REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

THE STATE OF WESTERN AUSTRALIA ..... APPELLANT;
RESPONDENT,

AND

WARD AND OTHERS ..... RESPONDENTS.
APPLICANTS,

THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY ..... APPELLANT;
RESPONDENT,

AND

WARD AND OTHERS ..... RESPONDENTS.
APPLICANTS,

NINGARMARA AND OTHERS ..... APPELLANTS;
APPLICANTS,

AND

THE NORTHERN TERRITORY OF AUSTRALIA AND OTHERS ..... RESPONDENTS.
RESPONDENTS,

WARD AND OTHERS ..... APPELLANTS;
APPLICANTS,

AND

CROSSWALK PTY LTD AND OTHERS ..... RESPONDENTS.
RESPONDENTS,

[2002] HCA 28

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

HC OF A
2001-2002

March 6-9,
13-16
2001

Aug 8
2002

Aboriginals — Native title to land — Pastoral lease — Mining lease — Grant under statutory authority — Effect of grant upon individual native title rights and interests — Reserves — Effect of dedication — Public works

Gleeson CJ,
Gaudron,
McHugh,
Gummow,
Kirby,
Hayne and
Callinan JJ

— Effect of resumption of land — Crown lands — Exclusive possession — Inconsistency of rights — Compensation — Land Act 1898 *(WA), ss* 3, 4, 106, 107 *— Land Act* 1933 *(WA), ss* 33, 106, 109, 139, 162, 163, 164 *— Mining Act* 1978 *(WA), ss* 84, 85 *— Public Works Act* 1902 *(WA), ss* 18, 34(1) *— Rights in Water and Irrigation Act* 1914 *(WA), ss* 3(2), 4(1), *Pt III — Crown Lands Ordinance* 1927 *(NT), Pt III, Divs* 1, 2 *— Crown Lands Ordinance* 1931 *(NT), Pt III, Divs* 1, 2, *Pt IV — Special Purposes Leases Act* 1953 *(NT), ss* 4(1), 8(1)*(a),* 9 *— Validation (Native Title) Act* 1994 *(NT), ss* 3B, 4(1), *Pt* 3C.

Aboriginals — Native title to land — Intermediate period acts — Past acts — Previous exclusive possession acts — Previous non-exclusive possession acts — Native Title Act 1993 *(Cth), Pt* 1, *Pt* 2 *Divs* 2, 2A, 2B, 5.

Aboriginals — Native title to land — Validity of ''past acts'' — Inconsistency of State and Territory law authorising or validating grant of interest in land — Racial Discrimination Act 1975 *(Cth).*

Aboriginals — Native title to land — Cultural knowledge — Rights in relation to land or waters.

Federal Court of Australia — Appeals — Nature of appeal — Statutes passed after hearing but before judgment.

The *Native Title Act* 1993 (Cth) (the NTA) defined the expressions ''native title'' and ''native title rights and interests'' and prohibited the extinguishment of native title except in accordance with the terms of the NTA. The NTA provided for the validation of certain ''past acts'' for the extinguishment wholly or partly of native title attributable to the Commonwealth, a State or a Territory which would, if it were not for the NTA, be invalid to any extent, and in particular by operation of the *Racial Discrimination Act* 1975 (Cth) (the RDA). The NTA was significantly amended by the *Native Title Amendment Act* 1998 (Cth) which introduced Divs 2A and 2B into Pt 2 and confirmed the past extinguishment of native title by certain acts attributable to the Commonwealth, a State or a Territory which were valid and not struck at by the RDA.

Native title claimants lodged an application for ''a determination of native title'' under the NTA in relation to an area of approximately 7,900 km^2 generally within the region known as the East Kimberley (the determination area). The determination area included land and waters in the north of Western Australia and some adjacent land in the Northern Territory. The application included a claim to the right to maintain, protect and prevent the misuse of cultural knowledge. Some of the land within the determination area was subject to existing pastoral leases. Most was land previously the subject of pastoral leases which had been abandoned, forfeited for non-payment of rent or non-compliance with lease conditions, or resumed for the Ord River Irrigation Project (the Ord River Project), diamond mining operations, or for the designation of reserves. Other land within the determination area may never have been the subject of a pastoral lease and may have at all times remained vacant Crown land. The application was lodged by the Native Title Registrar for decision by the Federal Court pursuant to the NTA. After the making of a determination by the primary judge but before the substitution of a

fresh determination by a Full Court of the Federal Court of Australia, the Parliament of Western Australia, in reliance upon the 1998 amendments to the NTA, enacted the *Titles Validation Amendment Act* 1999 (WA) to amend the *Titles Validation Act* 1995 (WA) (the State Validation Act) and to validate certain acts extinguishing native title.

Held, that an appeal to the Full Court of the Federal Court was not an appeal in the strict sense. The NTA, as amended from time to time, had to be applied in the form in which it stood at the date of a determination of native title under the Act. Hence State and Territory validating legislation for which the NTA provided had to be considered by the Full Court.

CDJ v VAJ (1998) 197 CLR 172 and *Allesch v Maunz* (2000) 203 CLR 172, applied.

Duralla Pty Ltd v Plant (1984) 2 FCR 342 and *Petreski v Cargill* (1987) 18 FCR 68, overruled.

Partial extinguishment of native title

Held, (1) that where claims are made under the NTA for rights defined in that Act the determination of native title rights and interests is governed by the Act. The Act provides for the partial extinguishment or suspension of native title rights.

Per Gleeson CJ, Gaudron, Gummow, Hayne JJ, Kirby J concurring. Native title rights and interests are a bundle of rights the individual components of which may be extinguished separately. [76], [95]

Per McHugh and Callinan JJ. Partial extinguishment of native title is recognised both at common law and under the NTA. [616]-[618]

(2) That questions of extinguishment first require the identification of the native title rights and interests that are alleged to exist. Whether rights defined in the NTA have been extinguished by a grant of rights to third parties or an assertion of rights by the executive government requires a comparison to be made between the legal nature and incidents of the right granted or asserted and the native title right asserted. The ''operational inconsistency'' test is useful, if at all, only by way of analogy. The ''adverse dominion'' approach to extinguishment is wrong, not least because it obscures the objective nature of the comparison. [78]-[88], [94], [149]

Per McHugh and Callinan JJ. ''Inconsistency of incidents'' is generally the correct test, but in some cases, a comparison will be unnecessary because the grant of some interests will extinguish all native title rights, whatever the content of the latter. [624]

Per Kirby J. To resolve questions of inconsistency an ''inconsistency of incidents'' test should be applied, but the Court's attention should be focused on the nature and extent of any non-indigenous interests in land, measured against the relevant rights and interests proved by the native title claimants. [589]

Vesting of reserved land in Western Australia

Part III of the *Land Act* 1933 (WA) provided for the reservation by the Governor of any lands vested in the Crown that might be required for various specified objects and purposes. Section 33 provided: ''The Governor may by Order in Council published in the Gazette — (a) direct that any reserve shall vest in and be held by any municipality, road board, body corporate, or persons to be named in the order, in trust for

the like or other public purposes, to be specified in such order; or (b) may leave the reserve in the form in [a schedule], or grant the fee simple, to secure the use thereof for the purpose for which such reserve was made. In either case a power to sublet the reserve or any portion thereof may be conferred.''

Held, (1) that the reservation of land pursuant to the *Land Act* 1933 was inconsistent with the right to be asked permission to use or have access to the land. The reservation of land before 31 October 1975 therefore extinguished that right, but (McHugh and Callinan JJ contra) did not otherwise extinguish native title. [219]

(2) That the vesting of land in a body or person under s 33 before 31 October 1975 passed the legal estate of the land and thereby extinguished all native title rights and interests in it. [249]

(3) By Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, McHugh and Callinan JJ dissenting, that in respect of the reservation of land after 31 October 1975, account must be taken of the RDA, Pt 2 of the NTA, and the State Validation Act. Reservation after that date of land that had not been and was not the subject of a pastoral lease was inconsistent with the RDA. By the operation of Pt 2 of the NTA and the State Validation Act, reservation would, in effect, suspend a native title right to speak for country for so long as the land remained reserved. [222]

(4) By Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, that the vesting of land under s 33 after 31 October 1975 was valid, the State provisions not being inconsistent with the RDA. Because the vesting of land under s 33 vested a right of exclusive possession it extinguished native title and, in some but not all cases, it was a ''previous exclusive possession act''. The extinguishing effect of a previous exclusive possession act was confirmed by Div 2B of Pt 2 of the NTA and the State Validation Act. The vesting of land under s 33 which did not amount to a previous exclusive possession act was nonetheless valid and effective to extinguish native title. [253], [258]-[261]

McHugh and Callinan JJ were of the opinion that reservation under the *Land Act* 1933 and the *Land Act* 1988 extinguished all native title rights and interests and that the RDA did not invalidate the creation of reserves or the vesting of land under s 33 after 31 October 1975. [784]

Leases of reserved land in Western Australia not required for reserved purpose

Section 32 of the *Land Act* 1933 empowered the Governor to grant a lease or leases for terms not exceeding ten years for any purpose of any reserve not immediately required for the purpose for which it was made. Section 116 empowered the Governor to grant special leases of any Crown land for not exceeding twenty-one years for any of various specified purposes.

Held, (1) that the grant of leases of reserved land under s 32 wholly extinguished native title rights and interests.

Per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ. Grants after 31 October 1975 to persons other than the Crown or a ''statutory authority'' were ''previous exclusive possession acts'' and, where still in force on 23 December 1996, were ''relevant acts'' within the definition of the State Validation Act which therefore wholly extinguished native title rights and interests. [370]-[375]

Per McHugh and Callinan JJ. Leases of reserves under s 32 extinguished native title completely and the RDA did not invalidate the grant of those leases. [749]-[765]

(2) That the grant of special leases under s 116 wholly extinguished native title rights and interests. [351]-[357], [745]

Permits to occupy land in Western Australia the subject of Crown grants

Section 16 of the *Land Act* 1898 (WA) provided that after payment of the purchase money and fee payable for a Crown grant, and having performed all conditions, a purchaser would, on application, receive a permit to occupy, being a certificate that the purchaser was entitled to a Crown grant.

Held, that the grant of a permit to occupy under the *Land Act* 1898 wholly extinguished any native title rights or interests in the land. [349], [699]

Rights to use and control natural waters and regulation of certain native fauna and flora in Western Australia

Part III of the *Rights in Water and Irrigation Act* 1914 provided that the right to the use and flow and to the control of the water in natural waters should, subject only to certain specified restrictions and until appropriated under the sanction of that or another Act, be vested in the Crown. By-laws made under that Act before the enactment of the RDA prohibited the removal, plucking or damaging of any wildflower, shrub, bush, tree or other plant growing on any land reserved for or vested in the Minister within half a mile of any reservoir and within the Ord Irrigation District and also prohibited the shooting, trapping or taking of fauna on such land.

Held, that the application of Pt III extinguished any native title right to possession of natural waters to the exclusion of all others and those by-laws extinguished native title rights to hunt fauna or gather plants on the land to which they applied. [265], [825]-[826]

Resumption of land in Western Australia

Section 18 of the *Public Works Act* 1902 (WA) provided for the vesting of land ''by the force of this Act'' in the Crown or a local authority in fee simple in possession or such lesser estate for a specified public work freed and discharged from all trusts, mortgages, charges, obligations, estates, interests, rights of way or other easements and that the estate or interest of every person in such land should be deemed to have been converted into a claim for compensation under that Act.

Held, that resumption of land under the Act before 31 October 1975 extinguished all native title rights and interests. Resumption after 31 October 1975 was not inconsistent with the RDA and, in any event, was a previous exclusive possession act validated by the NTA and the State Validation Act, whether or not native title holders enjoyed the same rights to compensation under the Act as non-native title holders. [204], [278]-[280], [832]-[833]

Minerals and petroleum

Section 117 of the *Mining Act* 1904 (WA) provided that minerals on or below the surface of any land in Western Australia were the property of the Crown. Section 9 of the *Petroleum Act* 1936 (WA) provided that

all petroleum on or below the surface of all land within the State should be deemed always to have been the property of the Crown. The determination made by the primary judge provided that, in the determination area, the native title holders had certain rights in respect of the resources of the area.

Held, that no native title rights to, or interest in, any minerals or petroleum in the State or Territory claim areas was established and therefore no question of extinguishment arose. [382]-[383], [572]

Per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ. Even if such rights had been established in respect of the State claim, those rights would have been extinguished by s 117 of the *Mining Act* 1904 and s 9 of the *Petroleum Act* 1936.

Fishing in the tidal waters of the Australian coastal sea

Section 225 of the NTA provided that a determination of native title was a determination of whether or not native title existed in relation to a particular area of land or waters and, if it did, a determination of various things which included ''the nature and extent of any other interests in relation to the determination area'' (par (c)).

Held, that the public right to fish recognised by the common law was an ''other interest'' within s 225(c) and must be recorded in a determination. [387]-[388], [880]

Per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ. Any exclusive right under traditional law and custom to fish in tidal waters has been extinguished because such a right is inconsistent with public rights of navigation over and fishing in those waters.

Per McHugh and Callinan JJ. No exclusive right to fish in tidal waters can be recognised by the common law.

The Commonwealth v Yarmirr (2001) 208 CLR 1, applied.

Pastoral leases in Western Australia

Lands Acts and regulations made thereunder provided for the granting of leases of Crown lands for pastoral purposes. The language of the grants varied but they described the purposes for which the land was leased and were usually expressed to give no right to the soil or to the timber except as was required for domestic purposes and improvements. Leases reserved certain powers to the Minister and reserved to ''Aboriginal natives'' a right to enter upon any unenclosed or enclosed but otherwise unimproved (or, under some leases, any unenclosed and unimproved) parts of the land to seek their sustenance (or subsistence) in their accustomed manner.

Held by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, that the grant of a pastoral lease in Western Australia extinguished the native title right to control access to, or the use to be made of, the land, but did not give a right of exclusive possession. To the extent that rights and interests granted by a pastoral lease were not inconsistent with native title rights and interests, the rights and interests under the lease prevailed over, but did not extinguish, native title rights. [170], [177]-[195]

Wik Peoples v Queensland (1996) 187 CLR 1, considered.

McHugh and Callinan JJ were of the opinion that the grant of pastoral leases in Western Australia extinguished all native title rights and interests. Any native title rights existing before the grant of a pastoral lease were replaced by the right of entry for subsistence given to all

Aboriginals. *Wik Peoples v Queensland* (1996) 187 CLR 1 was distinguishable. [699], [715], [720]

Section 109 of the *Land Act* 1933 empowered the Governor to resume, enter upon, and dispose of the whole or any part of the land comprised in any pastoral lease, for agricultural or horticultural settlement, or for mining or any other purpose as in the public interest he may think fit.

Held, by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, McHugh and Callinan JJ dissenting, that resumption of land under s 109 did not extinguish native title. [208]

Pastoral leases in the Northern Territory

Crown Lands Ordinances provided for the granting of leases of Crown lands for pastoral purposes. The language of the grants varied but they described the purposes for which the land was leased and usually contained reservations concerning timber and covenants concerning stocking levels and the passage of travelling stock through the leased land. Leases also reserved certain rights of access to Aboriginal inhabitants of the Territory for the purposes, amongst others, of erecting dwellings and of taking and using for food birds and animals ferae naturae.

Held, by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, McHugh and Callinan JJ dissenting, that the successive grants of pastoral leases over land in the determination area in the Territory extinguished the native title right to control access to, or the use to be made of, the land but they were not necessarily inconsistent with the continued existence of all native title rights and interests. They were non-exclusive pastoral leases and Pt 3C of the *Validation (Native Title) Act* 1994 (NT) (the Territory Validation Act) was engaged. [417], [422]-[425]

McHugh and Callinan JJ were of the opinion that the grant of pastoral leases in the Territory extinguished all native title rights and interests. [735]

Special purpose leases and perpetual leases in the Northern Territory

The *Special Purposes Leases Act* 1953 (NT) provided for the granting of leases subject to the stipulation that the land comprised in a lease granted under the Act should not be used for a purpose other than the purpose (or a purpose ancillary thereto) for which the lease was granted. A lease was granted under the Act to the Conservation Land Corporation (the CLC), a body corporate established by statute for the purpose of acquiring and holding real property for certain purposes specified by the Act. The *Crown Lands Act* 1931 (NT) empowered the Minister in the name of the Territory to grant a lease of Crown land. A lease of Crown land was granted by the Minister to the CLC in perpetuity.

Held, by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, McHugh and Callinan JJ dissenting, that both leases granted to the CLC conferred exclusive possession and therefore, subject to the operation of the RDA, extinguished any remaining native title rights and interests. Their grant was a grant by the Crown in right of the Northern Territory to a statutory authority of the Crown within the meaning of s 230(d)(i) of the NTA and a category D ''past act''. They were not previous exclusive possession acts under the NTA and the Territory Validation Act. [433], [439], [446], [448]-[453]

McHugh and Callinan JJ were of the opinion that both leases extinguished all native title rights and interests. [936]-[938]

Mining leases in Western Australia

The *Mining Act* 1978 provided for the granting of mining leases which were to be subject to conditions that the lessee should (a) pay the rents and royalties due under the lease; and (b) use the land in respect of which the lease was granted only for mining purposes in accordance with the Act: s 82(1). A mining lessee was authorised to work and mine the land in respect of which the lease was granted for any minerals and to do all acts and things necessary to effectually carry out mining operations in, on or under the land: s 85(1). The lessee was entitled to use, occupy and enjoy the land for mining purposes and owned all minerals lawfully mined from that land: s 85(2). The rights conferred were expressed to be exclusive rights for mining purposes in relation to that land: s 85(3).

Held, by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, McHugh and Callinan JJ dissenting, that the grant of mining leases under the Act would have extinguished the right to be asked permission to use or have access in relation to the whole of the area of the lease if it had not earlier been extinguished by the grant of pastoral leases. This would have raised the issue of validity of the grant by the operation of the RDA and the subsequent validation by the NTA and State Validation Act. [309]

McHugh and Callinan JJ were of the opinion that the grant of mining leases under the Act extinguished all native title rights and interests and that the RDA did not invalidate that grant. [848]-[855]

Cultural knowledge

Held, by Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, Kirby J dissenting, that in so far as claims to a right to maintain, protect and prevent the misuse of cultural knowledge went beyond a right to deny or control access to land or waters, they were not rights protected by the NTA. [60], [644]

Kirby J was of the opinion that the right to protect cultural knowledge that was inherently related to the land according to Aboriginal beliefs was sufficiently connected to the area to be a right ''in relation to'' land or waters for the purpose of s 223(1) of the NTA. [580]

Decision of the Federal Court of Australia (Full Court): *Western Australia v Ward* (2000) 99 FCR 316, reversed.

APPEALS from the Federal Court of Australia.

In 1994 Ben Ward and others lodged an application on behalf of the Miriuwung and Gajerrong People for a ''determination of native title'' under the *Native Title Act* 1993 (Cth) (the NTA). The application was accepted by the Registrar of Native Titles. It was subsequently joined by two other groups, comprising Cecil Ningarmara and others and Delores Cheinmora and others, on behalf of the Balangarra Peoples. The application engaged the definition of ''native title'' in s 223 of the NTA. The Native Title Tribunal made no determination and, as a consequence, s 74 of the NTA obliged the Registrar to lodge the

application for decision by the Federal Court of Australia. That was done on 2 February 1995.

The land and waters the subject of the application (the determination area) were generally within the region known as the East Kimberley region of north Western Australia and also included adjacent land in the Northern Territory. The determination area included (i) Crown land in or about the town of Kununurra, the Ord River irrigation area, and Lake Argyle and several freehold lots; and Crown land in the Glen Hill pastoral lease south-west of Lake Argyle but separated from the area in (i); (ii) Crown land and waters in the inter-tidal zones and mud flats on the eastern side of the Cambridge Gulf and on the north coast of Western Australia between Cambridge Gulf and the border with the Northern Territory; (iii) Crown land in three small islands, ''Booroongoon'' (Lacrosse), ''Kanggurryu'' (Rocky) and ''Ngarrmorr'' (Pelican) near the mouth of Cambridge Gulf; and (iv) Crown land in an area loosely described as ''Goose Hill'', east of the town of Wyndham and south of the Ord River. A wide variety of land tenures and uses were to be found in the determination area, including pastoral leases, tenements granted under the *Mining Act* 1978 (WA) and the *Petroleum Act* 1967 (WA), reserved Crown land vested in the Shire of Wyndham-East Kimberley or in other statutory authorities for purposes which include conservation, recreation, parkland, agricultural research, and quarrying, and land resumed for the Ord River Irrigation Project (the Ord River Project). Some of the land may always have been vacant Crown land.

By orders made on 24 November 1998 and 26 February 1999 Lee J made a determination as to the existence of native title in respect of a large portion of the determination area. Paragraph 3(d) of the determination gave as a particular of the rights and interests exercisable by reason of the existence of native title ''a right to control access of others to the 'determination area'''. Paragraph 3(j) gave as another particular ''a right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the 'determination area' ''.

Various parties to the proceeding appealed from the orders of Lee J to a Full Court of the Federal Court which (Beaumont and von Doussa JJ, North J dissenting) allowed the appeals and made orders setting aside the orders of Lee J and substituting a new determination of native title. That determination is set out in the judgment of Callinan J at 256-260 [603]. Special leave to appeal to the High Court from the judgment and orders of the Full Court was granted on 4 August 2000.

The appellant in the first appeal was the State of Western Australia. The respondents in that appeal were Ben Ward and others, on behalf of the Gajerrong People, Cecil Ningarmara and others and Delores Cheinmora and others, on behalf of the Balangarra Peoples.

The appellant in the second appeal was the Attorney-General for the Northern Territory. The respondents in that appeal were Ben Ward and

others, on behalf of the Miriuwung and Gajerrong People, and Cecil Ningarmara and others.

The appellants in the third appeal were Cecil Ningarmara and the other persons who with him were the second group of respondents in the first and second appeals. The respondents in that appeal were the Northern Territory of Australia, the Conservation Land Corporation, the State of Western Australia, Ben Ward and others, on behalf of the Miriuwung and Gajerrong People, and Delores Cheinmora and others, on behalf of the Balangarra Peoples.

The appellants in the fourth appeal were Ben Ward and the other persons who were respondents in the first and second appeals, on behalf of the Miriuwung and Gajerrong People. The respondents in the fourth appeal were Crosswalk Pty Ltd, Barnes River Cattle Co Pty Ltd, Cecil Ningamara and the other persons who were appellants in the third appeal, the Attorney-General for the Northern Territory, Delores Cheinmora and the other persons who were respondents in the first and third appeals, on behalf of the Balangarra Peoples, the State of Western Australia, the Kimberley Land Council, on behalf of the Malngin and Gija People, Alligator Airways Pty Ltd and others, and Argyle Mines Pty Ltd and The Argyle Diamond Mine Joint Venture.

The following were granted leave to intervene: the Attorney-Generals for the Commonwealth and the State of South Australia, the Goldfields Land Council, the Yamatji Barna Baba Maaja Aboriginal Corporation, the Mirimbiak Nations Aboriginal Corporation, the Human Rights and Equal Opportunity Commission, and the Pastoralists and Graziers Association of WA Inc.

The appeals were heard together.

M L Barker QC and *R H Bartlett* (with them *M J Windsor*), for the appellants and respondents Ward and others.

M L Barker QC. There are four broad matters for determination. The first is the nature and content of native title. The second concerns the circumstances in which native title may be extinguished and, in particular, whether partial extinguishment may occur under the common law. The third concerns the question whether certain legislative and executive acts done after the commencement of the *Racial Discrimination Act* (the RDA) on 31 October 1975 are ''past acts'', as defined in s 228 of the *Native Title Act* 1993 (Cth) (the NTA). The fourth relates to the application of s 47B of the NTA. It is consequential and will not be relied upon if we succeed on the first two matters.

The nature and content of native title: Native title is a right to the land itself. It is proprietary and its origin is the traditional law and custom of the applicant people. On a proper analysis of native title, the applicants, in this case the Miriuwung and Gajerrong People, through their predecessor community, occupied exclusively the determination area so that then, as now, they hold a right to exclusive possession. It

is a ''community title'' which is practically ''equivalent to full ownership'' (1). This conclusion is justified by the concept of ''belonging to country'', evidenced by the findings of fact, and is supported by the judgment of Brennan J in *Mabo [No 2]*. [KIRBY J. Recognition of the common law is one element in what Parliament has provided, but the starting point now is the NTA. We should not be foraging amongst what members of this Court said before the Parliament provided for native title.] It is accepted that the starting point for a determination of native title is now the NTA, rather than the common law as reflected in *Mabo [No 2]*, but the NTA has not changed the nature and content of native title or the circumstances in which will be found to exist, because the common law position is reflected in s 223 which enacts the ratio decidendi of *Mabo [No 2]*. The NTA clarifies the common law position in some respects, such as in the case of usufructuary rights to hunt and fish, but probably goes no further than the common law. Section 223 is no less than what was determined by *Mabo [No 2]*. Until extinguished, native title provides a ''right of occupation'' that prevails against all but the Crown (2). The decision of Lee J reflects this view of the nature and content of native title: native title is a communal ''right to land'' and not a mere ''bundle of rights'' (3). He relied on *Delgamuukw v British Columbia* (4). The Canadian view is not infected by constitutional provisions unique to Canada. If native title is a ''bundle of rights'', it can only be regarded as such in the same way as a grant in fee simple comprises a bundle of rights under general law.

Lee J found that the traditional laws, customs and practices of the Miriuwung and Gajerrong People provided for the distribution to subgroups of rights in respect of the use of the land. They included the right to use a particular area for the benefit of the ''estate group'' and the right of some of that group (the dawawang) to ''speak for'' that land, in particular to ''speak for'' its use. The latter right justified the finding that there was possession, occupation, use and enjoyment of the traditional homelands of the applicant group. It follows that there cannot be partial extinguishment of native title. In applying that principle, he found there was no extinguishment through much of the determination area. The Full Court majority considered that the rights and interests of indigenous people which together make up native title are aptly described as a ''bundle of rights'' which is an aggregation of individual rights and interests. Accordingly, the sticks could be extinguished singly so that there could be partial and progressive

(1) *Mabo v Queensland [No 2]* (*Mabo [No 2]*) (1992) 175 CLR 1 at 88.
(2) *Mabo [No 2]*; *Calder v Attorney-General (British Columbia)* [1973] SCR 313 at 352; *Johnson v McIntosh* (1823) 21 US 240 at 253; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 409; *Geita Sebea v Papua* (1941) 67 CLR 544 at 557.
(3) *Ward v Western Australia* (1998) 159 ALR 483 at 508.
(4) [1997] 3 SCR 1010.

extinguishment of the rights or incidents of a native title. Further, a native title that might begin as a proprietary could be so reduced in content that it lost that character. Native title is not so fragile. It is extremely resilient. Consistently with *Fejo v Northern Territory* (5), a specific right, such as one to forage, may, along with native title itself, be extinguished by the grant of fee simple. Anything less than such a grant, aimed at restricting particular rights or activities, does not extinguish unless the legislative or executive act makes it clear that it is intended to be totally inconsistent with the continued enjoyment of native title. Extinguishment is all or nothing because the interests in the land of the indigenous people should be treated with the same respect as other property interests. [GLEESON CJ. The possible point of view is that if one right is gone, all have gone, unless there is possibility of partial extinguishment.] The issue then concerns the test to characterise the act that purports to extinguish. It is not possible to extinguish some rights and interests but leave others. Passages in the judgment of Brennan J in *Mabo [No 2]* support the view that the interest of a community in exclusive possession of land is proprietary because there are no other proprietors. An identifiable community that was in exclusive possession of land, which is an identifiable community today and which observes customs that are traditionally based, has proprietary title. Brennan J also said that it is not possible to admit usufructuary rights of individual members of the clan or group without admitting a traditional proprietary community title. The two are inseverable and are derived from one title. Accordingly, unless the law or executive act strikes at that title, and everything derived from it, it continues. [MCHUGH J. If it is a proprietary right, how can the Crown issue estates inconsistent with it?] There are certain tensions, but the result of Lee J's determination is that there was no extinguishment through most of this determination area, regardless of the nature of the interest granted. Individual grants acted as mere regulation of native title or operated to curtail its enjoyment or to suspend native title rights. The result is that there was no extinguishment unless the grant was of a fee simple, or such other grant that exhibited that degree of permanence and impossibility of co-existence with native title that satisfied the clear and plain intention test for extinguishment. [CALLINAN J. Section 4(6) of the NTA refers both to complete extinguishment and extinguishment to the extent of inconsistency. Is that not against an all or nothing proposition?] Section 223(1)(c) of the NTA refers to native title as rights and interests that are recognised by the common law. There is also an assumption in the NTA that there may be partial extinguishment. In some circumstances that assumption is wrong. Where the native title in a case is identified as the right to possess, occupy, use and enjoy the land, it cannot be a bundle of rights, and partial extinguishment cannot

(5) (1998) 195 CLR 96.

occur. There may be cases where it can, and the assumption of partial extinguishment in the NTA is operative, but this is not such a case.

The manner of proof of native title is the same in Canada as in *Mabo [No 2]*. It is not restricted to ''practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies''. In relation to resources one does not ask whether there is enjoyment of resources only of a customary or traditional kind. One is entitled to look at the present requirements and demands of the society.

The Full Court held that there is no native title right to protect cultural knowledge. That fails to recognise the nature of the connection Aboriginal people have with land which goes to the basis of native title (6). Thus, if a person not a member of the indigenous people who held native title were to acquire secret knowledge of a spiritual, cultural or social kind and attempted to impart it to others not members of that people, the native title that inheres in them would permit the people or their representatives or custodians to take appropriate curial action to prevent dissemination. That goes beyond a mere ''personal right residing in the custodians of the cultural knowledge''.

Exclusivity: An exclusive right granted to third parties can work in conjunction with other interests. There can be a need for outside parties to consult with more than one legal right-holder under the general law. There may be a need to consult with the Aboriginal native title holder in respect of any decision relating to the use of the country. The exclusive nature of a granted right has meaning against persons who have no native title rights. Moreover, there may be statutory rights, such as those under the telecommunications legislation, which allow utility organisations to enter upon land. Such rights of access do not extinguish native owners' proprietary interest.

The right to take fauna in a reserve or wildlife sanctuary: The Full Court majority held that the *Wildlife Conservation Act* 1950 (WA) extinguished the right to take fauna in a reserve or wildlife sanctuary. Section 23 of that Act confers on a person who is Aboriginal a right to take fauna and flora ''upon Crown land or upon any other land''. The majority determined that that exception did not exempt Aboriginal people from the prohibition against taking fauna in a nature reserve or wildlife sanctuary. Hence s 23 extinguished native title rights to take fauna. The native title right to hunt was protected from extinguishment after 31 October 1975 by the RDA and by the NTA. Any amendment made on or after 31 October 1975 and before 1 July 1993 could only be a category D past act and could not extinguish native title: NTA, ss 15(1)(d), 228(3)(b), 232, 238. In view of the legislative and regulatory provisions which relieve against the prohibition on hunting, circumstances arise for the precise application of *Yanner v Eaton* (7),

(6) cf *Yanner v Eaton* (1999) 201 CLR 351 at 373 [38].
(7) (1999) 201 CLR 351.

so that no extinguishment occurs. There is mere regulation. The object of the *Wildlife Conservation Act*, as its long title indicates, is the ''conservation and protection of fauna'', not the expropriation of private rights. The object was achieved by a licensing, permit, or authorisation scheme regulating the taking of and dealing in protected fauna: ss 14-17. The scheme regulated the season, place and method of taking. See *R v Sparrow* (8), distinguishing control in great detail by the regulations from extinguishment.

Resumption of land: Land not initially in the Ord Irrigation District was compulsorily acquired under the *Rights in Water and Irrigation Act* 1914 (WA) and the *Public Works Act* 1902 (WA) for inclusion as part of an extension to the Ord River Project. One resumption was in 1972, before the enactment of the RDA; the second came afterwards. The Full Court held that because there had been a resumption under the Acts, in the light of *Fejo* native title had been extinguished. That is erroneous. The taking of interests under s 17(1) of the *Public Works Act* did not involve any native title. The focus of that Act is on proprietary interests under the general law, not native title. [GLEESON CJ. Does it follow that there can never have been an intention to extinguish native title before the decision in *Mabo [No 2]*?] No. The test of ''clear and plain intention'' is not subjective. One looks to the nature and operation of the legislation, its construction, and because the concern is with the possible permanent confiscation of a property right held by indigenous people, its effect on native title. We accept a conception of ''intention'' that imports a clear intention to achieve something inconsistent with native title rather than one to extinguish something not known to exist at the time of enactment. The purpose of the *Public Works Act* is to advance public works. When land is taken for that purpose, the Act deals only with the taking of estates and interests which, eg, the Court held to be relevant in *Stow v Mineral Holdings (Australia) Pty Ltd* (9). Moreover, the statutory vesting is ''qualified'' by the public purpose for which the land was resumed and is not ''in itself an act which elevates the interest of the Crown to a full beneficial interest with the intention of extinguishing native title'' (10). Public works do not necessarily extinguish native title. Fejo should be distinguished.

Application of the RDA: Following the enactment of the RDA, acts occurred such as the passing of legislation, the granting of mining leases and resumptions. The Full Court majority failed to find that acts, which included the enactment of the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* 1981 (WA) (the Ratifying Act), the granting of the Argyle special agreement mining lease and the mining and general purpose lease granted under the *Mining Act* 1978,

(8) [1990] 1 SCR 1075 at 1097.
(9) (1977) 180 CLR 295.
(10) *Pareroultja v Tickner* (1993) 42 FCR 32 at 218.

and the resumption of land in December 1975 under the *Rights in Water and Irrigation Act* 1914 and the *Public Works Act* 1902, were invalid on account of inconsistency with the RDA. The majority held that those acts extinguished native title but were not inconsistent with s 9 of the RDA. Through s 228(2)(b) of the NTA, the RDA came into play. Section 228(2) defines a ''past act'' as one which, but for the Act, was invalid to any extent but which would not be invalid to that extent if native title did not exist. The Act validates the past acts as past acts of category A (s 229), B (s 230), C (s 231 — grant of a mining lease) or D (s 232 — not a category A, B or C past act). The acts mentioned should have been held to be of category C and D subject to the non-extinguishment principle of the NTA (11). Under the non-extinguishment principle, invalidity is only to the extent that native title was affected. So the question is whether the RDA caused the invalidity of those acts for non-compliance with s 10 of the RDA. Sections 9 and 10 guarantee ''equality before the law'', in particular with respect to the right to be immune from the arbitrary deprivation of property (12). That protection extends to native title. Sections 9 and 10 are violated by an act that, though not on its face, has a discriminatory effect on native title holders. The discrimination need not be ''aimed'' at native title. Section 10 confers on native title holders ''security of enjoyment'' in the property affected. The effect and operation of much of the relevant legislation and grants since the RDA came into effect was extinguishment only of traditional proprietary rights, leaving intact rights and interests whose ultimate source lay in the European law. Accordingly, they offend ss 9 and 10 and should be struck down, as occurred in *Western Australia v The Commonwealth* (the *Native Title Act Case*) (13).

[He also referred to *Tunbridge Wells Corporation v Baird* (14); *Attorney-General v De Keyser's Royal Hotel* (15); *Attorney-General (Quebec) v Attorney-General (Can)* (16); *Newcastle City Council v Royal Newcastle Hospital* (17); *Randwick Corporation v Rutledge* (18); *Wheat v E Lacon and Co Ltd* (19); and *Anderson v Wilson* (20).]

R H Bartlett.

Principles of extinguishment of native title: Once native title is extinguished, it cannot be revived: NTA, s 237A (21). In *Wade v New*

(11) See *Wandarung People v Northern Territory* (2000) 104 FCR 380 at 425 [107].
(12) *Mabo v Queensland* (*Mabo [No 1]*) (1988) 166 CLR 186 at 198.
(13) (1995) 183 CLR 373.
(14) [1896] AC 434 at 439.
(15) [1920] AC 508 at 576.
(16) [1921] 1 AC 401.
(17) (1957) 96 CLR 493.
(18) (1959) 102 CLR 54.
(19) [1966] AC 552.
(20) (2000) 97 FCR 453.
(21) *Fejo* (1998) 195 CLR 96.

South Wales Rutile Mining Co Pty Ltd (22) the Court refused to interpret the *Mining Act* 1906 (NSW) to allow a mining lease to be granted over private land because to do so would be a derogation of private property rights. That case concerned the protection of property rights. In view of the finality of extinguishment, native title is entitled to a similar form of protection. Only inconsistency between native title rights and interests and a grant which amounts to an impossibility of coexistence can manifest a clear and plain intention to extinguish native title (23). Anything less fails to recognise the context of expropriation in which extinguishment is to be assessed. The Full Court failed in this regard, discounting the principles of ''full respect'' for property rights, which include native title, in favour of the sufficiency of an unspecified degree of ''inconsistency of incidents'' test. *Mabo [No 2]* is authority for the universal principles protecting property. Members of the Court relied on a range of Privy Council, Commonwealth and United States authorities, including *In re Southern Rhodesia* (24); *Adeyinka Oyekan v Musendiku Adele* (25); *R v Symonds* (26), affd *Nireaha Tamaki v Baker* (27); and *United States v Santa Fe Pacific Railroad Co* (28).

Reserves and Crown land: It is the actual and not future use of reserves and Crown land that is relevant to the extinguishment of native title. That founds the applicants' objection to the conclusions of the Full Court majority with respect to the Ord River Project. The mere creation of a reserve does not extinguish native title. As Brennan J made clear in *Mabo [No 2]*, only actual use of Crown land and reserves which is entirely inconsistent with native title will do so. Most of the land covered by the Ord River Project is vacant Crown land. Much of it has not been used, except perhaps as a buffer zone, to protect the reservoir from erosion, or to be set aside for future development. Lee J found there to be a right to possession, occupation and use of the land, including a right to decide who can go there. It had been extinguished in some parts of the Project Area with respect to the dam area and spillways and irrigation areas. The content of the right to control access in other areas would have been severely modified by the powers arising under the *Rights in Water and Irrigation Act* 1914, but it might be enforceable against others than the Crown or the Minister in whom control over the Project Area is vested. [MCHUGH J. Is radical title associated with sovereignty?] Radical title is a power of disposition. It has no beneficial content. The

(22) (1969) 121 CLR 177.
(23) *Chief Commissioner for Railways and Tramways (NSW) v Attorney-General (NSW)* (1909) 9 CLR 547.
(24) [1919] AC 211.
(25) [1957] 1 WLR 876; [1957] 2 All ER 785.
(26) [1847] NZ PCC 387.
(27) [1901] AC 561.
(28) (1941) 314 US 339.

creation of a reserve merely declares a purpose. It does not connote the vesting of beneficial ownership in the Crown. The Crown may grant a particular title to a government department or to the Ord authority, but ordinarily it simply uses the land. The Crown may bring an action to protect the land; it does so not as beneficial owner but as sovereign, as possessor of the power of disposition. Until it actually exercises its power of disposition in such a way that it is inconsistent with native title, there can be no adverse effect on native title. Further, it has been recognised that the creation of reserves for ''public purposes'' does not give rise to enforceable rights in the public (29). There was no conferral of rights on others in the reserves in question so as to extinguish native title (30).

