hall J at 404; United States v Santa Fe Pacific Railroad Co 314 US 339 (1941) at 353, 354.) Such extinguishment of native title must be plain and unambiguous in the public record. (See: Calder per Hall J at 393.) Until extinguished native title provides a right of occupation that prevails against all but the Crown. (See: Mabo (No 2) per Mason CJ, McHugh J at 15-16; per Brennan J at 51, 75; per Dawson J at 131-138; Calder per Hall J at 352-353; Johnson v McIntosh (1823) 21 US 240 per Marshall CJ at 253-254; Admodu Tijani per Viscount Haldane at 409-410; A E W Park,"The Cession of Territory and Private Land Rights: A Reconsideration of the Tijani Case", Nigerian Law Journal 1 (1964-65) 38 at 45-49; Geita Sebea v The Territory of Papua (1941) 67 CLR 544 per Williams J at 557; Guerin v the Queen [1984] 2 SCR 335 per Dickson J at 379-382; Delgamuukw per Lamer CJ at 245-246; J Gagne, "The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim" (1982-83) 47 Sask Law Rev 309 at 337-339; B Slattery, "Understanding Aboriginal Rights" Can Bar Rev 64 (1987) 727 at 746-749; W Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982 PtII - S35: The Substantive Guarantee" (1988) 22 UBC Law Rev 207 at 221; K McNeil, "The Meaning of Aboriginal Title", (Ch 5), Aboriginal and Treaty Rights in Canada, Editor: M Asch (Vancouver: UBC Press, 1997) 135 at 150-154.) Of course, ancillary to a power to extinguish native title is a power to regulate the exercise of rights that flow from native title and regulation may involve curtailment or suspension of those rights but not extinguishment. (See: Mabo (No 2) per Brennan J at 64; R v Sparrow (1990) 1 SCR 1075 at 1097.)

Except for formal surrender to the Crown, which has the effect of extinguishing the title, native title is inalienable. Because the rights and interests in respect of land able to be used and enjoyed by members of a community by virtue of native title are based on the traditional laws, customs and practices of the community, rights arising under native title cannot exist beyond the community which observes those traditions, customs and practices. (See: Mabo (No 2) per Brennan J at 60; per Deane, Gaudron JJ at 110.)

At common law, native title in land will exist at the date of sovereignty if an indigenous community had an entitlement to use or occupy the land at that time, that entitlement arising from local recognition that the presence of the community on the land reflected a particular relationship, or connection, between that community and the land. (See: Mabo (No 2) per Deane, Gaudron JJ at 86.) In determining whether the presence of a community on the land involved use or occupation of the land sufficient to ground a claim to native title, it is necessary to look at that question from the standpoint of the indigenous community. That is to say, is the degree of presence on the land consistent with the demands of the land and the needs of a community pursuing traditional practices, habits, customs and usages that form the way of life of that community?

As explained by Professor K Maddock in "The Australian Aborigines - A Portrait of their Society" (2nd Ed), (Ringwood: Penguin, 1982) at 33-34:

"Of course, Aborigines were nearly everywhere nomads, even after becoming closely associated with defined areas, but this did not mean random wandering. They may have been kept on the move by their need for food and water, but other factors too circumscribed their journeying. For example, there were rules or customs to govern the use of resources and access to places.

...

In addition to the controls on movement and activity which these avoidances imposed, there were outer limits to people's journeying. But the extent and direction of their movements were largely affected by the nature of the activity in which they were engaged at the time. Obviously the area over which people moved in the course of a seasonal cycle had to be extensive enough to supply them with the food and water they needed, there being no trade worth speaking of in such items. But this basic requirement does not fully explain Aboriginal perspectives on territory, for on the occasion of major ceremonies people came from far and wide to take part. For the rest of the year they would be hunting and gathering in different areas. And, as all men and women married, their social universe had to be large enough for them to obtain spouses without too much trouble. Thus outer boundaries can be thought of as set by a number of factors - economic, religious and marital, for example - and as varying with the factor in question, so that the area from which men and women drew their spouses and the area from which they normally drew their sustenance would have been different but overlapping.

...

The areas over which people moved in carrying out their various activities could not expand indefinitely, however, even when their haziness of outline is allowed for. On the one hand a limit was set by the practical advantages of staying in country with whose food and water resources and human population familiarity could be acquired. Here it is important to appreciate that Aborigines had to walk everywhere and to carry their possessions themselves. On the other hand each hazily defined territory shaded off into others having the same general character, the occupants of which would have been an obstacle to expansion by their neighbours."

The survival of such a society may depend upon occupation that is sparse and wide-ranging. The ever-changing locale of a nomadic community will not be inconsistent with occupancy for the purpose of that element of native title. (See: Mabo (No 2) per Toohey J at 189; Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development (1979) 107 DLR (3rd) 513, 544-545.) Of course, a truly random presence on land, unconnected with the economic, cultural or religious life of the community will not amount to occupation. (See: Mabo (No 2) per Toohey J at 188) Occupancy for the purpose of native title is not possession at common law but an acknowledged connection with the land arising out of traditional rights to be present on, and to use, the land. Such occupancy need not be exclusive to one community and may be shared between several communities in some circumstances. (See: Mabo (No 2) per Toohey J at 190; Delgamuukw per Lamer CJ at 259-260.)

It is not necessary that the indigenous community in occupation of the land at sovereignty be a community of a particular degree of organization, only that it be community or society sufficiently organized to be able to create and sustain rights. (See: Mabo (No 2) per Toohey J at 187.) It is not a requirement of native title that it be shown that the indigenous community had rules for defining and transmitting the rights of community members in respect of land. Native title fol-

lows from the occupation and use of land by an organized society which has a particular relationship with the land. It does not depend on proof of the existence of specific rules which govern the relationships of community members with that land. (See: Mabo (No 2) per Brennan J at 62-63; per Toohey J at 188-191.) The existence of laws or customs which determined how the land was controlled or utilized may be assumed from proof that a functioning society occupied the land. (See: Mabo (No 2) per Toohey J at 187.)

Native title that has not been extinguished by action of the Crown, or by extinction of the society that possessed it, will continue where connection with the land is substantially maintained by a community which acknowledges and observes, as far as practicable, laws and customs based on the traditional practices of its predecessors. (See: Mabo (No 2) per Brennan J at 59-60) The reasons of Brennan J were approved by Lamer CJ in Delgamuukw (at 257-258) who set out the requirement as follows:

"Needless to say, there is no need to establish "an unbroken chain of continuity" (Van der Peet, at para65) between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk "undermining the very purposes of s35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect" aboriginal rights to land (C té, supra at para53). In Mabo, supra, the High Court of Australia set down the requirement that there must be "substantial maintenance of the connection" between the people and the land. In my view, this test should be equally applicable to proof of title in Canada.

I should also note that there is a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. The only limitation on this principle might be the internal limits on uses which land that is subject to aboriginal title may be put, ie, uses which are inconsistent with continued use by future generations of aboriginals."

The activities or practices may be a modern form of exercise of those laws and customs. (See: Mabo (No 2) per Deane, Gaudron JJ at 110; per Toohey J at 192; R v Van der Peet per Lamer CJ at 553.) There is universal acknowledgement of this fact where traditional rights and culture of minority indigenous and tribal people are recognized and respected by a supervening community. (Lansman et al v Finland, Communication of Human Rights Committee No 511/1992, UN DOC CCPR/C/52/D/511/1992 (1994) at para9.3.) It will be immaterial that those laws and customs have undergone change since sovereignty, provided that the general nature of the connection between the indigenous people and the land remains. (See: Mabo (No 2) per Brennan J at 70.) The communal rights exercisable under native title, and the rules governing the exercise of those rights, may be varied from time to time according to the practices or customs now observed by the community based on traditional laws or customs. (See: Mabo (No 2) per Deane, Gaudron JJ at 110.) If native title has continued since the assertion of sovereignty the rights available under that title, and the persons who may exercise those rights, will be ascertained by reference to practices that are based on traditional laws and customs, not by enquiring whether the traditional practices observed today are in the same form as before as if frozen in time. Aboriginal, or native title, as recognized by the common law shares the capacity of the common law to evolve and mould as circumstances require. An indigenous society does not surrender native title by modifying its way of life. (See: Mabo (No 2) per Toohey J at 192.) The Aboriginal laws, customs and traditional practices on which native title is based have always been dynamic, not static.

"Non-Aboriginal Australians have consistently tended to understate the continuity and flexibility of Aboriginal traditions and patterns of living, including their capacity to adapt to changing circumstances. The point was made by Professor Berndt in a submission to the Commission:

Today, I would still say that while change is proceeding at a rate greater than ever before, what passes for a traditional Aboriginal life-style continues and is still significant in a number of areas. However, while Aboriginal identification, among other things, has sustained the continuing importance of this life-style, it is substantially different from what it was in most areas, say, two decades ago. (Submission 86 (11 July 1978))."

("Aboriginal Customary Law", Australian Law Reform Commission, Final Report, 1978 at 28-29.)

"...Aboriginal tradition is grounded in, but not bound by, the conditions and practices of the pre-colonial past, a point I would now regard as beyond dispute, not only among anthropologists but in Australian legal practice as well."

(P Sutton, "Atomism versus collectivism: The problem of group definition in native title cases", Anthropology in the Native Title Era, Editors: J Fingleton & J Finlayson, (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1995), 1 at 9.)

Such tradition-based practices as developed by the Aboriginal community now claiming native title will be relevant to whether connection with the land has been maintained by that community, as far as is practicable, and to defining the community as an Aboriginal community that has a "common outlook" that is rooted in practices developed from the traditional laws and customs observed by an anterior Aboriginal society or societies. (K Maddock, "The Australian Aborigines - A Portrait of their Society" at 178-181.)

In Mabo (No 2) per Deane, Gaudron JJ (at 86) refer to a requirement of common law that there be, at the time of colonization an "identified community" (rarely an individual) with an established entitlement to the use or occupation of land under the local law or custom. It is implicit in the reasons of Deane, Gaudron JJ that the claimant for native title be capable of being identified as "a tribe or other group" (at 110) and, similarly, in the reasons of Toohey J, which refer to communal native title being vested in an Aboriginal group (at 178-179). Brennan J (at 61) states that communal native title survives so long as indigenous people remain as an "identifiable community" living under traditionally based laws and customs. Brennan J (at 70) adds that membership of that community depends on "biological descent" from the indigenous people entitled to native title at colonization and on mutual recognition of a person's membership by that person and by persons enjoying traditional authority among those people. Neither Deane, Gaudon JJ nor Toohey J refer to a requirement of "biological descent".

Defining a community of indigenous people connected to land by traditional laws and customs by reference to "biological descent" involves a broad understanding of descent, not the application of a narrow, and exclusive test. If there were no evidence that the community claiming native title had some ancestral connection with the indigenous community in occupation of the land at the time of sovereignty the task of showing substantial maintenance of connection with the land would be difficult to satisfy. Some evidence of ancestry will be necessary not only to identify and define the group entitled to native title but also to show acknowledgement and observance of the traditional laws and customs of the community which possessed native title at sovereignty thereby showing that connection with the land has been substantially maintained.

As McEachern CJ BC stated in Delgamuukw v British Columbia (1991) 79 DLR (4th) 185 at 282 (referred to with with apparent approval by Macfarlane JA in Delgamuukw v British Columbia (1993) 104 DLR (4th) 470 at 506):

In a communal claim of this kind I do not consider it necessary for the plaintiffs to prove the connection of each member of the group to distant ancestors who used the lands in question before the assertion of sovereignty. It is enough for this phase of the case...for the plaintiffs to prove, as they have, that a reasonable number of their ancestors were probably present in and near the villages of the territory for a long, long time."

Of course, as made clear by the Supreme Court of Canada in Delgamuukw per Lamer CJ (at 253-254) "a long long time" is not a requirement that occupation be shown since time immemorial; it need be no earlier than the assertion of sovereignty by the Crown.

From the foregoing it may be said that in other than exceptional cases native title will be a communal entitlement to use or enjoy land and that rights which depend upon, and are enjoyed under, communal native title are communal rights governed by the traditional laws and customs of the community.

The expression "traditional laws and customs" used in Mabo (No 2) should be taken to be an inclusive statement consistent with the expression "practices, traditions and customs" referred to in Canadian authorities. (See: Wik per Toohey J at 126; R v Van der Peet per Lamer CJ at 548.) The expression necessarily implies that the words are to be understood from an Aboriginal perspective, not constrained by jurisprudential concepts. Law in Aboriginal terms is an aggregation of traditional values, rules, beliefs and practices derived from Aboriginal past. It might correspond to an anthropologist's description of "aboriginal culture" or "aboriginal lore". (K Maddock, "The Australian Aborigines - A Portrait of their Society" at 24.) As Brennan J stated in Mabo (No 2) (at 18), the evidence in that case showed the Meriam people to be regulated more by custom than by law and (at 61) that the customs observed were "traditionally based".

Difficulty in proving the boundaries of the area in respect of which native title is claimed, or of membership of the community that has occupied the area, will not in itself be sufficient to deny the existence of a communal title recognized by the common law nor the recognition of non-proprietary rights that depend upon that communal title and are derived from traditional laws and customs as observed by the community. (See: Mabo (No 2) per Brennan J at 51.) As discussed earlier, exigencies of the Aboriginal way of life neither required, nor facilitated, establishment of precise boundaries for territories occupied by Aboriginal societies.

In a proceeding in which native title is in issue any rules of evidence applied to the proceeding must be cognisant of the evidentiary difficulties faced by Aboriginal people in presenting such claims for adjudication and the evidence adduced

must be interpreted in the same spirit, consistent with the due exercise of the judicial power vested in the Court under the Constitution. (See: Delgamuukw per Lamer CJ at 230.) S82 of the Act affirms those principles in respect of applications for determination of native title made under the Act. (See: WA v Ward per Hill, Sundberg JJ at 516-517.)

Of particular importance in that regard is the disadvantage faced by Aboriginal people as participants in a trial system structured for, and by, a literate society when they have no written records and depend upon oral histories and accounts, often localized in nature. In such circumstances application of a rule of evidence to exclude such material unless it is evidence of general reputation may work substantial injustice. (See: Delgamuukw per Lamer CJ at 238-239) In this proceeding the principal opponent to the claims of the applicants is the Crown in the right of the State and in the right of the Territory. If it is accepted that the Crown is presumed to have had knowledge of relevant circumstances and events concerning the burden of native title on its land at material times and to have had access to all relevant resources, there can be no suggestion of unfairness in a trial process in which Aboriginal applicants are permitted to present their case through use of oral histories and by reference to received knowledge.

The Native Title Act 1993 (Cth)

Next it is necessary to consider the effect of the Act on the concept of native title at common law. The preamble to the Act states that when the Act was enacted consideration was given to, "inter alia", the following:

"It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented."

Also considered was the need to provide a special procedure for the "just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character".

The Act provides for the recognition and effect of, and restricts the extinguishment of, native title at common law. It does not replace common law native title with a statutory right enforceable under the Act. People determined under the Act to hold native title are the "common law holders" thereof (s56). As set out in s3 of the Act the main objects of the Act are:

"(a) to provide for the recognition and protection of native title; and

(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and

(c) to establish a mechanism for determining claims to native title; and

(d) to provide for, or permit, the validation of past acts invalidated because of the existence of native title."

S10 of the Act states that native title is recognized, and protected, in accordance with the Act. The principal protection provided by the Act is in s11(1) which states that native title is not able to be extinguished contrary to the Act. As the High Court held in Western Australia v The Commonwealth per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at 459, s11(1) of the Act removes "the common law defeasibility". That is, it is the common law recognition of native title that is protected, not an indefeasible statutory right that is created.

The definition of "native title" in s223(1) reflects the elements of native title at common law and, by s223(3), extends that concept for the purposes of the Act by including any statutory rights that, in the past, have replaced native title. The definition is a compendious provision in that it includes particular rights or interests that at common law are treated as the rights or interests that arise out of, and are dependent upon, native title. As Lamer CJ said in Delgamuukw (at 240-241):

"Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit,..., flows from the definition of aboriginal title as a sui generis interest in land, and is one way in which aboriginal title is distinct from a fee simple."

At the time the hearing of this matter was completed and the decision reserved, s225 of the Act required a determination that native title exists in relation to a particular area of land or waters to determine the native title rights and interests considered to be of importance. On 30 September 1998 s225 of the Act was repealed and replaced by the Native Title Amendment Act 1998 (Cth) ("the amending Act") to provide that a determination of native title is a determination of the nature and extent of native title rights and interests in relation to "the determination area". By the transitional provisions implemented by the amending Act (Sch 5, Pt5, Item 24) s225, as substituted by the amending Act, applies to all determinations of native title made after the commencement of the amending Act. The terms of the transitional provisions (Sch 5, Pt5, Item 21) suggest that the terms of s61 as it stood before the amending Act, are to be regarded as continuing for the purposes of a determination under s225. In its terms s225 remains a provision introduced by the legislature to assist the operation of the common law by adding a mechanism for better delineating the effect of a determination of native title.

The Act provides assistance for the application of the common law in respect of native title by, inter alia, moulding a form of litigation for the determination of the existence of native title at common law and by providing that such litigation is to be an exercise of federal jurisdiction.

If the Act is taken to be a special law in respect of Aboriginal people, and within the legislative power provided by s51(xxvi) of the Constitution, the Commonwealth may enact how litigation for the determination of an Aboriginal right of native title is to be conducted and the effect to be given to such a determination. Where the Act attempted to add certainty to that purpose by purporting, in s12, to provide that the common law had force as a law of the Commonwealth it was beyond the legislative power of the Commonwealth. The invalidity of that provision, however, did not remove the foundation supplied by other provisions of the Act for investing, or conferring, federal jurisdiction to hear and determine claims with respect to the determination of native title. (See: Western Australia v The Commonwealth per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at 488.)

In so far as the provisions of the Act (s13, s61, s74, s81, s225 before the amending Act, now s13, s61, s81, s225) apply to a "determination of native title" such an application is a claim made under a law of the Commonwealth and involves federal jurisdiction. (See: Western Australia v The Commonwealth per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at 488; Fourmile v Selpam Pty Ltd; Fourmile v State of Queensland (1998) 152 ALR 294.)

The Act does not provide jurisdiction in respect of the enforcement, or protection, of native title rights. In Fejo (at 731), Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said as follows:

"However, the Act otherwise does not deal with the ascertainment or enforcement of native title rights by curial process. It provides for the establishment of native title and recognises and protects it in the manner we have outlined. ... If actual or claimed native title rights are sought to be enforced or protected by court order, the party seeking that protection must take proceedings in a court of competent jurisdiction."

Fejo was decided before the amending Act came into effect but, as indicated above, the substance of s225 as substituted by the amending Act, remains, as before, a determination whether native title exists and, if so, the nature of the rights that may be asserted under that native title. The Act is concerned with the facilitation of curial proceedings in which it is determined whether native title exists and, as Fejo makes clear, neither ascertainment of the enforceability of, nor the enforcement or protection of, native title rights is within the jurisdiction of this Court. The nature of any additional jurisdiction conferred on the Court by s213(2) of the Act, or by s39B(1A)(c) of the Judiciary Act 1903, in respect of matters arising under the Act is unnecessary to determine. (See: Fejo per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 730-731.)

Further, the Act is not concerned with whether there may be a broader-based conception of aboriginal rights than rights dependent upon aboriginal title to land. (cf Yarmirr v Northern Territory of Australia (1998) 156 ALR 370 per Olney J at 405-406.) In R v Van der Peet and R v Adams [1996] 3 SCR 101 it was held that aboriginal title to land was but one manifestation of a broader concept of aboriginal rights and that an aboriginal right may exist independently of aboriginal title. Proof of the existence of that right would not require proof of the elements required to establish aboriginal title. That development of Canadian jurisprudence owes much to s35(1) of the Constitution Act 1982 (Can) by which "existing aboriginal rights" of the Aboriginal peoples of Canada are "recognised and affirmed". (See: Wik per Gummow J at 182; Fejo per Kirby J at 754-755.)

In Delgamuukw, Lamer CJ set out further explanation of how aboriginal title differs from other aboriginal rights:

"The acknowledgement that s35(1) has accorded constitutional status to common law aboriginal title raises a further question - the relationship of aboriginal title to the 'aboriginal rights' protected by s35(1). I addressed that question in

Adams,...where the Court had been presented with two radically different conceptions of this relationship. The first conceived of aboriginal rights as being 'inherently based in aboriginal title to the land'..., or as fragments of a broader claim to aboriginal title. By implication, aboriginal rights must rest either in a claim to title or the unextinguished remnants of title. Taken to its logical extreme, this suggests that aboriginal title is merely the sum of a set of individual aboriginal rights, and that it therefore has no independent content. However, I rejected this position for another -- that aboriginal title is 'simply one manifestation of a broader-based conception of aboriginal rights'...Thus, although aboriginal title is a species of aboriginal right recognized and affirmed by s35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land 'was of a central significance to their distinctive culture'...

The picture which emerges from Adams is that the aboriginal rights which are recognized and affirmed by s35(1) fall along a spectrum with respect to their degree of connection with the land.

...

At the other end of the spectrum, there is aboriginal title itself. As Adams makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself

...

(at 250-252)

In addition to differing in the degree of connection with the land, aboriginal title differs from other aboriginal rights in another way. To date, the Court has defined aboriginal rights in terms of *activities*. As I said in Van der Peet...:

...in order to be an aboriginal right an *activity* must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

Aboriginal title, however, is *a right to the land* itself. Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under s35(1). Those activities are parasitic on the underlying title."

[Emphasis in original]

(at 252)

A determination that native title exists may depend upon a finding whether native title has been extinguished. That question will raise for determination whether the Crown has displayed a clear and plain intention to extinguish native title. If so, no native title right dependent upon that underlying title will remain.

Native title at common law is a communal "right to land" arising from the significant connection of an indigenous society with land under its customs and culture. It is not a mere "bundle of rights". (See: Delgamuukw per Lamer CJ at 240-241.) The right of occupation that is native title is an interest in land. (See: Mabo (No 2) per Brennan J at 51.) There is no concept at common law of "partial extinguishment" of native title by the several "extinguishment" of one or more components of a bundle of rights. It follows that there cannot be a determination under the Act that native title exists but that some, or all, "native title rights" have been "extinguished".

Strict regulation of the rights parasitic upon native title by suspension, suppression, curtailment or control of those rights by legislation or by acts of the Crown which may thereby involve a grant of rights of use of Crown land to third parties may impair native title but strict regulation of the exercise of such rights of itself, will not mean that native title has been extinguished.

As stated in Western Australia v The Commonwealth by Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ (at 422):

"After sovereignty is acquired, native title can be extinguished by a positive act which is expressed to achieve that purpose generally ... provided the act is valid and its effect is not qualified by a law which prevails over it or over the law which authorises the act. Again, after sovereignty is acquired, native title to a particular parcel of land can be extinguished by the doing of an act that is inconsistent with the continued right of Aborigines to enjoy native title to that parcel - for example, a grant by the Crown of a parcel of land in fee simple - provided the act is valid and its effect is not qualifed by a law which prevails over it or over the law which authorises the act."

Furthermore, extinguishment by inconsistent acts of the Crown may be said to be effected by the grant of tenures by the Crown that confer on third parties rights to use the land in a way inconsistent with the exercise of rights that attach to native title, and by the exercise of those rights. Such circumstances have been described as extinguishment by "adverse dominion". (See: United States v Santa Fe Pacific Railroad Co at 347.)

In Delgamuukw v British Columbia per Lambert JA at 670-672 it was stated that for extinguishment to be effected in this manner three conditions were required to be satisfied. First, that there be a clear and plain expression of intention by Parliament to bring about extinguishment in that manner; second, that there be an act authorized by the legislation which demonstrates the exercise of *permanent* adverse dominion as contemplated by the legislation; and third, unless the legislation provides the extinguishment arises on the creation of the tenure inconsistent with an aboriginal right, there must be *actual use* made of the land by the holder of the tenure which is permanently inconsistent with the continued existence of aboriginal title or right and not merely a temporary suspension thereof. (See also: Fejo per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 739.)

A similar principle was set out in Mabo (No 2) by Brennan J (at 68, 70) in respect of the appropriation of Crown land, by reservation for a public purpose, and subsequent use of the land for a permanent public work.

The following remarks by Gaudron and Gummow JJ in Wik (cf Kirby J at 238) may be read as consistent with the principles of "adverse dominion" described above:

"And to the extent that there is any inconsistency between the satisfaction of conditions and the exercise of native title rights, it may be that satisfaction of the conditions would, as a matter of fact, but not as a matter of legal necessity, impair or prevent the exercise of native title rights and, to that extent, result in their extinguishment."

(Gaudron J at 166)

"It may be that the enjoyment of some or all native title rights with respect to particular portions of the ... (pastoral lease) would be excluded by construction of the airstrip and dams and by compliance with other conditions. But that would present particular issues of fact for decision. The performance of the conditions, rather than their imposition by the grant, would have brought about the relevant abrogation of native title."

(Gummow J at 203)

Of course, for the exercise of rights granted by the Crown to third parties to be seen to be inconsistent with the continuation of native title, it would be necessary to show that the rights granted reflected an intention by the Crown that exercise of the rights remove all connection of an Aboriginal community with land under native title.

It is the concept of extinguishment at common law which s227 of the Act attempts to reflect when it states that 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. The drafting of s227 appears to be based on the following statement of Brennan J in Mabo (No 2) (at 69-70):

"Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency...

Where the Crown had validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency."

(It was made clear by his Honour in the remainder of that paragraph that extinguishment was not effected until the land was used for the purpose for which it was appropriated.)

In those remarks his Honour, by way of summary, was re-stating a proposition set out earlier in his reasons, namely, that to extinguish native title there must be a clear and plain intention of the Crown to do so whether expressly stated in legislation or necessarily implied in the consequences of an act of the Crown.

At all times his Honour was speaking of extinguishment of native title and the nature of acts of the Crown from which an intent to extinguish native title may be inferred and the words "extinguish to the extent of the inconsistency" refer to the extinguishment of native title to the extent that there is land in respect of which inconsistent rights have been granted by the Crown with the intent of extinguishing native title. It is not a statement by his Honour that if the degree of inconsistency is not sufficient to show a clear and plain intention by the Crown to extinguish native title, native title continues in respect of that land but a specific aboriginal right which depends upon the existence of native title for its exercise nonetheless may be "extinguished".

It is not impairment or regulation of the aboriginal rights that are derived from native title that is the touchstone of extinguishment but the express statement by the Crown that native title is extinguished or an act of the Crown, the nature of which makes it clear that it is intended by the Crown that native title is to be extinguished, the intention being demonstrated by the fact that continuation of native title, and, therefore, continued existence, enjoyment and exercise of rights dependent upon that title, is incompatible with the extent, or the exercise, of the rights created by the Crown.

In Wik the questions put to the High Court for answer did not include the effect of the grant of a pastoral lease upon native title rights where native title had not been extinguished. Comments were made by Toohey J (at 108) and with the concurrence of Gaudron, Gummow and Kirby JJ (at 133) to the effect that if native title, and, therefore, the rights and interests available thereunder, had not been extinguished, the possibility arose of the existence of concurrent rights between a pastoral lessee and the holders of native title. It was noted that the form of the case put before the High Court precluded consideration of the question of the suspension of any native title rights during the currency of the grant of a pastoral lease.

The degree of inconsistency between the rights granted to third parties, and the rights exercisable by the common law holders of native title, is relevant, first, to the question whether the Crown has evinced a clear and plain intention to extinguish native title and second, to the question of the degree to which native title rights have been regulated by control or suspension in the event that native title has not been extinguished and the enforceability or protection of native title rights is in issue.

Where native title is extinguished, rights that are parasitic or dependent upon that title fall with the extinguishment. No question of the "revival" of extinguished native title can arise. (See: Fejo per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 740.) If native title to land is not extinguished, the extent to which native title rights are regulated, curtailed, subordinated or suspended by rights or interests in land granted by the Crown to third parties may be required to be considered as a separate issue, but not as a question relevant to the determination of the existence of native title. That question may be determined in a proceeding to enforce actual, or claimed, native title rights undertaken in a court of competent jurisdiction. (See: Fejo per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 731.)

Fundamental inconsistency between the exercise of rights granted to third parties by act of the Crown and the exercise of any right that attaches to native title may show an intention by the Crown to extinguish native title, but inconsistency with the exercise of some only of those rights will not. Native title will remain a right to the land under which other native title rights may be enjoyed.

Coexistence of competing interests in land, whether recognized at common law or derived from statute, is accommodated under common law and in Australia land law. (M Tehan, "Co-existence of Interests in land: a dominant feature of the common law", Land Rights, Laws: Issues of Native Title (Canberra: Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Issues Paper No 12, January 1997) at 4.) It is not contrary to legal principle for two interests in land to coexist in respect of the one area of land and it is not a requirement of law in such circumstance that a concept of "extinguishment" or "partial extinguishment" be applied to defeat one of those interests despite the fact that there may be some inconsistency between incidents of the respective rights as exercised.

Outline of cases of applicants

Having considered the elements of native title and the nature of an application for a determination of native title under the Act an outline may be provided of the matters to be established in the cases of the respective applicants.

The first applicants seek a declaration of native title in respect of the claim area, the native title claimed being the communal native title of the Miriuwung and Gajerrong people. That case will require the first applicants to show that at the time of formation of the colony of Western Australia, and at the time of inclusion of the Territory area in the colony of New South Wales, an indigenous community held native title by reason of presence on, and connection with, the land of the claim area. In addition it will require the first applicants to show that they are a group of Aboriginal people with ancestral connections to the community in occupation of the claim area at the time of sovereignty and that they acknowledge and observe traditional laws and customs by activities, practices, customs and traditions that, as far as is practicable in present circumstances, are rooted in, or based on, the traditional laws and customs of the ancestral community, so that it may be said that, as far as is practicable, the first applicants have maintained connection with the claim area.

The second applicants seek a determination that they hold native title rights equivalent to ownership as to parts of the claim area as members of sub-groups of the Miriuwung and Gajerrong people. The case of the second applicants is considerably narrower than that of the first applicants. The second applicants claim that at the time sovereignty was asserted over the land the Aboriginal people present on those parts of the claim area who had particular connection with that land were sub-groups from which the sub-groups represented by the second applicants have descended. It is asserted that the sub-groups represented by the second applicants acknowledge and observe the traditional laws and customs of the Miriuwung people in the same manner as the first applicants.

The evidence adduced by the first and second applicants was directed to proof of the traditional laws and customs observed by the Miriuwung and Gajerrong community; community identification; membership and structure of the community; spiritual beliefs of the community; connection of the community with those who occupied the land before sovereignty; and maintenance of connection of that community with the land of the claim area.

The evidence of the first applicants as to the maintenance of a connection with the land made reference to, but was not restricted to, the connection particular witnesses had with parts of the claim area whether described as the "country" of the witness or as an area connected with a sub-group with which the witness had ties. The "primary" evidence of the first applicants attested to the general connection of the Miriuwung and Gajerrong community with the claim area. The northern and north-eastern part of the claim area was said to be "Gajerrong", the remainder "Miriuwung". In respect of the latter part there were areas areas known as Yirralalem, Ngamoowalem, Wiram, Yardanggarlm, Nganalam and Mandangala with which witnesses had particular affiliation through sub-groups, in some cases reflected by the establishment of community settlements thereon.

The evidence of the second applicants as to connection with the Territory area of the claim area involved three sub-groups described as "estate groups", namely, Binjen, Dumbral and Nyawanyawam. Community settlements have been established by the estate groups on the three freehold sites referred to above.

The third applicants seek a declaration that communal native title is held by the Balangarra Peoples in respect of Lacrosse Island. The case of the third applicants is that they have ties with Lacrosse Island which maintain the connection of their forebears with the island. The third applicants do not regard themselves, and are not regarded by others, as part of the community of the first applicants.

The evidence adduced by the third applicants sought to show the connection those witnesses had with Lacrosse Island and to distinguish those persons from members of the community represented by the first applicants. The third applicants did not make their claim as the claim of an "estate" group.

Aboriginal connection with the claim area at sovereignty

The first issue to be resolved is whether there was an identifiable Aboriginal society or community in occupation of the claim area at the time of formation of the colony of Western Australia and at the time inclusion of the Territory area in the colony of New South Wales. In respect of the colony of Western Australia, sovereignty was asserted by the Crown in 1829. The Territory area was included in the colony of New South Wales in 1825 when, by letters patent, the meridian of 129° east longitude was substituted for the meridian of 135° east longitude as the western boundary of that colony.

In Mabo (No 2) Deane and Gaudron JJ (at 99-101) observed that it was obvious that at the time of formation of the first Australian colony in 1788 the proportion of the continent affected by common law native title was significant and conceivably was the whole. There was substantial ethnographical and anthropological material to support their Honours' conclusion that it was "beyond real doubt or intelligent dispute" that Aboriginal inhabitants were distributed throughout significant areas in organized communities with elaborate and obligatory laws and customs, each having a defined area of land recognised by other groups as the homeland of the respective communities used by them for social, ritual and economic purposes.

"Aborigines occupied without challenge virtually every part of the Australian continent and its adjacent islands for a still not finally estimated period, but one that is well in excess of 40,000 years... the fact of Aboriginal *occupation* of their land is not a main issue: that is too well documented to need further discussion here. Rather, what concerns us is *how* Aborigines occupied their land, the relationship they constructed *vis-à-vis* specific stretches of land, and the organization they developed to cope with it and with getting a living from it." [Emphasis in original]

(R M Berndt, "Traditional Concepts of Aboriginal Land", Aboriginal Sites, Rights and Resource Development, Editor: R M Berndt, (Academy of Social Sciences in Australia, Proceedings, 5th Academic Symposium, 1981) 1-11 at 1.)

As Blackburn J stated (at 266-267) in Milirrpum:

"...having heard the evidence in this case, I am, to say the least, suspicious about the truth of the assertions of the early settlers of New South Wales that the aboriginals had no ordered manner of community life.

...

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me."

(See also: Professor N Tindale, "Aboriginal Tribes of Australia" (Canberra: ANU Press, 1974); N Peterson, "The Natural and Cultural areas of Aboriginal Australia", Tribes and Boundaries in Australia, Editor: N Peterson (Canberra: Australian Institute of Aboriginal Studies, 1976) at 60; Ex A59 p78-p79, 106-107; Ex A59 p107.)

Was it otherwise in the north-west of Australia when sovereignty was asserted in 1825 and 1829 in respect of land which included the claim area?

Reports prepared by archeologists, Dr R Fullagar for the first applicants (Ex A11), and Dr R Gregory for the Territory (Ex NT2), accept that occupation of the continent by indigenous people included the north-west of Australia. The experience and expertise represented in the reports of those witnesses was not in issue. Dr Fullagar stated that few archeologists would disagree that Aboriginal people have lived in the north-west of Australia for at least 40,000 years. The scientific testing of archeological material at one site in the claim area, Miriwun Rock Shelter at Lake Argyle, had shown the site to have been used by Aboriginal people for at least 18,000 years. Having regard to the archeological evidence it was Dr Fullagar's opinion that it was beyond doubt that the claim area had been occupied by Aboriginal people for thousands of generations.

Few extensive archeological surveys have been undertaken in the region. Both archeologists agree that the number of archeological sites recorded to date should be regarded as a minimum. Work that has been done in the region, which does include some intensive surveys in limited areas such as the Miriwun Rock Shelter before the filling of Lake Argyle, demonstrates a pattern of use and occupation of the land by Aboriginal people over thousands of years. The numerous archeological sites identified and recorded, in and adjacent to the claim area, are but a small fraction of sites in the area but are sufficient to provide a reliable guide to the activities undertaken by Aboriginal people over millennia. Such sites attest to regular, and not random, use of the land by organized groups of people and provide evidence of activities consistent with the occupation of a homeland. For example, rock art in the form of paintings and engravings; quarrying and flaking of stone in the production of tools, in particular, spear points; quarrying of ochre for ceremonial purposes; stone structures and tools; grinding hollows; burial sites and so on. In addition it shows a pattern of usufructuary activities for which the Ord River and surrounding plains were important. It also demonstrates that the lifestyle of the Aboriginal inhabitants made use of the ranges and escarpments by sheltering in rocky outcrops and by extracting material for artefacts as well as obtaining sustenance from the fauna and flora to be found in those locations. Access to water sources, however, governed the lifestyle and the use of sites.

Information obtained from the excavation of sites identifies the activities of Aboriginal people over time and reveals whether there has been continuity or change in their use of land. Excavation of the Miriwun Rock Shelter had shown that site to be used from time to time by small groups that had subsisted by hunting and gathering the same type of food in that vicinity for over 18,000 years, for example, wallabies, possums, bandicoots, lizards, rodents, molluscs, reptiles, catfish and eggs. Other information from excavation conducted at that site, when used in conjunction with ethnographic research available to archeologists, suggested a continuing system of trade in artefacts had existed between Aboriginal inhabitants in the claim area and Aboriginal groups from more distant places.

In respect of evidence of Aboriginal occupation of the claim area at or about the time of sovereignty, the reports of historians received in evidence refer to the records of maritime explorers and cartographers who observed Aboriginal people carrying on subsistence activities at Lacrosse Island and in the Gulf before 1820 and groups of Aboriginal people were observed by overland explorers who traversed the region after sovereignty and before European settlers. It was acknowledged by Dr N Green, an historian, whose evidence was adduced by the State, that it was beyond question that Aboriginal people occupied the claim area before sovereignty and when settlers first arrived in the mid 1880s.

It may be concluded from the foregoing that the claim area, and surrounding lands, were inhabited by organized communites of Aboriginal inhabitants at the time of sovereignty and that, as had already been observed in respect of Aboriginal communities elsewhere in Australia, the Aboriginal people who occupied the claim area at sovereignty func-

tioned under elaborate traditions, procedures, laws and customs which connected them to the land. It follows that the Aboriginal communities which occupied the claim area at sovereignty possessed native title in respect of that land.

Aboriginal connection with the claim area after sovereignty

The next questions that arise are whether the applicants represent a community identifiable with the Aboriginal people in occupation of the claim area at sovereignty, and whether that community has maintained connection with the land by observing, as far as is practicable, traditional customs, laws and practices of its predecessors.

Unless there is evidence to the contrary, it may be inferred that when European settlement of the claim area began some sixty years after sovereignty was asserted, the Aboriginal inhabitants then in occupation of that area were connected to the land of the claim area and with the Aboriginal people who occupied the claim area at sovereignty.

The question whether native title has continued thereafter involves an assessment of the nature of the changes European settlement wrought upon the Aboriginal people who occupied the claim area at the time of settlement.

(a) Historical evidence

Excavation of archeological sites has shown continuity of use of particular areas of land prior to, and after, European colonization, the latter being demonstrated by artefacts such as tools or trade items fashioned from materials introduced by Europeans. For example, metal and glass and have been found in the upper levels of the excavated soil. The archeological evidence so gathered, when coupled with ethnographic material, is able to identify sites as places of continuing ceremonial or mythological significance. For example, rock paintings at some sites have spiritual and mythological meanings that have been handed down through the generations. The knowledge of Aboriginal people of the significance of such sites, together with the archeological material, points to the observance or acknowledgement of traditional laws and customs by a community subsequent to settlement and of the maintenance of some form of connection with the land thereafter. Dr Gregory also noted that artefacts made from European materials and depictions of rock art demonstrated that the sites continued to be used during the "contact period". A matter of importance in such rock art records is that according to ethnographic material such art is only carried out in the "country" of the artist. Whether there was an identifiable society which observed traditional laws and customs in respect of the land of the society in occupation at the time of sovereignty will be a matter of inference from that and other material. Dr Gregory concluded that taking into account the ethnographic evidence provided by members of the Miriuwung and Gajerrong people who spoke of and identified the rock art in the Territory area, and taking into account the short time that has elapsed since 1880 when European settlement commenced in the region, it was "reasonably likely" that the archeological material found in the Territory area could be "largely attributed to the Miriuwung Gajerrong people". (Ex NT2 p42)

Changes in the use of land after colonization were also noted by the archeological studies. For example, it can be shown that the quarrying and flaking of stone for spear points all but disappeared and that increased use of rock shelters and more intensive production of rock art indicated a change of pattern of use that occurred when the pastoral industry absorbed the Aboriginal inhabitants with the result that the former lifestyle of congregating in the "dry" season and dispersing in the "wet" was reversed by a pattern of employment and residence on pastoral properties in the "dry" and movement and congregation in the "wet". (P M Kaberry, "Aboriginal Woman: Sacred and Profane" (London: George Rutledge, 1939) (Ex 44 p8, p11, p30)). Formerly, the common pattern of land use in the region was that Aboriginal people split into small family groups for hunting, collecting and foraging for much of the year and that during the "dry" season large gatherings would occur for ceremonial ritual, social and trading purposes. There was seasonal movement between the coast, lowlands and plains in the "dry" season and the uplands were used for places of shelter in the "wet".

There was evidence that the trading and exchange of artefacts being carried on between groups from within and outside the claim area continued at the time of European settlement and thereafter. (P M Kaberry, "The Forrest River and Lyne River Tribes of North-Western Australia. A Report on Fieldwork", Oceania 5, 4, (1935) at 408 (Ex 53 p412-p413); Dr B Shaw, "Countrymen" (Canberra: Australian Institute of Aboriginal Studies, 1986) (Ex A18 p37, p83-p84)).

As noted earlier, settlement of the East Kimberley region and the claim area did not commence until the latter part of the nineteenth century, 100 years after the founding of the first Australian colony. As Dr Gregory stated "traditional Aboriginal societies in (the)...region were militant and mounted resistance against European intrusions in the form of raids on stations, cattle spearing and the physical retreat to less accessible locales such as the rugged sandstone country". (Ex NT2 p17) It took fifty years between 1880 and 1930 before "pacification", or conquest, of Aboriginal people in the region was effected by the use of force by settlers and law enforcement officers of the colonies.

Many Aboriginal people of the East Kimberley were killed by settlers and by others, including miners attracted to the Kimberley gold field at Halls Creek after 1885. Witnesses for the applicants referred to this period as the "shooting time". As late as 1926 a punitive raid which killed Aboriginal people in large numbers occurred in the East Kimberley. (Ex A16 p19-p20, p107-p110, p157-p163; Dr N Green, "Forrest River Massacre", (Fremantle: Fremantle Art Centre Press, 1995); Dr B Shaw, "Bush Time Station Time" (Underdale: University of South Australia, Aboriginal Studies Key Centre, 1991) Ex A20 p89-p92.) Deaths of Aboriginal people were caused also by the diseases and malnutrition that followed European settlement. (Ex NT2 p17) In some areas Aboriginal groups were virtually annihilated by reason of these events. It may be assumed that these factors had a great impact on the ability of Aboriginal people to maintain organized communities.

Furthermore, other consequences of settlement impacted adversely on Aboriginal communities, for example, the removal of large numbers of Aboriginal males to remote prisons after conviction on charges relating to the killing of cattle; the removal of large numbers of young Aboriginal males from the Kimberley region for use as divers in the pearling industry; the aggregation and relocation of Aboriginal people from the region at ration stations established some distance away at Moola Bulla and Violet Valley (Dr B Shaw, "On the Historical Emergence of Race Relations in the Eastern Kimberleys: Change?", (Ch 22), Aborigines of the West. Their Past and Their Present, Editors: R M and C H Berndt (Nedlands: University of Western Australia Press, 1979), 261 at 266; Ex A59 p313.) and the gathering of Aboriginal people and control of their traditional practices at settlements established by church missions in the region. (R M and C H Berndt, "The World of the First Australians. Aboriginal Traditional Life: Past and Present" (5th Ed), (Canberra: Aboriginal Studies Press, 1992) at 498-499; A P Elkin, "Aboriginal-European Relations in Western Australia: An Historical and Personal Record", (Ch 24), Aborigines of the West. Their Past and Their Present, Editors: R M and C H Berndt, 285 at 300-302.)

The introduction of cattle by pastoral enterprises deprived Aboriginal people of their usual sources of sustenance. The cattle ate out indigenous food, drove away native fauna, took over water holes, degraded the land and made it difficult for Aboriginal people to follow their nomadic way of life. The demand for labour by pastoral enterprises saw Aboriginal inhabitants of the region taken to pastoral homesteads where males were used as stockmen, or in similar duties, and females used in domestic service. The homestead became the source of food for both employed and unemployed Aboriginal people in the area.

The following extract from a report submitted in 1909 by James Isdell, an Inspector of the Aborigines Department, referred to by Dr Green in his report "Historical Issues in the NE Kimberley 1882-1972" (Ex 18 p59), stated the problem in clear terms:

"In the early days before stocking, all the best pastoral country was full of game of all descriptions, numerous varieties of ground game, rats and bandicoots, opossums everywhere in the timber, emus in large mobs of 50 to 100, native companions in flocks, duck and flock pigeon in hundreds of thousands. In those days both Kimberleys were a paradise for natives all varieties of meat could be caught with little labour. I have personally seen all this, over 25 years ago, when there were only a few stations near the Derby coast, at that time I explored a good deal of the Kimberley, and crossed the Warburton Desert from Christmas Creek to head of Oakover in the Northwest. All this is now changed, stocking up the country has completely destroyed and hunted all the ground game. You can travel for weeks without seeing a sign of emus, native companions, or plain pigeons, opossums have totally disappeared. Only a few ducks and kangaroos can occasionally be seen. Natives have no meat, so is it any wonder that they have taken to cattle killing to feed their women and children. Years ago, during the wet season you could get hundreds of different varieties of herbs and vegetables, which were the yearly medicine for the aborigines that kept their bodily system in good health. Stock have eaten out and killed all the native vegetables."

In more remote areas, for example, the coastal area between Wyndham and Keep River the effect of settlement occurred up to twenty years after the establishment of pastoral properties around the Ord River valleys. Up to the 1930s small groups of Aboriginal people maintained a nomadic lifestyle taking sustenance from the land and avoiding the "white man". Although in this period the majority of Aboriginal people in the region went to live and work at cattle stations, others "stayed away in the ranges and were visited by family and friends during the wet or holiday season". (Ex NT2 p18) As late as 1935 spearing of cattle in the claim area was reported as continuing and by one account went on until at least the early 1970s. (T Rowse, "Were You Ever Savages?: Aboriginal Insiders and Pastoralists' Patronage", Oceania 58, 1, (1987) at 81.) One of the witnesses for the first applicants, Mignonette Djarmin, born in the early 1930s, said that as a young child she had lived in the Ningbingi area, "Gajerrong country", with her mother and her father and others in a group "in the bush". Another witness, Gypsy Nyirrmoi, believed to have been born around the turn of the century, said

that she had been a small child in the bush with her mother and father near Bucket Springs (Binjen) when her father had been shot and killed by "gardia" (white men).

As Dr Gregory noted the period between the commencement of the settlement of the region and the present day is relatively short. For a person now sixty years of age the period in which settlement took place was a time through which great grandparents and grandparents would have lived. It may be anticipated that connections of witnesses with people and events of that time could be spoken about with some confidence.

Oral histories obtained by historian Dr Shaw, referred to by Dr Gregory, were taken from a number of Aboriginal men who lived in or about Kununurra in the early 1970s. In the main, but not exclusively, they were people who identified themselves as Miriuwung or Gajerrong. With one exception, they were all elderly and have since passed away. The principal oral histories recorded, relevant to these proceedings, were those of Mandi Moore, Bulla Bilinggiin, Jeff Janama, Waddi Boyoi, all of whom identified themselves as Miriuwung, and Grant Ngabidj, who stated to Dr Shaw that he was Gajerrong. Dr Shaw cross-checked the information he obtained with the informants and, with the exception of Waddi Boyoi, was able to confirm before publication the accuracy of the material he had prepared. The work recorded by Dr Shaw was published in narrative form under the titles "My Country of the Pelican Dreaming" (Ex A16); "When the Dust Come In Between" (Canberra: Aboriginal Studies Press, 1992) (Ex A17); "Countrymen" (Canberra: Australian Institute of Aboriginal Studies, 1986) (Ex A18); "Banggaiyerri" (Canberra: Australian Institute of Aboriginal Studies, 1983) (Ex A19); "Bush Time Station Time" (Ex A20). Contemporary historical records tendered in evidence were consistent in relevant respects with the accounts given to Dr Shaw. Apart from Jeff Janama the informants were born around the turn of the century and a number of them lived part of their early lives in the "bush" before being taken into the stations. Their stories provide substantial links between Aboriginal society before and after European contact.

In many respects the oral histories were interconnected. For instance, Mandi Moore and Bulla Bilinggiin were married to sisters, Marie Wunmi and Daisy Burrwi, who gave evidence on behalf of the the first applicants. Waddi Boyoi and Grant Ngabidj were said to be classificatory brothers and part of their respective stories involved participation in a tribal spearing in the 1920s and their life in the bush for a period of almost two years whilst they evaded capture by police. (Ex A16 p85-p98; Ex A20 p100-p103)

Grant Ngabidj, born in about 1904, gave an account of early contact with settlers which was narrated by Dr Shaw as follows:

"Soon after Grant was able to walk and run about, William Weaber a German station manager together with his brother and a number of white and Aboriginal station people from Queensland took up Ningbing Station, in 1907-08. Grant witnessed these persons round up many of his local group, most of whom were shot subsequently after he, his sister and their mother were removed from the scene."

(Ex A16 p16)

Mandi Moore, also born in about 1904 gave an account to Dr Shaw of the "shooting time" as follows:

"White men were wanting to shoot the blackfeller in our time, and all the old people *were* shot. Then the old blackfellers were always maybe terrified of the white man. If they met up coming down the road, the white man would shoot all the blackfellers in the bush."

(Ex A18 p36)

Bulla Bilinggiin, born in about 1899, told Dr Shaw:

"You just think about when the people were wild. You couldn't get them together. You had to shoot them to stop them. That's what the white men did before. See, they chased them round with horses. They'd follow them up and camp on their tracks and the next morning they'd follow till they found a fire. The policemen liked to shoot them down with guns."