Ord River Project and Argyle Diamond Project: Within the Project Area are Lakes Argyle and Kununurra. The Full Court held that the flooding of the land for those lakes did not extinguish native title. There was no sufficient degree of inconsistency. However, the majority found that, in respect of the remaining land of the Project, the size of the project, coupled with the nature and intensity of the activities contemplated in its execution, all gave rise to an ''operational inconsistency'' which wholly extinguished native title: the ''degree of management and control necessary'' for the project extinguished native title. The same reasoning was applied to the Argyle Diamond Project and to two reserves which were open bushland, in which Lee J had determined there had been no actual use that extinguished title. There has been no actual use of most of those reserves and, thus, no extinguishment. The permit to occupy granted by a Minister to a State trading concern in right of the Crown over 76,000 acres of land in the determination area pursuant to s 16 of the *Land Act* 1898 was held by the majority to have extinguished native title. Lee J took the view that the use contemplated by that permit was that of grazing lands. It was contemplated that a grant of fee simple might issue in the future, but none did. Hence the actual use, the nature of the permit and the fact that no Crown grant eventuated denies extinguishment. [GAUDRON J. Do you leave out of contention the legislation and the instrument creating rights in third parties?] The relevant legislation and dispositions are essential elements. There is a mining lease granted originally to Freeport Bow River Properties assumed pursuant to s 71 of the *Mining Act* 1978. Its terms and conditions are standard for mining leases in the State. They provide for the protection of Aboriginal sites, while ss 82(1)(b) and 85 of that Act provide that the lease is granted only for mining purposes and that occupation is only for such purposes. Exploration, but not mining, may take place until approval by the State mining engineer. Until approval

(29) *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 429, 433-436, 467.
(30) *Australia Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 496.

is granted, there can be no inconsistency with native title to extinguish native title, since, according to *Mabo [No 2]*, exploration is not inconsistent with native title. On most of the thousands of mining leases granted each year, mining is not conducted.

Mining leases: The *Mining Act* 1978 (WA), like the Land Acts, essentially provides a general scheme for the disposition of minerals. The general scheme authorising disposition does not itself extinguish native title, though tenements granted pursuant to it sometimes may do so. When a mining lease is granted over freehold or a pastoral lease, those interests are not extinguished because provision is made in s 113 of the 1978 Act for the owner's interests to revive. In those circumstances, and in accordance with *Mineralogy Pty Ltd v National Native Title Tribunal* (31), it cannot be said that there is no basis upon which to infer that the effect on any native title interest should be any more permanent. This submission is confined to mining tenements but it applies both to mining leases under the 1978 Act and the mining leases issued to Argyle Diamond Joint Venture under its special Act.

Pastoral leases: Wik (32) is applicable to pastoral leases granted under the *Land Act* 1933 (WA) and the Land Regulations 1850 and 1882. The Full Court majority erred in holding that the reservation in pastoral leases for Aboriginal access manifested a clear and plain intention to extinguish native title outside the language of the reservation. The context of the reservation was a part that must be considered. That context includes the historical documentation, the limitation of the grant for pastoral purposes, the nature of the conditions and the nature of the territory. The *Land Act* 1898 (WA) contained a differently worded reservation, to which the majority applied the same reasoning. Similar reasoning was again employed by the majority when referring to the reservation in the Northern Territory legislation for pastoral leases. Such reservations in pastoral leases do not extinguish rights (33). The language is not that of extinguishment or expropriation but that of preservation and protection. Extinguishment occurring as a result of the grant of pastoral leases must be confined to the ''particular portions'' where development, such as shed construction, rendered co-existence with native title impossible.

Regulation and control of land: The Full Court majority held that where regulation and control of land was invested in Ministers, extinguishment of native title occurred. Regulation should be distinguished from extinguishment. Regulation merely provides the framework or context in which native title is enjoyed. The conferral of rights on others does not thereby extinguish native title. A public right does not deny the exclusivity of native title. The majority erred in

(31) (1997) 150 ALR 467.
(32) (1996) 181 CLR 1.
(33) *Yandama Pastoral Co v Mundi Mundi Pastoral Co Ltd* (1925) 36 CLR 340.

failing to recognise that even ''stringent regulation'' and control over an area does not extinguish native title. There is no expropriation (34).

J Basten QC (with him *K R Howie* SC and *S A Glacken*), for the appellants and respondents Ningarmara and others. The Territory applicants are a body of sixty to 100 Aboriginal people. They live in or immediately adjacent to the Keep River National Park, and there are three community living areas within the park on which some of them reside. The largely unchallenged evidence was that the Territory applicants and their ancestors had always lived in this area.

The NTA and extinguishment of native title: Part 2, Div 2B of the NTA deals with two categories of past activities: those which totally extinguish native title in a particular, following from s 23C of the NTA, and those which give rise to what has been called ''partial extinguishment'', following from s 23G. The Territory applicants do not maintain that there can be no partial extinguishment, whatever that term may mean. The NTA requires for its relevant operation in the Territory complementary legislation, namely the *Validation (Native Title) Act* 1994 (NT) (the Territory Validation Act), which is provided for in relation to acts attributable to the Territory in s 23I of the NTA, as amended. While the early pastoral leases were granted when the Territory was part of the Commonwealth, those grants are also acts attributable to the Territory by virtue of s 23JA of the NTA. The test of extinguishment accepted by the NTA is what is sometimes called the ''inconsistency of incidence test'', which may result in partial extinguishment. The Act also incorporates in s 23B the concept of exclusive possession. Neither ''partial extinguishment'' or ''exclusive possession'' is defined in the NTA, and so it is necessary to look at the underlying common law principles to determine the meaning of those expressions.

Extinguishment may occur in any of five ways. First: extinguishment as a result of the acquisition of sovereignty by the British Crown was rejected in *Mabo [No 2]* and the *Native Title Act Case*. The second way is by the grant to third parties established by *Mabo [No 2]*, discussed and applied in *Fejo*. The third way, according to Brennan J in *Mabo [No 2]* and *Wik*, is by setting aside Crown land for a purpose wholly inconsistent with native title rights and interests, such as may be described as a head of operational inconsistency. Fourthly, extinguishment from operational inconsistency where the acts or activities are those of third party grantees of interests. Fifthly, a statutory declaration of extinguishment by a level of prohibition of an activity which is the exercise of a native title right. The fifth possibility is not dealt with in the NTA, probably because it is unlikely to arise. The second, third and fourth are dealt with by the NTA.

(34) *Thorpes Ltd v Grant Pastoral Co Pty Ltd* (1955) 92 CLR 317 at 329; *Mason v Tritton* (1994) 34 NSWLR 572 at 592.

Section 23B deals with grants to third parties and, in substance, adopts a test of exclusive possession. It is not qualified by a requirement relating to the term of a lease, though there are other qualifications.

If a pastoral lease is an ''exclusive pastoral lease'', as defined in s 248A, it is a previous exclusive possession act by virtue of s 23B(2)(c)(iv). A ''non-exclusive pastoral lease'' is other than a non-exclusive agricultural lease, the sole category of previous non-exclusive possession acts defined by s 23(2)(c). The findings of Lee J and of the Full Court were consistent only in so far as the present pastoral leases were non-exclusive. Section 23G provides for the effect of a previous non-exclusive possession act: where the act involves the grant of rights and interests not inconsistent with native title, the rights granted, and any activity giving effect to them, prevail over but do not extinguish the native title rights: s 23G(1)(a). In the case of a grant of inconsistent rights, the native title rights are either extinguished or suspended. It is assumed that the definition of ''extinguishment'', permanent extinguishment, now provided in s 237A, must have application, so that the question of whether, apart from the NTA, a grant extinguishes native title must be one of whether it permanently extinguishes. The chief, if not the only, reason why there might be invalidity of grants prior to the NTA was the effect of the RDA.

Pastoral leases in the Northern Territory: To understand the complete operation of the pastoral leave provisions, lease 809 may be taken as an example. It was granted on 21 March 1979, after the commencement of the RDA. The lease has not been suggested as a basis of extinguishment for two reasons. First, it is not ''past act'' because it had no effect on native title since it was a replacement of an earlier pastoral lease and did not extend the term of the lease. To determine whether an act is a past act, s 227 of the NTA provides that an act affects native title if it extinguishes native title rights or interests or is otherwise wholly or partly inconsistent with them. Section 228(2)(b) identifies a ''past act''. Of category A past acts, if this lease was a past act, s 229(3)(c) requires the grant to have been made before 1 January 1994 and the lease to have been in force on that date. Lease 809 was no longer in force, having been surrendered for the purposes of a national park. Hence, it is not a category A past act. It is not a category B past act because of the similar requirement of being extant on 1 January 1994: s 230(c)(i). Hence it is a category D past act and, if it is relevant, no extinguishment follows because the non-extinguishment principle applies by virtue of s 15. In relation to pastoral leases generally, the Full Court majority rejected the proposition that a reservation for the benefit of ''aboriginal natives'' substituted statutory rights for native title. They held that the lease reservation held back the rights described in it for the enjoyment of the Aboriginal people and concluded that the previously exclusive rights to possess ceased to be exclusive and that the native title right to make decisions about the land was abrogated, not extinguished entirely but to the extent that the right conflicted with the right of the pastoral

lessee to make decisions about the use of the land. The incidents of the grant should not be identified in a manner which reduces them to activities that can be conducted. There is a danger in looking for inconsistencies between the activities that may be permitted instead of inconsistency between the incidents of the grant itself. The correct way is to ask three questions. First, whether the lessee is given power to exclude Aboriginal people from the leased area. If he is, for the purposes of the NTA that is an exclusive possession lease. Secondly, whether the lessee has power to restrict the access of Aboriginal people in particular areas. If he has, there is an incident which is inconsistent. Thirdly, whether the lessee has power to prevent Aboriginal people from carrying out particular activities on the leased area. There is a problem with the way that the Full Court majority identified that question and answered it. It is incorrect to look at a reservation in the lease as indicating its effect in relation to Aboriginal people. The correct approach is found in *Wik*, to identify the nature of the lease in accordance with the background, the statutory purpose, and whether there are other limitations on the extent to which the pastoralist may exclude. [GAUDRON J. Do you contend that under the 1998 amendments one really looks only to the incidents of the lease to determine if there is total or partial extinguishment? One never has to look at operational inconsistency?] Operational inconsistency does not effect extinguishment of native title. It affects only the priority of rights.

Establishment of the Keep River National Park: Two leases were granted to a public authority, the Conservation Land Corporation (the CLC), for the purposes of the *Territory Parks and Wildlife Conservation Act* 1976 (NT). That Act provided for the establishment and management of national parks, although s 122 contained a form of protection, that nothing in the Act prevented Aboriginals who had traditionally used an area of the land or water from continuing to use that area for hunting, food gathering, and ceremonial and religious purposes. Lee J and North J (dissenting in the Full Court) held that neither the pastoral leases preceding the creation of the park nor those to the CLC had effected any extinguishment of native title. The Full Court majority held the pastoral leases had ''brought about partial extinguishment by abrogating native title rights to exclusively possess, occupy, use and enjoy the land'' and that native title rights, not in terms included in the reservation in the pastoral leases, were extinguished ''to the extent of inconsistency with rights granted under the pastoral lease''. They also held that there had been extinguishment of the exclusivity of the right to make decisions in relation to the land. That level of extinguishment having already been achieved by the pastoral leases, there was nothing more for the leases to the CLC to extinguish. The majority erred in holding that the grant of the pastoral leases effected any extinguishment of native title rights and interests that fell within the express reservation in the grant of those leases and that there were any significant native title rights and interest not

included within the reservation to those grants. In relation to the CLC leases, they erred in holding that there was no effect on native title because all relevant native title rights and interests that might be affected had been extinguished by the pastoral leases; by failing to apply the terms of the NTA to the grants and vesting of the land in the CLC; and by failing to hold that the NTA provided, by virtue of the application of the s 237 non-extinguishment principle, no extinguishment of native title was effected by the grants and vesting. The determination in respect of the establishment of the Keep River National Park should be worded that the Territory applicants hold possession, occupation, use and enjoyment of the land. It is not ''exclusive possession'', because it is recognised that there are public rights in relation to the CLC and to members of the public.

Minerals: Though the evidence did not establish any traditional Aboriginal law, custom, or use relating to minerals and the *Minerals (Acquisition) Act* 1953 (Cth) vested title to minerals absolutely in the Crown in right of the Commonwealth, the possibility that there are native title rights and interests in relation to minerals should be left open. It is unsatisfactory that the issue was resolved by the Full Court because the issue was never addressed in argument there.

Cultural knowledge: It is true that traditional laws and customs, including spiritual and religious beliefs which are integral to them, may subsist despite the extinguishment of title in relation to particular land. It does not follow that, where native title has not been extinguished, manifestations of the connection provided by traditional law and custom cannot be protected. The most obvious example of such a manifestation is in the performance of secret and sacred ceremonies and in artworks, eg, on rock, which constitute an essential expression of spiritual or cultural knowledge associated with the land. Defacement, or inappropriate viewing or reproduction, of such material may significantly diminish the law and customs themselves. A particular instance of the connection between religious knowledge and protection of sites and land is the religious knowledge which by traditional law may only be revealed to initiated men. For the Miriuwung and Gajerrong People, knowledge of this kind concerns the language, travels and activities of Ngarankani Beings, is possessed in narrative and song cycles, measures the boundaries of territory, and defines the significance of particular places, their physical features, and the spiritual presences associated with them. Protection of such religious knowledge, and compliance with the restrictions imposed by traditional law on its revelation, is essential to maintaining the significance and essential character of particular places. Revelation of the knowledge in a manner unlawful according to traditional law would destroy the significance and character of sites, and, according to the beliefs of the Aboriginal people responsible, cause damage to the land. Hence the protection of such knowledge, whether described as religious, spiritual or cultural, is central to the protection of land and places on land. Such knowledge is entitled to protection under the

common law, should be captured by s 223 of the NTA, and should be reflected in the determination. *Mabo [No 2]* accepted that Aboriginal sovereignty had gone and therefore traditional mechanisms for enforcement of traditional law which might have existed had gone too. Once one translates the content of traditional law and custom into rights and interests which can attract curial relief, that relief may be available against third parties or even other Aboriginal people to protect cultural knowledge.

[He also referred to *Yandama Pastoral Co v Mundi Mundi Pastoral Co* (35); *Wade v New South Wales Rutile Mining Co Pty Ltd* (36); *Stow v Mineral Holdings (Australia) Pty Ltd* (37); and *Wik* (38).]

W Sofronoff QC (with him *G M G McIntyre*), for the respondents Cheinmora and others. These respondents make submissions only with respect to the Ord River Project and the Argyle Diamond Project in so far as they are affected.

Ord River Project: The Full Court concluded that Lee J erred by not considering the Project as a whole when considering the effect of its implementation on the continued enjoyment of native title rights and interests. That proposition is an error which caused the Full Court to conclude erroneously that notwithstanding the limited purpose which was carried into effect on Project lands, native title was wholly extinguished. After observing that parts of the area were needed to exercise management and control to build dams and power stations and other structures, the majority concluded that there was a use of ''the land'' for a public purpose inconsistent with the continued enjoyment of native title, which must be taken to mean all of the land within the Project Area, including the two parcels of land of concern to these respondents which were resumed from pastoral leases for the Project. Upon those two parcels nothing happened except the erection of a fence to keep cattle out. In effect, the majority regarded the Project as a whole, as though it were a legal entity. It imbued the Project with qualities said to be inconsistent with the continued existence of native title. [HAYNE J. Is the use in fact of land a relevant inquiry?] Yes. There are three ways in which native title may be affected: by force of statute itself, which does not apply here; by the terms of the grant of the creation of an interest in a third party; or by the Crown using its own land in a way inconsistent with the continued enjoyment of native title. The Full Court held that the land acquired under s 109 of the *Land Act* 1933 (WA) was reasonably acquired for the purpose for which it was resumed. That is true but beside the point. The relevant inquiry is whether, by the terms of the resumption

(35) (1925) 36 CLR 340.
(36) (1969) 121 CLR 177 at 195.
(37) (1977) 180 CLR 295.
(38) (1996) 187 CLR 1.

and reservation, or by the incidents of use, there is a necessary implication that native title has been extinguished.

Argyle Diamond Project: The Argyle mining lease was issued pursuant to an agreement which was ratified by the *Diamond (Ashton Joint Venture) Agreement Act* 1981 (WA), later called the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* 1981 (WA) (the Ratification Act). The lease foreshadowed by the Ratification Act was expressed to be under and subject to the *Mining Act* 1978, so it is necessary to have regard to both statutes. The interest granted under the *Mining Act* is so circumscribed that it is not a common law lease. The defined rights by s 85 are limited by having been granted for mining purposes only and the imposition of other conditions. Existing rights are not extinguished. The interference caused by the grant of a mining lease and operations pursuant to it are the subject of compensation. It would be odd if all statutory interests granted before the mining lease are preserved while native title alone is entirely extinguished, as the Full Court held. Unlike the case of the land the subject of the Ord River Project, the disposition of land by the grant of the mining lease occurred after the enactment of the RDA. If the mining lease affected native title, and if the statutes under which it was granted treat native title differently from other title, it would offend s 10 of the RDA. Hence the mining lease would be a category C past act and the non-extinguishment principle would apply. The rights provided for by s 85 of the *Mining Act* 1978 are exclusive with respect to the matters to which they relate but do not give exclusive possession of the land as a whole. Section 82(1)(b) limits a mining lessee's rights in conferring a right to use the land for mining purposes. While compensation is provided for by s 123, it is to ''the owner and occupier'' of the land: ''owner'' is defined as ''the registered proprietor'' or ''the lessee or licensee from the Crown'': The term ''occupier'' is not apt to cover the holder of a s 7 statutory form of native title under the Western Australian legislation (39). The same applies to a traditional native title holder.

The Full Court majority was influenced by the evident importance of the Argyle Diamond Project and its intensity in some areas to conclude that the mining lease granted under it extinguished native title. If it had that effect, it would be discriminatory, since the lease does not annihilate existing pastoral leases or any other interest in land. Hence the RDA would apply and extinguishment would not occur: RDA, s 10. Alternatively, if the grant of the mining lease was invalid by reason of the operation of the RDA, the NTA would have been triggered, the grant would be a category C past act, and the non-extinguishment principle would apply. The Full Court also concluded that a mining lease is nothing more than a sale of the minerals and so

(39) *Native Title Act Case* (1995) 183 CLR 373.

cannot be inconsistent with most if not all native title rights and interests (40).

[He also referred to *Gowan v Christie* (41); *United States v Sante Fe Pacific Railroad Co* (42); *Milirrpum v Nabalco Pty Ltd* (43); *Delgamuukw v British Columbia* (44); *Mabo [No 2]* (45); *Fejo* (46); *Wilkes v Johnsen* (47); and *Yanner v Eaton* (48).]

GLEESON CJ announced that the Court considered that the following threshold questions might arise: First, should the Full Court of the Federal Court have held that s 12M of the *Titles Validation Act* 1995 (WA) as amended by the *Titles Validation Amendment Act* 1999 (WA) applied in relation to any part of the land in the State that was the subject of the claim? Secondly, which, if any, leases or other acts done or interests created in relation to land, that were held to have extinguished native title rights and interests in whole or in part, were (a) valid or validated acts for the purposes of Pt 2B of the *Titles Validation Act* 1995; (b) previous exclusive possession acts within the meaning of s 23B of the NTA; and (c) previous non-exclusive possession acts within the meaning of s 23F of the NTA. Submissions were requested from all parties on those questions.

J L Sher QC (with him *M T Ritter*), for the Goldfields Land Council, intervening. The Council is responsible for a vast area, many parts of which have been the subject of many pastoral and mining leases in the past. It is concerned with the statements of general principle of the Full Court majority in relation to the legislative scheme, applicable to both pastoral and mining leases in Western Australia which have already been applied adversely to applicants before the Native Title Tribunal.

General application of the NTA: In coming to its conclusions regarding mining leases in Western Australia and pastoral leases in that State and the Northern Territory, the Full Court majority effectively did not apply any provision of the NTA. That was a fundamental error. The reason for not applying the NTA was said to be that most of the Crown grants, reservations and uses alleged to have caused extinguishment occurred before 1976. That is factually incorrect and the way in which the majority approached the Western Australia mining legislation, a 1978 statute, demonstrates that.

(40) *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 192, per Windeyer J, cited by Toohey J in *Wik* (1996) 187 CLR 1 at 117.
(41) (1873) LR 2 Sc 273 at 284.
(42) (1941) 314 US 339.
(43) (1971) 17 FLR 141 at 272-273.
(44) [1997] 3 SCR 1010.
(45) (1992) 175 CLR 1.
(46) (1998) 195 CLR 96.
(47) [1999] 21 WAR 269.
(48) (1999) 201 CLR 351.

Secondly, one of the major areas of operation of the NTA is to past events. For no other reason than the existence of s 11 of the NTA, it was essential that the Full Court considered the provisions of that Act. [KIRBY J. Section 11(1) presumably spoke in futuro from the bringing into force of the NTA.] It applies in futuro in relation to claims being considered. Those claims would require reference back to past events, so that it would operate on claims after the NTA came into force, but in respect of events before then. The ''past acts'' provisions are central to this case. The transitional provision in relation to s 44H makes clear that s 44H applies to operational inconsistency arising from grants at any time. Hence it was appropriate to have regard to s 44H in relation even to ancient grants of pastoral and mining leases. Section 44H requires no complementary legislation; cf s 23G. It is designed to ensure that operational inconsistency does not extinguish native title.

Mining leases: The term ''mining lease'' is defined by s 242(2) of the NTA. Section 228 provides that a mining lease, if it is a ''past act'', is a category C past act. The application of s 238 provides for the suspension and non-extinguishment of native title rights as a result of a category C past act. The question then becomes one of whether the grant of a mining lease was in fact a ''past act''. To be a ''past act'' a grant must have occurred before 1 January 1994 and it has to be invalid to any extent other than because of the NTA and because of native title. Between 1975 and 1994, at least, there is an argument that the RDA rendered the grant of mining leases, partly or wholly, invalid from the time the RDA came into effect.

Pastoral leases: Section 23G of the NTA and its State and Territory counterparts countenance suspension rather than extinguishment of native title. The Full Court had to apply the Western Australian complementary legislation, passed after the primary determination but before the Full Court's determination, because the appeal to the Full Court was a rehearing, so that the Court had to apply the law as at the date of that determination. The Northern Territory complementary legislation was in force and under discussion before Lee J. Section 23G(b)(i), which involves total extinguishment, does not apply because the majority did not make such a finding. Hence, s 23G(b)(ii), which provides for suspension not extinguishment, applies.

Suspension of native title: Whether the concept of impairment by suspension should be recognised at common law has not been determined by this Court. Where rights conferred by a statutory grant are limited in time and content, those matters are a key characteristic of the legal right granted. The grant of such an interest should not be taken to extinguish native title permanently. A doctrine of impairment by the suspension of enforcement of native title rights and interests should be recognised; in such a case, native title is not extinguished.

Intention test: It is uncertain whether the Court has recognised the ''clear and plain intention'' of the Crown ''test'' of extinguishment to determine whether a right granted by statute extinguishes native title. The approach of seeking an intention in determining the question of

inconsistency and thus extinguishment of native title is not correct. Intention is a fiction. The Court should define the ''clear and plain intention'' test so as to recognise that, in the context of the grant of a statutory right before *Mabo [No 2]*, it has a fictional element. Attention should be focused on the nature of the rights granted rather than looking for the manifestation of legislative intent at a time when there was no understanding or recognition of native title. The search should be for clear ''statutory language'' of extinguishment.

[He also referred to *The Commonwealth v Hazeldell Ltd* (49); *Mineralogy Pty Ltd v National Native Title Tribunal* (50); *Mabo [No 2]* (51); *Pareroultja v Tickner* (52); *Re Waanyi Peoples* (53); and *Anderson v Wilson* (54).]

G M G McIntyre (with him *D L Ritter*), for the Yamatji Barna Baba Maaja Aboriginal Corporation), intervening.

Partial extinguishment: The real test of extinguishment, under s 23G of the NTA, is inconsistency. Section 23G does not indicate what is partial inconsistency other than to provide a test similar to Brennan J's view in *Mabo [No 2]*. The view of ''inconsistency'' in s 23G suggested here is similar to that of Gummow J in *Yanner v Eaton* (55), identifying the temporal as well as a substantive connotation of inconsistency under s 109 of the Constitution. If that view of partial inconsistency is taken the result is less damaging and more in keeping with the kind of protection which ought to be accorded to native title. Section 238(2) speaks of ''affecting'' native title. ''Affect'' is defined by s 227: ''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.'' That is a compendious expression. An appropriate test for partial inconsistency is in s 238(4): if the act is partly inconsistent ''the native title continues to exist in its entirety, but the rights and interests have no effect in relation to the act to the extent of the inconsistency''. If there is a temporal inconsistency, there will be no capacity to exercise the right during the relevant period, eg, if there was a statute that said that no-one might take kangaroo from the area for the duration of the statute, native title rights and interests would be inconsistent in so far as they included the taking of kangaroo. If the Act was repealed, the inconsistency would cease and under the umbrella of occupational title, native title parties would again be able to take kangaroo. The

(49) (1918) 25 CLR 552.
(50) (1977) 150 ALR 467.
(51) (1992) 175 CLR 1.
(52) (1993) 42 FCR 32.
(53) (1995) 124 FLR 1 at 21, 40.
(54) (2000) 97 FCR 453.
(55) (1999) 201 CLR 351 at 395-396 [107], [108].

view of the majority in *Western Australia v Ward* (56) that while a purpose of a reserve which had earlier been the subject of a pastoral lease would not have extinguished native title, the grant of the earlier pastoral lease extinguished the exclusivity of native title involved a misconception of partial extinguishment on the basis of partial inconsistency. There may have been inconsistency during the term of the early pastoral lease in relation to the native title holders' right to exclude others from entering on the land, but the doctrine of partial extinguishment does not apply to extinguish that element of title for all time. [CALLINAN J. Section 248A defines an exclusive pastoral lease as one that ''confers a right of exclusive possession over the land''. Why does not a pastoral lease confer a right to exclusive possession in the sense that a pastoralist may want to burn off, erect stockyards and make improvements, all of which he has the right to do?] One looks to the view of pastoral leases of this Court in *Wik*. [CALLINAN J. There is no reference to s 248A in *Wik*. Surely we have to apply our minds to this subsequent statute, the NTA, and not to *Wik*?] The Court held in *Wik* that on a pastoral lease there is a waxing and waning of use that does not allow you to reach a conclusion of exclusive possession. [CALLINAN J. That concerns us. We are concerned with a *right* to do things.] The difficulty is with ''exclusive possession''. Toohey and Gummow JJ in *Wik* cautioned against the use of that expression. A pastoralist cannot maintain an action in trespass against the whole world. It is Crown land and the right to deal with trespass is under the lands legislation. This issue was dealt with in *Wik*. [He also referred to *Yarmirr v Northern Territory* (57).]

C F Thomson, for the Mirimbiak Nations Aboriginal Corporation, intervening. The question in *Fejo* was straightforward compared to those here. The two basic questions now are: how is s 233 of the NTA to be construed to define native title as founded upon the facts of this case how and to what extent can that native title be extinguished by the relevant statutes and grants? Native title has a proprietary character. The relationship between the Aboriginal people and the land is holistic. It is not the case that these people belong to the land rather than vice versa. It is unfortunate that Blackburn J in *Milirrpum v Nabalco Pty Ltd* (58) characterised communal native occupancy as a personal right. [GLEESON CJ. Deane, Gaudron and Toohey JJ in *Mabo [No 2]* said that there is no need to argue about whether native title is personal or proprietorial. It is sui generis.] Yet the Full Court majority refused to accept a right to cultural knowledge as part of the determination because it is not proprietary. Cultural knowledge includes things such as song cycles. Song cycles are related to the land

(56) (2000) 99 FCR 316.
(57) (1998) 82 FCR 533.
(58) (1971) 17 FLR 141.

and, from the claimants' perspective, they create the land. They are in a sense survey maps and/or a text for living and so are related to the land and must be protected under the NTA. While the law of confidentiality or copyright may provide relief for misuse of cultural knowledge, the NTA can provide relief. Section 233 of the NTA is opaque as to the rights and interests that can be protected apart from hunting, gathering and fishing. Section 225 sets out what can be included in a determination but is not helpful. All the authorities agree that the connection with the land is expressed in this cultural knowledge. If cultural knowledge is the linchpin of the connection under traditional laws acknowledged, and traditional customs observed, by Aboriginal people or Torres Strait islanders, to contend that such knowledge is not of the essence of s 233 and cannot be protected under the NTA is to say that the Act is hollow. The NTA exists to protect native title rights and interests. That purpose must be given effect. Cultural knowledge is the kind of right and interest that is protected. If rights and interests can be properly formulated with precision, they should be protected under the NTA. [GAUDRON J. That might be the question. Have they been formulated with precision?]

B W Walker SC (with him *S E Pritchard*), for the Human Rights and Equal Opportunity Commission, intervening.

The ''bundle of rights'' nature of native title and partial extinguishment: This is an appeal in a matter which is essentially and ultimately statutory. The common law is embedded in the statutory question by reason of s 223(c), and is also invoked and must be considered as a matter of the statutory questions raised in cases to which s 23G applies. Because Australia is bound by Art 5(d), esp pars (5) and (7), of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and also by Art 27 of the International Covenant on Civil and Political Rights (ICCPR), the Full Court majority was wrong to use the ''bundle of rights'' approach and to conclude that clashes between enjoyment of aspects of common law native title and the statutory rights, principally pastoral leases, led to partial extinguishment rather than suspension of the common law native title rights and interests. [GLEESON CJ. Is there a difference between partial extinguishment of rights and interests and extinguishment of some but not all rights and interests?] Yes. The ''bundle of rights'' approach invites the latter approach as the exclusive means of proceeding. It is misleading. The ''bundle of rights'' conceptualisation should be rejected and the notion of a suspension or qualification adopted. The exposure of native title to extinguishment piece by piece runs counter to human rights norms in the international treaties to which Australia is a party and which the Court can use in stating the common law of native title in the framework of the NTA. Human rights norms require the conceptualisation of native title in a manner that promotes resilience rather than fragility and susceptibility to extinction. ''Partial

extinguishment'' depends on an understanding of the statutory provision being invoked. The words ''to the extent'' of any inconsistency do not mean ''if''. They imply matters of degree. They do not authorise a bundle of rights approach by which disaggregation rather than combination is the hallmark of a determined native title. Under s 225 native title comprises rights and interests. It is as close, in statutory terms, as one can be to a working equivalent of fee simple rights, ie the right to possession to the exclusion of others.

In the light of the non-discriminatory requirements in relation to property-owning in Art 5(d) of the CERD, Aboriginal Australians should not be in a lesser position in respect of proprietorial rights than other Australians. Article 27 of the ICCPR and its concern for the full rights and the guarantees of culture, including in community, and of religion, combines powerfully to suggest that there are choices in the statutory language and ambiguities in the common law where there is no binding authority, so that the Court should find the common law as a judicial rule and interpret the statute in accordance with those international obligations (59).

Pastoral and mining leases: The Court should uphold the findings of Lee and North JJ that the enclosure of, and improvements to, pastoral leases in Western Australia did not confer a right of possession exclusive of Aboriginal people and that inconsistency between the rights of pastoral leaseholders and native title rights and interests did not extinguish, but suspended, the native title rights and interests. The Full Court majority's conclusion about the extinguishing effect on native title rights and interests of provisions of statutes vesting ownership of minerals and petroleum in the Crown and of various mining leases has a considerable effect. To give effect to the guarantee of equality and the rights of indigenous minorities, in the interpretation of relevant statutes, where it is possible courts should resist approaches that would destroy, not recognise and protect, native title.

Cultural knowledge: In conformity with that guarantee and the guarantee of freedom of religion, the ''rights to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the determination area'' (par (j) of Lee J's determination) ought to be held to be rights which can be the subject of a native title determination. A conclusion that the common law applies to protect only the physical enjoyment of rights and interests that are of a kind that can be exercised on the land, and does not protect purely religious or spiritual relationships with land, should be rejected.

[He also referred to *Australian Communist Party v The Common-*

(59) *Leroux v Brown* (1852) 12 CB 801; *Jumbanna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309; *Zachariassen v The Commonwealth* (1917) 24 CLR 166.

wealth (60); *Dietrich v The Queen* (61); *Minister for Foreign Affairs and Trade v Magno* (62); the *Native Title Act Case* (63); and *Yanner v Eaton* (64).]

R J Meadows QC, Solicitor-General for the State of Western Australia, *C L J Pullin* QC and *K M Pettit*, for the State of Western Australia and Attorney-General for that State.

C L J Pullin QC.

Principles of extinguishment of native title rights and interests: Native title is not a unitary concept. Native title rights and interests are ascertained by examining evidence of activities that were, and are, carried out on the claimed land and finding as facts the laws and customs of the claimants. Each alleged right or interest has to be proved. If not it is absent from a native title bundle. Accordingly, each right or interest can be individually extinguished. This ''bundle of rights'' conception is of practical importance because the Full Court held that pastoral leases extinguished exclusive rights of occupancy, so that there was partial extinguishment. Declarations of nature reserves extinguished the right to hunt fauna, another aspect of the bundle of rights. Proclamations under the *Rights in Water and Irrigation Act* 1914 extinguished exclusive rights. The creation of public utility reserves extinguished certain rights, and certain legislation and regulations further extinguished some native title rights. The Full Court majority was correct in making such a determination and in referring to native title as a ''bundle of rights''. That phrase has been used by nine judges (65). It is irrelevant whether native title rights or interests are classified as personal or proprietary.

The submission that, until extinguished, native title ''provides a right of occupation'' is incorrect. Applicants must show connection to land amounting to occupation to prove a native title right of occupation under their traditional laws and customs. If they also prove that their tradition is to hunt and to gather, they will have a bundle of rights. It may be extensive in one case and slight in another. That bundle constitutes native title. The law of native title in Australia does not recognise a distinction between ''title'' and ''rights''. The ''right'' to occupy land is one element of native title that may or may not exist in a particular case. The Ward parties submit that native title (in principle) provides a right of occupation. Their submission would have

(60) (1951) 83 CLR 1.
(61) (1992) 177 CLR 292.
(62) (1992) 37 FCR 298.
(63) (1995) 183 CLR 373.
(64) (1999) 201 CLR 351.
(65) *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 616, per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ; *Fejo* (1998) 195 CLR 96 at 121 [25], per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

results in some cases to the disadvantage of Aborigines, eg, legislation concerning a recreation park might prohibit occupation but not other incidents of native title. If the Ward submissions were accepted, the extinguishment of the right of occupation would extinguish all other rights, such as a right to hunt or to gather. If occupation is merely one right, amongst others, to be proved, rights other than occupation could be exercised even if the right to occupy had been extinguished.

Native title rights and interests may be extinguished by or under statute or by acts of the Executive in exercise of conferred powers. Such laws or acts may be of three kinds: those that simply extinguish native title (Category 1); those that create rights in third parties in respect of land which are inconsistent with the continued right to enjoy native title (Category 2); and those by which the Crown acquires full beneficial ownership of land previously subject to native title (Category 3). In Category 1, the law or act will not extinguish native title unless there is a ''clear and plain intention'' to do so. The test of intention is objective, ascertained by the words of the law or the nature of the act, not by inquiry into the state of mind of the legislators or executive officer. In Category 2, a law or act which creates rights in third parties inconsistent with a continuing native title right or interest extinguishes that right or interest pro tanto. That is irrespective of the actual intention of the legislature or the Executive or the officer making the grant, and whether or not they adverted to the existence of native title. In Category C fall grants under land legislation: inconsistency is in relation to rights and it is not relevant to enquire whether there is practical inconsistency. It is irrelevant that an Aboriginal person can in fact still hunt on land the subject of a grant of an estate in fee simple. The grant of a third party interest must ''clearly, plainly and distinctly'' authorise activities or enjoyment of land which is necessarily inconsistent with native title (66), but the clarity or plainness and distinctness of the authorised activities are ascertained by comparing the terms of the grant with the native title rights — the ''inconsistency of incidents'' test (67). As well as by inconsistency of incidents, extinguishment may occur in Category 2 by ''operational inconsistency'' (68). Category 3 may be by the appropriation of land for use by the Crown, eg where it is set aside for a future inconsistent purpose, such as a school or a court house. In such a case, native title will not be extinguished until the land is actually used. But, if the land is reserved for a present inconsistent purpose, such as a reserve for public recreation, the reservation itself will extinguish native title. In contrast, Lee J applied the adverse dominion approach, holding that ''extinguishment by inconsistent acts of the Crown may be said to be effected by the grant of tenures by the Crown that confer

(66) *Yanner v Eaton* (1999) 201 CLR 351 at 396 [110].
(67) *Wik* (1996) 187 CLR 1; *Fejo* (1998) 195 CLR 96.
(68) *Wik* (1996) 187 CLR 1 at 203; *Yanner v Eaton* (1999) 201 CLR 351 at 396.

on third parties rights to use the land in a way inconsistent with the exercise of rights that attach to native title . . .'' (with which we agree) but also ''. . . and by the exercise of those rights''. That is contrary to what was decided in *Wik*. The exercise of rights is irrelevant. The Full Court was correct in holding that that was a wrong approach.

Ord River Project: The Full Court majority held that native title was extinguished by the implementation of the Project. The extent of the land involved was determined on the evidence of resumptions of pastoral leases under s 109 of the *Land Act* 1933 and the *Public Works Act* 1902. Resumptions under the *Public Works Act* extinguished native title. The resumptions pursuant to s 109 of the *Land Act* were in effect a marking out of the area needed for the Project. Thereafter, as the land was required, it was acquired under the *Public Works Act* which vested an estate in fee simple in the Crown. On *Fejo* principles, there was complete extinguishment. By s 18 of the *Public Works Act* the land was freed and discharged from all ''interests'' and the ''interest'' of every person was converted into a claim for compensation. Subject to s 10 of the RDA, that extinguished native title in the area resumed. Section 10 of the RDA only effects invalidity of a State Act if the Act is incapable of correction by s 10. If no right of compensation was conferred on Aborigines under the *Public Works Act*, s 10 would not invalidate the *Public Works Act* but it would confer a right to compensation. The conversion of ''interests'' into a right of compensation under the *Public Works Act* included the interests of native titleholders (in relation to whatever native title rights remained after previous extinguishment events). Hence, there was no unequal treatment of native titleholders compared with other persons with interests in land. Section 10 of the RDA does not apply and therefore the ''past acts'' provisions of the NTA do not apply. Finally, the area of resumed land became a public work within the definitions in ss 253 and 251D of the NTA. On the Ward parties' premise that native title was not extinguished by the resumption, it would have been extinguished by the public work itself as constituting a category A past act (69). The Full Court examined the marking out and resumption of land in considerable detail, including the possibility that too much was set aside. It concluded that native title was extinguished on all land marked out and resumed for the Project. That decision is unimpeachable under present law. [GLEESON CJ. Why did the land resumed from the Packsaddle Farm area become vested in the Crown in fee simple, while land resumed from the Lissadell and Texas Downs pastoral lease areas did not?] Resumption from the latter areas was under s 109 of the *Land Act*, which states that the Governor may resume, enter upon and dispose of the whole or any part of land in a pastoral lease. The resumption from the Packsaddle Farm area was

(69) NTA, ss 229(4), 15(1)(b), 19; *Titles (Validation) and Native Title (Effect of Past Acts) Act* 1995.

under s 18 of the *Public Works Act*, which provides that a resumption vests an estate in fee simple in the Crown. Hence the Full Court finding that resumption under s 109 of the *Land Act* did not work a complete extinguishment of native title. Resumption under the *Rights in Water and Irrigation Act* did effect a complete extinguishment of native title.

Effect of the RDA on resumptions: The Ward parties submit that the Full Court erred in failing to consider the application of the RDA under the operation of the NTA in relation to second resumption of land in the Packsaddle Farm area in 1975, after the commencement of the RDA. Section 9 of the RDA applies to Executive acts: s 10. Whether or not the native title holders got notice of the resumption as required by the *Public Works Act* does not matter because compensation rights which arise under that Act on the vesting of the estate in fee simple are given to everyone who loses an interest in land. Those compensation rights are subject to a limitation period, but the Minister has power to extend it.