(Ex A18 p83)

Banggaldun Balmirr, born in 1900, affinal kin to Mandi Moore and Bulla Bilinggiin and a stockman on the Ivanhoe pastoral lease in the claim area, gave the following description to Dr Shaw:

"He came along and rushed the camp now. No one could break out, they'd get a bullet. Girls or piccaninnies, mothers, were finished. Right, he heaped them up. He took two or three boys and told them, 'You gotta go an getim wood'. They heaped up the wood,... heaped it up. He came along and shot them and took them up to the fire place and chucked in all

the mob, girls and boys, and burned them. He got kerosene and chucked matches, finish. The white man came along and shot all the blackfellers, and some of them broke out, and ran away frightened."

(Ex A18 p64)

Dr Shaw obtained the following account from Jack Sullivan, a stockman on Argyle Downs pastoral lease, born in 1901:

"It was pretty good in my days, peaceful, but in the earlier days when they came in to get Australia the white feller had to fight his way. When they did get a bit of land to stand on they had to fight the blackfellers to keep it. And then they took the blackfellers afterwards and made them kings or something, to lift up their head and all that. They got a bit of ground, quietened the blackfellers, tamed them down and worked them. When they had been made to understand the white man's way they were helping him then and fighting the wild ones. They would go up and talk to the wild one in their lingo. 'You wanta come up an me feller workin now. You can't killim bout bullock anything well they shoot you.' But a lot of blackfellers would not come in; they wanted to fight them. Well, then they put a bullet in them. But the good blackfellers who came in, well they were all right. If the white man saw that that blackfeller was all right he put him in. If he ran away he would follow him and bring him back. If he ran away again well he followed him and shot him. That was what it was all about in those days. You see, they tamed one another, agreeing with one another. It was mostly before my time, but I saw a lot of it also when I was only a little boy, a few like that, not many. I know that in my time there were a few at Lissadell and one or two at Argyle. I saw them tied up at the post and then taken away the next morning and done in, the bush blacks. They would get a bush black and bring him in."

(Ex A19 p65)

No doubt the settlers believed that they and their property were under threat. In the early years several drovers and pastoralists had been attacked and killed. Such killings led to savage reprisals. The threat became justification for pre-emptive action.

"The settlers felt particularly unsafe, especially in East Kimberley where they were vastly outnumbered by the aborigines. In these circumstances it was hardly surprising that the administration should have abandoned all pretences of impartiality. The number of aborigines shot by the settlers, miners (there was a shortlived gold-rush in 1886, centred on Hall's Creek), and the police can be only guessed. 'Hundreds of men, women and even children were shot down in this period', wrote a pioneer; another old-timer, portrayed by Mary Durack in the novel Keep Him My Country, boasted of the notches on a gun which 'tally up the blacks it shot after Mick Condon was speared.'"

(P Biskup, "Not Slaves, Not Citizens" (Brisbane: University of Queensland Press, 1973) at 20-21.)

The son of an East Kimberley pastoralist described the situation as follows:

"In those days there were no police within three hundred miles. Every man was his own policeman; and the letter of the law was often ignored in favour of summary justice.

...

In priority of occupation these dark people are possibly the rightful owners of the soil. But the white man has his duty to do, as he sees it, and though might is not always right it should be tempered with mercy."

(G Buchanan, "Packhorse and Water Hole - With the First Overlanders to the Kimberley" (Sydney: Angus and Robertson, 1934) at 117.)

As Dr Gregory stated (Ex NT2 p18-p19), the pattern of lifestyle of Aboriginal people had undergone significant change by the time "pacification" was completed after fifty years of settlement.

Evidence adduced by the State from Dr Green in two reports (Exs 18, 20) concentrated on the issue of change.

In the first report (Ex 18) Dr Green describes the killing of Aboriginal people that occurred as a result of the Kimberley gold-rush (at 19-20) and records that no less than twenty multiple killings or massacres of Aboriginal people occurred between 1884 and 1926 in the East Kimberley, excluding killings by Europeans between 1886 and 1892 related to the Kimberley goldfields, and massacres in respect of which no official records were made (at 29). Of course, only some of those incidents occurred in or near the claim area with possible impact upon people known as Miriuwung or Gajerrong. But as Grant Ngabidj told Dr Shaw:

"There were all Gadjerong people along the coast until the white men shot them. Half of them died and some of the young boys were brought in to the stations to quieten them and to learn the horses, like me. All the Gadjerong people were taken out of their country and put on the stations or were killed. There are no people left there now."

(Ex A16 p35)

Indeed, a group, described as Doolboong and a neighbouring community to the Miriuwung and Gajerrong, is said to no longer exist as such. Bulla Bilinggiin told Dr Shaw in 1974:

"Dulbung is finished. Everybody died...and there was all that Dulbung lot from the coast down from Ningbing, down from Wyndham back this way."

(Ex A18 p84)

Grant Ngabidj told Dr Shaw that Doolboong country was below "Goose Hill" and that a number of Doolboong people lost their lives in the Forrest River massacre in 1926. (Ex A16 p161)

At the Royal Commission appointed in 1927 to inquire into the events at Forrest River, Dr Adams, a medical officer who had been stationed at Wyndham for ten years gave evidence as follows:

"I calculated that in the north during the last 50 years something like 10,000 natives had disappeared by devious means, not necessarily old age. Their natural game has been either exterminated or frightened away. Wherever a white man sets foot or uses firearms he frightened away the game. The native game being in diminished numbers their place taken by the flocks and herds of their white oppressors."

(Ex 18 p54)

Dr Green suggested that the extent of upheaval inflicted on Aboriginal inhabitants in the latter part of the nineteenth and early twentieth century may have resulted in the replacement of those inhabitants by other Aboriginal communities, and that perhaps the Miriuwung or Gajerrong communities had come to the claim area at that time. As indicated earlier in these reasons, the degree of dislocation and decimation caused by the arrival of settlers and miners in the East Kimberley in the 1880s and 1890s, and thereafter, cannot be underestimated. It had the effect of dispossessing Aboriginal inhabitants and fracturing their communities. However, if there is evidence of the connection of the present Aboriginal community with forebears present on the land at the time of settlement, and of maintenance of connection with the land thereafter, speculation that, as a consequence of European settlement of the region, Aboriginal inhabitants of the claim area were wholly annihilated or replaced by others, can be dismissed.

In a cross-examination in which Dr Green conceded that a number of propositions set out in his reports were to be read with qualification, he made it clear that he raised the possibility as one to be borne in mind, not to suggest that there was evidence to support it.

Dr Green agreed that there was no question that whenever Aboriginal people went, or were taken into pastoral station homesteads they continued, and have continued to the present, to practise their "law", and that traditional usufructuary activities were pursued as circumstances permitted.

The account given by Grant Ngabidj to Dr Shaw (Ex A16 p35) that the Gajerrong people were taken out of their country and put on the stations and that there were no people left (in their country) is to be understood in that light. There is abundant evidence that although separated from their homeland country, most Aboriginal people were on stations in proximity to their country and continued to be bound, or connected to the country, by their customs and beliefs and renewed contact with it by returning to the place in the "holiday time" of the stations.

In a report prepared by historian Dr Clement ("Historical Synopsis of European & Aboriginal Use and Occupation of Land in the Keep River National Park" (Exs A30(a), (b)), various documentary materials and oral histories were reviewed. It was concluded that Aboriginal people, some of whom were Miriuwung and Gajerrong, occupied the Keep River National Park area prior to 1894 and coexisted on the pastoral leases from which the national park was excised, with a number of them living a "bush" life until at least 1944. (ExA30(a) p91)

In 1940 Mr Bray, Assistant Commissioner for Native Affairs for the State, informed a Royal Commission of Inquiry into the Pastoral Industry as follows:

"Natives have continued to live and rear families on established pastoral holdings, because these areas embrace their own original country, and love of their country is deeply ingrained in the native. It would be well-nigh impossible to arrange to have these natives live elsewhere, quite apart from the employment question."

(C Choo, "Miriuwong and Gajerrong History Report No 3, Social Impacts of Pastoralism 1935-1995".) (Ex A27(a) p27)

In the above report prepared by historian Dr Choo reasons were set out for concluding that although the introduction of the "Pastoral Award" in 1968 saw Aboriginal people leave pastoral properties, thereafter the connection with land for Miriuwung and Gajerrong people remained. (Ex 27(a) p54)

In the East Kimberley Aboriginal people had accepted the changed order and wanted to live their lives "side-by-side" with Europeans on their own terms, namely, by retaining their identity (Dr Shaw, "On the Historical Emergence of Race Relations In the Eastern Kimberleys: Change?" at 268) The system of government that came with settlement was unable to meet those hopes and Aboriginal people, and their claims, were disregarded by settlers and legislators.

The absence of formal recognition of Aboriginal connection with the land of the claim area was but one aspect of the attitude of the European society to the interests of Aboriginal communities. In many respects acts of the Crown entrenched disadvantages suffered by Aboriginal people. For example, when the colonies federated as the Commonwealth of Australia in 1901 s127 of the Constitution, which excluded "aboriginal natives" from the count of the Commonwealth's population, treated Aboriginal people, in effect, as non-persons. (B Fitzpatrick, "The Australian Commonwealth: A Picture of the Community 1901-1955" (Melbourne: Cheshire, 1956) at 2.) That discrimination continued until 1967 when a referendum authorized removal of the provision from the Constitution. Under the Natives (Citizenship Rights) Act 1944 (WA) numerous barriers were erected to deny Aboriginal people "acquisition of full rights of citizenship". (Ex A27(a) p39-p40) For most of the period after settlement Aboriginal people employed on pastoral stations received little more than rations for their labour. They had no financial resources to use to assert their rights. Governments of the Crown declined to provide that wages be paid to Aboriginal employees on pastoral stations and used police resources to enforce the employment permits and indentures held by pastoralists, apprehending and returning Aborigines to the pastoral stations they had left. (Ex 18 p75; Ex A59 p288-p290, p294) Not until after 1942 were Aboriginal persons who had more than one-half of Aboriginal blood, entitled to receive pensions or allowances under Commonwealth legislation. Suffrage in federal elections was denied to Aboriginal people until 1962, and in State elections until 1971. Education of Aboriginal people was restricted. Until the 1950s Aboriginal children were regularly denied access to the State education system (Biskup, at 148-150, 191-192, 202-203, 241-242) and for Aboriginal children on Kimberley pastoral stations it was a matter of policy that they not be educated. (Ex A27(a) p69-p70)

These influences, added to matters already described, marginalized Aboriginal communities. However, by causing Aboriginal people to "retreat" and internalize their beliefs and opinions it also heightened their sense of Aboriginal identity and their desire to retain it. (Dr Shaw, "On the Historical Emergence of Race Relations In the Eastern Kimberleys: Change?", at 264.) In particular the isolation and sparse settlement of the East Kimberley region gave Aboriginal inhabitants the opportunity to retain their identity and their contact with the land with which they claimed connection, wherever they might be situated. Such claims to land had not been abandoned. After their rights as citizens were recognized in the late 1960s, claims for "living areas" in homelands were taken under notice and, eventually, acknowledged. In the words of Professor Berndt:

"Many have, however, moved into various centres - which has meant expanding their socio-cultural horizons and/or has involved them in socio-cultural intermixing with members of groups previously different from themselves. Nevertheless, even though they have come into such settlements...they have not relinquished their emotional and hereditary ties with, or claims to their home lands."

(R M Berndt, "Traditional Aboriginal Life in Western Australia: as it was and is", (Ch 1), Aborigines of the West. Their Past and Their Present, 3 at 5.)

Aboriginal people formed as organized societies based on traditional customs and laws had a special relationship with land which Professor Berndt explained as follows:

"In comparison with many others, and certainly in comparison with Europeans, the Aborigines were a deeply religious people. Religious feeling was manifested through ritual observance and through mythic expression - and, essentially, taken for granted. And an intrinsic part of it was a deep emotional attachment to the land, their own land. The whole countryside was full of signs and clues that were directly and indirectly relevant to their lives. It was made familiar and intimate to them through mythic beings who were believed to be manifested at specific sites, always present, and approachable through the medium of ritual. These were eternal or enduring elements, underlining continuity sustained

through religious practice. At one conceptual level, everything was brought together into one expanded socio-cultural environment. The deities were manifested predominantly through man, and other living things and other features were selected as intermediaries or symbolic representations: all drew on the same life force. This particular relationship to the land and all within it was phrased as a total dependence upon it - or, rather, a total *inter*-dependence: and the way this was wrapped up in social-cultural [sic] terms provided an emotional assurance that helped people to cope with such natural crises as drought or floods, and the human crisis of physical death."

(R M and C H Berndt, "The World of the First Australians" at 515-516)

"The genius of traditionally-oriented Aborigines rested primarily on their ability to organize, providing an assured though reasonably flexible programme for co-operation in everyday affairs, and a religious belief system which substantiated a life within surroundings that were familiar but full of interest and meaning."

(supra, at 516-517)

"We are reminded of what Strehlow...has pointed out, and others too: that anyone conversing with fully-initiated Aboriginal men 'trained in speech by means of the sacred myths and songs' cannot fail to be aware that he is in the presence of men of education and culture."

(supra, at 517)

The same point was made by Professor Maddock in "The Australian Aborigines - A Portrait of their Society":

"Perhaps the crucial point is that Aborigines idealized the country and their relations to it through their religion. Rite and myth - and the information stored in them - can stay alive long after the hunter-gatherer economy has collapsed...Thus it has often been possible to study the religious aspects of relations to land at first hand when the economic aspects could only be reconstructed".

(at 29)

...

The usual Aboriginal view... *(holds)* that human ties to land date from The Dreaming, which is also the time when the world attained the shape it has today. World-creative powers (often called totemic spirits or ancestors) descended from the sky, rose from under the ground, or came across the sea to form the earth and establish human institutions. Then, their work complete, they sank into the ground or water, rose into the sky, or journeyed into far-off country.

Most of these powers are depicted as having had animal or plant as well as human qualities, and under the former aspect they are prototypes of the various natural species. Because of this, human ties to land are bound up with ties to other forms of life (this web of relationships is often called totemism). But of course the acts of the powers, having created the world order, show their superiority to man and animal alike. The comprehensive body of lore that describes these acts varies considerably in detail from one part of Australia to another. it is conveyed in song, myth and ceremony, and it lends an almost personal significance to the countryside, for all its noticeable features (crags, waterholes and caves, for example) are places where powers acted creatively in The Dreaming. The result is that the world around him is full of meaning for a traditionally instructed Aboriginal, albeit meaning that has had to be communicated to him by an older generation, for it would never be obvious to the untutored eye."

(at 34-35)

All of the foregoing is important in understanding the concept of the "right to land" that underlies native title discussed earlier in these reasons.

(b) Linguistic evidence

The first applicants tendered a report prepared by a consultant linguist, Ms F Kofod. (Ex A36) Ms Kofod also gave viva voce evidence.

The evidence adduced from Ms Kofod was to the effect that the existence of the Miriuwung and Gajerrong languages, and the use thereof by Aboriginal people, indicated the continuing existence of an indentifiable Aboriginal community and of the maintenance of connection with land with which that group had been associated by repute.

The evidence dealt with the history and use of a language and indicated that before colonization an identifiable group had relied upon use of the language as an element of identification of the group. The languages studied by Ms Kofod

have taken centuries to evolve. It follows that the languages in use today would have been in use at the time of sovereignty and likely to have been given a similar role in defining the identity of a group at the time the Crown claimed sovereignty over land occupied by Aboriginal people.

Ms Kofod's report and evidence was instructive. She had observed and studied speakers of Miriuwung and Gajerrong languages for periods of three to four months in each year between 1971 and 1974 and again in 1986 and on numerous periods in 1987 and 1988. In 1994-95 Ms Kofod worked with fluent speakers of Miriuwung to assist in translating a "plain English" version of the Act into Miriuwung. Ms Kofod was involved in establishing the Mirima Dawang Woorlab-gerring Language and Cultural Centre ("Language and Cultural Centre") at Kununurra which has brought awareness of the Miriuwung and Gajerrong languages to younger generations and provided a focus for matters of tradition and custom for people who are regarded as, and regarded themselves as, Miriuwung or Gajerrong. Steps taken to preserve the use of the languages by the establishment of the Language and Cultural Centre is evidence of a desire to preserve an element of culture regarded by a community as giving it distinctiveness or identity.

Ms Kofod was an impressive witness whose evidence could be relied upon. It was obvious that diligence in her work had given Ms Kofod a sound knowledge of Aboriginal languages, in particular Miriuwung, Gajerrong and Gija and that in addition she gained substantial knowledge of the lifestyle of people who described themselves to her as Miriuwung or Gajerrong. Ms Kofod's evidence, including responses in cross-examination, was delivered in clear terms and her answers to any contrary propositions put in cross-examination were considered and persuasive.

The work undertaken by Ms Kofod necessarily involved gathering much ethnographic material and obtaining an understanding thereof. For example, Ms Kofod regarded her work at Kununurra in the earlier years as strongly influenced by information she received from consultations with Mandi Moore before he passed away. (See also: Ex A18 p16.)

Ms Kofod stated that the Miriuwung and Gajerrong languages are related languages being part of a group of languages known as Jerrag. There are differences between the languages and each may be treated as a distinct and separate language. According to Ms Kofod's observations, elder Miriuwung and Gajerrong people used their language amongst themselves and observed traditional laws relating to language such as switching to the correct language when travelling in the "country" to which the language "belongs". She also stated that she had observed that Miriuwung or Gajerrong is spoken to grandchildren and great grandchildren by elders and is regarded as an important part of the observance of culture by the group. Detailed knowledge of flora and fauna was exhibited and younger community members related to elders in a manner required by their culture. I was impressed with Ms Kofod's expertise and experience and accept her evidence and the assistance it provides.

Ms Kofod stated that Miriuwung and Gajerrong were used for separate "countries" albeit areas with overlapping boundaries. The people of each "country" related parallel Dreaming ("Ngarranggarni") stories for different areas of land in each "country". Ms Kofod observed that knowledge of and identification with a language brought connection with land on a practical, spiritual and usufructuary level. Having spent time with the Miriuwung people over twenty-five years and observing their knowledge of the land and its resources and the continued use thereof; their knowlege of the mythological connections with land handed down by ancestors; their desire to establish a language and cultural centre to preserve and promote the Miriuwung and Gajerrong languages; their desire to impart to the young their knowledge about the land they claimed as "country" and their desire to establish "out-stations" on "country", Ms Kofod expressed the opinion that Miriuwung and Gajerrong people had continued to maintain a connection with land claimed as "country" since the advent of European settlement in the region.

Having regard to her expertise in the Miriuwung and Gajerrong languages, and the deep understanding of Aboriginal people she had obtained in the course of gaining that expertise, she was qualified to express such a view although in the end it is a question for the Court as to whether the facts support that conclusion. The material Ms Kofod put before the Court distilled from her own experience and observation is part of the evidentiary material to be considered. A report prepared by linguist Dr B A Sommer, prepared in response to, and as a comment on, Ms Kofod's report was tendered by the State. (Ex 54) Dr Sommer was not called to provide oral evidence to add to his report, which differed from the report of Ms Kofod more in emphasis than substance. Any points of difference were answered by Ms Kofod in her oral evidence.

It was submitted by Dr Sommer that words that were not of the Miriuwung or Gajerrong languages, used to describe locations and features in the claim area, suggested the possibility that the Miriuwung and Gajerrong community had taken over habitation of the area from another group or groups.

It may be thought that in the absence of any evidence that such an event had occurred subsequent to the formation of the colony, there would be little room for such speculation. It was made clear by Ms Kofod that the extent of the use of the Miriuwung language in respect of features in the claim area, coupled with ethnographic material relating to widespread Dreaming and spiritual connections with the land for Miriuwung and Gajerrong people, speak quite forcefully of lengthy occupation of the relevant area and make it most improbable that the Miriuwung and Gajerrong were first connected with the land some time after 1825 or 1829.

It is common for Aboriginal groups to be multi-lingual (A Rumsey, "Language and Territoriality in Aboriginal Australia", Language and Culture in Aboriginal Australia (Ch 14), Editors: M Walsh and E Yallop (Canberra: Aboriginal Studies Press, 1993), at 195) and the use of terms in the claim area that may be sourced to languages of neighbouring groups, with whom some parts of the claim area may be regarded as shared land, is not, in itself, in a circumstance capable of supporting an inference that a Miriuwung or Gajerrong connection with the claim area is of recent origin.

The role of the Miriuwung and Gajerrong languages in defining the community connected to the land of the claim area is twofold. First, the languages are said (by witnesses for the applicants and in historical accounts) to have been deposited in the landscape of the region by Dreamtime figures. Second, the language, like the land, becomes possessed by the Aboriginal people connected with that land.

The community is not defined by, and as, people who speak the language but by, and as, people who observe the connection of the language with the country and share possessory interests in the language:

"...in the aboriginal myths which associate language and land, no account at all is taken of people, or peoples. Languages, or even mixtures of them, are directly placed in the landscape by the founding acts of Dreamtime heroes. From that point on, the relation between language and territory is a necessary rather than a contingent one. People too, or their immortal souls, are similarly grounded in the landscape, in the form of spirit children (or 'conception spirits') associated with specific sites, and via links through their parents to more extensive regions. But the languages were already placed in those regions before any people came on the scene. The links between peoples and languages are secondary links, established through the grounding of both in the landscape."

(Rumsey, "Language and Territorality in Aboriginal Australia", at 204)

The community is much a "tribal" group as it is a "linguistic" group.

In the evidence presented in this case the claim area is said to be Miriuwung and Gajerrong country partly because that is where the languages belong, not because it is country inhabitated by people who speak Miriuwung or Gajerrong. The witnesses who identified themselves as Miriuwung or Gajerrong did so not because they, or their forebears, spoke the Miriuwung or Gajerrong languages but because those languages were part of their connection with forebears and with the land. The mutual possession of a language connected with the land was an incident of identification of the community as was mutual recognition of membership of that community; mutual acknowledgement and observation of traditional law, customs and practices; and the recognition by others of the existence of the community.

(c) "Primary" evidence of applicants

The principal "primary" witnesses called by the first and second applicants were numerous. An important part of the evidence was provided by elder female witnesses. Marie Wunmi and Daisy Burrwi were the wives of two key ancestors, Bulla Bilinggiin whose "country" in the claim area was said to be Yardanggarlm and Argyle, and Mandi Moore whose country was said to be Yirralalem. According to the oral histories recorded by Dr Shaw the father of Marie and of Daisy was Paddy Jidbi whose country was said to be from Ivanhoe "right up Mistake Creek" near Yirralalem. The genealogies prepared by Ms Kaberry in the 1930s referred to below, suggest that Paddy Jidbi's parents and grandparents can be identified and estimates made that the latter would have been born at about the time of the formation of the Western Australian colony.

Impressive evidence received from Sheba Dignari (married to Friday Biwoogeng and to Simon Jingbi), Mignonette Djarmin (married to Waddi Boyoi), and Sheba's sister, Blanche Flying Fox, (married to Langgarruk) corroborated and added to the oral histories and provided details of the information given to them about occupation of parts of the claim area prior to, and after, European contact. In addition, they had a significant role in ceremonial matters and in women's "law" and impressed with their authority, their breadth of knowledge and depth of recall. Together with Nancy Dilyayi and Pamela Simon they presented historical information and evidence of the organization of the Miriuwung and Gajerrong community.

Equally impressive were a number of male witnesses who spoke of the community's laws and customs and of matters known only to them. Each of the following was knowledgeable and persuasive: Danny Wallace, Dodger Carlton, Paddy Carlton, Ronnie Carlton, David Newry, Peter Newry, Murphy Simon, Ben Ward, Jeff Djanama, Ben Barney, Toby Banmar, John Toby and George Dixon.

David Newry was an active participant in Miriuwung and Gajerrong community affairs. As Chairman of the Mirima Council Incorporated ("Mirima Council") he directed support for the Language and Cultural Centre of the Miriuwung and Gajerrong community maintained by the community to promote its identity and to provide outlets for community expression.

Some witnesses had greater knowledge than others, particularly in respect of matters of ancestry or connection with predecessors, but all spoke of a community based on the tradition of forebears.

The tenor of their evidence was that the community of which they were part, acknowledged or observed in a practical sense the laws or customs of, and had connection with, the Aboriginal people who occupied the land at the time of first contact with settlers, and, by inference, at and before the time of formation of the colony of Western Australia or incorporation of the Territory area in the colony of New South Wales.

There was no issue of credibility in respect of "primary" witnesses for the applicants. The principal issue was what had been proved, either directly or by inference, by that evidence.

Having due regard to the difficulties they faced, and interpreting the evidence with consciousness of the special nature of the Aboriginal claims, I found the "primary" witnesses for the first and second applicants to be convincing in their description of connection to land and acknowledgement of traditional practices. I was impressed by evidence of profoundly held views and beliefs given in a forthright manner without embroidery. Evidence given by senior and respected people, and by others who deferred to them, produced a very clear impression of witnesses who understood that they shared membership of a distinct social group or community identified by common beliefs, mutual recognition of membership, shared use of, or reference to, the Miriuwung or Gajerrong languages, and observance, as members of that community, of practices based on traditional laws or customs. Evidence of an organized community which observed traditional practices, laws or customs was most convincing.

(d) Anthropological evidence

No detailed ethnography dealing exclusively with the Miriuwung and Gajerrong peoples has been the subject of an anthropological study. While "pioneering research" was conducted in the north-east Kimberley in the 1920s and 1930s, primarily by Professor Elkin and Ms Kaberry, the area was subsequently "neglected anthropologically for nearly half a century". (Associate Professor Christensen, "Supplementary Report of Anthropologist".) (Ex A40 p19)

Professor Elkin worked in the Kimberley region under the supervision of Professor Radcliffe-Brown for twelve months in 1927-28 primarily to the south and west of the claim area. Ms Kaberry conducted field work under Professor Elkin's supervision in 1934 and in 1935-36, again primarily in the Forrest River area and with the Lungga (Gija) to the south of the claim area, with periods in Miriuwung country. As a result of this work she produced the seminal text "Aboriginal Woman; Sacred and Profane" (Ex 44) and wrote and published a number of shorter articles. The primary focus of her publications was on the role of women within Aboriginal society. Of greater interest to the anthropologists called to give evidence in these proceedings, were her primary field notes and the numerous genealogical charts recorded in her field diaries. A linguist Arthur Capell worked in the Kimberley between 1938 and 1939 and his field notes also provided assistance to anthropologists in these proceedings.

With the exception of Dr Shaw's work, recent ethnography in the region can be described as heritage and site survey work conducted in the context of development projects, most notably the Argyle Diamond Mine.

The first applicants adduced expert evidence in written reports and viva voce from two anthropologists, Mr Akerman and Associate Professor Christensen. The primary focus of their reports was to draw together and crystallise within a contemporary conceptual framework diverse written and unwritten ethnographic material relating to the Miriuwung and Gajerrong people for the purpose of these proceedings.

Mr Akerman's particular area of expertise lies in art and material culture of the Kimberley region including the "wirnan" ceremonial exchange cycle, sacred objects and tool-making. He also conducted a heritage survey in the Glen Hill area in 1979. He gave his evidence in an earnest and thoughtful manner and his responses in cross-examination were fair, rational and objective.

Associate Professor Christensen conducted site evaluations in the claim area in 1988 and conducted some limited field work for the purpose of the preparation of his report. The field work was largely for the purpose of cross-checking and building upon the secondary ethnographic material. After the "primary" evidence was taken he prepared a supplementary report providing commentary on aspects of the oral evidence for the assistance of the Court. His evidence was direct and confident and displayed a high level of professional skill.

The second applicants tendered anthropological reports prepared by Mr Barber and Dr Palmer and led further oral evidence. Mr Barber had been instructed at different times by the first and second applicants and the fifth respondents. He gathered genealogical information and data for the first applicants and was engaged by the second applicants to prepare, together with Dr Palmer, a report on the Keep River "estate groups" and genealogical charts. He carried out extensive field work in the Keep River area during 1996. Mr Barber also assisted Ms Doohan in the preparation of the genealogical charts tendered by the fifth respondents. The considerable knowledge and experience gained from working with members of the applicant groups in the claim area and with the Aboriginal community at Port Keats in the Territory to the north east of the Keep River was apparent in his evidence which was impressive and of assistance to the Court. Mr Barber's experience of ceremony and ritual extended for almost twenty years. Mr Barber stated that he attended men's ceremonies at Port Keats in 1983 lasting for two months which were linked to ceremonies occurring in Kununurra and involved Miriuwung and Gajerrong men. He attended similar ceremonies almost each year from 1983 to 1995. In some of those years he came down to Kununurra to attend "mandiwa" (circumcision) ceremonies in which there was broad participation by members of the Miriuwung and Gajerrong community. There were also ceremonies in Kununurra associated with "wirnan" exchanges.

Dr Palmer's role in the preparation of the Keep River anthropological report and the genealogical chart involved limited field work and primarily was to assist and cross-check Mr Barber's work on genealogies. I found Dr Palmer's evidence to be clear, objective and helpful.

Ms Doohan was instructed by the third applicants to prepare an anthropological report and genealogies and by the fifth respondents to prepare genealogical charts. She has had extensive experience in the Forrest River region to the west of the claim area. She has also done work with Aboriginal people at "Warmun" (Turkey Creek) to the south of the claim area. Ms Doohan also gave detailed oral evidence.

Professor Maddock was instructed by the State. He prepared a report and was the only anthropologist called to give evidence by the respondents. He has not conducted fieldwork in the claim area and his report was a comment on the opinions of the other anthropologists expressed in their reports. Like Associate Professor Christensen, Professor Maddock prepared a supplementary report after the hearing of the "primary" evidence had been completed.

Professor Maddock's first report was directed to the possibility of population shifts into, or out of, the claim area and to the extent of the possible change to the system of social organization that had existed in the claim area at the time of sovereignty. While Mr Akerman and Associate Professor Christensen emphasised the continuity of connection between the people who regard themselves as the Miriuwung and Gajerrong community today and the organized societies in occupation at the time of settlement, it was Professor Maddock's view that these "genetic, cultural and linguistic continuities" had to be understood as "continuities in the midst of change". (K Maddock, "East Kimberley Anthropological Report".) (Ex 46 p124)

Professor Maddock has had considerable experience in this field of anthropology and has participated in and observed the presentation of claims to land by "traditional owners" in the Territory under the Aboriginal Land Rights (Northern Territory) Act 1976 (NT). It is apparent in Professor Maddock's published works, from which I have drawn in these reasons, that he anticipated some time ago that the common law concept of communal native title may involve a determination that the holders of that title are not restricted to the "local descent group" or "traditional owners" in which statutory rights in land may be vested under "land rights" legislation. As he said in "Owners, Managers and the Choice of Statutory Traditional Owners by Anthropologists and Lawyers", (Ch 13), Aborigines, land and land rights, Editors: N Peterson and M Langton, (Canberra: Australian Institute of Aboriginal Studies, 1983):

"A proper jurisprudential analysis might favour the community above the clan, but the [Aboriginal Land Rights (Northern Territory)] Act calls for interpretation of its definition of ownership and not for the kind of exercise in comparative law which occurred during the Gove Land Rights Case (Milpirrum)."

(Ex A56 p218)

It became apparent during cross-examination that Professor Maddock agreed with significant aspects of the first applicants' case in that regard.

There was accord between the anthropologists that in respect of parts of the claim area "local descent" or "estate groups", anchored in areas of country by a particular site or geographic feature with which they had a special bond, were part of the framework of the traditional laws or customs of the Miriuwung and Gajerrong people in respect of land.

The rights distributed to such sub-groups under traditional laws or customs included the right to use a particular area of land for benefit of the "estate group" and the right of some in that group, (the "dawawang") to "speak for" that land, in particular, as to the use thereof.

Attached to those rights were responsibilities which included a duty to "care for" the country, in particular, to care for and protect Dreaming sites, art sites and other places of significance in the "estate" area. "Estate groups", however, were not self-contained, or autonomous functioning societies in occupation of the land. They were sub-groups of the Miriuwung and Gajerrong community from which rights and duties devolved under the traditional laws and customs of that community. When the anthropologists speak of "ownership" of "estate" country, or of "dawawang" as "owners" of such country, those words do not bear their legal meaning but are the best description the anthropologist can supply to a relationship that encompasses the rights and duties acknowledged under traditional laws and customs. (K Maddock, Ex A56 p213-p215.)

The concept of "estates" cannot be isolated from the kinship and subsection systems and totemism of the community, the latter defined by Ms Kaberry as the process in which natural species and phenomena "have been drawn into an institution or system of beliefs or practices, and have come to assume characters or functions other than their primary ones ..." ("Totemism in East and South Kimberley, North-West Australia", Oceania 8, 3, (1938) 265 at 287.) Professor Elkin in "Social Organisation in the Kimberley Division", Oceania 2, 3, (1932) 296 at 327 wrote:

"... though these principles can be distinguished from each other, yet in any society they are all functioning together as a whole, interacting on, modifying or strengthening one another."

In "The World of the First Australians" (at 90) R M and C H Berndt wrote:

"In Aboriginal Australia kinship is the articulating force for all social interaction. The kinship system of a particular tribe or language unit is in effect a shorthand statement about the network of interpersonal relations within that unit - a blueprint to guide its members. It does not reflect, except in ideal terms, the actuality of that situation; but it does provide a code of action which those members cannot ignore if they are to live in relative harmony with one another. And kinship, in this situation, pervades all aspects of social living. We cannot understand or appreciate traditional life in Aboriginal Australia without knowing something, at least, of its social organization and structure - of which kinship is the major integrating element, or, to put it another way, the fine mesh which holds the society together."

The kinship system said to be applicable in the East Kimberley is known as Arandic, or of the Arandic type. In his report Mr Akerman described this type of kinship system as follows:

"Aranda type kinship systems distinguish four kinds of kin at the grandparent level. Parents and their same sex siblings are called by the same term while different terms are used for parents of opposite-sex siblings - that is father's brothers are called by the same term as father while father's sister is called by a term that can be glossed as aunt. Similarly mother and her sisters are called by the same kin term but mother's brother is called a term equivalent to uncle."

(Ex A48 p11)

One of the important roles of the kinship system is explained in the report by Mr Barber and Dr Palmer as follows:

"Miriuwung kinship terms (eg brother, son, father) are a frequent mode of address, particularly in a culture where personal names are seldom used. Kin recognise that certain ties of behaviour are expected between them..."

(Ex B5(b) p20)

The subsection system identified by anthropologists in the East Kimberley as applicable to the first and second applicants is described by Mr Akerman as "...based on eight units known in the literature as subsections." He goes on to say:

"The eight named subsections or skins .., each with masculine and feminine equivalents. are organised on a framework of four sets of inter-marrying pairs and an individuals location within the framework is derived by reference to the mother's skin...It is formula by which marriages are ideally organised and which determines the correct protocol and behavioural rights and responsibilities between individuals."

(Ex A48 p11-p12)

It was accepted that the system was not inflexible and was able to accommodate a certain amount of "wrong" or incorrect marriages. Professor Maddock was in no doubt that "wrong" marriages would have occurred in pre-contact times.

According to Mr Barber and Dr Palmer one effect of the subsection system is to extend behavioural rules based on kinship to persons who are not related consanguinially.

Both the kinship and subsection system tend to suggest that from the Aboriginal perspective relationships between people, and their relationship with land, do not depend solely, or necessarily, on biological descent, a view confirmed by Ms Doohan in her evidence. Other factors said by both the anthropologists and the "primary" witnesses to be relevant to the existence of such a connection were adoption, place of birth or place of conception. These so-called 'secondary' mechanisms are not regarded as aberrations to a general rule but as demonstrative of the interconnectedness of various aspects of Aboriginal society.

The kinship system and the subsection system provide mechanisms not only for marriage outside of sub-groups but also across language groups. This is particular true of the East Kimberley where the above model of social organization is said by anthropologists to be applicable to the various language groups in the region.

Associate Professor Christensen emphasised that all anthropological writing on the East Kimberley and the adjacent Territory since the 1930s (particularly of Professor Elkin and Ms Kaberry) has underlined the comprehensive influence of the "Dreaming" ("Ngarranggarni") and totemism. He states that:

"...the notion of Dreaming pervades all other aspects of traditionally-based Aboriginal societies and cultures."

(Ex A40 p94)

He stated that the Dreaming simultaneously provides for local independence and authority (for example, "dawawang" rights relating to particular "estate groups") and the affirmation of mutual dependence with neighbouring sub-groups through ritual and ceremony.

Mr Akerman describes the wide scope of the Dreaming, ranging from vast Dreaming tracks where different "estate groups" along the Dreaming track "own", and have responsibility for, their segment of that track.

"From a religious perspective the acquisition of knowledge concerning the metaphysical rationale of the landscape is perhaps the primary way in which an individual can be perceived as caring for country. This acquisition takes place from an early age...As a child grows the stories are placed in a topographical perspective which validates both the mythology and the bond between the Dreaming, the child and the land."

(Ex A48 p15)

Mr Akerman confirmed the link between Dreaming, ceremony and ritual. Ceremonies related to the Dreaming are held with adjacent groups and communities:

"Initiation and the major cult ceremonies are never held in isolation. Members of adjacent communities and groups (including other language groups) who also celebrate these ceremonies are invited to participate by sending novices for initiation. In many cases senior cult leaders may belong to another group or reside elsewhere, the holding of the ceremony without their approval and involvement would be considered a major breach of protocol."

(Ex A48 p16-p17)

In the Territory the Miriuwung and Gajerrong participate actively on a ceremonial level with the Murrinpatha community and others resident at Port Keats, the Marithiel at Pepperminarti, Ngalliwurru and Nungalli at Timber Creek as well as their immediate neighbours, the Ngarinman and Jaminjung. In Western Australia ceremonial links are forged with the Gija and the Jaru. To a lesser degree there are ceremonial connections (mainly through the wirnan trade cycle which Mr Barber and Mr Akerman say continues to operate today) with the Wula and the Ngarinyin to the west. Mr Akerman gave evidence that during the late 1970s and 1980s he had seen "wirnan" operating in a cycle through Kununurra, Fork Creek, Turkey Creek and Timber Creek in the Territory.

Mr Barber and Dr Palmer describe the importance of rituals as providing:

"...an opportunity for the estate owners to demonstrate their rights to country through ritual performance...[and] an important opportunity for younger owners to learn the narratives, rituals and other spiritualities associated with their country."

(Ex B5(b) p16)

The anthropological evidence provided a framework for understanding the "primary" evidence in respect of the acknowledgement and observance of traditional laws, customs and practices.

(e) Genealogical evidence

The genealogical evidence adduced at the hearing was viva voce evidence of "primary" witnesses and of anthropologists for the first, second and third applicants and the fifth respondents; charts prepared by the anthropologists; genealogical charts and field notes prepared by Ms Kaberry in the 1930s, (in particular the genealogies for "Argyle", "Ivanhoe" and "Forrest River") and oral histories recorded by Dr Shaw. (Exs A16-A20) It should be noted that Ms Kaberry's material remained in raw, or draft, form as field notes and there was some uncertainty amongst the expert witnesses as to the extent to which symbols or notations had consistent meanings throughout the whole material.

By that evidence the applicants sought to establish that the applicants had forebears who were members of an Aboriginal community or communities that occupied the claim area well before Aboriginal people had contact with European settlers and, by inference, before sovereignty was asserted in the State or the Territory. Further, by depicting relationships between Aboriginal people, the material relied upon also spoke of the existence of an identifiable community that had a connection with the land through forebears and which observed, or acknowledged, traditional laws and customs of the forebears.

It has been said that the dependence of Aboriginal societies upon an oral culture, limits knowledge of ancestors to two generations. In some cases the genealogical charts prepared by the anthropologists in this matter extended to four or five generations by use of material provided by other sources such as the Kaberry genealogies and the oral histories. The genealogical charts depict but a small part of a possible range of genealogical connections of the applicants. The purpose of the charts is to show connection between the present claimants and ancestors who may be assumed to have been present in the claim area at the time of sovereignty. The genealogies, prepared as they are from ethnographic material, represent accepted social recognition of kinship and "biological descent" in its widest sense.

The first and second applicants adduced substantial oral evidence from witnesses on kin relationships and connections with the forebears. That evidence was largely consistent with genealogies prepared by the anthropologists.

The preparation of the genealogies involved distilling information from a broad context of ethnographic material and it involved the application of skill and expertise of anthropologists. I was satisfied as to the reliability of the methods employed by the anthropologists in preparing the charts having regard to the general consistency of the content of the charts with the tenor of the "primary" evidence of the applicants. The charts as received in evidence were not restricted to the expression of opinion by anthropologists but were also evidence as to the truth of the statements contained therein. Genealogies duly prepared by anthropologists employing their specialised skill and understanding of the structure and culture of a society represent not only an appropriate field of expert evidence but also a record of statements made to the anthropologists, the record of which is likely to be reliable, the statements made being appropriate to be admitted in a case of this nature.

The respondents did not tender any evidence to contradict the genealogical evidence presented by the applicants. In his primary report Professor Maddock stated that:

"It is likely enough - though no perhaps entirely certain - that the people who were living in the area in 1829 included predecessors and forebears of Miriuwung and Gajerrong whom Elkin and Kaberry could have met in the 1920s and 1930s, who in turn included predecessors and forebears of present-day Miriuwung and Gajerrong. But the evidence shows that among their predecessors and forebears are people from other areas and of other identities."

(Ex 46 p124)

The Territory made it clear at the outset of the hearing that it was not part of its case to say that the Miriuwung and Gajerrong people were not the "right people in an Aboriginal way" for the Territory area.

As I have said, it is not a requirement that a "biological" connection be made between each member of the Miriuwung and Gajerrong community and an ancestor who was in occupation of the claim area at the time of sovereignty as a member of an identifiable and functioning society. What is required is that there be sufficient connection by way of actual, or implied, genealogical links to show that the community in occupation of the land at sovereignty was the predecessor of a community that now claims native title. Part of that connection is shown by demonstrating the observance,

or acknowledgement, by the community in some practical form of traditional laws or customs. As far as the requirement of descent is concerned, it is sufficient to show that an inference may be drawn that known ancestors were connected with the community in occupation at the time of sovereignty and with members of the present community.

Some of the relevant ancestors in this case were identified as Bulla Bilinggiin and his father Joobool, Waddi Boyoi, Grant Ngabidj, Boolngara, Maggie Darrng, Roger Goolboog, Jacob Boondal, Mick Goobaring, Mandi Moore and his father Goonkooyi, Paddy Jidbi, Friday Biwoogeng, Banjo Birrwi, Gijirring, and Jimmy McCarthy. These ancestors were parents and grandparents of present claimants and the oral histories recorded them as living traditional "bush" life-styles before coming, or being brought, into pastoral stations in the first half of this century.

The primary focus of the submissions of the State on the issue of "descent" was the lack of adherence to strict patrilineal "inheritance" in respect of each "family" or "estate" sub-group. However, the question whether there is an identifiable society in which communal native title is vested is not limited to consideration of sub-groups and the rules by which they operate. The evidence in this matter dictates a conclusion that the concept of communal title goes well beyond "estate groups".

The State also submitted that there had been an extraordinary mixing of persons from different tribal groups within the claim area after European settlement of the region and that the present-day claimants were the products of this fusion and, therefore, as I understood the submission, the community today could not claim connection with the community in occupation at sovereignty.

An example of the material relied upon by the State for that submission is to be found in the connection of Mandi Moore with community members. Members of the community with links with Mandi Moore included the representative claimant Jeff Janama. Jeff Janama's mother is Daisy Burrwi, whose father was Paddy Jidbi, referred to above. The State, relying upon Jeff Janama's statement in cross-examination that Mandi Moore's father was "Goolawarreng", submitted that there was confusion of tribal entities and no link through Mandi Moore to the pre-sovereignty community. Putting to one side the ambiguous nature of the statement having regard to matters referred to below, the submission in turn was predicated upon a proposition that ancestral links with the prior community had to be strictly patrilineal. As set out earlier in these reasons, the evidence shows there can be no such restriction with ancestral links when looking at the connection between present and previous communities.

In any event, the oral histories recorded by Dr Shaw show that Mandi Moore's father had a Miriuwung identity or connection. (Ex A18 p33-p35, 206; Ex A19 p44) Mandi Moore's connection to Miriuwung country is supported in Ms Kaberry's genealogies. Marie Wunmi in evidence, clearly stated that her husband, Mandi, was Miriuwung.

Furthermore, Jeff Janama's links with ancestors also included the link through the father who "grew him up", Bulla Bilinggiin who is identified as Miriuwung and whose father was Joobool. While there was some evidence Joobool was identified as Goolawarreng, I accept the evidence of Sheba Dignari that this identity flowed from Joobool's marriage outside Miriuwung country.

The genealogies show a broad spread of links with the ancestors referred to above among the representative claimants and others, including Danny Wallace, Carol Hapke, Toby Banmar, Ben Ward, Sheba Dignari, Daisy Burrwi, Marie Wunmi, Nancy Dilyayi and Marjorie Brown. Through ancestors Grant Ngabidj, Boolngara, Maggie Darrng and Goolalpany links are shown in the genealogies to claimants Dodger Carlton and Kim Aldus, Mark and Brexie Aldus and Julie Bilminga.

Linked to ancestors Banmelang, Garrwam, and Langgarruk, a son of Garrwam, all of whom lived in the bush at Damberalm, were Miriuwung people Ben Barney, Charlie Barney, Tommy Barney, Katherine Yarrbi, Maggie John, Peggy Griffiths and others.

Through Boolngara, Gooladooboo and Giguwin ancestral links were shown with Peter Newry, the Boombi family, Blanche Flying Fox, Sheba Dignari, David Newry, Ronnie Yundun, Dinah Dinggul and others. Toby Banmar, and his siblings, are the children of Friday Biwoogeng and Sheba Dignari.

Ancestors Tjimbarrainy, Darim and Waddi Boyoi are linked with Ronnie Carlton, Teddy Carlton, Gypsy Nyirrmoi, Button Jones and others. Waddi Boyoi, who was married to Mignonette Djarmin, told Dr Shaw he had a Gajerrong mother and was regarded as a brother of Grant Ngabidj. (Ex A20 p13; Ex A16 p51) He was an important ritual and ceremonial leader for Miriuwung and Gajerrong people (Ex A18 p147) and Sheba Dignari gave evidence that he arranged her marriage to Friday Biwoogeng. For several periods Mignonette Djarmin had lived a bush life on Carlton Hill Station first as a young girl with Boolngara's "mob" and later, when married to Waddi Boyoi, who was suffering from

leprosy, she returned to the bush with Waddi Boyoi, Grant Ngabidj and others. Ronnie Carlton was born at this time and did not come into the station homestead until he was about eleven years old.

Though Jimmy McCarthy, John Toby, Joe Lissadell, George Dixon and Evelyn Hall were linked to the southern part of the claim area and to the Miriuwung community.

There was no dispute that the evidence established that, either alone or in combination, ancestors such as Grant Ngabidj, Boolngara, Maggie Darrng and Goolalpany were connected to an organized society or societies in occupation of the northern part of the claim area at the time of sovereignty. Grant Ngabidj was married to Maggie Darrng and also to Daisy Djanduin, a Gajerrong woman and daughter of Goolalpany. Maggie Darrng was also married to Boolngara and the claimants Kim, Mark and Brexie Aldus are their grandchildren. The claimant Dodger Carlton is the son of Boolngara's daughter from another marriage.

According to Dodger Carlton, Maggie Darrng spoke three languages Wardanybeng, Gajerrong and Doolboong and her country, and her parents' country, was an area along the north of the Ord River as it enters the Gulf above Goose Hill and Wyndham. Elsewhere in the evidence she was identified as the last of the Doolboong. There was also evidence from Ms Doohan that Paddy Carlton consistently described her as Gajerrong.

With regard to the Goose Hill area and the question whether it was Miriuwung country, the State submitted that evidence to the effect that Aboriginal people were hunted off this area and, further, that it was identified as Goolawarreng country denies the present claimants a connection with the community in occupation of this part of the claim area at sovereignty. As stated later in these reasons, I am satisfied that the area at the time of sovereignty had a Miriuwung identity. It may have been an area shared between several communities in that it was the site of congregation of several tribes including Miriuwung and Gajerrong (Ex A18 p84) but there is no doubt it was "country" which the Miriuwung community used as of right. As I will describe later in these reasons, however, that did not extend to the whole of the Goose Hill area. From the "primary" evidence it is clear that there was continuity of occupation of this part of the claim area and that evidence is corroborated by Ms Kaberry's field notes and pastoral station records.

Community members, Daisy Carlton and Gerry Moore had a connection with the earlier community through Banjo Birrwi. There was evidence that Goose Hill was part of Banjo Birrwi's country and, according to Ms Kaberry's genealogies, he and his parents were linked with Miriuwung country ("Ngamoowalem"). The State submitted that failure to call Daisy Carlton permitted the inferences contended for by the State to be drawn with more confidence. For several reasons I am not persuaded that that is appropriate. First, the relevant evidence was before the Court and there was nothing to suggest that there was material particularly within the knowledge of Daisy Carlton that the first applicants may have been expected to adduce. Second, as set out earlier in these reasons, establishment of the existence of native title does not depend upon evidence connecting each member of the claimant community with ancestors who were members of the community in occupation at the time of sovereignty. What is required is evidence which shows that the claimant community has sufficient connection with the previous community to be able to say that there has been continuity of the communal native title. Part of that evidence will be some evidence of ancestral connection.