Pastoral leases: If submissions to this point are correct, there remains an issue of pastoral leases outside the Ord River Project Area, below the Cambridge Gulf and a part of what appears on the maps as mudflats. If the submissions regarding the Project are not accepted, the submissions regarding pastoral leases also apply to such leases predating the resumptions for the Project and lying within the Project Area. The Full Court majority concluded that pastoral leases conferred exclusive possession save that there was a reservation in favour of Aborigines. We accept the reasoning in relation to reservation. The majority further determined that, if a lessee under a pastoral lease encloses or improves parts of leased land, the lessee becomes entitled to the use and possession of the surface of that part of the land to the exclusion of the rights to enter of Aboriginal people. That is so. In areas where there is no enclosure or improvement, pastoralists have extensive rights which do not work a complete extinguishment of native title but co-exist with the native title rights to be present. The native title rights and interests which remain are coincident with the statutory right of access under s 106(2) of the *Land Act*. If there is any clash between pastoralists' and native title rights, there is a resolution at common law, the principle of the reasonable user. The Commonwealth submits that third parties cannot extinguish native title rights by erecting a fence or making improvements. The answer is that extinguishment is not brought about by the fact of enclosure but by the authority of the Crown to enclose the land.

The history of the Western Australian legislation is pertinent. An 1828 Colonial Office circular refers to settlers receiving ''grants of land in fee simple''. The first reference to a lease was on 28 August 1829, where there was a power to grant ''a lease of 21 years''. ''Lease'' must mean a common law lease, not a statutory bundle of rights in the form of a *Wik* bundle. That situation never changed. It did not become more complicated and in Western Australia now there are

not some seventy different forms of lease, as there was in Queensland, as noted in *Wik*. Following the concern of Earl Grey, expressed on 11 February 1848, to ensure that Aboriginals were not being excluded from the land, there was an Order in Council of 22 March 1850 which contains two things: that a pastoral lease ''shall signify a lease''; and that ''nothing contained in any pastoral lease shall prevent the Aboriginal natives of [the] Colony from entering upon lands comprised therein and seeking their subsistence therefrom in their accustomed manner''. From that time, and in legislation, there was a balancing of interests in different forms. A lease would still be a lease even if it had exceptions and reservations, including the provision of access to suit classes of persons. The existence of such exceptions or reservations indicated that exclusive possession was otherwise intended. As the Full Court majority said, to say that there was no contrary intention to use the word ''lease'' in any other way than would be understood by a property lawyer says nothing if there is an exception in favour of Aborigines. That is why the majority held that a pastoral lease did not extinguish all native title on grant but it did so once enclosure occurred or the improvement took place.

Spiritual versus physical connection with the land: Lee J and the Full Court held that, while actual physical presence, in pursuit of traditional rights to live and forage there and for the performance of traditional ceremonies and customs, would provide clear evidence of the maintenance of a connection with the land, that is not essential. A spiritual connection, and the performance of responsibility for the land could be maintained even where physical presence had ceased. It is impossible to conclude that there is a right to exclude others from land to which the claimants do not go. [CALLINAN J. Without some use or activity actually on the ground, there can be no content to native title right or interest.] Spiritual connection is not enough to give rise to native title. There are Dreaming stories which relate to land that has never been visited. Some stories end quite often with a character or animal shifting from place to place. A connection for the purposes of the common law and the NTA means a physical connection. Spiritual connection is insufficient. If native title holders cease all physical connection with their traditional country, shift to live in towns or cities, and do not return to their country, maintenance of Dreaming stories about the country of those persons' ancestors is not enough to establish a right to a determination of native title.

K M Pettit.

Reserves: The Full Court concluded that reserving land for public use only protected the land from sale, that no rights were created in favour of third parties, and that accordingly no question could arise of the enjoyment of rights by others inconsistent with the continuation of native title. That reasoning is incorrect. First, the creation of a reserve is not a mere setting aside from sale but a dedication of land to a specified purpose with the consequence that alternative uses cannot be

enforced as of right, by the Crown itself and certainly not by citizens. Accordingly, any former native title in reserves is extinguished. Secondly, and alternatively, the vesting of reserves is the conferral of property and possession and, in addition to control and management for the purposes of the reserves, it creates in third persons such rights of property and possession as are inconsistent with native title. [KIRBY J. What, in terms of title, happens for a reserve?] The procedures under the various statutes are followed and nothing else. There is a proclamation in the Government Gazette of an area and a dedicated purpose and the marking on official maps. It is not registered under the *Transfer of Land Act* 1893 (WA). These submissions are relevant to two reserves, one for public utility under the 1882 regulations, and another for tropical agriculture under the *Land Act* 1898, to the many reserves and vesting inside the Ord River Project, and to what are called ''nature reserves'', which are really ordinary reserves which attain special status because of their dedication to the protection of wildlife. The Full Court majority held that mere reservation for a public purpose did not extinguish native title. It was necessary in the case of each reservation to consider whether there was also a dedication which created inconsistent rights in the public, or a use which had that effect, having regard to the nature of the purpose. The majority erred. First, every creation of a reserve is a dedication and one cannot divine a different result for different reserves given that they are all created under the same statutory authority. Secondly, it is necessary to consider whether or not any particular reserve was so dedicated. To understand the significance of the ''reserve'' one begins with the instructions to Governor Stirling. The twenty-fifth instruction included a direction that ''not on any account or on any pretence whatsoever grant convey or demise to any person or persons any of the Land so specified as fit to be reserved as aforesaid nor permit or suffer any such Lands to be occupied by any private person for any private purposes . . .'' From that instruction the subsequent legislation took its character and preserved the words ''reserve'' and ''lands reserved''. That legislative history is important because it shows that there was never a break in the continuity of the treatment of ''reserved'' from that instruction. [GLEESON CJ. For what estate is reserved Crown land said to be vested in the Shire of Wyndham East-Kimberley or in statutory authorities?] That was never made explicit. The reserves the subject of the State's appeal are not vested in the Shire. Vesting is part of our submission because the reserves inside the Project Area are ''vested''. They are not expressed to be vested in any particular estate. The Shire and all other relevant authorities are vested in possession.

If, contrary to our submissions that the resumption, setting aside and commencement of use of a reserve for the Project did not extinguish native title over the whole of the Project Area and that extinguishment occurred on a ''square-metre-by-square-metre'' basis as the actual ground is covered with building or used, the extinguishing effect of the

components of the Project would have to be considered item by item. That would be unworkable and would mean that mapping of areas in which native title existed or had been extinguished would have to change, depending on the extent of use or construction day by day.

R J Meadows QC.

Minerals and petroleum: The Full Court turned Lee J's determination that native title rights and interests extended to ''resources'', which they took to include minerals and petroleum, with the exception of ochre, and then only because the majority concluded that ochre is not a mineral. We do not appeal against the determination in relation to ochre, though it is questionable because there was a proclamation bringing under the *Mining Act* 1904 ''clays, ochres, and felspars for use in the manufacture of porcelain, fine pottery, or pigments, . . .'' We support the Full Court's finding that if there were any native title rights and interests in relation to minerals and petroleum, they have been extinguished. The effect of s 117 of the *Mining Act* 1904 and s 9 of the *Petroleum Act* 1936 was to appropriate to the State property in minerals and petroleum which amounted to full beneficial ownership and that extinguished any native title that may have existed. The Full Court stated that s 3 of the *Western Australia Constitution Act* 1890 (Imp) had enabled the enactment of s 117 of the *Mining Act* 1904, although we submit that it was s 2 of the *Constitution Act* provided the power. [He also referred to *Attorney-General (NSW) v Brewery Employees Union of NSW* (70); *Radaich v Smith* (71); *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (72); *Mineralogy Pty Ltd v National Native Title Tribunal* (73); *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (74); *Gerhardy v Brown* (75); and *Anderson v Wilson* (76).]

T I Pauling QC, Solicitor-General for the Northern Territory, and *R J Webb*, for the Attorney-General for that Territory.

T I Pauling QC. The first issue concerns the rights of native title holders to make decisions about the use of land in the Keep River National Park. There is no native title right or interest, exclusive or non-exclusive, to make decisions about the use of that land and there cannot be co-existing decision-making powers in relation to it. The second issue concerns the Full Court's apparent erection of a new and more onerous test as to what is the effect of the erection of improvements on that National Park in the past and its introduction of

(70) (1908) 6 CLR 469.
(71) (1959) 101 CLR 209.
(72) (1973) 128 CLR 199.
(73) (1977) 150 ALR 46.
(74) (1981) 147 CLR 677.
(75) (1985) 159 CLR 70.
(76) (2000) 97 FCR 453.

notions of intention which it held to have been negated in this case because the Northern Territory had a friendly and co-operative arrangement with Aboriginal people and because of the factual management of that National Park. The Full Court majority confused intention and use of land with the legal effect of the erection of improvements within the National Park. The determination area in the Territory is within the National Park and relates to the three communities within its boundaries.

We adopt Western Australia's submissions on the nature of native title rights and interests. It is possible that native title in respect of a certain piece of land comprise a single right, eg to enter upon the land to perform a religious ceremony. In relation to the discussion of a ''bundle of rights'', the label does not really matter. The correct approach is the comparison of one right with another, identifying a native title right found and comparing it with the legal rights and incidents that occur under, eg, pastoral leases, or leases to the CLC to determine what native title right and interest is extinguished and to what extent and what is intact.

What did the framers of the rights the subject of pastoral leases (which covered most of the land now in the National Park) have in mind, according to the attribution of Lee J and the Full Court, in the creation of some non-exclusive right to make decisions for use of the land for non-pastoral purposes? [KIRBY J. You seem to be coming close to a challenge to the fundamental principle in *Wik*.] We accept *Wik*. The list of the native title rights found by Lee J and the Full Court is extensive. But the non-exclusive right to make decisions about the use of the land for non-pastoral purposes has no content. [GAUDRON J. There may well be rights about using the land, eg whether people can hold a ceremony at a particular site. So there may be some content to a right to make decisions for the use of the land for non-pastoral purposes. Under a pastoral lease, the pastoralists could only make decisions for pastoral purposes.] We are looking at the rights that ought to be stated in a determination under the NTA. A bland statement that one has a non-exclusive right to make decisions about the use of the land for non-pastoral purposes or, now, for non-park purposes, does not assist to understand what sort of decisions can be made about what parts of the National Park and what sorts of activities can be conducted pursuant to those decisions. The State submitted a schedule matching claimed right against given right so that a determination might be made about inconsistency.

On the second issue, we submit that improvements to the land within the National Park extinguished native title because of the building itself. Lee J determined that in a quarantine reserve established within the Park, only the buildings extinguished native title. The Full Court determined that native title was extinguished with respect to the whole reserve. To say that in an area in which there are substantial houses, buildings and workshops and other improvements native title is unaffected is wrong. The Full Court majority applied a

test that for there to be inconsistency, the operation of the opposing rights must be inimical to the exercise of native title rights. The correct test is that of operational inconsistency. [GLEESON CJ. Does this argument about the Keep River National Park only arise if it is confirmed that the earlier pastoral leases did not extinguish native title?] Yes.

R J Webb. The following submissions are premised on the Court's holding that the inconsistency of incidents test applied by the Full Court majority is appropriate for the extinguishment of native title by statutory grants of rights to others. The question is whether the respective incidents are such that the native title rights cannot be exercised without abrogating rights created by the statutory grant. If they cannot, by necessary implication the native title rights are extinguished. The question is not whether the estate or the interest granted had been exercised in a way incompatible with the exercise of native title rights but whether it was legally capable of being so exercised. The other premise of these submissions is that there can be partial extinguishment of native title at common law. Part 2, Div 2B of the NTA confirms partial extinguishment.

Extinguishment: The original NTA was a response to the decision in *Mabo [No 2]*. The 1998 amendments were a response to *Wik*. Section 10 of the NTA gives enhanced statutory protection to native title. While some protection was given under the RDA, the NTA enhances it. [GUMMOW J. What is the effect of a determination under the NTA? Does it confer Federal status which binds everybody?] A determination does not confer some general status. It is a declaration of rights in relation to land and waters which are enforceable and protected under this statute. Extinguishment of native title is governed by s 11. While s 11(1) provides that native title cannot be extinguished except in accordance with the NTA, sub-s (2), inserted in 1998, provides that sub-s (1) only applies to extinguishment of native title by legislative acts ''after 1 July 1993''. After 1 July 1993 the Commonwealth, States and Territories cannot pass an Act purporting to extinguish native title for the future if it does not comply with the future act procedures in the NTA. As to past extinguishment, s 11 provides that the Commonwealth, States and Territories cannot pass an Act after 1 July 1993 which retrospectively extinguishes native title unless it is done in accordance with either Div 2, which validates ''past acts'' in relation to native title, Div 2A, which validates ''intermediate past acts'', or Div 2B, which confirms past extinguishment. Divisions 2, 2A and 2B provide certainty for the broader Australian community with respect to the enforceability of their rights and interests which have been granted in the past and provide for the removal of all doubt about the extinguishing effect of acts within their scope. [GLEESON CJ. If a dispute arose tomorrow whether native title still existed in relation to the land on which Government House in Sydney stands, would the NTA say anything

about its resolution?] If the relevant event fits within the NTA it has the extinguishing effect the Act provides for. If it does not fit, it is a question of whether native title was extinguished at common law. Applying that process, the construction of Government House is not invalid because of the existence of native title, so neither Div 2 nor Div 2A is engaged. In Div 2B, s 23B(7) defines ''previous exclusive possession act'' and includes a reference to an act that is ''valid'' and consists of ''the construction and establishment of any public work that commenced to be constructed or established before 23 December 1996''. The definition of ''public work'' in s 253 includes a building ''constructed or established by or on behalf of the Crown''. Section 251D provides that a ''reference to land or waters on which a public work is constructed ... 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''. The NTA is a comprehensive code with respect to future, but not to past, extinguishment. [GLEESON CJ. What does the NTA say about a pastoral lease granted in 1930 which expired in 1960?] That kind of lease is found in this case. It does not fall within Div 2 or 2A because the grant of a pastoral lease is not a previous exclusive possession act. But, it falls within Div 2B and the confirmatory provisions in the Territory legislation. Section 23G(1)(b) (or, more correctly, s 9M of the Territory Validation Act) directs the inquiry into the inconsistency of rights and interests, requiring the ''inconsistency of incidents'' test to be applied. The Full Court found, with respect to pastoral leases, that the native title rights and interests that survived the grant were those within the scope of the reservation in the leases in favour of Aboriginals. Such rights and interests are now preserved in s 122 of the *Territory Parks and Wildlife Conservation Act*. They include rights to enter leased land, use springs and natural surface water, erect and make wurlies and other dwellings, and take and use for food birds and animals ferae naturae.

Where an act has been done after the commencement of the RDA and it affects native title, it is invalidated by the RDA, so that the ''past act'' provisions of the NTA are required to validate it only where it is ''aimed at'' native title or otherwise makes a distinction based on race. The RDA applies only where a legislative act is ''a bare legislative extinguishment of title'' or where an act (legislative or executive) is ''discrimination against the holders of native title which adversely affects their enjoyment of title in comparison with the enjoyment of other title holders of their title'' (77). Neither the CLC leases nor the legislative provisions under which they were granted can be so described. The grant of leases in perpetuity to the CLC over NT Portions 1801 and 3121 — the Keep River National Park — effected a partial extinguishment of native title rights and interests. Not only

(77) *Native Title Act Case* (1995) 183 CLR 373 at 418.

would the grant of those leases have extinguished any exclusive native title subsisting in the land (if they had not already been extinguished by the grant of pastoral leases) but the grant would have wholly extinguished any native title right to make decisions about the use and enjoyment of the land, such right being inconsistent with the statutory powers of control and management of the Territory Parks and Wildlife Commission of land in parks or otherwise held by the CLC.

Minerals and petroleum: The difficulty is whether ''resources'', used in the primary determination, includes minerals and resources. We make three points. First, in the context of a claim based on custom and tradition, a claim to rights and interests in resources must refer only to resources of a customary or traditional kind. Secondly, the evidence does not establish any traditional law or customary use relating to minerals or petroleum, apart from ochre. The determination should have made clear that a right to resources does not include minerals or petroleum. Thirdly, if the Court determines that native title is not restricted to resources that were traditionally used, any native title right to minerals and petroleum in the Territory was wholly extinguished by the Crown's appropriation by the *Minerals (Acquisition) Act* 1953 which effected full and compulsory acquisition of beneficial, not just radical, title to all interests in minerals that were in private ownership. It provided rights to compensation and it resulted from the failure to include in the early grants of land in the Territory express reservation of minerals to the Crown, so that the Crown had to acquire title back. Section 5 of the *Petroleum (Prospecting and Mining) Ordinance* 1954 had the same effect with respect to petroleum, although the claimants make no appeal on that point. [She also referred to *Milirrpum v Nabalco Pty Ltd* (78); *Schiller v Mulgrave Shire Council* (79); *Hayes v Northern Territory* (80); and *The Commonwealth v Yarmirr* (81).]

H B Fraser QC (with him *K R Jagger*), for the respondents Argyle Diamond Mines Pty Ltd and another. All tenements held by Argyle are in the area of reserve 31165, which was the subject of the Ord River Project. None of the tenements within the determination area are the subject of operations, though there has been exploring and prospecting in relation to alluvial mines. The primary determination of native title included rights to ''minerals'' in this area. We do not complain about a lack of definition but of something more fundamental, since the primary determination appears to comprehend the tenements granted, all the diamonds removed from the mines, and probably also the property and the minerals belonging to the Crown. That determination was altered by the Full Court, which excepted minerals. We submit

(78) (1971) 17 FLR 141.
(79) (1972) 129 CLR 116.
(80) (1999) 97 FCR 32.
(81) (1999) 101 FCR 171.

that the Ward parties failed to establish their claim to minerals on the facts. The only finding they secured did not give them minerals and did not give them ochre except at specific sites none of which are within Argyle's tenements. [KIRBY J. Are Aboriginals to be in a lesser position because, before sovereignty, they did not have a particular interest or knowledge about minerals? Are we looking at enforcing Aboriginal customary rights to land in a way that is frozen in time?] First, Aboriginals are not treated in a lesser way in relation to minerals because there are few people in Western Australia who hold any interests in sub-surface minerals. None hold interests in gold, and only those who obtained grants prior to 1899 might hold interests in other sub-surface minerals. Secondly, it does not follow from the concept of native title adopted by the NTA (broadly reflected in the judgments of Brennan, Deane and Gaudron JJ in *Mabo [No 2]*) that the common law mentioned in s 223(1)(c) of the NTA may not be developed. It does follow that what NTA protects in s 11, and allows for determination, is not simply native title rights and interests recognised by common law but those which fill the two cumulative requirements in s 223(1)(a) and (b). Theoretically that may leave room for a claim in the Supreme Court for a common law determination of native title, though in practical terms that is unlikely. [KIRBY J. If we are talking about waste Crown land with no competing claims, doesn't native title pick up land all the incidents of that land as a part of the title, whether or not a particular incident was relevant to them in traditional times?] Section 223 uses the words ''native title rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed''. To pick up the incidents that the traditional law acknowledged, and the traditional customs observed, those interests in land have to be identified. [GLEESON CJ. Does the NTA use the expression ''interest in land'' in relation to native title?] The expression in s 223(1) is ''in relation to land and waters''. The issue is one of the construction of s 223(1). Paragraphs (a) and (b) do not arise because the common law does not recognise the rights to minerals, but it may be simpler to start with (a) and (b) to determine what they exclude.

Section 117 of *Mining Act* 1904 takes for the Crown property in minerals defined in s 115. The regulatory provisions, which allow for the grant of mining leases and prohibit unauthorised mining, deal with minerals as defined in s 3, a much broader definition, namely ''all minerals, other than gold, and all precious stones''. It is illogical to postulate that the purpose of s 117 was to provide some foundation for the operation of all the provisions of the Act concerning the grant of mining leases. While the *Land Act* 1898 (WA) reserved minerals from all future grants of land, s 117 of the 1904 Territory Act went further and claimed the property. Further, there was never any reservation in mining leases similar to those in pastoral leases in favour of Aboriginal sustenance, and s 177 was not qualified in favour of Aboriginal use of minerals, because no-one understood there to be any

Aboriginal traditions concerning minerals in 1904. If we are correct about title to diamonds extracted from the Argyle tenements, there is still the practical issue of future acts in the treatment of minerals. It has to be determined what native title rights and interests existed at the time of the grant. If there were no native title rights and interests following the Ord River Project, there is no conflict. If there were some, there may be potential for conflict. What was granted is then relevant. The Full Court, in reference to lands resumed from Lissadel and Texas Downs, determined that the whole of the land had been appropriated for the use of the Project.

The first of the relevant acts is the enactment of s 8 of the Ratification Act, which makes a statutory grant of the land for a limited, interim, period. That grant gave ''exclusive possession of the subject land for the purposes of the *Mining Act* 1904 and the *Mining Act* 1978''. Section 8 creates a regime unlike that considered in *Wik*, where there was no reference to exclusive possession. [GUMMOW J. What does ''exclusive possession for a purpose'' mean? Does not the latter cut down the former?] No. It is comparable to a provision in a lease of a shop in a shopping centre that the premises may only be used for the purposes of a butcher shop. Exclusive possession is granted and this includes the power to exclude others from the land, even though the power to sue in trespass is not explicitly granted by the *Mining Act* or the Joint Venture Agreement. After this interim grant was the grant of a mining lease under the *Mining Act* 1978 (WA), which is in the form of a schedule. That mining lease, being referable to cl 7(1) of the Joint Venture Agreement, includes the right of Argyle to mine and recover diamonds, build roads, a town, water and power supplies, an airstrip and other works and services desired by the Joint Venturers. None of those things has been done in that part of Argyle's tenements in the determination area. They could be. It is not submitted that these rights necessarily lead to the extinguishment of native title. Our submissions relate only to the rights granted to Argyle; those rights include exclusive possession, qualified only as mentioned. Before it is possible to determine their effect on native title other provisions of the *Mining Act* 1978 must be examined. Section 113 provides that anyone who has been deprived of possession of the land the subject of a mining lease is entitled to retake possession at the end of the lease. Section 113 confers that right, whether or not the persons who had prior possession derived their rights from the Crown or from native title rights and interests. They must qualify in terms of the section itself, that they have to be ''owners'' (defined by s 8 to include a ''person who for the time being, has the lawful control and management'' of the land). That provision was not drafted with the interests of native title holders in mind, but if in terms it can apply, it should be, so that if native title holders are entitled to possession, they have the control and management and would have the benefit of s 113. If the definition of ''owner'' were to be read to exclude persons deriving interests from native title, s 10 of the RDA would ''top up''

the rights of native title holders to make them equivalent to persons who are owners. In neither case would the grant of the mining lease be invalidated by the RDA, so that there would be no basis for the further operation of the RDA or the validating provisions of the NTA. Section 113 can be construed in that it grants a statutory right that did not exist before the grant or that it affects the quality of the interest granted to the mining company itself so that the grant does not destroy, but merely suspends, previous rights of possession. On the second construction, there is more reason for finding that native title is not extinguished by the grant of the project lease or the other mining leases granted to Argyle. The *Mining Act* 1978 also provides rights to compensation which are not necessarily predicated on the persons entitled to compensation being in possession. [MCHUGH J. How can s 113 add to the ordinary rights of a person by reason of proprietary rights?] That is why the submission is put in two ways. Section 113 may qualify the nature of the interest granted to the mining lessee. However, in the case, such as this, where the leases are perpetually renewable, by the time the mining lease finally expires the native title holders may have lost their connection with the land so that it is hard to see how s 113 would operate.

If, contrary to our submissions, the mining lease is invalid, it will be validated by the NTA so that the non-extinguishment principle will apply.

[He also referred to *Chirnside v Registrar of Titles (Vict)* (82); *The Commonwealth v New South Wales* (83); *Barrett v Federal Commissioner of Taxation* (84); *Harper v Minister for Sea Fisheries* (85); *Fejo* (86); *Yanner v Eaton* (87); *Attorney-General (Quebec) v Attorney-General (Can)* (88); *United States v Northern Paiute Nation* (89); and *Delgamuukw v British Columbia* (90).]

B O'Loughlin, for the respondent Conservation Land Corporation, adopted the submissions of the Northern Territory. The CLC is not an appellant. It merely responds to that the leases granted to it by the Crown in right of the Northern Territory were a category D past act under the NTA so that the non-extinguishment principle applies. The leases to the CLC were a category B past acts, and the CLC, though a statutory authority, is not a statutory authority of the Crown (91). This point has to be considered only if it is held that the leases caused an

(82) [1921] VLR 406.
(83) (1923) 33 CLR 1 at 67.
(84) (1968) 118 CLR 666.
(85) (1989) 168 CLR 314.
(86) (1998) 195 CLR 96.
(87) (1999) 201 CLR 351.
(88) [1929] 1 AC 401.
(89) (1968) 393 F 2d 786.
(90) (1993) 104 DLR (4th) 470.
(91) *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395.

extinguishment after and in addition to any extinguishment of native title from the earlier grant of pastoral leases. If there is no additional extinguishment, the grant of the leases to the CLC are not a ''past act'' under the NTA. [He also referred to *Wandarang People v Northern Territory* (92).]

N Johnson QC (with her *M T McKenna*), for the respondents Crosswalk Pty Ltd and Baines River Cattle Co Pty Ltd, adopted the revised submissions for the State of Western Australia. Crosswalk and Baines are lessees of land within the determination area which they presently use for pastoral purposes. That description is used because they are not pastoral leases under s 90 of the *Land Act* 1933. The current lease to Crosswalk is under s 32 of the *Land Act*, a general or special lease. The lease was granted by the Crown on 15 February 1993 for one year, retrospectively commencing from 1 July 1992 and thereafter from year to year. There were earlier pastoral leases, all granted under the *Land Act* 1898. There is a current lease of the land leased to Baines under s 32 of the *Land Acquisition and Public Works Act* 1902 and a previous lease under the same Act. There was a further previous lease under the same Act, there are pastoral leases under the *Land Act* 1933 and the *Land Act* 1898. As with the current Crosswalk lease, the leases under the s 32 of the *Land Acquisition and Public Works Act* are general or special, not pastoral, leases. Each lease granted a right to exclusive possession, such that at every stage native title rights and interests were extinguished.

Extinguishment: All property rights may properly be referred to as a bundle of rights (93). All property is liable to regulation of part of the bundle of rights (94). But it is only regulation to the point of ''sterilisation'' that may amount to an effective acquisition of conventional title from a party (95). In contrast, native title is characterised by fragility. That the native title bundle of rights is capable of piecemeal extinguishment is supported by previous decisions. The grant of rights, rather than their exercise, creates the relevant inconsistency with the continued existence of native title rights and interests. That was decided in *Wik* by a majority of five to two.

If the Full Court determination that the Ord River Project extinguished all native title rights and interests is upheld, there is no need to look to the earlier pastoral leases or the subsequent general leases. If the Full Court erred on that point, the earlier pastoral leases wholly extinguished native title because each was an ''exclusive possessory act''. And if that is wrong, the Crosswalk and Baines leases

(92) (2000) 104 FCR 380.
(93) *Yanner v Eaton* (1999) 201 CLR 351; *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 285.
(94) *Waterhouse v Minister for Arts and Territories* (1993) 43 FCR 175.
(95) *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513.

subsequent to the Project reservations wholly extinguished native title. The earlier pastoral leases were ''exclusive possessory acts'': there is a difference between the legislation in *Wik* and the Western Australian legislation, notwithstanding the reservation for Aboriginal people in the Western Australian pastoral leases. It was held in *Wik* that, because of other provisions in the Queensland legislation, what was called a ''pastoral lease'' was not in law a lease granting exclusive possession. There are no counterparts to those provisions here. Leases granted under s 32 of the *Land Act* 1933, and under s 32 of the *Land Acquisition and Public Works Act* for grazing purposes, are leases properly so called at common law. Leases are not mere statutory licences such as the pastoral leases granted under the Queensland Act were held to be in *Wik*. Section 32 of the *Land Act* 1933 makes no specific provision for access by Aboriginal people. The current Crosswalk lease is subject to a requirement that the ''public shall have at all times free and uninterrupted use of roads and tracks which may exist on the demised land consistent with the efficient operation of the lease''. Lee J concluded that that lease was qualified, not only by the grant for pastoral purposes, but also by the public access provisions. Yet the concept of exclusive possession is inevitably going to be restricted at some point, eg by the right of the Crown or government instrumentalities to access land for public purposes and rights of utilities such as water, power and telecommunications providers. The extinguishing effect under s 32 of the *Land Acquisition and Public Works Act* was not considered by the Full Court because of the majority's conclusion about the effect of the reservation for the Ord River Project. [She also referred to *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (96).]

D W McLeod (with him *P L Wittkuhn*), for the respondents Alligator Airways Pty Ltd and others, substantially adopted the submissions of the State of Western Australia. These respondents represent a cross-section of the non-claimant residents and business proprietors in the Ord River Project Area, and the nature and distribution of their interests gives a significant insight into the character and detail of the Project and its implementation. The determination of the Full Court was correct in finding that the Project extinguished native title in that area. One of the principal concerns is that, notwithstanding that Lee J was requested to stipulate in some detail the way in which the rights and interests of the seventh respondents were affected by the rights of the claimants, that was not done. [HAYNE J. If the appellants succeed and they want the primary determination reinstated, do you contend that Order 5 of that determination is insufficiently precise in its preservation of your rights?] Yes. Better guidance should have been given. But we accept that the individual interests of each of the

(96) (1973) 128 CLR 199.

seventh respondents may be referred to the Court below for determination in accordance with the decision of this Court on the larger issues.

The Full Court majority was correct in applying the ''inconsistency of incidents'' test. The general implementation of a major public project by the Crown which incorporates components that are integrally interrelated and interdependent, where that public project represents the fundamental imposition of a completely new order on to the landscape, will exhibit the required degree of inconsistency of incidents with native title. Whether a public project constitutes an integrated whole, which represents the imposition of a completely new order upon the landscape, is a question of fact. If the project is merely a planning scheme for guided development, the intent of which (objectively assessed) is to affirm and accommodate the underlying bedrock of existing property interests while guiding and restricting future development down preferred paths, the project cannot be characterised as representing such a ''fundamental imposition''. For the reasons of the Full Court majority, the Project was not of the mere ''guided development scheme'' kind. It was a ''fundamental imposition''.

D M J Bennett QC, Solicitor-General for the Commonwealth, (with him *M A Perry* and *J S Stellios*), for the Commonwealth, intervening.

Changes in the law and appeals: Where a change in the law occurs between trial and appeal, the initial question is whether the appeal is one strictu sensu by way of rehearing. If by rehearing, the new law so far as it is applicable, applies. If not, it does not. Yet the situation is more complex than that. In an appeal strictu sensu a change in the law at the date of the trial would not normally be taken into account. A problem arises when the intervening legislation is retrospective. If that legislation expressly provides that it shall apply to pending appeals the appellate court is bound to apply it. There has been indecisive discussion in a number of cases (97). The Full Court here was, pursuant to the NTA, making a fresh determination of native title rights and interests, rather than hearing an appeal in the strict sense, and so was obliged to apply the law as it stood that the time of that determination.

Native title and the NTA: The NTA is not a code. In the second reading speech to the Native Title Bill, the Prime Minister stated that it did not codify native title right. Rather, s 223, particularly sub-s (1)(a), (b) is taken almost verbatim from *Mabo [No 2]*. The native title in the NTA is something recognised by the common law of Australia subject to the two descriptive elements in s 223(1)(a) and (b). [MCHUGH J. Is the common law mentioned in s 223(c) the organic, developing, but

(97) eg, *Attorney-General v Vernazza* [1960] AC 965; *Duralla Pty Ltd v Plant* (1984) 2 FCR 342.

unwritten body of law which the judges proclaim from time to time or the common law as of the date of the Act or at some earlier point of time?] It is the first, with the qualification that sub-s (1)(a), (b) imposes a limitation concerning cultural knowledge. The contest in this case as to the nature of native title is fundamental to both the establishment of native title and the issue of extinguishment. The Ward and Ningarmara parties and the Cheinmora parties contend that native title is the underlying interest in land or right to land arising out of occupation or some other significant connection of the community claiming title with the land, from which particular native title rights (or incidents) derive by implication of the common law. If, contrary to the Commonwealth's submission, that is so, a claimant group would not need to establish the nature of its use or enjoyment of the land and the particular incidents of its title. It would be necessary only to show occupation of, or connection with, the subject land by the indigenous community at the time of acquisition of sovereignty which had been maintained since then to establish an interest equivalent in its incidents to a legal or equitable estate. Dependant upon and exercisable under that title there would be communal rights which might vary from time to time according to practices and customs observed by the community holding that title. In short, the incidents of native title are, they submit, similar in many ways to an estate in fee simple. That view was largely accepted by Lee J and by North J (dissenting) in the Full Court. The Full Court majority took the view that the content of native title will vary between groups and that its incidents are defined by the traditional laws and customs of the group in question. There are two related implications for extinguishment said to arise from the concept of native title adopted by Lee J and North J. The first is that there can be no partial extinguishment of native title. The second is that there can be no extinguishment without a clear and plain intention on the part of the Crown to extinguish the underlying native title by granting rights, the exercise of which has the effect of removing all connection of an Aboriginal community with the land under native title. To remove all connection, such rights must be permanent. That approach is wrong. Analysis of native title in terms of an underlying title or right to the land is not consistent with the principles developed in Australian authority. Native title originates in the traditional laws in existence at the time of the acquisition of sovereignty by the Crown. [GAUDRON J. Why at the time of sovereignty? The traditional laws themselves may have changed. Why not the date of the NTA?] The NTA in s 223(1)(a) and (b) does not need to refer to the date of sovereignty because the common law referred to in s 223(1)(c) picks it up. The *Mabo [No 2]* doctrine is a recognition of pre-existing rights. One effect of the acquisition of sovereignty was to discontinue the existence of traditional legal systems as legal systems but, through the common law, to recognise that those who held rights and interests in land and waters under traditional laws would have those rights and interests recognised as burdens on the Crown's radical title. [KIRBY J.

So alone of all the legal systems in the world, the Aboriginal laws of Australia are frozen in time?] No. The Aboriginal legal system does not continue. The common law merely recognises the pre-existing legal system and the rights and interests conferred under it, much as occurs with a conquered country in Europe. The recognition of native title by the common law represents ''an intersection of traditional laws and customs with the common law'' (98). The native title rights and interests that apply to an area of land or water will vary according to the laws and traditions of the indigenous communities concerned. The term ''native title'' can include rights of exclusive occupation and use, where those rights are established in evidence. Postulating an underlying title which does not derive from the traditional laws and customs of the Aboriginal people is inconsistent with authority and the NTA suggests nothing to the contrary.

Extinguishment: There can be no common law restriction on Parliament's capacity to extinguish, or to confer authority on the Executive to do so, particular incidents of native title as well as the whole (99). To the extent that the Ward parties deny the possibility of a parliamentary intention to extinguish native title in part, their submission cannot be sustained. The question is one of the test by which intention to extinguish is ascertained where it must be implied. This Court has held that there must be a clear and plain intention. As native title rights comprise a varying assortment of rights and interests in land defined by the laws and customs of the indigenous group in question, there is presumption that Parliament did not intend to extinguish any native title rights comprised in the ''bundle of rights'' unless it intended to extinguish them all. The particular rights which comprise the ''bundle of rights'' are not parasitic on, and therefore not sustained by, the continuation of an underlying title. The principle that native title can be partially extinguished is established by authority and reflects the accepted nature of native title rights. The Full Court majority correctly held that native title can be partially extinguished and that partial extinguishment may occur where a granted interest in land confers less than a right to exclusive possession but which is inconsistent in part with the native title rights and interests established on the evidence. The Full Court majority also correctly held that native title will be extinguished to the extent to which there is an inconsistency between the right granted and the continued enjoyment of the native title rights and interests. A determination of inconsistency directs attention to the obligations imposed upon the grantee as well as to the rights and powers granted. Whether extinguishment occurs because the inconsistency reveals a clear and plain intention to extinguish or, as the joint judgment in *Fejo* suggests, because of the existence of inconsistency simpliciter between the incidents of the

(98) *Fejo* (1998) 195 CLR 96 at 128 [46].
(99) *Kruger v The Commonwealth* (1997) 190 CLR 1 at 157-159.

estate or interest and the native title rights, is largely academic. There could be no actual intention to extinguish before *Mabo [No 2]* was decided and actual intention is not the test. Further, the authority of this Court does not support the contention that such inconsistency must be permanent and that non-native title interests are not merely suspended by the grant of the estate or interest. It has been accepted that interests other than the grant of an estate in fee simple, such as a lease, may extinguish native title even though such interests are not permanent. That is because, first, the grant of a lease in the common law sense confers a right of exclusive possession which is inconsistent with the exercise of native title; and second, the recognition of the possibility of revival of native title after the grant of so comprehensive an interest in land would in effect convert the fact of continued connection into a right to maintain that connection, as would the possibility of revival after the grant of an estate in fee simple. Such a right to maintain the connection would have to be one created by the common law, and not merely recognised by it, contrary to the basis on which native title is recognised.

Reservations to the grant of pastoral leases: The Full Court majority correctly concluded that the grant of pastoral leases in Western Australia and the Northern Territory would have extinguished at least the exclusive nature of the native title right to possess, occupy, use and enjoy the land and any right to make decisions in relation to it. However, the majority erred in its reasons in that it held that the reservations in favour of Aboriginal peoples, which qualified the rights granted under pastoral leases in the State and the Territory, expressed a clear intention that the grant of a pastoral lease did not necessarily extinguish native title, and because the terms of the reservations delineated both in terms of purpose and geographical location the extent of the rights not adversely affected by the grant of a pastoral lease. The existence of reservations in favour of Aboriginal peoples, whether created by statute or contained in the terms of a lease, does not reveal Parliament's intention in relation to native title rights (if any) which were, in any event, unknown at the time the pastoral leases were granted. No clear and plain intention to extinguish native title rights and to create new rights in their place can be discerned from the statutory reservations themselves. Rather, in accordance with *Wik*, the reservations are to be treated as one of a number of factors relevant to determining whether the pastoral leases conferred a right to exclusive possession which would be wholly inconsistent with the continued enjoyment of native title or, if exclusive possession is not conferred, to determining the extent of any inconsistency between the interest granted and the continued enjoyment of the native title rights and interests established by evidence. In view of the reservations in the pastoral leases, the Full Court majority further held that when leased land was fenced and/or improved, native title was wholly extinguished. That approach would be largely unworkable in practice and cannot be sustained in principle. First, although the reservations in favour of

Aboriginal peoples in the Western Australian pastoral leases were defined to apply only where land was unfenced and/or unimproved, irrespective of whether it was fenced or improved, the question remains of whether the grant of the lease conferred a right of exclusive possession which was necessarily and wholly inconsistent with the continued enjoyment of the particular native title rights. Secondly, to the extent that the majority suggest that, in any event, improvements effected by a pastoral lessee might bring about an operational inconsistency so as to wholly or partially extinguish native title, that approach is misconceived. The power to extinguish, together with the power to create, private rights and interests in land, is an aspect of sovereign power (100). Equally, native title is inalienable except by surrender to the Crown which, through its acquisition of sovereignty over all land in the territory, obtains the capacity to accept a surrender of native title (101). As such powers are sovereign, they are not exercisable by private individuals. The only repositories of power capable of extinguishing native title other than the Commonwealth are the States and Territories and some of their statutory authorities (102).

Fishing: The Ward parties contend that the Full Court majority erred in holding that the exclusivity of native title was ''extinguished'' by the public right to fish in tidal waters and not merely that the public right regulated or controlled the enjoyment of native title rights. Public rights do not extinguish native title. Their relevance is to recognition. As the Full Court held in *The Commonwealth v Yarmirr* (103), no native title rights of exclusive occupation, possession, use or enjoyment are capable of being recognised by the common law in the intertidal zone (and the seas beyond) because such recognition would contradict the public rights to fish and to navigate which are fundamental principles of the common law. Hence, the clear and plain intention test for extinguishment is not relevant. Concern is with the prior question of common law recognition. Further, public rights do not merely regulate or control exclusive native title rights. Such native title rights as can be recognised without contradicting the public rights cannot be characterised as exclusive. Thus, it was unnecessary for the Full Court to include in the determination, as a right to which native title must yield, reference to ''other interests held by members of the public arising under common law''. Having held that the Court was required to consider whether the public rights existed and, if so, to reflect them in the determination (a declaration in rem), and having held that no exclusive native title rights to fish could be recognised in the intertidal area as a result, the Full Court ought to have varied the

(100) *Mabo [No 2]* (1992) 175 CLR 1 at 63.
(101) *Mabo [No 2]* (1992) 175 CLR 1 at 60, 70, 88.
(102) *Native Title Act Case* (1995) 183 CLR 373 at 469.
(103) (1999) 101 FCR 171.

determination to state that the native title rights in the intertidal zone were not exclusive.

Public works: The vesting of an estate in fee simple occurred by force of s 18 of the *Public Works Act* 1902 (WA) on publication of the notices specifying that the land had ''been set apart, taken, or resumed'' for the Ord River Project and directing that ''the said lands vest in Her Majesty for an estate in fee simple in possession for the public works herein expressed, freed and discharged from all trusts, mortgages, charges, obligations, estates, interests, rights-of-way or other easements whatsoever''. Acquisitions in these terms have long been held to involve an acquisition of all rights or interests, giving the Crown an unencumbered and absolute interest. The fact that the existence of native title was unknown when the *Public Works Act* was enacted and when the resumptions were made does not affect that result any more than it would affect the consequences of a grant of fee simple to an individual.

Minerals: The Full Court correctly held that no native title rights to minerals can be recognised without evidence that they existed under traditional laws and customs. Moreover, the common law could never have recognised native title rights in gold and silver as those metals were the subject of the Crown's prerogative rights from the date sovereignty was acquired, and any native title rights to minerals in Western Australia have been extinguished. In relation to the Northern Territory, the Full Court correctly held that s 3 of the *Minerals (Acquisition) Ordinance* 1953 necessarily extinguished any native title rights to minerals because that section disclosed an intention by the Crown to acquire an interest in minerals throughout the Territory exclusive of any other person. If there were any minerals which were not the property of the Crown but of native title holders, those rights were acquired absolutely by the Commonwealth by s 3, in the same way as any rights to minerals vested in the holder of an estate in fee simple were acquired absolutely. Contrary to the Ningarmara submissions, the ''exception'' in s 3 in relation to minerals already the property of the Crown does not suggest that s 3 did no more than ''confirm'' the Crown's radical title to the minerals. That contention does not answer the fact that the Ordinance was intended to ensure that no person other than the Crown would have any right or interest in minerals in situ. That intention, clear from the terms of s 3, is confirmed by s 4, which provides for compensation for the acquisition of minerals. [GLEESON CJ. What do you say about the meaning of ''resources'' in these determinations?] It is an imprecise word. Colloquially it could include water or a great variety of things. It is inappropriate for a determination to have so imprecise a word when a large part of the function of the determination is to define the nature of the rights involved. So much of the primary determination as uses a word of that degree of generality should not be restored without working out the rights that are given by the grant.

Cultural knowledge: Native title comprises rights and interests that

relate to the use of land by the holders of native title (104). The claimed right to maintain, protect and prevent the misuse of cultural knowledge is a form of intellectual property. That the subject of the cultural knowledge may include knowledge about particular land does not convert the right into a right in relation to the land itself. Such a right could not be a burden on the radical title, which is the ultimate proprietary right to the land, being the logical postulate for the doctrine of tenure. Nor would consistency with the international instruments referred to by the Human Rights and Equal Opportunity Commission mean that the common law should be developed to recognise the claimed rights to cultural knowledge as distinct native title rights. The protection of cultural knowledge and traditions may be effected in a number of different ways: in so far as it finds reflection in traditional laws and customs that underlie the native title in relation to land; and expressions of it through artistic media, by the *Copyright Act* 1968 (Cth) and legislation providing for the protection of sites of spiritual significance. The Full Court majority correctly held that a right in those terms was not one in relation to land that can be the subject of a native title determination.

Inconsistency with the RDA: The question of whether particular acts were invalid on the ground that they were inconsistent with the RDA is raised by the contention that the creation of wildlife reserves in 1977 and 1992 were not valid under the RDA; that leases to the CLC were invalid by operation of the RDA and were validated category D past acts under the NTA; that resumptions in December 1975 under the *Rights in Water and Irrigation Act* 1914 (WA) and the *Public Works Act* 1902 (WA) were invalid by reason of being in breach of s 10 of the RDA and were validated as category D past acts; that the Ratifying Act offended s 9(1) of the RDA; and that that Act, the *Mining Act* 1978, the regulations, the mining leases and the general purpose leases were invalid by reason of being in breach of RDA, s 10 and were validated as category C or D past acts. Each ground alleging invalidity assumes that legislation which operated in the period after the substantive provisions of the RDA commenced and which affected native title rights was rendered invalid by the operation of the RDA. That assumption should not be accepted. Section 10 of the RDA operates where by reason of a law there is an inequality of rights. That inequality cannot be assumed but has to be shown. We adopt the submission of Western Australia that the principal operation of s 10 of the RDA is to enhance or ''top up'' the rights of native title holders to the level necessary to eliminate any inequality that would otherwise exist between the enjoyment of such rights by persons of different races by reason of a State or Territory law (eg, by conferring a right to compensation). It is only where it is not possible for s 10 to address the inequality in that way that a provision of a State or Territory law

(104) *Fejo* (1998) 195 CLR 96 at 128 [46].

may be invalid, as was the case in *Mabo [No 1]* and the *Native Title Act Case*.

In relation to s 9(1) of the RDA, the enactment of legislation is not an act involving a distinction, exclusion, restriction or preference based on race. It is not an ''act'' within s 9(1); nor is the Parliament which enacted it a ''person'' for the purposes of s 9(1). Hence, the Ratifying Act cannot contravene s 9(1). But s 9 may render ''unlawful'' certain executive acts ''involving a distinction ... based on race''. To attract s 9, such a distinction has to be shown and cannot merely be assumed. Furthermore, the RDA provides its own exclusion regime for remedying contravention which does not involve invalidating the executive act.

Part 2, Div 2 of the NTA (the past acts regime) generally remedies, or allows the States and Territories to remedy, the invalidity of laws enacted, or executive acts carried out, after 31 October 1975 by reason of the RDA and the existence of native title. The past acts regime sets out the effect of this validation on native title. It operates only where there was invalidity. There will have been laws and executive acts which affected native title rights after that date which were not discriminatory, or which the RDA did not invalidate. The effect on native title then will be determined by the common law. Hence the effect of the law or act on native title may vary depending whether it was always valid, in which case the effect is determined by that statutory regime. This is subject to an exception where the act is a ''previous exclusive possession act''. There, the effect of the act on native title is determined by s 23C of the NTA or the equivalent State or Territory provision, depending whether the act is attributable to a State, a Territory, or the Commonwealth. Section 23C(1) provides that such acts will extinguish native title and that extinguishment is taken to have occurred when the act was done (or in the case of a public work, when construction or establishment of the public work began). [He also referred to *Pickering v Rudd* (105); *Amodu Tijani v Secretary of Southern Nigeria* (106); *Delgamuukw v British Columbia* (107); and *Breen v Williams* (108).]

B M Selway QC, Solicitor-General for the State of South Australia, (with him *S T Hellams*), for the Attorney-General for that State, intervening. [Submissions which repeat arguments presented on behalf of other intervenors or by appellants or respondents have been omitted.]

Exclusive possession and extinguishment: To the question why the Court should not develop the common law to expand upon the notion of native title or, alternatively, to reduce it to a right of occupation the

(105) (1815) 4 Camp 218 [171 ER 70].
(106) [1921] 2 AC 399.
(107) [1997] 3 SCR 1010.
(108) (1996) 186 CLR 71.

answer is provided by Kirby J in *Wik* (109) and *Fejo* (110). In *Mabo [No 2]* (111) the Court, relying in part on international practice and norms, developed Australian common law to recognise native title. There were gaps that needed to be filled. The question now is not whether one fills the gaps, but whether, every year or so, one goes through a process of reconsidering whether native title should be broader. In *Mabo [No 2]* a limit was recognised which was the validity and effect of existing title. That limit was proper and the Court should not develop a notion of native title which had the effect that fee simple was no longer fee simple or that fee simples were invalid, likewise for leases. [GLEESON CJ. Fee simple does not cease to be fee simple because there are rights in certain third parties to come on to the land.] That was the answer given in *Fejo* — that fee simple is a right of exclusive possession which is necessarily inconsistent with native title, because that is what fee simple is. Similarly, a common law lease grants a right of exclusive possession because that is what a common law lease does. One can properly inquire whether one has a lease, but once a lease is identified, it extinguishes ipso facto. Ultimately it is a question of intention and in that way the issue of what has been granted refects that intention. If Parliament intended to grant a lease, that grant extinguished native title. If it intended to grant a licence, it might not. If the conclusion is that a lease was granted, each granted right does not have to be compared. The petroleum leases confer rights over large areas and grant specific rights to the lessees, such as to fence off particular areas, exclude people from them, and to take enforcement action in trespass. The only sensible explanation is that it is a grant or a right which may lead to operational inconsistency. The grant is the source of the rights. Notwithstanding the parliamentary intent, a grant of a lease creates an operational inconsistency which has the effect of extinguishing native title. [GLEESON CJ. Is any right or interest listed in par 3(a) to (i) of the primary determination not inconsistent with a right to exclusive possession?] All are inconsistent.

Distinguishing an interest and an incident: No test has been developed by Australian courts to distinguish between an interest and an incident. Canada has identified the issue, but this Court should not rely heavily on Canadian authority for the obvious reasons, not least of which are constitutional and historical. It is unnecessary to deal with the issue in this case. It is not raised by the Ward parties. The situation may be different for the Ningarmara parties. In that case the claimants claimed separate rights and they are not in a position to complain when they have got them. A pastoral lease goes directly to the core of rights to possession of land. It does not concern an incident such as, eg, a profit à prendre.

(109) (1996) 187 CLR 1.
(110) (1996) 195 CLR 96 at 150.
(111) (1992) 175 CLR 1.

Pastoral leases, mining leases and public works: The Full Court applied the common law to determine whether a pastoral lease, a mining lease, or a public work, if valid, extinguishes native title on the relevant land, including all land necessary and incidental to the public work. In doing so, the Court applied the same test as is set out in Pt 2, Div 2B of the NTA but as common law exercise. A mining lease is not dealt with in Pt 2, Div 2B or the equivalent Western Australian provisions, so that the common law is applied to determine whether there has been extinguishment. At common law a ''mining lease'' did not necessarily connote a common law lease, rather, a profit à prendre giving a right to go on to land and remove the specified mineral or minerals from it (112). Where it is argued that all native title rights have been extinguished by a mining lease it must be ascertained whether the profit à prendre is associated with sufficient power to control the use of the land and to exclude others from it that the right can be described as one of exclusive possession. There is considerable diversity between legislation in the Australian States and Territories so that the reasoning of the Full Court, even if correct for Western Australia or the Northern Territory, may not apply elsewhere.

In the case of a pastoral lease, assuming it is not invalid under the NTA past acts regime, the question is whether there is an exclusive possession act. For that the reference is to the common law. If it is not such an act, the next question is whether the grant of the lease conferred inconsistent rights so as to extinguish at common law. [He also referred to *Milirrpum v Nabalco Pty Ltd* (113); *Re Waanyi Peoples* (114); *Newcrest Mining (WA) Ltd v The Commonwealth* (115); and *The Commonwealth v Yarmirr* (116).]

G E Hiley QC, for the respondent Pastoralists and Graziers Association of WA (Inc). [Submissions which repeat arguments presented on behalf of other respondents have been omitted.]

Native title as a statutory right: The Full Court majority held, in effect, that native title was totally extinguished on areas of land the subject of Western Australian pastoral leases to which Aboriginal people had no right of entry pursuant to the right under s 106(2) of the *Land Act* 1933. A major difference between the pastoral leases in Western Australia and those in Queensland the subject of *Wik* is the provision which confers statutory rights on Aboriginal people. These are the kinds of rights contemplated in s 223(3) of the NTA which specifically deals with statutory rights and interests of the kind referred

(112) *Re Commissioner of Stamp Duties; Ex parte Henry* (1963) 63 SR (NSW) 298, app (1964) 114 CLR 322; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177.
(113) (1971) 17 FLR 141.
(114) (1995) 124 FLR 1.
(115) (1997) 190 CLR 513.
(116) (1999) 101 FCR 171.

to in s 106(2) of the *Land Act* 1933. It deems those rights and interests to be native title rights. However, s 223(3) is subject to sub-s (4), which provides that sub-s (3) does not apply to rights relevantly created in a pastoral lease granted before the enactment of the NTA. Section 106(2) creates statutory native title rights in circumstances where there would be no rights at common law. [GLEESON CJ. Does s 106(2) have no different effect than native title rights, or does it involve some kind of redistribution of rights amongst Aboriginal people?] The provisions are an attempt at the redistribution of rights. They would override the native title rights of the communal group that previously enjoyed those rights. Thus, if a discrete group of people regarded themselves as having an exclusive control over a certain area, the statutory right would permit other Aboriginal persons from anywhere else in Australia to enter on the land. The pre-existing native title right to exclude others would have been extinguished by the grant of the pastoral lease. [CALLINAN J. If it is a statutory right, it is not a native title right and interest within the meaning of s 223(4), and s 223(3) does not apply to it, does it?] That is so. Further, it is also arguable that the expression ''to seek their sustenance in their accustomed manner'' in s 106(2) imports traditional native title rights and interests; but that expression relates solely to the seeking of sustenance, not to the identity of the people who are entitled to the benefit of the provision. It would be different if it said that those Aboriginal people with traditional connections to the land would enjoy the right.

Extinguishment: We adopt the submission of the Commonwealth on the question of operational inconsistency. Extinguishment occurs at the time of grant. If the effect of a grant is to give a lessee the ability to do certain things, eg, to fence the entire property or to do things otherwise inconsistent with others using the property in a normal way, extinguishment occurs at the time of the grant and there is no concern with the concept of operational inconsistency being engaged by a third party. The point of inquiry is that at which a power is given, in this case what rights are given to the lessee. From then, whatever rights are included in the grant can be exercised. It is irrelevant to the existence of the right and any extinguishment of native title flowing from it that a grantee does not exercise a right until later.

[He also referred to *City of Keilor v O'Donohue* (117) and *Northern Territory v Mengel* (118).]

M L Barker QC, in reply. The attack on Lee J's use of ''adverse dominion'' is unwarranted: it connoted only an operational inconsistency test. If, contrary to the approach of the Full Court majority, an approach to extinguishment was adopted which, if not a brick-by-brick

(117) (1971) 126 CLR 353.
(118) (1995) 185 CLR 307.

is parcel-by-parcel, an error becomes apparent. The Full Court determined that areas within the Ord River Project where ''the requirements of management and control are perhaps not so obvious'' nevertheless extinguished all native title rights and interests; but it flows from *Mabo [No 2]* that an assessment must be made of the area that is reasonably required for the purpose for which land is reserved or a grant is made before it can be determined whether (and to what extent) native title has been extinguished.

Western Australia submitted that, if native titleholders cease occupying their traditional country and shift to live in towns or cities and do not return to the country, they will not be able to prove their native title. That proposition is far from the facts of this case. Many Miriuwung and Gajerrong People live in Kununurra but maintain outstations throughout their country, including the Keep River area. On the evidence Lee J was right in making a determination that they have a right to the possession, occupation, use and enjoyment of the land and waters in the determination area. It is understood from the type of determination the Ward parties sought and obtained, and which was comprehended by the NTA, that an order for possession etc comprehends all the matters that might be done, provided they are done in accordance with the laws and customs of the people, as currently acknowledged and observed.

There is no reason why ''resources'' in the primary determination should not be given its ordinary meaning. It includes natural resources, and there are indications in Lee J's reasons that indicate that he was referring to natural resources. On the issue of minerals, there are still privately owned minerals in Western Australia independently of mining controls over minerals. Nothing in s 117 of the *Mining Act* 1978 extinguishes a native title right in respect of minerals and, eg, the grant of a mining lease does not do so. But it is recognised that once diamonds are taken, it is not possible for native titleholders to insist upon a portion of them.

Section 225 of the NTA recognises that there will be determination of the type made by Lee J. That determination should be enforced according to its terms.

J Basten QC, in reply. The concept of exclusivity lies at the heart of the concerns of the Ningarmara parties about the Full Court majority's decision in relation to pastoral leases, because it was that which was said to be extinguished. Those in prior occupation of land may have their right to exclude others qualified by the creation of a class of persons whom they cannot exclude. We submit that the native title right is qualified only for so long as the interest exists which creates the qualification. The other legal possibilities, that the right to exclude those within the class is permanently extinguished or that the native title holders can never exclude anybody ever again, are rejected. Only if the disaggregative theory of rights is adopted does extinguishment

occur. That theory is unjustifiable, both in principle and in terms of the common law.

The Commonwealth's submissions to the effect that native title can only be extinguished by governmental power are correct; the principle now reflected in Div 2B of Pt 2 of the NTA is expressed in terms of inconsistency of rights. It is also reflected in provisions such as s 47B of the NTA which speak of grants or the creation of interests as the source of extinguishment that must be disregarded. There is a consistency about the NTA which conforms to what the Commonwealth has put.

On the issue of the reservations to the grants of pastoral leases in Western Australia and the Northern Territory, it is clear from the history of the reservations that they sought to protect the facts on the ground, as understood at the time. No ahistorical approach should be taken to the concept of entitlement or rights. It is incorrect to talk of those reservations in terms of native title rights.

C J L Pullen QC, in reply. A determination of native title under s 225 of the NTA will be made if that title is recognised by the common law of Australia. If native title was extinguished, say, in 1890, the common law will not recognise it in a determination today. In enacting and amending the NTA, the Commonwealth Parliament did not intend to effect extinguishment where it had already occurred. Division 2B of Pt 2 of the NTA was entirely concerned with the confirmation of past extinguishment. The Commonwealth submitted that the Full Court erred by not applying Div 2B of Pt 2B in the Western Australian legislation. But one must look at the acts concerned. Concerning the pastoral leases granted under s 90 of the *Land Act* 1933 or its predecessors, the definition of ''relevant act'' in the State legislation only bites if the leases were in force on 23 December 1996. None of the pastoral leases here was on foot, and so the *Titles Validation Act* does not apply to them. In relation to the public works of the Ord River Project there is a provision that deals with public works. But the setting out of the Project occurred in the 1960s, and construction commenced then. Thus, there was extinguishment in the past and the *Titles Validation Act* does not apply. All findings of fact which would allow that Act to apply have been made.

T I Pauling QC, in reply. When determining the content of native title, it is the word ''traditional'' in ''traditional laws acknowledged and traditional customs observed'' which takes us back to the time of sovereignty, because that native title became a burden on the Crown's radical title then (119). Native title cannot be said to evolve.

Cur adv vult

(119) See *Yarmirr v Northern Territory [No 3]* (1998) 82 FCR 533.

8 August 2002

The following written judgments were delivered: —
GLEESON CJ, GAUDRON, GUMMOW AND HAYNE JJ.

Introduction

1 The central issues in these four appeals from the Full Court of the Federal Court (120) were said to be whether there could be partial extinguishment of native title rights and interests, and what principles should be adopted in determining whether native title rights and interests have been extinguished in whole or in part. Those questions were framed in the abstract. The supposition appeared to be that the answer to them is to be found by an examination of the general law as revealed in previous decisions of this Court. The supposition cannot be supported.

2 As is apparent from the Preamble to the *Native Title Act* 1993 (Cth) (the NTA), that statute was introduced following the decision in *Mabo v Queensland [No 2]* (121). The subsequent decisions of this Court, *Wik Peoples v Queensland* (122), *Fejo v Northern Territory* (123) and *Yanner v Eaton* (124), were not given in appeals brought in respect of the determination by the Federal Court of applications under the NTA. In the present litigation, the determination provisions of the NTA are directly engaged. Thus, statute lies at the core of this litigation. The NTA has been amended from time to time, most significantly by the *Native Title Amendment Act* 1998 (Cth) (the 1998 Act). The relevant provisions of the 1998 Act commenced on 30 September 1998. Judgment at trial was delivered on 24 November 1998.

3 These reasons are organised as follows:

PART 1 — THE LEGISLATIVE SCHEME AND THE LITIGATION

(120) *Western Australia v Ward* (2000) 99 FCR 316.
(121) (1992) 175 CLR 1.
(122) (1996) 187 CLR 1.
(123) (1998) 195 CLR 96.
(124) (1999) 201 CLR 351.

PART 1 — THE LEGISLATIVE SCHEME AND THE LITIGATION

A. *The Legislative Scheme*

1. *General*

4 It is convenient at this stage to refer, albeit in somewhat general terms, to the legislative scheme upon the operation of which turn the issues of extinguishment in this litigation. The chronology fixed by the legislative scheme is important for an understanding of the scheme. In particular, the temporal guide posts of 31 October 1975, 1 January 1994 and 23 December 1996 should be identified as follows.

5 The NTA contains provisions in Pt 2, Div 2 which provide for the ''validation'', by Div 2 itself (s 14) and corresponding provisions in State and Territory laws, of certain ''past acts'' attributable to the Commonwealth, a State or a Territory which, were it not for the NTA, would be invalid to any extent, in particular by operation of the *Racial Discrimination Act* 1975 (Cth) (the RDA). The relevant provisions of the RDA commenced on 31 October 1975. ''Past act'' is a somewhat misleading expression. Many previous acts which took effect at earlier times will not be ''past acts'' because they are not to any extent invalid by operation of the RDA. They may have been effective at common law to work extinguishment of native title.

6 Division 2 provides in respect of some ''past acts'' not only for their validation (by s 14 and corresponding State and Territory laws), but also (by s 15 and corresponding State and Territory laws) for the extinguishment wholly or partly of native title because they are to be classified as some particular species of ''past act''. Where the ''past act'' in question is, to put it broadly, the grant of a freehold estate or a lease, then for Div 2 to have its effect with respect both to validation and extinguishment, the grant must have been made before 1 January 1994 and the estate or lease must have been in force on that date. Grants of freehold and leases which post-dated 31 October 1975 and were ''past acts'' but which were not still in effect on 1 January 1994 will not be a ''category A past act'' or a ''category B past act'' and there will be no extinguishment of native title as provided in Div 2 by s 15 and corresponding State and Territory laws.

7 To other categories of ''past act'', including the grants of mining

leases, the ''non-extinguishment principle'' applies. This ''principle'' is spelled out in s 238 of the NTA. In general terms it involves the suspension of what otherwise would be native title rights and interests so that, whilst they continue to exist, to the extent of any inconsistency (which may be entire) they have no effect in relation to the ''past act'' in question. The native title rights and interests again have full effect after the ''past act'' ceases to operate or its effects are wholly removed.

8 The 1998 Act introduced Div 2B into Pt 2. It has the stated object of confirming past extinguishment of native title by certain acts which were valid and not struck at by the RDA because, for example, they predated the RDA, or which are rendered valid by the NTA, including by s 14 of Div 2 (and State and Territory analogues). This object is achieved by Div 2B directly with respect to acts attributable to the Commonwealth; in respect of State and Territory acts, Div 2B supports State and Territory validating legislation. Division 2B fixes upon certain ''previous'' acts but not the definition of ''past act''. The previous act must have taken place before 23 December 1996 but need not still have been effective at that date. For example, Div 2B applies to certain pastoral leases granted before 31 October 1975 which had expired before 23 December 1996 and were not ''past acts''.

9 Sections 23C and 23G are the provisions in Div 2B which respectively (with corresponding State and Territory provisions) mandate entire and partial extinguishment. Section 23C deals with extinguishment by ''previous exclusive possession acts''. Section 23G deals with extinguishment by ''previous non-exclusive possession acts''. ''Previous exclusive possession act'' is defined in s 23B so as to draw in a wider class of ''act'' than does the definition in s 23F of ''previous non-exclusive possession act''. The latter term is defined so as to be limited to the ''non-exclusive agricultural lease'' and ''non-exclusive pastoral lease''. Thus, a ''previous act'' may be of a species which (exclusivity aside) falls within s 23B but not s 23F.

10 If Div 2B applies to a particular act, then, in general (125), s 15 (in Div 2) and State and Territory counterparts do not apply and the extinguishment regime which Div 2 otherwise in some cases might impose is put aside. In that way, Div 2B provides the analytical starting point and any overlapping between the two extinguishment regimes is resolved in favour of Div 2B and the corresponding State and Territory provisions.

11 The 1998 Act also introduced Div 2A into Pt 2. Division 2A provides for the validation of certain acts which took place on or after 1 January 1994 but on or before 23 December 1996 and which meet the definition in s 232A of ''intermediate period acts''. Division 2A also deals with the effect of that validation upon native title. Some acts

(125) See ss 23C(3) and 23G(3), but note the restriction flowing from s 23G(2) and s 15(1)(a), a special provision dealing with public works.

in question in this litigation may be ''intermediate period acts'' and it will be necessary to say something about the operation of Div 2A but attention will be directed principally to Divs 2 and 2B (126).

12 It should be added that the NTA and certain State and Territory laws provide for compensation in respect of some acts of extinguishment of native title. Such provisions are found in Div 2 (ss 17, 20) and Div 2B (s 23J) of Pt 2 of the NTA. In this litigation, no issues under these provisions of Pt 2 directly arise. What has been sought is a determination of the existence of native title, not compensation for any extinguishment which may have occurred. However, as will appear (127), in considering the operation of the RDA (as construed in decisions of this Court) (128) upon certain post-1975 alleged extinguishing acts under State and Territory legislation, the provisions (if any) for compensation under that legislation become important; if those provisions otherwise would have applied, it becomes necessary to consider s 45(1) of the NTA. This takes what otherwise would be a right to compensation under State or Territory law, being a right brought into existence by the operation of the RDA upon that law, and transmutes it into a right to compensation under Div 5 of Pt 2 (ss 48-54) of the NTA.

13 At all material times, s 10 of the NTA has declared that ''[n]ative title is recognised, and protected'', in accordance with the NTA, and s 11 has included a statement that ''native title'' cannot be extinguished contrary to the NTA. The starting point must be the meaning of the term ''native title''. An understanding of the answer to that question is a necessary pre-condition to all that follows in these reasons and it is convenient to turn to the matter immediately.

2. *Native title*

14 As is now well recognised, the connection which Aboriginal peoples have with ''country'' is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd* (129), Blackburn J said that: ''the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship . . . There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole''. It is a relationship which sometimes is spoken of as having to care for, and being able to ''speak for'', country. ''Speaking for'' country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of

(126) See at 77-79 [41]-[45] and 110-112 [135]-[140].
(127) See, eg, at 170 [321].
(128) See 96-109 [98]-[134].
(129) (1971) 17 FLR 141 at 167.

the connection that the phrase seeks to capture. The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer. Nor are they reduced by the requirement of the NTA, now found in par (e) of s 225, for a determination by the Federal Court to state, with respect to land or waters in the determination area not covered by a ''non-exclusive agricultural lease'' or a ''non-exclusive pastoral lease'', whether the native title rights and interests ''confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others''.

15 The expression ''native title'' or ''native title rights and interests'' is elaborately defined in s 223 of the NTA. For present purposes, it is sufficient to set out the text of sub-ss (1) and (2). These have not changed since the statute was enacted. The statutory text is:

> ''(1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.
>
> (2) Without limiting sub-section (1), *rights and interests* in that sub-section includes hunting, gathering, or fishing, rights and interests.''

16 Much of the argument in the courts below, as in this Court, took as its starting point consideration of what was said in *Mabo [No 2]*. No doubt account may be taken of what was decided and what was said in that case when considering the meaning and effect of the NTA. This especially is so when it is recognised that pars (a) and (b) of s 223(1) plainly are based on what was said by Brennan J in *Mabo [No 2]* (130). It is, however, of the very first importance to recognise two critical points: that s 11(1) of the NTA provides that native title is not able to be extinguished contrary to the NTA and that the claims that gave rise to the present appeals are claims made under the NTA for rights that

(130) (1992) 175 CLR 1 at 70.

are defined in that statute. In particular, at the time of the decision of the Full Court of the Federal Court, the applicable legislation dealt at some length and in some detail with the question whether rights of the kind that are claimed have been extinguished or suspended. Full Court authority which obliged it to disregard the statutory text in its then current form should be overruled by this Court. The consequence, as will become apparent in these reasons, is that the course taken by the litigation in the Federal Court does not provide a sufficient foundation for this Court to determine the outcome which would be reached were the provisions of the legislation given their necessary operation upon the litigation.

17 However, as indicated, the immediately relevant elements in the definition in s 223(1) of ''native title'' and ''native title rights and interests'' have remained constant. Several points should be made here. First, the rights and interests may be communal, group or individual rights and interests. Secondly, the rights and interests consist ''in relation to land or waters''. Thirdly, the rights and interests must have three characteristics: (a) they are rights and interests which are ''possessed under the traditional laws acknowledged, and the traditional customs observed'', by the relevant peoples; (b) by those traditional laws and customs, the peoples ''have a connection with'' the land or waters in question; and (c) the rights and interests must be ''recognised by the common law of Australia''.

18 The question in a given case whether (a) is satisfied presents a question of fact. It requires not only the identification of the laws and customs said to be traditional laws and customs, but, no less importantly, the identification of the rights and interests in relation to land or waters which are possessed under *those* laws or customs. These inquiries may well depend upon the same evidence as is used to establish connection of the relevant peoples with the land or waters. This is because the connection that is required by par (b) of s 223(1) is a connection with the land or waters ''by those laws and customs''. Nevertheless, it is important to notice that there are two inquiries required by the statutory definition: in the one case for the rights and interests possessed under traditional laws and customs and, in the other, for connection with land or waters by those laws and customs.

19 The distinction is critical for any attempt (as is made in this litigation) to treat the maintenance and protection of cultural knowledge of native title holders as a matter with which the NTA is concerned. The cultural knowledge in question may be possessed under the traditional laws acknowledged and traditional customs observed by the relevant peoples. The issue which then arises is whether, by those laws and customs, there is ''a connection with'' the land or waters in question.

20 Paragraphs (a) and (b) of s 223(1) indicate that it is from the *traditional* laws and customs that native title rights and interests derive, not the common law. The common law is not the source of the relevant rights and interests; the role accorded to the common law by

the statutory definition is that stated in par (c) of s 223(1). This is the ''recognition'' of rights and interests. To date, the case law does not purport to provide a comprehensive understanding of what is involved in the notion of ''recognition''.

21 There may be some laws and customs which meet the criteria in pars (a) and (b) of s 223(1), but which clash with the general objective of the common law of the preservation and protection of society as a whole (131), but the case law does not provide examples. Secondly, the statement in *Mabo [No 2]* (132) that native title ''may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence'' is yet to be developed by decisions indicating what is involved in the notion of ''appropriate'' remedies. In *Fejo* (133), six members of the Court referred to the determination provisions of the NTA and continued:

> ''However, the [NTA] 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. But the protection which the [NTA] gives is protection 'in accordance with [the NTA]' (s 10). 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.''

Thirdly, the recognition may cease where, as a matter of law (134), native title rights have been extinguished even though, but for that legal conclusion, on the facts native title would still subsist. Thus, for example, the circumstance that, perhaps by reason of the attitude adopted by the non-indigenous owner of land in fee simple, indigenous people retain connections to the land in question does not derogate from the conclusion that the grant of the fee simple extinguished the native title. That conclusion would follow from the reasoning and the decision in *Fejo*.

22 The actual holding in *Wik* touched upon some of these matters but was constrained by the course which had been taken in the Federal Court. There had been no determination at trial as to the existence or otherwise of native title rights and interests. Rather, by the formulation of questions for decision in advance of trial, an attempt had been made, as Toohey J put it, to (135):

(131) cf *Church of the New Faith v Commissioner of Pay-roll Tax (Vict)* (1983) 154 CLR 120 at 135-136; *Mitchell v Minister of National Revenue* [2001] 1 SCR 911 at 987 [153]-[154].
(132) (1992) 175 CLR 1 at 61.
(133) (1998) 195 CLR 96 at 120-121 [22].
(134) *Yanner v Eaton* (1999) 201 CLR 351 at 395 [107].
(135) *Wik* (1996) 187 CLR 1 at 131.

> ''reduce to straightforward propositions what are in truth complex issues of law and of fact. [The questions] look for a certainty in the answers which, in the circumstances of the present appeals, is a mirage. There have been no findings as to whether native title rights even exist in connection with the land, let alone the content of any such rights.''

In the result, the Court determined that there was no necessary extinguishment of such native title rights as might otherwise exist by reason of the grant of pastoral leases under the Queensland statutes in question. However, with the concurrence of Gaudron, Gummow and Kirby JJ, Toohey J added (136):

> ''Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established. If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees.''

23 This passage was consistent with what by then had been provided in s 227 of the NTA. This states:

> ''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 term ''act'' is given a detailed definition in s 226 (137).

24 The 1998 Act substituted a fresh s 4 to the NTA (s 3 and Sch 1, Item 2). This makes it plain that the amendments made by the 1998 Act were a legislative response to what was seen as the outcome in *Wik*. In particular, s 4(6) states:

> ''This Act also confirms that many acts done before the High Court's judgment [in *Wik*], that were either valid, or have been validated under the past act or intermediate period act provisions, will have extinguished native title. If the acts are *previous exclusive possession acts* (see section 23B), the extinguishment is complete; if

(136) *Wik* (1996) 187 CLR 1 at 133.

(137) This states: ''(1) This section affects the meaning of *act* in references to an act affecting native title and in other references in relation to native title. (2) An *act* includes any of the following acts: (a) the making, amendment or repeal of any legislation; (b) the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument; (c) the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters; (d) the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise; (e) the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation; (f) an act having any effect at common law or in equity. (3) An *act* may be done by the Crown in any of its capacities or by any other person.''

the acts are *previous non-exclusive possession acts* (see section 23F), the extinguishment is to the extent of any inconsistency.''

Sections 23B and 23F are in Div 2B which was added by the 1998 Act. Division 2B is of central importance for these appeals.

25 Yet again it must be emphasised that it is to the terms of the NTA that primary regard must be had, and not the decisions in *Mabo [No 2]* or *Wik*. The only present relevance of those decisions is for whatever light they cast on the NTA.

3. *Extinguishment of native title*

26 Before the changes made by the 1998 Act, which came into effect after the institution of the present litigation, the NTA itself otherwise indicated little about what was involved in the notion of extinguishment of native title. Native title might be taken to have ceased to exist because, in a given case, those asserting title could not establish the present subsistence of the necessary connection required by par (b) of s 223(1), but it may be doubted that circumstances of this kind are at the core of the meaning to be given to the notion of extinguishment. The term ''extinguishment'' is most often used to describe the consequences in law of acts attributed to the legislative or executive branches of government. In addition, it was asserted that in some cases the native title claimed in these matters had been extinguished by acts of the executive branch of government, done pursuant to legislative authority, that were acts which did not constitute a grant of rights to any third party but were said to be the assertion, by the executive, of rights in respect of the land, or the exercise, again by the executive, of powers over the land, inconsistent with the continued existence of some or all native title rights and interests. It is important to recognise, however, that despite the grant of rights to others, or the assertion or exercise of rights or powers by the executive, to some extent the native title might survive or there might be no inconsistency in the relevant sense at all. Further, as *Yanner v Eaton* illustrates, statute may regulate the exercise of the native title right without abrogating it.

27 The amendments made to the NTA by the 1998 Act continue the distinction between the extinguishment of native title rights and interests and partial inconsistency. Section 237A states:

> ''The word *extinguish*, in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.''

The NTA contains in s 242(1) a definition of ''lease'' which includes, as par (c), ''anything that, at or before the time of its creation, is, for any purpose, by a law of the Commonwealth, a State or a Territory, declared to be or described as a lease''. The 1998 Act introduced a

distinction, important for these appeals, between the exclusive pastoral lease and the non-exclusive pastoral lease. The latter is a pastoral lease that is not included in the former class (s 248B). A pastoral lease that confers a right of exclusive possession over the land or waters covered by the lease will be an exclusive pastoral lease (s 248A).

28 At trial, findings of fact were made by Lee J to underpin the conclusion that the claimants had satisfied the requirements of pars (a) and (b) of the definition in s 223(1) of the NTA. The Full Court was not persuaded by the submissions of Western Australia that the trial judge had erred in these findings; the evidence had been open to an interpretation that supported his findings (138). The Northern Territory throughout has taken a position which differs from that of Western Australia. There has been no issue between the Territory and the Ningarmara claimants that the laws and customs of the three estate groups (139) connected them to the area claimed in the Territory and that it was reasonable to find (by inference) that those laws and customs were rooted in the pre-sovereignty laws and customs.

29 The arguments in this Court focused upon questions of extinguishment rather than upon the anterior questions of the existence of native title and the particular content of native title rights and interests. That, as will appear, gives rise to some difficulty. The more general the terms in which the findings are made as to the subsistence of native title, the more difficult the giving of specificity to findings of extinguishment, particularly where, as the NTA postulates, there may be partial extinguishment. It may be observed that the specific finding at trial in *Yanner v Eaton* as to the existence of the hunting and fishing rights and interests which the appellant claimed to have exercised facilitated the finding in this Court of regulation rather than extinguishment.

B. *The Litigation Below*

1. *General*

30 This litigation was instituted in the Federal Court on 2 February 1995. On that date, the Native Title Registrar (the Registrar), holding office under s 95 of the NTA, lodged with the Federal Court for decision an application under ss 13(1) and 61 of the NTA for ''a determination of native title''. This engaged the definition of ''native title'' in s 223 of the NTA. The application had been accepted on 26 May 1994 but the Native Title Tribunal (the Tribunal) itself made no determination and, as a consequence, s 74 of the NTA obliged the Registrar to lodge the application for decision by the Federal Court. (Section 74 was later repealed by s 3 and Sch 2, Pt 1, Item 18 of the 1998 Act.)

(138) *Western Australia v Ward* (2000) 99 FCR 316 at 377-378 [222]-[228].

(139) Bindjen, Damberal and Nyawamnyawam estate groups; see *Western Australia v Ward* (2000) 99 FCR 316 at 371 [200].

31 Section 213(2) of the NTA conferred jurisdiction upon the Federal Court in relation to matters arising under that statute and s 81 provided that the Federal Court had jurisdiction to hear and determine applications lodged with it under s 74, that jurisdiction being exclusive of the jurisdiction of all other courts except the High Court. At the time of the institution of the litigation, the expression ''determination of native title'' was defined in s 225 as:

> ''a determination of the following:
> (a) whether native title exists in relation to a particular area of land or waters;
> (b) if it exists:
> (i) who holds it; and
> (ii) whether the native title rights and interests confer possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others; and
> (iii) those native title rights and interests that the maker of the determination considers to be of importance; and
> (iv) in any case — the nature and extent of any other interest in relation to the land or waters that may affect the native title rights and interests.''

Section 225 was repealed by the 1998 Act (s 3 and Sch 2, Pt 1, Item 80) and a new section substituted, with effect from 30 September 1998 (140). That was after the reservation but before the delivery of judgment by the primary judge (141). It will be necessary later in these reasons to return to the significance of this and other changes to the NTA made by the 1998 Act and also to the significance of subsequent legislation enacted in Western Australia (the State) and the Northern Territory (the Territory).

32 At all material times, s 13(1) of the NTA has provided for the making of an application to the Federal Court for the subsequent variation or revocation of a determination of native title on the grounds stipulated in sub-s (5), namely:

> ''(a) that events have taken place since the determination was made that have caused the determination no longer to be correct; or
> (b) that the interests of justice require the variation or revocation of the determination.''

Thus, an order in which the Federal Court makes a determination of native title has an indefinite character which distinguishes it from a declaration of legal right as ordinarily understood in such authorities as *International General Electric Co of New York Ltd v Commissioners*

(140) *Commonwealth of Australia Gazette*, S428, 28 August 1998.
(141) *Ward v Western Australia* (1998) 159 ALR 483.

of Customs and Excise (142). That indefinite character reflects the requirement for the continuing acknowledgment and observance of traditional laws and customs and continuing connection with land implicit in the definition of ''native title'' in s 223(1) of the NTA.