The second applicants' genealogical evidence showing a connection with the Binjen, Dumbral and Nyawanyawam "estate groups" with the community in occupation in the Keep River National Park area at sovereignty was unchallenged and presented further evidence of ancestral links between members of those groups and members of previous Miriuwung and Gajerrong communities

The continuing genealogical links between Miriuwung and Gajerrong people are considerable. For instance, the mother of the Aldus siblings, Topsy Aldus, is Miriuwung, and Gajerrong elder Paddy Carlton is depicted in the genealogies as married to a Miriuwung woman, Katherine Yarrbi.

The interlocking connections, vertical and lateral, with numerous members of the Miriuwung and Gajerrong community were extensive and more than sufficient to support the conclusion that members of the Miriuwung and Gajerrong community had ancestral links to the community in occupation of the claim area at the time of sovereignty.

(f) Observance of traditional laws, customs and practices to maintain connection with prior community and with the land

The evidence adduced by the applicants attests to a community conducted in parallel with European society organized by adherence to, and observance of, traditional laws and customs of a prior Aboriginal community.

For example, almost without exception members of the Miriuwung and Gajerrong community retain, and are known to each other by, Aboriginal names in addition to European names. Further, the practice of assigning "narregoo" names (the names of deceased ancestors, often grandparents) was common and ceremonial bestowal of those names upon children is still undertaken.

The subsection, or "skin" names referred to earlier in these reasons still forms part of the organization of the community. Most witnesses were aware of the skin names which applied and although some younger witnesses had lesser knowledge they were aware of its significance to the community structure. Demonstrating connection between the subsection system, relationship to country and Miriuwung identity, Peter Newry gave the following evidence when asked if he was able to explain where the skin names came from:

"From the mother and the land.

Counsel: Mother and the land?

Yes. That's the rules of Miriuwung, that was laid here before everybody.

Counsel: Right.

We're following the same thing.

Counsel: When you say that skin comes from mother --.

Yes.

Counsel: How do you mean?

Because its like me, I'm djaburda, I come from nanagu, and father tjulama.

Counsel: Yes.

Its a bit hard for gardia to understand.

Counsel: Yes. And what about when you say the skins come from the land, what do you mean by that?

That's Miriuwung, Miriuwung land."

Ms Kofod also stated in her report that "Despite the disruption to traditional life, people remember and use skin names. They know the relationship terms and also something of the obligations and restrictions involved. It is still an important part of life for lots of people." (Ex A36, Appendix A, p5)

Marriage rules based on the subsection system have yielded to the influences of the surrounding European lifestyle but the avoidance rules and taboos of that system remain relevant to community behaviour and are adhered to. Avoidance of places according to the requirements of traditional laws is observed and the names of the recently deceased are not to be spoken.

Traditional ceremonial practices are still followed including, as noted earlier in these reasons, initiation ceremonies. The passing-down of ritual knowledge incrementally from elders to others continues to be followed and there is an impression of strong belief in the value of such ritual in the organization of the community. Rules on the restriction of access to such knowledge are rigidly applied.

Ngarranggarni stories are known and referred to regularly and the elder members of the community regard themselves as obliged to transfer this knowledge to younger members. Evidence of the acknowledgement of traditional laws, customs and practices was manifest in the pronouncement of spiritual beliefs and obligations in respect of Ngarranggarni sites and tracks.

Considerable evidence involving the Ngarranggarni arose in different contexts; for example, descriptions of sites and names of "country" and topographic features; descriptions of ceremony and ritual and of particular relationship to country. It was clear that the Miriuwung and Gajerrong people had extensive knowledge of the obligation to care for the land associated with the Ngarranggarni and to pass on knowledge of the Ngarranggarni and of the responsibilities to be undertaken in that regard. The Ngarranggarni formed part of the group identity of the Miriuwung and Gajerrong people, linking them to the land, to each other and to their ancestors.

An important Ngarranggarni story in relation to the claim area is that of the White Crane and Eaglehawk. It is transcribed in Miriuwung in the report of Ms Kofod. (Ex A36, Appendix B) The story was told to Dr Shaw by Grant Nga-

bidj, Mandi Moore and Bulla Bilinggiin. (Ex A16 p128-p130; Ex A18 p134-p135, p175-p178) Similar versions of the story were given in evidence by Nancy Dilyayi, Carol Hapke, Dodger Carlton, Sheba Dignari, Danny Wallace and Marjorie Brown. It is primarily associated with sites in the Ord River valley. The Gajerrong version of the story as given in evidence by Dodger Carlton, started from Needle Point in Gajerrong country and travelled down, and through, the Ord region.

In Miriuwung country the Dingo Ngarranggarni, associated with Yardanggarlm (Dingo Springs), was recorded by Dr Shaw from Bulla Bilinggiin. (Ex A18 p173-p174) In the evidence of Danny Wallace it was said that it extended north, north-east to Spring Creek and on to Mistake Creek in the Territory. Dr Shaw also recorded Grant Ngabidj's account of the story which commences in Gajerrong country with which he was connected, in the north-west of the claim area at Boorroonoong (Lacrosse Island) and Shakespeare Hill:

"The dingo ngaranggani or dreaming of the early days tells how they helped the blackfellars by bringing down fire... The dingoes came along all the way down the Ord River from the top, starting from my country down across Shakespeare Hill and Burrunungun near Wyndham, going the bushway to where Dingo Springs is now and dying there."

(Ex A16 p65)

Grant Ngabidj told Shaw about his personal Ngarranggarni connection as follows;

"My proper name, given by my mother is Wilmirr. I do not like to use it when dealing with white men. It comes from another dreaming that of the pelican *marrimarri*, that big white bird like an eaglehawk [wedge-tailed eagle] which you can hear whistling in the water. My father's dream was the pelican too, but it all comes from the mother, for it is from her dream that you get your skin name. That is in the Law."

(Ex A16 p32)

There was "primary" evidence that the Ngarranggarni totem for Gajerrong country was the Pelican and that the Pelican Ngarranggarni linked Ngarrmorr (Pelican Island) to the mainland. Dodger Carlton gave evidence of an associated Ngarranggarni of the Brolga making freshwater springs on the northern coast and travelling east towards the Territory.

In the south of the claim area an important Ngarranggarni is that of the Barramundi. The story is recorded in K Palmer & N M Williams, "Aboriginal Relationships to Land in the Southern Blatchford Escarpment Area of the East Kimberley", (Ch 2), Aborigines and Diamond Mining, Editors: R Dixon and M Dillon (Nedlands: University of WA Press, 1990) (Ex A43)). A similar version of the story was given in evidence by John Toby and Chocolate Thomas in which it travels south through Goowooriny, the range of hills running north-south through the Glen Hill area.

A Kangaroo Ngarranggarni was said to run through the eastern part of the claim area involving Gajerrong country to the north-east and Miriuwung country between Dumbral and the Ord River.

A good example of the manner in which the Ngarranggarni provides a connection between the present claimants, their ancestors, and particular parts of the claim area is in the Gurrgrurdjing (night owl or tawny frog mouth) story. Mandi Moore told Dr Shaw it was one of his personal Dreamings given to him by his father. (Ex A18 p34) Jeff Janama told Dr Shaw also that, through Mandi Moore, it became his personal Dreaming and that of his siblings and children. (Ex A 18 p110) This was confirmed in evidence by Jeff Janama, his sister Nancy Dilyayi and his adopted son Ben Ward. In evidence Jeff Janama said that the Dreaming started from Yirralalem country and Nancy Dilyayi identified a specific site for the Dreaming near Janayiwum Creek on Yirralalem Hill.

In observance of courtesies to spiritual figures, persons with responsibility for an area of spiritual significance introduce a stranger to that place by touching that person with water or with leaves, a gesture known as "mantha".

Mr Akerman in his report (Ex A48 p15-p18) emphasised the link between ritual, ceremony, the land and the community. Mr Akerman's and Mr Barber's testimony as to the ritual and ceremony they have witnessed since the late 1970s was sufficient in itself to establish the contemporary vitality of ceremonial law and custom but, in addition, there was considerable oral and visual evidence of contemporary ceremony and ritual associated with the claim area to support that conclusion.

It was not the case, nor was it contended, that the content of the ceremony and ritual had remained static since settlement. Rather they were dynamic, traditionally based activities which served to reinforce and maintain the connection of the Miriuwung and Gajerrong people with the claim area. For instance, the joonba or dance known as Ngalwirriwirri, was said to have been found on Argyle by clever men Daylight and Boxer who were not from the claim area. (Ex A48

p8; T Swain, "A Place for Strangers - Towards a History of Australian Aboriginal Being", (Cambridge: Cambridge University Press, 1993) at 233-242.)

Rules relating to control of knowledge of separate men's and women's law are followed and regarded as important in the organization of the community. There is a common belief that breach of an important aspect of Miriuwung Gajerrong "law" will visit consequences upon that person.

As noted earlier in these reasons, there is deep community interest in the preservation of the Miriuwung and Gajerrong languages, the significance of that having already been discussed.

There was evidence of the contemporary use of natural resources found in and around the claim area for ceremonies and tool-making, in particular, ochre for the former. Consistent with the "primary" evidence, the archealogical evidence suggested that sources of ochre within Miriuwung and Gajerrong country were limited and that all locations of ochre were associated with sacred sites. (Ex A11 p20)

Traditional skills handed down through generations remain, for example, the making of spears still serves a purpose in fishing in riverine pools. Members of the community continue to hunt, fish and gather traditional foods in the claim area including reptiles, wallabies, yams and bush fruits.

It was apparent from Ms Kofod's evidence, and from the "primary" evidence, that members of the Miriuwung and Gajerrong community retain substantial knowledge of the location and use of bush foods and bush medicines, and from time to time rely to varying degrees on these resources for their dietary and medicinal needs. The skill and knowledge required in the gathering and preparing of these medicines and foods is strong evidence of the maintenance of physical connection with the claim area and of the oral transmission of knowledge across generations by the Miriuwung and Gajerrong people since settlement. Similarly, the practice of hunting and fishing is not only motivated by the desire for sustenance but by the desire to maintain a connection with the land and with their ancestors. There was evidence of specialised knowledge of the methods for hunting certain animals such as the echidna and the goanna, and of the proper or customary way to prepare and cook them. There was also evidence of contemporary observance of certain food taboos and restrictions, indicative of ongoing totemic relationships.

As the ecology of the claim area, and the nature of the occupation of it by the Miriuwung and Gajerrong people, has changed since settlement their opportunity to engage in traditionally-based activities on the land has been restricted. However against the historical background discussed above, namely, the manner in which people were brought into the stations in the early years of settlement; the changes brought about by the pastoral industry and by the Ord River irrigation scheme; the drift from the pastoral stations into the town of Kununurra in the late 1960s and 1970s; the story presented by the evidence remains that of a people who have sought to maintain their connection with land in a practical sense. First, through the use of "holiday time" while working on the stations and, thereafter, by seeking to establish outstations on traditional country to give them the opportunity and authority to continue traditional links.

As noted earlier in these reasons, there is a very strong affiliation with particular areas of land by particular groups in the Miriuwung and Gajerrong community, not restricted to the groups represented by the second applicants. The Court was left with the impression that fundamental ties to the land remain. There is acceptance of obligations to care for country and to protect sites of spiritual and ancestral significance. Community members know their land by place names that have been passed on by members of Miriuwung and Gajerrong communities making connection with the land of particular significance to them.

In so far as the case for the respondents contested the foregoing, in cross-examination Professor Maddock agreed that he was not asserting that there had been a complete breakdown of knowledge, acknowledement and observance of traditional laws, customs or practices of the Miriuwung and Gajerrong community and conceded that the overall culture of the community could be said to be at least, in part, rooted in the past. The effect of his evidence was that while traditional laws and customs remain there had been a weakening of the links between the component parts of that system or organization.

The manner of exercise of activities connecting community members with the land is not of supervening importance. The question is whether the links with forebears are relied upon for the right to enjoy, or the obligation to perform, such activities. From the evidence presented I have no doubt that that requirement is satisfied.

Change or variation in the practise of traditional laws or customs will not declaim loss of native title. The question to be asked and answered is whether the community claiming native title retains a form of practice of traditional laws and

customs that shows that, as far as is practicable, it has a connection with the land that may be attributed to an ancestral community.

The evidence in this case is clearly sufficient to provide an affirmative answer to that enquiry.

(g) Conclusion

The first applicants claim native title as a communal title of the Miriuwung and Gajerrong community. The second applicants claim that native title vests in them as persons who "speak for" the "estate groups" of the Miriuwung and Gajerrong community in the Territory area. Whilst the first applicants did not present their claim as the claim of "estate groups", either severally or in combination, it was accepted by the first applicants that such sub-groups were part of the Miriuwung and Gajerrong community having links to particular parts of the country, being organized on kinship and subsection systems which were part of the traditional laws and customs of the community.

The evidence of the third applicants was not concerned with sub-group organization and the subsection system was not part of the traditional laws of the community the third applicants represented.

According to the evidence received in this matter "estate" or "family" sub-groups continue to play a part in defining a Miriuwung and Gajerrong community. As implied in the description, an "estate" or "family" sub-group is based on descent but on the evidence received in this case its structure now is flexible, not limited to a "once and for all" delineation by birth under a system of strictly patrilineal or matrilineal descent. A person may be included in such a sub-group by adoption and may opt in, or opt out, by exercise of choice.

There were numeous examples of evidence to that effect in this case, in particular, in evidence given by Rita and Stephanie Boombi, Peter Newry, Button Jones, John Toby and George Dixon.

The evidence established that whilst there may remain a patrilineal bias or expectation in the organization of such sub-groups, young Aboriginal people may have several choices presented by lines of descent as to which sub-group they will identify themselves. Other grounds of choice may be provided by the locus of conception, birth and by adoption. According to the general tenor of the evidence in this case, any right to claim membership of a sub-group, and thus of the community as a whole, may depend upon the course of life of the child concerned. According to life experience, what degree of association the child establishes with one family group rather than another, and what degree of education the child receives in traditional or religious matters of the relevant family group will determine what election is available or has been made. (K Maddock ,"The Australian Aborigines - A Portrait of their Society" at 39-41.)

The major changes inflicted on Aboriginal societies by European settlement imposed acceptance by Aboriginal communities of flexibility in defining community membership by the exercise of choice by children as to the group with which they became identified. (P Sutton, "Native Title and the Descent of Rights", (Perth: National Native Title Tribunal, 1998 at 50, 63-64, 66.)

In pre-settlement times the definition of an Aboriginal community would have been made more plain by a number of factors. Mutual recognition of the connection of the Miriuwung and Gajerrong languages with land occupied by the community would have been reinforced by the universal use of the languages within the community. More frequent assembly of community members for ritual and ceremonial activities and for expression or dissemination of shared religious beliefs in respect of the land occupied would have provided clear and regular statements and delineation of community membership. The common acceptance, and disciplined application, within the "estate" or "family" sub-groups of the customary rules and practices of the community in respect of rights and obligations of kinship, restrictions on marriage and membership of the sub-group according to descent, would have instilled and underlined recognition of a community of which the sub-group was part and from which it received the traditional laws and customs observed.

How the occupying societies operated is not an element to be proved in a native title claim but it is likely that sub-groups (whether described as "estates", "families" or "clans") were numerous, more structured, and more engaged in the political and economic affairs of the community. (R M and C H Berndt, "The World of the First Australians", at 39-45, 97.) Responsibility for control of tracts of land according to the traditional laws and customs of the society, defined particular areas of country to which members of sub-groups had close affinity, "belonged" or "spoke for", but the community as a whole occupied the land, and rights in respect of the land, including usufructuary rights, which arose out of that occupation were exercised in the society according to its laws and customs. At common law, the native, or aboriginal, title of that community would be a communal title held by the community, not separate and discrete vestings of native title in sub-groups, notwithstanding that control of, and responsibility for, the country of the sub-group was an important part of the maintenance of community life.

With European settlement in the East Kimberley, and its impact upon Aboriginal people and their lifestyle as described, Aboriginal communities had to face and accommodate substantial change. Events such as near extinction of sub-groups and removal of people from the country in which the sub-groups were located brought greater reliance upon the identity of the Miriuwung or Gajerrong community than the identity provided by a sub-group. Such adjustment was a necessary phase in the development of this Aboriginal community in the East Kimberley.

The territory of the Gajerrong community was adjacent to Miriuwung and they shared economic and ceremonial links. Those links were reinforced when the extent of the depletion of Gajerrong people after European settlement saw Miriuwung and Gajerrong become regarded as a composite community with shared interests. The members of that community were still Miriuwung people and Gajerrong people but with a common outlook and beliefs, and common traditions and customs in respect of the land with which they were connected.

The evidence adduced in this case demonstrated substantial consistency with the concept of a "tribal group" advanced by Professor Elkin in "The Australian Aborigines - How to Understand Them" (2*nd* Ed), (Sydney - London: Angus and Robertson, 1943) (at 22-25). As described by Professor Elkin, such a group is comprised of people related by actual and implied genealogy who occupy and are in a definite area of territory and hunt and gather food over it according to rules which control the behaviour of smaller groups and families within the tribe. The identity of the tribal group is reinforced by shared use and possession of language. The sub-groups make the community work by acting as the economic units which take sustenance from, and are responsible for the upkeep of, the land and for the protection of sites of religious or ritual significance for the community according to traditional laws and customs that have been handed down from Dreamtime figures. Sub-group reliance upon kinships systems and lines of descent provided order in the community (at 27). The exogamous nature of the sub-groups, (which according to the anthropological evidence was historically the case with Miriuwung and Gajerrong sub-groups), meant that there were contacts, ties and understandings between the sub-groups. The elder men and women of the community, with authority based on knowledge of laws and customs and of secret matters, were drawn from the sub-groups to organize ceremonial activities and rituals, such as initiation, for the "tribal" group (at 40).

The clear thrust of the evidence from both the first and second applicants is to the effect that there is an organized community of Aboriginal people, described as Miriuwung and Gajerrong, which possesses the languages and the Ngarranggarni that are part of, or run through, the claim area, being a community which observes traditional laws and customs. Without exception the "primary" witnesses identified themselves as Miriuwung or Gajerrong and were regarded by others, as Miriuwung or Gajerrong. The second applicants do not deny the connection of the Miriuwung and Gajerrong community with the land of the Territory area but assert that the common law right of native title, based on occupation and possession, is vested in the sub-groups represented by the second applicants.

Being satisfied that there is a Miriuwung and Gajerrong community that has an ancestral connection with the Aboriginal community, or communities, which occupied the claim area at the time of the assertion of sovereignty in the State or the Territory, it follows that the communal title in respect of the claim area is the title of the Miriuwung and Gajerrong people. In observing, or acknowledging, customary rules or practices, the community may be so organized that responsibility for, and, indeed, control of parts of the area occupied by the community may be exercised by sub-groups whether described as "estate groups", "families" or "clans" but the traditional laws and customs which order the affairs of the sub-groups are the laws and customs of the community, not laws and customs of the sub-group.

The inter-relation, and allocation of rights, between the community and its sub-groups is governed by the traditional laws and customs of the community. As stated earlier in these reasons, how the traditional laws, customs and practices of an organized indigenous community distribute, or recognize, the exercise of rights or usages which depend upon native title is irrelevant to a determination that native title exists.

The connection with land of a Miriuwung and Gajerrong person may be reinforced by, but is not subordinate to, a particular connection with part of that land as a member of a sub-group of the community which exercises rights and duties in respect of that part of the land. The second applicants who represent several sub-groups with particular connection to part of the claim area may have been included among the first applicants as representatives of the Miriuwung and Gajerrong community. One of their number, Peter Newry, was named as one of the first applicants.

The traditional laws, customs and practices of the Miriuwung and Gajerrong community provided for the distribution of rights in respect of the use of the land for sustenance, ritual or religious purposes. For example, a member of the Miriuwung and Gajerrong community is entitled to forage over Miriuwung and Gajerrong territory, and is not confined to the "country" of a sub-group with which that person has connection. As a matter of courtesy or custom that person may be expected to inform the "dawawang" of a sub-group, as persons responsible for the "country", of the intended use of

the land in the care and control of the sub-group and to confirm that Miriuwung or Gajerrong traditions and customs would be observed by that person on that land, however, the right to be on the land arises under the laws and customs of the community and not of the sub-group. (See: Report by Toohey J, Aboriginal Land Commissioner, Daly River (Malak Malak) Land Claim, 12 March 1982, para5, para119, para124, para126, para175). As Ben Barney, a member of the Dumbral "estate group", said, he was entitled to live on Dumbral land under Miriuwung law.

The evidence of Marjorie Brown given on Lake Argyle on a boat anchored above the site of the former Argyle homestead, being "country" with which she had connection through a conception totem and birth, exemplified the point:

"Once you're a Miriuwung country, this whole country belongs to us, for Miriuwung people, not the Gija, not Ngarinyman. This Miriuwung.

Counsel: Who told you this was Miriuwung country?

My mother, my father, my ngajang, [paternal grandmother] my gagayi, [maternal grandmother] everybody.

Counsel: How do you get a particular area? You have this particular area that you're interested in because you grew up here.

Yes and our Dreaming is here, Ngalwirriwirri Dreaming and I was born here. My birth stone is underwater, just there on the other side there. My birth stone is there.

Counsel: How do you get a country? Can you only be interested in the country that you were born in? That is to care for that particular country.

We care for the place we're born in but we also care for the rest of the Miriuwung country. That my country too.

Counsel: I thought you said that particular families, groups of families, I don't want to misquote you, but I think you said specific families have areas of some country.

I'll say it again. There's about twenty Miriuwung families or maybe more, right. Every Miriuwung elders, there's old man Bulla, old man Bungledoon, this old man... All these people have little bits, part of the Miriuwung country. Us mob, we have this part of the Miriuwung country. The Dardi Jep mob, they have the Ivanhoe side of the country. Now, every part of the country is Yirralalem. Every part of the country has this group of Miriuwung people, they're families, right. They look after that area but they also look after the rest of the area. We all put in to look after our country.

Counsel: But who says that they look after a particular area, like Yirralalem, who says that that country has to be looked after by some particular person or persons?

Our old people. We have to follow our law. It's happened in the past and it's still happening today. We still look after our country. Everybody - every Miriuwung person has certain rights to this Miriuwung country and they looked after. They just don't look after the area that they - where they come from, where they were born, because our Miriuwung country is big, we look after every part of the Miriuwung country, you know, all the Dreamings. The Dreamings are not where we live, right where we live, where we actually live. They could be up in the hills. That might be too far away from those Miriuwung people so the closest Miriuwung people look after them so this is us. We can look after this Dreaming, we can look after that Dreaming, and the rest of the Miriuwung tribe will know that the top end Miriuwung people are looking after our country."

The association of the community of Miriuwung and Gajerrong people with land in the East Kimberley region does not appear to have been in issue until this proceeding commenced. Public information signs erected by the Territory at the entrance to the Territory area inform tourists that the park falls within the "tribal lands" of the Miriuwung Aboriginal people whose long association with the area is evident in art sites, rock carvings, shell middens, bird traps, all being sites of cultural importance to the "traditional owners". The signs also state that Gajerrong people are "neighbouring" people regarded by Miriuwung as "countrymen" and that traditionally they met for ceremonies. Similarly, signs erected by the State in the Mirima National Park (Hidden Valley), near Kununurra, inform visitors that the park is a place that has been used by Aboriginal people for thousands of years as evidenced by rock paintings, engravings, grinding stones and stone tool-making sites. The signs state that Mirima is a special place for Miriuwung people containing sites of Dreaming stories which tell how the land was formed, and plants which provide them with food and medicines. The signs also acknowledge that cultural ceremonies continue to be performed there.

I am satisfied by the evidence that the Miriuwung and Gajerrong community has maintained a connection with the ancestral communities which held the native title at sovereignty and has maintained connection with the land to which that native title applied.

Boundaries of Miriuwung and Gajerrong land

As stated earlier in these reasons, precision is not to be expected in speaking of the boundaries of native title held by a community, particularly when the right to exclude others from land at the outer limits was likely to be shared with neighbouring communities.

Miriuwung and Gajerrong communities were occupants of adjacent territories which overlapped in part and, although they used separate languages, they shared knowledge of Dreaming myths, Dreaming tracks and Dreaming sites and co-operated in ritual and economic activities.

The boundaries of that territory cannot be accurately described at this time. From what is known there can be little issue that in most respects the area now described as Miriuwung "country" is within the area occupied by the original society. The boundaries of Gajerrong territory, however, were in issue and it was contended by the respondents that Gajerrong "country" was outside the claim area.

(a) Miriuwung boundaries

The connection of Miriuwung people to the claim area is consistently described in the evidence. Ethnographical maps, particularly those of Ms Kaberry, provide general support for that evidence. The location of the Miriuwung tribe, or language group, shown in broad terms in those maps, by and large, follows the description of Miriuwung "country" given by "primary" witnesses in these proceedings and the description of Miriuwung "country" given by Dr Shaw's informants in the 1970s.

According to those witnesses Miriuwung country was the Ord River valleys and environs, being the area formerly covered by the Ivanhoe, Argyle and Newry pastoral leases and, therefore, includes the claim area in the vicinity of Kununurra and Lake Argyle and the Territory area. It was apparent from evidence such as that given by Marjorie Brown and the accounts recorded by Dr Shaw that despite the flooding of the Ord Valley and the development of Kununurra those areas were still regarded as Miriuwung country. (Ex A18 p11, p170-p173)

In approximate terms the northern boundary of Miriuwung territory extended from the Ord River, north of Goose Hill, to Point Springs, north-east of Kununurra, and further east into the Territory beyond the Territory area. To the north of Miriuwung was Gajerrong territory.

Miriuwung country was described in the oral histories (Ex A18 p85, p170) and in the "primary" evidence of Danny Wallace and Ben Ward as extending south-east as far as Spring Creek and Mistake Creek Stations and to the east to Waterloo Station in the Territory. Ms Kofod's report (Ex A36 p9-p10) and material gathered by her in "Warmun" (Turkey Creek) as to the language in Dreaming stories puts the use of Miriuwung language extending well south of the claim area.

A recent heritage survey by Mr Barber and others identified Daisy Burrwi and Marie Wunmi as "primary owners" and Jeff Janama as "custodian" of that part of the claim area east of Lake Argyle and north of the Ord River (Ex A54 p49-p51) and this was confirmed by John Toby in evidence and by Daisy Burrwi who, as noted earlier, said her father's country went from Ivanhoe "right up Mistake Creek".

Professor Tindale's mapping of Miriuwung was, in some respects, not consistent with this evidence. (Ex 40) Associate Professor Christensen stated that Professor Tindale's depiction of tribal areas had Miriuwung country "shaved on its western and eastern flanks, much reduced in its southern extensions and bulbous northwards". (Ex A41 p60) In Mr Akerman's view, Professor Tindale's map crops Miriuwung country on its southern boundary. (Ex A48 p4)

In the part of the claim area within the State the issue between the first applicants and the respondents as to the historical boundaries of Miriuwung country was, in the main, in respect of the margins of the area, such as the Goose Hill area on the west and to the south the Glen Hill area and land to the south of Lake Argyle.

The ethnographic maps do not purport to set exact boundaries of Miriuwung country in these areas and provide only a general geographic indication.

The State contends that there was a general shift or movement of the location of Miriuwung speaking people after sovereignty. The exact nature or direction of the shift asserted was not entirely clear. In respect of the Goose Hill area it was suggested there had been a northward movement of the Miriuwung people and that the Miriuwung connection to that area was of recent origin. In respect of the southern part of the claim area it was suggested that the area was Gija territory last century and, by inference, that the Miriuwung community had expanded southward.

A degree of indeterminacy is to be expected in the alignment of boundaries of tribal or language units and at the edges of the tribal territory acknowledgement of shared interests will be reflected in descriptions of country affiliation as "mixed" or as "half-half", eg Miriuwung-Gija mix. Primacy of affiliation is often given to the language that is first mentioned. (P Sutton, "Language in Aboriginal Australia: social dialects in a geographic idiom", Language In Australia, Editor: S Romaine (Cambridge: Cambridge University Press, 1991) 49 at 53-55; Associate Professor Christensen, "Supplementary Anthropological Report" Ex A40 p80, p83.) The evidence in these proceedings suggests that there may have been in the past a shared Miriuwung-Goolawarreng use of the Goose Hill area and that the southern part of the claim area has had in the past, and retains, a shared identity for Miriuwung and Gija people. Such mixing indicates that Miriuwung and Gajerrong were communities within a region of communities and does not in itself suggest a population shift, nor does it deny the Miriuwung and Gajerrong people a continuity of connection to those parts of the claim area.

In earlier times the Goose Hill area had been a meeting place for a number of tribal groups including Miriuwung, Gajerrong, Doolboong and Goolawarreng. (Ex A18 p84, p147) In "primary" evidence the area was identified as "Miriuwung-Guluwaring mixed" and linguistic and cultural similarities between the Miriuwung and Goolawarreng were emphasised. There is no evidence that people today claim traditional connections to Goose Hill as Goolawarreng people or identify as Goolawarreng. While it might be inferred that there has been a loss of some of the linguistic and cultural diversity since contact, it cannot be said that Miriuwung identification with the country is of recent origin.

In the course of taking "primary" evidence near Goose Hill it became apparent that no claim was made by witnesses for the first applicants to country west of Goose Hill, identified as the Parry Lagoon area. That area was said to be for a cultural and linguistically distinct people the Boogayi and who had all died out. At the same time Mona Williams, one of the third applicants, was said to have an interest in the Parry Lagoon area and she in turn acknowledged a Miriuwung interest in the eastern part of the Goose Hill area.

It was said by Sheba Dignari that Doolboong country was west of the claim area and included part of the claim area to the west of Goose Hill. The demarcation of territory was a creek line described by the witness. (Ex A8 - mark "J7") As stated earlier, according to Grant Ngabidj, Doolboong country was "below Goose Hill". (Ex A16 p161) According to the evidence presented, Doolboong is extinct as a separate Aboriginal community. Some members of the Miriuwung and Gajerrong community have Doolboong links but it was not submitted that a Doolboong community remains extant as part of the Miriuwung and Gajerrong community. The "primary" evidence for the first applicants did not contend that Miriuwung country had been expanded to include the Doolboong country. That part of the claim area west of Goose Hill, being the area west of the line drawn by Sheba Dignari between Parry Lagoon and Muggs Lagoon must be excised.

As to the southern part of the claim area, the evidence of Mr Akerman, Dr Palmer and Mr Barber based on recent heritage and site survey work suggested that the country may be identified as "Miriuwung-Gija mix" and that the persons holding rights and interests in this country included Gija-speaking people. There was "primary" evidence adduced by the fifth respondents as to rights and interests held by a family group identified as Gija-speaking people. Two of the members of that group, Joe Lissadell and Chocolate Thomas, are included in the first applicants as representatives of the Miriuwung and Gajerrong people.

In that southern part of the claim area between the Ord and Bow Rivers south of the junction, there was conflicting evidence as to whether the Aboriginal persons acknowledged to have rights and interests in that area now identified as Miriuwung people. John Toby said it was Miriuwung country because those people were Miriuwung people and he was supported in this by Ms Kofod. Chocolate Thomas said it was Gija country. The fifth respondents adduced evidence from Maggie John and another witness that at least part of this area, extending to east of Lake Argyle and to north of the Behn River was Malngin country.

Having regard to the whole of the evidence, I am satisfied that, historically, Miriuwung people were connected with the southern part of the claim area and that the connection has been maintained.

The evidence also suggests, however, that in respect of that part of the claim area the right to use the area may have been shared and native title also held by Malngin and Gija communities. No determination to that effect can be made in

this proceeding under the Act as amended. If communal title is asserted by communities claiming connection with the original Malngin and Gija communities, that may require an application for declaration of a common law right in a court of competent jurisdiction.

(b) Gajerrong boundaries

The respondents contended that all, or part, of that part of the claim area, said by the first applicants to have been Gajerrong country, was occupied at sovereignty by other communities and not by people who identified themselves as Gajerrong.

It was accepted that Gajerrong was not the only language spoken in, and identified with, the northern part of the claim area at the time of sovereignty. In the "primary" evidence extinct languages Wardenybeng and Doolboong were acknowledged to have been associated with this area albeit that use of the area was said to be mixed in with Gajerrong. No vocabulary other than the language names themselves has been recorded. In these proceedings Wardenybeng was described as a language very similar to Gajerrong. The impression I gained from the evidence is that they could be regarded as mutually understood dialects. The Doolboong language differed more markedly from Gajerrong although the inference has been drawn by linguists that it would have formed part of the Djerag langauge group.

Overall, the evidence supports a conclusion that, as the fifth respondents conceded in respect of that part of the claim area identified as Ningbing, "as far back as living memory goes those who identified as Doolbung, Wardenybeng and Gajerrong mixed together socially and culturally and exploited the resources of the land together".

Persons who are now identified as Gajerrong people, namely Dodger Carlton and the Aldus siblings were said to have spiritual or religious responsibility to look after the northern part of the claim area under the laws and customs acknowledged by the Gajerrong people. It was also acknowledged that other Aboriginal people, namely, Frank Chulung and the Gerrard family had rights and responsibilities in respect of that part of the claim area. Apart from Frank Chulung, who was not called to give evidence by the fifth respondents, there is no evidence that there was any Aboriginal person identifying as Doolboong or Wardenybeng asserting an interest in this area. As stated above, it was also clear from the evidence, and not really disputed by the respondents, that these persons had ancestral connections to the organized community in occupation of the north and north-west parts of the claim area at the time of sovereignty.

It was Associate Professor Christensen's view that, having regard to the work of Ms Kaberry and what was told to Dr Shaw by Grant Ngabidj, Gajerrong may have been an overall tribal label, or a portmanteau term, by which the society in occupation of the northern part of the claim area at the time of sovereignty was identified. (Ex A41 p56)

The map prepared by Ms Kaberry to accompany her major work "Aboriginal Woman Sacred and Profane" (Ex 44) and which serves as a descriptive illustration to assist understanding of the text, shows Gajerrong to be to the north of Miriuwung, extending east across the Territory border from the east side of the Gulf. One of the earlier sketch maps prepared by Ms Kaberry (Ex A42) is especially interesting in that it appears to suggest that Ms Kaberry formed the view that Gajerrong was a label synonomous with "nulamo", a term used by Aboriginal people in the Forrest River area to refer to peoples to the east and covering placenames such as Jalil, recorded by Ms Kaberry as the "gra" for Maggie Darrng's sibling, mother, and maternal grandparents and Mulali (Reedy Creek), being locations in an area that the respondents contend was Doolboong country. Significantly, unlike Gajerrong, there is no mention in Ms Kofod's written work or field notes of Wardenybeng people or language, and sparing reference to Doolboong with no indication that either of them existed as a tribal group.

It was apparent from Ms Kaberry's Forrest River genealogies (Ex A57), and Associate Professor Christensen's analysis of them, that Ms Kaberry recorded the names of numerous persons whose "gra" or country was said to be a location within the area described in the "primary" evidence as Gajerrong territory, including Boorroonoong (Lacrosse Island) and Minini (Elephant Hill), on or within the claim area, and Jalil, Mulali and Ningbing, outside it.

In apparent conflict with the map prepared by Ms Kaberry is Professor Tindale's work "The Aboriginal Tribes of Australia", in which a tribe described as "Duulngnari" is shown as occupying the entire north and north-west of the claim area from the eastern side of the Gulf to the other side of the Territory border where the tribal country of Gajerrong is depicted. (Ex 40)

In the text, Professor Tindale (at 153) states that Duulngnari is comprised of three constituent hordes "that some aborigines claim are separate tribal units. They are the Pokai on the mangrove margins of the Cambridge Gulf south of Mount Connection, the Kanjai between that eminence and Knob Peak, and the Wardaia extending east to the mouth of the Keep River."

In her evidence Ms Kofod said that the word Duulngnari may have a similar meaning to Doolboong, "-ngarri" being a pan-Kimberley suffix sometimes attaching to language names, having an equivalent meaning in other languages to the Miriuwung "-woong" or "-boong". She also gave evidence that Wardaia may equate to Wardenybeng.

Whilst Associate Professor Christensen accepted that Duulngnari could equate to Doolboong, he noted that a distinction was to be drawn between the nature of the use of the word Doolboong in evidence and the use of Duulngnari by Tindale. He said it was plausible Tindale had used the term to gloss a complex grouping.

Professor Maddock held a contrary view to that of Associate Professor Christensen and preferred Professor Tindale's mapping to that of Ms Kaberry as Professor Tindale's work was explicitly concerned with boundaries at the time of sovereignty. But unlike Ms Kaberry's mapping there is no evidence as to the basis on which Professor Tindale settled the identity of country for the "Duulngnari". For example, there is no evidence that he conducted any field work in the claim area and he appears to have rejected the field notes of Professor Birdsell, who was said to be his principal informant in respect of the claim area. (Ex A41 p47) There was also evidence from Mr Akerman that Professor Tindale, in a meritorious attempt to map the tribal areas for the whole of Australia, had been unable to avoid clear errors in some instances. Further, as stated above, taken as a whole Ms Kaberry's mapping of the Miriuwung and other tribes was more consistent with other evidence received.

Grant Ngabidj told Dr Shaw (Ex A16 p31) that he was a Gajerrong person and described his right to occupy and make use of the natural resources of the north coastal area and the eastern side of the the Gulf.

Dr Shaw was extensively cross-examined on his recording of Grant's Ngabidj's birth place as Cow Creek (Ex A16 p31), it being put to him that it was more likely that Grant Ngabidj's place of birth was Skull Creek on the west side of the Territory border. I am not persuaded there is any error in that part of Dr Shaw's record. It is consistent with other material he recorded:

"My father gave me a sandy island called Wundarri on the coast where I was born. ... It was a very long island joined to the mainland by a marsh with mangroves growing on it. We called the mangroves Balimbarr and they stretched from Kamilili near Bamboo Spring and Wungabal on the limestone towards Brolga Spring."

(Ex A16 p32)

It is clear that Dr Shaw was told by Grant Ngabidj that prior to the massacre of his people by the proprietors of Ningbing Station before World War I, Ngabidj, as a young boy, lived a traditional life with his family along the northern coastal part of the claim area between the Gulf and Keep River. (Ex A16 p32-p35)

The history records the types of "bush tucker" found and eaten in the area when Ngabidj was growing up. Water was obtained from wells dug in the "early days" not far from the sea, and found by lifting up stones when the tide went out to expose fresh water springs. Ngabidj describes an island called Ngarrmorr (Pelican Island) and how people would get to Ngarrmorr on the retreating tide from Wundarri, swimming on logs to hunt porcupine (echidna), pelicans, flying foxes and white cranes and to collect turtle eggs. They would stay overnight and return in the morning.

When Grant Ngabidj was perhaps about ten years of age he saw the European managers of Ningbing Station round up his people near Grant Creek on the north coast, north-east of Ningbing Station as a result of which approximately forty young Gajerrong men were shot and killed. The occurrence of this event and the taking of Grant Ngabidj, his mother and his sister to Ningbing Station is described in plain terms in the record made by Dr Shaw. (Ex A16 p28, p36-p38; Ex A19 p45)

Dr Shaw in his evidence confirmed that Grant Ngabidj identified himself as Gajerrong. He also spoke Doolboong but he did not suggest to Dr Shaw that the east coast of the Gulf was the preserve of the Doolboong people:

"...we talk Gadjerau and Dulbung when we answer them back. The people who speak Dulbung came from Forrest River; they bred in that country. Many of them come along for their relations and lived in my country, mixed; but I am Gadjerau properly."

(Ex A16 p31)

As mentioned earlier, Grant Ngabidj in describing Ngarranggarni to Dr Shaw identified Boorroonoong, and the adjacent coastal area, as his country. There was continuity between the Dreamings referred to by Dodger Carlton in his evidence and those told by Grant Ngabidj to Dr Shaw.

The principal "primary" evidence adduced by the first applicants was that of Dodger Carlton. Paddy Carlton was called as a witness by the fifth respondents and the third applicants.

Dodger Carlton was born at Boogoojoowarli, a spring near where the court heard evidence at Ningbing. At that time his parents were 'walking around' in the bush with Grant Ngabidj and a "couple of old people from the Wyndham side". He was told that he was born around 1942. When he was still small they went in to Ningbing Station and later when he was a "grown-up kid" they moved to Carlton Hill Station.

His country was said to be the Ningbing area, which was also referred to in the proceedings as Wardenybeng or Yoorra Yoorra, which includes the north and north-west inter-tidal zones, coastal flats and islands in the claim area. Dodger Carlton is also regarded as a regent to the Aldus siblings in respect of that part of the claim area on the eastern side of the Gulf. Regency, it was explained by Mr Akerman, was a situation whereby Dodger Carlton had a responsibility to look after country in respect of that part of the claim area until such time as the Aldus siblings were regarded as having acquired sufficient knowledge, or maturity, under the laws and customs of the Gajerrong people.

Dodger Carlton stressed the similarities between Doolboong, Wardenybeng and Gajerrong, by stating variously that "Mulali" (Reedy Creek) and "Gayirreban" (Mount Connection) above the Ord River on the eastern side of the Gulf were "Doolbung or Gajerrong Doolbung mix"; that Doolbung, Wardenybeng and Gajerrong were "all one"; that "Wardenybeng is Gajerrong"; that in the earlier days Doolboong, Wardenybeng and Gajerrong were "all mixed together"; and that Lacrosse Island was for three groups Doolboong,Wardenybeng and Gajerrong; and that Doolboong and Gajerrong "used to mix, understand one another, speak one another language."

Paddy Carlton is an older man born at around the time of the First World War and it was apparent that as an elder he played an important role in the ritual and ceremonial life of the Miriuwung and Gajerrong community and was respected and deferred to by members of that community especially in respect of traditional matters. He was initiated into the law by Boolngara.

Paddy Carlton identified Doolboong, Wardenybeng and Gajerrong as separate, although contiguous, areas of country. In the light of the understanding that the Doolboong, Wardenybeng and Gajerrong shared the use of some parts of this part of the claim area, albeit that different areas of country may have been more closely identified with one or other, there is no real conflict between the evidence of Dodger Carlton and Paddy Carlton. (See: R M and C H Berndt, "The World of the First Australians", at 96.)

Having regard to the foregoing, the contention that people who now identify themselves as Gajerrong assert a right to this part of the claim area as a result of the introduction, post-sovereignty, of Gajerrong speaking peoples from outside the claim area cannot be sustained.

There is little doubt that there has been a dramatic thinning of population in this part of the claim area and a loss of the cultural and language diversity that may have been present at the time of sovereignty but connection with ancestors who were members of the original community in occupation of the land has been demonstrated. The Gajerrong identity of the present community is rooted in the past and lends weight to the contention that the community has maintained, as far as practicable, a connection with the claim area since the time of sovereignty.

I am satisfied that Gajerrong country included the land in the claim area running from the eastern side of the Gulf, along the northern coast to the State/Territory border, and the three islands off the north coast. As stated earlier, Miriuwung country merges with Gajerrong country from about Point Springs on the east to north of Goose Hill on the west.

Second applicants' claim

As set out earlier in these reasons, the claim of the second applicants cannot be separated from the claim of the first applicants. The native title is a communal title held by the Miriuwung and Gajerrong community of which the second applicants are part. If native title is determined to exist it will be appropriate for discussions to be held between the first and second applicants before any orders are made under s56 and s57 of the Act.

Third applicants' claim

Boorroonoong (Lacrosse Island)

The case put by both the first and third applicants was that Boorroonoong (Lacrosse Island) was an area in which the interest of the Gajerrong people overlapped with that of Aboriginal people from the western side of the Gulf. As stated

above the third applicants also sought to demonstrate that these Aboriginal persons were not persons holding rights and interests under the laws and customs of the first applicant group, rather it was asserted that they were members of the community of native title holders described as the "Balanggarra Peoples".

There was primary evidence that Aboriginal people from the western side of the Gulf, in particular Victor Martin, through his grandfather Kaalgi, regarded Lacrosse Island as part of their country. This is supported by Ms Kaberry who records Boorroonoong as Kaalgi's "gra" in her Forrest River genealogies. Kaalgi was said to have travelled to Lacrosse Island from the west side of the Gulf in dug-out canoes to hunt flying fox; to have lived on the island for a time to escape massacres and to have a Dreaming and ritual connected with the island. There was also evidence that Boorroonoong was part of the country connected with the Gajerrong people, that they have knowledge of Dreamings associated with that area, distinct from that of Kaalgi, which link the island with Gajerrong country on the eastern side of the Gulf, that Gajerrong men swam to the island on logs for hunting and that the Gajerrong people continue to assert rights and responsibilities in relation to the island under their laws and customs.

The Gajerrong people clearly acknowledge the rights of Victor Martin and his family in Boorroonoong, and there was general agreement from the anthropologists that Aboriginal people from the east and west side of the Gulf had overlapping, but not inconsistent, rights and interests in Boorroonoong under their respective laws and customs. Ms Doohan explained this overlapping of interests as follows in her initial report:

"the two groups do not come together to form a single claimant group but rather two groups whose laws and customs have allowed them to share the use and enjoyment of Lacrosse Island and to maintain their separate and distinctive traditions and connections to the islands".

(Ex Cl6(a), Appendix A, p7)

There was "primary" and anthropological evidence that the Aboriginal people represented by the third applicants were distinct from the first applicant group in that they did not observe the classificatory kinship system and were part of a coenobium of common ancestors with people from the west side of the Gulf. I accept Ms Doohan's opinion that the connection of Victor Martin and other Aboriginal people from the west side of the Gulf does not arise by reason of their membership of the Miriuwung and Gajerrong people, rather they have separate and distinct traditions and connections in respect of Boorroonoong.

It was apparent that Victor Martin acknowledged and observed laws and customs in relation to land by reason of his membership of a wider community. There was limited primary evidence led by the third applicants as to the identity of the group said to hold native title, no doubt because of the comparatively small area of land involved. However the evidence that was led was consistent with Ms Doohan's report in which she identified a group observing separate laws and customs, which group included the third applicants who made the claim as representatives of that group, however the relevant group may have been identified at sovereignty.

I am satisfied that any determination of native title should take account of the interest of the third applicants in Boorroonoong (Lacrosse Island).

It was faintly submitted in argument that the Court could not make a determination of native title which included a determination of the interests of the third applicants unless the determination was in respect of an application made by the third applicants and referred to the Court by the Tribunal pursuant to s81 of the Act as it then stood.

That submission may be dealt with quite shortly. It is apparent from the provisions and objects of the Act that the Court is given jurisdiction to resolve a dispute by determining whether native title exists. Once a matter attracting jurisdiction is before the Court the whole of the dispute as to the existence of native title in respect of the land the subject of the application referred to the Court, and arising out of the facts which underlie that matter, can be dealt with by the Court if the appropriate parties are properly joined to the litigation to have that dispute resolved. Such a course was followed in this matter.

Extinguishment of native title

The first issue that arises in respect of the extinguishment of native title is whether there is an onus of proof upon the applicants to show that native title has not been extinguished, or upon the respondents to show that it has.

As set out earlier in these reasons, extinguishment of native title, fragile though the interest is, will not be taken to have been effected by the Crown unless a clear and plain intention so to act is made obvious in the public record either by act

of the Executive, authorized by the legislature, or by act of the legislature. (Wik per Toohey J at 126; per Gummow J at 186; per Kirby J at 249.)

In Coe v Commonwealth of Australia (1993) 118 ALR 193 at 206 Mason CJ, in deciding an interlocutory motion to strike out a statement of claim, opined that the Crown would not bear the onus of showing that native title had been extinguished. Expressions conveying a contrary view are to be found in the reasons of Toohey J in Mabo (No 2) (at 183) and of Gummow J in Wik (at 185). Toohey J referred to the remarks of Hall J in Calder who had stated that there was a presumption of continuance of native title after sovereignty and that the burden of establishing extinguishment rested squarely on the Crown. (Calder per Hall J at 375, 401, 404.) The opinion of Hall J was approved by the Supreme Court in R v Sparrow (at 1099).

In R v Van der Peet (at 585) L'Heureux-Dubé J stated that the "onus of proving extinguishment is on the party alleging it, that is, the Crown" and legislation necessarily inconsistent with the continued enjoyment of Aboriginal rights was not sufficient to meet the test.

In Western Australia v The Commonwealth (at 422-423) Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ stated:

"Although an acquiring Sovereign can extinguish such rights and interests in the course of the act of State acquiring the territory, the presumption in the case of the Crown is that no extinguishment is intended.

...

The State of Western Australia, acknowledging the presumption, sought to rebut it by showing that the British Crown, in acquiring the territory of Western Australia, manifested an intention to extinguish all native title to land in that territory. That intention was said to follow from the Crown's intention to assume absolute ownership of all land within the Colony. To discharge the onus, it is necessary to show at least that the Crown has manifested clearly and plainly an intention to extinguish all native title. So much is required of any statute which is said to extinguish native title which has survived acquisition of a territory by the Crown and there is no reason why some lesser standard should be applied in ascertaining the Crown's intention when exercising the prerogative power to acquire new territory. It may be that even stricter proof is required."

The weight of authority, and the application of principle, requires that the onus of proof in respect of extinguishment rest on the party propounding it.

Except for coastal flats, tidal zones and the islands, land now described as vacant or reserved Crown land was land subject to pastoral leases first granted by the Crown in the last decade of the nineteenth century. The terms on which pastoral leases were granted included the reservation by the Crown of a right to excise from the lease, from time to time, such land as was required by the Crown for public purposes.

The State and the Territory contend that the grant of pastoral leases pursuant to statute, was a clear statement of Crown intention to extinguish native title in respect of land subject to such leases.

In the Goose Hill area the first applicants contend that at least some of the reserved land in that area was not subject to a prior grant of a valid pastoral lease. As set out earlier in these reasons, the first applicants have not established that native title exists in relation to the land in the western part of this Reserve. The State contends that in any event part of that reserved land was the subject of a freehold grant in 1918 to the Wyndham Freezing Canning and Meat Export Works, an incorporated trading concern under the State Trading Concerns Act 1916 (WA). Part of the reserved land in this area was also included in the Noogoora Burr Quarantine Area declared in 1981 pursuant to reg10 of the Agriculture and Related Resources (Property Quarantine) Regulations 1981 (WA) and under s105(ia) of the Agriculture and Related Resources Protection Act 1976 (WA). These issues will be dealt with separately later in these reasons.