33 As the litigation was constituted after the making of interlocutory orders in the Federal Court, three groups of claimants sought determinations of native title. The first claimants (Ben Ward and others) applied on behalf of the Miriuwung and Gajerrong People, the second claimants comprised Cecil Ningarmara and others, and the third claimants (Delores Cheinmora and others) applied on behalf of the Balangarra Peoples.

2. *The claim area*

34 The whole of the claim area fell generally within the region known as the East Kimberley, comprising land and waters in the north of the State and some adjacent land in the Territory. The primary judge said of the settlement by Europeans of the East Kimberley (143):

> ''Land in the East Kimberley was not made available to settlers by the Crown until late in the nineteenth 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* (144), 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.'
>
> The first grants of rights to depasture stock in the region were for land undefined by survey. Pastoral rights were applied for by

(142) [1962] Ch 784 at 789. See also *R v Inland Revenue Commissioners; Ex parte Rossminster Ltd* [1980] AC 952 at 1014, 1027; *Magman International Pty Ltd v Westpac Banking Corporation* (1991) 32 FCR 1 at 15; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-357 [45]-[49].

(143) *Ward* (1998) 159 ALR 483 at 489.

(144) 2nd ed (1970), p 63.

marking on maps the approximate positions of the areas sought. In 1881 two speculators acquired pastoral rights to approximately 800,000 ha 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 one million hectares, including land on the Ord River, wherever the course of that river may be shown to be by subsequent survey and mapping (145). 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.''

His Honour continued (146):

''By the end of 1883 approximately 20 million ha 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 100 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 ha 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 (147).''

35 In total, the claim area was approximately 7,900 km^2. Lee J gave the following summary description of the land and waters within the State in respect of which native title was claimed (148): (i) Crown land in or

(145) Durack, *Kings in Grass Castles* (1973), pp 209-210.
(146) *Ward* (1998) 159 ALR 483 at 490.
(147) Graham-Taylor, *The Ord River Scheme*, pp 6-7.
(148) *Ward* (1998) 159 ALR 483 at 491-492; a map appears at 641.

about the town of Kununurra, the Ord River irrigation area, and Lake Argyle and several freehold lots; (ii) Crown land in the Glen Hill pastoral lease south-west of Lake Argyle but separated from the area in (i); (iii) Crown land and waters in the inter-tidal zones and mud flats on the eastern side of the Cambridge Gulf (the Gulf) and on the north coast of the State between the Gulf and the border with the Territory; (iv) Crown land in three small islands, ''Booroongoong'' (Lacrosse), ''Kanggurryu'' (Rocky) and ''Ngarrmorr'' (Pelican) near the mouth of the Gulf; and (v) Crown land in an area loosely described as ''Goose Hill'', east of the town of Wyndham and south of the Ord River. The areas in (i) and (ii) represent Crown land resumed or taken from pastoral leases at various stages in the development of what has been called the Ord River irrigation project (the Project). Further, the area in (i) contains part of the most significant tenement on which diamond mining operations are carried out on Crown land south-west of Lake Argyle by the Argyle Diamond Mine Joint Venture (149). The rest of that tenement lay outside the claim area.

36 Lee J described the area comprised in (iii), (iv) and (v) as follows (150):

> ''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 40 m 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.''

The variety of interests involved in the areas resumed or set aside for the Project appears in the following passage of his Honour's reasons (151):

> ''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

(149) *Ward* (1998) 159 ALR 483 at 492.
(150) *Ward* (1998) 159 ALR 483 at 492-493.
(151) *Ward* (1998) 159 ALR 483 at 492.

> 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 Kimberley . . . 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 organisations. 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.''

Later in his reasons, his Honour gave a further description of the claim area near Kununurra and said (152):

> ''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.''

It may be that some of the claim area was never subject to a pastoral lease and at all times was vacant Crown land (153). The findings of fact below do not permit us to assume the contrary.

37 With respect to the claim area in the Territory, Lee J observed that part of it was in the Keep River National Park, having been excised in 1979 from the Newry pastoral lease. A further area, adjacent to the

(152) *Ward* (1998) 159 ALR 483 at 584-585.
(153) cf at 129-130 [189], 157 [281].

Keep River National Park, was excised from the Newry pastoral lease in 1987. Other land in the Territory, contiguous with or formerly within the Keep River National Park, had been granted in 1990 and 1993 as freehold land to Aboriginal corporations (154).

3. *The determination of the primary judge*

38 By orders made on 24 November 1998 and 26 February 1999, Lee J made a determination as to the existence of native title in respect of a very large portion of the claim area.

39 In the form in which it stood at the time of these orders, s 225 of the NTA stated that a determination of native title was:

> ''a determination whether or not native title exists in relation to a particular area (the *determination area*) of land or waters and, if it does exist, a determination of:
>
> (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
>
> (b) the nature and extent of the native title rights and interests in relation to the determination area; and
>
> (c) the nature and extent of any other interests in relation to the determination area; and
>
> (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
>
> (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease — whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.'' (Emphasis added.)

40 The determination made at trial proceeded upon a view of the requirements for extinguishment which some parties sought to have this Court reinstate. As will later appear, the Full Court was correct in rejecting the view which had been taken at trial. Paragraph 3(d) of the determination gave as a particular of the rights and interests exercisable by reason of the existence of native title ''a right to control the access of others to the 'determination area'''. Paragraph 3(j) gave as another particular: ''a right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the 'determination area'.'' It is unnecessary to set out the balance of the text of the determination. The Full Court later set the determination aside (155). The Full Court substituted a fresh determination, which in turn is the subject of contention in this Court.

(154) *Ward* (1998) 159 ALR 483 at 493.
(155) *Western Australia v Ward* (2000) 99 FCR 316.

4. *The* 1998 *Act*

41 The term ''non-exclusive pastoral lease'' which appears in par (e) of s 225 and elsewhere in the NTA has particular significance for the present litigation. As already indicated, the meaning of the term is to be gauged from ss 248A and 248B of the NTA. Sections 248A and 248B were added by the 1998 Act (s 3 and Sch 1, Item 54). The 1998 Act thus was immediately attracted by s 225 as it stood at the time of the determination by the primary judge. Division 2B (ss 23A-23JA) also was added by the 1998 Act. It uses the notions of ''exclusive pastoral lease'' and ''non-exclusive pastoral lease'' as integers in the definitions of the expressions ''previous exclusive possession acts'' and ''previous non-exclusive possession acts''. These govern the operation of Div 2B. Section 23A is a summary of the operation of Div 2B. It states:

> ''(1) In summary, this Division provides that certain acts attributable to the Commonwealth that were done on or before 23 December 1996 will have completely or partially extinguished native title.
> (2) If the acts were *previous exclusive possession acts* (involving the grant or vesting of things such as freehold estates or leases that conferred exclusive possession, or the construction or establishment of public works), the acts will have completely extinguished native title.
> (3) If the acts were *previous non-exclusive possession acts* (involving grants of non-exclusive agricultural leases or non-exclusive pastoral leases), they will have extinguished native title to the extent of any inconsistency.
> (4) This Division also allows States and Territories to legislate, in respect of certain acts attributable to them, to extinguish native title in the same way as is done under this Division for Commonwealth acts.''

Section 239 of the NTA deals with the attribution of acts to the Commonwealth, States and Territories. It states:

> ''An act is *attributable* to the Commonwealth, a State or a Territory if the act is done by:
>
> (a) the Crown in right of the Commonwealth, the State or the Territory; or
>
> (b) the Parliament or Legislative Assembly of the Commonwealth, the State or the Territory; or
>
> (c) any person under a law of the Commonwealth, the State or the Territory.''

The expression ''any person under'' in par (c) of s 239 significantly extends the notion of attribution.

42 It may be added that provisions in Div 2B (156) respecting the suspension rather than extinguishment of native title rights and interests have a significant impact upon the content of the obligation under s 23J to compensate native title holders in respect of extinguishment effected under the NTA. The entitlement to compensation will arise only to the extent of extinguishment, so that any legislative treatment of inconsistency as leading to no more than suspension of native title rights and interests will have the effect of diminishing what would otherwise be the obligation to compensate native title holders.

43 The 1998 Act (s 3 and Sch 1, Item 4) amended s 11, a central provision of the NTA. Section 11 states, as it did at the time of the decision and the making of the determination at first instance, that:

> ''(1) Native title is not able to be extinguished contrary to this Act.
> (2) An act that consists of the making, amendment or repeal of legislation on or after 1 July 1993 by the Commonwealth, a State or a Territory is only able to extinguish native title:
> (a) in accordance with Division 2B (which deals with confirmation of past extinguishment of native title) or Division 3 (which deals with future acts etc and native title) of Part 2; or
> (b) by validating past acts, or intermediate period acts, in relation to the native title.''

Section 11, therefore, expressly provided for consideration of the operation of Div 2B, albeit in relation to the making, amendment or repeal of legislation on or after 1 July 1993.

44 In the proceeding before Lee J, the State did seek to rely upon Div 2B. It submitted that, by reason of the *Western Australia Agreement (Ord River Irrigation) Act* 1968 (Cth) (the 1968 Ord River Act), the construction within the claim area of the main dam and associated works for the Project was an act done by a person under a law of the Commonwealth, thereby engaging Div 2B. That submission was rejected by his Honour (157), and is not a live issue in this Court. But Div 2B was drawn into the decision-making process leading to the determination reflected in the orders made by the primary judge in other ways as well. In so far as acts attributable to the Commonwealth which were done on or before 23 December 1996 (when *Wik* was decided) were relied upon in the litigation to extinguish native title wholly or partially, consideration had to be given to the operation of Div 2B.

45 Moreover, s 23A(4) indicates that Div 2B also allows the States and Territories to legislate in the same way as is done under the Division in respect of Commonwealth acts. Such a provision with respect to the

(156) Particularly in s 23G(1)(b)(ii).
(157) *Ward* (1998) 159 ALR 483 at 635-636.

States and Territories is then made specifically, in ss 23E and 23I, permitting the confirmation of extinguishment, or partial extinguishment, of native title by previous exclusive possession acts or previous non-exclusive possession acts of a State or Territory. At the time of the decision at trial, no such legislation of Western Australia was in force. However, the Territory had legislated. The *Validation of Titles and Actions Amendment Act* 1998 (NT) (the 1998 NT Act), which amended the *Validation of Titles and Actions Act* 1994 (NT), had commenced on 1 October 1998. The 1998 NT Act also substituted a new short title for the 1994 principal Act, the *Validation (Native Title) Act*. It is convenient to refer to the 1994 Act, as amended by the 1998 NT Act, as ''the Territory Validation Act''. No reliance appears to have been placed upon that statute before Lee J when the parties responded to an invitation to make further submissions with respect to the effect of the 1998 NT Act.

5. *The Full Court appeals*

46 Several of the parties to the proceedings at trial were dissatisfied with the determination that was made and appealed to the Full Court of the Federal Court. The judgment on the appeals was reserved on 13 August 1999 and, on 3 March 2000, the Full Court (Beaumont and von Doussa JJ, North J dissenting) delivered its reasons for judgment and made orders setting aside the orders made by Lee J. In place thereof, by orders entered on 13 July 2000, the Full Court made a determination of native title in substitution for that made at trial. That order by the Full Court then answered the statutory description of an approved determination of native title (s 13(6) of the NTA).

47 The order of the Full Court containing that determination was as follows (158):

> ''The Court orders, declares and determines that:
> 1. Native title exists in the 'determination area' save for the areas of land or waters described in the Second Schedule. The determination area is that part of the land or waters within the area depicted by red outline on the map in the First 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 [Tribunal] referred to the Court by the Tribunal.
> 2. Native title existing in the determination area is held by the Miriuwung and Gajerrong People, and in respect of that part of the determination area known as Booroon[g]oong (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 paragraph 7 hereof the nature and extent of the native title rights and interests in:

(158) *Western Australia v Ward* (2000) 99 FCR 316 at 542-543.

The whole of the land in the Glen Hill pastoral lease;
The whole of Reserve 40260;
Booroongoong (Lacrosse Island);
Kanggurryu (Rocky Island);
The north-west extremity of the mainland portion of the determination area encompassing Shakespeare Hill and Cape Donnet, being the mainland lying outside the limits of the following former leases 3114/1058, 396/508 and 2163/98;
The whole of NT portion 3541 (Policeman's Hole);
The whole of NT portion 3542 (Bucket Springs); and
The whole of NT portion 3863 (Bubble Bubble)

are an entitlement as against the whole world to possession, occupation, use and enjoyment of these parts of the determination area.

4. Subject to paragraph 7 hereof the nature and extent of the native title rights and interests in Reserves 26600, 31221, 40536 and 41401, each for 'Use and Benefit of Aboriginal Inhabitants', Reserve 31504 for 'Arts and Historical — Aborigines' and Reserve 32446 'Native Paintings', being reserves within the [Project] area to which s 47A of the [NTA] applies, are an entitlement as against the whole world to possession, occupation, use and enjoyment of these parts of the determination area, save that their entitlement does not affect the public works comprising the [Project].

5. Subject to paragraphs 7, 8, 9 and 10 hereof the nature and extent of the native title rights and interests existing in the balance of the determination area are as follows:

(a) a right to possess, occupy, use and enjoy the land;
(b) a right to make decisions about the use and enjoyment of the land;
(c) a right of access to the land;
(d) a right to use and enjoy the traditional resources of the land;
(e) a right to maintain and protect places of importance under traditional laws, customs and practices in the determination area.

6. The nature and extent of other interests in relation to the determination area are the interests created by the Crown or created otherwise, as set out in the Third Schedule.

7. There is no native title right or interest in minerals and petroleum in the State as defined in the *Mining Act* 1904 (WA), the *Mining Act* 1978 (WA), the *Petroleum Act* 1936 (WA) and the *Petroleum Act* 1967 (WA), or in the Territory as defined in the *Minerals (Acquisition) Act* (NT) and the *Petroleum Act* 1984 (NT). In all nature reserves or wildlife sanctuaries created in [the State] in the determination area before the [RDA] came into operation, native title to take fauna has been wholly extinguished.

8. To the extent that any inconsistency exists between the native title rights and interests referred to in paragraph 5 hereof and the

rights conferred by other interests referred to in paragraph 6 hereof the native title rights and interests must yield to such other rights.

9. The native title rights and interests referred to in paragraph 5 hereof are not exclusive of the rights and interests of others.

10. The native title rights and interests described in paragraphs 3, 4 and 5 are subject to regulation, control, curtailment or restriction by valid laws of Australia.

11. (a) Declare that the rights and interests from time to time comprising the native title area are held by the common law holders.

(b) Direct that, within three months of the date of this determination, a representative of the common law holders nominate in writing to the Federal Court a prescribed body corporate to perform the functions mentioned in s 57(3) of the NTA. Reserve liberty to apply to a single judge of the Court in that connection.''

The Second Schedule listed those parts of the determination area in which native title had been wholly extinguished. The Third Schedule detailed a range of ''other interests'', including interests under a number of statutes of the State (159).

48 The form of the determination that was made must be understood in the light of the way in which the proceedings had been conducted at trial. Prior to the hearing before Lee J, the Ward claimants had filed a statement of the nature of the rights which it was contended were exercisable in relation to the land or waters claimed. That statement took each area of land or waters claimed, and stated the rights that were said to be exercisable over that area. Typically, more than twenty

(159) *Western Australia v Ward* (2000) 99 FCR 316 at 546. These ''other interests'' were: ''(a) Interests of persons in whom Crown reserves are vested under the *Land Act* 1898 (WA) or [the] *Land Act* 1933 (WA) or under a lease 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 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 licensees 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 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 s 46(1A) of the *Lands Acquisition Act* 1979 (NT). (i) Other interests held by members of the public arising under the common law.''

rights were claimed in respect of each area. Those rights were variously expressed. At the widest, the claim made was for ''the right to possession, occupation, use and enjoyment of the land''. Other, narrower, claims were made. These claims included rights ''to derive sustenance from the land'', ''to hunt and gather food on the land'', ''to hold ceremonies on the land'', ''to hold ceremonies concerning the land'', ''to care for the land according to environmental requirements, including burning the land'', and ''to regulate access to the land''. The debate at trial, however, appears to have focused largely on the widest of the claims — the claim to the right to possession, occupation, use and enjoyment of the land — and on claims to control access to or use of the land.

49 It is convenient to notice, at this point, some aspects of the determination that was made by the Full Court. First, on its face, there appears to be tension between par 5(b), stating that the native title rights and interests include a right to make decisions about the use and enjoyment of the land, and par 9 which provides that this, and the other rights and interests described in par 5 of the determination, are not exclusive of the rights and interests of others. Identifying the content of a right to make decisions about use and enjoyment of land that is a right which is not exclusive of the rights of others in that regard is not easy. Providing that, to the extent that any inconsistency exists, native title rights and interests must yield to the rights of others does not help in identifying the content of a non-exclusive right to make decisions about use and enjoyment.

50 Secondly, although there would be little or no difficulty in identifying those who hold most of the ''other interests'' set out in the Third Schedule to the determination, it may not always be easy to identify ''persons entitled to use reserves according to a purpose for which Crown land is reserved'', at least in those cases where the purpose is stated in general terms. Further, it is by no means clear exactly what is encompassed by the reference in the Third Schedule to ''other interests held by members of the public arising under the common law''.

51 A determination of native title must comply with the requirements of s 225. In particular, it must state the *nature* and *extent* of the native title rights and interests in relation to the determination area (s 225(b)). Where, as was the case here in relation to some parts of the claim area, native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms.

52 It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use

to which it is put. To use those expressions in such a case is apt to mislead. Rather, as the form of the Ward claimants' statement of alleged rights might suggest, it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters.

53 Further, to find that, according to traditional law and culture, there is a right to control access to land, or to make decisions about its use, but that the right is not an exclusive right, may mask the fact that there is an unresolved question of extinguishment. At the least, it requires close attention to the statement of ''the relationship'' between the native title rights and interests and the ''other interests'' relating to the determination area (s 225(d)).

C. *This Appeal*

1. *Parties and submissions*

54 Two of the groups of claimants (Ben Ward and others on behalf of the Miriuwung and Gajerrong People, and Cecil Ningarmara and others) and two of the respondents at trial (the State and the Territory), being dissatisfied with the determination made by the Full Court, now appeal to this Court. There are four appeals. Matter No P59/2000 is brought by the State, Matter No P62/2000 by the Territory, Matter No P63/2000 by Cecil Ningarmara and others, and Matter No P67/2000 by Ben Ward and others. Matter Nos P62 and P67 are confined to grounds narrower than those on which special leave was sought.

55 The appeals have been heard together. Applications for leave to cross-appeal have been filed by some parties; notices of contention have been given by some parties.

56 By their appeals, the Ward and Ningarmara claimants sought to have the determination made by the Full Court set aside and a determination made which would give more extensive native title rights and interests. The Cheinmora claimants, who made a claim in respect of land or waters which include Booroongoong or Lacrosse Island, and the sixth respondent (in Matter No P67), Kimberley Land Council, supported those submissions. Several other bodies intervened in support (160). Submissions to the contrary were advanced on behalf of the State, the Territory, the Conservation Land Council (a Territory statutory corporation), and what may be referred to collectively as the private respondents: the group comprising the Alligator respondents; Crosswalk Pty Ltd (Crosswalk) and Baines River Cattle Co Pty Ltd; and Argyle Diamond Mines Pty Ltd and the Argyle Diamond Mine Joint Venture. The Attorneys-General for the Commonwealth and South Australia intervened substantially in support of some or all of

(160) Human Rights and Equal Opportunity Commission, the Goldfields Land Council, Yamatji Barna Baba Maaja Aboriginal Corporation, and Mirimbiak Nations Aboriginal Corporation.

the submissions advanced on behalf of the State and the Territory, as did the Pastoralists and Graziers Association of WA (Inc).

2. *Cultural knowledge and spiritual connection*

57 The determination made by the Full Court omitted any provision such as that in par 3(j) of the determination made at trial. The majority of the Full Court took that course saying (161):

> ''Although the relationship of Aboriginal people to their land has a religious or spiritual dimension, we do not think that a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title.''

58 In this Court, it was submitted that the Full Court erred in this respect and that this Court should restore par 3(j) of the first determination. The first difficulty in the path of that submission is the imprecision of the term ''cultural knowledge'' and the apparent lack of any specific content given it by factual findings made at trial. In submissions, reference was made to such matters as the inappropriate viewing, hearing or reproduction of secret ceremonies, artworks, song cycles and sacred narratives.

59 To some degree, for example respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land found in par (b) of the definition in s 223(1) of the NTA. However, it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under par (c) of s 223(1). The ''recognition'' of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere. It is here that the second and fatal difficulty appears.

60 In *Bulun Bulun v R & T Textiles Pty Ltd* (162), von Doussa J observed that a fundamental principle of the Australian legal system was that the ownership of land and ownership of artistic works are separate statutory and common law institutions. That is the case, but the essential point for present purposes is the requirement of ''connection'' in par (b) of the definition in s 223(1) of native title and native title rights and interests. The scope of the right for which recognition by the common law is sought here goes beyond the content of the definition in s 223(1).

61 That is not to say that in other respects the general law and statute

(161) *Western Australia v Ward* (2000) 99 FCR 316 at 483 [666].
(162) (1998) 86 FCR 244 at 256.

do not afford protection in various respects to matters of cultural knowledge of Aboriginal peoples or Torres Strait Islanders. Decided cases apply in this field the law respecting confidential information, copyright, and fiduciary duties (163). Provision respecting moral rights is now made by Pt IX (ss 189-195AZO) of the *Copyright Act* 1968 (Cth).

62 Many, but not all, of the remaining issues turn upon questions of extinguishment. Other questions arise in relation to claims relating to minerals and petroleum and to fishing and will be dealt with later in these reasons. However, there was one issue about the establishment of native title rights and interests with which it is convenient to deal now. Western Australia contended that there were parts of the areas in respect of which native title rights and interests were claimed which, so it was submitted, were not shown to have been visited or used by any Aboriginal person in recent times or in the past. The Full Court (164) rejected the submission by the State that physical occupation of the land is a necessary requirement for there to be a connection with the land or waters as required by par (b) of the definition in s 223(1) of native title rights and interests.

63 Western Australia maintained a generally similar submission in this Court — that proof of continued use of land or waters was essential to establishment of connection with that land or those waters. That submission should be rejected.

64 In its terms, s 223(1)(b) is not directed to how Aboriginal peoples use or occupy land or waters. Section 223(1)(b) requires consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a ''connection'' with the land or waters. That is, it requires first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a ''connection'' of the peoples with the land or waters in question. No doubt there may be cases where the way in which land or waters are used will reveal something about the kind of connection that exists under traditional law or custom between Aboriginal peoples and the land or waters concerned. But the absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection. Whether there is a relevant connection depends, in the first instance, upon the content of traditional law and custom and, in the second, upon what is meant by ''connection'' by those laws and customs. This latter question was not the subject of submissions in the present matters, the relevant contention being advanced in the absolute terms we have identified

(163) See, eg, *Foster v Mountford and Rigby Ltd* (1976) 14 ALR 71; [1978] FSR 582; *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244.

(164) *Western Australia v Ward* (2000) 99 FCR 316 at 383 [245], per Beaumont and von Doussa JJ; at 486-487 [682], per North J.

and without examination of the particular aspects of the relationship found below to have been sufficient. We, therefore, need express no view, in these matters, on what is the nature of the ''connection'' that must be shown to exist. In particular, we need express no view on when a ''spiritual connection'' with the land (an expression often used in the Western Australian submissions and apparently intended as meaning any form of asserted connection without evidence of continuing use or physical presence) will suffice.

3. *The applicable law*

65 The first question is to determine the law which should have been applied by the Full Court. This included the 1998 Act and the Territory and State legislation authorised thereby.

66 In the interval between the making of the determination by Lee J and that by the Full Court, the State had legislated in express reliance upon those provisions of Div 2B (ss 23E and 23I) allowing the State to legislate in respect of certain acts attributed to it so as to extinguish native title in the same way as was done under Div 2B for acts attributable to the Commonwealth. The legislation in question was enacted by way of amendment to the *Titles Validation Act* 1995 (WA) (165). The *Titles Validation Amendment Act* 1999 (WA) commenced on 5 May 1999, before the Full Court reserved its judgment.

67 The claimants in one of the appeals before the Full Court (No WG6294/1998) comprised numerous parties identified by the Full Court by reference to the first-named of them, Alligator Airways Pty Ltd, as ''the Alligator appellants'' (166). The Alligator appellants are now represented as the seventh respondents in Matter No P67. In the Full Court, the Alligator appellants, in their written submissions, had sought to invoke the Western Australian legislation which came into effect on 5 May 1999 (167).

68 In the Full Court, Beaumont and von Doussa JJ dealt with those submissions as follows (168):

> ''It was contended that if native title had not already been extinguished in respect of a number of grants to particular appellants within the Alligator group, that Act would have the effect of validating the grants and confirming extinguishment. In light of the conclusions that we have reached as to extinguishment, the premise on which the alternative submissions are advanced does not arise.

(165) Enacted in accordance with s 19 of the NTA; for present purposes nothing turns upon the earlier form of the *Titles Validation Act* 1995 (WA).

(166) *Western Australia v Ward* (2000) 99 FCR 316 at 336 [49].

(167) Stated in the Full Court's reasons as 12 May 1999: *Western Australia v Ward* (2000) 99 FCR 316 at 482 [659]. Nothing turns on the difference between the two dates.

(168) *Western Australia v Ward* (2000) 99 FCR 316 at 482 [659].

> However, it should be noted that a right of appeal to this Court under s 24 of the *Federal Court of Australia Act* 1976 (Cth) is an appeal in the strict sense and not by way of rehearing. Accordingly, the Court must consider and apply the law as it stood at the date of the hearing at first instance, and not at the date of hearing of the appeal (169). If legislation which comes into force after the operative date of the determination affects native title in a way that contradicts the determination, power exists under s 13(1) of the NTA for the Court on application under s 61 to vary or revoke an approved determination.''

In the interval between the reservation and delivery of judgment, further changes to the Western Australian legislation came into effect. These changes were made by the *Titles (Validation) and Native Title (Effect of Past Acts) Amendment Act* 1999 (WA). The commencement date was 13 December 1999. The State legislation is now consolidated as the *Titles (Validation) and Native Title (Effect of Past Acts) Act* 1995 (WA) (the State Validation Act).

69 One reason for the Full Court declining to enter upon the significance for its decision of the legislation as relied upon by the Alligator appellants was found in earlier decisions of the Full Court respecting the nature of appeals within that Court.

70 The provisions of the *Federal Court of Australia Act* 1976 (Cth) (the Federal Court Act), in particular s 24, take a form which is in no relevant way different from the provisions of the *Family Law Act* 1975 (Cth) governing appeals to the Full Court of the Family Court of Australia. Those provisions were considered by this Court in *CDJ v VAJ* (170) and in *Allesch v Maunz* (171). In *CDJ*, it was held (172) that the Full Court of the Family Court was bound, on an appeal to that Court, to ''decide the rights of the parties upon the facts and in accordance with the law as it exists at the time of hearing the appeal''. This understanding of the operation of those provisions was affirmed in *Allesch* (173).

71 It follows that in the present litigation the Full Court erred in concluding that by reason of s 24 of the Federal Court Act account could not be taken of the State Validation Act. An appeal to the Full Court of the Federal Court is not an appeal in the strict sense and *Duralla Pty Ltd v Plant* and *Petreski v Cargill* should be overruled. As will later appear, the provisions of the State Validation Act do bear on the existence of native title, as do those of the Territory Validation Act, and, thus, each of the appeals to this Court must be allowed.

72 It will be necessary in the reasons that follow to consider the effect

(169) *Duralla Pty Ltd v Plant* (1984) 2 FCR 342; *Petreski v Cargill* (1987) 18 FCR 68.
(170) (1998) 197 CLR 172.
(171) (2000) 203 CLR 172.
(172) *CDJ* (1998) 197 CLR 172 at 202 [111].
(173) (2000) 203 CLR 172 at 179-180 [20]-[22].

of Div 2B of Pt 2 of the NTA and of the Territory and State legislation. However, in various respects, a decision as to the operation of these laws cannot be made in the present state of the fact-finding. The construction of a number of sections presents what may be criteria turning upon facts not yet found. Where the case has not been fully dealt with by the intermediate appellate court, the course generally taken by this Court is to remit the matter to that intermediate court to hear and complete the hearing and determination of the appeal to it (174).

PART 2 — EXTINGUISHMENT

D. *The Criterion for Extinguishment*

73 Before turning to consider the various acts attributable to the State (and then those attributable to the Territory) which were said to extinguish native title, wholly or partly, it is convenient to turn to the criterion for extinguishment of native title which was adopted by the primary judge and rejected by the Full Court.

74 The primary judge adopted the adverse dominion test or approach which had been suggested but not adopted in a dissenting judgment of Lambert JA of the British Columbia Court of Appeal in *Delgamuukw v British Columbia* (175). Lee J did not expressly endorse the adverse dominion test but, as Beaumont and von Doussa JJ later pointed out in the Full Court (176), it is apparent from his Honour's treatment of pastoral leases and other grants to third parties that he had adopted the adverse dominion test. That test or approach was described by Lee J in the following terms (177):

> ''First, that there be a clear and plain expression of intention by parliament to bring about extinguishment in that manner; secondly, that there be an act authorised by the legislation which demonstrates the exercise of *permanent* adverse dominion as contemplated by the legislation; and thirdly, 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.'' (Original emphasis.)

75 His Honour applied the adverse dominion test to conclude that the claimants had native title rights and interests in respect of much of the area they claimed. He rejected the contention that some or all of those rights and interests had been extinguished.

(174) *Jones v The Queen* (1989) 166 CLR 409 at 414-415; *Bank of South Australia Ltd v Ferguson* (1998) 192 CLR 248 at 263 [34]-[35].
(175) (1993) 104 DLR (4th) 470 at 670-672, per Lambert JA.
(176) *Western Australia v Ward* (2000) 99 FCR 316 at 342-343 [79].
(177) *Ward* (1998) 159 ALR 483 at 508.

76 On appeal to the Full Court, the majority rejected (178) the adverse dominion test and concluded that native title rights and interests had been wholly or partly extinguished in respect of much of the area claimed. There was much debate in the Full Court as to whether native title rights and interests are properly to be seen as a bundle of rights, the separate components of which may be extinguished separately. The NTA, particularly in the distinction now drawn in s 23A, referred to above, between complete extinguishment and extinguishment ''to the extent of any inconsistency'', mandates the correctness of the approach taken by the Full Court.

77 It is necessary to say something further about the adverse dominion test. Some of the parties in this Court contended that it is no more than the use of different language to express a test of extinguishment which has been, or should be, adopted in Australia as the criterion for the withdrawal by the common law of the recognition of native title spoken of in par (c) of the definition in s 223(1) of the NTA.

78 The cases often refer to the need for those who contend that native title has been extinguished to demonstrate a ''clear and plain intention'' to do so (179). That expression, however, must not be misunderstood (180). The subjective thought processes of those whose act is alleged to have extinguished native title are irrelevant. Nor is it relevant to consider whether, at the time of the act alleged to extinguish native title, the existence of, or the fact of exercise of, native title rights and interests were present to the minds of those whose act is alleged to have extinguished native title. It follows that referring to an ''*expression* of intention'' is apt to mislead in these respects. As *Wik* (181) and *Fejo* (182) reveal, where, pursuant to statute, be it Commonwealth, State or Territory, there has been a grant of rights to third parties, the question is whether the rights are inconsistent with the alleged native title rights and interests. That is an objective inquiry which requires identification of and comparison between the two sets of rights. Reference to activities on land or how land has been used is relevant only to the extent that it focuses attention upon the right pursuant to which the land is used. Any particular use of land is lawful or not lawful. If lawful, the question is what is the right which the user has. If it is not lawful, the use is not relevant to the issues with which we must deal in these matters.

79 Beaumont and von Doussa JJ correctly observed (183):

(178) *Western Australia v Ward* (2000) 99 FCR 316 at 342-344 [78]-[87].
(179) eg, *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 423, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
(180) *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169, per Gummow J.
(181) (1996) 187 CLR 1 at 185-186, per Gummow J.
(182) (1998) 195 CLR 96 at 126 [43], per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.
(183) *Western Australia v Ward* (2000) 99 FCR 316 at 343 [81].

''The inconsistency of incidents test requires a comparison between the legal nature and incidents of the statutory right which has been granted and the native title rights being asserted. The question is whether the statutory right is inconsistent with the continuance of native title rights and interests. It is to be noted that Lambert JA in *Delgamuukw* (184) said that he did not think that there was any basis in principle for saying that inconsistency between the grant and native title necessarily means that it is the native title that must give way. This view is not consistent with the inconsistency of incidents test adopted in Australia.''

80 Further, to speak, as did the primary judge, of ''*permanent* adverse dominion'' raises a question about the meaning of ''permanent'' in this context. If it is intended to mean unlimited in time, it would follow that the grant of no interest in land less than a fee simple (such, for example, as a lease for a term of years) could extinguish native title. Yet it is plain that the rights held under at least some grants of interests in land less than a fee simple are inconsistent with the continued existence of native title rights. If, however, ''permanent'' is used to embrace not only transactions in which interests are created which are not limited in time but also other ''long term'' transactions, there are obvious difficulties in identifying a satisfactory criterion for distinguishing between long term and other transactions. The majority of the Full Court were right to conclude that the test proposed by Lambert JA in *Delgamuukw* should not be adopted.

81 The third member of the Full Court (North J) took a different view about extinguishment. This proceeded from the premise that there may be ''inconsistency between the rights and interests created by the law or act [in question] and native title but the *degree* of inconsistency is not sufficient to extinguish native title'' (emphasis added) (185). A little later in his reasons, his Honour said (186):

''A minor or insignificant inconsistency between the rights or interests created and native title could not lead to such a far-reaching consequence as total abrogation of native title. There must be proportionality between the impact of the law or the act and the effect on native title. Only a law or act which has the effect of totally replacing native title by completely nullifying it will result in extinguishment of native title. The inconsistency between the law or act must be total, fundamental or absolute to effect extinguishment. Thus, where native title is a permanent right to land, only a law or act which has permanent consequences adverse to the existence of the right to land will extinguish native title. Such a law or act must give rise to rights which fully eclipse native title. Where the

(184) (1993) 104 DLR (4th) 470 at 671.
(185) *Western Australia v Ward* (2000) 99 FCR 316 at 487-488 [684].
(186) *Western Australia v Ward* (2000) 99 FCR 316 at 489 [689].

> inconsistency is not total or absolute it is not necessary that native title be abolished in order to allow the unfettered exercise of inconsistent rights or interests. It is only necessary that the enjoyment of the rights and interests dependent upon the holding of native title is held in abeyance for the duration of the existence of the inconsistent rights or interests. As long as the exercise of the rights or interests dependent on native title is suspended, the exercise of inconsistent rights or interests is not impeded.''

82 This approach to extinguishment as understood with respect to the withdrawal of recognition by the common law should not be adopted. First, it is an approach which proceeds from a false premise, that there can be degrees of inconsistency of rights, only some of which can be described as ''total'', ''fundamental'' or ''absolute''. Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment. Absent particular statutory provision to the contrary, questions of suspension of one set of rights in favour of another do not arise. Secondly, it is a mistake to assume that what the NTA refers to as ''native title rights and interests'' is necessarily a single set of rights relating to land that is analogous to a fee simple. It is essential to identify and compare the two sets of rights: one deriving from traditional law and custom, the other deriving from the exercise of the new sovereign authority that came with settlement. It is true that the NTA (in par (b)(ii) of s 23G(1)) and the State Validation Act (in par (b)(ii) of s 12M(1)) speak of the ''suspension'' of inconsistent native title rights and interests in certain circumstances. However, this statutory outcome is postulated upon an inconsistent grant of rights and interests which, apart from the NTA and the State Validation Act, would not extinguish the native title rights and interests. An example would be a post-1975 grant which, by operation of the RDA, was ineffective to extinguish native title rights and interests. It will be necessary to return to this aspect of the legislation later in these reasons.

E. *Ward Submissions*

83 The Ward claimants submitted that, although the content of native title may vary according to the extent of the pre-existing interests of the relevant applicant, native title will ordinarily be a ''communal native title'' or ''community title'' which is practically equivalent to full ownership. They further submitted that where a community at sovereignty held rights and interests in relation to land recognised by the common law as a ''community title'' the ownership of the land within the territory concerned is ''vested in'' the community or ''people''.

84 The first of the steps in this argument, that native title will ''ordinarily'' be practically equivalent to full ownership, is a statement about the frequency with which rights will be found to exist. Whether

it is right or wrong depends on what is meant by ''ordinarily''. But whatever is meant by it, the proposition is not a useful commencing point for any consideration of the issues that now arise. It is not useful because it assumes, rather than demonstrates, the nature of the rights and interests that are possessed under traditional law and custom. Further, to speak of ''ownership'' of the land being ''vested in'' the community or people is to speak in the language of the common lawyer and, therefore, to use words which carry with them legal consequences that may or may not be warranted.

85 As was pointed out in *Fejo* (187), ''[t]here is ... an intersection of traditional laws and customs with the common law''. Identifying the nature and location of that intersection requires careful attention to the content of traditional law and custom and to the way in which rights and interests existing under that regime find reflection in the statutory and common law.

86 The reasons for judgment of the primary judge say little about the nature or content of the rights and interests possessed under traditional law and custom which were either alleged by the claimants or found to have been established. The starting point taken by the primary judge was his conclusion (188):

> ''that the claim area, and surrounding lands, were inhabited by organised communities 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 functioned under elaborate traditions, procedures, laws and customs which connected them to the land.''

From this the primary judge concluded that ''[i]t follows that the Aboriginal communities which occupied the claim area at sovereignty possessed native title in respect of that land''.

87 The primary judge described this title as being ''at common law a communal 'right to land' '' (189). Rights and responsibilities in relation to the land were found (190) to be distributed among sub-groups of the community according to traditional laws and customs. Those rights included the right to use a particular area of land for the benefit of the group and for some in the group to ''speak for'' that land, in particular as to the use of it. His Honour went on (191):

> ''Attached to those rights were responsibilities which included a duty to 'care for' the country, in particular, to care for and protect

(187) (1998) 195 CLR 96 at 128 [46], per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.
(188) *Ward* (1998) 159 ALR 483 at 514.
(189) *Ward* (1998) 159 ALR 483 at 508.
(190) *Ward* (1998) 159 ALR 483 at 529.
(191) *Ward* (1998) 159 ALR 483 at 529.

> 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 subgroups 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.''

88 It may be accepted that, as counsel for the Ningarmara claimants submitted in reply, ''a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'''. It is the rights under traditional law and custom to be asked permission and to ''speak for country'' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others (cf s 225(e)). The expression of these rights and interests in these terms reflects not only the content of a right to be asked permission about how and by whom country may be used, but also the common law's concern to identify property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing.

89 The expression ''possession, occupation, use and enjoyment ... to the exclusion of all others'' is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of ''possession'' of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.

90 As we have said, it may be accepted that the right to be asked for permission and to speak for country is a core concept in traditional law and custom. As the primary judge's findings show, it is, however, not an exhaustive description of the rights and interests in relation to land that exist under that law and custom. It is wrong to see Aboriginal connection with land as reflected only in concepts of control of access to it. To speak of Aboriginal connection with ''country'' in only those terms is to reduce a very complex relationship to a single dimension. It is to impose common law concepts of property on peoples and systems which saw the relationship between the community and the land very differently from the common lawyer.

91 Reference was made in *Mabo [No 2]* to the inherent fragility of native title. One of the principal purposes of the NTA was to provide

that native title is not able to be extinguished contrary to the Act (s 11(1)). An important reason to conclude that, before the NTA, native title was inherently fragile is to be found in this core concept of a right to be asked permission and to speak for country. The assertion of sovereignty marked the imposition of a new source of authority over the land. Upon that authority being exercised, by the creation or assertion of rights to control access to land, the right to be asked for permission to use or have access to the land was inevitably confined, if not excluded. But because native title is more than the right to be asked for permission to use or have access (important though that right undoubtedly is) there are other rights and interests which must be considered, including rights and interests in the use of the land.