First, it is necessary to consider the effect on native title of the grant of a pastoral lease before considering whether native title was affected by any subsequent acts of the Crown in respect of land in the claim area.

(a) Pastoral Leases

(i) State

In Western Australia v The Commonwealth, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ (at 433-434) held that native title in Western Australia was not extinguished by the establishment of the colony of Western Australia and that -

"since the establishment of the Colony native title in respect of particular parcels of land has been extinguished only parcel by parcel. It has been extinguished by the valid exercise of power to grant interests in some of those parcels and to appropriate others of them for the use of the Crown inconsistently with the continuing right of Aborigines to enjoy native title."

By an Order in Council made on 22 March 1850, pursuant to the Sale of Waste Lands Act 1842 (Imp) the Crown ordered that the following provisions be of effect in the colony of Western Australia:

"Nothing contained in any pastoral lease shall prevent the aboriginal natives of this colony from entering upon the lands comprised therein, and seeking their subsistence therefrom in their accustomed manner;"

By that Order in Council the Crown sought to avoid problems experienced in the colony of New South Wales, namely, conflict arising out of the exercise of rights asserted by pastoralists and the traditional rights of Aboriginal inhabitants. (See: Wik Peoples v State of Queensland (1996) 63 FCR 450 per Drummond J at 466-475.)

The terms of the Order in Council were incorporated in the Land Regulations 1851 (WA), made by Queen Victoria for proclamation in Western Australia.

The first pastoral leases of the East Kimberley were granted by the Governor under the Land Regulations 1882 (WA) in the form set out in the 11th Schedule to the Regulations. The interest described as a pastoral lease in that Schedule was subject to a reservation in favour of Aboriginal people expressed in the following terms:

"Except and always reserved to Us, Our Heirs and Successors, ... full right to the Aboriginal natives of the said Colony at all times to enter upon any unenclosed or enclosed but otherwise unimproved part of the said demised Premises for the purpose of seeking their subsistence therefrom in their accustomed manner;"

An identical clause was included in the form of pastoral lease set out in the Land Regulations 1887 (WA), which replaced the Land Regulations 1882 (WA) in respect of pastoral leases issued in the Kimberley Division of the State. Similarly, after responsible government commenced in the colony in 1890, s92 of the Land Act 1898 (WA) provided that all pastoral leases were to be issued in the form set out in the 24th Schedule of that Act and the form contained a clause in the same terms.

The Land Act 1933 (WA), which replaced the Land Act 1898 (WA), did not continue that reservation in the statutory form of pastoral lease. However, the Land Act Amendment Act 1934 (WA) inserted s106(2) in the Land Act 1933 (WA) which provides as follows:

"The aboriginal natives may at all times enter upon any unenclosed and unimproved parts of the land the subject of a pastoral lease to seek their sustenance in their accustomed manner."

It was accepted that no pastoral leases were issued under the Land Act 1933 (WA) in respect of land in the claim area before the Land Act Amendment Act 1934 (WA) came into operation. Under the Land Act 1933 (WA) the term of a "pastoral lease" could be for a period of up to forty-eight years.

There were numerous limitations, described as reservations, upon the interest granted as a pastoral lease under the Land Reg 1882 (WA), the Land Regulations 1887 (WA), the Land Act 1898 (WA) and the Land Act 1933 (WA).

Under reg85 of the Land Reg 1882 (WA) the following rights were reserved by the Crown:

o to lay out and make public roads through the leased land;

o to take away "indigenous produce", rock or soil required for public purposes;

o to cut and remove timber and other woods;

o to sell any "mineral land" within the limits of the pastoral lease;

o to sell any portion of the pastoral lease and exercise a right of immediate entry; and

o for any person to pass over unenclosed or enclosed but otherwise unimproved land, with or without stock, on all necessary occasions.

In the form of pastoral lease set out in the 11th Schedule to the Land Regulations 1882 (WA), matters excepted and reserved from the grant were further described, for example:

o full power in the Crown from time to time to sell all, or any, unsold portion of the pastoral lease subject to a claim for compensation for improvements;

o full power in the Crown to make grants or sales of any part of the pastoral lease for public purposes and to except from sale and reserve, or to resume, parts of the pastoral lease as required in the public interest, including for the use and benefit of Aboriginal inhabitants;

o full right for any person to enter upon any part of the pastoral lease to examine the mineral capabilities thereof and do all things necessary for the purposes of making such an examination.

The foregoing exceptions and reservations were repeated in reg61 of the Land Regulations 1887 (WA) and in the form of pastoral lease set out in the 9th Schedule (see: Moore and Scroope v State of Western Australia (1907) 3 CLR 334 at 336) and in s107 of the Land Act 1898 (WA) and in the form of pastoral lease set out in the 24th Schedule thereof.

S105 of the Land Act 1933 (WA), equivalent to reg82 of the Land Regulations 1882 (WA), reg59 of the Land Regulations 1887 (WA) and s106 of the Land Act 1898 (WA) described the limited nature of the interest obtained by a lessee under a pastoral lease, the relevant parts of s105 reading as follows:

"105(1) Subject to subs(2) a pastoral lease shall give no right to the soil, or to the timber, except as may be required for domestic purposes, for the construction of airstrips, roads, buildings, fences, stockyards, or other improvements on the lands so occupied."

Under s106(1) of the Land Act 1933 (WA) specified qualifications, described as reservations, on the grant of a pastoral lease included reservation of use of the land in the pastoral lease for the making of public roads; for the taking of any material for public purposes; for the passage of any person, with or without stock, over unenclosed or enclosed but otherwise unimproved land in the pastoral lease on all necessary occasions; and, up until 1982, the right to sell any part of the leased land with a right of immediate entry by the Crown upon exercise of their right. In addition, in s109 of the Land Act 1933 (WA) the interests of the pastoral lessee were subject to the excision of any part of the land required by the Crown at any time for public purpose without compensation being payable other than for improvements. Land contained within a pastoral lease could be resumed and declared open for selection for homestead farms and working men's blocks and, until 1939, without compensation necessarily being paid for improvements. After 1963 land within pastoral leases could be resumed, declared open for selection and made subject to another pastoral lease to the "selector".

Under s46 and s47 of the Land Act 1933 (WA), land could also be withdrawn from a pastoral lease and declared open for selection as cultivable or grazing land under a "conditional purchase lease". Until 1963, under s56 of the Land Act 1933 (WA) and previously under s62 of the Land Act 1898 (WA), a pastoral lessee in the Kimberley Division could apply for a "conditional purchase lease" in respect of up to 1 per cent, but in any event not more than 2,000 hectares, of the Crown land within the pastoral lease.

Pursuant to the Mining Act 1904 (WA) and the Mining Act 1978 (WA) land subject to a pastoral lease was at all times subject to the grant by the Crown of possession to a third party for mining purposes, not limited to prospecting.

A similar position obtained in respect of land subject to a pastoral lease in the Territory.

Land subject to a pastoral lease remains Crown land as defined in the Land Regulations 1887 (WA) (reg2), the Land Act 1898 (WA) (s3) and the Land Act 1933 (WA) (s3). Unlawful occupation or trespass upon Crown lands is made an offence (Land Act 1898 (WA) (s135); Land Act 1933 (WA) (s164)). It was not contended that such provisions were intended to apply to native title holders. (See: Mabo (No 2) per Brennan J at 66, Deane, Gaudron JJ at 114; Wik per Toohey J at 120-121; per Gaudron J at 146-147; per Gummow J at 190-194.)

Furthermore, land in a pastoral lease is still "Crown land" for the purposes of other legislation dealing with control, management and possession of such land and of flora and fauna, to wit, legislation dealing with the mining of minerals and petroleum, drainage and catchment of water, and conservation of land, flora and fauna. (See: Mining Act 1904 (WA) (s3); Mining Act 1978 (WA) (s8); Petroleum Act 1936 (WA) (s4); Petroleum Act 1967 (WA) (s5); Land Drainage Act 1925 (WA) (s6); Wildlife Conservation Act 1950 (WA) (s6); Conservation and Land Management Act 1984 (WA) (s11)).

The nature of the foregoing limitations upon an interest granted as a pastoral lease under the Land Regulations 1882 (WA), Land Regulations 1887 (WA), Land Act 1898 (WA) and Land Act 1933 (WA) do not support a conclusion that the creation of the statutory interest of a pastoral lease by the Crown demonstrated a clear and plain intention by the Crown to extinguish native title in respect of land the subject of a pastoral lease.

In addition to the qualified nature of the possessory rights granted to a pastoral lessee, it is plain that the clauses of the statutory form of pastoral lease set out in the Land Regulations 1882 (WA), Land Regulations 1887 (WA), and the Land Act 1898 (WA) retained for Aboriginal people the right to enter, and to be on, unenclosed and enclosed but unimproved land on pastoral leases, to maintain their existence in their accustomed manner. The effect of that exception was to limit the interest granted by the Crown as a pastoral lease and to preserve an existing right of Aboriginal people. (Wade v New South Wales Rutile Mining Company Pty Ltd (1969) 121 CLR 177 per Windeyer J at 194; Wik per Gummow J at 200-201.) The statutory exception to, or reservation upon, the statutory interest granted in the form prescribed did not create a new right in Aboriginal people but reserved and acknowledged an existing right. (The Yandama Pastoral Company v The Mundi Mundi Pastoral Company Ltd (1925) 36 CLR 340 per Knox CJ at 348; per Higgins J at 377.)

The qualification expressed in s106(2) of the Land Act 1933 (WA), in place of the exception, or reservation, in the prescribed form of the pastoral lease, was not intended to have, and did not have, a different consequence for native title.

The use of that substantive statutory provision, which stated that access to unenclosed and unimproved land of pastoral leases for Aboriginal people seeking sustenance in their accustomed manner was unrestricted, made clear that the statutory interest granted to a pastoral lessee did not include a right in the lessee to exclude Aboriginal people from land held for pastoral purposes, nor permit the lessee to restrict the exercise of a right of Aboriginal people to the convenience of the lessee. The substance of the statutory provision was the acknowledgement by the Crown of an existing right based on custom and that such a right, although regulated, continued after the grant of a pastoral lease. Such a statutory provision made it unnecessary for the Crown to further define the nature of the interest granted as a pastoral lease by an express exception or reservation to the grant.

The history of legislative provisions in respect of pastoral leases before s106(2) was introduced, and the form of the subsection, does not support an argument that by s106(2) the Crown evinced a clear and plain intention to extinguish native title by the grant of a pastoral lease and create a new statutory right of access for Aboriginal people as a burden on a pastoral lessee's interest.

The reference to seeking subsistence, or sustenance, from the land in an accustomed manner made it plain that in the exception clauses, and in s106(2) of the Land Act 1933 (WA), the Crown acknowledged an existing right of access to land over which the Crown had granted rights to depasture stock. Such an acknowledgement was inconsistent with any intention to extinguish native title under which such rights of access and use arose.

In its terms, s106(2) does not create a right. It is a statement that nothing in an instrument granted under the Land Act 1933 (WA), namely, a pastoral lease, will prevent access by Aboriginal people to Crown land for the customary purpose of obtaining sustenance. In other words, the terms of a pastoral lease are not to be read as disposing of existing Aboriginal rights.

S106(2) is to be read with the knowledge that rights granted to a pastoral lessee by the Crown under a pastoral lease may subordinate rights of Aboriginal people under native title if the exercise of those rights conflicts with the exercise of rights granted by the Crown under a pastoral lease. Accordingly, the purpose of s106(2) is to make it clear that the right granted by the Crown to a pastoral lessee to make use of the fruits of the land of the pastoral lease is subject to and, therefore, cannot be in conflict with, an Aboriginal right to obtain sustenance from the same source.

Although it may follow necessarily that the grant of a pastoral lease may involve regulation of aboriginal rights arising under native title, it does not follow that it is the intention of the Crown that the grant of such an interest effect extinguishment of native title, the root of aboriginal rights in respect of the land, usufructuary and otherwise. As explained earlier, the Supreme Court stated in R v Sparrow (at 1097) that regulation is not to be confused with extinguishment. That an aboriginal right is controlled stringently or in great detail does not mean that right and title is intended to be extinguished.

Recognition by the Crown of an aboriginal right to enter and use land of a pastoral lease for usufructuary purposes, a right that is an incident of native title, and acknowledgement of the priority of that right over rights of a pastoral lessee created by the Crown, denies intention by the Crown to extinguish native title and with it such rights as are available thereunder, for example, rights to have access to the land for spiritual, ritual or ceremonial purposes, or to pass over, or through, the land as necessary according to traditional rights and practices.

The State submitted that the Western Australian land legislation, unlike the legislation considered in Wik, observed a remarkable degree of uniformity with, and adherence to, common law forms of tenure. However, the relevant legislation did not utilize a distinction between "leases" and "licenses" for pastoral purposes in the Kimberley District and it provided for numerous kinds of other leases (see: Pt4 to the 1st Schedule of the amending Act) indicating that as in other States there was an invention of Australian tenures of new types by land legislation in Western Australia. Further, at all relevant times the Regulations and legislation contained provisions equivalent to those discussed by the High Court in Wik which "effectually vested without the need for prior entry, the interest granted" (Wik per Gummow J at 189.) As Dr T P Fry states, the evolution of Crown leasehold tenures in Western Australia was destined to develop upon similar lines to colonies on the eastern seaboard. ("Land Tenures in Australian Law", Res Judicatae 3 (1947) 158 at 161.)

Reg3 of the Land Regulations 1882 (WA) provided, in relevant respects, that:

"The Governor is authorised,...to dispose of the Crown lands within the Colony in the manner and upon the conditions prescribed by these Regulations,...and all grants and other instruments disposing of any portion of Crown lands in fee simple or for any less estate made in accordance with such Regulations shall be valid and effectual in law to transfer to and vest in possession in the purchasers the land described in such grants or other instruments for the estate or interest therein mentioned."

Equivalent provisions were contained in the Land Regulations 1887 (WA) (reg3); the Land Act 1898 (WA) (s4) and the Land Act 1933 (WA) (s7).

It can be seen that at all relevant times a fundamental requirement for the creation and alienation of a statutory interest in lands of the Crown was completion by the Crown of an appropriate formal grant of interest.

After 1900 the Land Act 1898 (WA), (by s15 of Act No15 of 1900), provided that

"A Notice inserted in the Government Gazette, signed or purporting to be signed by the Minister or the Under Secretary for Lands, to the effect that any lease, license or other holding is forfeited for default in payment of rent, or for breach or non-observance or non-performance of the conditions thereof, shall be deemed equivalent to a re-entry and recovery of possession by or on behalf of the Crown within the meaning of the proviso for re-entry expressed in or implied by the lease, license, or other instrument".

Similar provisions are found in s163 of the Land Act 1933 (WA). Failure to pay rent under a pastoral lease issued under the Land Regulations 1882 (WA) (reg78) would result in the lessee forfeiting all right to land and the improvements thereon. Under the Land Regulations 1887 (WA) (reg101), such forfeiture would occur 120 days after notification in the Government Gazette (WA) of non-payment of rent.

It is unnecessary to further review the analysis of a pastoral lease, its statutory origins and purpose, as undertaken by the High Court in Wik. It is impossible to distinguish in any substantive way the facts relevant to the decision in that matter and the facts established in this case indicated by the limitations upon the interest of a pastoral lessee set out above. The conclusion must follow that in granting a pastoral lease the Crown did not act to extinguish native title. The expression of exception, or statutory reservation, in respect of the grant of a pastoral lease by which a lessee was unable to exclude as trespassers Aboriginal people exercising rights of the type which attach to a subsisting native title, provides further support for that conclusion.

There was nothing in the relevant legislation providing for the creation of a pastoral lease to show a clear and plain intention to effect extinguishment of native title by the grant of such a lease. The grant of a pastoral lease is not the creation of a permanent interest in respect of the land and, a fortiori, except for a few well-defined events, it is unlikely that an act by a pastoral lessee will amount to actual use of the land in a manner permanently inconsistent with the continued existence of native title in respect of the portion of land used for that purpose.

Under the Land Regulations 1887 (WA) a pastoral lessee was required to comply with stocking requirements or prescribed expenditure on improvements within seven years from the date of application for the lease (reg74).

This provision was repeated in s101 of the Land Act 1898 (WA) until repealed in 1906. After 1917 (Land Act Amendment Act 1917 (WA) s33 (3)) it was a condition of all pastoral leases that there be prescribed expenditure on improvements. There was a similar provision in the Land Act 1933 (WA) (s102) until 1963. Thereafter, plans of proposed pastoral improvements were to be submitted by pastoral lessees. No improvements were to be made otherwise than in accordance with such a plan.

Reg105 of the Land Regulations 1887 (WA) provided that no improvements would be considered for the purpose of the Regulations:

"unless the Commissioner shall be satisfied that the same were made bona fide for the purpose of improving the land or increasing the carrying capacity thereof, and unless the same shall consist of wells of fresh water, reservoirs, tanks or dams of permanent character and available for the use of stock,... or of fences, sheds, and buildings erected for farm or shearing and station purposes, not being dwelling houses (except where such dwelling houses exist upon a pastoral lease); or of cultivation, sub-division fences, clearing, grubbing, draining, ring-barking..., or any improvement for maintaining or improving the agricultural or pastoral capabilities of the land".

Improvements were defined in similar terms in the Land Act 1898 (WA) (s145) and the Land Act 1933 (WA) (s140), however, after 1963 a dwelling house on a pastoral lease was not considered an improvement for the purposes of the Land Act 1933 (WA) (Land Act Amendment Act 1963 (s24)).

Of the improvements contemplated by the Act only dwelling houses, and possibly reservoirs and dams, are of sufficient permanence to indicate an intention to extinguish native title by adverse dominion. Erection of fencing cannot be considered an act giving effect to a Crown intention to extinguish native title. It must be associated with some other intensive use of the land that is contemplated before it could be said to reflect a clear intention to extinguish native title. (See: Wik per Gaudron J at 166; per Gummow J at 203.)

The only dwelling houses in the claim area that were said to constitute improvements for the purpose of a pastoral lease were the homesteads of Argyle Downs, Goose Hill, Lissadell and Glen Hill.

The Argyle Downs homestead was constructed on land held under freehold tenure discussed above and it is unnecessary to consider whether the construction of the homestead itself would have had an extinguishing effect. No evidence was submitted to show that the Goose Hill homestead was an improvement relied upon by a pastoral lessee to satisfy the requirements of a pastoral lease. Expenditure on the old homestead at Lissadell was included as expenditure on improvements on a pastoral lease. It is now part of Reserve 31165. Similarly, the expenditure on Glen Hill homestead was included as expenditure upon improvements by the pastoral lessee. The State did not contend that either homestead construction was, in itself, an act that extinguished native title.

The Report on Improvements on Pastoral Leases within the claim area (Ex 24) does not report any substantial dams or reservoirs constructed as improvements on pastoral leases.

There was no evidence in respect of permanent improvements in the way of dwellings or dams or reservoirs constructed by reason of requirements in pastoral leases issued in respect of the Territory area.

Apart from the stocking requirements it was not submitted that there were any conditions added to the pastoral leases issued in the claim area requiring improvements to be made to the lease.

In light of the foregoing conclusion that neither the grant of a pastoral lease or use of the land pursuant to the lease reflected a Crown intention to extinguish native title, it is unnecessary to consider further submissions by the first applicants that the State had not proved that valid leases were issued under the Land Regulations 1882 (WA) and the Land Regulations 1887 (WA) in respect of pastoral leases issued prior to 1898.

(ii) Territory

Until 1926 the land which became the Territory area was included in two pastoral leases granted under the Northern Territory Crown Lands Act 1890 (SA). The leases were in statutory form under regulations made under that Act. In substantial respects, pastoral leases over land in the Territory were subject to similar limitations as those considered above in respect of pastoral leases issued by the State. For example, reservation to the Crown of rights to timber and minerals, and reservation of rights of third parties to travel through the lease with or without stock. Pursuant to reg39 of the Regulations made under the Northern Territory Crown Lands Act 1890 (SA) a pastoral lease was subject to such conditions as the Governor in Council thought necessary to insert for the protection of Aborigines. The clause inserted in the relevant leases was in the following form:

"...Excepting out of this lease to Aboriginal Inhabitants of the Province and their descendants during the continuance of this lease full and free right of ingress egress and regress into upon and over the said lands and every part thereof and in and to the springs and natural surface water thereon and to make and erect such wurlies and other dwellings as the said

Aboriginal Natives have been heretofore accustomed to make and erect and to take and use for food birds and animals ferae naturae in such manner as they wold have been entitled to do if this lease had not been made..."

After 1926 the Territory area was included within a pastoral lease granted under the Crown Lands Ordinance 1927 (NT). The statutory form of lease was "subject to a reservation in favour of the aboriginal natives of Northern Australia". S21 of the Crown Lands Ordinance 1927 (NT) provided as follows:

"21. In any lease under this Ordinance -

...

(e) a reservation in favour of the aboriginal inhabitants of North Australia shall be read as a reservation giving to all aboriginal inhabitants of North Australia and their descendants, full and free right of ingress, egress and regress into, upon and over the leased land and every part thereof, and in and to the springs and natural surface water thereon, and to make and erect thereon such wurlies and other dwellings as those aboriginal inhabitants have before the commencement of the lease been accustomed to make and erect, and to take and use for food birds and animals ferae naturae in such manner as they would have been entitled to do if the lease had not been made."

In 1958 the Territory area became subject to a pastoral lease ("the Newry pastoral lease") granted under the Crown Lands Ordinance 1931 (NT) which included the same form of lease and a similar statutory reservation as set out above.

In 1979 a pastoral lease was granted under Crown Lands Ordinance (No 3) 1978 (NT), expressed to be subject to a reservation in favour of the Aboriginal inhabitants of the Territory. In respect of such a reservation s24(2) of the Crown Lands Ordinance (No 3) 1978 (NT) provided as follows:

"24...

...

(2) ...in any lease under this Ordinance a reservation in favour of the Aboriginal inhabitants of the Northern Territory shall be read as a reservation permitting the Aboriginal inhabitants of the leased land and the Aboriginal inhabitants of the Northern Territory who in accordance with Aboriginal tradition are entitled to inhabit the leased land -

(a) to enter and be on the leased land;

(b) to take and use the natural waters and springs on the leased land;

(c) subject to any other law in force in the Northern Territory, to take or kill for food or for ceremonial purposes animals ferae naturae on the leased land; and

(d) subject to any other law in force in the Northern Territory, to take for food or for ceremonial purposes any vegetable matter growing naturally on the leased land."

In 1979, 251 square kilometres of the leased land was surrendered by agreement between the pastoral lessee and the Territory. That land later became, by declaration, the Keep River National Park. In 1985, 335 square kilometres of land adjacent to the Park was surrendered to the Territory under an agreement made between the pastoral lessee and the Commission that the area be surrendered.

With respect to the form of Territory pastoral leases, for the reasons already given in respect of State pastoral leases, limitation of the statutory interest granted by the colony of South Australia, and later by the Territory by statutory reservation, was an acknowledgement by the Crown of rights of the type attaching to a subsisting native title. The form of statutory interest described as a pastoral lease was moulded to coexist with the exercise of the existing rights of Aboriginal people. No intention to extinguish native title is manifested in the actions of the Crown and, to the contrary, it is made plain that the Crown had no intention so to act.

The Territory further submitted that the provision described as a reservation constituted the substitution of statutory rights for rights obtained under native title and demonstrated an intention by the Crown to extinguish native title. The Territory referred to Mayor of New Windsor v Taylor [1899] AC 41 in support of its submission. In that case a prescriptive right to exact tolls was replaced by authority provided by statute. It was held that the original prescriptive right no longer existed. Those circumstances have nothing in common with the facts of this case. Here the Crown reserves, or excepts, from the interest that it grants, an interest sufficient to preserve continued exercise of pre-existing rights of third parties. No new rights are conferred in replacement of existing rights.

It was submitted that words used in the exception clauses of the first leases, namely, "as they would have been entitled to do if the lease had not been made" were words which acknowledged that the effect of the lease was to destroy a pre-existing right and to provide for replacement of that right. Those words must be read with the terms and purpose of the exception to the grant made by the Crown. The exception is an acknowledgement by the Crown that the Crown's interest in the land is subject to rights of Aboriginal inhabitants. By reason of the exception the interest granted to a lessee cannot be said to reflect a Crown intention to extinguish native title which, therefore, continues notwithstanding the grant of a pastoral lease. In effect, the words amount to a statement that such an entitlement of Aboriginal inhabitants would not be in issue if a lease were not granted, and the effect of the exception will be that the entitlement will continue as if the lease had not been made.

By reason of the exception, or reservation, to the interest granted by the Crown to a pastoral lessee, the interest of a pastoral lessee is also burdened by the native title which burdens the title of the Crown. Under the grant of a lease the pastoral lessee does not receive an interest that is free of that burden, although rights granted by the Crown to the pastoral lessee will be concurrent with rights exercisable under native title and in some circumstances may be intended by the Crown to have priority over the latter when exercised.

Whether, or to what extent, the interest created by the Crown in the form of a pastoral lease regulated the exercise of rights under a subsisting native title is unnecessary to consider. The question to be determined is whether, by the grant of a pastoral lease, the Crown extinguished native title and it is clear that it did not.

It was further submitted by the Territory that unlike the form of pastoral lease considered in Wik, pastoral leases granted over Territory land conferred "a right of exclusive possession". I am unable to discern any difference of significance in the form of the respective leases. In particular, the interest granted by the Crown as a pastoral lease in the Territory did not include a right to exclude Aboriginal people exercising existing rights. The right of possession of Crown land for pastoral purposes granted to a lessee under a pastoral lease was not an exclusive right and, at the time of grant, was subject to the rights of access and use of Aboriginal people arising under native title.

(b) Vesting of Keep River National Park and leases to the Corporation

The land surrendered to the Crown from the Newry pastoral lease in 1979 was, as Crown

land, leased in perpetuity to the Corporation in 1980. The lease was made under the Special Purposes Leases Act 1953 (NT) as a lease for the purpose of carrying out the functions of the Commission in accordance with the Conservation Commission Act 1980 (NT) (now Parks and Wildlife Commission Act (NT)) and the Territory Parks and Wildlife Conservation Act (NT). In 1981 the area leased was declared a park pursuant to the Territory Parks and Wildlife Conservation Act (NT).

The adjacent area surrendered to the Territory in 1987 was, at the time of that surrender, made the subject of a perpetual Crown lease, granted to the Corporation under the Crown Lands Act 1978 (NT) for the purpose of carrying out the functions of the Commission in accordance with the Conservation Commission Act 1980 (NT) and the Territory Parks and Wildlife Conservation Act (NT).

In June 1989 part of the land leased to the Corporation was excised from the Park and, together with contiguous land which had been surrendered to the Territory by the Corporation from the adjacent Crown lease, was granted by the Crown to Nyawanyawam Dawang Aboriginal Corporation in 1990 as freehold land.

The Crown grant of freehold land to Binjen Ningguwung Aboriginal Corporation in 1990 was land surrendered to the Territory by the Corporation from the Crown lease adjacent to the Park. The land granted by the Crown to Dumbral Aboriginal Community Association was land contiguous with that Crown lease surrendered to the Territory by the pastoral lessee of the Newry pastoral lease.

The leases granted to the Corporation in perpetuity under the Special Purposes Leases Act 1953 (NT) and the Crown Lands Act 1978 (NT) were instruments used by the Crown for the better management of Crown land for the purpose of the Territory Parks and Wildlife Conservation Act (NT). Leases in perpetuity are unknown to the common law. (Wik per Gummow J at 201.) The Corporation is a body corporate under s27 of the Parks and Wildlife Commission Act (NT). S29 provides that the Corporation is not an authority or instrumentality of the Crown and is not subject to the control and direction of the Minister of the Crown. The function of the Corporation, as set out in s39, is to acquire, hold and dispose of real property (including any estate or interest in real property) in accordance with the Parks and Wildlife Commission Act (NT). It provides further that the Commission has the care, control and management of all land acquired by the Corporation. The functions and powers of the Commission in respect of promotion and conservation or

management of land are set out in s19 and s20 of the Parks and Wildlife Commission Act (NT). S21 provides that the Commission shall not acquire or hold any estate or interest in real property and under s22 the Commission is subject to the direction of the Minister both in the performance of its functions and the exercise of its powers.

The effect of the leases was little different from a reservation of Crown land for a prescribed public purpose or the vesting of reserved land in a body to manage and control Crown land for the public purpose of the reservation.

The interests in leases granted to the Corporation were interests prescribed by statute granted for statutory purposes. The interest obtained by the Corporation in the land was solely for the purposes of the Parks and Wildlife Commission Act (NT) and the Territory Parks and Wildlife Conservation Act (NT), in particular, to enable the Commission to carry out its functions in respect of the management of land and the protection and conservation of wildlife.

S122 of the Territory Parks and Wildlife Conservation Act (NT) provides as follows:

"122(1) Subject to subs(2), nothing in this Act prevents Aboriginals who have traditionally used an area of land or water from continuing to use the area of land or water for hunting, for food gathering (otherwise than for purposes of sale) and for ceremonial and religious purposes.

(2) The operation of subs(1) is subject to regulations made for the purposes of conserving wildlife in any area and expressly affecting the traditional use of the area by Aboriginals."

The statutory powers and functions of the Corporation, and the Commission, are governed by the terms of s122 and it follows that the statutory leases granted to the Corporation for the purpose of carrying out the functions of the Commission under that Act cannot be read as intended to create an interest free of an aboriginal right at law to make traditional use of any part of the leased land for hunting, food gathering, ceremonial or religious purposes.

It may be concluded, therefore, that by the grant of the leases to the Corporation, the Crown, in the right of the Territory, did not manifest a clear and plain intention to extinguish native title. The interest granted by the Crown to the Corporation was predicated upon the assumption, expressed in s122 of the Territory Parks and Wildlife Conservation Act (NT), that performance of the functions of the Corporation, and the Commission, could coexist with the exercise of rights of the character derived under native title. Whilst management of the Park involved carrying out improvements, those improvements were of a minor nature insufficient to reflect an overriding intention by the Crown to have native title extinguished by manner of use of the Park area.

The Territory submitted that in respect of the land that in 1981 became subject to the declaration of a park pursuant to s12(1) of the Territory Parks and Wildlife Conservation Act (NT), s12(7) had the effect of "vesting" that land in the Corporation and by the operation of that provision the Crown had clearly demonstrated an intention to extinguish native title.

That submission raises several questions of construction.

S12(7) of the Territory Parks and Wildlife Conservation Act (NT) provides that upon declaration of a park all right, title and interest, both legal and beneficial, held by the Territory in respect of the land within the park becomes vested in the Corporation by force of the section. No argument was submitted that the lease to the Corporation merged with the interest vested in the Corporation by statute. (See: Blackstone, Commentaries, Bk II, 177; Rye v Rye [1962] AC 496 at 513.)

Under s13 of the Territory Parks and Wildlife Conservation Act (NT) notice of declaration of a park may be revoked or amended and if land, "other than land leased by the Corporation as lessee", ceases to be land within a park, all right, title and interest held by the Corporation in respect of that land becomes, by force of s13(3), vested in the Territory. The notice of declaration of the Park was amended in December 1989 by excising from the Park the area later included in the Crown grant to Nyawanyawam Dawang Aboriginal Corporation in 1990.

Pursuant to s13(4), if land that ceases to be land within a park is land leased to the Corporation, the lease of that land, by force of the subsection, is "surrendered".

S12(7), read in the context of s13, appears to contemplate that where land is leased to the Corporation by the Territory no greater interest is "vested" in the Corporation under that section. If it were otherwise, the surrender of a lease of land "vested" in the Corporation would not re-vest that land in the Territory.

If it were the intention of the legislature that the words "land leased by the Corporation as lessee" be restricted to land leased to the Corporation by a lessor other than the Crown or emanation of the Crown, one would expect to find appropriate words of limitation.

The provisions appear to accept that a lease of land to the Corporation by the Crown creates a sufficient interest in the land for the Corporation for the purposes of the Act. However, even if a "reversionary interest" in land leased in perpetuity to the Corporation is to be taken to be vested in the Corporation as a statutory interest, the statutory interest enjoyed by the Corporation is a limited interest determinable at will upon revocation by the Crown of the declaration of the Park. It falls well short of equivalence to an interest in fee simple in the land.

The Corporation is a public body created to perform a limited function for a public purpose. The only function of the Corporation is that set out in s39(1) of the Parks and Wildlife Commission Act (NT), namely, "to acquire, hold and dispose of real property (including any estate or interest in real property) in accordance with this Act..."

By s39(6) the Commission has the care, control and management of all land acquired by the Corporation. It may be assumed that that function of the Commission extends to land acquired on lease by the Corporation. The Commission is the body that carries out all functions in giving effect to the purpose of the Parks and Wildlife Commission Act (NT) which, according to the long title thereof, at the relevant time, was "to establish a Conservation Commission to assist in the conservation and protection of the environment and for related purposes".

That the Corporation, under the Parks and Wildlife Commission Act (NT), is a person other than the Crown is irrelevant to the nature of any statutory interest "vested" in the Corporation by s12(7) of the Territory Parks and Wildlife Conservation Act (NT). (cf The Queen v Kearney; Ex parte Japanangka (1984) 158 CLR 395.) The only capacity the Corporation has to deal with real property is to acquire, hold and dispose of it in accordance with the Parks and Wildlife Commission Act (NT), in other words, to meet the requirements of, and as directed by, the Commission.

Furthermore, as already noted, the terms of s122 of the Territory Parks and Wildlife Conservation Act (NT) govern the functions and powers of the Corporation and make it clear that the exercise of rights of the type which would attach to a subsisting native title would continue notwithstanding any provisions in that Act for the vesting of land set aside for a public purpose under that Act.

As stated by the Privy Council in Attorney-General for the Province of Quebec v Attorney-General for the Dominion of Canada [1921] 1 AC 401 at 409:

"...a declaration that lands are 'vested' in a public body for public purposes may pass only such powers of control and management and such proprietary interest as may be necessary to enable that body to discharge its public functions effectively."

Although s12(7) of the Territory Parks and Wildlife Conservation Act vests a "legal and beneficial" interest in the Corporation, it is a statutory interest that is subject to the substantial reservations set out in that Act and does not become property within the absolute control of the Corporation. Furthermore, the interest vested is determinable at will upon revocation, or amendment, of a park declaration.

The vesting of the interest in the Corporation by statute is for management of the land for a public purpose and no more. The extent to which the Corporation may enjoy any vested legal or beneficial interest is determined by the terms of the statute which vests it. (See: The Sydney Harbour Trust Commissioners v Wailes (1908) 5 CLR 879 per Isaacs J at 888.)

Pursuant to s18 of the Territory Parks and Wildlife Conservation Act (NT) as soon as practicable after a park has been declared, the Commission is to prepare a plan of management in respect of the park. Two such plans were tendered by the Territory, the first of which came into operation in 1982 (Ex NT 6) and the second in 1991 (Ex NT 7).

Specific reference to the rights and interests of Aboriginals in the area of the Park is made in both plans. For example, in the first plan, one of the objectives of the plan was "to maintain its values for the Aboriginal people, give special protection to the Aboriginal art sites, and other sites of significance, and have regard to the interests of Aborigines associated with the Park".

The second plan acknowledges that "the traditional custodians of the area, the Mirriwung and Gadjerong people, assisted greatly in providing the Plan with its Aboriginal perspective..." Chapter 5 deals with "Management for Aboriginal Interests" and states the following as objectives:

o "To take fully into account in the management of the Park, the interests and concerns of the traditional Aboriginal custodians for the area."

o "In conjunction with the traditional owners, to manage and protect sites of spiritual or other significance to them."

o "To record, document and protect Aboriginal sites, artefacts, cultural resources and tradition according to the wishes of the traditional custodians."

o "In accordance with the wishes of the traditional custodians to enable visitors the opportunity to appreciate and understand the significance of the Aboriginal cultural resources of the Park through appropriate interpretive programmes."

Clearly, the purpose and use of the Park pursuant to the lease and vesting, reflected in the management plans, is not to effect extinguishment of any native title interests but to protect and maintain those interests.

It is to be concluded from the foregoing that the vesting of part of the land of the Territory area in the Corporation by s12(7) of the Territory Parks and Wildlife Conservation Act (NT) upon declaration of the Park, displayed no intention by the Crown through the legislature to extinguish native title by operation of that statutory provision.

In response to submissions of the second applicants that the acts of the grant of leases to the corporation were "category D past acts", the Territory submitted that if the acts were "past acts", which was denied, they were "category B past acts" and by operation of s7 of the Validation of Titles and Actions Act 1994 (NT) native title, "to the extent of any inconsistency" of those acts with the continuation of the existence, enjoyment or exercise "native title rights and interests", was extinguished.

In the light of the foregoing finding that native title has not been affected by acts of the Crown described above it is unnecessary to deal with further submissions as to the effect of "validation" provisions enacted pursuant to the Act in respect of acts of the Crown which affected native title before 1 January 1994.

As set out above the grant of the leases to the Corporation was not incompatible with the continuation of native title and at law native title was not extinguished. Rights exercisable under native title may have been subject to regulation, not by grant of the lease but by measures for protection and conservation undertaken by the Commission but, of course, the prospect of such regulation does not show a clear and plain intention by the Crown to extinguish native title.

In so far as s7 of the Validation of Titles and Actions Act 1994 (NT) applies the Act, it is dependent upon the concept of extinguishment of native title at common law discussed earlier in these reasons and s7 of the Validation of Titles and Actions Act 1994 (NT) had no operation upon the grant of leases to the Corporation.

With regard to the grants of freehold to the Binjen Ningguwung Aboriginal Corporation, Nyawanyawam Dawang Aboriginal Corporation and Dumbral Aboriginal Community Association made in 1990 and 1993, it must be concluded that the grant of a statutory freehold interest described in the Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989 (NT) was not intended to have the effect of extinguishing native title in respect of those areas of land. Indeed, the Territory did not rely on those grants as acts which extinguished native title.

Pursuant to the Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989 (NT) the purpose of the Act was to give effect to a memorandum of agreement between the Commonwealth and the Territory for the granting of "community living areas" on pastoral leases in the Territory. The long title of the Act stated that it was "An Act to amend certain Acts to make provision for the excision of certain areas of land from pastoral leases and the granting of an estate in fee simple in those areas as living areas for the benefit of Aboriginals who are or have been ordinarily resident on those pastoral leases or other Aboriginals, and for related purposes." As noted above, the grant to the Dumbral Aboriginal Community Association was of a parcel of land excised from the Newry pastoral lease and contiguous with the land leased to the Corporation. Although the grant to the Dumbral Aboriginal Community Association was made under the Crown Lands Act 1978 (NT), the relevant terms of that Act in respect of that grant were as set out in the Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989 (NT) and discussed above.

In each case the form of freehold interest was a statutory creation for a specific purpose and, notably, was an interest subject to specific statutory restrictions as to disposal.

Having regard to the nature of the interest created under the relevant statutory provisions, it is not possible to be satisfied that such a provision evidenced a clear and plain intention on the part of the Crown to extinguish native title to the relevant land. The principles discussed and applied in Pareroultja v Tickner (1993) 117 ALR 206 compel that conclusion.

(c) Freehold Interests

There were three parcels of land within the claim area in respect of which interests in "fee simple" had been granted by the Crown before 1 January 1994.

(i) Crown Grants

In 1921, a grant of 400 hectares of land, part of the Argyle Downs pastoral lease, was made to Connor Doherty Durack Ltd, the pastoral lessee. The Argyle Downs homestead was situated on that land. The company became entitled to a Crown grant pursuant to s55(6) of the Land Act 1898 (WA) upon fulfilment of the conditions of a Conditional Purchase Lease issued under s62, and in the form of the 9th Schedule of the Land Act 1898 (WA). Under s4 of that Act, the Governor was authorized to dispose of Crown land by, inter alia, a grant in fee simple "upon such terms and conditions as to resumption of the land or otherwise as to him shall seem fit."

The words of the grant were as follows:

"the natural surface and so much of the land as is below the natural surface to a depth of 110 feet...: TOGETHER with all Profits, Commodities, Heriditatements and Appurtenances whatsoever thereinto belonging, or in anywise appertaining: TO HAVE AND TO HOLD...unto the said *Grantee, its successors and assigns, for ever*: if and they YIELDING and PAYING for the sums to Us...one peppercorn of yearly rent..." [emphasis added]

The grant was expressed to be subject to reservations to the Crown of the power to resume up to one-twentieth of the land for use for public purposes without payment of compensation other than for improvements thereon; power to cut and take timber and to search and dig and carry away stones and other materials on the land as may be required for public works; and the full right to minerals precious metals and gems and to enter upon the land to search and dig and carry them away.

It is to be inferred from the words of grant that an estate in fee simple was granted by the Crown. (See: Fejo per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 728.) Although the grant is expressed to be subject to the payment of a yearly rent of one peppercorn, that provision, albeit inappropriate, is not inconsistent with a grant in fee simple, being a statutory form of a feudal rent charge, quit rent or chief rent, a charge on freehold land almost unknown in England since 1290. (See: R E Megarry and H W R Wade, "The Law of Real Property" at 818-829; T P Fry, "Land Tenures in Australian Law" at 160.)

By reason of the grant, the company was recorded on a register of titles under the Transfer of Land Act 1893 (WA) as the registered proprietor of an estate in fee simple in the land.

The reservations to the grant were in favour of the Crown and did not provide rights in the land in third parties and, in effect, apart from resumption without payment of compensation, reflected statutory powers of, and reservations by, the Crown similar to those affecting other freehold land in the State. Therefore, it cannot be said that in granting this interest the Crown did not evince a clear and plain intention to extinguish native title. (See: Fejo per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 736-739.)

In 1974 land was conveyed to the Commonwealth of Australia by a Crown grant in similar terms under the Land Act 1933 (WA). Pursuant to s141 of that Act, however, resumption of land granted by the Crown was subject to the payment of compensation. The Commonwealth was registered as proprietor of an estate in fee simple in the land. A telecommunications facility, known as the Lake Argyle Telephone Exchange, was constructed on the site in 1975.

While the use of the land by the Commonwealth may have been limited by the purpose of the acquisition (see: s6 and s8 Lands Acquisition Act 1955 (Cth)) no such limitation is imposed by the State on the grant and the estate granted did not contemplate the enjoyment by anyone else of rights and interests in the land. (See: Fejo per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 736.)

In 1984 a Crown grant of land near Kununurra, in the same terms as above, was made to S G Muller under the Land Act 1933 (WA). Muller was registered as proprietor of an estate in fee simple in the land. That land was not land in the claim area. In October 1994, under s118CA of the Land Act 1933 (WA), the Minister for Lands approved the amalgamation of a contiguous portion of Crown land with the land previously granted to Muller and declared that such contiguous Crown land vest in Muller's successors in title in the same interest as that held in the land with which the Crown land was amalgamated.

No submissions were made by the respondents in respect of the effect of this declaration on native title. It is apparent, however, that the purported vesting of an interest in fee simple after 1 January 1994 could have no effect on native title unless the requirements of the "future act" provisions of the Act were met. (Sections 22 and 235 of the Act (as it stood at the relevant time)). (See: Fejo per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 729)

The effect of the repeal of those sections and the insertion of Div 2A by the amending Act pursuant to which a law of the State may "validate" such an act, is unnecessary to consider.

In addition to the parcel of Crown land vested as above, a number of other lots were "alienated" by the Crown after 1 January 1994.

In 1996 a lot, 380 hectares in area, was sold by the Crown to Innes Holdings Pty Ltd, the thirteenth respondent, for a sum of approximately $312,000 and conveyed by Crown grant under the Land Act 1933 (WA). The grant was in the same terms as those discussed above, including the payment of a yearly rent of one peppercorn.

The land is on the north-east extremity of the land served by the irrigation scheme and is now an irrigated farm. Prior to sale, it was vacant Crown land. On the boundaries of the lot were several stormwater drains and an irrigation system drain constructed in 1964.

The land was not included in the land released as irrigated farm lots in 1964 because the cost of the works needed to supply the land with water and the nature of the drainage system required to be constructed on the lot made it uneconomic to develop. The land was offered for sale by tender in 1994 on the condition that the successful tenderer construct the works required to supply irrigation water to the lot.

At the time the land was sold by the Crown the native title claim of the first applicants had been lodged with the Tribunal. The State contended that native title had been extinguished when the land was resumed from the Ivanhoe pastoral lease and, therefore, alienation of the land would not "affect" that title and the "future act" provisions of the Act did not apply. Alternatively, the State submitted that the grant of a freehold interest was a "category A past act" pursuant to s229(4) of the Act as the "establishment" of a public work had commenced before 1 January 1994 and the act was "validated" by the Titles Validation Act 1995 (WA). It may be assumed from the contention by the State that native title had been extinguished that no compensation was offered to native title holders before the Crown grant was made and that "invalidity" was attracted to the act of grant by provisions of the Racial Discrimination Act 1975 (Cth).

As discussed later in these reasons, the act of resumption of Crown land with the intention of making the land available for use for a public purpose was not sufficient in itself to show Crown intention to extinguish native title. Application of the land to the declared purposes of permanent and incompatible character was required before native title could be said to be extinguished. The lot the subject of the Crown grant to the thirteenth respondent was not land appropriated by the Crown in 1964 for development as irrigated farmland and alienation by the Crown to third parties. The decision by the Crown in 1996 to appropriate this area of vacant Crown land for development as irrigated farmland and to alienate the interest of the Crown therein was a separate act, not the "completion" of a "public work" commenced before 1 January 1994.

The thirteenth respondent submitted that pursuant to s228(3) of the Act the grant of the land to the thirteenth respondent was a "past act" as it gave effect to, or otherwise was because of, an offer, commitment, arrangement or undertaking made, or given, in good faith before 1 July 1993.

The only material relied upon by the thirteenth respondent to support that submission was the admitted fact that in April 1993 the Ord Development Council resolved to recommend to the Minister that the land be offered for conditional sale by tender. Plainly, those circumstances did not meet the requirements of s228(3).

The consequence of the act of alienation of the land by the Crown in 1996 is as discussed above in respect of the vesting of land in Muller.

A different conclusion may follow in respect of two parcels of Crown land vested in Murlroam Pty Ltd (one of the sixth respondents) in July 1996 by declaration of the Minister under s118CA of the Land Act 1933 (WA).

The vested land was amalgamated with a property of which the company was registered as proprietor of an estate in fee simple and on which it conducted a fuel supply business on the eastern boundary of the Kununurra townsite.

It was submitted by counsel for the sixth respondents that the declaration vesting the land had given effect to an offer made, or given, in good faith by the Crown before 1 July 1993 and that the vesting was a "past act" pursuant to s228(3) of the Act.

The admitted facts show that the Crown, in correspondence forwarded by departmental officers in 1991, had, in effect, offered, subject to compliance with several minor conditions, to alienate the relevant land. The facts are sufficient to attract the operation of s228(3) to make the declaration a "past act" to which s5 of the Titles Validation Act 1995 (WA) applied.

Other land conveyed by the Crown after 1 January 1994 as freehold interests were residential lots of land in the Kununurra townsite, described as the Lakeside Stage 4 Subdivision. The lots were sold by auction in 1994 and Crown grants issued under the Land Act 1933 (WA) in the same terms as the Crown grants discussed above. The purchasers of the lots are registered under the Transfer of Land Act 1893 (WA) as proprietors of estates in fee simple in the land and some of them are included as sixth respondents.

Subdivision of the land was prepared by departmental officers under the control and direction of the Minister. Before 1 January 1994 the lots were planned, surveyed and marked out; the land cleared and levelled; sewers, drains, footpaths and roadways constructed and sealed; and telephone and electricity services installed.

Either by the permanent nature of the acts of the Crown giving effect to the purpose for which the land was set aside, namely, development of a townsite, or by operation of s228 and s229(4) of the Act, which, in the circumstances described, would include as a "public work" the alienation of the land by Crown grant after 1 January 1994, a "past act" intended to extinguish native title occurred to which s5 of the Titles Validation Act 1995 applied.

(ii) Permit to occupy Crown land prior to issue of Crown grant

In January 1918 Reserve 16729 ("Use and Requirements of the Government of the State") was created, which included land formerly held in other reserves, under pastoral leases and under a special lease. The area of the Reserve was approximately 30,000 hectares. It was situated outside the townsite of Wyndham between Wyndham and Goose Hill. A major part of that land is outside the claim area as established by the evidence.

In June 1918 the purpose of the Reserve was amended to "Use and requirements of the Government of the State in connection with the Wyndham Freezing, Canning and Meat Export Works". In August 1918 an application was made under s42 of the Land Act 1898 (WA) for a Crown grant of the land contained in the Reserve. The purpose of the grant applied for was "For the Use and Requirements of the Government of the State in connection with the Wyndham Freezing, Canning and Meat Export Works". S42 provided for the vesting of a reserve in a municipality or other person in trust for a public purpose or grant of fee simple in a reserve to secure the use thereof for the purpose for which the reserve was made.

The application was signed by H B Lefroy. Details endorsed on the application indicate that the application was approved on 2 October 1918.

On 27 September 1918 a Permit to Occupy Rural Lands ("the Permit") was issued under s16 of the Land Act 1898 (WA) to the "Wyndham Freezing, Canning and Meat Export Works, incorporated as a State Trading Concern" ("the Works") in respect of the land in the Reserve. In June 1918 the Works had been established as a State trading concern subject to the State Trading Concerns Act 1916 (WA) by the Wyndham Freezing, Canning and Meat Export Works Act 1918 (WA).