92 In his reasons for judgment the primary judge said that (192):

> ''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 organised that *responsibility for, and, indeed, control of* parts of the area occupied by the community may be exercised by subgroups whether described as 'estate groups', 'families' or 'clans' but the traditional laws and customs which order the affairs of the subgroups are the laws and customs of the community, not laws and customs of the subgroup.
>
> . . .
>
> 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.'' (Emphasis added.)

93 Although not the subject of direct challenge in the appeals and cross-appeals in this Court, it is as well to say something about this passage in the reasons. The finding that predecessors of the claimants occupied the claim area at sovereignty does not, without more, identify the nature of the rights and interests which, under traditional law and custom, those predecessors held over that area. The fact of occupation, taken by itself, says nothing of what traditional law or custom provided. Standing alone, the fact of occupation is an insufficient basis for concluding that there was what the primary judge referred to as ''communal title in respect of the claim area'' or a right of occupation of it. If, as seems probable, those expressions are intended to convey the assertion of rights of control over the land, rights of that kind would flow not from the fact of occupation, but from that aspect of the

(192) *Ward* (1998) 159 ALR 483 at 542.

relationship with land which is encapsulated in the assertion of a right to speak for country.

94 It is important to explore issues of this kind because questions of extinguishment of native title cannot be answered without first identifying the rights and interests possessed under traditional laws and customs which it is said have been extinguished. There is much scope for error if the examination begins from the common law expression of those rights and interests. Especially is that so if a portmanteau expression used to translate those rights and interests (''possession, occupation, use and enjoyment ... to the exclusion of all others'') is severed into its constituent parts and those parts are then treated as they would be in the description of some common law title to land.

95 Further, recognising that the rights and interests in relation to land which an Aboriginal community may hold under traditional law and custom are not to be understood as confined to the common lawyer's one-dimensional view of property as control over access reveals that steps taken under the sovereign authority asserted at settlement may not affect every aspect of those rights and interests. The metaphor of ''bundle of rights'' which is so often employed in this area is useful in two respects. It draws attention first to the fact that there may be more than one right or interest and secondly to the fact that there may be several *kinds* of rights and interests in relation to land that exist under traditional law and custom. Not all of those rights and interests may be capable of full or accurate expression as rights to control what others may do on or with the land.

F. *Consideration of Extinguishment Submissions*

1. *General*

96 The general tenor of the submissions made to this Court by those who opposed the Ward, Ningarmara and Cheinmora claimants was that the native title rights and interests which were claimed had been extinguished. The arguments about extinguishment directed attention to the several different types of transactions affecting areas within the claim area that had occurred over the many years since settlement. Because the area of land and waters in respect of which claims for determination were made is so large, and includes land and waters in the State and the Territory, it would be possible to approach the question of extinguishment in any of several different ways. It may be most convenient if the extinguishment is considered by reference to the different kinds of act or dealing which are alleged to have had some extinguishing effect. Inevitably, then, where a particular parcel of land has been affected by successive acts or dealings, there may be some duplication of consideration, but it is as well to focus upon the alleged extinguishing act, if only to ensure that attention is directed to whether, by that act, there was created or asserted some right which was inconsistent with the exercise of native title rights and interests.

97 In considering the submissions about extinguishment, it will be

necessary to make frequent reference to the RDA and to the operation of Divs 2 and 2B of Pt 2 of the NTA. It is, therefore, convenient to say something further about those provisions now.

2. *The Racial Discrimination Act* 1975

98 As has already been pointed out, one of the central provisions of the NTA is s 11(1) and its provision that ''[n]ative title is not able to be extinguished contrary to this Act''. Section 11(1) being valid, ''it is within the powers of the Parliament of the Commonwealth to prescribe the areas within which other laws may operate to affect the regime of protection prima facie prescribed by s 11(1)'' (193). It follows, as was also pointed out in the joint reasons in *Western Australia v The Commonwealth* (*Native Title Act Case*) (194), that:

> ''a law protecting native title from extinguishment must either exclude the application of State and Territory laws or prescribe the areas within which those laws may operate. The Commonwealth has chosen to prescribe the areas available to control by other laws by prescribing what State and Territory laws are 'valid' or 'invalid' and, if valid, the conditions of validity.''

As was also pointed out in those reasons (195):

> ''[T]he use of the term ['valid'], its derivatives or its opposite . . . so far as those respective terms relate to a State law, must be taken to mean having, or not having, (as the case may be) full force and effect upon the regime of protection of native title otherwise prescribed by the [NTA]. In other words, those terms are not used in reference to the power to make or to the making of a State or Territory law but in reference to the effect which a State law, when validly made, might have in creating an exception to the blanket protection of native title by s 11(1). In using the terms 'valid' and 'invalid', the [NTA] marks out the areas relating to native title left to regulation by State and Territory laws or the areas relating to native title regulated exclusively by the Commonwealth regime.''

It is against that understanding of the NTA that the questions presented by the operation of the RDA must be assessed.

99 Further, account must also be taken of s 7 of the NTA which provides:

> ''(1) This Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act* 1975.
>
> (2) Sub-section (1) means only that:
>
> (a) the provisions of the *Racial Discrimination Act* 1975 apply

(193) *Native Title Act Case* (1995) 183 CLR 373 at 468-469.
(194) (1995) 183 CLR 373 at 469.
(195) *Native Title Act Case* (1995) 183 CLR 373 at 469.

to the performance of functions and the exercise of powers conferred by or authorised by this Act; and

(b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act* 1975 if that construction would remove the ambiguity.

(3) Sub-sections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.''

One effect of this section is that, contrary to what otherwise might follow from the fact that the NTA is a later Act of the federal Parliament, the NTA is not to be taken as repealing the RDA to any extent. The significance of s 7(3) is to make it clear that, notwithstanding the continued paramountcy of the RDA stated in the earlier sub-sections, the effect of the validation achieved by the NTA is to displace the invalidity which otherwise flowed from the operation of the RDA. It is unnecessary to consider whether s 7 may have other operations.

100 The operation and effect of several provisions of the RDA must be considered.

3. *Section* 9(1) *of the RDA*

101 Section 9(1) provides:

''It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.''

Mason J in *Gerhardy v Brown* (196) observed that:

''[t]he operation of s 9 is confined to making unlawful the acts which it describes. It is s 10 that is directed to the operation of laws, whether Commonwealth, State or Territory laws, which discriminate by reference to race, colour or national or ethnic origin.''

102 The issue arises as to whether s 9(1) operates in respect of an act authorised by a State or Territory statute, the act having a discriminatory effect upon the enjoyment of native title rights and interests. Mason J considered this question in *Gerhardy*. His Honour said (197):

''Because *s 9(1) creates a criminal offence* and because the sub-section is aimed at an act whose purpose or effect is to nullify or

(196) (1985) 159 CLR 70 at 92.
(197) *Gerhardy* (1985) 159 CLR 70 at 93.

impair the recognition, enjoyment or exercise on an equal footing of a relevant human right or fundamental freedom, the operation of the sub-section does not extend to circumstances in which the actor, having statutory authority to confer a benefit or to impose a burden or liability only in a particular way, acts in accordance with that authority.'' (Emphasis added.)

It should be observed that, although s 9(1) makes it unlawful for a person to do an act there mentioned, unlawful acts are not offences unless the RDA expressly so provides (s 26). There is no such provision in relation to a contravention of s 9. Further, the procedures and remedies applicable to a breach of s 9 are to be found in Pt III of the RDA. The joint judgment of this Court in *Re East; Ex parte Nguyen* (198) made so much clear. Their Honours said (199):

''Central to the operation of Pt III is the role of the Human Rights and Equal Opportunity Commission and of the Race Discrimination Commissioner. Complaints of unlawful acts may be lodged with the Commission by persons aggrieved (s 22). The Commissioner is to conduct inquiries into such acts and is obliged to endeavour, by conciliation, to effect a settlement (s 24). There are procedures designed to assist such consultation (eg, ss 24C, 24D). If matters cannot be settled they are referred to the Commission (s 24E). The Commission is empowered to conduct inquiries into complaints (s 25A). The [RDA] confers upon the Commission various powers to enable it to undertake such inquiries. After holding an inquiry, the Commission may either dismiss the complaint or find the complaint substantiated and make determinations including declarations as to what the respondent to a complaint should do (s 25Z(1)). However, such a determination is not binding or conclusive between the parties (s 25Z(2)). The enforcement of determinations is a matter for the Federal Court (Div 3A). In certain circumstances damages may be awarded (s 25ZG).''

Their Honours continued (200):

''The elaborate and special scheme of Pt III of the [RDA] was plainly intended by the Parliament to provide the means by which a person aggrieved by a contravention of s 9 of the [RDA] might obtain a remedy.''

103 Because legislative sanction is now necessary before anything can be done with Crown land which would extinguish or affect native title (201), s 9(1) does not operate to invalidate discriminatory acts of that kind. The appropriate provision is that in s 10(1).

(198) (1998) 196 CLR 354.
(199) *Re East* (1998) 196 CLR 354 at 364-365 [25].
(200) *Re East* (1998) 196 CLR 354 at 365 [26].
(201) See at 121-122 [167].

4. *Section* 10(1) *of the RDA*

104 Section 10(1) of the RDA provides:

> ''If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.''

105 A number of points may be made at once. First, the sub-section does not use the word ''discriminatory'' or cognate expressions. Yet these terms are used throughout the authorities in which s 10(1) has been considered. That to which the sub-section in terms is directed is the *enjoyment* of rights by some but not by others or to a more limited extent by others; there is an unequal enjoyment of rights that are or should be conferred irrespective of race, colour or national or ethnic origin. ''Enjoyment'' of rights directs attention to much more than what might be thought to be the purpose of the law in question. Given the terms of the Convention which the RDA implements (the International Convention on the Elimination of all Forms of Racial Discrimination) that is not surprising. The Convention's definition of racial discrimination refers to any distinction, exclusion, restriction or preference based (among other things) on race which has the purpose *or effect* of nullifying or impairing (again among other things) the enjoyment of certain rights. Further, the basic obligations undertaken by States party to the Convention include taking effective measures to nullify laws which have *the effect* of creating or perpetuating racial discrimination (Art 2, s 1(c)). It is therefore wrong to confine the relevant operation of the RDA to laws whose purpose can be identified as discriminatory (202).

106 Secondly, at first sight, neither the grant of an interest in land nor the vesting of land in another appears to be a discriminatory act. Thirdly, on its face, s 10(1) operates by force of federal law to extend the enjoyment of rights enjoyed under another federal law or a Territory or State law. Fourthly, as Mason J pointed out in *Gerhardy*, different considerations arise in two kinds of case. His Honour said (203):

> ''If racial discrimination arises under or by virtue of State law because the relevant State law merely omits to make enjoyment of

(202) cf *Waters v Public Transport Corporation* (1991) 173 CLR 349.
(203) *Gerhardy* (1985) 159 CLR 70 at 98.

> the right universal, ie by failing to confer it on persons of a particular race, then s 10 operates to confer that right on persons of that particular race. In this situation the section proceeds on the footing that the right which it confers is complementary to the right created by the State law. Because it exhibits no intention to occupy the field occupied by the positive provisions of State law to the exclusion of that law the provisions of the State law remain unaffected.''

107 This may be contrasted with the case where the State law in question imposes a discriminatory burden or prohibition. As Mason J said in *Gerhardy* (204):

> ''When racial discrimination proceeds from a prohibition in a State law directed to persons of a particular race, forbidding them from enjoying a human right or fundamental freedom enjoyed by persons of another race, by virtue of that State law, s 10 confers a right on the persons prohibited by State law to enjoy the human right or fundamental freedom enjoyed by persons of that other race. This necessarily results in an inconsistency between s 10 and the prohibition contained in the State law.''

The same is true of a State law that deprives persons of a particular race of a right or freedom previously enjoyed by all regardless of race.

108 Three situations may be considered: (i) a State law expressed in general terms forbids the enjoyment of a human right or fundamental freedom and, because the burden falls upon all racial groups, there is no discrimination upon which s 10(1) may operate; (ii) a State law, for example, provides for the extinguishment of land titles but provides for compensation only in respect of non-native title; on the above analysis, this falls in the first category identified by Mason J for the operation of s 10(1) and, whilst the extinguishment remains valid, there is, as referred to in [12], a right to compensation provided to native title holders; (iii) a State law, for example, extinguishes only native title and leaves other titles intact; the situation falls in the second category identified by Mason J and the discriminatory burden of extinguishment is removed because the operation of the State law is rendered invalid by s 109 of the Constitution.

109 *Gerhardy*, *Mabo v Queensland [No 1]* (205) and the *Native Title Act Case* all concerned State laws in this second category. In *Gerhardy*, however, the Court held that the legislation was a ''special measure'' and was thus subject to the exception in s 8(1) of the RDA. In both *Mabo [No 1]* and the *Native Title Act Case*, s 109 of the Constitution was held to operate upon the relevant State legislation. It is this result that has been said to confer upon native title holders the same

(204) (1985) 159 CLR 70 at 98-99.
(205) (1988) 166 CLR 186.

''immunity from legislative interference'' with the relevant human right as that of other members of the community (206).

110 It is as well to say something more about *Mabo [No 1]* and the *Native Title Act Case*.

111 The central questions in *Mabo [No 1]* concerned the effect of the *Queensland Coast Islands Declaratory Act* 1985 (Q) (the 1985 State Act) and whether that Act was inconsistent, to any extent, with ss 9 and 10 of the RDA. Six members of the Court held that s 3 of the 1985 State Act had the effect of extinguishing land rights claimed under traditional law and custom by the Miriam people. Four members of the Court (Brennan, Deane, Toohey and Gaudron JJ) concluded that on that construction of the 1985 State Act, it was inconsistent with s 10(1) of the RDA. A critical step in the reasoning of the majority was that the 1985 State Act operated to deprive only Torres Strait Islanders of whatever may have been their traditional rights to the land and had no operation on the rights of others. So much followed from the 1985 State Act deeming that at an earlier date (when the islands were annexed to and became part of Queensland) the islands were vested in the Crown in right of Queensland freed of all other rights, interests and claims. At that earlier date there were no rights, interests or claims to the islands except under traditional law. As was said in the joint judgment in relation to the Murray Islands (207):

> ''By extinguishing the traditional legal rights characteristically vested in the Miriam people, the [1985 State Act] abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights *while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people*.'' (Emphasis added.)

Or, as Deane J put it, on the assumption that traditional communal and personal proprietary rights and interests to the land, seas, seabeds and reefs survived annexation to Queensland in 1879 (208):

> ''the practical operation and effect of the Act would be to extinguish *only traditional proprietary rights and interests* whose ultimate source predated annexation *while leaving intact rights and interests whose ultimate source lay in the European law* which became applicable upon annexation and which included the common law rules and statutory provisions relating to waste lands of the Crown.'' (Emphasis added.)

(206) *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at 219; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 613.
(207) *Mabo [No 1]* (1988) 166 CLR 186 at 218.
(208) *Mabo [No 1]* (1988) 166 CLR 186 at 230-231.

It was upon this basis that the majority concluded that s 109 of the Constitution applied and the 1985 State Act was invalidated. The majority concluded that the human rights of the Miriam people to own and inherit property, and not to be deprived arbitrarily of their property, were denied or diminished. Section 10(1) of the RDA was read by the majority as saying that all members of the community shall enjoy those rights. Accordingly, a State statute which took them away or diminished them was, to that extent, inconsistent with s 10(1) and invalid. This, so Deane J said (209), was ''the only way'' that s 10 could operate ''to procure the result which the section is designed to guarantee''.

112 Focusing attention upon procuring the result guaranteed by s 10 of the RDA should not, however, be understood as enlarging accepted principles about the operation of s 109 any more than it should be permitted to obscure the fact that s 10(1) may have relevant operation in two ways.

113 The operation of s 10(1) was considered further in the *Native Title Act Case* (210). It was said in the joint reasons of six members of the Court that (211):

> ''Where, under the general law, the indigenous 'persons of a particular race' uniquely have a right to own or to inherit property within Australia arising from indigenous law and custom but the security of enjoyment of that property is more limited than the security enjoyed by others who have a right to own or to inherit other property, *the persons of the particular race are given, by s 10(1), security in the enjoyment of their property* 'to the same extent' as persons generally have security in the enjoyment of their property (212). Security in the right to own property carries immunity from arbitrary deprivation of the property (213). Section 10(1) thus protects the enjoyment of traditional interests in land recognised by the common law.'' (Emphasis added.)

Of the operation of s 109 of the Constitution in relation to s 10(1) of the RDA, it was said in the joint judgment in the *Native Title Act Case* that (214):

> ''If a law of a State provides that property held by members of the community generally may not be expropriated except for prescribed purposes or on prescribed conditions (including the payment of compensation), a State law which purports to authorise expropriation of property characteristically held by the 'persons of a

(209) *Mabo [No 1]* (1988) 166 CLR 186 at 232.
(210) (1995) 183 CLR 373.
(211) *Native Title Act Case* (1995) 183 CLR 373 at 437.
(212) *Mabo [No 1]* (1988) 166 CLR 186 at 218-219, 230-231.
(213) *Mabo [No 1]* (1988) 166 CLR 186 at 217, 230.
(214) *Native Title Act Case* (1995) 183 CLR 373 at 437.

particular race' for purposes additional to those generally justifying expropriation or on less stringent conditions (including lesser compensation) is inconsistent with s 10(1) of the [RDA].''

Again it will be seen that the conclusion that the State law provided for differential treatment of land holding according to race, colour, or national or ethnic origin was critical. This was because it is that understanding of the legal operation of the State law which underpins the conclusion that there is direct inconsistency between that law and the relevant federal law, the RDA.

114 If s 10(1) does not operate to invalidate the relevant State legislation, the ''past acts'' provisions of the NTA, and equivalent State provisions, are not engaged (215). It is therefore of the first importance to ascertain the precise operation and effect of any potentially discriminatory legislation affecting or authorising acts affecting native title rather than assuming that the NTA is to apply. However, the provisions of Div 2B may still apply to a post-RDA ''act'' which is not a ''past act''. This is because the operation of s 23B(2)(a) and s 23F(2)(a) extends to certain previous possession acts (exclusive and non-exclusive) which are valid, with or without the validating effect of Div 2.

115 In determining whether a law is in breach of s 10(1), it is necessary to bear in mind that the sub-section is directed at the enjoyment of a right (216); it does not require that the relevant law, or an act authorised by that law, be ''aimed at'' native title, nor does it require that the law, in terms, makes a distinction based on race. Section 10(1) is directed at ''the practical operation and effect'' of the impugned legislation and is ''concerned not merely with matters of form but with matters of substance'' (217). Mason J in *Gerhardy* put the matter this way (218):

> ''[Section] 10 is expressed to operate where persons of a particular race, colour or origin *do not enjoy* a right that is enjoyed by persons of another race, colour or origin, or do not enjoy that right to the same extent.'' (Original emphasis.)

116 Some care is required in identifying and making the comparison between the respective ''rights'' involved. In *Mabo [No 1]* the ''right'' referred to was ''the human right to own and inherit property (including a human right to be immune from arbitrary deprivation of

(215) A ''past act'' is defined so as to require invalidity to an extent due to the existence of native title (s 228(2)(b)).

(216) *Gerhardy v Brown* (1985) 159 CLR 70 at 97, 99, per Mason J; *Mabo [No 1]* (1988) 166 CLR 186 at 198-199, per Mason CJ (dissenting); at 216-219, per Brennan, Toohey and Gaudron JJ; at 231-232, per Deane J.

(217) *Mabo [No 1]* (1988) 166 CLR 186 at 230, per Deane J.

(218) *Gerhardy* (1985) 159 CLR 70 at 99.

property)'' (219). ''Property'' in this context includes land and chattels as well as interests therein (220) and extends to native title rights and interests.

117 It is because native title characteristically is held by members of a particular race that interference with the enjoyment of native title is capable of amounting to discrimination on the basis of race, colour, or national or ethnic origin (221). In *Mabo [No 1]* the Court, by majority, rejected the argument that, as native title has different characteristics from other forms of title and derives from a different source, it can legitimately be treated differently from those other forms of title (222). It was said that (223):

> ''s 10(1) of the [RDA] clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community.''

In the joint judgment in the *Native Title Act Case*, it was said, to the same effect, that (224):

> ''[t]he [RDA] does not alter the characteristics of native title, but it confers on protected persons rights or immunities which, being recognised by 'the tribunals and all other organs administering justice', allow protected persons security in the enjoyment of their title to property to the same extent as the holders of titles granted by the Crown are secure in the enjoyment of their titles.''

However, as was pointed out by Dawson J in *Mabo [No 1]* (225) in dissent:

> ''[E]ven if land rights of the kind alleged by the plaintiffs are enjoyed only by persons of the same race, colour or national or ethnic origin, when the Murray Islands became subject to Queensland law (as the plaintiffs admit they did) those rights were not rights enjoyed generally by persons in Queensland. To deprive the plaintiffs of those rights would not necessarily be to deprive them of rights enjoyed by persons of another race, colour or national or ethnic origin. I say that it would not necessarily be the case

(219) *Mabo [No 1]* (1988) 166 CLR 186 at 217, per Brennan, Toohey and Gaudron JJ. See also at 229-230, per Deane J; the *Native Title Act Case* (1995) 183 CLR 373 at 436-437.

(220) *Native Title Act Case* (1995) 183 CLR 373 at 437.

(221) *Mabo [No 1]* (1988) 166 CLR 186 at 218, per Brennan, Toohey and Gaudron JJ; at 230, per Deane J; the *Native Title Act Case* (1995) 183 CLR 373 at 437.

(222) *Mabo [No 1]* (1988) 166 CLR 186 at 218, per Brennan, Toohey and Gaudron JJ; at 230-232, per Deane J.

(223) *Mabo [No 1]* (1988) 166 CLR 186 at 219, per Brennan, Toohey and Gaudron JJ.

(224) *Native Title Act Case* (1995) 183 CLR 373 at 437.

(225) (1988) 166 CLR 186 at 243.

> because I am conscious of the possibility of an argument along the lines that, if the land rights alleged by the plaintiffs in fact amount to the form of ownership in which land is enjoyed by them and other persons of their race, colour or national or ethnic origin, to deprive them of those rights may be to deprive them of rights of ownership equivalent to the rights of ownership enjoyed by others, albeit in a different form.''

118 The question which was posed by Dawson J in *Mabo [No 1]* of whether native title rights and interests amount to rights of ownership equivalent to the rights of ownership enjoyed by others appears not to have been specifically addressed in the joint judgment in that case. That being so, it may be thought that if native title has different characteristics to other forms of title and it is those very characteristics which provide elements of strength but which also render native title vulnerable to extinguishment (i) that the RDA should not operate in the manner suggested by the joint judgment in the *Native Title Act Case* or (ii) that, if it does so, it does, in fact, alter the characteristics of native title.

119 The rights upon which s 10 of the RDA operates are defined in s 10(2) to include ''a right of a kind referred to in Article 5 of the [International] Convention [on the Elimination of all Forms of Racial Discrimination]''. Relevant to the decision in *Mabo [No 1]*, Art 5 includes ''[t]he right to own property alone as well as in association with others'' (Art 5(d)(v)) and ''[t]he right to inherit'' (Art 5(d)(vi)) — rights which are identified in terms of complete generality.

120 Only if there were some basis for distinguishing between different types of ownership of property or different types of inheritance might it be correct to say, in the context of s 10(1) of the RDA, that to deprive the people of a particular race of a particular species of property or a particular form of inheritance not enjoyed by persons of another race is not to deprive them of a right enjoyed by persons of that other race. No basis for such a distinction is apparent in the text of the Convention. Nor is any suggested by the provisions of the RDA.

121 Because no basis is suggested in the Convention or in the RDA for distinguishing between different types of property and inheritance rights, the RDA must be taken to proceed on the basis that different characteristics attaching to the ownership or inheritance of property by persons of a particular race are irrelevant to the question whether the right of persons of that race to own or inherit property is a right of the same kind as the right to own or inherit property enjoyed by persons of another race. In this respect the RDA operates in a manner not unlike most other anti-discrimination legislation which proceeds by reference to an unexpressed declaration that a particular characteristic is irrelevant for the purposes of that legislation (226).

(226) See *Street v Queensland Bar Association* (1989) 168 CLR 461 at 571.

122 For present purposes, however, the point of chief importance is not the validity of the analysis we have just described; it is to recognise what was held in *Mabo [No 1]* and the *Native Title Act Case*. As has been pointed out earlier in these reasons, the Court has rejected the argument that native title can be treated differently from other forms of title because native title has different characteristics from those other forms of title and derives from a different source. This conclusion about the operation of the RDA should not now be revisited.

123 As is apparent from the foregoing, discrimination can occur in a variety of circumstances. In addition to the operations of s 10(1) to which reference has been made, the sub-section may also be engaged by legislation which regulates or impairs the enjoyment of native title without effecting extinguishment. This is indicated by the terms of the NTA itself in both the definition in s 227 of an ''act affecting native title'' (227), and in s 17. Section 17 provides in some cases for compensation where extinguishment did not result from the ''past act'' in question (228).

124 Finally, the legislation may attract s 10(1) of the RDA because it purports on its face to extinguish native title without compensation (229) or on less stringent conditions (including lesser compensation) (230) than those which govern the expropriation of the property of the people of another race. *Mabo [No 1]* and the *Native Title Act Case* were concerned with legislative extinguishment that resulted in the ''arbitrary deprivation of property''; the force of the adjective ''arbitrary'' appears to have been to emphasise the absence of (and need for) compensation. In such cases, it is appropriate to compare that lack of compensation in respect of native title with what it appears are rights of compensation generally afforded to holders of other forms of title. In this respect, Toohey J in *Mabo [No 2]* said (231):

> ''Ordinarily, land is only acquired for a public purpose on

(227) Section 227 of the NTA provides: ''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.''

(228) Section 17(2) provides that if the ''past act'' is other than a category A or B past act, and thus does not extinguish native title, the native title holders are entitled to compensation if: ''(a) the native title concerned is to some extent in relation to an onshore place and the act could not have been validly done on the assumption that the native title holders instead held ordinary title to: (i) any land concerned; and (ii) the land adjoining, or surrounding, any waters concerned; or (b) the native title concerned is to some extent in relation to an offshore place; or (c) the native title concerned relates either to land or to waters and the similar compensable interest test is satisfied in relation to the act.''

(229) *Mabo [No 1]* (1988) 166 CLR 186; the *Native Title Act Case* (1995) 183 CLR 373.

(230) *Native Title Act Case* (1995) 183 CLR 373 at 437.

(231) *Mabo [No 2]* (1992) 175 CLR 1 at 214.

payment of just terms, whatever may be the precise statutory language employed (232).''

125 In the joint judgment in the *Native Title Act Case*, a similar approach was taken. However, it should be noted that that case concerned State legislation purporting on its face to extinguish native title and to replace it with rights derived from that very legislation. This provided that those (statutory) rights could be extinguished, suspended or impaired by action taken under the general laws of the State. The majority said (233):

> ''The 'general laws' include the Acts of Western Australia ... including the *Mining Act* 1978, the *Land Act* 1933, the *Petroleum Act* 1967 and the *Public Works Act* 1902. Under those Acts, rights and interests in land amounting to 'title' can be created by executive action ... [T]he application of those Acts is unaffected by the existence of [the statutory] rights over or in respect of the land to which those Acts respectively apply. Each of them creates a power which may be exercised by the Executive Government of the State and which, if exercised, would extinguish or impair [the statutory] rights. By reference to those Acts ... it is possible to compare the security of possession and enjoyment of [the statutory] rights by those on whom those rights are conferred with the security of possession and enjoyment of [other forms of] 'title' by the holders thereof.''

This approach was thus dependent upon the terms of the legislation under consideration in that case.

126 In other cases, involving different legislation, it will be appropriate to compare the effect of that legislation upon native title holders with the effect on other title holders. This will not necessarily involve any analysis of the general laws of the State or Territory. If, under the relevant legislative scheme, no provision is made respecting compensation for interference with, or abrogation of, any rights and interests in land, then the failure to compensate in respect of native title would not be sufficient to engage s 10(1). However, it may be that the power conferred by the legislation is exercised in a manner that, as a matter of fact, is discriminatory and thereby engages s 10(1) (234).

127 Particular considerations are presented where it is by reason of a law of the Territory that persons of particular race do not enjoy a right that is enjoyed by persons of another race. The Legislative Assembly of the

(232) See, eg, *Lands Acquisition Act* 1989 (Cth), Pt VII; *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW), Pt 3; *Land Acquisition and Compensation Act* 1986 (Vict), Pt 3; *Acquisition of Land Act* 1967 (Q), Pt IV; *Land Acquisition Act* 1969 (SA), Pt IV; *Public Works Act* 1902 (WA), Pt III; *Lands Resumption Act* 1957 (Tas), Pt IV; *Lands Acquisition Act* 1978 (NT), Pt VII.

(233) *Native Title Act Case* (1995) 183 CLR 373 at 440-441.

(234) See Hanks, ''Can the States Rewrite *Mabo (No 2)*? Aboriginal Land Rights and the *Racial Discrimination Act*'', *Sydney Law Review*, vol 15 (1993) 247, at p 251.

Territory is empowered by s 6 of the *Northern Territory (Self-Government) Act* 1978 (Cth) (the Self-Government Act) to make laws for the peace, order and good government of the Territory. Section 6A(1) of the RDA states that it ''is not intended, and shall be deemed never to have been intended'' that the RDA exclude or limit laws, including Territory laws, which further the objects of the International Convention on the Elimination of all Forms of Racial Discrimination and are ''capable of operating concurrently with [the RDA]''.

128 If the Territory law is one of the first species identified by Mason J in *Gerhardy* and omits to make universal the enjoyment of the right it confers, then s 10 of the RDA confers a complementary right. In that way, s 10 and the Territory law operate concurrently. Difficulty arises where the Territory law does not operate concurrently with s 10 because its effect is to forbid the enjoyment by persons of a particular race of a human right or fundamental freedom enjoyed by persons of another race. Section 109 of the Constitution has no operation upon the Territory law. The means of resolution of conflict between the federal and Territory law must be found elsewhere in the text and structure of the Constitution.

129 The enactment of the RDA preceded that of the Self-Government Act. The RDA is in force in the territories as a law supported by the powers conferred in s 51 of the Constitution (in particular par (xxix) (external affairs)) and operates generally throughout the country, including the territories (235). The RDA so operated at the commencement of the Self-Government Act. However, in so far as s 10 of the RDA applied in any territory with respect to territorial laws in the second category identified by Mason J, s 10 was supported by the territories power in s 122 of the Constitution. In this class of case, s 10 required that the prohibition imposed by the territory law be treated as ineffective.

130 That was the state of affairs in the Territory when the Self-Government Act commenced. The question for the present case then becomes whether laws made thereafter by the Legislative Assembly of the Territory, which are relied upon as extinguishing native title rights and interests, displaced the continued operation of s 10 of the RDA. That result would only be possible if the Parliament has conferred upon the Legislative Assembly the authority to repeal (here by implied repeal) laws of the Commonwealth in force in the Territory when the Self-Government Act commenced (236).

131 It may be observed that, in *Northern Territory v GPAO* (237), a different order of events produced a different issue. The question there

(235) See also *Lamshed v Lake* (1958) 99 CLR 132 at 142. The RDA is expressly stated by s 4 to extend to external territories.

(236) *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 at 417-419.

(237) (1999) 196 CLR 553.

was whether by reason of the *Family Law Reform Act* 1995 (Cth) the continued operation of the *Community Welfare Act* 1983 (NT) had been limited, so that s 97(3) of the latter now had an application narrower than otherwise would have been the case. In the event, that particular question was answered in the negative.

132 However, in *GPAO*, there was some discussion of the treatment in the Self-Government Act of the continuing status of the previous legal regime in the Territory. The effect of s 57 of that law was to exclude from the power of alteration or repeal given to the Legislative Assembly any Act of the federal Parliament in force in the Territory immediately before the commencement of the Self-Government Act. What was said in *GPAO* by Gleeson CJ and Gummow J (with the concurrence of Hayne J (238)) respecting the *Family Law Act* 1975 (Cth) is true of the RDA. Their Honours said (239):

> ''In its form at that date, the *Family Law Act* was not subject to alteration or repeal by or under an enactment of the Legislative Assembly. The power of the Legislative Assembly, conferred by s 6 of the Self-Government Act, to make laws for the peace, order and good government of the Territory, is expressed to be '[s]ubject to this Act'. Therefore, s 6 is subject to the limitation found in s 57 upon the power to alter or repeal laws in force in the Territory immediately before the commencing date. Plainly, it was within the competence of the Parliament in legislating under s 122 of the Constitution 'for the government' of the Northern Territory to provide in this way for its constitutional development.''

133 The result is that s 10 of the RDA continued to speak in respect of Territory laws and to require the disregarding of prohibitions of the second species identified by Mason J in *Gerhardy*. The consequence in a given case may be to attract the ''past acts'' and other provisions of the NTA. The relationship between these two laws of the Commonwealth, the RDA and the subsequent NTA, in particular as indicated by s 7 of the NTA, has been explained earlier in these reasons (240).

134 Section 10 of the RDA was amended in minor respects in 1980 and 1986 to remove linguistic infelicities (241). Nothing turns upon this. Substantive changes made to s 10 after the commencement of the Self-Government Act and after the enactment of a particular Territory law could present an issue of the nature dealt with in *GPAO*.

(238) *GPAO* (1999) 196 CLR 553 at 650 [254].
(239) *GPAO* (1999) 196 CLR 553 at 579 [48].
(240) See at 96-97 [98]-[99].
(241) By the Schedules to the *Racial Discrimination Amendment Act* 1980 (Cth) and the *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act* 1986 (Cth) respectively, ''the Commonwealth'' replaced ''Australia'' in s 10(1) and ''the person'' replaced ''him'' in s 10(3).

5. *Divisions* 2, 2A *and* 2B *of Pt* 2 *of the NTA*

135 General reference has already been made at the start of these reasons (242) to the way in which Divs 2, 2A and 2B operate. It is now convenient, however, to say something further about their structure and operation leaving detailed consideration of their application to await the examination, later in these reasons, of particular transactions and events said to have extinguished native title. In order to do that, it is necessary to understand at the outset that Div 2 deals separately with the validation of ''past acts'' and the effect of validation on native title. As has already been explained, the ''past acts'' with which Div 2 is concerned are (subject to some qualifications which need not be noticed) acts which, apart from the NTA, would be invalid to any extent but would have been valid to that extent if the native title did not exist (s 228(2)(b)). ''Past acts'', therefore, include acts invalidated by the operation of the RDA.

136 If a ''past act'' is attributable to the Commonwealth it is validated by s 14(1). Section 15 and to some extent s 16 then provide for the effect of validation on native title and s 15 does so by reference to the four part classification of ''past acts'' as category A, B, C or D past acts. For present purposes, primary attention must be directed to s 19 which provides:

> ''(1) If a law of a State or Territory contains provisions to the same effect as sections 15 and 16, the law of the State or Territory may provide that past acts attributable to the State or Territory are valid, and are taken always to have been valid.
> (2) To avoid any doubt, if a past act validated by sub-section (1) is the making, amendment or repeal of legislation, sub-section (1) does not validate:
>
> (a) the grant or issue of any lease, licence, permit or authority; or
>
> (b) the creation of any interest in relation to land or waters;
>
> under any legislation concerned, unless the grant, issue or creation is itself a past act attributable to the State or Territory.''

The State and Territory Validation Acts do contain provisions to the same effect as ss 15 and 16 of the NTA and, accordingly, s 19 provides that those Acts may provide that ''past acts'' attributable to the State or Territory (as the case requires) are valid and are taken always to have been valid. That provision is made by s 5 of the State Validation Act and s 4 of the Territory Validation Act.

137 The validation of ''past acts'' attributable to the State or Territory has two aspects that are significant. First, when it comes to consider the effect of validation on native title provided for by ss 15, 16-19 of

(242) See at 62-64 [5]-[11].

the NTA, ss 6-11 of the State Validation Act and ss 5-11 of the Territory Validation Act, the act in question will be of full force and effect between the parties to it. Secondly, it is an important feature in considering the operation of Div 2B to which we now briefly turn.

138 As already explained (243), Div 2B operates in relation to ''previous exclusive possession acts'' (s 23B) and ''previous non-exclusive possession acts'' (s 23F) and the State and Territory Validation Acts (244), for which Div 2B provides, operate in relation to acts as defined by those sections. One of the necessary elements in the definition of both previous exclusive possession act and previous non-exclusive possession act is that the relevant act is valid (ss 23B(2)(a), 23F(2)(a)), but that includes not only acts that are not invalid as affected by the RDA but also acts that are validated because of the application of Div 2 or its State or Territory analogue under s 19 of the NTA.

139 Accordingly, in cases where the act in question took place *before* the RDA commenced, it will not be necessary to have regard to Div 2. But if the act is of a kind dealt with in Div 2B, account must be taken of that division and the relevant State or Territory provisions made pursuant to s 23E or s 23I. In cases where the act in question took place *after* the RDA commenced it will be necessary to take account of Div 2 and, if applicable, Div 2B and the relevant State or Territory analogues.

140 Division 2A deals with acts that took place on or after 1 January 1994, but on or before 23 December 1996, and would otherwise be invalid to any extent because they fail to pass any of the future act tests in Div 3 of Pt 2 or for any other reason because of native title (s 21). Whether any of the acts that are relied on in these matters as extinguishing native title and which occurred between the dates mentioned (the creation and vesting of certain reserves (245) and the grant of certain mining leases (246)) fall to be considered by application of Div 2A was not explored in argument. The general scheme of the operation of Div 2A is, in some important respects, similar to Div 2B. In particular, provision is made validating ''intermediate period acts'' attributable to the Commonwealth (s 22A) and for State and Territory legislation to provide that such acts attributable to the State or Territory are validated (s 22F). Both the State and Territory Validation Acts have made such provision (247). Because the application of this division to particular transactions is not the subject of relevant findings of fact and has not been explored in argument, it is convenient to put it aside, leaving any question about

(243) See at 63 [9] and 77 [41].
(244) State Validation Act, ss 12I(1), 12J(1), 12M(1); Territory Validation Act, ss 3A, 3B.
(245) The reserves include Reserves 42998, 43140, 43196 and 43002.
(246) The mining leases include leases M80/360, M80/396 and M80/403.
(247) State Validation Act, s 12A; Territory Validation Act, s 4A.

its application to any further argument of the matters in the Federal Court.

G. *The Project and ''Operational Inconsistency''*

141 The judgment of the majority in the Full Court recorded (248) that the Project had been conceived as providing a major production area for cotton and rice but, in the event, neither crop had succeeded. Production of rice ceased in 1966 and cotton in 1974. Growers turned with success to seed crops, nuts, sugar and horticultural ventures such as melons and other fruits. Tourism became an important part of the economy of the region and, by 1991, the contribution of tourism to the economy was estimated as equivalent in value to that of the agricultural products produced under the Project.

142 Before 1941, when trial plots of irrigated pasture were established, almost all of the land which now forms part of the catchment area for the Ord River was held under pastoral lease. The work on the Project was done in three stages. The first involved the construction of a diversion dam and irrigation works for about 10,000 ha of land and the creation of the new town of Kununurra to serve the area. The water impounded by the diversion dam is Lake Kununurra which covers about 20 km^2. The second stage involved the construction of the main dam and irrigation works to irrigate a further 50,000-60,000 ha. The lake behind the main dam is Lake Argyle. This covers about 700 km^2 and at times of maximum flood may spread over 2,000 km^2 (249). At the time of the taking of evidence at trial, the area of land under irrigation was approximately 14,500 ha. In 1996, a hydro-electric power station was constructed on the main dam and power reticulated across the claim area to Kununurra and Wyndham and to the Argyle Diamond Mine south of Lake Argyle (250). It should be noted that for the construction of the diversion and the main dam and associated works, the State received significant financial assistance from the Commonwealth pursuant to the 1968 Ord River Act and the *Western Australia Agreement (Ord River Irrigation) Act* 1980 (Cth).