S16 of the Land Act 1898 (WA) provides that after payment of the purchase money and fee payable for a Crown grant, and having performed all conditions, a purchaser shall, on application, receive from the Minister a permit to occupy, in a form set out in the appropriate Schedule to that Act, being a certificate that the purchaser is entitled to a Crown grant.

The Permit was issued to the Works by H B Lefroy. H B Lefroy was the Minister for Lands and the Minister in control of the Works. It is to be noted that the Permit was issued before the application for the Permit was approved.

The Permit stated that the holder was entitled to receive a grant from the Crown of an estate in fee simple but that the grant had not yet been prepared. It permitted the holder to "enter upon the said tract or parcel of land, and to hold and enjoy the same for his and their absolute use and benefit; subject to the provisos contained in the prescribed form of Crown Grant for rural lands in the Third Schedule to The Land Act 1898.'"

Under s6 of the State Trading Concerns Act 1916 (WA) the administration of the Works was under the control of a Minister of the Crown charged by the Governor with that function and all property, assets, and rights vested in the Crown for the purposes of the Works became vested in the Minister upon appointment to those duties. It may be said that at the time of the formation of the Works the Reserve became vested in the relevant Minister, H B Lefroy.

According to the evidence, the land referred to in the Permit was not surveyed and a Crown grant did not issue. S12 of the Land Act 1898 (WA) provided that all Crown grants must be signed by the Governor, Minister and Surveyor-General and dated and sealed with the seal of the Colony and entered on record in the Department of Lands and Surveys. The date endorsed on the grant is deemed to be the date of issue.

The State submits that a Crown grant, or alternatively the Permit, was entered in a register maintained under the Transfer of Land Act 1893 (WA) and thereafter an indefeasible interest in the land had been obtained under s68 of that Act. However, under the Transfer of Land Act 1893 (WA), as it then stood, registration of a grant in fee of Crown land, and hence the protection of s68, depended upon the deed of grant being delivered to the Registrar of Titles and the Registrar making out a certificate of title and endorsing a memorandum on the grant specifying the folium of the Register Book where the certificate of title is bound (s18). A certificate of title is not deemed, or taken, to be "registered" under the Transfer of Land Act 1893 (WA) until the Registrar has marked on that certificate the volume and folium of the Register Book in which it is bound (s52).

There was no deed of grant and no certificate of title was made out. The record relied upon by the State appears to be a register of details relating to applications for Crown grants. It is to be noted that unlike every other entry in the relevant pages of that register there is no notation of a freehold interest being created and no record of the issue of a sealed deed of grant as required by s12 of the Land Act 1898 (WA). It appears that the Permit was delivered to the Registrar of Titles in 1918 and filed but, of course, no memorandum was endorsed on the Permit by the Registrar and no certificate of title prepared by reason of presentation of the Permit. It was only the sealed Crown grant with which s18 of the Transfer of Land Act 1893 (WA) was concerned not a permit to occupy issued under s16 of the Land Act 1898 (WA).

At material times it would seem that the land was vested in the Minister for the purpose of the Reserve and that the Minister was not registered as a proprietor of an estate in fee simple under the Transfer of Land Act 1893 (WA).

Between 1918 and 1962 the Reserve was used for the grazing and watering of cattle before the cattle were taken to the Works at Wyndham. After 1962 cattle were delivered to the Works by road train and thereafter the Reserve was not used by persons taking their stock to the Works. Thereafter consideration was given to reserving the land for the purpose of conservation of flora and fauna. In 1969, by an instrument of transfer, purportedly pursuant to the Transfer of Land Act 1893 (WA) and executed by two Ministers of the Crown, the land was said to be the subject of "transfer and surrender" to the Crown by the Works.

Having regard to the foregoing, the assumption in that transfer that the Works had been registered as the proprietor of an estate in fee simple was erroneous and the instrument operated not as a transfer of an interest in fee simple in land but a surrender or cancellation by the Minister administering the Works, of the interest of the Works in the Permit.

The Permit was issued and held by the one Minister of the Crown for the use of a Crown instrumentality. That the land was not surveyed and a Crown grant not issued suggests that the Crown may have regarded the interest accorded by the Permit, as sufficient for the purposes for which the Reserve was to be used.

There was no provision of statute, nor alienation from the Crown of the Crown's interest in the land, by which paramount rights in the land were divested from the Crown to a third party. The Crown's interest in the Reserve was vested in the Minister under the State Trading Concerns Act 1916 (WA) and neither that vesting nor the Permit, nor the manner of use of the land for the purpose for which the Reserve had been created, demonstrated a clear and plain intention by the Crown to extinguish native title in the land. The Reserve, a substantial area of land, remained undeveloped, used only for the purpose of grazing and watering cattle.

(d) Roads

The following areas, described as roads, are said by the State to be lands in respect of which native title has been extinguished:

Lake Argyle Road

The land on which this sealed road is situated (formerly known as Parker Road) was "set apart, taken or resumed" under s17 of the Public Works Act 1902 (WA) by declarations published in the Government Gazette (WA) in April and August of 1977. It is not apparent on the material presented to the Court how it is said a road became dedicated as a public street under s288 of the Local Government Act 1960 (WA) (now repealed and replaced by the Local Government Act 1996 (WA)). S288 of the Local Government Act 1960 (WA) provided that the Governor, on the request of a local authority, may declare land to be a public street and from the date of publication of that order the land is dedicated to the public as a public street. In Ex 34r (p5,850) the area is depicted as "Dedicated Road (S288 LGA)". No issue was raised as to the fact of dedication. In any event, the permanent public work for which the land was set aside was effected. It is to be concluded that the principles set out in Fourmile apply and that native title has been extinguished in that part of the claim area occupied by Lake Argyle Road. If that act of extinguishment by the Crown was invalid and a "past act", it was "validated" by s5 of the Titles Validation Act 1995 (WA).

Long Michael Plain Road and Durack's Folly Road

The Governor, in a notice published in the Government Gazette (WA) in September 1977 pursuant to s288 of the Local Government Act 1960 (WA), declared the above roads to be public streets and thereupon the land specified therein became dedicated to the public as public streets. Both are unsealed roads used by the public. According to the reasons set out in Fourmile, native title has been extinguished in that part of the claim area occupied by these roads. If that act of extinguishment by the Crown was invalid and a "past act", it was "validated" by s5 of the Titles Validation Act 1995 (WA).

Cycas Court, Livistona Street and Celtis Street

Each of these roadways is a bitumen road constructed as part of the "Lakeside Stage 4" subdivision in 1993 and used by the public thereafter. The roadways were part of the survey of subdivision of Crown land into lots in the plan certified as correct in September 1994 by an authorized officer of the Department of Lands and Surveys.

Under s294A of the Local Government Act 1960 (WA) where Crown lands in the district of a municipality are surveyed into lots by direction of the Minister under s17 of the Land Act 1933 (WA) and the plan of such a survey is certified as correct by the Surveyor -General, or by an "officer duly authorized", then from the date of that certification any land delineated in the survey as a new street is dedicated as a street. If the certification of the plan of subdivision was a "past act" in that it completed a public work under way before 1 January 1994 (see: s228, s229(4) and s253 ("public work") of the Act), s5 of the Titles Validation Act 1995 (WA) applied to give effect to the extinguishment of native title that would have been effected had the acts not been invalid.

Ibis Road

The only evidence in respect of this "road", depicted as a short side street intersecting with Packsaddle Road at the southern end of the irrigated lands, is a diagram of survey certified as correct in August 1994 by an authorized officer of the Department of Lands and Surveys. Whether the survey was pursuant to a direction of the Minister that Crown lands in the Shire be surveyed into lots pursuant to s294A of the Local Government Act 1960 (WA) is unknown but on the face of the diagram its purpose seems to have been to provide a survey of Lot 780 to create Reserve 43002 and a survey of Ibis Road. The diagram was prepared in November 1993. Under s294A of the Local Government Act 1960 (WA), the land delineated as Ibis Road was dedicated as a street upon certification of the diagram and native title was extinguished. If certification was a "past act", in that it completed a public work under way before 1 January 1994, it was "validated" by s5 of the Titles Validation Act 1995 (WA).

Martin's Gap Road

The only evidence in respect of this "road", depicted as being in vacant Crown land to the north-east of developed irrigated land, is a diagram of survey made in 1969. (Ex 34r p5,852) According to a map prepared by the State (Ex 34r p5,848), a portion of land is said to be a "Dedicated Road (S294A LGA)". The segment said to be a dedicated road is not the part shown as Martin's Gap Road in the diagram of survey. S294A was not inserted in the Local Government Act 1960 (WA) until December 1975.

There is no evidence that native title has been extinguished in respect of any land described as Martin's Gap Road.

Portion of Victoria Highway

This portion of Victoria Highway is on the State side of the State/Territory border. The State Quarantine Inspection Station is situated on land set aside for the road. The road was sealed before 1975 and at all times has been used as a public road. A diagram of survey of the road reserve and the adjoining Lot 771 set aside as Reserve 42710 ("Quarantine Checkpoint") was certified as correct in February 1994 by an authorized officer of the Department of Lands and Surveys. The Reserve was created in June 1993 and the diagram prepared in February 1993. If it is assumed that the diagram was prepared as a result of a direction by the Minister that Lot 771 be created by survey and the portion shown on the diagram was a new survey of the road area for the highway, then, upon certification of the diagram, that area was dedicated as a street and native title extinguished. It would be a "past act" under s228 and s229(4) of the Act either, because certification of the plan of survey completed a public work under way before 1 January 1994, or because the road was a public work constructed before 1 January 1994. Therefore, s5 of the Titles Validation Act 1995 (WA) would apply to "validate" the act and extinguish native title.

(e) Creation of reserves

The reserved Crown land in the claim area is land reserved under the Land Regulations 1882 (WA), the Land Act 1898 (WA) or the Land Act 1933 (WA).

Under the Land Regulations 1882 (WA) the Governor, by reg29, was provided with the power to except from sale and reserve Crown land for specified purposes including, inter alia, "any purpose of...public utility...or for otherwise facilitating the improvement and settlement of the Colony". Under reg33 the Governor may direct by order published in the Government Gazette (WA) that a reserve vest in, and be held by, any corporation "in trust" for like or other public purposes specified in the vesting order.

Under s39 of the Land Act 1898 (WA) the Governor was authorized, subject to such conditions and limitations he may think fit, to except from sale and either, to reserve to Her Majesty, or to dispose of in such other manner as for the public interest may seem best, any lands vested in the Crown that may be required for specified purposes including the general purpose described above in the Land Regulations 1882 (WA). As in the Land Regulations 1882 (WA), s41 provided the Governor with an unfettered power to amend, cancel or change the specified purpose of a reserve provided notice was published in the Government Gazette (WA). Under s42 of the Land Act 1898 (WA) the Governor could direct that any reserve "vest in and be held by" a municipality or other person "in trust" for like or other public purposes specified in the vesting order and was also empowered to lease, in a form prescribed by Schedule to that Act, or to "grant the fee simple" of any reserve to secure the use thereof for the purpose for which the reserve was made.

Under s29 of the Land Act 1933 (WA), as it stood prior to 1982, the Governor may, subject to such conditions and limitations as he thought fit, reserve to Her Majesty, or dispose of in such a manner as for the public interest may seem fit, any lands vested in the Crown. The power of disposition appears to have been broadened in that it was not a requirement that the land disposed of be land that had been excepted from sale. S31 of the Land Act 1933 (WA) allowed the Governor, prior to 1949 by notice and thereafter by proclamation, to declare reserves for certain purposes to be Class A Reserves by which classifications land so reserved remained dedicated to that purpose until an Act of Parliament provided otherwise. A reserve declared to be a Class B Reserve was reserved from alienation, or otherwise being dealt with, subject to cancellation of the reserve by the Governor by notice in the Government Gazette (WA) after presentation to both Houses of Parliament of a special report giving reasons for the cancellation. All other reserves are classified as Class C. Pursuant to s37 of the Land Act 1933 (WA) there was otherwise an unfettered power to cancel and amend the boundaries, or change the purpose, of any reserve not classified as a Class A or Class B reserve.

In 1982 s29 was amended to allow land to be reserved for a specified purpose without the requirement that the purpose be a purpose specified in the Act. S31 was amended to allow lands reserved for that purpose to be classified as a Class A or Class B reserve.

S32 of the Land Act 1933 (WA) provided power for the Crown to lease a reserve for any purpose if the land is not immediately required for the purpose for which it is reserved, the term of the lease not to exceed ten years. In 1960 provisions were added to this section allowing the Crown to grant a lease, or licence, for a term of one year for the purpose of depasturing stock over land reserved for the purpose of parks or recreation or amusement of inhabitants notwithstanding that the land is being used for the purpose for which it was reserved. Clearly, it was intended that the land remain available for use for the specified purposes notwithstanding the grant of a lease, or licence, to depasture stock thereon.

S33 of the Land Act 1933 (WA), in similar terms to s42 of the Land Act 1898 (WA), empowered the Crown to direct that a reserve vest in a municipality, body corporate or other person but did not authorize the Governor to "grant the fee simple" in reserved land. In 1949, s33 was repealed and a provision substituted which authorized the Governor to direct

that reserved land be vested in a municipality, body corporate or other person for the purpose for which the land is reserved with power to lease the land for that purpose. Further, the Governor was empowered to direct that any reserved land be leased or "granted in fee simple" to any person subject to such conditions and limitations as the Governor deemed necessary to ensure that the land is reserved for the reserved purpose. In 1987 s33 was expanded to include in the reserved purpose "any purpose ancillary, and beneficial" to that purpose.

Under s34B of the Land Act 1933 (WA), inserted in 1982, the Governor has power to revoke any vesting order in respect of reserved land. Leases granted by a person in whom the reserve had been vested prior to revocation were to continue as if the Crown were the lessor.

The State submitted that the creation of reserves for a purpose had the effect of withdrawing the lawfulness of the use of the land for any other purpose. If by this submission it is contended that the use of the land by native title holders was rendered unlawful, the contention cannot be accepted. An offence of unlawful occupation of Crown lands applied equally to vacant Crown land and land withdrawn, reserved or excepted from sale, for a public purpose including reserved land leased or vested for the purpose. (See: Land Act 1898 (WA) s135; Land Act 1933 (WA) s164; Mabo (No 2) per Brennan J at 66, per Deane, Gaudron JJ at 114; Wik per Gummow J at 190-194.) The effect of a reservation of land was to enable the Crown to hold back from alienation areas of land which it deemed necessary to retain for use for a public purpose. Upon reservation, the land did not pass from the control of the Crown and something more formal than mere reservation by the Crown was required to create a right in members of the public or a section of the public. (See: Council of the Municipality of Randwick v Rutledge (1959) 102 CLR 54 per Windeyer J at 74.)

In addition the State submitted that pursuant to the ordinary meaning of the word "vest" the vesting of reserved Crown land in any person had the effect of a conveyance of an estate in the land with the right to exclude others thus evidencing a clear and plain intention to extinguish native title. Such a submission may elevate the concept of "vesting" of land reserved for public purposes beyond the effect thereof hitherto applied or understood.

As was stated by the Privy Council in Attorney-General for the Province of Quebec v Attorney-General for the Dominion of Canada at 409:

"...a declaration that lands are 'vested' in a public body for public purposes may pass only such powers of control and management and such proprietary interest as may be necessary to enable that body to discharge its public functions effectively: Tunbridge Wells Corporation v Baird [1896] AC 434, an interest which may become devested when these functions are transferred to another body. In their Lordships' opinion, the words quoted from s1 are not inconsistent with an intention that the Commissioner should possess such limited interest only as might be necessary to enable him effectually to execute the powers and duties of control and management, of suing and being sued, committed to him by the Act."

In Tunbridge Wells Corporation v Baird [1896] AC 434 the issue before the Judicial Committee was the vesting of a street in an urban authority under the Public Health Act 1875 (UK) and at p442 Lord Herschell stated:

"the vesting of [a] street vests in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use."

In The City of Perth v Crystal Park Ltd (1940) 64 CLR 153 Crown land was reserved for recreation and parking pursuant to s33 of the Land Act 1933 (WA) and was vested by the Governor in the State Gardens Board. Rich ACJ and Williams J referred, with apparent approval, to the opinion expressed by the Privy Council in Attorney-General Quebec v Attorney-General Canada concluding that the word "vest" is a word of elastic import and of limited meaning when lands are vested in a public body for public purposes.

A similar opinion was expressed by Romer LJ in Port of London Authority v Canvey Island Commissioners [1932] 1 Ch 446 at 502.

In Sheffield City Council v Yorkshire Water Services Ltd [1991] 1 WLR 58 Lord Browne -Wilkinson VC suggested that a distinction could be drawn between statutory provisions which simply vest in a public authority something which is not the land itself and the transfer of property from a proprietor to a public authority. That may have been an appropriate distinction on the facts according to the proper construction of the relevant legislation in that case but as The City of Perth v Crystal Park Ltd makes clear, the well-settled principles in relation to vesting of property in a public authority for use for a public purpose apply equally to the vesting of land and unless the circumstances and context require a conclusion that a greater interest in land is conveyed to an authority, mere vesting will not settle on the authority more than that which is necessary for it to execute its powers of control or management effectively.

The State suggested that the right to exclude others as a consequence of a vesting order must signify an intention to extinguish native title. First, it may be said that any power to exclude is likely to be found in the statutory powers conferred upon the vestee and not as a consequence of the vesting of the reserved land. Second, the right to exclude in itself may be no more than is necessary for the management of the land for the purpose of the reserve.

The effect of the use of reserves for the purpose for which they have been created will be considered separately later in these reasons.

(f) Mining tenements

(i) "Argyle" and "Normandy" mining leases

Under the Agreement made between the State and the Argyle Diamond Mine Joint Venturers, the Joint Venturers proposed to mine and market diamonds. Pursuant to cl15 of the Agreement upon certain matters being performed and preconditions satisfied, the Joint Venturers were entitled to the grant of "the Argyle mining lease" under, and subject to, the Mining Act 1978 (WA) but in the form set out in the Schedule to the ratifying Act. The Argyle mining lease was to be subject to such conditions as applied to "previous tenements" as the Minister for Mines determined.

Pursuant to cl15(4) of the Agreement the Joint Venturers were required to permit the State, and third parties with the consent of the State, to have access to, and to pass over, the Argyle mining lease so long as that access and passage did not unduly prejudice or interfere with the operations of the Joint Venturers under the Agreement. Pursuant to cl15(2) of the Agreement the term of the Argyle mining lease would be for a period of twenty-one years with a right to successive renewals of periods of twenty-one years.

Under s7 of the ratifying Act, applications for certain mineral claims that had been made by one of the Joint Venturers under the Mining Act 1904 (WA) were deemed to have been validly made and, by operation of the ratifying Act, to be approved and registered. The ratifying Act provided in s7(8) that the validity, or effect, of the application for, and approval or registration of, those claims was not liable to challenge or review in any court proceeding whether the proceeding was instituted before or after the coming into operation of the ratifying Act.

Under s8 of the ratifying Act it was further declared that, for the purposes of the Mining Act 1904 (WA) and the Mining Act 1978 (WA), the Joint Venturers had "exclusive possession" of land the subject of, inter alia, the mineral claims referred to above upon the ratifying Act coming into operation and until the grant of the Argyle mining lease. S8 provided further that any diamonds found on that land before the ratifying Act came into operation, and before the Argyle mining lease was granted, were the property of the Joint Venturers, and that such entitlement could not be challenged, or called into question, in any court proceeding, whether commenced before or after the coming into operation of the ratifying Act. S9 of the ratifying Act provided, inter alia, that any right, title, interest, benefit or entitlement under and for the purposes of the Mining Act 1904 (WA) held by a person other than the Joint Venturers in respect of that land was extinguished and deemed never to have existed. S10 stated that the marking out of a mining tenement under the Mining Act 1904, or Mining Act 1978 (WA), by a person other than a Joint Venturer on, inter alia, the land referred to above before the coming into operation of the ratifying Act, was of no effect and deemed never to have had effect.

Pt4 of the ratifying Act, in contemplation of the commencement of a mining operation and providing for the security thereof, provided for the creation, by declaration of the Governor, of "designated areas", being land or premises used for, or proposed to be used for, mining, treatment, processing, sorting, storage or cutting of diamonds. A "designated area" was not restricted to an area within the land held by the Joint Venturers under the Argyle mining lease. The ratifying Act authorized the Joint Venturers to instruct security officers employed by them to detain and search persons in a "designated area" and to enforce strict control of that area for better security of diamond mining and recovery operations. The ratifying Act prescribed offences for, inter alia, entering or leaving a "designated area" other than by a "controlled access point" and failing to comply with the requirement of a security officer in a "designated area".

In due course, the Argyle mining lease was granted to the Joint Venturers in 1983. The leased land was the land to which s7 and s8 of the ratifying Act applied, only the northern portion of which was within the claim area. It was not contended that the land in the Argyle mining lease within the claim area was within a "designated area" at any time.

In November 1984 an Order in Council was published in the Government Gazette (WA) which declared a number of sites to be "protected areas" under the Aboriginal Heritage Act 1972 (WA). One of those sites was described as "Flying Fox Hole - Mythological Site". That site was referred to in the primary evidence of John Toby. (Ex A9 - marked "Wariminy") The dimensions of the protected area were set out in the declaration.

In November 1986 the leased area was extended pursuant to cl15(6) of the Agreement. At the same time the Minister for Mines imposed conditions to which the mining lease was subject, namely, an obligation on the Joint Venturers to comply with the provisions of the Aboriginal Heritage Act 1972 (WA) and to ensure that no action was taken which was likely to interfere with, or damage, any Aboriginal site. In addition, the Minister for Mines excised from the leased area, the area of a miscellaneous licence, reserving to that licensee rights of ingress and egress, and passage across the Joint Venturers' lease to the licensed area at all times. In 1992 the Minister imposed further conditions on the Joint Venturers by prohibiting mining on Reserve No 31165 without the prior written consent of the Minister and by prohibiting mining absolutely on the areas of land declared as "protected sites" in 1984, namely, "Flying Fox Hole" and other sites.

In respect of the portion of the Argyle mining lease within the claim area, the whole of that part is situated on Reserve No 31165. There is no evidence that mining on that Reserve has been permitted by the Minister.

Argyle submitted that by the grant of the mining lease and, or, by reason of the provisions of the ratifying Act, the Crown had signified a clear and plain intention to extinguish native title in respect of the whole of the area, the subject of the Argyle mining lease.

With regard to the provisions of the ratifying Act, the mischief sought to be addressed by the unusual provisions contained in s7-s10 thereof was explained in the Second Reading Speech of the Minister for Resources Development (Legislative Assembly Second Reading, Hansard 18 November 1981, 5811 at 5812-5813) on introducing the Bill to the Parliament. (See also the remarks of Mr Stephens, MLA at 6213-6217.) The security of some of the mining tenements upon which the Joint Venturers proposed to conduct a diamond mining operation was in doubt and under challenge in legal proceedings undertaken by a third party claiming that a possessory title had been obtained under the Mining Act 1904 (WA) and the Mining Act 1978 (WA). S7-s10 had a specific purpose, namely, to defeat the claim of that party to an interest under the Mining Act 1904 (WA) and the Mining Act 1978 (WA) in respect of land sought to be used for mining purposes by the Joint Venturers. The specific purpose of the legislative provisions was, by extinguishing any competing interest obtained under the Mining Act 1904 (WA) and Mining Act 1978 (WA) by the third party, to validate the current position of the Joint Venturers and, further, to validate the issue of the Argyle mining lease to the Joint Venturers in due course.

It was not the intention of the legislature to extinguish in general all pre-existing interests in that land. Under s9 of the ratifying Act the interests extinguished were, inter alia, those held under, and for the purpose of, the Mining Act 1904 (WA). The "exclusive possession" of the land over which the Argyle mining lease was to be granted, declared by s8 to be held by one of the Joint Venturers until the lease was granted, was possession for the purposes of the Mining Act 1904 (WA) and the Mining Act 1978 (WA). That provision was directed to putting beyond question that the Joint Venturer which held the mining tenements under challenge, had possession of the land at all material times, thereby validating the acquisition of any property by the Joint Venturer in diamonds that may have been recovered by it on the tenements after October 1979.

It is confirmed by s85 of the Mining Act 1978 (WA) that a mining lessee is given possession of land (which may include freehold land) for mining purposes, namely, to extract from that land minerals vested in the Crown. Under para82(1)(b) of the Mining Act 1978 (WA) a mining lease is granted subject to the condition that the lessee, inter alia, use the land in respect of which the lease is granted only for mining purposes in accordance with the Act. The right to mine is exclusive in respect of the land to which it is granted. The possession granted to a lessee under a mining lease is limited, both in time and in purpose. It remains a mining tenement for the extraction of minerals, by definition a finite operation, requiring removal of the mining equipment and rehabilitation of the land at the completion of the mining project. The grant of such an interest does not display an intention by the Crown to extinguish native title. Just as the rights of the owner of a freehold interest in land subject to a mining lease may be impaired, rights exercisable by the holders of native title over Crown land may be impaired or suspended. Whatever degree of impairment it may cause, the lack of permanence in purpose and duration of a mining operation precludes the conclusion that by the grant of a lease for mining purposes the Crown has intended to extinguish native title. The grant of such a tenement is consistent with an intention of the Crown that there be full resumption and utilization of rights under native title upon completion of a mining operation.

The grant of exclusivity of possession of land by the Crown is not the determinant of the Crown intention as to the extinguishment of native title. The character of the act of the grant of possession has to be assessed by having regard to the purpose for which possession is granted.

The underlying purpose of a statutory instrument described as a mining lease is of greater relevance to the character of that instrument than the nomenclature used. As Toohey J pointed out in Wik (at 117), the mining lease considered in Wade v New South Wales Rutile Mining Company Pty Ltd was properly described as a sale by the Crown of minerals reserved to the Crown, to be taken by the lessee at a price payable over a period of years as royalties.

The terms of cl15(4) of the Agreement acknowledge, in effect, the reservation of existing rights of access to, and passage over, the land subject to the exercise of those rights not unduly prejudicing or interfering with the operations of the Joint Venturers. In its terms, cl15(4) of the Agreement qualified the interest to be granted as the Argyle mining lease and amounted to a reservation by the State from the interest granted. The reservation is consistent with the exercise of a right of access to the land by the holders of native title.

It was submitted that in so far as cl15(4) of the Agreement refers to third parties who have the consent of the State to pass over the mining lease, the lessee retains the right to refuse permission to persons who do not obtain that consent. Whether that is so is not a material issue. The consent may be express or implied and would include a consent the Crown is unable to refuse, for example, by reason of the rights granted to the holders of the miscellaneous licence, the area of which was excised from the mining lease. There would be implied consent from the Crown for the holders of that licence to have access to the licensed area and to pass and re-pass over the Argyle mining lease for that purpose. Similarly, the holders of native title whose interest burdens the title of the Crown, would have an implied consent from the Crown to exercise rights of entry and passage under that title until such time as the title is extinguished by the Crown. In this case, that conclusion is reinforced by the declaration of "protected sites" under the Aboriginal Heritage Act 1972 (WA) within the area of the mining lease and the imposition of conditions prohibiting the carrying on of mining operations on any of those sites. The declaration of such sites is consistent with the Crown intention that a right of access to those sites attached to a subsisting native title would continue subject to the exercise of the right of access not unduly prejudicing or interfering with the operations of the Joint Venturers under the Argyle mining lease. If any of the "protected sites" were within a declared "designated area", the opportunity to exercise a right of access to the sites may be severely curtailed, or even suspended, but it would not follow that it was the intention of the Crown that native title, and a right of access to the site arising thereunder, be extinguished.

Further, with regard to that part of the Argyle mining lease that is within the claim area, the whole of that part is subject to a condition that no mining be conducted thereon without the consent of the Minister. Such controlled used of the land does not, on its face, signify any intention by the Crown to extinguish native title under which access, or other rights in respect of the land, may be exercised.

For the foregoing reasons relating to the character of a mining lease the conclusion must follow that in respect of the mining leases granted under the Mining Act 1978 (WA) to Argyle and to Normandy, all situated in Reserve No 31165, no clear and plain intention by the Crown to extinguish native title is manifested by the grant of such tenements and creation of rights in Crown land in third parties. It was a condition of each of the mining leases granted to Argyle and to Normandy within Reserve No 31165 that the lessees comply with the terms of the Aboriginal Heritage Act 1972 (WA) to ensure that no action is taken which is likely to interfere with, or damage, any Aboriginal site and in respect of two of those leases, both granted to Normandy, there was a specific condition that there be no mining without the permission of the Minister.

It was submitted by the first applicants that the material presented by Argyle and Normandy did not prove the validity of the grant of the tenements under the Mining Act 1978 (WA). In the absence of any material pointing to actual invalidity, it should be presumed that tenements recorded in a register of tenements have been validly created.

(ii) Other mining leases

A general purpose lease and a number of mining leases were granted to the parties included as the sixth and ninth respondents. For the foregoing reasons the same conclusion set out above applies to these interests, namely, that the grant thereof did not evince a clear and plain intention by the Crown to extinguish native title.

(iii) Other mining tenements

With regard to other mining interests it was not contended by the eighth respondents that the grant of prospecting licences or exploration licences evidenced an intention by the Crown to extinguish native title. It was submitted by the ninth respondents that the issue of an exploration licence would extinguish native title.

Under the Mining Act 1978 (WA), exploration licences are for a limited term and in the period of the licence part of the land in respect of which the licence is granted must be relinquished (s65(1)). Strict conditions are applied to prevent damage to land and property (s63AA).

It is unnecessary to expand the foregoing reasons to conclude that such licences granted under the Mining Act 1978 (WA) demonstrate no intention by the Crown upon grant to extinguish native title in respect of Crown land over which the licences may be issued.

The State submitted that a general purpose lease issued under the Mining Act 1978 (WA) evidenced a Crown intention to extinguish native title. Under s86 of the Mining Act 1978 (WA) a general purpose lease may be granted for use with respect to mining operations on such terms and conditions as the Minister considers reasonable. Under s87 a general purpose lease entitles the lessee to the exclusive occupation of Crown land for one or more of the following purposes:

o erecting, placing and operating machinery thereon in connection with mining operations;

o depositing or treating the minerals or tailings;

o using the land for any other specified purpose directly connected with mining operations.

Under s88 of the Mining Act 1978 (WA) a general purpose lease may be granted for twenty-one years and renewed for a further term of twenty-one years. Under s86 of the Act the maximum area of a general purpose lease is ten hectares.

For the reasons relied upon for the conclusion that the grant of a mining lease does not extinguish native title, the grant of a general purpose lease will not be a declaration of Crown intention to extinguish native title. A general purpose lease is a statutory interest ancillary to the statutory tenement of a mining lease, and has no particular characteristic that demonstrates a Crown intention to extinguish native title upon grant of that interest.

The reasons given for concluding that the grant of tenements for the extraction of minerals under the Mining Act 1978 (WA) is not an act of the Crown intended to extinguish native title apply equally to the grant of tenements under the Mining Act 1904 (WA), the Petroleum Act 1936 (WA) and the Petroleum Act 1967 (WA) for the use of land or waters for the purpose of exploring for and recovering petroleum.

(g) Limitation Act 1935 (WA)

In the course of its submissions the State put an argument that a limitation period under the Limitation Act 1935 (WA) could be applied to an application to enforce native title and that upon expiration of such a period the title could be said to be extinguished. The submission, in part, was based upon the remarks of Deane and Gaudron JJ in Mabo (No 2) (at 90) in which their Honours stated that where the actual occupation or use of the native title holders was terminated "an ultimate lack of effective challenge" would found either an assumption of acquiescence in the extinguishment of the title or a defence based on laches or some statute of limitations.

In this proceeding the Court is concerned only with the determination of the existence of native title under federal legislation providing machinery for that purpose. The legislation is predicated upon the assumption that the rights are rights of antiquity and, as far as the common law is concerned, date at least from the time of sovereignty. The Court is not concerned with curial ascertainment of the enforceability of rights that arise under native title. (See Fejo per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 731.)

As stated earlier, native title existing at sovereignty is a burden on the radical title of the Crown. If extinguished by the Crown it ceases to exist. It will cease to exist also if it has been abandoned. It will not be shown to exist if a claimant for native title is unable to show that, as far as is practicable, connection with the land has been maintained and traditional laws and customs observed. It is not necessary for proof of the existence of native title to show that it has been asserted against the Crown. It is a "sui generis" interest, inalienable to third parties, and is not an estate in land capable of being lost to the Crown by prescription.

(h) Proclamation of the Ord Irrigation District

Under s28 of the Rights in Water and Irrigation Act 1914 (WA) any defined part of the State may be constituted an "Irrigation District" by Order in Council. Pursuant to s29 of that Act the District may be extended by adding further land thereto.

In 1962 the Ord Irrigation District ("the District") was constituted by proclamation. Prior to that, by proclamation made in 1960 pursuant to s27(3) of that Act (as it then stood), it was declared that PtIII of the Rights in Water and Irrigation Act 1914 (WA), which provided for the vesting of rights in the Crown for the use and flow, and to the control, of water in any watercourse, applied to the Ord River and its tributaries. The District was extended by two further proclamations made in 1965 and 1973. As now constituted, the District is an area of land which covers all the potentially irrigable land in the East Kimberley region (a minor part of the District), the whole of the area of the Argyle Downs pastoral lease and the catchment area of the Ord River, a vast area which includes numerous pastoral leases that extend hundreds of kilometres to the south of Lake Argyle beyond Halls Creek.

Under s27(4) of the Rights in Water and Irrigation Act 1914 (WA) (as it then stood) every river, stream, watercourse, lagoon, lake, swamp or marsh within the boundaries of the District became subject to PtIII of that Act. S5 in PtIII of that Act declared and deemed that the bed of a watercourse, lake, lagoon, swamp or marsh had not been, and would not be, alienated by the Crown and at all times remained the property of the Crown. Under s26 of that Act the bed of any lake, lagoon, swamp or marsh on any land alienated by the Crown did not exceed the width of the watercourse at its inlet to, or outlet from, such lake, lagoon, swamp or marsh.

By providing that the bed of any watercourse or water area was not land subject to alienation, the Crown did not act to elevate the nature of the title it held in the land but made it plain that land that was necessary for the use and control of water in any watercourse or water area, remained with the Crown at all times as of its usual estate.

S7 of that Act acknowledged the existing right of an owner or occupier of land adjacent to the bed of a watercourses or water area by stating that such a person was entitled to have like access and use of the portion of the bed to which land is adjacent as if that Act had not been passed, as long as the Crown had not "actually appropriated" that portion of the bed for a purpose of that Act. Furthermore, the right of such an owner or occupier to control the access of others by remedies in trespass, continued as if that Act had not been passed save that it did not entitle such an owner or occupier to pursue a remedy in trespass against the Crown. In accord with the principles discussed earlier, such recognition and retention of existing rights did not reflect any intention by the Crown to extinguish native title, a right based on occupation pursuant to which a right of access to, and use of, land may be exercised.

The State submitted that the proclamation of the District and of its extension were acts by the Crown intended to extinguish native title. It is plain that the vesting of rights for the control of watercourses may lead to regulation of the exercise of some rights under native title but it is equally plain that it does not involve a statement of intention by the Crown to extinguish native title. Similarly, the nature of the rights of the Crown in water and beds of watercourses and water areas within the District may lead to regulation of some rights exercisable under native title but regulation of those rights does not bespeak an act calculated to extinguish the native title vested in Aboriginal people in respect of the land and waters within the vast area of the District.

The comments of Fullagar J in Thorpes Ltd v Grant Pastoral Co Pty Ltd (1955) 92 CLR 317 at 331 in respect of the effect of like legislation in South Australia, are equally apt in respect of the provisions of the Rights in Water and Irrigation Act 1914 (WA):

"I should have thought,...that the real object of the Water Rights Act 1896, as revealed by the latter part of s1, was to enable the Crown, in a country in which water is a comparatively scarce and important commodity, to exercise full dominion over the water of rivers and lakes and to undertake generally the conservation and distribution of water. For the attainment of that object it was not necessary to destroy anybody's rights, but it was necessary to give to the Crown, or to some statutory authority, overriding rights to which private rights must, if need arise, give way.

The effect given to the statute in Hanson's Case (1900) 21 NSWLR 271 means that a riparian proprietor has no remedy as of right if a river is dammed by an upper owner so that no water reaches him, or if it is polluted and poisoned by the refuse of a factory. There is much to be said for the view that it would be contrary to elementary rules of construction to give to it any such effect in the absence of clear and unmistakable language. The view which I am disposed to take is that the Act does not directly affect any private rights, but gives to the Crown new rights - not riparian rights - which are superior to, and may be exercised in derogation of, private riparian rights, but that, until those new and superior rights are exercised, private rights can and do co-exist with them."

These remarks were considered and followed by the Supreme Court of Western Australia in Rapoff v Velios [1974] WAR 27.

The State further submitted that the content of certain by-laws, made in 1963 under the Rights in Water and Irrigation Act 1914 (WA) in respect of the District, which prohibited or controlled certain activities in specified areas within the District including the use of flora or fauna, displayed an intention to extinguish native title within those specified areas.

Again, it is plain that at their highest the by-laws controlled the exercise of some rights under native title but did not signify Crown intention to extinguish native title in the prescribed areas. Even the imposition of stringent regulation does not deny the continuation of native title and the exercise of the Crown's power of regulation is not to be confused with the exercise of a power to extinguish native title. (See: R v Sparrow at 1097; Mason v Tritton (1994) 34 NSWLR 572 per Kirby P at 592-593.) It was not submitted by the sixth respondents that the approval of applications under the by-laws to pump water from the Ord River and Lake Kununurra could reflect an intention to extinguish native title.

(i) Proclamation of Townsite of Kununurra

In 1961 the Governor, by notice in the Government Gazette (WA), constituted and defined the boundaries of the town of Kununurra pursuant to s10 of the Land Act 1933 (WA). It was submitted that such a declaration had the effect of a clear and plain intention to extinguish native title under that Act.

The major part of the area developed as the town of Kununurra is within that part of the townsite that was part of the land resumed in 1960 from the Ivanhoe pastoral lease for the Project, approximately 600 hectares. The land resumed in 1961 for the Kununurra townsite from the Ivanhoe pastoral lease was an adjacent area of land (approximately 3,000 hectares) to the east. Only a minor part of the land resumed for the townsite has been developed for use as residential lots and dwellings. Approximately two-thirds of the area resumed for the purpose of the Kununurra townsite was removed from availability for townsite development by the proclamation of the Mirima (Hidden Valley) National Park in 1982 and by the extension thereof in 1989. The area of the Park is 2,067 hectares. The land in the Mirima National Park (Reserve 37883) was open land that had not been used for any townsite purpose after resumption of the land in 1961.

Although the development of a town pursuant to the declaration of a townsite may involve a use of the land of permanence and inconsistent with continuation of native title to cause extinguishment thereof, the bare declaration of a townsite on open land cannot be said to have such a consequence. In keeping with any other form of reservation of land for a public purpose, extinguishment of native title will depend upon the extent and form of utilization of the land for the reserved purpose. As noted below, the claim area does not extend to that part of the land within the townsite that has been developed as the town of Kununurra with the exception of certain reserved land.

A substantial part of the area of the townsite consists of vacant Crown land, approximately 20 per cent. At some time some of the land may be subdivided and used for residential lots but other parts of the vacant land are unsuitable for subdivision. At this time there is no use of the land, which remains open country, which is inconsistent with the continuation of native title.

With regard to that part of the townsite which remains vacant Crown land, it follows that it has not been shown that native title has been extinguished by declaration of the townsite, the land not being used for the declared purpose. Whether the grant of "special leases" by the Crown in respect of part of this land has affected native title will be considered later in the reasons.

(j) Resumption and acquisition of Crown lands from pastoral leases for Project and other purposes

A large part of the land resumed or acquired for the Project remains in unaltered form. Substantial areas have been used for reserves and a large part remains as vacant Crown land. The balance has been put to a variety of uses. The principal uses have been for the construction of the diversion and main dams and reservoirs, irrigation works and farmlands, and some land has been included within the townsite of Kununurra.

The claim area does not include land resumed or acquired for the Project developed as irrigated lands or used for roads or drains on that land, nor does it include the land resumed and used for an airfield, or the land which was resumed in 1947 to form the Kimberley Research Station. That part of the land resumed for the extension of the Kimberley Research Station which now forms Reserve 38358 is included in the claim area. The claim area does not include that part of the land resumed for the Project later included within the townsite and developed as the town of Kununurra other than specific reserves which are dealt with below.

Land required for the purpose of the Project was resumed, or acquired, by the State by three different means:

(i) Resumption of land under s109 of the Land Act 1933 (WA)

Most of the land used for the Project was resumed under s109 of the Land Act 1933 (WA).

Pursuant to s109 the Governor was empowered to resume, enter upon, and dispose of the whole or any part of the Crown land in a pastoral lease, for agricultural or horticultural settlement, mining or for any other purpose thought fit in the public interest. In 1963 those purposes were enlarged by adding "industry" and "to enable the land to be declared open for selection for pastoral purposes and again leased..."

Relevantly, the statutory form of a pastoral lease in the 19th Schedule of the Land Act 1933 (WA) provided that the land was leased for pastoral purposes under, and subject to, the provisions of PtVI of that Act (s90-s115 "Pastoral Leases") and that the lease was granted subject to the powers, conditions and reservations set out in PtVI and to all rights and privileges lawfully acquired or exercisable thereunder. The right was also reserved to the Crown to dispose of such portions of the land under the provisions of PtIII (s29-s37B "Reserves") as may be required for any purpose prescribed therein of public utility or for otherwise facilitating the improvement and settlement of the State.

It appears from the foregoing that s109 is not a plenary power in the executive to resume Crown land comprised in a pastoral lease and dispose of it at will. It is not a power to deal with land that is wider than the power to reserve and otherwise deal with Crown land under other parts of the Act. Land resumed from a pastoral lease would be Crown land available to be used for the purpose set out as the purpose for resumption or reserved under the Land Act 1933 (WA) or otherwise held as vacant Crown land. Pursuant to s3 of the Rights in Water and Irrigation Act 1914 (WA) as it stood at relevant times, all lands acquired for, or dedicated to, the purposes of that Act were vested in the Minister until such lands, irrigation works and constructions were vested in a Board.

The word "dedicated" is there used in its broadest sense not in the narrow sense of rights conferred on the public giving an entitlement to cause the Crown to have the land used for the purpose declared by the Crown. (See: Williams v The Attorney-General of New South Wales (1913) 16 CLR 404; Council of the Municipality of Randwick v Rutledge per Windeyer J at 73-74.)

The relevant resumptions for the purpose of the Project were made by the Crown from the Ivanhoe pastoral lease between 1960 and 1967.

Land resumed from the Ivanhoe pastoral lease for a declared purpose other than the Project were the resumptions for: "Agricultural Research Station" (1947); "Kununurra Townsite" (1961); "Aerial Landing Ground" (1961); and "extending Reserve No 22609 (Agricultural Research Station)" (1964).

Land was resumed from the Lissadell and Texas Downs pastoral leases in 1972, the stated purpose for the resumption being "Government Requirements".

The State submitted that the effect of each such resumption was to vest the "reversionary interest" the Crown held in that land as lessor of the pastoral leases and to expand the Crown's radical title to full beneficial ownership of the land resumed.

Putting to one side whether it is appropriate to refer to a "reversionary interest" as part of the statutory instrument that is a pastoral lease under the Land Act 1933 (WA) (see Wik per Toohey J at 72-73; per Gaudron J at 229; per Gummow J at 247-249; per Kirby J at 281) there is nothing on the face of an act of resumption of Crown land to set it aside for a public purpose that evidences a clear and plain intention to extinguish native title.

The act of resumption in itself cannot be said to signify an intention greater than that which would apply to the declaration of the purpose for which the land may be used. For example, land in a pastoral lease may be resumed for the purpose of re-leasing it as a pastoral lease.

The act of resuming Crown land for a declared public purpose does not, at that point, signify inconsistency with the continued enjoyment of native title. Extinguishment of native title will occur when Crown land is resumed, appropriated by the Crown for a public purpose and used for a purpose that is inconsistent with the continued enjoyment of native title.

"Until such a use takes place, nothing has occurred that might affect the legal status quo. A mere reservation of the land for the intended purpose, which does not create third party rights over the land, does not alter the legal interests in the land..."

(Wik per Brennan CJ at 86)

"Native title continues where the wastelands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (eg land set aside as a national park)."

(Mabo (No 2) per Brennan J at 70)

Appropriation of Crown land for the purpose of an irrigation project or townsite may lead to use of the land that is inconsistent with continuation of native title but a conclusion in that regard will depend upon, inter alia, the area of land involved and the nature of the use to which the land is put. As noted above, the claim area does not include land resumed or acquired that is developed land used for the purposes of the Project, townsite, airfield or Kimberley Research Station. The question of extinguishment of native title on the resumed or acquired land remaining within the claim area is dealt with later in the reasons under consideration of reserves and leases of reserves.

(ii) Acquisition of Argyle Downs pastoral lease and freehold land

In 1971 the whole of the Argyle Downs pastoral lease and freehold land were acquired by the State in a bargain-and-sale transaction, not pursuant to the powers of resumption provided under the Land Act 1933 (WA), the Public Works Act 1902 (WA) or the Rights in Water and Irrigation Act 1914 (WA). Substantially more land than that required for the Project was contained in the Argyle Downs pastoral lease, however, resumption of only the parts of the pastoral lease required for the Project would have left areas on which a grazing concern could not be operated efficiently. (Ex 21(a) p30)

A transfer to the Crown of the freehold property acquired in 1971 was recorded on the certificate of title. In 1972 the certificate of title was cancelled and the land contained therein removed from the operation of the Transfer of Land Act 1893 (WA).

As set out in Fejo no argument can arise that native title revived upon return of that freehold land to the Crown.

A transfer to the Crown was also recorded on the Argyle Downs pastoral lease. The lease was not treated as surrendered or cancelled. Dealings on the lease by way of notification and withdrawal of caveats have been recorded since 1971 and as recently as 1993. The term of the lease expires on 30 June 2015. No argument was submitted that upon acquisition of the lessee's interest the leasehold interest merged with the interest of the Crown in the land. Although a declaration of the purpose for the acquisition was not part of the process of acquisition of the Argyle Downs pastoral lease, it appears to be accepted that part of the land was acquired for the purposes of the Rights in Water and Irrigation Act 1914 (WA) and, pursuant to s3 and s62(1) of that Act, became vested in the relevant Minister. At the time the land was acquired the main dam had been under construction on that land for a period of three years and was near completion. Parts of the acquired land have been included in reserves and the area that is not reserved land is represented as vacant Crown land on area maps prepared by the State.

For similar reasons to those set out above, there is nothing in the act of the Crown in acquiring the whole of the land of the Argyle Downs pastoral lease that shows a clear and plain intention to extinguish native title. Whether use of the land for the purpose for which it was acquired affected native title is considered later in the reasons under consideration of reserves and leases of reserves.

(iii) Acquisition of land under the Public Works Act 1902 (WA) and under the Rights in Water and Irrigation Act 1914 (WA)

In 1972 and 1975 further land was obtained by the State for the Project by resumption of land from the Ivanhoe pastoral lease.

The notices of resumption published in the Government Gazette (WA) were ambiguous. They were expressed to be pursuant to the Rights in Water and Irrigation Act 1914 (WA) and the Public Works Act 1902 (WA). Separate powers for compulsory acquisition of land, including freehold land, were provided in s62 of the Rights in Water and Irrigation Act 1914 (WA) and s10 of the Public Works Act 1902 (WA). Pursuant to s62(3)(a) of the Rights in Water and Irrigation Act 1914 (WA), upon publication of notices of land being acquired by compulsory process for the purpose of that Act, the land, by force of the publication, is "vested" in the Crown. Under s18 of the Public Works Act 1902 (WA), upon publication of notice that land has been set apart, taken or resumed under that Act, the land referred to, by force of that Act and as the Governor may direct, is "vested in the Crown for an estate in fee simple in possession or such lesser estate for the public work expressed in such notice". In each case the statutes provide that the vesting of the land frees and discharges the land from the interests of third parties.

Although the published notices were drawn in terms appropriate for the exercise of the power of resumption under the Public Works Act 1902 (WA), by directing that the land set apart, taken or resumed vest in the Crown "for an estate in fee simple in possession for the public work", the public work expressed in the notice of resumption, "Ord River Irrigation Project - Packsaddle Plains area - Extension", indicated that the provisions of s3 of the Rights in Water and Irrigation Act 1914 would apply to simply "vest" the land in the Minister on behalf of the Crown.

The character and purpose of such a resumption of Crown land from a pastoral lease was indistinguishable from a resumption under s109 of the Land Act 1933 (WA). The land was recovered by the Crown to be used for a public purpose. Vesting of the land in the Crown, even including a vesting in fee simple for a public work, is effected by statute to assist carrying out the declared public purpose and is a vesting qualified by that purpose.

As stated earlier in these reasons, the act of the Crown in recovering Crown land from a pastoral lease does not, in itself, enhance the interest of the Crown in the land granted as a pastoral lease, and upon resumption the land stands as vacant Crown land until otherwise dedicated, reserved, or used for the purpose for which it was taken. Statutory provisions which merely "vest" in the Crown such resumed Crown land for an estate in fee simple for the carrying out of a public work will not, in itself, be an act which elevates the interest of the Crown to a full beneficial interest with the intention of extinguishing native title, for there is no grant or alienation by the Crown of an estate in fee simple in the land creating rights in third parties and no act undertaken by the Crown inconsistent with the continued preservation of native title. (See: Pareroultja v Tickner per Lockhart J at 218) Of course, freehold land resumed from a third party and vested in the Crown is land in which native title has been extinguished.

Whether use of the resumed land for the purpose for which it was acquired affected native title is considered later in these reasons.

(k) Use of reserves

(i) Townsite reserves

Some of the reserves established within the townsite are vested in the Shire and others in the Aboriginal Lands Trust. The State and the Shire referred to Shire by-laws relating to the use of reserves vested in the Shire, promulgated in 1966 and 1991, which prohibit camping, lighting of fires disturbing flora or destruction of fauna and submitted that the vesting of a reserve in the Shire signified an intention to extinguish native title in that the prohibitions in the by-laws were inconsistent with the continuation of native title. The Shire town planning scheme which prohibited a development on such reserves without the written consent of the Shire was also relied upon.

Some rights exercisable under native title may be severely constrained by operation of the Shire by-laws and town planning scheme in respect of reserves but, as has been stated earlier in these reasons, control of such rights is not to be confused with the extinguishment of native title. Native title will continue to exist notwithstanding such regulation of the rights that are exercisable under it. There is nothing in the act of creating a reserve and vesting it in the Shire that stands as a clear and plain intention by the Crown to extinguish the entitlement of Aboriginal people to maintain connection with the land under a subsisting native title and regulation by the Shire of the exercise of an aboriginal right under a subsisting native title will not amount to a use of the reserve authorized and contemplated by the Crown for the purpose of extinguishing native title.

The State also referred to the provisions of s266 and s267 of the Local Government Act 1960 (WA), as in force at material times, and submitted that powers granted to a municipality by those sections illustrated a "legislative intention" that the Shire have "complete ownership" of reserves vested in it "leaving no room" for native title.

S266 provided that a Council may, with the consent of the Governor, convey and transfer in fee simple land which is vested in or held by it and which is not, in the opinion of the municipality, required for the purposes for which the land was acquired and which is not subject to a trust.

Plainly, the provisions of that section provide no assistance in determining if the intention of the Crown in vesting in a municipality a reserve for a purpose subject to conditions that ensure that the land is used for that purpose. First, the exercise of the power provided by s266 is subject to the consent of the Governor which suggests that the statutory powers extended to a local authority are less than equivalent to an absolute estate in the land. However, more importantly, s266 does not purport to apply to land reserved for a purpose by the Crown and vested in a municipality. A municipality does not "acquire" such land for a purpose and is not empowered to form an opinion whether the land is required for the purpose for which it is reserved by the Crown. Furthermore, land in a reserve created by the Crown for a purpose and

vested in a municipality is land subject to a statutory trust and within the meaning of the word "trust" as used in s266. (See: Bathurst City Council v PWC Properties Pty Ltd (1998) 157 ALR 414 at 426-427.)

S267 conferred on a local authority a power to lease land vested in or held by it including land vested in or held by it on a trust which does not preclude a municipality so letting land. That provision does not add to the material relevant to the issue of the Crown's intention in vesting a reserve in a municipality. The power to lease land in a reserve is conferred at the discretion of the Governor upon vesting the reserve in a municipality. If the power to lease is withheld, the powers of the municipality as "statutory trustee" would be circumscribed accordingly and s267 would not apply.

It is now necessary to deal with reserves established for specific purposes and the effect of the use of the reserves.

The following raise similar issues and may be dealt with together:

Reserve 26600 - "Use and Benefit of Aboriginal Inhabitants"

This Reserve of four hectares was created in 1963 for the purpose of "Natives - Camping" later altered to "Reserve for Natives". Many Aboriginal people came to this site after the introduction of the "Pastoral Award" in 1968 and when Argyle Downs ceased pastoral activities at about the same time. In 1972 the Reserve was vested in the Minister for Community Welfare and the purpose changed to "Community Welfare Purposes". In 1973 the Reserve became known as the Mirima Village and in 1986 was vested in the Aboriginal Lands Trust and its purpose changed to "Use and Benefit of Aboriginal Inhabitants". The Reserve is on the northern limits of the Kununurra townsite and is contiguous with several other reserves in the townsite used by Aboriginal people, being Reserves 31221 ("Use and Benefit of Aborigines"); 31504 ("Use and Benefit of Aboriginal Inhabitants (Arts and Historical"); 39128 ("Park"); and 41401 ("Use and Benefit of Aboriginal Inhabitants").

The Reserve was leased to Mirima Council by the Aboriginal Lands Trust by lease dated 6 November 1986 for a term of ninety-nine years at a peppercorn rental. The lease was express to be pursuant to s20(3)(c) and s30(c) of the Aboriginal Affairs Planning Authority Act 1972 (Cth) ("AAPA Act").

The Aboriginal Lands Trust is established as a body corporate with perpetual succession and a common seal by s20 of the AAPA Act. S20(3)(c) provides that with the prior approval of the Minister the Aboriginal Lands Trust is capable of alienating or demising real property. The functions of the Aboriginal Lands Trust are, relevantly, to "acquire and hold land, whether in fee simple or otherwise, and to use and manage that land for the benefit of persons of Aboriginal descent" (s23(b)); "to ensure that the use and management of the land held by the Trust, or for which the Trust is in any manner responsible, shall accord with the wish of the Aboriginal inhabitants of the area so far as that can be ascertained and is practicable" (s23(c)); and "generally, on behalf of and as the corporate entity representing the interests of the Aboriginal inhabitants of the area to which the matter relates, to take, instigate or support any action that may be required to ensure the most beneficial use of the land" (s23(e)).

It was a term of the lease that the Mirima Council use and manage the land in accordance with the wishes of the Aboriginal inhabitants and the "traditional custodians" of the land. Having regard to this provision and the functions of the Trust, it cannot be said that the lease gives effect to an intention of the Crown that native title be extinguished. To the contrary, if the purpose of the lease is consistent with the purpose of the Reserve it is wholly compatible with the continuation of native title. (See: Pareroultja v Tickner per Lockhart J at 218.)

Reserve 31221 - "Use and Benefit of Aborigines"

This Reserve was created in 1972 for the purpose of "Orchard and Horticultural Development" and vested in the Minister for Native Welfare. The Reserve was created at the request of the Commissioner for Native Welfare who sought reservation of fifteen hectares adjacent to Reserve 26600 (Mirima Village) for the use of a group of Aborigines who wished to grow lime trees. In 1974 the Reserve was vested in the Minister for Community Welfare and in 1975 the purpose of the reserve was changed to "Use and Benefit of Aborigines" and vested in the Aboriginal Lands Trust. In 1984 the area of the Reserve was increased to forty-eight hectares.

Miriuwung and Gajerrong people reside on the Reserve and the following are some of the buildings established on the Reserve:

o Waringarri Arts Centre;

o The Language and Cultural Centre;

o Waringarri Radio Station and transmitter tower;

o Kimberley Land Council building.

Reserve 39128 - "Park"

The Reserve, created in 1985, is adjacent to Reserve 31221 and is a fifty metre wide strip of unimproved land vested in the Shire. It is intended that the Reserve be incorporated in Reserve 31221 and vested in the Aboriginal Lands Trust.

Reserve 31504 - "Use and Benefit of Aboriginal Inhabitants (Arts and Historical)"

The Reserve was established in 1972 for the purpose of "Arts and Historical - Aborigines". It is thirty-nine hectares in area. The Reserve was created to provide land to store sacred objects and items of cultural significance for Aboriginal people. In 1983 the purpose of the Reserve was changed to "Use and Benefit of Aboriginal Inhabitants (Arts and Historical)" and the Reserve vested in the Aboriginal Affairs Planning Authority in trust for that purpose.

Reserve 41401 - "Use and Benefit of Aboriginal Inhabitants"

In 1974 a group of Aboriginal people requested that they be given an area of land on which to construct an Aboriginal hostel to provide accommodation for children from remote areas, and an inter-cultural centre. In 1977 an area of Crown land, now part of the land in Reserve 41401, was leased by special lease to the Moongoong Darwung Aboriginal Association Inc for a term of twenty-one years for use as an Aboriginal hostel and inter-cultural centre. In 1982 that lease was surrendered and the Minister for Community Welfare granted another lease of the area to the Association for a term of fifteen years. These leases are considered separately later in the reasons. In 1990 the land was set aside as a Reserve for the above purpose and vested in the Aboriginal Lands Trust. In addition to use of the land as an hostel for Aboriginal children, it has been used for residences for Aboriginal families and for an alcohol rehabilitation centre. The Reserve is 6.8 hectares in area.

Reserve 40260 - "Use and Benefit of Aboriginal Inhabitants"

The Reserve, approximately twenty-four hectares, is on the south-east corner of the townsite boundaries and is surrounded by vacant Crown land. It is vested in the Aboriginal Lands Trust and was created in 1983 pursuant to a request by Aboriginal people for an area on which to reside after they had been required to vacate another part of the townsite taken over for expansion of the Kununurra residential area by subdivision of vacant Crown land into freehold lots.

The Aboriginal Lands Trust leased the Reserve to Gulgagulganeng Aboriginal Corporation by lease dated November 1988 for a term of ninety-nine years from November 1987. The Reserve is known as "Emu Creek".

The lease is in similar terms to the lease to Mirima Council discussed above in respect of Reserve 26600. The relevant condition in the lease requires the lessee at all times during the term to "use and manage the land in accordance with the wishes of the Aboriginal inhabitants of the land and for the benefit of persons of Aboriginal descent". The lease agreement cannot be said to effect an intention of the Crown to extinguish native title.

With respect to each of the foregoing Reserves, none of the purposes for which they have been set aside is inconsistent with the continuation of native title. The use of the Reserves for the purposes of the Reserves has not constituted the use of a declared townsite in a manner inconsistent with the continuation of native title.

Reserve 37883 - Mirima (Hidden Valley) National Park

The Reserve contains the whole of the north-east sector of the townsite and as noted above, the area of the Reserve is 2,067 hectares. Establishment of the Reserve, acknowledged to be a place of significance for Miriuwung people, was suggested in 1967 and effected in 1982. The Reserve contains caves in which there are Aboriginal paintings and skeletons and it has striking geological formations overlooking the town of Kununurra, It is a well known, and frequently visited, site for tourists. The Reserve is vested in the National Parks and Nature Conservation Authority in trust for the above purpose. Prior to 1984 the Reserve was vested in the National Parks Authority ("the Authority").

At the time the Reserve was created the relevant legislation was the National Parks Authority Act 1976 (WA) ("the Parks Act"), subsequently repealed by the Conservation and Land Management Act 1984 (WA).

The relevant provisions of the Parks Act were s18, s22 and s41. Under s18 the Governor may vest in, or place under the control or management of, the Authority any land reserved under the provisions of s29 of the Land Act 1933 (WA). S22 of the Parks Act required the Authority to prepare a "detailed written program" the objects of which were to include "the public utilization, and the maintenance, study, care and restoration of the natural environment, the conservation of indigenous flora and fauna, and such other matters as the Authority recommends and the Minister approves". S41 of the Parks Act permitted the Authority to make regulations giving effect to that Act. The Authority had promulgated such regulations in 1977 which, inter alia, prohibited, unless express permission of the Authority had been obtained; entry to a park except through provided access; entry to a cave; taking or injuring of flora; taking or disturbing of fauna, except fish where it is for personal consumption; carriage of any weapon or means of taking fauna; the lighting of fires except in a stipulated fireplace, in picnic or camping sites; marking of rocks; removal of earth, stone or gravel; camping in other than camping areas; and erection of permanent or semi-permanent structures. Breach of these provisions was an offence under the Regulations.

The State submitted that the prohibitions introduced by the Regulations and the rendering of breaches thereof as offences displayed an intention to extinguish all native title within the Reserve in that the prohibited activities extended to residence access and sustenance.

The first applicants submitted that the Parks Act did not clearly and plainly manifest an intention to extinguish native title nor was it impossible for native title to coexist with the administration and protection of the Reserve by the Authority.

The effect of "vesting" of a reserve under the Land Act 1933 (WA) has been dealt with earlier in these reasons and there is nothing in the Parks Act to indicate that the particular act of the vesting of this Reserve in the Authority under the Parks Act differs in substance from the examples already considered. Indeed, the act of vesting is plainly for the purpose of management of the land for the vested purpose and not devolution of a full beneficial interest in the land. (See: L M Strelein, "Indigenous People and Protected Landscapes in Western Australia", Environmental and Planning Law Journal, 10 (1993) at 380-397.)

The Parks Act was directed to facilitate public use of national parks while at the same time ensuring that the environment thereof was conserved and protected.

The fact that the Regulations make a breach of a regulation an offence is not, in itself, an indication that the Crown intends to extinguish native title and, indeed, it may be contended that the Regulations are not directed to indigenous inhabitants who were in occupation of land by right of unextinguished native title. (See: Mabo (No 2) per Brennan J at 66; per Deane, Gaudron JJ at 114; Wik per Toohey J at 120-121; per Gaudron J at 146-147; per Gummow J at 190-194.)

In any event, on its face the act of creating a national park is to make it available for public use, and even if regulations governing the control and administration of such a park impinge upon rights exercisable by holders of native title, it is impossible to conclude that such impingement amounts to more than regulation of those rights incapable of demonstrating a clear and plain intention of the Crown to extinguish native title as the source of those rights. The setting aside of land as a national park is entirely consistent with the continuation of native title. (See: Mabo (No 2) per Brennan J at 70.)

To like effect, the remarks of Lamer J in R v Sioui [1990] 1 SCR 1,025 where it was made an offence under regulations to destroy, mutilate or remove any kind of plant, and the collection of edible vegetable products was authorized solely for the purpose of consumption of food on the site except in preservation zones where it was forbidden at all times. Camping and fires were permitted only in designated places. In considering whether the exercise of aboriginal rights was compatible with the use to which the land had been put by the Crown as a park, his Honour (at 1, 073) said as follows:

"For the exercise of rites and customs to be incompatible with the occupancy of the park by the Crown, it must not only be contrary to the purpose underlying that occupancy, it must prevent the realization of that purpose. First, we are dealing with Crown lands, lands which are held for the benefit of the community. Exclusive use is not an essential aspect of public ownership. Secondly, I do not think that the activities described seriously compromise the Crown's objectives in occupying the park. Neither the representative nature of the natural region where the park is located nor the exceptional nature of this natural site are threatened by the collecting of a few plants, the setting up of a tent using a few branches picked up in the area or the making of a fire according to the rules dictated by caution to avoid fires. These activities also present no obstacle to cross-country recreation. I therefore conclude that it has not been established that occupancy

of the territory of Jacques-Cartier Park is incompatible with the exercise of Huron rites and customs with which the respondents are charged."

If it could be said that the exercise of some aboriginal rights arising under native title were severely curtailed, it would not follow that native title itself had been extinguished by delegated legislation providing for the management of the Reserve. It was not submitted that anything in the Conservation and Land Management Act 1984 (WA) enacted in substitution for the Parks Act, had greater consequence for native title.

Reserve 29799 - "Recreation and Community Facilities"

In 1969 the Reserve, then approximately twenty-four hectares in area, was created for the purpose of "Public Recreation" and vested in the Shire in 1974. In 1975 part of the Reserve that had been developed by the Ord River Sports Club ("the Sports Club") for a clubhouse and sporting fields for various sports was excised and vested in the Shire as a separate reserve for the purpose of "Club and Club Premises Site". Between 1988 and 1991 further land was excised from the Reserve to be incorporated in the reserve created for "Club and Club Premises Site". That reserve is not part of the claim area. At the same time the purpose of the Reserve was changed from "Public Recreation" to "Recreation". In 1993 the purpose of the Reserve was changed from "Recreation" to "Recreation and Community Facilities".

The area of the Reserve is now approximately 22.5 hectares and about one-third of the area of the Reserve is undeveloped bushland.

In 1991 the developed part of the Reserve was leased in part, approximately two hectares, to the Kununurra Riding Club Incorporated ("the Riding Club") and in part ("the showground") to the Kununurra Agricultural Society Incorporated ("the Agricultural Society"). The lease granted to the Riding Club was for a term of twenty-one years for equestrian activities. Before the lease was granted, and since the 1970s, the Riding Club had used the land for weekend events and had erected stables, jumps and stalls. The Riding Club went into "recess" in 1996. The lease granted to the Agricultural Society is for a term of twenty-one years for entertainment and recreation, and equestrian and agricultural show activities. The area leased to the Agricultural Society is approximately nine hectares.

The showground is used once a year for an agricultural show and otherwise for cricket, exhibitions and entertainment events. Improvements on the land are a pavilion constructed in 1987, toilet facilities erected in the 1970s and replaced in 1997, and caretaker's quarters. A perimeter fence erected in the late 1970s was replaced in 1997.

The validity of the lease to the Riding Club was challenged by the first applicants. For the following reasons it is unnecessary to determine that issue.

The land used by the Riding Club and by the Agricultural Society is land provided for use as a town amenity recognized as such in the town planning scheme of the Shire. Although use of the Reserve by the Riding Club or the Agricultural Society may not bespeak permanent use or development by those organizations of the parts of the Reserve they possess, there has been a use and commitment of the Reserve for "Recreation and Community Facilities" by the Shire that has permanence whatever organizations coordinate the use of that part of the Reserve from time to time as a town amenity. On the other hand, the undeveloped part of the Reserve has not been put to a use that is inconsistent with the continued existence of native title and it cannot be concluded that native title has been extinguished in respect of that land. The absence of conflicting use of that land may be contrasted with the more intensive use of land used for a town amenity, for example, the land used by the Riding Club, Agricultural Society and Sports Club and other land in the town used for facilities such as a caravan park, swimming pool and public parks, none of the latter having been included in the claim area.

Reserve 42441 - "Landscape Protection and Recreation"

This is a Reserve of seventy-five hectares, created in 1993 and vested in the Shire. The land has not been used for any other purpose than that for which it is now reserved. It is undisturbed land except for improvements by way of access roads to a prominent lookout known as Kelly's Knob and to small areas used for water tanks, water pipes, communication towers and beacons.

No development of the area has been undertaken for the purpose of the townsite other than the limited matters mentioned. The creation of the Reserve was not for a purpose inconsistent with the continuation of native title. Therefore, neither the act of resuming the land for the purpose of a townsite nor setting the land aside for a reserve for landscape protection and recreation has demonstrated an intention to extinguish native title.

Reserve 42998 - "Park and Drainage"

This is a small Reserve the size of two residential lots, on the perimeter of a residential area abutting vacant Crown land. The Reserve was created in April 1994 and vested in the Shire. The land was formerly vacant Crown land on which residents of the adjoining subdivision established a grassed area, installed a bore, connected the area to the electricity supply, reticulated water and erected children's playground equipment including a practice cricket pitch and net. There are drains on the land to take water from the residential area. The Shire requested that the Reserve be created to provide formal recognition of a public park established on Crown land.

The nature of the use of the land as a town amenity is inconsistent with the continuation of native title. It is now a town park albeit used principally by the residents of the freehold properties which surround it. However, the work carried out on vacant Crown land was not authoirzed by the Crown at the time it was carried out and the land, although reserved for the purpose of a townsite, had not been set aside for any specific use.

The creation of the Reserve adopted as a public work the work that had been carried out on the land without authority prior to that date. The creation and vesting of the Reserve in those circumstances effected the dedication of land to a townsite amenity.

At the time the Reserve was created, the act of the Crown in proclaiming the Reserve, adopting the work carried out on the land and vesting the Reserve in the Shire with the intent of extinguishing native title, would have been a "future act" under s233 of the Act as it then stood and incapable of extinguishing native title. Whether it may be the subject of validating legislation by the State under s22F of the Act as "an intermediate period act" is unnecessary to consider.

Reserve 39000 - "Drainage"

The area of the Reserve, approximately nineteen hectares, is contiguous with Reserve 31221 ("Use and Benefit of Aborigines") and Reserve 41401 ("Use and Benefit of Aboriginal Inhabitants") vested in the Aboriginal Lands Trust. It is on the western boundary of the townsite and was created in 1985 to serve the irrigated lands outside the townsite by controlling and draining waters that would otherwise run from elevated areas of the townsite on to farmlands. The Reserve functions as a water basin to collect run-off water and to drain it to the Ord River thereby preventing flooding of irrigated properties. The Reserve is vested in the Water Corporation.

The land is not used for the purpose of the townsite and it is use of the land for the public work of the Project that determines whether the nature of the use is such that native title has been extinguished.

The use of the Reserve for drainage involves no development or construction of works on the reserve other than drainage lines. It is an area used to contain water for short periods until the drainage system can convey it away from farmlands. There is no fundamental inconsistency between the use of the land for the drainage purpose and the continuation of native title.

Reserve 40258 - "Buffer Strip"

This is a minor area that serves as a "buffer strip" between the Victoria Highway and a freehold lot on which a bulk-oil depot operates. The Reserve is undeveloped land on the south-eastern boundary of the townsite, indistinguishable from adjacent vacant Crown land. In the absence of any other material detailing the use of the Reserve for the purpose of the townsite no intention to extinguish native title has been demonstrated.

Reserve 30356 - "Cattle Experiments (Department of Agriculture)"

This Reserve is approximately 333 hectares in area and is situated on the southern boundary of the townsite to the south-east of the town as developed. The Reserve was proposed in 1967 and created in 1970. The land has not been used for any townsite purpose since resumption of the land in 1961 except for the excision of two small areas for the use of a radio tower and for road works. The Reserve was created for the use of the Kimberley Research Station for cattle-fattening experiments and is vested in the Chief Executive Officer of the Department of Agriculture. Improvements on the land consist of fenced paddocks, cattle yards, a shed, a lot feeding system and a dam.

There has been no use of the land for townsite purposes to effect the extinguishment of native title. The purpose and use of the Reserve for agricultural research has neither been permanent nor so inconsistent with the continuation of native title to conclude that the intention of the Crown to extinguish native title has been manifested by the dominion exercised in respect of the land.

(ii) Other reserves Reserve 1060 - "Public Utility"

This Reserve was created in 1886 and was used as a watering point for cattle on the stock route to Wyndham. The area of the Reserve is approximately 987 hectares. There was some doubt according to the records produced whether a formal pastoral lease was issued for this land before the Reserve was created. The records indicated that in 1887 the pastoral lease was forfeited for non-payment of rent. It was also suggested that whether possession of the land over which the pastoral lease was granted was ever entered into was uncertain and that when the Reserve was created in 1886 it may have been vacant Crown land and not land subject to a pastoral lease.

Having found that the grant of a pastoral lease did not extinguish native title, it is immaterial whether this Reserve was created on land excised from, or formerly held under, a pastoral lease. The reserve is situated on the northern bank of the Ord River near the eastern side of the Gulf and is surrounded by the land of the Carlton Hill pastoral lease. A stock-watering dam is the only development on a small portion of the reserve. Neither the creation of the reserve nor the use of the land for the reserve purpose thereafter effected extinguishment of native title.

Reserve 1061 - "Public Utility"

This Reserve is approximately 3,000 hectares in area. It is situated on the Ord River south-west of Reserve 1060 ("Public Utility") and adjacent to Reserve 18810 ("Tropical Agriculture"). It was created in 1886.

The Reserve included a crossing point over the Ord River and was used for a similar purpose to Reserve 1060, namely, a watering point for cattle on the stock route to Wyndham. The part of the Reserve on the north side of the Ord River abuts land of the Carlton Hill Station pastoral lease and the remainder of the Reserve, south of the Ord River, abuts land of the Ivanhoe pastoral lease. In 1977 a lease of the part of the Reserve south of the Ord River was granted to Ivanhoe Grazing Company Pty Ltd from year-to-year for "grazing only" under which no compensation is payable for any improvements erected on the land. In 1992 a lease of part of the Reserve south of the Ord River, excluding the areas referred to below, and Reserve 18810, was granted to Crosswalk Pty Ltd, one of the seventh respondents, for a term of one year for grazing purposes.

Two small portions of the Reserve have been the subject of statutory leases from the Crown of short duration under s32 of the Land Act 1933 (WA). One such lease of an area of 8,000 square metres near the Ord River, granted in 1993 to G and J Harman, sixth respondents, is for a term of one year, the land to be used for the purpose of a "tourist and travel stop facility". If renewed it is determinable on three months notice. The area is used as a basic camp facility comprising a residence, kitchen area, bough sheds, water tank and ablution facilities as a base for tourists engaged in fishing excursions conducted by the lessees. The structures appear to have been established prior to the grant of the lease and it was not submitted that such acts were done pursuant to lawful authority. At material times the land was within the Noogoora Burr Quarantine Area.

The second lease, also granted in 1993, is a lease for one year to the Agricultural Protection Board in respect of an area of 5.85 hectares for the purpose of Government residence. The lease is determinable on three months notice if renewed. Some improvements erected on the leased land were constructed before the lease was granted. The improvements consist of a camp for Agriculture Protection Board officers engaged in eradicating noogoora burr from the area when it was within the proclaimed Noogoora Burr Quarantine Area. It is a requirement of each lease that public right of access to roads and tracks be maintained.

Given that the purpose of the Reserve, comprised of open bushland, is for public use, the creation and use of the Reserve involves no impediment to the continuation of native title and demonstrated no clear and plain intention by the Crown to extinguish native title. In so far as parts of the Reserve are subject to short-term leases, the purposes of those leases is subject to the purpose of the Reserve and do not suggest any permanence of use from which it could be concluded that it was intended that native title be extinguished by adverse dominion on those parts of the Reserve. Given that no extinguishment of native title has been effected, the grant of the lease to G and Harman in 1993 is not a "past act" under the Act. It is unnecessary to consider the submission that if it were a "past act" it would have been a "category A past act" as a "commercial lease" as defined in s246 of the Act. I would observe, however, that the class of activity contemplated in s246 to satisfy the concept of a "commercial lease" is, as may be expected, an undertaking of greater permanence and involving more intense use of land than is represented by an uninhabited camping facility on pastoral land for use in organized fishing excursions.

The effect of the leases to Ivanhoe Grazing Company Pty Ltd and to Crosswalk Pty Ltd and of the proclamation of the Noogoora Burr Quarantine Area upon native title will be considered later in the reasons.

Reserve 1062 - "Public Utility"

This Reserve, created in 1886, as a watering point on a stock route is approximately 458 hectares in area situated on the Ord River north of Kununurra, known as "Button's Crossing". The Reserve is surrounded by vacant Crown land and land of the Ivanhoe pastoral lease. Part of the Reserve is used by Kununurra residents and tourists for access to fishing areas, and for the launching of boats into the Ord River. Neither the creation of, nor the use of, the Reserve is inconsistent with the continuation of native title.

Reserve 1063 - "Agricultural Research Station"

This Reserve, approximately 404 hectares in area, was also created in 1886 as a watering point for cattle on the stock route to Wyndham and the purpose of the Reserve was for "public utility". The Reserve is outside the eastern boundary of the townsite of Kununurra.

In 1968 the purpose of the Reserve was changed to "Cattle Experiments (Department of Agriculture)" and the land was used by the Kimberley Research Station.

In 1983 the purposes of the Reserve was changed to its present description, and the Reserve vested in the Minister for Agriculture. The Reserve, largely undeveloped, is surrounded by the Ivanhoe pastoral lease, Mirima National Park and vacant Crown land.

The material provided suggests no inconsistency between the purpose and the use of the Reserve and the continuation of native title.

Reserve 1166 - "Public Utility"

This Reserve, approximately 259 hectares in area, was created in 1886 as a watering point for cattle on a stock route to Wyndham. It is north of the Ord River surrounded by land of the Carlton Hill pastoral lease. The area is undeveloped and neither the vesting of the Reserve nor any use of the Reserve has extinguished native title.

Reserve 18810 - "Tropical Agriculture"

This Reserve was created in 1924 and is now approximately 4,645 hectares in area after the size of the Reserve was increased in 1991. The Reserve is situated on the southern bank of the Ord River between Kununurra and Wyndham and is included within land that, potentially, is useable as irrigable land. It is open land between Reserve 1061 ("Public Utility") and Reserve 42155 ("Conservation of Flora and Fauna") and is contiguous with land of the Ivanhoe pastoral lease. It was not suggested that the Reserve was ever used for tropical agriculture. As noted above, the Reserve, with part of Reserve 1061, is leased from year-to-year to Crosswalk Pty Ltd. The effect of that lease on native title is considered later in the reasons. Neither the creation of the Reserve nor the use of the reserved land for grazing purposes is inconsistent with the continuation of native title.

Reserve 38358 - "Parkland"

This Reserve, approximately 658 hectares in area, was created in 1983 by excision of that land from Reserve 22609 ("Kimberley Research Station"). The Reserve is on the eastern bank of the Ord River adjacent to irrigated farmlands north of Kununurra. The Reserve was created for "Natural Regeneration" to halt erosion that had been caused by grazing activities while the land was part of the Ivanhoe pastoral lease and used for research purposes when part of the Kimberley Research Station.

The Reserve was that part of the land resumed from the Ivanhoe pastoral lease in 1963 for the purpose of extending the Kimberley Research Station. The Reserve has not been vested under s33 of Land Act 1933 (WA). In 1992 the purpose of the Reserve was changed to "Parkland" and it is now said that the function of the Reserve is to preserve an area of local bushland.

In 1975 the whole of Reserve 22609 ("Kimberley Research Station") was leased by the State to the Commonwealth of Australia pursuant to s33 of the Land Act 1933 (WA) for a term of fifty years from 1 July 1974. The purpose of the lease was to hand over the operation of the Kimberley Research Station to the Commonwealth Scientific and Industrial

Research Organisation. The lease provided that at all times the land was to be used by the Commonwealth for the purpose of "Agricultural Research Station" and for no other purpose whatsoever without the licence of the lessor. It was provided that if the land was used otherwise than for the purpose of the lease, or not used for the purpose within two years from the date of the lease, the lessor may re-enter and repossess the land as if the lease had not been executed.

The interest conferred by the lease fell short of an estate in fee simple which the State was empowered to grant under s33(4) of the Land Act 1933 (WA). Rather than vest the land in the Commonwealth under s33(2), the Crown in the right of the State provided possession of the land to the Commonwealth by way of lease thereby retaining some measure of control. In 1982 the State was able to obtain from the Commonwealth a surrender of the lease in respect of the land that became the Reserve.

Whilst it was possible that use of the land for the purpose of an agricultural research station, may have involved an intensity of development and a change of character of the land that was incompatible with the continuation of Aboriginal connection with the land pursuant to native title, the grant of the lease by the State to the Commonwealth did not signify a clear and plain intention by the Crown in the right of the State, to extinguish native title by creation of a possessory interest in the land in the Commonwealth. Indeed, in 1982 the State was able to recover part of the land when it determined that it desired to set aside the land of the Reserve for the purposes of soil conservation and vegetation regeneration. In 1986 the Commonwealth ceased to use the land for the purpose of the lease. The lease was terminated and the land recovered by the State as of its former interest.

No adverse dominion was demonstrated by the grant of the lease and the use of the land by the Commonwealth. The lease was for the purpose of Reserve 22609 which, in turn, was a purpose serving the public interest. Use of the land under the lease was not inconsistent with the continuation of native title although it may have involved regulation of rights exercisable by reason of that title.

Reserve 29277 - "Irrigation Works"

The Reserve, now approximately twenty-four hectares in area, was created in 1968. It is vested in the Water Corporation with power to lease for a term not exceeding twenty-one years. This Reserve is near the construction site of the diversion dam and, between 1960 and 1963 during the construction of the diversion dam, was used as a construction yard and depot and for a concrete batching plant and pre-casting yard for construction works. Between 1977 and 1993 part of the land has been the subject of short-term leases to C Guerinoni and has been held over for periods at the expiration of a short-term lease. The stipulated purpose for the use of the land in the leases has been the operation of a crushing plant. Since 1993, that part of the land has been under short-term licences to Guerinoni Nominees Pty Ltd for the same purpose. Material is brought from quarries to the crushing plant which operates for five months of the year. There was no permanent use of the area for irrigation purposes.

In 1983 portion of the Reserve was excised for Reserve 38368 "Tropical Gardens" for the purpose of beautifying the area in the vicinity of the diversion dam.

The evidence does not suggest any permanent use of the Reserve inconsistent with the continuation of native title. Use of the Reserve for a crushing plant, although it has operated for a number of years, has been on short-term arrangements and is not an "irrigation work". That use does not require a conclusion that native title has been extinguished by exercise of adverse dominion although exercise of rights under native title may be regulated or controlled by exercise of the rights granted to the licensee and its predecessor under lease.

Reserve 29297 - "Recreation"

The Reserve was created in 1968 and vested in the Shire in 1978 with power to lease for a term not exceeding twenty-one years, subject to the approval of the Minister. It is situated behind the foreshore of Lake Kununurra and is 8.7 hectares in area. The original purpose of the Reserve was for "Public Recreation" altered to "Recreation" in 1991. Part of the Reserve is leased to the Kununurra Water-Ski Club (Inc) ("the Water-Ski Club"). By an indenture which operated as an agreement to lease, dated 11 August 1981, the Shire agreed to lease an undefined part of the Reserve to the Water-Ski Club for a term of twenty-one years. The indenture did not refer to a schedule but attached to the photocopy documents was a page headed:

"THE SCHEDULE of land hereinbefore referred to - ALL THAT land delineated and coloured red and the plan hereto annexed and being part of lot 314, Reserve No 29297."

Below these words was a locality plan for, inter alia, Reserve 29297 and a hand-drawn marking of an area on that plan.

The Indenture appears to have been overtaken by a Deed of Lease dated 10 November 1992 pursuant to which portion of the Reserve and of Reserve 41812 ("Foreshore and Recreation"), was purportedly leased to the Water-Ski Club for a term of twenty-one years.

The only description of the land leased by the Deed is as follows:

"1) Portion of Reserve No 29297, King Location 714;

2) Portion of Reserve No 41812, King Location 667."

It is impossible to ascertain the dimensions of the demised premises from the terms of the Deed. The State contends that the estate of the Water-Ski Club as lessee would be recognized in equity by reason of the doctrine of part-performance. Whether that is so is not necessary to decide. The legal interest recognized as native title is not subject to defeat by such an equitable interest whether prior or subsequent. Extinguishment of native title is a matter of law effected by legislation, or by acts of the Crown authorized by legislation, which, at law, have the effect of extinguishing native title as intended by the Crown.

Irrespective of the validity of the lease to the Water-Ski Club, extinguishment of native title may be demonstrated only by use of the reserve for a purpose and in a manner that is permanent and involves the exercise of dominion that is inconsistent with the continuation of native title. In making the land available to the Water-Ski Club, the Shire provided for recreation for a segment of the public by allowing the Water-Ski Club to use a small clubhouse and shade facilities erected on the land before the lease was granted in November 1992. The use of those facilities may exclude other members of the public but the land surrounding the facilities is open to public use. The whole of the Reserve is an amenity regularly utilised by the local population for a variety of water sports and water-related activities. (Ex 21(a) p18) It is a requirement of the purported lease that the Water-Ski Club comply with directions of the Shire to ensure free and unimpeded public access to any part of the demised area that forms part of the foreshore of Lake Kununurra.

The use of the Reserve by the Water-Ski Club pursuant to the lease provided by the Shire involves regulation of the exercise by Aboriginal people of rights derived from native title but that the rights granted by the lease are not fundamentally and permanently inconsistent demonstrating completion of an intention by the Crown to extinguish native title.

In addition the Shire has permitted the Ord River Yacht Club Inc ("the Yacht Club") to use part of the Reserve pursuant to an indenture made between the Shire and the Yacht Club. The indenture purports to be dated as at March 1981 but the date of execution by the Shire is shown as 14 March 1982. The indenture operates as an agreement to lease pursuant to which the Shire agrees to lease to the Yacht Club "a portion" of Kununurra Lot 314 (Reserve 29297) for a term of twenty-one years from 1 March 1982.

The part of the Reserve subject to the agreement to lease is not further defined in the indenture. The indenture does not refer to a schedule but attached to the photocopy documents tendered in evidence was a page headed:

"THE SCHEDULE of land hereinbefore referred to - ALL THAT land delineated and coloured red and the plan hereto annexed and being part of lot 314, Reserve No 29297."

Below these words was a locality plan for, inter alia, Reserve 29297 and a hand-drawn marking of an area on that plan.

Cl3(k) of the indenture is in the following terms:

"3(k) To allow reasonable and unrestricted access and the use of the general grounds and ablutions by members of the general public and persons not a member of the Yacht Club PROVIDED HOWEVER that any person who is not a member of the Yacht Club and who is on the aforementioned premises whilst the Yacht Club is conducting it's [sic] regular or normal activities shall comply with all reasonable direction relating to-his-use [sic] and conduct at the said premises in the interests of safety decency and the smooth operation of the normal operation of the activities of the Club."

If it is said that the indenture in its terms took effect as a lease, there is nothing in the terms thereof to conclude that the possession of part of the Reserve given to the Yacht Club involved a use of the Reserve inconsistent with the continuation of native title.

To the contrary, at best, the terms of the indenture may permit the control of the exercise of rights under native title but otherwise the rights provided to the Yacht Club and the rights of the holders of native title may coexist.

It follows that native title has not been extinguished in respect of the Reserve.

Reserve 30290 - "Racecourse and Pony Club"

The Reserve was created in 1970 and vested in the Shire with power to lease for a term not exceeding twenty-one years, subject to the approval of the Minister. Before the Reserve was created the land had been used by the Kununurra Amateur Race Club Inc ("the Race Club") as a racecourse. The area of the Reserve was slightly enlarged in 1991 and now comprises approximately 110 hectares. The Race Club was granted a lease of the entire Reserve in 1970. The term of the lease was twenty years. In 1991 the Race Club was given a lease of part of the Reserve. The lease was granted for the purpose of horse riding, rodeo and equestrian club activities.

Only part of the Reserve is in the claim area. The claim area does not extend to that part of the Reserve that is the main part of the area leased to the Race Club, on which the race-track and some other facilities are situated. The Reserve is outside the townsite and is in open country. On the northern part of the Reserve within the claim area, the only improvements are some stables and fences. That area is outside the area leased to the Race Club. The southern segment of the Reserve within the claim area and subject to the lease, is mainly undeveloped land adjacent to a large area of land reserved for conservation purposes (Reserve 31780). The part of the Reserve within the claim area remains natural country of which limited use has been made. Only occasional use is made of the land for race events and rodeos by the Race Club.

There is nothing in the material to suggest that in respect of the portion of the Reserve within the claim area that creation of the Reserve, and use of that part of the Reserve thereafter, has made continuation of native title impossible.

Reserve 30804 - "Gravel"

The Reserve was created in 1971 and vested in the Shire. It was used by the Shire for gravel for road works. The use of the Reserve for that purpose ceased in the 1980s. The area of the Reserve was reduced in 1991 to a little over three hectares.

There is no permanent use of the Reserve for any public purpose and native title has not been extinguished by creation and use of the Reserve.

Reserve 31780 - "Conservation and Recreation"

The Reserve was created in 1973 to formalise use of vacant Crown land over several years by members of a pistol club who had established a pistol range. The Reserve was vested in the Shire with power to lease for a term not exceeding twenty-one years, subject to the approval of the Minister. The purpose of the Reserve when created was "Pistol Range" and the area of the Reserve was about two hectares.

In 1992 the area of the Reserve was increased to 209 hectares and the purpose of the Reserve altered to "Conservation and Recreation". The area added to the Reserve was open country containing a distinctive topographical feature known as the "Sleeping Buddha".

The small original area of the Reserve was leased by the Shire to the Ord Pistol Club Inc ("the Pistol Club") for a period of two years from 31 March 1993. Members of the Pistol Club have used the pistol range most weekends since it was established in about 1970. Later, by a Deed of Variation the term of the lease was purportedly extended to twenty-one years. In 1995 the Pistol Club erected a fence around the leased area. The Pistol Club has constructed firing ranges separated by concrete walls, banks of target frames, a clay pigeon shooting amphitheatre, a storeroom, toilets, covered spectator seating, a generator shed and a bore.

The first applicants contested the validity of the Deed of Variation on the basis that the approval of the Minister for Lands had not been obtained as required by the conditions of the vesting of the Reserve in the Shire and that the common seal of the Pistol Club had not been affixed. The State submitted that an interest had been created pursuant to the Land Act 1933 (WA) by execution of the Deed of Variation by the Shire and, furthermore, that the Court should take judicial notice of the apparent endorsement of the consent of the Minister upon the Deed. The approval of the Minister is clearly endorsed as submitted and the contents of the Deed, which required no covenants from the Pistol Club and operated as a grant by the Shire of an extension of the term of the lease, is sufficient to create an interest in law upon execution of the Deed by the Shire.

In any event, extinguishment of native title in respect of the two-hectare area occupied by the Pistol Club does not turn on the grant of the lease but on the creation of a reserve in 1973 with the intention that the Pistol Club use the facilities

that had already been constructed and thereafter make use of the Reserve in a manner that was incompatible with continuation of native title in respect of that area.

It should be concluded that that part of the Reserve created originally for the purpose of a pistol range and now the subject of lease to the Pistol Club has been used for an activity of sufficient nature and permanence to be inconsistent with the survival of native title. In respect of that part of the Reserve native title should be regarded as extinguished. With regard to the balance of the Reserve, the purpose for which the Reserve exists, and the use of that part of the Reserve demonstrate no inconsistency with the continuation of native title.

Reserve 32446 - "Native Paintings"

The Reserve was created in 1974 to protect Aboriginal rock paintings and vested in the Western Australian Museum. The area of the Reserve is 121 hectares and, as the purpose of the Reserve suggests, is undisturbed land to the north of irrigated land north of Kununurra.

Clearly, native title has not been extinguished by the creation and use of this Reserve.

Reserve 41812 - "Foreshore and Recreation"

The Reserve was created in 1991 and jointly vested in the Water Authority of Western Australia (now Waters and Rivers Commission) and the Shire with power to lease for a term not exceeding twenty-one years, subject to the approval of the Minister. The Reserve is outside the Kununurra townsite and is fifty-five hectares in area. It extends around the northern side of Lake Kununurra inserted between Reserve 29297 ("Recreation") and Reserve 302900 ("Racecourse and Pony Club"). When created the sole purpose of the Reserve was "Foreshore". "Recreation" was added in 1993. The Waters and Rivers Commission, as a joint vestee of the Reserve, exercises control over the use thereof to ensure that erosion of the banks of Lake Kununurra and pollution of the lake waters can be prevented. The Shire is responsible for facilitating public recreation. The Reserve is used for access to Lake Kununurra by persons who use a beach on the Lake and by members of the Yacht Club and Water-Ski Club referred to earlier in respect of Reserve 29297.

The Reserve is used by many as an area providing access to water-based activities but is also an area well-used for passive recreation and relaxation. The Court conducted a hearing on the Reserve. Topsy Aldus, Mignonette Djarmin, Nancy Dilyayi and others performed ceremonial singing and dancing ("Moonga Moonga") as part of the case of the first applicants.

A boat ramp and sand beach have been constructed on the Reserve, and picnic and barbecue facilities, children's play equipment, and reticulated grassed areas installed. In general, the Reserve represents an area open to the public for general recreation coupled with several concession areas granted to commercial operators.

A number of interests have been created in the foreshore by the construction of works and grant of various leases and licences, the principal among which may be summarised as follows:

o Ord Valley Aquacraft Hire

In 1996 a purported lease of seventy metres of the foreshore was granted to the proprietor of this firm. It was submitted that the lease did not comply with the "future act" provisions of the Act and did not have the approval of the Minister in writing as required and was, therefore, invalid. The State made no submissions in response. The terms of the lease required the lessee not to restrict public access to the foreshore.

Neither the Shire, nor the lessee as sixth respondent, made any submissions in response to the first applicants' contentions. The purported lease was for a term of five years.

The lessee was required by the Shire by covenant to comply with the reasonable directions of the Shire to provide for public pedestrian access to the leased area during daylight hours. The only permitted purpose for the use of the leased premises was for the hire of non-motorised aqua-bikes.

The lack of permanence in, and the limited nature of, the use provided by the lease coupled with the broad purpose of the Reserve, demonstrates that native title has not been extinguished by any adverse dominion constituted by this use of the Reserve. It is unnecessary to consider whether the purported grant of the lease "affected" native title within the meaning of s227 of the Act.

o Kona Lakeside Tourist Park

The lease made in 1993 to the proprietor of the caravan park for a term of ten years permitted the lessee to use part of the foreshore for the purpose of "camping" but required the lessee to comply with all reasonable directions of the Shire to provide for public pedestrian access to the foreshore during daylight hours.

Given that Shire by-laws prohibit camping on reserves vested in the Shire unless done with the consent of the Shire, the lease acts as a continuing consent. Whether such a continuing consent is consistent with the terms of the by-laws, or with the purpose of the Reserve, is unnecessary to consider.

Having regard to the limited nature of the lease and the broad purpose of the Reserve with which the lease must be consistent, there is a lack of permanence in the use to which that part of the Reserve has been put to conclude that native title has been extinguished in respect of that area by exercise of adverse dominion.

o Pumping Station

This public work was carried out before the Reserve was created as an integral part of the first irrigation of land on Ivanhoe Plain pursuant to the purpose for which the land had been resumed, namely, the Project. After the main dam was constructed, however, the pumping station was rarely used. Thereafter water has been kept at an appropriate level in Lake Kununurra by release of water from the main dam to maintain gravity-generated flows of water through the main irrigation channel.

The work was constructed as a public work of a permanent nature effected for the purpose for which the land had been set aside upon resumption and native title was extinguished in respect of the area on which the pumping station was erected.

o Alligator Airways Pty Ltd

This company has been granted a licence under the Jetties Act 1926 (WA) to erect a jetty on Lake Kununurra foreshore. The licence is terminable on one month's notice and upon termination the jetty is to be removed by the licensee.

o Triple J Tours Kununurra Pty Ltd

A licence to erect a jetty was granted to this company under the Jetties Act 1926 (WA) and permission granted to construct and maintain a fuelling facility at the pumping station site and to use the jetty and facilities to supply fuel to private and commercial vessels. As noted above, the pumping station area is land in respect of which native title has been extinguished and the effect of the jetty licence is unnecessary to consider.

The Reserve is an open area available for use by the public. Continuation of native title was not incompatible with the purpose of the Reserve when it was created nor with the use of the Reserve thereafter. The exercise of aboriginal rights may be regulated by rights vested in third parties and the public but the respective rights remain concurrent rights and extinguishment of native title is not an obvious pre-condition for the exercise of rights by third parties and the public. Further, it is apparent that the temporary nature of the rights granted pursuant to the leases or licences of the type referred to above, did not occasion the extinguishment of native title in respect of that part of the Reserve to which the leases and licences apply.

Reserve 38368 - "Tropical Gardens"

The Reserve was created in 1983 and vested in the Shire. The Reserve is situated behind Reserve 41812 ("Foreshore and Recreation") and Reserve 29297 ("Recreation") but is proximate to the diversion dam and Lake Kununurra. The Reserve was excised from Reserve 29277 ("Irrigation Works"). When created it was proposed that it be used for picnics and passive recreation. In 1993 more land was excised from Reserve 29297 and added to the Reserve, the area of which is now approximately 8.5 hectares. Part of the Reserve has been developed as a botanical garden by a community organization. A gazebo, boardwalk, a small ornamental lake and picnic facilities have been constructed.

The development of the Reserve is not intensive and together with adjoining Reserves 29297 and 41812 it forms a large area of open land available to the public.

The purpose and use of the Reserve has not created public rights that are incapable of coexistence with rights exercisable under native title.

Reserve 41273 - "Recreation"

This five-hectare Reserve was created in 1990 and vested in the Shire. The Reserve was created in response to a request from the Yacht Club for use of an area of land near Lake Argyle. The Reserve is surrounded by vacant Crown land and is near the northern limits of the Lake. It is an isolated Reserve in open bushland. The area is rarely used. Clearly, no adverse dominion extinguishing native title has occurred by reason of the creation and use of the Reserve.

Reserve 40536 - "Use and Benefit of Aboriginal Inhabitants"

The Reserve is approximately ninety-five hectares in area. It was created in 1988 and vested in the Aboriginal Lands Trust. The Reserve was created from vacant Crown land formerly part of the Argyle pastoral lease. It is near the eastern bank of the Ord River, about ten kilometres south of Kununurra. The Trust granted a lease of the Reserve for a term of ninety-nine years from 1 August 1992 to the Ribinyung Dawang Aboriginal Corporation. The Reserve is known as "Mudd Springs".

It is a condition of the lease that the lessee at all times during the term "use and manage the land in accordance with the wishes of the Aboriginal inhabitants of the land and for the benefit of persons of Aboriginal descent". The lease contains a clause that neither in its execution or operation is the lease to be construed or administered so as to extinguish or in any way impair any traditional native title which exists or may be found to exist at law in respect of the land or any part of it. "Traditional native title" is defined as "any rights or interests, apart from any rights or interests held by virtue of the lease or any other grant of the Crown held at law in the land and its resources or any part thereof by an Aboriginal person or persons, such rights or interests arising by virtue of custom or by virtue of possession, occupation and/or use of the land or part thereof in accordance with Aboriginal traditions, customs and practices."

Obviously the purpose of the Reserve, and the use of the Reserve for that purpose, involves no fundamental inconsistency with rights exercisable under native title and no extinguishment of native title has been effected by the creation and use of the Reserve or the grant of a lease in respect of the Reserve.

Reserve 41617 - "Recreation"

The Reserve is an area of 61.5 hectares vested in the Shire in 1991. The creation of a larger Reserve was proclaimed earlier in 1991 but then revoked. The Reserve was created by excision of land from the Ivanhoe pastoral lease which surrounds it, about ten kilometres south-east of Kununurra. Whilst it was part of the pastoral lease, the land had been used informally in the 1970s by a pony club for equestrian activities. The land is open, undeveloped country available for use by any member of the public. No inconsistency between the creation and use of the Reserve and the exercise of rights under native title has been demonstrated and it follows that native title has not been extinguished in respect of the land in the Reserve.