143 Whilst it is convenient to refer to the Project, the limitations in the expression for the determination of the issues in this litigation must be recognised. It is convenient to use the term ''Project'' as an inexact term of geographical reference and as a general term to encompass the various works and economic activities undertaken in the area. However, resolution of the issues in the present litigation turns upon the legal effect of particular dealings with land. It follows that attention must be directed to those dealings rather than to the geographical and economic entity suggested by use of the term ''Project''.

(248) *Western Australia v Ward* (2000) 99 FCR 316 at 330 [15].
(249) *Western Australia v Ward* (2000) 99 FCR 316 at 330 [13].
(250) *Western Australia v Ward* (2000) 99 FCR 316 at 330 [14].

144 The Project developed in a piecemeal fashion. It did not proceed by way of implementation of an agreement between the State and a particular listed or unlisted corporation (which itself was to raise the necessary finance and provide security) for the development and operation of infrastructure, being an agreement to which statutory force was given by the Parliament of the State. Statutes such as the *Iron Ore (Hamersley Range) Agreement Act* 1963 (WA), the *Iron Ore (Mount Newman) Agreement Act* 1964 (WA) and the *Iron Ore (Mount Goldsworthy) Agreement Act* 1964 (WA) (251) gave statutory force to agreements of this description and specifically modified a range of general legislation so as to vest the land and mineral interests necessary for the particular project. In that sense, and in contrast to the development at the Ord River, expressions such as the ''Mount Newman Project'', the ''Mount Goldsworthy Project'' and the ''Hamersley Project'' had a defined statutory content, beyond the identification of a particular geographical area or particular economic activities conducted there.

145 In the Full Court, the majority held that the primary judge had erred not only in applying the adverse dominion test with respect to extinguishment, but also (252):

> ''in not considering the [Project] as a whole when considering the effect of its implementation upon the continued enjoyment of native title rights and interests.''

That fresh approach then led the majority into error.

146 Later in their reasons, Beaumont and von Doussa JJ said (253):

> ''We have earlier indicated our view that the mere declaration of the Ord Irrigation District is not in itself sufficient to extinguish native title. It appears to us that there are large parts of the former Argyle Downs pastoral lease, including the areas which are now inundated by water, which clearly form lands and 'irrigation works' which are an integral part of the [Project] *such that administrative management and control give rise to operational inconsistency that wholly extinguishes native title*.'' (Emphasis added.)

Their Honours later said (254):

> ''The south and south-eastern portions of the former Argyle Downs pastoral lease beyond the flood levels of Lake Argyle, and

(251) See *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 205-207; affd *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1975) 132 CLR 463. See also the consideration of the *Commonwealth Aluminium Corporation Pty Limited Agreement Act* 1957 (Q) in *Wik* (1996) 187 CLR 1 at 251-257.

(252) *Western Australia v Ward* (2000) 99 FCR 316 at 428 [418].

(253) *Western Australia v Ward* (2000) 99 FCR 316 at 434 [439].

(254) *Western Australia v Ward* (2000) 99 FCR 316 at 435 [443].

> the lands resumed from Lissadell and Texas Downs are now Reserve 31165 being lands reserved for 'Government Requirements'. In these areas strict controls are necessary to manage the erosion and to limit the concentration of grazing activities on those parts where grazing is permitted. In our view, even though some of this land is now leased for grazing purposes under strict terms that permit the Water Corporation to control the use of the land, *the whole of it has been appropriated to the use of the [Project] with the consequent inconsistency with native title rights*. In our opinion native title rights are now wholly extinguished throughout this area.'' (Emphasis added.)

147 Two points should be made here. They are related. The first is that, whilst the Project may be spoken of as an economic or geographical entity, that does not avoid the necessity, for the purposes of this litigation, of analysing the legal effect of particular grants by or pursuant to a range of statutes, none of which was bespoke legislation, enacted for the particular purposes of the establishment of the enterprise identified as the Project.

148 The second is that the notion of administrative management and control of the activities engaged in to further the Project does not engage the notion of ''operational inconsistency'' for the extinguishment of native title.

149 The term ''operational inconsistency'' may provide some assistance by way of analogy in this field (255). Nevertheless, the analogy cannot be carried too far. The term ''operational inconsistency'' was not used in passages in the judgments in *Wik* of Gaudron J (256) and Gummow J (257), to which the Full Court referred in this regard. In *Wik*, their Honours were considering the legal consequences of the grant of pastoral leases which they had held did not carry a right to exclusive possession. The result was that it could not be said that all of such native title rights as may have existed had necessarily been extinguished by the grant of the pastoral leases. Generally, it will only be possible to determine the inconsistency said to have arisen between the rights of the native title holders and the third party grantee once the legal content of both sets of rights said to conflict has been established.

150 Further, the use in this universe of discourse of the term ''grant'', derived from old system conveyancing, including the creation and transfer of rights by the Crown in favour of subjects, is apt to mislead. The operation of a grant of rights may be subjected to conditions precedent or subsequent. The rights themselves may be incapable of identification in law without the performance of a further act or the

(255) *Yanner v Eaton* (1999) 201 CLR 351 at 396-397 [110]-[112].
(256) *Wik* (1996) 187 CLR 1 at 166.
(257) *Wik* (1996) 187 CLR 1 at 203.

taking of some further step beyond that otherwise said to constitute the grant.

151 Further problems arise where, as here, it is contended that rights or powers have been asserted or exercised by the Crown which are inconsistent with native title rights and interests. What exactly is the right or power which is said to be asserted or exercised? That is a question which can be answered only by examining the relevant statutory basis for the assertion or exercise of a right or power in relation to the land. Just as the change in sovereignty at settlement worked no extinguishment of native title, the bare fact that there is statutory authority for the executive to deal with the land in a way which would, on the occurrence of that dealing, create rights inconsistent with the continued existence of native title rights will not suffice to extinguish native title. So much follows from *Mabo [No 2]* and *Wik*. Yet there may be cases where the executive, pursuant to statutory authority, takes full title or plenum dominium to land and it is clear that this would extinguish native title. Likewise, it may be that the assertion or exercise of some rights in relation to land which fall short of the taking of full title to it, may have some relevant effect on native title rights and interests.

152 What is of immediate importance is the first point made above, namely that the identification of the Project does not displace the necessity to determine issues of extinguishment by reference to particular items of legislation. Thus, it is not possible to consider issues of extinguishment of native title rights and interests without a clear understanding of what the land law of Western Australia provides with respect to transactions and interests of the kind now in question.

153 The 1998 Act contains provisions which, it was submitted in argument in this Court, would apply to the geographical area of the Project and bring about complete extinguishment. This would be by classification of the Project as a ''public work'' which was a ''previous exclusive possession act''.

154 An ''act'' (the term defined in s 226 of the NTA) which is valid (including, as has already been pointed out (258), a ''past act'' which is validated by other provisions of the NTA) and which ''consists of the construction or establishment of any public work that commenced to be constructed or established on or before 23 December 1996'' is a ''previous exclusive possession act''. Section 23B(7) of the NTA so provides. Part 2B (ss 12I-12P) of the State Validation Act is then attracted. Section 12J of the State Validation Act provides:

> ''(1) If an act is a previous exclusive possession act under section 23B(7) of the NTA (which deals with public works) and is attributable to the State —

(258) See at 110-111 [135]-[139].

(a) the act extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated; and
(b) the extinguishment is taken to have happened when the construction or establishment of the public work began.
(2) If this section applies to the act, sections 7 and 12C do not apply to the act.''

Provision for compensation by the State then is made by s 12P, but ''only to the extent (if any) that the native title rights and interests were not extinguished otherwise than under this Act''.

155 But, in any event, did the Project involve the construction or establishment of a public work, particularly with respect to the area claimed? The term ''public work'' is defined as follows in s 253 of the NTA:

''*public work* means:
(a) any of the following that is constructed or established by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities:
(i) a building, or other structure (including a memorial), that is a fixture; or
(ii) a road, railway or bridge; or
(iia) where the expression is used in or for the purposes of Division 2 or 2A of Part 2 — a stock-route; or
(iii) a well, or bore, for obtaining water; or
(iv) any major earthworks; or
(b) a building that is constructed with the authority of the Crown, other than on a lease.''

Section 251D (added by the 1998 Act) takes the matter further. It states:

''In this Act, 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.''

The phrases ''necessary for, or incidental to'' plainly may provoke disputation as to their reach, for example to the flood and catchment areas for Lake Argyle to which Beaumont and von Doussa JJ referred in the passages set out above.

156 These matters cannot be resolved in this Court in the absence of attention to them and findings by the Full Court. Accordingly, it is necessary for the area of the Project, as for the rest of the claim area, to begin with the first level of alleged extinguishment, the pastoral leases. That consideration requires attention first to the history of land law in the State.

H. *Land Law in Western Australia*

1. *History*

157 The history of the establishment of the Colony of Western Australia is set out in the reasons of six members of the Court in the *Native Title Act Case* (259). It is unnecessary to repeat that history here. In the *Native Title Act Case* the Court rejected the contention that, in establishing the Colony, the Crown had intended to extinguish native title and to acquire for itself the absolute ownership of all land in the Colony. Nevertheless, as was also pointed out in that case (260):

> ''[T]hose involved in establishing the British Colony of Western Australia knew that there were Aborigines who, by their law and customs, were entitled to possession of land within the territory to be acquired by the Crown and settled as a Colony. But the acquisition of the territory of Western Australia was effected for the purpose of creating a colony to be populated by British settlers to whom land would be granted. The policy of the British Government was that Western Australia should be fully surveyed and, subject to reserves which might be created for specific purposes, the whole of the land within the territory should be available for sale. This policy was to be (and was) implemented by the exercise of sovereign power backed, if need be, by force.''

Before the *Western Australia Constitution Act* 1890 (Imp) (261) introduced responsible government to Western Australia, disposal of the waste lands of the Crown was regulated under the authority given to the Governor of the Colony, first under his instructions, then, successively under 5 & 6 Vict c 36, the 1842 Imperial Act dealing with waste lands of the Crown in the Australian colonies (the 1842 Waste Lands Act) and 9 & 10 Vict c 104, the 1846 Imperial Act dealing with the same subject (the 1846 Waste Lands Act). Upon the repeal of the latter two Acts, by 18 & 19 Vict c 56, the *Australian Waste Lands Act* 1855 (Imp), power to regulate sale, letting, disposal and occupation of waste lands of the Crown in Western Australia was exercisable by the Crown, by instructions under the signet and sign manual or through one of the Principal Secretaries of State (262). Accordingly, the Land Regulations which applied at the time of the first grants of pastoral leases in the East Kimberley (the Land Regulations 1878 as modified by the Land Regulations for the Kimberley District, the Land Regulations 1882 and the Land Regulations 1887) were made on that authority.

(259) (1995) 183 CLR 373 at 421-434, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
(260) *Native Title Act Case* (1995) 183 CLR 373 at 431.
(261) The *Constitution Act* 1889 (WA) was the 1st Sched to the *Western Australia Constitution Act* 1890 (Imp).
(262) *Australian Waste Lands Act* 1855 (Imp), s 7.

158 The lands to which those Regulations applied were the waste lands of the Crown within the Colony. In the 1846 Waste Lands Act these were defined (s 9) as lands vested in the Crown ''which have not been already granted or lawfully contracted to be granted . . . in Fee Simple, and which have not been dedicated or set apart for some public Use''. Similar provision was made in the Land Regulations 1887, where waste lands of the Crown were defined (reg 2) as lands vested in the Crown ''and not for the time being dedicated to any public purpose or granted or lawfully contracted to be granted in fee simple or with a right of purchase'' under those or earlier Regulations (263).

159 In 1844, provision was made by colonial Act (7 Vict No 14, An Act to regulate the temporary occupation of Crown Lands in the Colony of Western Australia) for the grant of licences for, among other things, depasturing livestock on unalienated Crown lands in the Colony. Persons occupying unalienated Crown lands without a licence were to be subject to penalty (264).

160 It was not until 1850, in Regulations made under the 1846 Waste Lands Act, that provision was first made for what were to be called ''pastoral leases'', a term which the Regulations said ''shall signify a lease giving to the holder thereof, the right of occupying the land comprised therein for pastoral purposes exclusively''. By those Regulations, proclaimed in 1851, pastoral leases could be granted for terms not exceeding eight years (265). Power was given to the Governor to ''sell to any person who shall be in actual occupation of a run under any pastoral lease any part of such run at its fair value in an unimproved state'' (266) and, subject to some conditions, at the end of each successive year from the date of any pastoral lease, to offer to sell any part of the land comprised in it (267). The 1851 Regulations further provided (268) that pastoral leases which had been occupied but became vacant ''by forfeiture or other determination . . . shall be disposed of by public auction''.

161 By the Land Regulations 1860 some changes were made to the regulations governing the grant of pastoral leases in the area of the Colony described as ''Class B'' which was land beyond the more closely settled areas. A ''Lessee in actual occupation of a run granted under these regulations'' was given, until the end of the first year of the term, a pre-emptive right to buy land ''within the boundaries of such run'' at a fixed price, together with a right to select a homestead block and a pre-emptive right to buy that before the end of the third

(263) The effect of an exception in this form to the definition of ''Crown lands'' is considered later in these reasons. See at 135-138 [211]-[221].
(264) 7 Vict No 14, s 1.
(265) Land Regulations 1851, Ch IV, s 1.
(266) Land Regulations 1851, Ch IV, s 2.
(267) Land Regulations 1851, Ch IV, s 3.
(268) Ch IV, s 8.

year of the term (269). After those periods expired, all of the unsold parts of the land, except the selected homestead, were open to public purchase (270). The Regulations further provided (271) that on the determination of any lease, whether by forfeiture or otherwise, the lands and improvements ''shall revert unconditionally to the Crown, and all rights and privileges of the Lessee in reference thereto shall cease''.

162 The Land Regulations 1864 made still more elaborate provision for pastoral leases in the area called ''Class B'' and in the North and East Districts of the Colony. The North District was the area bounded on the west and north by the sea coast (including adjacent islands) and on the south by the River Murchison and a true east line through the summit of Mt Murchison (272). The Regulations provided for the form of pastoral lease that might be granted in respect of some of the land in this district (273). Under a lease in that form, power was reserved to the Crown to sell all, or any part, of the land after the first year of the term, except the selected homestead, and to sell all, or any part, of the homestead at the end of the third year of the term, subject to a claim for improvements. In addition, the lease provided power ''to except from sale and reserve to [the Crown], and to enter upon and dispose of in such other manner as for the public interest to [the Crown] may seem best, such part or parts of the [subject land] as may be required'' for any of a long list of purposes (274). Provision was also made (275):

> ''for any person or persons to pass over, through, and out of any such part of the [subject land], while passing from one part of the country to another, with or without horses, stock, teams, or other conveyances, on all necessary occasions; also full right to the aboriginal natives of the said Colony at all times to enter upon any unenclosed part of the [subject land] for the purpose of seeking their subsistence therefrom in their accustomed manner.''

163 The Regulations under which the first pastoral leases were granted in the East Kimberley must be understood against this history. Several features of the Land Regulations 1878 and the Land Regulations for the Kimberley District may be noted. The 1878 Regulations provided that (reg 2):

> ''Save as is hereinafter excepted, the Waste Lands of the Crown in Western Australia shall not be conveyed or alienated in fee simple by Her Majesty, or by any person or persons acting on the

(269) Land Regulations 1860, Ch IV, s 2.
(270) Land Regulations 1860, Ch IV, s 3.
(271) Ch IV, s 10.
(272) Land Regulations 1864, Ch VIII, s 1.
(273) Land Regulations 1864, Ch VIII, s 7.
(274) Land Regulations 1864, Form V.
(275) Land Regulations 1864, Form V.

behalf or under the authority of Her Majesty, unless such conveyance or alienation be made by way of sale, nor unless such sales be conducted in the manner and according to the Regulations hereinafter prescribed.''

The Governor was authorised (reg 3):

''subject to such conditions and limitations as he may think fit, to sell or 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, such lands . . . as may be required''

for any of various purposes of which the last was:

''[a]ny purpose of safety, public utility, convenience, or enjoyment, or for otherwise facilitating the improvement and settlement of the Colony.''

What were described as ''[t]he pastoral lands of the Crown in Western Australia'' (reg 54) were divided into two classes: 1st Class and 2nd Class. When, in 1880, the Land Regulations for the Kimberley District were made, special provision was made for leases of pastoral lands in the area with which those Regulations dealt (276), but otherwise the Land Regulations 1878 applied to the waste lands of the Crown in the Kimberley District (277). The prescribed form of pastoral lease contained similar provisions to those mentioned earlier in connection with pastoral leases under the Land Regulations 1864. Although the Land Regulations 1882 and the Land Regulations 1887 contained rather more elaborate provisions about pastoral leases in the Kimberley District, nothing turns on those differences. The form of pastoral lease which was granted under these later Regulations was not significantly different from the leases granted earlier.

164 The pastoral leases granted under the 1882 and 1887 Land Regulations, and the earlier forms of lease prescribed in and after the Land Regulations 1864, used some of the language of the common law lease. The words of grant used were ''do by these presents demise and lease'' (278). The forms referred to the land as ''the premises hereby demised'' and to the ''lessee'' ''yielding and paying'' a specified rent during ''the term''. It will be necessary to consider the significance that should be attached to this use of language.

165 In the meantime, however, it is convenient to consider the next significant step in the regulation of land holding in Western Australia which was the introduction of responsible government to Western

(276) All that portion of the territory of Western Australia lying to the north of the parallel of 19°30′ South Latitude (reg 1).

(277) Land Regulations for the Kimberley District, reg 2.

(278) Land Regulations 1864, Form V; Land Regulations 1872, 9th Sched; Land Regulations 1878, 10th Sched; Land Regulations for the Kimberley District, Schedule; Land Regulations 1882, 11th Sched.

Australia followed by the enactment of the *Land Act* 1898 (WA). Under the new constitutional arrangements, control of the waste lands of the Crown in Western Australia passed from the Imperial authorities to the legislature of Western Australia (279). It was pursuant to that authority that the *Land Act* 1898 was enacted. Several of its provisions should be noted.

166 First, there is the definition of ''Crown Lands'' in s 3:

> '' 'Crown Lands' means the waste lands of the Crown within the Colony, that is to say, lands vested in Her Majesty, and not for the time being reserved for or dedicated to any public purpose or set apart as a city, town, or village, or granted or lawfully contracted to be granted in fee simple or with a right of purchase under this Act or any Act or Regulations hereby repealed, and which are not held under lease or license under the Goldfields Act or Mineral Lands Act, and include all lands between high and low water mark on the sea-shore and on the banks of tidal waters.''

Secondly, s 4 provided:

> ''THE Governor is authorised, in the name and on behalf of Her Majesty, to dispose of the Crown lands within the Colony, in the manner and upon the conditions prescribed by this Act or by any Regulations made thereunder, 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 this Act or 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. The Governor is authorised to make such grants and other instruments, upon such terms and conditions as to resumption of the land or otherwise as to him shall seem fit.''

The Land Regulations of 1864, 1882 and 1887 had made similar provision (280).

167 Two things may be noted about s 4. First, disposal of Crown lands was a matter wholly regulated by statute. As Gummow J pointed out in *Wik* (281): ''The result [of the enactment of a provision equivalent to s 3 of the *Western Australia Constitution Act*] was to withdraw from the Crown, whether represented by the Imperial authorities or by the Executive Government of [the Colony], significant elements of the prerogative.'' Secondly, by providing that the grant was valid and effectual to vest the land in possession for the estate or interest mentioned in it, these provisions did away with the need for the

(279) *Western Australia Constitution Act* 1890 (Imp), s 3.
(280) Land Regulations 1864, reg 3; Land Regulations 1882, reg 3; Land Regulations 1887, reg 3.
(281) (1996) 187 CLR 1 at 173.

grantee of a pastoral lease to take possession before acquiring more than an interesse termini or interest of a term (282).

168 The *Land Act* 1898 (and the Land Regulations which preceded it) provided for a number of different interests in land such as several kinds of conditional purchase: of agricultural lands (283), of grazing lands (284), of so-called poison lands (285). It provided for grants of ''Free Homestead Farms'' (286) and for ''Working Men's Blocks'' (287). The Regulations had provided for ''Special Occupation and Immigrants' Lands'' (288). Several forms of licence were contemplated. Provision was made in the *Land Act* 1898 for various forms of licence in respect to timber (289) and quarrying (290) and the earlier Land Regulations had made similar provision (291) for other kinds of licence. In addition to various forms of pastoral lease (292) provision was made for ''Timber Leases'' (293).

2. *Pastoral lease provisions for Aboriginal people*

169 From the earliest days, pastoral leases granted for land in the East Kimberley were subject to a reservation in favour of Aboriginal peoples. The form of pastoral lease prescribed by the 11th Sch to the Land Regulations 1882 provided as an exception and reservation to the grant

> ''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 [subject land] for the purpose of seeking their subsistence therefrom in their accustomed manner''.

The form of pastoral lease prescribed in the 24th Sched to the *Land Act* 1898 contained a similar provision. The *Land Act* 1933 (WA) did not make similar provision when first enacted, but in 1934 s 106 of that Act was amended (294) by adding, as sub-s (2):

(282) 2 Co Litt 270a; Megarry and Wade, *The Law of Real Property*, 5th ed (1984), pp 647-648; cf *Wik* (1996) 187 CLR 1 at 129-130, per Toohey J; at 153, per Gaudron J; at 198-199, per Gummow J; at 241-242, per Kirby J. Interesse termini was not abolished in Western Australia until 1969 by s 74 of the *Property Law Act* 1969 (WA).

(283) *Land Act* 1898 (WA), Pt V (ss 53-67).

(284) *Land Act* 1898, Pt VI (ss 68-69).

(285) *Land Act* 1898, Pt VII (ss 70-72).

(286) *Land Act* 1898, Pt VIII (ss 73-86).

(287) *Land Act* 1898, Pt IX (ss 87-90).

(288) *Land Act* 1898, ss 150-151.

(289) *Land Act* 1898, ss 110-111.

(290) *Land Act* 1898, s 154.

(291) See, eg, Land Regulations 1887, reg 93, providing for timber licences.

(292) *Land Act* 1898, s 93 (South-West Division), s 94 (Western Division), s 95 (Eucla Division), s 96 (North-West Division), s 97 (Eastern Division), ss 98-99 (Kimberley Division) and s 102 (Goldfields and Mining Districts).

(293) *Land Act* 1898, ss 112-133.

(294) *Land Act Amendment Act* 1934 (WA), s 11.

''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, both in the Full Court and in this Court, that no pastoral leases were issued under the *Land Act* 1933 in respect of land in the claim area before the 1934 amendment came into operation (295). That acceptance seems to be at odds with some material filed in this Court on behalf of Crosswalk which speaks of a pastoral lease dated 1 January 1934 but no party suggested that anything turns on this and we therefore put it to one side. It is to be noted that, unlike the earlier reservation, the 1934 provision spoke of entry upon any ''unenclosed *and* unimproved parts of the land'', not ''any unenclosed *or* enclosed but otherwise unimproved part of the land''.

3. *Pastoral leases*

170 The rights obtained under a pastoral lease were limited. Such a lease (296):

''[gave] no right to the soil, or to the timber, except to such timber as may be required for domestic purposes, for the construction of buildings, fences, stockyards, or other improvements on the lands so occupied.''

The interest obtained was precarious. It could be forfeited for non-payment of rent or for failing to comply with its terms and conditions (297). If the lease was forfeited for failure to pay rent, or for some other failure to comply with its terms and conditions, it was to be offered at auction (298). Importantly, s 106 of the *Land Act* 1898 provided that:

''such lease shall immediately determine over any land which may be reserved, sold, or otherwise disposed of under this Act, or under the Goldfields or Mineral Lands Acts.''

171 Power was reserved to the Minister to sell or otherwise dispose of not only any mineral land within the lease but also any other portion of the lease (s 107). It was held in a very early decision of the Court (299) that sale or other disposal included granting rights less than freehold. Under that power, the Minister could, no doubt, reserve some or all of the land under Pt III of the Act for any of the objects or purposes specified in s 39. As well, by s 107, extensive rights were reserved to the Minister in respect of lands held under pastoral lease,

(295) *Western Australia v Ward* (2000) 99 FCR 316 at 396 [301].
(296) *Land Act* 1898, s 106.
(297) *Land Act* 1898, s 32.
(298) *Land Act* 1898, s 33.
(299) *Moore and Scroope v Western Australia* (1907) 5 CLR 326.

including the right to make roads, to cut timber and to quarry. Finally, s 107 also reserved to the Minister the rights:

> ''to depasture any horses or cattle in the employ of the Government while working on or passing over the said land, and to water them at any natural sources there, together with a right for any person to pass over any such land which may be unenclosed, or enclosed but otherwise unimproved, with or without horses, stock or vehicles, on all necessary occasions.''

Pastoral leases could be transferred with the Minister's written approval (300) and could be mortgaged (301). Unlike earlier forms of pastoral lease, the holder had no pre-emptive right to buy the land. A holder of a lease under previous Land Regulations could, however, surrender that lease and obtain a new lease under the *Land Act* 1898 (s 104).

172 As has already been noted, the prescribed form of pastoral lease used language found in a lease between private parties. In addition, the *Land Act Amendment Act* 1900 (WA) provided that (s 15):

> ''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.''

The language of re-entry is aptly used in connection with a lease. It is, however, not apt to speak of re-entry in connection with licences or other interests any more than it is apt to speak of recovery of possession by the grantor of a contractual licence from the grantee.

173 In 1905, a further legislative step was taken which might be said to suggest that leases, including pastoral leases, granted under the 1898 Act were to be understood as being no more than particular species of the genus ''lease'' as that term is used in the common law. The *Land Act Amendment Act* 1905 (WA) provided (s 11):

> ''The demand or acceptance of rent in respect of any lease granted or agreed to be granted under the principal Act, or any amendment thereof, before or after the passing of this Act, shall not be deemed a waiver of the right of His Majesty or the Minister to enforce the observance of any covenant, condition, or regulation under which the demised premises are held, or the forfeiture thereof

(300) *Land Act* 1898, ss 142-144.
(301) *Land Act* 1898, s 138.

for breach of any such covenant, condition, or regulation committed before the receipt of such rent.''

Again, however, the significance to be attached to this provision must be judged against the whole of the legislative scheme.

174 The *Land Act* 1898 contained a general provision (s 135) penalising unlawful or unauthorised use or occupation of Crown lands or lands reserved for or dedicated to any public purpose. Land subject to pastoral lease formed part of the waste lands of the Crown; it was land vested in the Crown, ''not for the time being reserved for or dedicated to any public purpose or set apart as a city, town, or village, or granted or lawfully contracted to be granted in fee simple or with a right of purchase'' under the *Land Act* 1898 or any Act or Land Regulations repealed by that Act (s 3). Land subject to pastoral lease was, therefore, ''Crown land'' under the *Land Act* 1898 and s 135 applied to it.

175 The *Land Act* 1898 was repealed by the *Land Act* 1933 (s 4 and 1st Sched). The new Act provided for the creation of various interests in agricultural and grazing land: for ''Conditional Purchase'' (302), for ''Free Homestead Farms'' (303), for ''Working Men's Blocks'' (304) and for ''Special Settlement Lands'' (305). It provided for ''Special Leases and Licenses'' (306) and for ''Agricultural Lands Purchase'' (307). The provisions made in the 1933 Act for pastoral leases (308) were substantially the same as those made in the 1898 Act except, as has already been noted, for the omission from the prescribed form of pastoral lease of a reservation permitting access to the land by Aboriginal peoples for the purpose of gathering sustenance. As has also been noted earlier, this omission was remedied by the *Land Act Amendment Act* 1934 (WA) and reference has been made to the difference between the 1934 provision and the provision found in leases granted under the 1898 Act or earlier Land Regulations.

176 Like the 1898 Act, the 1933 Act provided a penalty for trespass upon Crown lands (s 164):

> ''Every person who, either by himself or by his servant, agent, or other person acting under his direction, shall be found in the unlawful or unauthorised use or occupation of any Crown lands, or lands reserved for or dedicated to any public purpose, or set apart as town or suburban lands, or who in any manner trespasses thereon, shall on conviction be liable to a fine not exceeding twenty-five pounds.''

(302) *Land Act* 1933, Pt V, Div 1 (ss 46-63).
(303) Pt V, Div 2 (ss 64-79).
(304) Pt V, Div 3 (ss 80-83).
(305) Pt V, Div 4 (ss 84-89).
(306) Pt VII (ss 116-118).
(307) Pt VIII (ss 119-134).
(308) Pt VI (ss 90-115).

Sections 162 and 163 of the *Land Act* 1933 substantially reproduced the provisions of the *Land Act Amendment Act* 1905 about acceptance of rent not being a waiver of breach and the *Land Act Amendment Act* 1900 about *Gazette* notice being equivalent to re-entry.

177 What emerges from this recitation of statutory provisions is that the interest in land which was obtained by the holder of a pastoral lease under the *Land Act* 1898 or earlier Land Regulations was very different, in many respects, from the interest that a lessee would obtain under a lease for a term of years granted to the lessee by the freehold owner of the land. The differences between a pastoral lease and some archetypal form of ''ordinary'' or ''typical'' lease of land are, however, of importance to the present inquiry only to the extent that they assist in considering the question of extinguishment of native title. For the reasons given earlier, that inquiry requires attention to whether the rights given under a pastoral lease are inconsistent with the native title rights and interests which are asserted. As Toohey J said in *Wik* (309), at the heart of the argument in that case, and in the present — ''that the grant of each pastoral lease extinguished native title rights — is the proposition that such a grant conferred exclusive possession of the land on the grantee, and that entitlement to exclusive possession is inconsistent with the continuance of native title rights''. But as Toohey J went on to point out, ''[e]xpressed with that generality, the proposition tends to conceal the nuances that are involved''.

178 On no view did a pastoral lease granted under the provisions examined so far, give the holder a right to exclusive possession of the land. There were extensive reservations permitting entry not only on behalf of the Crown but also by others in many different circumstances and for many different purposes. It is enough to notice the widest of these, reserving a right to *any* person ''to enter, pass over, through, and out of any [unenclosed or enclosed but otherwise unimproved part of the land] while passing from one part of the country to another, with or without horses, stock, teams, or other conveyances, on all necessary occasions'' (310).

179 Of most immediate relevance, for present purposes, is the reservation in each pastoral lease which was issued under the *Land Act* 1898 or previous Land Regulations and s 106(2) of the *Land Act* 1933 which applied to pastoral leases issued after 1934. The majority of the Full Court concluded that when that reservation ceased to apply (upon the land being, as the case required, enclosed, improved or both enclosed and improved) native title to that land was wholly extinguished (311). That conclusion depends upon the premise that, but

(309) (1996) 187 CLR 1 at 108.
(310) *Land Act* 1898, 24th Sched.
(311) *Western Australia v Ward* (2000) 99 FCR 316 at 403 [329].

for the reservation, the holder of a pastoral lease had the right to exclude Aboriginal people from the land.

180 As was pointed out in *Wik*, the fact that both the instrument by which a pastoral lease was granted and the legislative instrument pursuant to which it was granted used language that might be used in or in relation to a lease between private individuals does not conclusively demonstrate that the holder of a pastoral lease was granted a right to exclusive possession of the land. Putting aside, for the moment, the provision about Aboriginal access, the following features may be noticed about the pastoral leases with which we are concerned in this matter:

(a) Pastoral leases are a creature of statute or regulation, not the common law (312).

(b) Pastoral leases were but one of several forms of interest in land for which provision was made by the Acts and Land Regulations, and not all of those interests find close analogy with interests that could be created at common law (313).

(c) Although the Acts and Land Regulations provided for both leases and licences as different kinds of interest (314), various provisions of the Acts and Land Regulations treated leases and licences without distinction (315) as, for example, in provisions dealing with their transfer (316), their forfeiture (317) and the periodic payment to be made under each as ''rent'' (318).

(d) The holder of a pastoral lease was entitled to use the land only for the limited purposes referred to as ''pastoral purposes'' and the holder obtained no right to the soil or the timber except to the extent required for certain limited purposes (319).

(e) As has been noted earlier, the interest obtained under a pastoral lease was precarious.

181 Unlike the legislation considered in *Wik*, no provision was made for the holder of a pastoral lease to bring action for removal of persons in ''unlawful occupation'' (320) of the land the subject of the pastoral lease. There were the successive penal provisions prohibiting unlawful or unauthorised use or occupation of Crown lands.

182 It was not, nor could it be, submitted that these penal provisions should be understood as working an extinguishment of native title. The

(312) cf *Wik* (1996) 187 CLR 1 at 149, per Gaudron J.
(313) cf *Stewart v Williams* (1914) 18 CLR 381 at 390; *Wik* (1996) 187 CLR 1 at 110-112, per Toohey J.
(314) cf *Wik* (1996) 187 CLR 1 at 151, per Gaudron J.
(315) cf *Wik* (1996) 187 CLR 1 at 199-200, per Gummow J.
(316) Land Regulations 1878, reg 93; *Land Act* 1898, s 142 (cf s 144); *Land Act* 1933, s 144.
(317) *Land Act* 1898, s 136; cf *Land Act* 1933, ss 139, 162, 163.
(318) *Land Act* 1898, s 136; cf *Land Act* 1933, ss 139, 162, 163.
(319) *Land Act* 1898, s 106.
(320) *Land Act* 1910 (Q), s 204.

provisions were generally applicable to all Crown land, that is, to all waste lands of the Crown, and are not to be understood ''as intended to apply in a way which will extinguish or diminish rights under common law native title'' (321). That is to say, the penal provisions which operated in respect of persons found in the ''unlawful or unauthorised use or occupation'' of Crown lands did not extend to persons exercising native title rights and interests. The exercise of native title rights and interests did not constitute an *unlawful* or *unauthorised* use or occupation of the land. Did the grant of a pastoral lease over Crown land prohibit the continued use or occupation of that land, in accordance with native title rights and interests, by the holders of those rights? Did it make use or occupation of the land by those persons for those purposes ''unlawful or unauthorised''?

183 That would be so *only* if a pastoral lease gave the holder the right, either absolutely, or contingently upon the taking of certain steps (enclosure, improvement or both), to exclude native title holders from the land. Pastoral leases granted under the statutes and Land Regulations in issue in these matters did not grant that right. There are several reasons why that is so.

184 Chief among those reasons is the recognition of the fact that the exercise of native title rights and interests on Crown lands was not an unlawful or unauthorised use liable to penalty under the penal provisions of the then applicable *Land Act* or Land Regulations. The grant of a precarious interest in Crown land, for limited (pastoral) purposes, subject to extensive reservations and exceptions permitting entry on the land in a wide variety of circumstances and, in some circumstances, by anyone, is not to be understood as rendering unlawful what was previously a lawful use of the land by native title holders.

185 The reservation or statutory provision in favour of Aboriginal people requires no different conclusion. Neither the reservation nor the later statutory provision is to be read as confining the circumstances in which access to the land by native title holders was to be permitted to the purpose of seeking subsistence in the accustomed manner and prohibiting access in all other circumstances. Nor is either to be read as suggesting that, despite the great generality of the other reservations in the pastoral lease, and the limitations on the purposes to which the land may be put, the holder was granted a right, in all other circumstances, to exclude not only other citizens but also the grantor of the interest.

186 In considering whether a lease confers the right of exclusive possession on the lessee the proper order of inquiry is first to examine what are the rights granted and only then to classify the grant. Here the rights granted were limited in the respects that have been noted.

(321) *Mabo [No 2]* (1992) 175 CLR 1 at 111, per Deane and Gaudron JJ; *Wik* (1996) 187 CLR 1 at 146-147, 154-155, per Gaudron J; at 192-195, per Gummow J.

Especially were they limited in respect of the grantor of the interest. Under the early forms of lease (322), the Crown reserved to itself very extensive rights of entry — ''for any purposes of public defence, safety, utility, convenience, or enjoyment, or for otherwise facilitating the improvement and settlement of our Colony''. Under the *Land Act* 1933, it retained power (s 106(e)) to sell, lease or otherwise dispose of any part of the lease at any time as well as power (s 29(q)) to reserve or dispose of any part of it for any of a number of purposes, including those described in the reservation of right of entry just mentioned as reserved under the earlier forms of lease. Pastoral leases granted under the early Land Regulations, the *Land Act* 1898 or the *Land Act* 1933 conferred no right of exclusive possession on the grantee. The reservation or provision in favour of Aboriginal access cannot, then, be seen as qualifying an otherwise general right to exclude. It follows that upon the happening of the contingency of enclosure or improvement contemplated by the reservation or provision, those who would enter or use the land as native title holders could continue to do so. Those who could no longer do so were those Aboriginal persons who, although within the terms of the reservation, were not native title holders. It is unnecessary to decide what constitutes enclosure or improvement (323).

187 The conclusion that pastoral leases granted under the statutes and regulations of the State did not grant to the holder of a pastoral lease the right either absolutely or contingently upon the taking of certain steps to exclude native title holders from the land has significant consequences for the application of Div 2B of Pt 2 of the NTA and of Pt 2B of the State Validation Act.

188 The pastoral leases were ''non-exclusive pastoral leases'' within the definition in s 248B of the NTA. This was because they did not confer ''a right of exclusive possession over the land or waters covered by the lease'' within the meaning of s 248A.

189 Beaumont and von Doussa JJ summarised the position with respect to pastoral leases by saying (324):

> ''According to the records of the State the claim area was blanketed by some forty-five pastoral leases granted under the Land Regulations 1882 (WA), and thirty-eight granted under the Land Regulations 1887 (WA). Over time these were replaced by forty-two pastoral leases granted under the *Land Act* 1898 (WA). The pastoral leases renewed under the *Land Act* 1933 (WA) covered

(322) *Land Act* 1898, 24th Sched.

(323) cf *Western Australia v Ward* (2000) 99 FCR 316 at 401-402 [320]-[324].

(324) *Western Australia v Ward* (2000) 99 FCR 316 at 404 [330]. Their Honours went on to identify Glen Hill as the only continuing pastoral lease but added that it was held in trust for members of the Miriuwung and Gajerrong community including one of the named applicants; in those circumstances par (b) of s 47(2) of the NTA produced the consequence that native title in that area was not extinguished.

larger areas and were fewer in number. It seems a series of leases covering the area were issued for terms of up to about fifty years in the mid-1930s, and then consolidated and reissued between 1966 and 1974 for terms expiring on 30 June 2015, save however for areas that in the meantime had been surrendered or withdrawn and become reserved lands or the subject of some other grant.''

The earlier dates of the pastoral leases referred to in this passage are significant. They were granted before the RDA commenced and there is, therefore, no question about their validity. Division 2 of Pt 2 of the NTA therefore has no application to them.

190 The grant on or before 23 December 1996 of a non-exclusive pastoral lease which is valid answers the definition in s 23F of the NTA of a ''previous non-exclusive possession act''. If a previous non-exclusive possession act is attributable to the State, then Pt 2B of the State Validation Act is applicable. In particular, s 12M is engaged. Section 12M parallels s 23G of the NTA and deals with confirmation of partial extinguishment of native title by a previous non-exclusive possession act of the State. It states:

''(1) Subject to sub-section (2), if a previous non-exclusive possession act (see section 23F of the NTA) is attributable to the State —

(a) to the extent that the act involves the grant of rights and interests that are not inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned, the rights and interests granted, and the doing of any activity in giving effect to them, prevail over the native title rights and interests but do not extinguish them;

(b) to the extent that the act involves the grant of rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned —

(i) if, apart from this Act, the act extinguishes the native title rights and interests, the native title rights and interests are extinguished; and

(ii) in any other case, the native title rights and interests are suspended while the lease concerned, or the lease as renewed, re-made, re-granted or extended, is in force;

and

(c) any extinguishment under this sub-section is taken to have happened when the act was done.