Reserve 34585 - "Conservation of Flora and Fauna"

The Reserve is 303 hectares to the north of the land resumed for the Project. In 1977 the land contained in the Reserve was resumed from the Ivanhoe pastoral lease. The Reserve was created in the same year and vested in the Western Australian Wildlife Authority (now National Parks and Nature Conservation Authority). It was named "Point Spring Nature Reserve" in 1982. Reserve surrounds a spring which provides a natural water supply and is the domicile of a rare species of wallaby and a colony of bats and contains a small area of rain forest. In 1968 the Shire, supported by the Department of Fisheries and Fauna, had requested that the land be declared a flora and fauna reserve. The land was part of the Ivanhoe pastoral lease and cattle using the Point Spring water supply were damaging the area and polluting the water. A fence has been constructed on the perimeter of the Reserve. Before the Reserve was created yards for trapping cattle near the water source had been erected and used by the lessee of the pastoral lease.

None of the foregoing involves more than regulation of Aboriginal rights under native title and no extinguishment of native title has been effected by the creation and use of the Reserve, nor was it extinguished by acts of the lessee under the pastoral lease in respect of that area.

Reserve 35289 - "Natural Regeneration"

The Reserve is approximately 6,020 hectares, south-west of Kununurra on the western side of the land of Packsaddle Plains developed as irrigated farms. It includes all the land resumed from the Ivanhoe pastoral lease in the Packsaddle

Plains area in 1972 not developed as irrigated land, and part of the Argyle Downs pastoral lease acquired by the State in 1972. The Reserve was created in 1978 to exclude cattle from land adjacent to irrigated farms to prevent further erosion of that land and to drain water to the Dunham River on the northern border of the Reserve. The Reserve has not been vested in any authority. As suggested by the purpose of the Reserve, it is open, undeveloped country. Within it are the community living areas of the Woorre-Woorrem and Yirralalem communities.

Drains and levees constructed to protect adjacent farmlands involve a very small part of the land and a minor use thereof. There has been no act by the Crown to extinguish native title in respect of the area of this Reserve.

Reserve 36951 - "Quarry"

The Reserve occupies part of the watercourse of the Ord River from a point approximately one kilometre north of the diversion dam and extending for approximately six kilometres downstream. The total area of the Reserve is approximately 430 hectares. The Reserve was created in 1980 and is vested in the Minister for Works. The land within the Reserve was used as a source of aggregate for concrete works most of which were carried out before the Reserve was created. The Reserve includes an area covered by the continual flow of the Ord River. The Reserve was created to protect a source of aggregate. What use has been made of the Reserve for the supply of aggregate, and what part of the Reserve is used for that purpose since the creation of the Reserve was not the subject of evidence.

The creation of the Reserve and the use of the Reserve for the purpose it was created do not suggest any permanent inconsistency with the exercise of Aboriginal rights under native title capable of supporting a conclusion that native title has been extinguished by adverse dominion.

Reserve 37380 - "Protection of Diversion Dam"

The Reserve is approximately eighty hectares and vested in the Water Corporation. It was created in 1981 to exercise control over activities on, or near, the diversion dam. The diversion dam and the section of highway built on the dam are within the Reserve. The Reserve includes the waters and river banks downstream from the dam for approximately one kilometre. There is regular flow of water through the gates of the diversion dam that erodes the riverbed and banks, and the force of water flow also creates safety issues and the need to control public activities in the area. It is a well-known, well-used location for fishing. The Reserve is an area well used by the inhabitants of Kununurra and by visitors.

Apart from the public works constructed, the area is undeveloped although the character of the riverine area has been altered by the constant water flow released from the diversion dam.

Native title has been extinguished on the land on which public works have been constructed but in respect of the balance of the Reserve the exercise of aboriginal rights under native title can coexist with the use of the Reserve for the purpose for which it was created although such use of the Reserve may involve regulation or control of those rights.

Reserve 36551 - "Irrigation"

The Reserve was created in 1980 and is now vested in the Water and Rivers Commission. The terms of the vesting order in evidence did not include a power to lease. The area of the Reserve is 800 hectares of open land near Lake Argyle. The Reserve commences at the spillway of Lake Argyle which flows into a natural watercourse which takes the overflow from the dam back to the Ord River. Although the purpose of the Reserve is for "Irrigation", it is said that the Reserve is used to control activities at the spillway and the creek, involving, principally, camping and white-water rafting.

In 1988 approximately 8.6 hectares of the Reserve was the subject of a lease for a term of two years for the purpose of "activities associated with accommodating and maintaining a stockman's camp as an area for public interest". In 1992 a licence was issued in respect of the same area for a period of five years for the purpose of "Maintaining a Youth Training and Rehabilitation Centre". No significant improvements were contemplated or erected under either the lease or the licence and public access to Spillway Creek was preserved.

Licences have been granted to parties conducting canoeing ventures on the creek and overnight camping is permitted. Some facilities have been erected for those purposes, including ablution blocks, shade areas and barbecues.

Any interest created pursuant to the instruments referred to, in effect, regulate the use of the land consistent with the purpose of the Reserve and do not convey an interest incapable of coexisting with native title.

The activities pursuant to the licences do not depend for their exercise upon the extinguishment of native title and are concurrent rights with those exercisable under native title. Neither the creation of the Reserve for the purpose of irrigation nor the use of the Reserve has demonstrated an intention by the Crown to extinguish native title.

Reserve 40978 - "Repeater Station Site"

The Reserve was created in 1989 and vested in the Australian Telecommunications Commission. The area of the Reserve is only 1,200 square metres and it is situated north of Lake Argyle near the junction of Lake Argyle Road and the Victoria Highway. In 1988 a telecommunications facility known as the Stonewall Repeater Station, was erected on the land by the Telecommunications Commission which was empowered to enter the land and carry out the work under s16(2) of the Telecommunications Act 1975 (Cth). The repeater station is part of the Australian telephone network. The creation of the Reserve and the use of the Reserve for the dedicated public purpose by use of a structure erected for that purpose would extinguish native title in respect of the land on which the repeater station was situated. The public work was lawfully carried out before the land was formally set aside for that purpose but the effect of the act itself was to lawfully set aside the land used for the public work. In any event, the creation of a Reserve for the purpose of the constructed work adopted the lawful work and defined the area required for the work. In respect of that area, native title was extinguished.

If it is said that the act of creating the Reserve to extinguish native title was a "past act" under the Act, it was an act to which s5 of the Titles Validation Act 1995 (WA) applied and if the extinguishing act was the erection of the work and a "past act" attributed to the Commonwealth, s14 of the Act applied to "validate" that act. It is unnecessary to consider the effect of s23C and s251D of the Act as introduced by the amending Act, in particular whether the presumption set out in s8 and s8A of the Acts Interpretation Act 1901 (Cth) applied and the right of the applicants to have their application determined according to the terms of the Act as it stood before amendment remained unaffected by the amendment.

Reserve 39016 - "Repeater Station Site"

The Reserve was created in 1985 within the borders of Reserve 42155 ("Conservation of Flora and Fauna") near Goose Hill. The area of the Reserve is approximately 8.8 hectares and as with the preceding Reserve it is also vested in the Telecommunications Commission. After the Reserve was created the Telecommunications Commission occupied the Reserve in 1985 and constructed a telecommunications facility in the form of a steel tower with guy ropes, an equipment hut and a solar panel. The facility is known as the Palm Springs Repeater Station. The facility has an important function in the telecommunications network provided by Telstra.

Although the area of the Reserve is substantially larger than the Reserve created for the Stonewall Repeater Station site, the public work involved is of a greater dimension. The Reserve was created for the purpose of the work and it should be concluded in the absence of any other evidence that the whole of the area of the Reserve is required for carrying out the public purpose for which the land is reserve. As set out in the preceding paragraph, it would follow that native title has been extinguished in respect of the land in that Reserve and if the construction of the public work was a "past act" then by operation of s14 of the Act the "past act" was "validated" as provided therein.

Reserve 34724 - "Preservation of Historical Relics"

The Reserve was created in 1977 and vested in the Shire. The area of the Reserve is two hectares and is situated near Goose Hill. The Reserve is a remnant area of former Reserve 1059 ("Public Utility") which was a watering point on the stock route to Wyndham. A depot and some cattle yards had been erected on the former Reserve. The Reserve was created to protect the ruins of the depot consisting of a chimney, fireplace and a cattle dip. The depot operated as a dipping site for cattle and as an inn for stockmen and travellers.

Reserve 1059 was created in 1886 and for the reasons provided earlier in respect of reserves created for the same purpose, (Reserves 1060, 1061, 1062 and 1166), the creation and use of the Reserve did not extinguish native title. It follows that neither the creation of the Reserve for the preservation of historical relics nor the use of the Reserve for that purpose evidences a clear and plain intention to extinguish native title by adverse dominion.

Reserve 42710 - "Quarantine Checkpoint"

The Reserve was created in 1993 and vested in the Agriculture Protection Board of Western Australia. The area of the Reserve is approximately 45.4 hectares and is situated on the State/Territory border. The facilities that have been constructed on the Reserve are ancillary to the quarantine checkpoint constructed on the area dedicated to Victoria High-

way. The facilities on the Reserve consist of ablution blocks, a parking area, power generator, fuel and water tanks, a tourist information shelter and a shed. Those facilities occupy a minor part of the Reserve which consists of open bushland. The works constructed on the Reserve were said to have been done when the quarantine checkpoint was established in the mid-1980s.

The nature and purpose of the Reserve and the permanent nature of the public work carried out on the Reserve to advance that purpose evidences the intention of the Crown to extinguish native title by adverse dominion in respect of that part of the land. The first applicants submitted that the works carried out on the Reserve were effected before the Reserve was created and, therefore, were not done pursuant to lawful authority under the purpose of the Reserve. However, at the time the works were carried out, the land was part of Reserve 31165 ("Government Requirements") and would have been duly carried out for the purpose of that Reserve. In respect of the remainder of the Reserve neither the creation of the Reserve nor any use of that part of the Reserve, has extinguished native title.

Reserve 43140 - "Power Station"

The Reserve, approximately 0.5 hectares, was created in 1994 and is now vested in the Electricity Corporation. Constructed on the land is a diesel generator, a shed, powerlines, poles and roads. The perimeter of the Reserve is fenced. The power station was constructed in 1969 to supply electricity during construction of the main dam. Thereafter it has supplied electricity to tourist facilities established at the main dam on the site of the construction workers' camp. The power station was a public work constructed on land acquired for the purpose of the Project.

Acquisition of the Argyle pastoral lease did not occur until 1972 but by carrying out the work of constructing the power station the Crown had entered upon the land of the lease and, with acquiescence of the lessee, repossessed so much of the Crown land as was required to be used and disposed of for a purpose of public utility and had constructed the work on the land pursuant to that purpose. The nature of the work was of sufficient permanence to conclude that an intention to extinguish native title by the exercise of adverse dominion had been demonstrated. It follows that when the Reserve was created in 1994 native title had already been extinguished over the land in respect of which the Reserve was created.

Reserve 43196 - "Water Supply and Electricity Generation"

The Reserve was created in 1994 and is now vested in the Water Corporation. The area of the Reserve is approximately 234 hectares and contains the main dam, the hydro-electric power station and water outlets from the dam, access roads near the dam, the Ord River downstream from the dam, picnic area facilities, boat-mooring and launching facilities in the dam, and an area covered by part of the dam which includes the area known as Coolibah Pocket.

The works constructed for the Project, namely, the main dam, the hydro-electric power station and road works are works giving effect to the purpose for which the land was set aside by the Crown. Although the acquisition of the land from the Argyle pastoral lease did not occur until 1972, as set out earlier, the act of the Crown in carrying out the works on the land had the effect of excising the land from the pastoral lease for the purpose of the Project and the construction of the works of a permanent nature had the effect of extinguishing native title in respect of that part of the land utilised by the Crown.

The Reserve is substantially larger than the land on which the works were constructed and adjacent land required for the purpose of the works. In respect of the balance of land in the Reserve particularly the land on the banks of the Ord River downstream from the dam, much of which is undisturbed bushland, no further intention to extinguish native title is demonstrated by the creation of the Reserve and no further use of the land of the Reserve has occurred that demonstrates extinguishment of native title by adverse dominion.

With regard to the waters of Lake Argyle within the Reserve area, the effect of the creation of the Lake upon native title is discussed later in the reasons.

Reserve 31165 - "Government Requirements"

The Reserve was created in 1972 and vested in the Minister for Works. As noted earlier in these reasons, in 1972 resumptions of land were made from the Lissadell and Texas Downs pastoral leases and those areas were added to Reserve 31165 in 1973. The total area of the Reserve is approximately 129,000 hectares after substantial excisions were made from time-to-time between 1977 and 1994 for land reverting to vacant Crown land. In addition, Reserve 1064 ("Public Utility"), created in 1886 to serve the stock route, subsequently surrounded by the Argyle Downs pastoral

lease, was cancelled in 1994 to become part of the land in the Reserve and, in the same year, was part of the land excised from the Reserve to be made vacant Crown land.

The purpose of the Reserve was to ensure that the land remained under Government control. A portion of it was subject to flooding and it was necessary to keep stocking numbers at levels at which soil conservation measures could be applied to protect the reservoir from siltation and pollution. (Ex 21(a) p31)

The lake-side boundary of the Reserve is set at approximately the 100 metre contour level, taken to be the one-year-in-fifteen flood level. The Reserve has been fenced along that border with the intention of keeping stock out of land closer to the dam. Land within the Reserve has been leased for grazing purposes. The effect of those leases on native title is dealt with later in these reasons. Included in the Reserve are some improvements left from the use as a pastoral lease, for example a homestead, yards, fences, paddocks and watering points.

There is nothing in the creation of this Reserve, or in the nature of the use to which it has been put, to demonstrate a Crown intention to extinguish native title by adverse dominion in respect of this land.

Reserve 42155 - "Conservation of Flora and Fauna"

This Reserve was created in 1992 and occupies approximately 36,111 hectares incorporating the Goose Hill area. As noted earlier in these reasons, the claim area which covered the whole of this Reserve has not been shown to be Miriuwung or Gajerrong territory in respect of land to the west of a line drawn, approximately, between Parry Lagoon and Muggs Lagoon.

The Reserve is an area that has a history of reservations within its borders for various purposes since 1886 including public utility, public purpose, resting place for stock, stock route, Aborigines, protection of flora and fauna, conservation of fauna, and government requirements.

In addition to reserved areas, some pastoral leases were issued which excluded reserved areas. Several conditional purchase leases were issued pursuant to which no grants of freehold were made. It was in respect of part of the area now included in this Reserve that the "Permit to Occupy Rural Lands", considered earlier, was issued.

It was agreed that homesteads and ancillary buildings were erected on land subject to conditional purchase leases and on other land, fences and roads were constructed.

There is nothing in the creation of the Reserve, and no use of the Reserve thereafter, that demonstrates a Crown intention to extinguish native title to that part of the Reserve that remains within the claim area. Whether native title is affected by the grant of conditional purchase leases will be considered later in the reasons.

Reserve 31967 - "Conservation of Flora and Fauna"

The Reserve was created in 1973 and vested in the Western Australian Wildlife Authority (now National Parks and Nature Conservation Authority). The area of the Reserve is 79,842 hectares and covers the area of mud flats and inter-tidal zones along the eastern and northern edges of the Gulf. The purpose of the Reserve is to protect mangrove wetlands and wildlife, including the salt-water crocodile. It is also a nominated area (a "Ramsar" site) under the Convention on Wetlands of International Importance Especially Waterfowl Habitats 1975, involving international obligations for the protection of habitats of migratory birds.

There is uncertainty as to the extent to which any part of the Reserve was formerly part of pastoral leases granted in the latter part of the last century. For the reasons already provided, the grant of a pastoral lease did not extinguish native title. Plainly, the purpose and use of the Reserve is not inconsistent with the continuation of native title and, therefore, no intention to extinguish native title can be found therein. Substantive regulation and control of the exercise of aboriginal rights that arise under native title may follow from the creation of the Reserve and the operation of legislation applying to such reserves such as the Fauna Protection Act 1950 (WA) and the Wildlife Conservation Act 1950 (WA) but, as indicated earlier in these reasons, stringent regulation of the exercise of aboriginal rights under native title does not signify an intention to extinguish native title, the root of those rights.

Reserve 29541 - "Nature Reserve"

This Reserve applies to Ngarrmorr (Pelican Island), an area of approximately eight hectares, ten kilometres off the northern coast. The Reserve was created in 1968 and vested in the Western Australian Wildlife Authority (now National

Parks and Nature Conservation Authority). It is a pelican breeding area known as Pelican Island Nature Reserve. Neither the vesting of the Reserve nor the purpose or use of the Reserve demonstrates an intention to extinguish native title on the part of the Crown.

Reserve 38955 - "Trigonometrical Station Site"

The Reserve was created in 1984 and occupies one hectare. A bronze survey plaque was set in concrete as a trigonometrical station and a stone cairn erected over the mark in 1967. It is located at Shakespeare Hill near Cape Dommet on an island off the northern coast of the mouth of the Gulf. It forms part of the State survey system and was installed by the Royal Australian Survey Corp.

The installation of such survey marks involve no fundamental exercise of dominion against which native title cannot continue. Whilst such sites are important, the exercise of aboriginal rights under native title is not incompatible with the purpose and use of the Reserve which requires no more than the mark not be disturbed. Such sites occur on land leased by the Crown without being excised from the leased area. It follows that native title was not extinguished by the creation of this Reserve in 1984 for the purpose of recogniton of the trigonometrical station established in 1967.

Reserves 20678 -"Aerial Landing Ground"; 25899 - "Aerodrome"

Both Reserves were created from land resumed from the Argyle Downs pastoral lease. Reserve 20678 was created in 1931 and Reserve 25899 was created in 1961. Both were cancelled in 1974 by which time both areas of land were some meters below the surface of Lake Argyle. Reserve 20678 was approximately thirty-six hectares in area and Reserve 25899, 218 hectares.

The only information provided in respect of the improvements on each Reserve was to the effect that the Reserves contained "planed landing areas".

Having regard to the size of the areas and the minimal nature of the improvements involved it is difficult to say that the use of the Reserves or any part of them was sufficient to extinguish native title by adverse dominion prior to the land being inundated by Lake Argyle.

(l) Legislation

(i) Conservation of wildlife and flora

By s14 of the Fauna Protection Act 1950 (WA) (now the Wildlife Conservation Act 1950 (WA)) "all fauna is wholly protected throughout the whole of the State at all times" except to the extent to which the Minister declares by notice published in the Government Gazette (WA). Pursuant to s14 the Minister may declare that any fauna is not protected, or is protected, for a period of time throughout the whole or part of the State as the Minister thinks fit and may declare a closed season or open season in respect of any fauna. Under s15 the Minister may issue licences in a prescribed form which may authorize the taking of fauna. S16 provides that it is an offence to take fauna otherwise than by authority of a licence. Under s22 the property in fauna until lawfully taken is, by virtue of that, Act vested in the Crown. S23 originally provided that a person who is a native according to the interpretation of "native" in the Native Administration Act 1905 (WA) may take fauna upon Crown land, not being a sanctuary, sufficient only for food for himself and his family. "Sanctuary" was defined in s6 as an area of land vested in the Crown reserved to the Crown for the conservation of fauna pursuant to s29(1)(g) of the Land Act 1933 (WA). Under s29(1)(g) a specified purpose for a reserve included conservation of indigenous flora or fauna.

In 1975 s23 was amended to replace "sanctuary" with "nature reserve" which is also defined by reference to s29(1)(g) of the Land Act 1933 (WA).

Reserves 29451 ("Nature Reserve"), 31967 ("Conservation of Flora and Fauna"), 34585 ("Conservation of Flora and Fauna") and 42155 ("Conservation of Flora and Fauna") are nature reserves for the purpose of s23 of the Wildlife Conservation Act 1950 (WA).

The State contends that the foregoing provisions completely extinguish native title in the land contained in those Reserves by depriving Aboriginal people of the right to sustenance from the land. The first applicants submitted that the legislative scheme of the Wildlife Conservation Act 1950 (WA) is to regulate the exercise of rights including aboriginal rights under native title but did not display a clear and plain intention to extinguish native title.

Decisions of the Supreme Court of Canada have addressed this issue in a number of cases. In R v Sparrow it was contended that detailed regulation and restriction of rights to fish by provisions of the Fisheries Act RSC 1970 had extinguished an aboriginal right to fish. It was submitted there was a "fundamental inconsistency" between the aboriginal right to fish and fishing to pursuant to a licence issued at the discretion of the Minister and subject to terms and conditions set by the Minister.

Dickson CJ and La Forest J (at 1,097-1,099), delivering the judgment of the Court, held as follows:

"That the right [to fish] is controlled in great detail by the regulations does not mean that the right is thereby extinguished.

...

There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights."

The same principles were followed by the Supreme Court in R v Van der Peet and in R v NTC Smokehouse Ltd [1996] 2 SCR 672. L'Heureux-Dubé J (at 712) said as follows:

"I am prepared to accept that the extinguishment of aboriginal rights can be accomplished through a series of legislative acts. However, Sparrow specifically stands for the proposition that the intention to extinguish must nonetheless be *clear and plain*. This is diametrically opposed to the position that extinguishment may be achieved by merely regulating an activity or that legislation necessarily inconsistent with the continued enjoyment of an aboriginal right can be deemed to extinguish it. Clear and plain means that the Government must address the aboriginal activities in question and explicitly extinguish them by making them no longer permissible."

Again, that principle was applied by the Supreme Court in R v Gladstone [1996] 2 SCR 723. As McLachlin J stated (at 817-818):

The most likely purpose of these regulatory measures was to conserve the young of the resource in order to foster the growth of the fisheries. A measure aimed at conservation of a resource is not inconsistent with a recognition of an aboriginal right to make use of that resource."

In R v Alphonse [1993] 4 CNLR 19 the Court of Appeal of British Columbia reached a similar conclusion with respect to legislation restricting the hunting of wildlife in that Province. Macfarlane JA (Taggart, Hutcheon and Wallace JJA, concurring) (at 28-29) held that the Wildlife Act 1982 (BC) did not reflect a clear and plain intention to extinguish aboriginal hunting rights and there was no inconsistency between ownership of wildlife by the Crown and the continued existence of aboriginal hunting rights:

"...an Indian, exercising his Aboriginal right to hunt on unoccupied Crown land, or lawfully on other lands, who complies with the Act and valid regulations thereunder, can do so, despite the fact that the Crown is the owner of all wildlife within the Province. In short, it is possible that the Aboriginal right to hunt can co-exist with the ownership by the Crown of all wildlife."

In Mason v Tritton, Kirby P (at 592-593) said as follows:

"The history of the Fisheries and Oyster Farms Act 1935 and its accompanying Regulation establishes a regime of control of the New South Wales fisheries in a manner amounting to stringent regulation, but not extinguishment, of any otherwise established proprietary right. No doubt stringent regulation may reach the point where the ordinary rights and privileges associated with property are so curtailed that proprietary rights can no longer be enjoyed. Whether that is the case is ultimately a question of fact."

In Eaton v Yanner; ex parte Eaton (Queensland Court of Appeal, 27 February 1998, unreported) similar provisions to those in the Wildlife Conservation Act 1950 (WA), contained in the Fauna Conservation Act 1974 (Qld) were considered by the Queensland Court of Appeal. By a majority the Court held that by provisions which vested in the Crown property in all fauna in Queensland abrogated any right the respondent may have had as an Aboriginal to take fauna whether for sustenance or any other purpose.

Although s211 of the Act was relied upon by the respondent to assert that his right as an Aboriginal to take estuarine crocodiles was unaffected by the provisions of the Fauna Conservation Act 1974 (Qld), it was not a case in which the existence of native title was required to be determined or declared. S211 of the Act provides that a State Act prohibiting the exercise of native title rights by native title holders where the type of activity prohibited includes hunting, fishing, gathering, cultural or spiritual activity, or any other kind of activity prescribed for the purpose of s211 does not take effect as a prohibition.

The right asserted by the respondent in that case may have been equated with a "free-standing" usufructuary right and the significance of native title as an interest in land native title may not have been in the foreground. Accordingly, the majority applied the reasoning expressed by Brennan J in Walden v Hensler (1987) 163 CLR 561 at 566-567 in which it was concluded that the vesting in the Crown of property in all fauna "eliminated" an Aboriginal right to take fauna.

Of course, Walden v Hensler was decided before Mabo (No 2) determined and identified the nature of native title at common law and it is to be noted that it appears that no Canadian jurisprudence was cited to the Court of Appeal on the issue.

More importantly, it appears that the Queensland legislation did not have provisions equivalent to those contained in the Wildlife Conservation Act 1950 (WA) which, notwithstanding the vesting in the Crown of property in flora and fauna, recognized an aboriginal right to take flora and fauna as sustenance on Crown land and on any other land with the consent of the occupier, with the exception of land contained in a nature reserve. That provision demonstrates that the manner of operation of the Wildlife Conservation Act 1950 (WA) was to recognize an existing aboriginal right to have, and take, flora and fauna for the purpose of sustenance but purports to regulate it.

The obligation to have a licence to take fauna on a nature reserve was part of that regulation in respect of that area contained in a nature reserve, not an extinguishment of native title and of rights derived under it.

In Derschaw v Sutton the Full Court of the Supreme Court of Western Australia (16 August 1996, unreported, Library No 960449S per Franklyn J at 26-28; Murray J concurring) determined that the Fisheries Act 1905 (WA) which prohibited or required the netting of fish to be licensed was clearly regulatory legislation and not legislation concerned with native title rights recognized at common law. A New Zealand authority to similar effect is Te Weehi Regional Fisheries Officer [1986] 1 NZLR 680.

S23 of the Wildlife Conservation Act 1950 (WA), and its predecessor, may restrict an aboriginal right to take fauna in a reserve established for the purpose of conservation of flora or fauna and may require a person exercising an aboriginal right to obtain a licence to do the act, the substance of the aboriginal right.

However, such provisions are directed at conservation of flora and fauna and not the extinguishment of native title. Regulation of a right arising under native title remains consistent with the continued existence of the right and, further, is in no way inconsistent with the continuation of native title from which that right and others are derived.

(ii) Noogoora Burr Quarantine Area

By informal acts steps were taken in 1974 to prevent public access to an area of land between Kununurra and Wyndham, near the Ord River, where an outbreak of noogoora burr plant had been detected. In 1981 pursuant to the Agriculture and Related Resources Protection (Property Quaratine) Regulations 1981 (WA) made under the Agriculture and Related Resources Protection Act 1976 (WA) declaration was made of a quarantine area by notice published in Government Gazette (WA). Pursuant to the notice it was stated that a person other than an owner/occupier of the land shall not enter the land, the subject of the notice, except with the written approval of an inspector or authorized person.

The first applicants submit that the notice, published in a different form on three occasions, was ineffective in purporting to define the area to which the notice applied and that in any event the provisions were regulatory and not directed to the extinguishment of native title.

The State submitted that prohibition of entry to the quarantine area under the control of the departmental officers meant that native title had been extinguished in that area.

It is clear that the purpose of the purported declaration of the quarantine area was to control and, if possible, eradicate a plant the spread of which could threaten an economic impact on the wool industry of the State. The provisions were not directed to native title and certainly not with extinguishing it. Above all, the object of the provisions was to return the land to a state where control of access to it could be removed.

Furthermore, restriction of access by permission was no way inconsistent with continuation of native title in relation to the area and, as the evidence indicated, permission for witnesses and others to have access to the area was either obtained or taken to be implied on a number of occasions.

(iii) Aborigines Act 1905 (WA)

In 1923 a proclamation was published in the Government Gazette (WA) pursuant to s39 of the Aborigines Act 1905 (WA) declaring it unlawful for Aborigines to remain in an area specified in the Schedule to the proclamation. The specified area was in the vicinity of Wyndham. The State submits that native title was extinguished as a result of that proclamation.

S39 of the Aborigines Act 1905 (WA) provided that:

"The Governor may, by proclamation, whenever in the interest of the aborigines he thinks fit, declare any municipal district or town or any other place to be an area in which it shall be unlawful for aborigines or half-castes, not in lawful employment, to be or remain; and every such aboriginal or half-caste who, after warning, enters or is found within such area without permission, in writing, of a protector or police officer, shall be guilty of an offence against this Act."

The State submitted that the effect of the proclamation was that entry upon, and presence on, the land was prohibited for an Aboriginal person except for the purpose of employment.

It would be an odd result if the provision directed to be in the interests of Aborigines, was said to be the expression by the Crown of a clear and plain intention to extinguish native title. It is impossible to conclude that controls exercised by authority of the provisions such as s39 of the Aborigines Act 1905 (WA) reflected such an intention.

(m) Leases

(i) Conditional purchase leases under s62 of the Land Act 1898 (WA)

The words "conditional purchase" are defined in s3 of the Land Act 1898 (WA) as "any area of land held under conditional terms of purchase from the Crown". Under s62 of the Land Act 1898 (WA) a pastoral lessee who has complied with stocking requirements may apply to purchase an area that does not exceed 1 per cent of the land the subject of the pastoral lease, but not more than 800 hectares, subject to the "conditions...prescribed for purchase" by s55 of that Act, with the exception of a condition requiring residence on the land.

One of the "conditions... prescribed for purchase" under s55 of the Land Act 1898 (WA) is that a lease issue in the form of the 9th Schedule to that Act. S62 appears to contemplate that the pastoral lease be determined as to the land sought to be purchased and a new lease issued in respect of it. Other "conditions prescribed for purchase" under s55 are that there be prescribed expenditure on improving the land in the first ten years; that one half of the land be fenced within five years and the whole of the land within ten years; and that the purchase money and fee for the Crown grant be paid in full at the expiration of the lease. Performance of the conditions may be accelerated by the lessee to qualify for the issue of a Crown grant five years after commencement of the lease. The term of a conditional purchase lease was twenty years.

A lease in the form of the 9th Schedule to the Land Act 1898 (WA) was subject to reservations which included, inter alia, a power in the Crown to resume for public purposes, without compensation, one-twentieth of the land except land on which buildings had been erected or enclosed for use as gardens. The form of lease also provided a right in the Crown "into and upon the said land, or any part thereof in the name of the whole, to re-enter, and the same to have again, re-possess, and enjoy, together with all improvements thereon, without making any compensation to the Lessee" on default by the lessee in complying with the conditions set out in the Act. As stated above in respect of pastoral leases, re-entry was effected by notice in the Government Gazette (WA).

A conditional purchase lease is a unique feature of Australian land law (see: Dr T P Fry, "Land Tenures in Australian Law" at 161-162; Davies v Littlejohn (1923) 34 CLR 174; In re Brady [1947] VLR 347). It served a public purpose in promoting the settlement of land. (Davies v Littlejohn per Knox CJ at 183.)

A conditional purchase lease issued under s62 of the Land Act 1898 (WA) has more in common with an agreement for the sale property (see: Moore & Scroope v State of Western Australia (1907) 5 CLR 326 per Isaacs J at 345, 347) than the grant of a lease at common law. However, there is a significant difference from a contract of sale in that the Crown parts with no interest and the lessee obtains no interest in the land until all statutory conditions have been fulfilled. (See:

Davies v Littlejohn per Isaacs J at 190.) Continued possession and ultimate acquisition of the land depends upon fulfilment of conditions. (See: Davies v Littlejohn per Knox CJ at 184.)

The statutory form of lease in the 9th Schedule embodies as conditions of the lease performance of the statutory conditions that pertain to obtaining a right to a Crown grant. The lessee obtains an interest in the land as lessee annexed to which is a contingent statutory right to acquire an interest in the land as purchaser. (See: Attorney General (Victoria) v Ettershank [1875] LR 6PC 354 at 372.)

The possessory interest provided in the lessee by statute is subject to summary determination in the event that the conditions imposed by the statute are not performed. The lease is for a limited term, although not limited as to the purpose or as to the use to be made of the land. The grant of a conditional purchase lease of Crown land in a pastoral lease under s62 is not equivalent to the grant of a conditional purchase lease in an "agricultural area" under s55. Unlike the latter, it is not a requirement that the pastoral lessee as conditional purchase lessee, reside on the property. That condition was of prime importance under s55(4) in respect of the conditional purchase lease in an "agricultural area" and if not complied with the land was "forfeited".

The conditional purchase lessee was not required to stock the land or make the land productive. The conditions required expenditure upon fencing and "prescribed improvements". Crown land subject to a pastoral lease in the Kimberley that becomes land subject to a conditional purchase lease would be undeveloped pastoral land, not cultivable land. Unless, and until the lessee carried out development on the land that was wholly incompatible with the continuation of native title, it would not be contemplated by the Crown that the grant of a conditional purchase lease of the pastoral land would extinguish native title. The prospect of the Crown land being returned to the Crown would remain until all the conditions imposed by the Land Act 1898 (WA) had been satisfied.

Native title, however, may be extinguished as a matter of fact by improvements to the property effected pursuant to those conditions (see: Wik per Gaudon J at 166; per Gummow J at 203) or upon fulfilment of the statutory conditions vesting in the lessee an entitlement to a Crown grant.

Of three conditional purchase leases issued in the claim area, it is necessary to consider the effect of the issue of only one of those leases. Of the other two, one became the freehold property on which the Argyle Downs homestead stood and the other was in respect of land near Wyndham outside the claim area established by the evidence.

The remaining conditional purchase lease was issued in 1910 to Connor Doherty Durack Ltd in respect of an area of land in and around Goose Hill held by the company under a pastoral lease. The area of the lease was approximately 800 hectares most of which is to the west of Goose Hill outside the claim area established by the evidence. The term of the lease commenced in 1906.

It was an agreed fact that a homestead was erected on the land to which the conditional purchase lease related but there as no evidence as to the date on which that occurred nor that any work was carried out in compliance with the conditions set out in the Land Act 1898 (WA), or in any regulations made thereunder. The conditional purchase lease was resumed under s9 of the Land Act 1898 (WA) for the "Use and Requirements of the Government of the State" by proclamation published in January 1918. At the same time adjacent land was resumed from the pastoral lease pursuant to the power reserved to the Crown in the statutory form of a pastoral lease and in due course the whole of the resumed land was included in Reserve 16729 created under s39 of the Land Act 1898 (WA) for the purpose "Use and Requirements of the Government of the State".

Having regard to the legislation, no clear and plain intention to extinguish native title by alienation of a right to full use and enjoyment of the land is apparent from the issue of a conditional purchase lease pursuant to an application made under s62 of the Land Act 1898 (WA). The Land Act 1898 (WA) only contemplates incompatibility with native title arising in respect of pastoral land in the Kimberley Division in the event that the pastoral lessee performs the conditions precedent to obtaining a statutory right to a Crown grant, or, in the performance of those conditions, has applied any part of the land to a use inconsistent with the continuation of those conditions.

So characterized it is apparent that the mere grant of a conditional purchase lease under s62 does not create an interest in the land wholly inconsistent with the continuation of native title.

(ii) Special leases under s152 of the Land Act 1898 (WA) and s116 and s117 of the Land Act 1933 (WA)

Parts of the claim area have been subject to "special leases" granted under s152 of the Land Act 1898 (WA) and s116 and s117 of the Land Act 1933 (WA). Some of the leases were granted near the turn of the century over vacant Crown

land in the Goose Hill area and more recently over vacant Crown land, formerly held under pastoral lease, resumed or required for the purpose of the Project, or over vacant Crown land formerly Crown land reserved for a purpose.

S152 of the Land Act 1898 (WA), at relevant times, provided that the Governor may, on application, grant a lease not exceeding ten hectares of Crown land for various purposes including sites for quays, ship and boat building, inns, stores, smithies and bakeries or similar buildings, quarries, baths, works for supplying water, gas or electricity, market gardens, or any special purpose approved by the Governor by notice in the Government Gazette (WA). If it were proposed to grant a lease for a term longer than ten years, wide publication of that intent was to be given by notice published in four consecutive numbers of the Government Gazette (WA), the first publication to be at least one month before the grant. The term of the lease was not to exceed twenty-one years.

S116 of the Land Act 1933 (WA) is in similar terms, however, the lease, at relevant times, was to be in the form of the 21st Schedule and there is no limit on the area that may be leased.

As defined in the Land Act 1898 (WA) (s3) and the Land Act 1933 (WA) (s3), Crown land includes Crown land subject to a special lease.

Having regard to the purposes specified in the sections referred to, it is apparent that the legislature intended to enable the Executive to facilitate the development and use of Crown land for the benefit of the public through the issue of special leases. Just as a reservation of land entails Crown land being set aside for a purpose, a special lease enables and requires a lessee to develop and use Crown land for a prescribed purpose, notably an industrial or commercial purpose.

In the form of the lease provided by the 21st Schedule to the Land Act 1933 (WA) the reservations as to resumption are equivalent to those in a conditional purchase lease, namely, limited to one-twentieth of the land leased and excluding land on which buildings have been erected. In the event of default in the payment of rent or the lessee failing or ceasing "to use, hold and enjoy the said land for the said special purpose", it is lawful for the Crown "into and upon the said demised premises, or any part thereof in the name of the whole, to re-enter and the same to have again, re-possess, and enjoy, as if this deed poll had never been executed, without making any compensation to the said Lessee". Again, re-entry was by notice in the Government Gazette (WA).

S13 of the Land Act 1898 (WA) and of the Land Act 1933 (WA) require all leases disposing of Crown land to be signed, or signed and sealed, as the case may require, by the Minister or an officer authorized in that behalf by the Governor. The 29th Schedule to the Land Act 1898 (WA) and the 21st Schedule to the Land Act 1933 (WA) appear to require the signature and seal of the Minister for the disposal of Crown land by a special lease. As noted above, creation of an interest in lands of the Crown required compliance with form as prescribed by statute. (See: North Ganalanja Aboriginal Corporation v State of Queensland (1995) 61 FCR 1 per Lee J at 19.) That conclusion is reinforced by the content of other provisions of the relevant Acts. S74 of the Land Act Amendment Act 1906 (WA) and s151 of the Land Act 1933 (WA) stated, inter alia, that no lease shall be effectual to pass any interest in land under the operation of the relevant Acts until that instrument was registered in the Office of Land Titles or in the Department of Lands and Surveys and only then would the interest comprised in the instrument pass. It appeared to be conceded by the State that those provisions applied to leases granted by the Crown in addition to leases granted by persons to whom interests had been alienated by the Crown and that the operation of those sections prevented a demise and interest in land taking effect under the relevant Acts until the requirements of those sections had been satisfied.

Most of the special leases issued in respect of the claim area had conditions endorsed which indicated that the intention of the Crown was to ensure that the use of the land under the lease would not be permanent and that the land would resume its former character as vacant Crown land on expiration of the lease. Conditions attached included an express statement that no compensation would be payable for improvements on expiration or early determination of the lease and required the land to be left in a neat and tidy state on determination of the lease.

The form of lease prescribed in the relevant Schedules together with the additional conditions attaching to most of the special leases in the claim area, speak of an interest in land created and confined by a statute.

However, if the purpose for which the lease was issued contemplates a permanent improvement of the land amounting to the exercise of adverse dominion, native title may be extinguished where the land has been used, or where works have been constructed as required by the lease. (See: Wik per Gaudron J at 166; per Gummow J at 203.) Therefore, it is necessary to consider each case in turn.

Special leases for grazing purposes

Two special leases granted under the Land Act 1933 (WA) for grazing purposes were said to have been issued in respect of land in the claim area. Neither lease is current. Grazing is not a purpose specified in s116 of the Land Act 1933 (WA) and it must be assumed that it was a purpose approved by the Governor by notice in the Government Gazette (WA) as required by s116(14). It was not contended that the purpose had not been so approved or that the approval of the purpose for grazing was otherwise beyond the power conferred by that Act.

Only one lease document is in evidence being a lease for a term of twenty-one years from 1 April 1962 granted to Northern Australian Estates Ltd determinable by the Minister or lessee upon six months notice. The area of land contained in the lease was approximately 36,230 hectares, of which only a minor part was within the claim area, namely, a small section of the inter-tidal zone in the north-west part of the claim area. The land was almost entirely surrounded by land included in the Carlton Hill pastoral lease being a pastoral lease also granted to Northern Australian Estates Ltd. Presumably notice of the proposed grant was given in the Government Gazette (WA) as required by the Land Act 1933 (WA) having regard to the length of the term of the lease. The lease is in the form of the 21st Schedule with further conditions endorsed, one of which allows no compensation for improvements at the expiration or early determination of the term. Another condition provides that the lessee shall not destroy, or otherwise interfere with, timber or scrub growing on the land.

Whilst the document is described as a lease, the limited interest created, namely, possession for the purpose of grazing and the right to terminate the lease upon notice, suggested that the interest bore some of the characteristics of a licence. (See: R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327 per Mason J at 340-344; per Wilson J at 352-354.)

In any event, being a lease solely for the purpose of grazing, it was a lease which, under the Land Act 1933 (WA) as it stood in 1962, was a "pastoral lease" as then defined in s3 of that Act, namely, "the lease of an area of Crown land for grazing purposes". The provisions of s106(2) and s109, therefore, applied to a pastoral lease issued as a special lease under PtVII of that Act. In 1981 the definition of "pastoral lease" in s3 was amended to confine it to a lease of Crown land for grazing purposes granted under PtVI.

The limited nature of the interest created by statute and of the use of Crown land permitted thereunder, and the assistance provided by s106(2) in determining the intention of the Crown by its act in issuing such a lease, dictates the same conclusion as to the effect on native title of a special lease for the purpose of grazing as that set out earlier in respect of the effect of pastoral leases, namely, that the grant of such a lease did not reflect a clear and plain intention to extinguish native title.

Another special lease for grazing purposes was said to have been granted in 1977 to K J Lilly for a term of five years in respect of land in the Goose Hill area. A sketch map attached to the application gave no clear indication of the boundary of the land proposed to be leased. It was not contested that if the lease issued it would have been endorsed with similar or additional conditions to those set out in the special lease for grazing purposes referred to above. Having regard to the conclusion that a grant of that lease did not extinguish native title, it is not necessary to determine whether, in fact, such a lease issued to Lilly as asserted by the State. Such evidence as was available, suggested that the lease did not issue, although the parties conducted themselves as if the lease had issued.

Special leases for cultivation and grazing

Four special leases were said to have been issued under the Land Act 1933 (WA) for use of Crown land for "Cultivation and Grazing". "Cultivation and Grazing" is not a purpose referred to in s116. Presumably it is a purpose approved by the Governor by notice in the Government Gazette (WA) under s116(14). The respective lessees of the four special leases were said to be P McGinty ("McGinty"); L von Hancock and others ("von Hancock"), P Ryan and another ("Ryan"); and S and E Skoglund and others ("Skoglund"). All of the leases were issued, or said to have been issued, in respect of vacant Crown land formerly held under pastoral lease resumed for the purpose of the Project. The land the subject of the leases is north-east of Kununurra and to the east of irrigated land. The purpose of the leases was to provide dry ground adjacent to irrigated lands for the grazing of cattle in the wet season.

The lease to McGinty is the only special lease extant in the claim area. It commenced in July 1992 for a term of ten years in respect of an area of 443 hectares. It is in the form of the 21st Schedule with additional conditions endorsed, including provisions requiring the land to be occupied and used for the purpose of the lease within nine months of commencement of the lease, and continuously thereafter, to the satisfaction of the Minister, and construction and operation of works (undefined) within two years; exclusion of compensation for improvements on early determination or expiry of the lease; a right of re-entry for the Minister to inspect the land any time; exclusion of compensation for flooding

of the land; the lessee on determination of the lease to "fill in, consolidate and level off any unevenness, excavation or hole caused by him during the term of the lease or by removal of his improvements", and leave the land in a clean, neat and tidy condition to the satisfaction of the Minister, and to remove all waste matter as required by the Minister; any clearing of the land to be in accordance with a farm management plan approved by the Department of Agriculture; power in the Minister to direct that the lessee reduce the number of stock on the land if the Minister is of the view that the land is overstocked or likely to cause permanent damage to the land, failure to comply with the direction resulting in "forfeiture"; and the lessee to fence the external boundaries of the land within twelve months of commencement of the lease.

It is apparent that the purpose for which the lease was granted and the defeasible nature of the interest is not inconsistent with the continued existence of native title. There is no evidence of any cultivation of the land the subject of the lease. The only structure put on the land by the lessee is a shed. Construction of a perimeter fence would not be contemplated by the Crown as an act giving effect to the intention of the Crown that native title be extinguished.

The land leased to McGinty includes land said to have been the subject of a prior special lease to von Hancock for the purpose of cultivation and grazing, that lease said to have been for a term of ten years commencing in 1971. Correspondence from the Department of Lands (Ex 34(r) p5,936), a response to a request for a copy of the lease, states that "no lease document had been prepared for issue to the Office of Titles" and that as the lease was cancelled "preparation of the document" was not considered necessary.

Whether von Hancock obtained a right in equity against the Crown in respect of the failure to create a statutory interest in the land is unnecessary to decide. As stated earlier in these reasons, such a right, whatever its character, could only demonstrate that at law the Crown had not acted to extinguish native title. (See: Davies v Littlejohn per Isaacs J at 187.)

The special lease to Murphy is in respect of an area of 490 hectares for a term of ten years commencing in July 1971. The lease is in slightly irregular form, although the principal provisions of the 21st Schedule are adopted. It also provides that there be no compensation for improvements or for flooding of the land and that the lessee is to ensure the land is clean and tidy in the event of removal of any improvements on expiration or early determination of the lease. The lessee is required to fence the external boundaries of the lease within ten years, sufficient to resist the passage of stock.

According to the evidence (Exs 29, 30) the land was used by the lessees for grazing of cattle until 1973 with a small dam being the only improvement constructed on the land. Small trial plots of cattle feed were tried in those years. The lease was forfeited in 1980 for non-compliance with the conditions and the land reverted to vacant Crown land.

The limited purpose of the lease and lack of permanence contemplated in the use of the land for that purpose mean that it has not been shown that there was a clear and plain intention by the Crown by the grant of a lease to extinguish native title in respect of that land.

The first applicants challenged the State's reliance on a lease to Skoglund of 800 hectares of land said to have been for a term of ten years commencing in July 1969, on the ground that there was no evidence that such a lease had been issued by the Crown. A register maintained by the Crown to record such leases does not record the issue of a lease. (Ex 34(r) p5,917) Mr Skoglund said that he could remember signing a lease. Mr Skoglund and others had possession of the land as if a lease had been issued and paid rent as required. The land was fenced on the boundary of the leased area and was used for the grazing of cattle and some horses. A small dam was constructed as a watering point for cattle. According to Crown records the land reverted to vacant Crown land in 1979.

In the absence of execution of a lease by the Crown as required by s13 of the Land Act 1933 (WA), no legal interest was created. The State submitted that from Mr Skoglund's evidence it should be inferred that the lease was executed "by all parties". However, the absence of a notation of the grant of lease on the register, or any other evidence to that effect on departmental files, suggests that the proper inference to be drawn is that if a lease was prepared for execution, execution was not completed by the Crown.

For reasons already stated, in the absence of the issue of a lease in the manner required by s13, native title cannot be extinguished at law by an act of the Crown by issue of a lease. In any event, the limited purpose for which the statutory interest of lease was created and lack of permanence contemplated in the use of the land for that purpose demonstrated no clear and plain intention by the Crown to extinguish native title by issue of that lease.

Special leases for market garden

Three leases for this, or a similar purpose, were said to have been issued in the Goose Hill area under the Land Regulations 1887 (WA) and the Land Act 1898 (WA). The three lessees were said to be Wallace and others ("Wallace"); Ah Ying; and Ah Kim. The land leased to Ah Ying is outside the claim area as established by the evidence. The land leased to Wallace appears to have been just within the claim area but no lease document is in evidence, nor is there any evidence that such a lease was granted or that the land was put to use for the purpose pursuant to the lease. In the absence of a finding that a lease issued, no question of extinguishment arises.

The land leased to Ah Kim was four hectares in area. The lease was for a term of one year, renewable at the will of the Minister commencing in 1904. The purpose of the lease was for a saddling business and market garden. The lease was under the Land Act 1898 (WA) in the form of the 29*th* Schedule. The land, the subject of the lease, was barely within the claim area. The lease was cancelled in 1946 pursuant to s23 of the Land Act 1933 (WA) for non-compliance with conditions.

The land, the subject of the lease, was located in open country. There is no evidence that the land was used for the purpose of the grant or involved any use of the land of permanence that indicated that adverse dominion was intended by the Crown and established by use of the land pursuant to the lease. The limited nature of the statutory interest created as a possessory interest from year-to-year for a specific purpose does not suggest a clear and plain intention on the part of the Crown to extinguish native title by creation of the interest.

Special lease for canning and preserving works

The State submitted that four leases over four contiguous ten-hectare lots were created under the Land Act 1898 (WA). It was said that the leases were for terms of ten years commencing October 1906. The lease documents submitted in evidence follow the form of the 29*th* Schedule to that Act but according to that material no lease was executed by the Minister as required by s13 of that Act. The documents are all undated except one which is dated 3 July 1907. An extract from the special lease register indicates that rent was unpaid from the second half of 1907. The fact that the leases were recorded as "cancelled" gives rise to an inference that the Minister was not prepared to sign a grant of lease while the rent was unpaid. There is no evidence of the construction of a canning and preserving works nor any evidence of improvements under the special leases. It cannot be concluded that such leases issued under the hand and seal of the Minister and no question of extinguishment arises.

Special lease for tourist resort

A special lease for the purpose of "Tourist Resort" issued in January 1986 for a term of twenty-one years commencing on 1 January 1984 over an area of 132 hectares near the main dam and including a small island in Lake Argyle. "Tourist Resort" is not a purpose referred to in s116 of the Land Act 1933 (WA) and it is to be assumed that it was a purpose approved by the Governor by notice in the Government Gazette (WA).

The lease is in the form of the 21*st* Schedule of the Act with conditions endorsed which provide that no compensation will be payable for improvements on expiration or early determination of the lease, or for damage by flooding of the land. On determination of the lease the lessee was required to "fill in, consolidate and level off any unevenness, excavation or hole caused by him during the term of the lease or by removal of his improvements" and leave the land in a clean, neat and tidy condition to the satisfaction of the Minister and remove all waste matter as required by the Minister. The lease refers to a requirement that the lessee occupy the land and commence construction of the "works" within nine months and construct and complete and operate the "works" within two years from the date of commencement of the lease. The "works" were not defined in the lease.

It would appear that the lessee was already in default at the time the lease was issued by the Crown in that it had failed to commence construction of the "works" within nine months of the commencement of the term of the lease and, of course, failed to complete construction thereof within two years, a period that had elapsed before the lease was issued. No improvements or works took place pursuant to the conditions endorsed on the lease. In December 1988 the Minister wrote to the lessee purporting to give notice of termination of the lease for failure to comply with the conditions. Formal notice of cancellation of the lease was published in the Government Gazette (WA) in 1996.

The lease was in respect of vacant Crown land and issued for the purpose of carrying out a work of permanence on that land. However, the lease was subject to conditions and continuation of the lease depended upon the performance of conditions set by the Minister. The statutory interest created was intended to be defeasible and the land revert to vacant Crown land if the specific condition relating to the specific purpose of the lease was not satisfied.

Although the act of the Crown in granting the lease signified an intention to extinguish native title by permitting the land to be used for the purpose for which the lease had been granted and authorized the lessee to carry out the work which would have the effect of extinguishing native title, such extinguishment was inchoate until such a time as the work was carried out. In other words, if the lease was determined for non-performance of the condition that the land be used for the purpose for which it was leased and the land reverted to vacant Crown land, native title would remain unaffected.

It follows that native title was not extinguished by the grant of the special lease.

Special lease for jetty and boat-launching facilities

A special lease for the purpose of "Jetty and Boat-Launching Facilities" was issued in November 1986 in respect of approximately 5.6 hectares of land on the shores of Lake Argyle. The land concerned was contiguous with the land subject to the special lease for the purpose of "tourist resort" referred to above and involved the same lessee. The lease was for a term of one year commencing on 1 April 1986. The lease was renewable at the will of the Minister and determinable thereafter on three months notice by either party. The lease was in the form of the 21st Schedule of the Land Act 1933 (WA) with conditions endorsed in similar terms to those endorsed on the special lease for a tourist resort referred to above. It was a condition of the lease that at no time would the land be available for freehold purchase.

The limited statutory interest created as a lease does not reflect an intention to create an interest giving rise to a permanent use of the land for a purpose inconsistent with the continuation of native title. No work was carried out pursuant to the lease and written notice of termination of the lease was sent to the lessee from the Minister on 7 December 1988.

Neither the grant of the lease nor any act by the lessee thereafter extinguished native title.

Special lease for concrete production

A special lease for the purpose of "Concrete Production" was said to have issued in December 1987 for a term of one year commencing on 1 July 1987. It was renewable at the will of the Minister and after the initial term was determinable on three months notice by either party. The area of land, the subject of the lease, was approximately one hectare near Lake Argyle at a site formerly used as a construction waste dump during the building of the main dam.

It appears that it was contemplated that the lessee would require the land, the subject of the lease, to produce concrete for supply to the builder of the tourist resort, the subject of the special lease referred to above. However, the requirement did not eventuate and the land was not used for the purpose of the lease.

The land, the subject of this lease, became the site of a public work referred to earlier in these reasons, namely the site on which an electrical sub-station was erected in conjunction with the construction of the hydro-electric power station on the main dam. As I have determined earlier, native title was extinguished by reason of that public work on Reserve 43140 ("Power Station").

Special lease for aboriginal hostel and inter-cultural centre

Under s117 of the Land Act 1933 (WA) the Governor was given an unfettered power to lease "town, suburban or village lands on such terms as he may think fit". No form of lease is prescribed in that Act for such a lease.

Two such leases were issued in respect of land in the claim area being land on the western boundary of the Kununurra townsite. The leases were issued to the Moongoong Darwung Aboriginal Corporation for the purpose of "Aboriginal Hostel and Inter-cultural Centre". The first lease was for a term of twenty-one years commencing on 1 July 1976 at a peppercorn rental. The lease was in respect of an area of approximately four hectares. The lease was surrendered in January 1982. The second lease, which included the land the subject of the first lease and an additional area of approximately two hectares, was issued in November 1982 for a term of fifteen years commencing in January 1982, also at a peppercorn rental. That lease was surrendered in 1990 when the land became Reserve 41401 ("Use and Benefit of Aboriginal Inhabitants") vested in the Aboriginal Lands Trust. The leases were issued in the form of the 21st Schedule to the Land Act 1933 (WA) with additional conditions endorsed.

The use of the land contemplated by the lease was consistent with the continuation of native title. (See: Pareroultja v Tickner per Lockhart J at 218.) Although the lease may have contemplated the erection of dwellings or structures in the townsite of Kununurra, the purpose for which the lease was granted was directed specifically at the welfare and benefit of Aboriginal people and as such it is not possible to conclude that there was a clear and plain intention on the part of

the Crown to extinguish native title either by the grant of the lease or by the carrying out of acts authorized by the grant of a lease.

(iii) Leases of reserves under s41a of the Land Act 1898 (WA) and s32 of the Land Act 1933 (WA)

Under s41a of the Land Act 1898 (WA) the Governor could grant a lease of a reserve from year-to-year, or a shorter term where the reserve was not immediately required for the purpose for which it was made, the lease to be subject to such conditions as the Governor thought fit.

Under s32 of the Land Act 1933 (WA) the Governor may lease a Reserve for any purpose if it is not immediately required for the purpose for which it is made, the term of the lease not to exceed ten years. However, if the land is to be leased for more than a year it is necessary for the Governor to call for applications by notice in a Government Gazette (WA). The only lease said to have been granted for more than a year was a lease for the purpose of market gardening. S32 was amended in 1960 to provide for the issue of a "grazing lease or licence" in respect of land reserved for parks or recreation or amusement of inhabitants notwithstanding that the land is being used for those purposes. S32(4), however, contemplates that the land is to remain available for the specified purpose of the Reserve despite the issue of such a lease.

The 4th Schedule to the Land Act 1933 (WA) is headed "Leases under PtIII", however, the use of such form is not directed by s32 which occurs in PtIII. The form of the 4th Schedule provides that if, without licence, the land is used otherwise than for the purpose for which it is leased, or is not used for the purpose for which it is leased within two years of the date of the lease, it is lawful for the Crown "into and upon the said land, or any part thereof, in the name of the whole, to re-enter, and the same to have again, re-possess and enjoy as if this demise had never been executed." There was a right of resumption in respect of the whole of the land with compensation payable only for buildings and improvements.

Lease of part of Reserve 1059 ("Public Utility")

In 1926 R G Skuthorp made application under s152 of the Land Act 1898 (WA) for a special lease of approximately thirty-two hectares of land within Reserve 1059 ("Public Utility") near Goose Hill. According to the application, the purpose of the lease was "Business and Garden Area". The documents in evidence show that the application was approved in August 1927 and the lease to be for a term of one year from 1 July 1927, renewable at the will of the Minister, subject to determination on three months notice on either side, and no compensation being payable for improvements at the expiration or earlier determination of the lease. There is no departmental record that a lease issued. It is recorded "Lease terminated 30.9.1958."

On the "Approval Sheet", there is a stamped endorsement dated 21 December 1927 "FILE TILL LEASE IS ASKED FOR [signed] O C Deeds Branch". Evidence given by an officer of the Department of Land Administration stated that it had not been departmental practice to prepare leases in all cases. Until the early 1980s leases were only prepared where it was necessary to do so, or where it was requested by the lessee, for example, when the lease was being transferred or mortgaged. It would seem that in respect of short-term leases no lease issued and the parties proceeded as if there were a lease on the terms notified as those on which the lease would issue.

A "special lease" under s152 of the Land Act 1898 (WA) (as amended in 1905) was a lease of Crown land for a purpose specified in that section, each of which was in the nature of the construction of infrastructure for industry or commerce, or provision of public facilities of a substantial nature. The land in respect of which a "special lease" could be granted was limited to twenty-five acres (ten hectares). Crown land as defined in the Land Act 1898 (WA) did not include land vested in the Crown reserved for any public purpose. The application by Skuthorp was for a "special lease" in respect of reserved land and for an area of eighty acres (thirty-two hectares). Such a lease could not be granted under s152 of the Land Act 1898 (WA).

A Cabinet Minute prepared by the Minister for Lands sought approval from the Executive Council to grant a lease under s41a of the Land Act 1898 (WA) to Skuthorp for "Business and Garden Area" for a term of one year, renewable at the will of that Minister. That minute was approved by Executive Council in August 1927. However, the advice forwarded to Skuthorp informed him that his application for a "Special Lease" had been approved.

No form of lease was provided by the Land Act 1898 (WA) in respect of a lease granted under s41a of that Act. Reserve 1059 had been vested in the Minister for Public Works in 1900 by order of the Governor made pursuant to s42 of the Land Act 1898 (WA). The Reserve was vested in the Minister in trust for the purpose of the Reserve with power to

lease. The material before the Court suggests that at all material times Reserve 1059 was required for the purpose for which it was made. Furthermore, it may be said that the proper construction of s41a is that it applies only to reserves still vested in the Crown per se and not to a reserve vested in a municipality or other person under s42. Such a construction is indicated by the reference to a grant of lease by the Governor, a power that would only be available if the vesting of the reserve did not include a power to lease in the vestee divesting that power from the Governor.

Having regard to the foregoing and in the absence of any evidence that a lease issued, or as to the form in which the lease issued, no presumption should be made either that the lease issued or, if it did issue, that it was a valid lease.

It appears that when the Land Act 1898 (WA) was replaced by the Land Act 1933 (WA), the foregoing situation continued in respect of Skuthorp's use of Crown land until a lease was issued for a term of one year commencing on 1 October 1958, thereafter from year-to-year, renewable at the will of the Minister and determinable by either party on three months notice in writing. The lease is not in the form of the 4th Schedule to the Land Act 1933 (WA) but does purport to be a lease under s32. The application for a lease of part of the Reserve made under s32 of the Land Act 1933 (WA) by Skuthorp in 1958 resulted in the issue of a lease by the Governor on behalf of the Crown. That land, being portion of Reserve 1059, remained vested in the Minister for Works. The power to lease the Reserve was a power vested in that Minister. Again, as at 1958, there is nothing in the material to indicate that the Reserve was "not immediately" required for the purpose for which it was made, namely, "public utility".

At all material times the land was part of Reserve 1059 created in 1886 for the purpose of public utility. The area was open country adjacent to the land used for pastoral purposes. There was no development in the area other than the depot near Goose Hill. In a statutory declaration made in 1968, Skuthorp stated that the land was bushland on which there was a hut and a well and that the market value of the land and improvements was $100 and no more.

It is difficult to see that a lease for a term of one year, of land reserved for a specific purpose, to wit, public utility, can be intended to operate to convey such permanent interest as necessary to extinguish native title. There is insufficient material to determine how the land was used and it should be concluded that native title was not extinguished in respect of this area by the grant of the lease to Skuthorp in 1958.

The purpose of the Reserve for "public utility" was a statement of Crown intention that the land be set aside for public use. It is to be distinguished from a reserve for a public purpose which may deny the public a right to use the reserve. (See: Bowen v Stratigraphic Explorations Pty Ltd [1971] WAR 119 per Wickham J at 128.)

The area leased to Skuthorp was a lease of land subject to the Reserve, not a lease of land excised from the Reserve and leased to Skuthorp for a purpose inconsistent with the purpose of the Reserve. The intention of the Crown in creating such an interest has to be ascertained in that context. The fact that the Crown is not prepared to grant more than a lease from year-to-year determinable on three months notice of land within Reserve for public utility, suggests that consistent with the terms of s32 of the Act, the Crown contemplated that the land was to remain available for the purpose of the Reserve despite the issue of the lease.

Lease of part of Reserve 1600 ("Public Purpose")

A lease under s32 of the Land Act 1933 (WA) was said to have issued to L Manton in 1956 in respect of an area of five acres within Reserve 1600 ("Public Purpose") in the Goose Hill area near Muggs Lagoon for the purpose of a market garden. No lease instrument is in evidence and having regard to evidence already referred to, no presumption should be made that the lease did issue. There is no evidence that any use was made of the land pursuant to a lease. However, the land in Reserve 1600 appears to have been to the west of the boundary of the claim area as established by the evidence and it is unnecessary to make any determination as to the effect of this lease upon native title.

Lease of part of Reserves 1061 ("Public Utility"), 1064 ("Public Utility"), 18810 ("Tropical Agriculture")

A lease was granted in October 1977 to Ivanhoe Grazing Company Pty Ltd in respect of portions of Reserves 1061 ("Public Utility"), 1064 ("Public Utility") and 18810 ("Tropical Agriculture") under s32 of the Land Act 1933 (WA). The term of the lease was said to be for one year commencing 1 October 1966, renewable at the will of the Minister for Lands and determinable after the first year on three months notice by either side. The lease was granted for the purpose of grazing. The land was an area of 7,425 hectares between Kununurra and Wyndham on the south bank of the Ord River. The land was open country contiguous with land in the Ivanhoe pastoral lease. The lease was "cancelled" in December 1987. The whole of the land leased was within the area said to be the Noogoora Burr Quarantine Area. It was a condition of the lease that the public had free and uninterrupted use of the roads or tracks which exist on the land.

Given that the lease was over land in part reserved for public utility, which contemplated the exercise of parts of the land for use by the public and that the purpose of the lease was limited to the use of grazing, and limited in time to be of a term of no more than one year determinable on three months notice, no conclusion can be formed by the grant of a lease that the Crown demonstrated a clear and plain intention to extinguish native title. The grant of the lease involved no contemplation of exclusive use of the land or permanent alteration to the land by actions of the lessee. The interest granted to the lessee was compatible with the continuation of native title. In all respects the lease was an inferior form of pastoral lease.

In 1993 a lease of an area of 7,633 hectares being portion of Reserve 1061 ("Public Utility") and Reserve 18810 ("Tropical Agriculture") was issued to Crosswalk Pty Ltd for a term of one year commencing in July 1992, determinable on three months notice after the first year. The lease was granted under s32 of the Land Act 1933 (WA) and in addition to the statutory form of lease, conditions were attached which provided that the land was not to be used for any purpose other than grazing without the approval of the Minister. The lease was renewable at the will of the Minister and no structures were to be erected without the approval of the Minister; no timber or scrub was to be cut down, injured or destroyed; the public was to have at all times free and interrupted use of roads and tracks existing on the land consistent with the efficient operation of the lease; and no compensation was payable to the lessee in respect of any improvements made before the expiration of the lease or earlier determination thereof. The lessee was required to leave the land in a clean, neat and tidy condition and removal all waste matter, and the Minister reserved the power to direct the lessee to reduce the number of stock where the Minister was of the opinion that the number of stock was likely to cause permanent damage to the land. Failure to comply with that condition would result in "forfeiture" of the lease.

The land was contiguous with land in the Ivanhoe pastoral lease of which Crosswalk Pty Ltd was pastoral lessee.

The limited form of interest created and the restrictive conditions and degree of control applied to that interest, give the interest some equivalence to a licence rather than a lease. (See: R v Toohey; Ex parte v Meneling Station Pty Ltd per Mason CJ at 340-344; per Wilson J at 352-354.)

In any event, the nature of the interest created did not demonstrate any clear and plain intention by the Crown to extinguish native title. The continuation of native title was compatible with the rights created in the lessee by grant of the lease and with any use of the land pursuant to the lease.

Lease of Reserves 2049 ("Resting Place for Stock"), 16729 ("Use and Requirements of the Government of the State in connection with the Wyndham Freezing, Canning and Meat Export Works")

In January 1956 a lease of portion of Reserve 2049 and of Reserve 16729 was granted to R G Skuthorp. The area of the lease was approximately 2,440 hectares and the purpose of the lease was for grazing. The term of the lease was for one year from 1 January 1956, thereafter from year-to-year determinable on three months notice on either side. The lease was in respect of open land, typical pastoral country, between Goose Hill and the Ord River. The lease was "cancelled" in September 1969.

In April 1972 a lease of a slightly larger area, 2,936 hectares, including the above land, was granted to E J & M S Lilly for a term of one year, renewable at the will of the Minister and determinable on three months notice by either party. The lease was granted under s32 of the Land Act 1933(WA) and "terminated" in 1976.

For the reasons stated in respect of similar leases referred to above the grant of this lease by the Crown and the nature of the use of the land contemplated by the lease demonstrated no clear and plain intention by the Crown to extinguish native title. Continuation of native title was compatible with the rights created by the lease.

(iv) Leases of reserves under s33 of the Land Act 1933 (WA)

Prior to 1949, s33 of the Land Act 1933 (WA) empowered the Crown to vest a Reserve for "like or any other public purpose" in any person or to lease the Reserve for the purpose for which the Reserve was made. In 1949 the section was amended to provide that a person in whom the Reserve was vested may also be conferred with the power to lease the land subject to such conditions and limitations as were deemed necessary to ensure that the land is used for the purpose for which it was reserved.

In respect of reserves in the claim area vested by the Crown, it was common for the power to lease granted with the vesting order to be subject to the control of the Executive in that the approval of the Governor was required for a proposed lease.

In 1987 the purpose for which any reserved land could be vested, or leased, was expanded to include "any purpose ancillary, and beneficial to" the reserved purpose.

As noted earlier in these reasons, in 1982 power was given to the Governor to revoke any vesting order made under the section and to provide that any lease made by the person in whom the Reserve had been vested was deemed to continue as if the Crown were the lessor and, if the land were re-vested in another person, as if that person were the lessor.

It was not contended that any of the leases in question in these proceedings were granted for a purpose inconsistent with the vested purpose.

Lease of part of Reserve 31165 ("Government Requirements")

By an undated indenture stamped 5 December 1973, the Minister for Works, in whom Reserve 31165 was vested, granted a lease of part of that Reserve to Fielder Downs (WA) Pty Ltd ("Fielder Downs") for a term of twenty-one years commencing on 1 November 1970 for the purpose of "grazing cattle thereon and purposes incidental thereto and the carrying out of works associated therewith". The land, the subject of the lease, was formerly part of the Argyle Downs pastoral lease. The area of the lease appears to be in the vicinity of 51,000 hectares.

It was submitted by the first applicants that at the time of the commencement of the term of the lease the land was not vested in the Minister for Works and, therefore, the grant of the lease was beyond power. At the time the lease was granted the land was vested in the Minister and the date of the commencement of the term was a matter of computation pursuant to the terms of the grant. (See: North Ganalanja Aboriginal Corporation v State of Queensland per Lee J at 21.)

The covenant conditions contained in the lease included the following:

o Not to use the land otherwise than for the purpose of grazing cattle for the purposes incidental thereto and carrying out of works associated therewith.

o Not to erect any buildings or improvements except fences, borders, yards and other improvements not exceeding in cost the sum of $1,000 that was usual and normal nature on pastoral properties without the previous consent in writing of the Minister.

o At all times to use the land for the purpose of the lease in a proper and husband-like manner using approved methods of pastoral husbandry in relation to cattle and for the management conservation regeneration of pasture for pastoral purposes that prevail in the district.

o Not to permit to be depastured on the land a number of cattle in excess of the number that in the opinion of the Minister is reasonable having regard to the condition of the land.

o Not to cut down, injure or destroy any timber, bush or shrub on the land without the consent of the Minister.

o At all times to maintain on the land good and improving soil and plant conditions.

o If the Commissioner of Soil Conservation recommended that the land be reserved as a soil conservation reserve under the Soil Conservation Act 1945 (WA), the Minister may re-enter the land on three months notice and upon expiration of the notice the lease shall absolutely determine.

o If the land was required for a public purpose or any public work, the Minister can determine the lease on three months notice at the expiration of which the Minister may enter the land and take possession thereof paying only the value of the improvements on the land erected by the lessee.

In October 1977 by a deed executed by the Minister, the lessee and the Aboriginal Lands Trust, the interest of the lessee in the lease was assigned to the Aboriginal Lands Trust. The lease is not annexed to the Deed of Assignment but from the description of the lease in the deed it may be inferred that it was the lease referred to above. The land referred to appears to be the land to the north-east of Lake Argyle.

By another deed of assignment made in 1979 between Fielder Downs, the Minister, and Sogex Pastoral Company Pty Ltd ("Sogex") Fielder Downs assigned to Sogex its interest as lessee in a lease granted by the Minister. The lease is not in evidence but is described as a lease for a term of five years commencing on 1 November 1970 with an option to renew for terms of five years for a total period of twenty years, for the purpose of grazing cattle and purposes incidental thereto and the carrying out of works associated therewith. The land, the subject of the lease, appears to be land formerly part of the Argyle Downs pastoral leases to the south-east of Lake Argyle and the area of the lease appears to be in

the order of 70,000 hectares. In October 1983 the Minister issued a lease to Sogex in respect of that land for a term of five years commencing on 1 November 1980. In an undated lease stamped 29 January 1986, the Minister granted a lease to Sogex of that land for a term of twenty-one years commencing on 1 November 1985.

By a lease, undated but stamped in May 1986, the Minister granted a lease of part of the Reserve to M E Green Pty Ltd for grazing purposes. The land, the subject of the lease, was the land resumed from Texas Downs and Lissadell pastoral leases. The lease was for a term of ten years commencing on 1 July 1982. The lease was "extended" for a further period of five years by a deed made in October 1992 between the Water Authority of Western Australia (now the Water Corporation), as successor to the Minister and as vestee of the Reserve, and M E Green Pty Ltd.

The leases to Sogex and the lease to M E Green Pty Ltd were in similar terms. In particular, there was a recital in the lease that the lessor was desirous that certain parts of the land be used for pastoral purposes and in no way detrimental to the "Ord River Water and Irrigation Works". The terms of the lease were similar to those contained in the Fielder Downs lease. Provisions with respect to determination of the lease expressly provided for determination in the event that continuation of the lease either as to the whole or part of the demised land may be detrimental to the "Ord River Water and Irrigation Works".

Counsel for the seventh respondents submitted that the Minister had no power under s32 of the Land Act 1933 (WA) to grant the lease to Sogex for a term of twenty-one years. It was submitted that a power to lease could be found in s32 of the Public Works Land Acquisition Act 1902 (WA). Whether s32 of the latter Act applied is unnecessary to consider, although it may be contended that the power under that section was not available once the land was set aside as Reserve 31165 for the purpose of "Government Requirements".

The Reserve, by notice in the Government Gazette (WA) in January 1972, was vested in the Minister for Works in trust for the purpose of "Government Requirements" with power to the Minister to lease the whole or portion of the Reserve for any term not exceeding twenty-one years. As discussed earlier in these reasons, s32 of the Land Act 1933 (WA) was not relevant to a Reserve that had been vested pursuant to s33 of that Act. Under s33 the Minister obtained power to grant the lease to Sogex and the other leases referred to above.

Pursuant to s33(2) the vesting order would be read as confining the power to lease conferred on the Minister as a power to lease for the purpose of the Reserve. The Minister's intention to satisfy that requirement is to be found in the restricted conditions in the lease to the use the lessee may make of the land and in the overriding powers of the Minister to have control of use of the land by the lessee.

The terms of the various leases referred to above make it quite clear that the Minister intended to give only the most limited interest to the lessees and assignees so as to prevent any inconsistency arising between protection of the environment surrounding Lake Argyle and the use of the land by the lessees. It was a requirement of the leases that the lessees construct appropriate fencing to fence out cattle that may otherwise wander on to the Reserve from adjoining unenclosed pastoral holdings. The interests obtained by the lessees are substantially less in content than those obtained under a pastoral lease and, indeed, have more in common with a licence to use the land for grazing purposes subject to the directions of the licensor.

For the foregoing reasons none of the leases of Reserve 31165 referred to above, extinguished native title by grant of interest or by use of land pursuant to rights acquired by grant of that interest.

The seventh respondents made an alternative submission that in the event that native title existed at the time of the grant of leases to Crosswalk Pty Ltd and Sogex in respect of the land in Reserves 1061, 18810 and 31165, and that native title was not extinguished at common law by that grant, such native title as existed was extinguished by virtue of the Titles Validation Act 1995 (WA).

The Titles Validation Act 1995 (WA) provides that every "past act" attributable to the State is valid (s5) and that a "category A past act", other than one to which s229(4) of the Act applies, extinguishes the native title concerned (s6). The Titles Validation Act 1995 (WA) is expressed to be an Act to validate, under s19 of the Act, "past acts" attributable to the State. S19 of the Act provides that if a law of a State or Territory contains provisions to the same effect as s15 and s16 of the Act that law may provide that a "past act" attributable to the State is valid, and taken always to have been valid. By s4 of the Titles Validation Act 1995 (WA) a word or expression used in that Act has the same meaning as in the Act.

S226 of the Act defines "act" as used "in references to an act affecting native title and in other references in relation to native title" to include the creation of any interest in relation to land or waters. S227 provides that 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". S229(3) provides that a "past act", consisting of the grant of a pastoral lease made before 1 January 1994 is, subject to certain exceptions, a "category A past act" if that lease was in force on 1 January 1994.

S248 of the Act defines a pastoral lease as:

"...a lease that:

a) permits the lessee to use the land or waters covered by the lease solely or primarily for:

(i) maintaining or breeding sheep, cattle or other animals; or
(ii) any other pastoral purpose; or

b) contains a statement to the effect that it is solely or primarily a pastoral lease or that it is granted solely or primarily for pastoral purposes."

A lease is defined in s242 of the Act as, inter alia, "anything that...is, for any purpose, by a law of...a State...declared to be or described as a lease".

The seventh respondents submit that the lease to Crosswalk Pty Ltd of portions of Reserves 1061 and 18810 in July 1992 and the lease to Baines River Cattle Co Pty Ltd of part of Reserve 31165 in January 1985 were, assuming that native title existed in respect of the land leased, invalid by reason of the grants being in contravention of s9 of the Racial Discrimination Act 1975 (Cth).

The basis for contending that the grants contravened that Act was that such a lease constituted an interference with all or some of the rights subsisting under the incidents of native title and no compensation was proffered to the holders of native title in relation to that grant. (See: D Gal, "Implications Arising from the Operation of the Native Title Act for the Existence of Native Title on Pastoral Leases" (1997) 71 ALJ 487 at 488-489.)

The submission is predicated upon the assumption that interference, control or impairment of native title by introduction of the concurrent rights of a pastoral lessee is sufficient to attract the operation of the "past act" provisions of the Act, notwithstanding extinguishment of native title at common law may not have been effected. That is a construction of the Act that must be rejected as stated earlier in these reasons.

Furthermore, the question may arise of the extent to which the Titles Validation Act 1995 (WA) may extinguish native title by force of that Act alone and not as a consequence at common law of the validation of a pastoral lease. (See: Western Australia v The Commonwealth per Mason CJ, Brennan, Deane, Gaudron and McHugh JJ at 453.)

The object of the Act invalidating "past acts" is to preserve the effect of the common law as it would have applied but for the operation of the Racial Discrimination Act 1975 (Cth).

Further, it should be noted that there will be a presumption that the grant is valid. (See: Mineralogy v National Native Title Tribunal (1997) 150 ALR 467 per Carr J at 482); Wingadee Shire Council v Mary Willis (1910) 11 CLR 123 per Griffiths CJ at 130.) That presumption cannot be displaced by the recipient of the grant merely putting in issue the validity of its own title.

(n) Creation of Lake Kununurra and Lake Argyle

By the construction of the diversion dam and the main dam which created these Lakes, the Crown altered the landscape and put lands flooded by those waters beyond reach of the holders of native title. It may not follow, however, that such an event necessarily extinguished, or was intended to extinguish, native title. The public rights created by the flooding of those lands are minimal. That is, there is no fundamental incompatibility between the continuation of native title and the exercise of public rights in respect of the area of water by the acts of damming the watercourse. The areas are immense and the effect is the replacement of open land with vast stretches of water. Attachment to the land remains for Aboriginal people through spiritual belief notwithstanding that the landscape has changed. There was substantial "primary" evidence of the maintenance of connection with the area in spiritual terms in addition to usufructuary uses.

Although the rights exercisable pursuant to native title may be said to be severely curtailed and controlled by reason of the creation of the lakes and statutory controls directed thereto, some usufructuary and spiritually-based rights can be

exercised without being wholly incompatible with rights asserted by the Crown or provided by the Crown in others in respect of the waters.

The area covered by both lakes is described as vacant Crown land and as such it is difficult to distinguish the surrounding land for the purpose of determining what effect the acts of the Crown have had upon native title. Lake Kununurra is also a "Ramsar" site under the Convention referred to earlier. Both the diversion dam and the main dam involve the use of natural features of land to store water supplied by an existing watercourse. Flooding of that land was part of the ecological system before the dams were constructed. The operation of the dams is to maintain the enlargement of the body of water. In the case of the main dam the area of water is a vast expanse in open lands in a remote area. Neither body of water is equivalent to a constructed reservoir for which a discrete area of land is dedicated to an exclusive purpose. The water bodies created by the dams were applied to public and commercial uses not consonant with a dedicated reservoir. For example, the waters are used by charter boats, fish-farm operators, float planes, watercraft and operators of tourist excursions. The degree of use of the water for such purposes does not suggest that at the time the dams were constructed it was intended that the impounded waters extinguish native title and abrogate all rights exercisable thereunder.

Bilbiljim (Mount Misery) is a site of significance in the Grasshopper Dreaming story. It is now an island in Lake Argyle but still of importance to the Aboriginal culture. There are totemic connections of the area despite the flooding thereof and a strong connection with other Dreaming stories in the southern part of Lake Argyle near Lissadell.

In R v Adams the Supreme Court of Canada considered whether an aboriginal right to fish was extinguished in an area of weed beds and marshes that had been submerged by construction of a canal which raised the level of the St Lawrence River. It was held by Lamer CJ (at 130) whose reasons were adopted by all members of the Court, that enlargement of a body on which an aboriginal right to fish for food exists, does not relate to the existence of that right "let alone demonstrate a clear and plain intention to extinguish it".

In that case, as discussed earlier in these reasons, it was confirmed that under Canadian law an aboriginal right may exist that is not dependent on native title but the same principles as to extinguishment of the right by acts of the Crown apply to such a "free-standing" right.

It was not necessary for the Court to determine whether aboriginal entitlement to lands of the fishing area had been extinguished by the act of submerging the lands by construction of a canal, a finding that had been made at first instance. It may be noted, however, that Lamer CJ directed his consideration of the question of extinguishment of aboriginal title to extinguishment by the act of the Mohawks in formally surrendering that title.

In the end, the answer to such questions turn on their own facts. The conclusion at first instance in that case, that native title in the fishing lands had been extinguished by the rise in the level of the St Lawrence River, was based on the fact that the river was a navigable waterway the bed of which, including any expansion thereof by submerging riparian lands, was "part of the public".

As described above, the relevant facts in this case are substantially different. In all the circumstances no clear and plain intention to extinguish native title has been demonstrated, although the exercise of rights dependent upon native title may be regulated or controlled and the native title concerned may apply to waters and land rather than to land and waters.

(o) Further effect of the amending Act

The parties were invited to make further submissions in respect of the effect of the amending Act which came into effect after the decision in this matter had been reserved.

The amending Act inserted Subdivision 2B of Pt2 (s23A-s23JA) under the heading "Confirmation of past extinguishment of native title by certain valid or validated acts". The Subdivision, in terms, purports to confirm the operation of the common law by providing, inter alia, that native title in relation to land will have been extinguished by certain "previous exclusive possession acts" or "previous non-exclusive possession acts" of the Commonwealth. "Previous exclusive possession acts" (defined in s23B, s249C and Sch 1 of the Act) are taken to have extinguished native title at the time the act was done (s23C). The effect of a "previous non-exclusive possession act" (s23F) is dealt with in s23G which, in effect, recognises the position at common law in respect of the coexistence of native title with pastoral and agricultural leases and the concurrent rights of leaseholders and native title holders.

The State submitted that by reason of the "Western Australia Agreement (Ord River Irrigation) Act 1968 (Cth) a work carried for the Project, being the work referred to in that Act, was to be regarded as an "act attributable to the Com-

monwealth" as defined in s239(c) of the Act and, as such, "a previous exclusive possession act" (s23B(7)) which extinguished native title under s23C(2).

The submission relied upon the contention that the construction of the main dam and associated works was an act done by a person under a law of the Commonwealth. The submission cannot be accepted. The Western Australia Agreement (Ord River Irrigation) Act 1968 (Cth) was an Act of the Commonwealth Parliament to serve two purposes. First, to ratify an agreement made between the Commonwealth and the State under which the Commonwealth agreed to provide funds by way of grant to enable the State to construct the work specified in the agreement, namely, the main dam and ancillary works, and to lend further monies to the State if the State decided to carry out further works referred to in the agreement, namely, extension of the irrigation system to the Weaber and Carlton Plains, Keep River Plain and Knox Creek area. Second, the purpose of the legislation was to authorize the appropriation of monies from the Consolidated Revenue Fund to fulfil the Commonwealth's obligation under the agreement made with the State.

The circumstances which led to the formation of the agreement between the Commonwealth and the State are set out by Ms Graham-Taylor in "The Ord River Scheme" (Ex 23 p39-p40).

In the agreement for the provision of finance made with the Commonwealth, the State agreed with the Commonwealth to exercise proper control in respect of the management and conduct of the works, and agreed to obtain approval from the Commonwealth, as financier, before letting any contract for the works in a sum in excess of $500,000. The State chose to finance the work with Commonwealth funds but at all times the works were the acts of the State carried out under the relevant legislative power and authority of the State. In no sense can it be said that construction of the works was attributable to the Commonwealth as an act done by a person under an enactment of the Commonwealth.

The amending Act also introduced s47A and s47B applying principles similar to those expressed in s47. S47, which was not amended by the amending Act in any relevant respect, provides that where an application is made for determination of native title in relation to an area held under pastoral lease by any person claiming to hold native title in respect of the area, any extinguishment of native title effected by the grant of the lease or creation of any other interest in relation to the area, or the doing of any act pursuant to the lease or the interest "must be disregarded".

S47A and s47B provided that prior extinguishment "must be disregarded" in respect of land granted, vested or reserved for the benefit of Aboriginal people or in respect of vacant Crown land where one or more members of the "native title claim group" (s61(1) and s253) occupy the area at the time the application was made.

As set out earlier in these reasons, a pastoral lease issued in respect of the Territory area was not an "exclusive pastoral lease" as now defined in s248A of the Act and had no extinguishing effect upon native title. The Territory did not submit that the establishment of the Keep River National Park and adjacent part of the Territory area under the perpetual leases granted to the Corporation were "previous exclusive possession acts".

It was conceded by the Territory that s47A applied to the freehold interests granted to the respective Aboriginal Corporations in the Territory area. On the facts set out in the foregoing reasons s47B has no application to the parts of the claim area to which the first applicants submitted it may apply, namely, land granted in freehold to the Aboriginal corporations and association in the Territory area, land in the Glen Hill pastoral lease, vacant Crown land in and around Kununurra and on the northern coastal flats, the area known as Yardangarlm sub-let by the Aboriginal Lands Trust to the Miriuwung and Gajerrong community outstation known as Yardangarlm, and the Yirallalem area in which there are Miriuwung and Gajerrong community outstations.

The State submitted that the introduction of s251D to the Act by the amending Act expanded the operation of the Titles Validation Act 1995 (WA). S251D of the Act provides that "a reference to land or waters on which a public work is constructed, established or situated includes a reference to any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work".

Under s229(4) of the Act a "past act" consisting of the construction or establishment of any public work, is a "category A past act".

In support of its submission the State referred to the terms of s16(3) of the Interpretation Act 1984 (WA) which provide that a reference in a written law to a Commonwealth Act shall be construed so as to include a reference to such Act as it may from time-to-time be amended. It was submitted that the Titles Validation Act 1995 (WA) in s4 referred to the Act and provided in that section that a word or expression used in the Titles Validation Act 1995 (WA) had the same meaning as it has in the Act. The argument was that the words in s7(1) of the Titles Validation Act 1995 (WA) "land or wa-

ters on which the public work concerned (on completion of its construction or establishment) was or is situated" now include adjacent land or water, the use of which was incidental to the construction or operation of the work.

The submission overlooks the limited operation of the Titles Validation Act 1995 (WA). By reason of the terms of the Act the Titles Validation Act 1995 (WA) may only give effect to that which is permitted by the Act. There cannot be a retrospective grant of Commonwealth legislative power and the terms of s16(3) of the Interpretation Act 1984 (WA) are irrelevant to that issue. Furthermore, amendment of the Act, in so far as it excluded the application of provisions of the Act which protect native title from defeasibility in respect of land or waters adjacent or incidental to the establishment or operation of a public work, would be an amendment to which the presumptive construction set out in s8 and s8A of the Acts Interpretation Act 1901 (Cth) would apply. By reason of that presumption, such an exclusion of application of the indefeasibility provisions of the Act could not affect any right that had accrued by application of those provisions of the Act before the amending Act came into effect unless the presumption was displaced by clear words to that effect. (See: Esber v The Commonwealth of Australia (1992) 174 CLR 430.) If such a question of interpretation arose, it would be necessary to have regard to the legal relationship between the Crown and indigenous people in consequence of the Crown's assertion of sovereignty over land occupied by such people. In dealings between Government and Aboriginal people, including legislation, the honour of the Crown is at stake. (See: R v Van der Peet per Lamer CJ at 536-537; R v Symonds per Chapman J at 391.)

(p) Telstra interests

The interests held by Telstra in respect of its repeater stations and telephone exchange are dealt with earlier in these reasons. Other interests held by Telstra in respect of the claim area include optical fibre cabling, local customer terminals and local customer cabling. It was not contended by Telstra that such interests extinguish native title nor was the validity of such interests contested by the first applicants.

(q) Licences granted to the sixth, ninth, tenth and thirteenth respondents

It was not contended that the sixth respondents pumping water from the Ord River and Lake Kununurra pursuant to by-laws under the Rights in Water and Irrigation Act 1914 (WA) in respect of the District had an extinguishing effect on native title nor was it contended that "commercial purpose" licences under s32C of the Wildlife Conservation Act 1950 (WA), "fishing boat licences" under the Fish Resources Management Act 1994 (WA) and "ferry licences" under the Transport Co-ordination Act 1966 (WA) had such an effect.

A fish farm operates in respect of a small area of Coolibah Pocket on Lake Argyle pursuant to an "acquaculture licence" under the Fish Resources Management Act 1994 (WA) and, formerly, a "fish farm licence" under the Fisheries Act 1905 (WA). The licences are issued on an annual basis and are limited for the purpose of farming barramundi. There is nothing in the terms of the licence document to indicate that the rights conferred by the licence extend beyond the farming of barramundi, an activity, of course, that is not incompatible with the continued existence of native title where it may exist in relation to the waters used for the licence.

(r) Public right to fish

No submissions were made on a public right to fish and navigate in tidal waters that may have been part of the common law received in Australia at sovereignty and the effect of that right upon native title in so far as the claim area includes such waters. (See: Yarmirr per Olney J at p430.)

Summary

The conclusions expressed in the foregoing reasons may be summarized as follows:

The first applicants as representatives of the Miriuwung and Gajerrong people ("the community") have established that native title existed in respect of part of the claim area ("the determination area") at the time sovereignty was asserted over that land by the Crown and that the holders of native title at that time included ancestors of the members of the community. The community, as a group of Aboriginal people, observes and acknowledges traditional laws, customs and practices, and has maintained connection with the land as far as practicable according to those traditional laws, customs and practices.

Except to the extent that native title has been extinguished in parts of the determination area, native title has continued and is held by the community in respect of the determination area.

The second applicants have not established that in respect of the Territory area of the determination area, native title in that land is held by the "estate groups" of the Miriuwung community known as "Dumbral", "Nyawanyawam" and "Binjen", or by the second applicants as representatives of those "estate groups". The native title that exists in the determination area is a communal title held collectively by the members of the community.

In respect of that part of the claim area described as Boorroonoong (Lacrosse Island), the third applicants have established that they hold native title concurrently with the community in respect of that area of land.

Native title as an interest in land, vests in the community, and in the third applicants, a right to possess, occupy, use and enjoy that part of the determination area in respect of which native title exists, in accordance with traditional laws, customs or practices acknowledged and observed by them, as far as is practicable, but subject to the extent that the Crown, by legislation and by acts vesting concurrent rights in third parties in land or water of the determination area, has provided for the regulation, control, curtailment, restriction, suspension or postponement of the exercise of the rights vested in the community, or third applicants, as incidents of native title.

How concurrent rights are to be exercised in a practical way in respect of the determination area must be resolved by negotiation between the parties concerned. It may be desirable that the parties be assisted in that endeavour by mediation, a course contemplated, perhaps, by s86B(5), s86A(1)(b)(iv) of the Act. (See: The Hon Justice R S French, "Courts under the Constitution, (1998) 8 JJA 7 at 13.)

Determination

Pursuant to s225 of the Act the "determination of native title" will be as follows:

1. Native title exists in the "determination area" save for the areas of land or waters described in the 2nd Schedule. The "determination area" is that part of the land or waters within the area depicted by red outline on the map in the 1st Schedule as does not include land or waters in respect of which no application for determination of native title was made by the first applicants in the application lodged with the National Native Title Tribunal referred to the Court by the Tribunal.

2. Native title in the "determination area" is held by the Miriuwung and Gajerrong People, and in respect of that part of the "determination area" known as Boorroonoong (Lacrosse Island), native title is also held by the Balangarra Peoples, both parties being described hereafter as the common law holders of native title.

3. Subject to para5 hereof, the nature and extent of the "native title rights and interests" in relation to the "determination area" are the rights and interests of the common law holders of native title derived from, and exercisable by reason of, the existence of native title, in particular:

a) to possess, occupy, use and enjoy the "determination area";

b) a right to make decisions about the use and enjoyment of the "determination area";

c) right of access to the "determination area";

d) the right to control the access of others to the "determination area";

e) the right to use and enjoy resources of the "determination area";

f) the right to control the use and enjoyment of others of resources of the "determination area";

g) the right to trade in resources of the "determination area";

h) the right to receive a portion of any resources taken by others from the "determination area";

i) the right to maintain and protect places of importance under traditional laws, customs and practices in the "determination area"; and

j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the "determination area".

4. The nature and extent of any other interests in relation to the "determination area" are the interests created by the Crown as set out in the 3*rd* Schedule.

5. The relationship between the "native title rights and interests" described in para3 and the "other interests" described in para4 is as follows:

The "Native title rights and interests" described in para3 hereof and the "other interests" described in para4 hereof are concurrent rights and interests in relation to that part of the "determination area" to which the "other interests" relate, but by operation of legislation or by reason of the nature and extent of the "other interests" created by the Crown, the exercise of some of those concurrent rights, including "native title rights and interests", may be regulated, controlled, curtailed, restricted, suspended or postponed.

1ST SCHEDULE

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2ND SCHEDULE

Native title has been extinguished in the following parts of the "determination area".

Land in roads as follows:

Lake Argyle Road (Road No 15762).

Long Michael Plain Road (Road No 15658).

Duracks Folly Road (Road No 15659).

Cycas Court, Livistona Street and that portion of Celtis Street between Eugenia Street and Livistona Street as described in Department of Land Administration Plan Diagram 18383.

Ibis Road as described in Department of Land Administration Diagram 91377.

Portion of Victoria Highway described in Department of Land Administration Diagram 91116.

Land in reserves as follows:

That part of Reserve 29799 ("Recreation and Community Facilities") occupied by the Kununurra Riding Club Incorporated described as the area leased to the Club by a lease dated 1 July 1991.

That part of Reserve 29799 ("Recreation and Community Facilities") occupied by the Kununurra Agricultural Society Incorporated described as the area leased to the Society by a lease dated 17 June 1992.

That part of the Reserve 31780 ("Conservation and Recreation") occupied by the Ord Pistol Club Incorporated described as the area leased to the Club by a lease dated 31 March 1993.

That part of Reserve 41812 ("Foreshore and Recreation") on which the pumping station is constructed, situated immediately west of the main irrigation channel.

That part of Reserve 37380 ("Protection of Diversion Dam") on which the diversion dam is constructed.

The whole of Reserve 40978 ("Repeater Station Site").

The whole of Reserve 39016 ("Repeater Station Site").

That part of Reserve 42710 ("Quarantine Checkpoint") on which ablution blocks, a parking area, power generator, fuel and water tanks, a tourist information shelter, shed and facilities for the Quarantine Checkpoint have been constructed.

The whole of Reserve 43140 ("Power Station").

That part of Reserve 43196 ("Water Supply and Electricity Generation") on which the Ord River dam, outlet structures, hydro-electric power station and access roads have been constructed.

Other land

All the land in:

King Location 2

King Location 406

Kununurra Lot 1647

Kununurra Lot 1648

Kununurra Lot 1649

Kununurra Lot 1650

Kununurra Lot 1651

Kununurra Lot 1652

Kununurra Lot 1653

Kununurra Lot 1654

Kununurra Lot 1678

Kununurra Lot 1679

Kununurra Lot 1680

Kununurra Lot 1681

Kununurra Lot 1682

Kununurra Lot 1683

Kununurra Lot 1684

Kununurra Lot 1685

Kununurra Lot 2399

Kununurra Lot 2400

Kununurra Lot 2401

Kununurra Lot 2402

Kununurra Lot 2403

Kununurra Lot 2404

Kununurra Lot 2405

Kununurra Lot 2406

Kununurra Lot 2407

Kununurra Lot 2420

That part of the land in Kununurra Lot 2257 added to that lot by declaration of the Minister for Lands by order made 9 July 1996.

3RD SCHEDULE

Other interests in the determination area are of the following kind:

(a) Interests of persons in whom Crown reserves are vested under the Land Act 1898 (WA) or Land Act 1933 (WA) or under a lease made for the purpose of the reserve.

(b) Interests of persons entitled to use reserves according to a purpose for which Crown land is reserved, or under a lease made for the purpose of the reserve.

(c) Interests of lessees under:

(i) Leases granted under the Land Act 1933 (WA);

(ii) Leases granted under the Crown Lands Act 1978 (NT);

(iii) Leases granted under the Special Purposes Leases Act 1953 (NT);

(iv) Leases granted under the Mining Act 1978 (WA);

(v) Leases granted under the Aboriginal Affairs Planning Authority Act 1972 (Cth).

(d) Interests of licencees under:

(i) Licences issued under the Land Act 1933 (WA);

(ii) Licences issued under the Fish Resources Management Act 1994 (WA);

(iii) Licences issued under the Jetties Act 1926 (WA);

(iv) Licences issued under and the Mining Act 1978 (WA);

(v) Licences issued under the Wildlife Conservation Act 1950 (WA);

(vi) Licences issued under the Rights in Water and Irrigation Act 1914 (WA);

(vii) Licences issued under the Transport Co-ordination Act 1966 (WA).

(e) Interests of holders of permits issued under:

(i) The Land Act 1933 (WA);

(ii) The Ord Irrigation District By-Laws under the Rights in Water and Irrigation Act 1914 (WA).

(f) Interests of holders of tenements under the Mining Act 1904 (WA).

(g) Interests of holders of tenements under the Petroleum Act 1936 (WA) and the Petroleum Act 1967 (WA)

(h) Interests of grantees under the Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1978 (NT) and the Crown Lands Act 1978 (NT).

(i) Other interests obtained by reason of provisions of legislation of the State, Territory or Commonwealth.

Order

THE COURT ORDERS, DECLARES AND DETERMINES THAT:

1. Native title exists in the "determination area" as defined below except those areas of land or waters as are described in the 2*nd* Schedule. The "determination area" is that part of the land or waters within the areas outlined in red on the map in the 1st Schedule as does not include land or waters in respect of which no application for determination of native title was made by the first applicants in the application lodged by them with the National Native Title Tribunal ("the Tribunal") referred to the Court by the Tribunal for decision.

2. Native title in the "determination area" is held by the Miriuwung and Gajerrong people, and in respect of that part of the "determination area" known as Boorroonoong (Lacrosse Island), native title is also held by the Balangarra Peoples, both parties being described hereafter as the common law holders of native title.

3. Subject to para5 hereof, the nature and extent of the "native title rights and interests" in relation to the "determination area" are the rights and interests of the common law holders of native title derived from and exercisable by reason of the existence of native title, in particular:

a) a right to possess, occupy, use and enjoy the "determination area";

b) a right to make decisions about the use and enjoyment of the "determination area";

c) a right of access to the "determination area";

d) a right to control the access of others to the "determination area";

e) a right to use and enjoy resources of the "determination area";

f) a right to control the use and enjoyment of others of resources of the "determination area";

g) a right to trade in resources of the "determination area";

h) a right to receive a portion of any resources taken by others from the "determination area";

i) a right to maintain and protect places of importance under traditional laws, customs and practices in the "determination area"; and

j) a right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the "determination area".

4. The nature and extent of any other interests in relation to the "determination area" are the interests created by the Crown as set out in the 3*rd* Schedule.

5. The relationship between the "native title rights and interests" described in para3 and the "other interests" described in para4 is as follows:

"The native title rights and interests" described in para3 hereof and the "other interests" described in para4 hereof are concurrent rights and interests in relation to that part of the "determination area" to which the other interests relate, but by operation of legislation or by the nature and extent of the other interests created by the Crown, regulation, control, curtailment, restriction, suspension or postponement may operate upon the exercise of some of those concurrent rights.

6. Within twenty-eight days the common law holders of native title are to file any minute of proposed determination under s56 and s57 of the Native Title Act 1993 (Cth) and if no such minute is filed it is determined that native title is held by common law holders.

7. There be liberty to apply as to costs and to refer to the National Native Title Tribunal for mediation issues arising out of the relationship between native title rights and interests and other interests in relation to the "determination area".

Note: Settlement and entry of orders is dealt with in O36 of the Federal Court Rules.

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No appearance for the third respondent

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