(2) If the act is the grant of a pastoral lease or an agricultural lease to which section 6 applies, this section does not apply to the act.

(3) If this section applies to the act, sections 6, 8, 9, 12D and 12E do not apply to the act.''

Section 6 (referred to in s 12M(2)) does not apply. It deals with a particular species of ''past act''. That term is defined in s 228(2) of the

NTA in terms which postulate invalidity, in particular, by reason of the operation of the RDA.

191 It then is necessary to apply the provisions of s 12M to the conclusions reached above respecting the nature and effect of the grants of pastoral leases by the State.

192 These were acts involving the grant of rights and interests inconsistent with so much of the native title rights and interests as stipulated for control of access to the land the subject of the grants. The pastoral leases were acts attributable to the State which denied to the native title holders the continuation of a traditional right to say who could or who could not come onto the land in question. That consequence flowed apart from the provisions of the State Validation Act. It followed that to that extent the grants of pastoral leases extinguished native title rights and interests within the meaning of par (b)(i) of s 12M(1).

193 To the extent that the grants of pastoral leases involved the grant of rights and interests not inconsistent with native title rights and interests in relation to the land or waters covered by the pastoral leases in question, the rights and interests granted, and the doing of any activity in giving effect to them, prevailed over the native title rights and interests but did not extinguish them. That is to say, par (a) of s 12M(1) was engaged.

194 The right to control access apart, many other native title rights to use the land the subject of the pastoral leases probably continued unaffected. For example, the native title right to hunt or gather traditional food on the land would not be inconsistent with the rights of the pastoral leaseholder although, as stated in par (a) of s 12M(1), the rights of the pastoral leaseholder would ''prevail over'' the native title rights and interests in question. On the other hand, for the native title holders to burn off the land probably would have been inconsistent with the rights granted to the pastoral leaseholder, so as to bring about extinguishment as identified in par (b)(i) of s 12M(1).

195 It is necessary to use terms such as ''many'' and ''probably'' because there are limited findings by the primary judge and by the Full Court as to the relevant content of the native title rights and interests which were the subject of the determination in favour of the claimants. Without that identification it is not possible to say whether there was inconsistency with rights granted under a pastoral lease and to appreciate the consequences of applying s 12M of the State Validation Act.

196 For the reasons given earlier (325) these are issues that will have to be taken up on the remitter of the matters to the Full Court.

(325) See at 87-88 [72].

I. *Reserves*

1. *Introduction*

197 Much of the land in Western Australia which is the subject of the Ward claimants' claim is, or at some time has been, designated as ''reserve'' or ''public reserve''. Land has been designated in this way by executive act done pursuant to Land Regulations made under Imperial statute or, later, under colonial or State statutes. Some reference has already been made to the relevant provisions (326). For the moment, reference to the relevant provisions of the Land Regulations 1882, the *Land Act* 1898 and the *Land Act* 1933 will suffice to enable the relevant arguments to be understood and considered.

198 Provision was made for the Governor to make reserves for specified public purposes (327), which reserves were then to be notified in the *Government Gazette* (328), and for the ''vesting'' of reserves (329). Provision was also made in the statutes (but not the Land Regulations) for reserves to be placed under the control of a board of management, without the issuing of any deed of grant, and the board of management could be empowered to make by-laws for the control and management of the reserve (330).

199 Three different kinds of transaction were contemplated by the statutory provisions for vesting reserves (331). First, by Order in Council, a direction could be given that a reserve ''vest in and be held by'' a municipality, road board or other person named in the order ''in trust for the like or other public purposes, to be specified in such order'' with a power to lease the land for a term not exceeding twenty-one years. Secondly, the Governor, by Order in Council, might lease the land (under the 1898 Act for 999 years) at a peppercorn rental. Thirdly, the Governor, again by Order in Council, might grant the fee simple of a reserve ''to secure the use thereof for the purpose for which such reserve was made''. Under the 1933 Act (s 32), the Governor was given power to lease, for a term not exceeding ten years, ''any reserve ... not immediately required for the purpose for which it was made''.

200 The primary judge (332), and the majority of the Full Court (333), held that the effect of reserving land under these provisions (as distinct

(326) Land Regulations 1882, regs 29-34; *Land Act* 1898, Pt III (ss 39-46); *Land Act* 1933, Pt III (ss 29-37).
(327) Land Regulations 1882, reg 29; *Land Act* 1898, s 39; *Land Act* 1933, s 29.
(328) Land Regulations 1882, reg 30; *Land Act* 1898, s 40; *Land Act* 1933, s 30.
(329) Land Regulations 1882, reg 33; *Land Act* 1898, s 42 and 33rd Sched; *Land Act* 1933, s 33.
(330) *Land Act* 1898, s 43; *Land Act* 1933, s 34.
(331) *Land Act* 1898, s 42; *Land Act* 1933, s 33.
(332) *Ward* (1998) 159 ALR 483 at 575.
(333) *Western Australia v Ward* (2000) 99 FCR 316 at 418 [387].

from taking other steps contemplated by them) was to do no more than reserve the land from sale, creating no rights in others. This conclusion is plainly correct but it does not necessarily mean that the designation of land as a ''reserve'' is irrelevant to the questions which must be decided in these matters. It is also necessary, as the majority of the Full Court noted (334), to consider what other steps were taken under the Acts in relation to the land and, in at least some cases, it is contended that it is necessary to consider what was done on the land. Further, in the case of some parcels of land, it is desirable to notice the transaction by which previous interests in the land (usually under a pastoral lease) were brought to an end before the land was reserved for some purpose. It is convenient to deal with this last subject first.

2. *Resumptions*

201 Not all of the land connected in some way with the Project was resumed from pastoral leases pursuant to s 109 of the *Land Act* 1933. Section 109 provided:

> ''Subject as hereinafter provided, the Governor may resume, enter upon, and dispose of the whole or any part of the land comprised in any pastoral lease, for agricultural or horticultural settlement, or for mining or any other purpose as in the public interest he may think fit.''

202 The largest area of land which was not resumed in this way was Argyle Downs Station. That land was the subject of what was described in the instrument by which that transaction was effected as a ''bargain and sale'' transaction. It was not submitted, however, that this transaction extinguished native title rights and interests. It may, therefore, be put to one side for the moment.

203 Other parcels of land (in what was known as an Extension to the Packsaddle Plains Irrigation Area) were resumed in 1972 and 1975 under the *Public Works Act* 1902 (WA) (335). The notices published in the *Government Gazette* in relation to the 1972 and 1975 resumption referred in each case to both the *Public Works Act* and to the *Rights in Water and Irrigation Act* 1914 (WA). The notices directed that the lands:

> ''shall vest in Her Majesty for an estate in fee simple in possession for the public work herein expressed, freed and discharged from all trusts, mortgages, charges, obligations, estates, interests, rights-of-way or other easements whatsoever.''

204 The Ward claimants contend that the Full Court failed to consider the application of the RDA to the 1975 transaction or the legislation pursuant to which it was effected. It is convenient to consider this

(334) *Western Australia v Ward* (2000) 99 FCR 316 at 419 [389].
(335) *Western Australia v Ward* (2000) 99 FCR 316 at 431 [429].

issue about the RDA separately (336). For the moment, it is enough to say that the majority of the Full Court were right to conclude (337) that vesting an estate in fee simple in the Crown would, apart from the operation of the RDA, extinguish any native title over the land. What otherwise may be thought to be the oddity of an estate in fee simple being vested in the Crown must be put to one side when the *Public Works Act* (s 18) provides that this is to be the effect of publication of a notice in the form employed in these cases. Subject to the issue about the RDA the interest thus taken by the Crown extinguished native title (338).

205 No contrary conclusion is required by the *Rights in Water and Irrigation Act*. The primary judge held (339) that because the public work was described by reference to the ''Ord River Irrigation Project'', the land vested in the Minister under s 3 of that Act, for some interest less than fee simple. The majority in the Full Court rightly held (340) that the notice of resumption made clear that the interest that was to be created by the resumption was an estate in fee simple.

206 The other parcels of land which were resumed from pastoral leases, in connection with the Project, were resumed pursuant to the power given by s 109 of the *Land Act* 1933 to ''resume, enter upon, and dispose of the whole or any part of the land comprised in any pastoral lease''. In the Full Court, it was submitted on behalf of Western Australia that resumption under this provision was itself enough to effect an extinguishment of native title rights and interests ''by reason of the crystallisation of the reversion, acquisition of the land under s 109, and termination of the operation of s 106(2)'' with its provision for Aboriginal access to land (341). It was submitted that upon resumption the Crown acquired all right and title to the land.

207 The Full Court rejected these contentions and they were not pursued in this Court in that form. Rather, it was submitted that what had been done after resumption amounted to a reserve *and dedication* of the land to public purposes, not a mere reservation from sale, or that, in some cases, there had been a vesting of the land which worked extinguishment of native title.

208 For the reasons given earlier, the fact that, upon resumption, the statutory provision in s 106(2) for Aboriginal access to land ceased to operate in respect of a particular piece of land did not, of itself, work any extinguishment of native title to that land. Nor did resumption of the land mean that the Crown acquired all right and title to the land.

(336) See at 155-157 [278]-[280].
(337) *Western Australia v Ward* (2000) 99 FCR 316 at 432 [432].
(338) *Fejo v Northern Territory* (1998) 195 CLR 96.
(339) *Ward* (1998) 159 ALR 483 at 587-588.
(340) *Western Australia v Ward* (2000) 99 FCR 316 at 432 [433].
(341) *Western Australia v Ward* (2000) 99 FCR 316 at 427 [415].

Resumption brought the relevant pastoral lease to an end. If there was no dedication of the land, and only a resumption, both before and after that resumption the land was Crown land. That is to say it was, both before and after resumption, part of the lands of the Crown vested in the Crown which was not ''for the time being, reserved for or dedicated to any public purpose, or granted or lawfully contracted to be granted in fee simple or with the right of purchase'' under the *Land Act* 1933 or any Act repealed by that Act (342). Resumption did not give the Crown any larger title to the land than the radical title acquired at sovereignty.

3. *The effect of reservation*

209 The resumptions of 1972 and 1975 for the Extension to the Packsaddle Plains Irrigation Area may be contrasted with earlier resumptions and reservations made in connection with the Project. Western Australia submitted that the subsequent reservation of those parcels was more than an exception of the land in question from sale, it was the dedication of the land to the nominated purpose and the land could not, thereafter, be lawfully used except for the reserved purpose.

210 The argument that reservation worked an extinguishment had two elements: first, that reserved lands cannot lawfully be used except for the reserved purpose and, secondly, that creation of a reserve gave a right to the public, at least where, as was the case with Reserve 1061, the reserve is for public purposes.

211 The first of these arguments was closely bound up with Western Australia's contention that reservation of land amounted to a ''dedication'' to the specified purpose. It was submitted that dedication meant ''devoted to a purpose'' and reliance was placed upon what was said in that regard by Windeyer J in *Randwick Corporation v Rutledge* (343). Further, some emphasis was given to the use of the word ''dedicated'' in Land Regulations or statutes and it is as well to notice that usage now.

212 The Land Regulations 1882 did not use the word ''dedicated'' in connection with reserves. In the Land Regulations 1887, however, ''Crown Lands'' was defined (reg 2) as the ''Waste Lands of the Crown'' to which the Land Regulations gave the meaning of lands vested in the Crown ''and not for the time being *dedicated* to any public purpose or granted or lawfully contracted to be granted in fee simple or with a right of purchase'' (emphasis added). Both the Acts of 1898 and 1933 made similar reference, in the definition of Crown lands, to land not for the time being ''reserved for or dedicated to'' any public purpose (344). Further, in 1899, an Act (345) was passed in

(342) *Land Act* 1933, s 3.
(343) (1959) 102 CLR 54 at 72-74.
(344) *Land Act* 1898, s 3; *Land Act* 1933, s 3.
(345) *Permanent Reserves Act* 1899 (WA), s 2.

Western Australia to provide for the identification of some reserves as those which ''shall for ever remain dedicated to the purpose declared'' until Parliament otherwise provided.

213 Considerable reliance was placed by Western Australia on what Brennan J said in *Mabo [No 2]* (346):

> ''Where the Crown grants land in trust or reserves and dedicates land for a public purpose, the question whether the Crown has revealed a clear and plain intention to extinguish native title will sometimes be a question of fact, sometimes a question of law and sometimes a mixed question of fact and law. Thus, if a reservation is made for a public purpose other than for the benefit of the indigenous inhabitants, a right to continued enjoyment of native title may be consistent with the specified purpose — at least for a time — and native title will not be extinguished. But if the land is used and occupied for the public purpose and the manner of occupation is inconsistent with the continued enjoyment of native title, native title will be extinguished. A reservation of land for future use as a school, a courthouse or a public office will not by itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native title which would thereby be extinguished.''

214 It is important to recall that the ultimate question is whether, by the steps that were taken, the Crown created in others, or asserted, rights in relation to the land that were inconsistent with native title rights and interests over the land. It was submitted that the features of the statutory regulation of public reserves which we have mentioned indicated that reservation, even without vesting, amounted to dedication to the purpose specified in the instrument of reservation in the sense, so it was submitted, that reservation prevented the Crown from applying the land to some other purpose and created some right in members of the public generally or a section of the public (347).

215 The reference by Brennan J, in the passage of his reasons in *Mabo [No 2]* that is set out earlier, to *use* of the land that is reserved, may distract attention from the relevant inquiries. They are, as we have said, whether rights have been created in others that are rights inconsistent with native title rights and interests, and whether the Crown has asserted rights over the land that are inconsistent with native title rights and interests. Use of the land may suggest, it may even demonstrate, that such rights have been created or asserted, but the basic inquiry is about inconsistency of *rights*, not inconsistency of *use*. Further, as has already been pointed out, it is often necessary to examine inconsistency by reference to the particular native title right and interest concerned.

(346) (1992) 175 CLR 1 at 68.
(347) *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 74, per Windeyer J.

216 Because the disposition of Crown lands in Western Australia is now, and, since the coming of representative government, has been, *wholly* regulated by statute it is to the applicable statutes that attention must be directed. If the land is used in some way, there will be some statutory warrant for that use. In some cases that statutory authority will be in a *Land Act*; in others it will be found in some other statute. The question of extinguishment of native title rights and interests requires attention to the rights that are asserted rather than the use that is made of the land.

217 We doubt that great weight can be attached to the use of the word ''dedicated'' in the Acts or Land Regulations. ''At common law the only way in which land can properly be said to be dedicated to a public use is when it is dedicated as a highway.'' (348) The Western Australian legislation, like the legislation considered in *Randwick Corporation v Rutledge*, appears to use the word in a sense wider than its common law use. It is necessary, therefore, to understand it in its context. The use of the word is by no means conclusive of the issues in these matters. For present purposes, what is important is to identify the rights that are created or exercised when a reserve is created or ''dedicated'' to a public purpose. That requires consideration of the whole of the relevant statutory framework.

218 Reservation of land under the relevant Western Australian provisions inhibited the Crown's future action in relation to that land. The inhibition, however, was not, and could not be, absolute. As Windeyer J pointed out in *Randwick Corporation v Rutledge* (349), even if land were dedicated to a public purpose, it did not take the land outside the authority of the legislature. Moreover, under the Western Australian statutes, reserves, other than those dealt with by the *Permanent Reserves Act* 1899 (WA) and its legislative successor (350), could be cancelled or the purpose of the reservation altered by executive act (351). Even permanent reserves could be cancelled or the purpose of the reservation altered by statute. Further, as had been held in *Williams v Attorney-General (NSW)* (the *Government House Case*) (352), the Crown appropriating lands to a particular purpose, without the creation of a trust, did not mean that the land became dedicated to that purpose, or that it could not later be used by the Crown for some other purpose.

(348) *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 74, per Windeyer J, referring to *Ex parte Lewis* (1888) 21 QBD 191 at 197; *Attorney-General (NSW) v Williams* (the *Government House Case*) (1915) 19 CLR 343 at 345-346; [1915] AC 573 at 579; *New South Wales v The Commonwealth* (the *Garden Island Case*) (1926) 38 CLR 74 at 91.

(349) (1959) 102 CLR 54 at 75.

(350) *Land Act* 1933, s 31.

(351) Land Regulations 1887, reg 35; *Land Act* 1898, s 41; *Land Act* 1933, s 37.

(352) (1913) 16 CLR 404; on appeal, *Attorney-General (NSW) v Williams* (1915) 19 CLR 343; [1915] AC 573.

219 Nevertheless, by designating land as a reserve for a public purpose, even a purpose as broadly described as ''public utility'', the executive, acting pursuant to legislative authority, decided the use or uses to which the land could be put. The executive thus exercised the power that was asserted at settlement by saying how the land could be used. The exercise of that power was inconsistent with any continued exercise of power by native title holders to decide how the land could or could not be used. The executive had taken to itself and asserted (pursuant to the authority conferred in that regard by statute) the right to say how the land could be used. This step was not, however, necessarily inconsistent with the native title holders continuing to use the land in whatever way they had, according to traditional laws and customs, been entitled to use it before its reservation.

220 The reason that the right to use the land may have survived reservation is the same reason that the grant of a pastoral lease extinguished the right to control access to the land, but not necessarily all the rights of native title holders to use it in accordance with the rights held under traditional laws or customs. The provisions of the Acts providing a penalty for ''unlawful or unauthorised use or occupation'' of lands (including ''lands reserved for or dedicated to any public purpose'') (353) did not, on their proper construction, prohibit use or occupation by native title holders. It is, therefore, not right to say, as a proposition of universal application, as Western Australia submitted, that reserved lands could not lawfully be used except for the reserved purpose. The facts that the 1905 amendments to the *Land Act* 1898 permitted leasing of reserves not immediately required for their purpose (354) or that in 1960 the *Land Act* 1933 was amended (355) to permit leasing or licensing of certain kinds of reserve for depasturing stock require no different conclusion. Whether a right in native title holders to use the land continued unextinguished depends upon other considerations, particularly what, if any, rights in others were created by the reservation or later asserted by the executive.

221 The designation of land as a reserve for certain purposes did not, without more, create any right in the public or any section of the public which, by reason of inconsistency and apart from the State Validation Act, extinguished native title rights and interests.

222 However, in the case of reserves created after 31 October 1975, account must be taken of Div 2 of Pt 2 of the NTA. Creation of a reserve, being the exercise of executive power of the Crown (in this case, in right of Western Australia and pursuant to legislative authority in that regard) fell within the definition of ''act'' in the NTA (s 226(2)(e)). Because it was inconsistent with the continued existence

(353) *Land Act* 1898, s 135; *Land Act* 1933, s 164.
(354) *Land Act Amendment Act* 1905 (WA), s 10.
(355) *Land Act Amendment Act* 1960 (WA), s 2.

of the native title right to control the use of or access to land, it was an act which could have affected native title (s 227). Questions of the operation of the RDA could then arise. The considerations differ according to whether the reservation was of land that was then or had at any time been held under a pastoral lease or of land that was always vacant Crown land. In the case of land that was, or had been, held under a pastoral lease any right which native title holders may once have had to control the use of or access to the land would have been extinguished by the grant of the pastoral lease (356). The subsequent reservation of the land could not affect that right and no question would then arise under the RDA. In the case of reservation of land not earlier held under a pastoral lease, reservation, being inconsistent with the continued existence of a native title right to control the use of or access to the land, would extinguish that right and, by hypothesis, it would affect *only* that native title right. It follows from what was held in *Mabo [No 1]* and the *Native Title Act Case* (357) that, because the practical operation and effect of the *Land Act* 1933 was to provide for the uncompensated destruction of native title rights and interests, there was an ''arbitrary deprivation of property'' and that the case is to be understood as being of the second kind identified by Mason J in *Gerhardy* (358). Further, this understanding of the operation of the RDA is consistent with the way in which the NTA is framed, with its frequent reference to acts taken under State or Territory legislation as being acts that are, or are not, valid (359). The *Land Act* 1933 was, therefore, to that extent, inconsistent with the RDA and the reservation invalid. Nevertheless, if it took place before 1 January 1994 it was a ''past act'' and validated by s 19 of the NTA and s 5 of the State Validation Act. As a category D past act the non-extinguishment principle would apply and native title rights would, in effect, be suspended for so long as the reservation remained (360).

223 If the construction or establishment of a ''public work'' on a reserve was commenced before 23 December 1996, the act of construction or establishment would be a previous exclusive possession act (s 23B(7)). Section 12J of the State Validation Act would apply to confirm extinguishment of native title in relation to the land or waters on which the public work was situated at its completion, and with effect from the beginning of its construction or establishment. Subject to that, however, creating a reserve was neither a previous exclusive possession act nor a previous non-exclusive possession act. Accordingly, neither s 12I nor s 12M of the State Validation Act would be engaged.

(356) See at 131 [192].
(357) (1995) 183 CLR 373 at 449-451.
(358) (1985) 159 CLR 70 at 98-99.
(359) See at 96 [98].
(360) NTA, ss 15(1), 19, 238; State Validation Act, s 9.

4. *Vesting of reserves*

224 Some, but not all, of the reserves with which we are concerned have been vested in some body or person. At trial, and both on appeal to the Full Court and in this Court, Western Australia contended that vesting of reserved Crown lands in any person had the effect of a conveyance of an estate in the land (or, as it was put in this Court, transferred property and possession) to that person and extinguished native title. The primary judge (361) and the Full Court (362) rejected this contention. The primary judge held that (363):

> ''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 Full Court reached the same conclusion, the majority saying (364) that it was ''necessary to consider the nature and circumstances of the reserve and the purpose for which it was created to ascertain if the vesting granted to the authority more than merely the rights necessary for the control and management of the reserve''.

225 Both the Full Court and the primary judge referred to this Court's decision in *Perth Corporation v Crystal Park Ltd* (365) and the Privy Council decision in *Attorney-General (Quebec) v Attorney-General (Can)* (366) where statements are to be found that ''the term 'vest' is of elastic import'' (367) and that vesting lands 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'' (368). So much may readily be accepted but it does not answer the questions which now arise. Those require the identification of the rights which vesting a reserve under the relevant Western Australian legislation gave to the body or person in whom it was vested.

226 In *Perth Corporation v Crystal Park Ltd* (369) the land had been vested, pursuant to s 33 of the *Land Act* 1933, in the State Gardens Board ''in trust for recreation and parking area'' with power to the Board to lease the whole or any part of the land. Crystal Park Ltd held

(361) *Ward* (1998) 159 ALR 483 at 576.
(362) *Western Australia v Ward* (2000) 99 FCR 316 at 419 [390], per Beaumont and von Doussa JJ; at 538-539 [861], per North J.
(363) *Ward* (1998) 159 ALR 483 at 576.
(364) *Western Australia v Ward* (2000) 99 FCR 316 at 419-420 [391].
(365) (1940) 64 CLR 153.
(366) [1921] 1 AC 401.
(367) *Attorney-General (Quebec) v Attorney-General (Can)* [1921] 1 AC 401 at 409; *Perth Corporation v Crystal Park Ltd* (1940) 64 CLR 153 at 162, per Rich A-CJ; at 168, per Williams J.
(368) *Attorney-General (Quebec) v Attorney-General (Can)* [1921] 1 AC 401 at 409. See also *Mayor &c of Tunbridge Wells v Baird* [1896] AC 434.
(369) (1940) 64 CLR 153 at 157.

part of the land under a lease from the Board. The ultimate question before the Court was whether the land that had been leased in this way was *rateable* property. The relevant exemption from rating depended upon the land being ''vested'' in a board under the *Parks and Reserves Act* 1895 (WA). This, the Court held, had been done by the vesting under the *Land Act* (despite the difficulties presented by the ''Board'' being an unincorporated body) (370).

227 Nor, of course, is the question, what rights does vesting land give to the body or person in whom it is vested, concluded by the several English cases to which Western Australia referred (371). Those cases do no more than emphasise the protean qualities of the word ''vest'' and the proposition that what is ''vested'' will often be no more than is necessary for the public body to discharge its function.

228 As always, in a question such as the present, the relevant starting point is the legislation; it is not what has been held about other statutes, even by courts of high authority. Leaving aside the provisions of the *Public Works Act* used in relation to the Extension to the Packsaddle Plains Irrigation Area, the vesting provisions relevant to the present matters can be divided into two broad categories — those contained in the *Land Act* 1933 and those contained in the *Rights in Water and Irrigation Act*.

Vesting under the Land Acts

229 Under both the *Land Act* 1898 (s 42) and the *Land Act* 1933 (s 33) provision was made for the Governor, by Order in Council published in the *Gazette*, to direct that a reserve ''shall vest in and be held by'' the named body or person ''in trust for the like or other public purposes, to be specified in such order''. We were referred to no parcel of land in the areas claimed in Western Australia in which there was said to have been a vesting under the *Land Act* 1898.

230 As the majority of the Full Court pointed out (372), some reserved Crown land near Kununurra is vested in the Shire of Wyndham-East Kimberley (the Shire) or in other statutory authorities for various purposes, including conservation, recreation, parkland, agricultural research, gravel, quarry, drainage, preservation of Aboriginal paintings, the use and benefit of ''Aborigines'' and for purposes which the majority described as ''purposes connected with the Ord Project'' (373). The Full Court dealt separately with some reserves

(370) See also *Municipality of South Perth v Hackett* (1908) 8 CLR 44.

(371) *Rolls v Vestry of St George the Martyr, Southwark* (1880) 14 Ch D 785; *Mayor &c of Tunbridge Wells v Baird* [1896] AC 434; *Port of London Authority v Canvey Island Commissioners* [1932] 1 Ch 446; *Sheffield City Council v Yorkshire Water Services Ltd* [1991] 1 WLR 58; [1991] 2 All ER 280.

(372) *Western Australia v Ward* (2000) 99 FCR 316 at 331 [19].

(373) *Western Australia v Ward* (2000) 99 FCR 316 at 331 [19].

(Reserve 1063 (374) and Reserve 42710 (375)) which were vested pursuant to the *Land Act* 1933. After the RDA came into operation, Reserve 1063 was vested, in 1983, in the Minister of Agriculture. Reserve 42710 was created in 1993 and is now vested in the Agriculture Protection Board of Western Australia.

231 Other reserves were for purposes which were said to engage Western Australian legislation about preservation of flora and fauna, including the *Wildlife Conservation Act* 1950 (WA). Those reserves included 29541 for Wildlife Sanctuary (376), and 31967, 34585 and 42155 for Conservation of Flora and Fauna (377) and Reserve 37883 for the Mirima National Park (378). Each of these reserves is now vested in the National Parks and Nature Conservation Authority.

232 Other reserves were said to engage provisions of the *Rights in Water and Irrigation Act*. They include Reserve 36551 vested in the Water and Rivers Commission (379) and Reserve 43196 vested in the Water Corporation (380).

The significance of the use of reserved land

233 The majority of the Full Court treated the *use* that had been made of reserved land, even land that had been vested in a body or person, as determining whether native title had been extinguished. So, for example, it was held (381) in relation to Reserve 1059 (a reserve which had been created in 1886 for ''public utility'' but had not been vested in any body or person) that ''[t]he general use of the area for watering cattle, and as a pastoral lease destroyed the exclusivity of native title rights''. Their Honours went on to say that ''[t]he close use'' of the area of Reserve 1059 which now forms part of another reserve ''would have wholly extinguished native title in that area'' (382). Similarly, in the case of reserves vested in a body, their Honours looked to the use that had been made of the land (383).

234 As we have said earlier, we consider that looking to the use that has actually been made of land distracts attention from the central inquiry which is an inquiry about rights created in others or asserted by the executive, not the way in which they may have been exercised at any

(374) Now reserved for the purpose of ''Agricultural Research Station'', previously, ''Cattle Experiments (Department of Agriculture)'', and still earlier, ''Public Utility'': *Western Australia v Ward* (2000) 99 FCR 316 at 439 [459].

(375) Now reserved for ''Quarantine Checkpoint'', previously, ''Government Requirements'': *Western Australia v Ward* (2000) 99 FCR 316 at 443 [489].

(376) *Western Australia v Ward* (2000) 99 FCR 316 at 440 [471].

(377) *Western Australia v Ward* (2000) 99 FCR 316 at 441 [475]-[477], 442-443 [486].

(378) *Western Australia v Ward* (2000) 99 FCR 316 at 436 [446].

(379) *Western Australia v Ward* (2000) 99 FCR 316 at 442 [480].

(380) *Western Australia v Ward* (2000) 99 FCR 316 at 444 [492].

(381) *Western Australia v Ward* (2000) 99 FCR 316 at 438 [455].

(382) *Western Australia v Ward* (2000) 99 FCR 316 at 438 [455].

(383) See, eg, *Western Australia v Ward* (2000) 99 FCR 316 at 443-444 [489]-[490] concerning Reserve 42710 — ''Quarantine Checkpoint''.

time. Neither the Full Court nor the primary judge considered that central inquiry.

Vesting under the Land Act 1933, *s* 33

235 As has been noted, s 33 of the *Land Act* 1933 empowered the Governor, by Order in Council published in the *Gazette*, to direct that a reserve ''shall *vest* in and be *held* by'' a named body or person ''in *trust* for the like or other *public purposes*, to be specified'' in the Order (emphasis added). (The comparison which the expression ''like or other public purposes'' requires is with the purposes for which the land was reserved.)

236 Section 33 must be understood in its context. Section 7 empowered the Governor to ''dispose of the Crown lands within the State, in the manner and upon the conditions'' prescribed by the Act or regulations. ''Crown lands'' were defined (s 3) as ''all lands of the Crown vested in [Her] Majesty, except land which is, for the time being, reserved for or dedicated to any public purpose, or granted or lawfully contracted to be granted in fee simple or with the right of purchase''. Under s 29, the Governor was authorised to ''reserve to [the Crown] or dispose of in such manner as for the public interest may seem fit, any lands vested in the Crown that may be required'' for any of the several objects and purposes described in that section. If land was reserved, it was to be classified in accordance with s 31. Class A lands were ''for ever [to] remain dedicated to the purpose declared . . . until by an Act of Parliament in which such lands are specified it is otherwise enacted'' (s 31(1)). Class B lands were to remain reserved from alienation, or from being otherwise dealt with, until the Governor cancelled the reservation, in which event the cancellation was to be reported to Parliament (s 31(2)). Class C reserves were not subject to such restrictions.

237 Sections 32, 33 and 34 then provided for four different kinds of transaction in relation to reserved lands. Under s 32, if a reserve was ''not immediately required for the purpose for which it was made'' the Governor could grant a lease or leases of it for a term not exceeding ten years. Under s 33, the Governor might direct that the reserve vest in a body or person to be held in trust for the identified purposes or might lease the reserve ''to secure the use thereof for the purpose for which such reserve was made''. Section 34 provided for the Governor to ''place any reserve under the control of any municipality, road board, body corporate, or persons, as a board of management'', with power to provide by-laws for the control and management of the reserve and ''for prescribing fees for depasturing thereon, or other use thereof''.

238 It will be seen then that not only does s 33 refer to ''vesting'', it refers to holding the land in trust for the specified (public) purposes. Many of the purposes for which land may be reserved under the *Land Act* 1933 are charitable purposes either because they are ''purposes beneficial to the community'' as that expression is understood in

connection with charitable trusts (384) or because they fall within some other head of charitable purposes. Reference need be made only to s 29(e) (sites for churches and chapels), s 29(f) (sites for schools and other buildings for the purposes of education, and land for the endowment of educational institutions of a public character) and that part of par (j) of s 29 of the *Land Act* 1933 which permits creation of reserves ''for places necessary ... for the health, recreation, or amusement of the inhabitants [of towns]'' to demonstrate the point. As Windeyer J pointed out in *Randwick Corporation v Rutledge* (385), vesting of land in trustees for purposes of this last kind, and we would add any other charitable purpose, may create a public trust.

239 The step of vesting reserved land to be held in trust for stated purposes may be contrasted with the steps, for which s 34 provides, of placing a reserve ''*under the control of* any municipality, road board, body corporate, or persons, *as a board of management*'' (emphasis added). Not only did s 34 not provide for the *vesting* of the land, the reference to depasturing and other uses makes plain that the land might, in at least some circumstances, be used other than for the reserved purpose.

240 In these circumstances, s 33 must be understood as providing for the creation of a public trust in cases where the purposes for which the person was to hold the land were charitable purposes (386). That is, if the purpose specified in the direction vesting the land was a charitable purpose, the effect of s 33 was to vest the legal estate of the land in the person or body named, to be held by that person or body as trustee of a public charitable trust, a trust which could, no doubt, be enforced in the same way as any other public charitable trust.

241 All of the purposes for which land may be reserved under the *Land Act* 1933 may be seen as having some public element but it may be that not all could found a valid charitable trust. Which of the purposes could properly be regarded as charitable purposes need not be decided. Assuming that some could not, there is, however, no reason to conclude from that fact, that vesting land in a person or body to be held for a purpose that was not charitable did not pass to that person or body a legal estate in fee simple in the land and did not oblige the person or body in whom the land was vested to devote the land to the stated purpose and no other purpose. In the sense in which ''dedicated'' has come to be used in Australia in relation to reserved Crown lands (387), on vesting the reserved land in a person or body under s 33 (whether for charitable or other purposes) the land was

(384) *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 667, per Barwick CJ; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 582 [34]-[35].

(385) (1959) 102 CLR 54 at 75-76.

(386) In deciding whether recreational purposes were charitable purposes, account may have to be taken of the operation of the *Charitable Trusts Act* 1962 (WA).

(387) *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 73-76, per Windeyer J.

dedicated to that purpose. To adopt and adapt what Isaacs J said of different statutory provisions, in his dissenting reasons in *New South Wales v The Commonwealth* (the *Garden Island Case*) (388), the step of vesting the land ''impressed upon dedicated lands a statutory status limiting their use and benefit, and consequently their possession, in conformity to the purpose to which they were dedicated''. What was created by these means might be described as a ''statutory trust'', compliance with which could be enforced by the Attorney-General (389).

242 Section 33 of the *Land Act* 1933 further provided that the Governor might, by Order in Council published in the *Gazette*, lease a reserve or grant the fee simple ''to secure the use thereof for the purpose for which such reserve was made''. The section further provided that ''a power to sublet the reserve or any portion thereof'' could be conferred on the body or person in whom a reserve was vested or to whom the reserve was leased or granted in fee simple. Western Australia submitted that a body or person in whom a reserve was vested could not lease (or in the words of s 33 ''sublet'') the land without owning a greater estate than that to be leased.

243 Even if a power of leasing a vested reserve was conferred in unconfined terms on the body or person in whom the reserve was vested, because the land was vested in trust for the purposes specified, the power to lease or sublet would not be untrammelled. There could be no letting of the land which would be inconsistent with the purposes for which it was to be held by the body or person in which it was vested. This implicit limitation on a power to lease was made explicit by amendments made to s 33 of the *Land Act* 1933 in 1948 (390). As amended, the Act provided that the Governor may, ''subject to such conditions and limitations as the Governor shall deem necessary to ensure that the land is used for the purpose'', confer power to lease.

244 Because the power to lease is a power, if it were given, that must be understood as confined by the nature and extent of the interest held by the body or person in whom the land is vested, it offers little assistance in identifying the nature and extent of that interest. The conclusion that vesting a reserve in a body or person in accordance with s 33 of the *Land Act* 1933 vested the legal estate in fee simple in that body or person depends upon the other considerations which we have mentioned, not upon the existence of the power to lease.

(388) (1926) 38 CLR 74 at 91.

(389) *Municipality of South Perth v Hackett* (1908) 8 CLR 44 at 48, per Griffith CJ; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 592 [67], per Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

(390) *Land Act Amendment Act* 1948 (WA), s 5.

Nature reserves

245 Under the *Land Act* 1933 a reserve could be created for the ''conservation of ... indigenous flora and fauna'' (s 29(g)). The *Wildlife Conservation Act* 1950 (WA) (formerly called the *Fauna Protection Act* and later the *Fauna Conservation Act*) provided that (391):

> '' 'nature reserve' means land reserved to Her Majesty, or disposed of, under the *Land Act* 1933 or any other Act, for the conservation of flora or fauna.''

By s 23(1) of that Act a ''person of Aboriginal descent'' was authorised to take fauna or flora upon Crown land or any other land not being a nature reserve or wildlife sanctuary ''sufficient only for food for himself and his family, but not for sale''. (A ''wildlife sanctuary'' was defined (s 6(1)) as an area of land which was the subject of an agreement between the Minister and the owner for its use as a sanctuary.)

246 The majority of the Full Court held that any native title right or interest to hunt or gather over land in a nature reserve created before 1975 was extinguished (392). Special leave to appeal to challenge that holding was refused. It may therefore be put aside.

247 Three of the nature reserves in the area claimed by the Ward claimants were created after the RDA came into operation on 31 October 1975. Those reserves are Reserve 34585 created in 1977, Reserve 37883 created in 1982, and that part of Reserve 42155 which was created in 1992 (393). Further consideration of the issues that arise in respect of those reserves may be deferred and dealt with at the same time as are other issues arising out of the RDA.

248 Subject to those qualifications, what has been said about other reserves under the *Land Act* 1933 applies to reserves for conservation of flora and fauna.

5. *The effect on native title of vesting reserves under the Land Act* 1933, *s* 33

249 It follows from what has been said earlier that, because the vesting under s 33 of the *Land Act* 1933 of a reserve in a body or person vests the legal estate in fee simple to the land in that body or person and obliges the body or person to hold the land on trust for the stated purposes, rights are vested in that body or person which are inconsistent with the continued existence of any native title rights or

(391) s 6(1). Section 6(1) was amended by the *Acts Amendment (Conservation and Land Management) Act* 1984 (WA) but nothing was said to turn on this amendment or on the provisions of the *Conservation and Land Management Act* 1984 (WA).

(392) *Western Australia v Ward* (2000) 99 FCR 316 at 446 [504].

(393) *Western Australia v Ward* (2000) 99 FCR 316 at 436 [446], 441 [477], 442-443 [486], 445 [496].

interests to the land. Accordingly, if, pursuant to the *Land Act* 1933, a reserve was vested in a body or person before the RDA came into operation, native title was extinguished by that vesting. In relation to reserves vested in a body or person after the RDA came into operation, other questions arise.

250 On its face, the *Land Act* 1933 does not single out native title rights and interests for different treatment. And leaving aside the question of compensation, there is nothing to suggest that, so far as concerns the vesting of reserves, the practical operation of the *Land Act* 1933 resulted in the different treatment of native title rights and interests and non-native title rights and interests. So far as concerns compensation, it is necessary to note some further matters. Under s 11 of the *Land Act* 1933 power was given to the Governor, to resume, by proclamation, for any of the purposes for which land could be reserved under s 29 of the Act, any portion of land held as a homestead farm, or timber lease, or special lease, or leased by the Crown with a right of purchase. Section 11 provided that the owner of such land, ''upon making claim as required by the *Public Works Act* 1902, in case he shall be entitled to compensation under this Act,'' was to be compensated for the resumption.

251 If, then, as a step along the way to creating a reserve, and then vesting it, it was necessary to bring to an end any of the interests specified in s 11, the holder of the interest was entitled to compensation. As has been pointed out earlier, that was not so in the case of a pastoral lease. That interest was precarious and could be brought to an end, without compensation, if the land were required for a reserve. But importantly, that consequence flowed from the terms upon which the interest was originally granted to its holder.

252 Once reserved, land could, of course, be leased, but the interest of the lessee could not be brought to a premature end without compensation. No other interest in reserved land could be created under the *Land Act* 1933. It follows that, at the time of vesting a reserve, the only interests in the land which could be affected by the vesting and the holder of which would not be entitled to compensation would be native title rights and interests.

253 This analysis reveals that the provisions of the *Land Act* 1933 providing for the vesting of reserves are provisions of State law of the first kind identified by Mason J in *Gerhardy* and referred to earlier in these reasons (394). The vesting of a reserve effected pursuant to those provisions, after 31 October 1975, would be valid, but the RDA would supply to native title holders a right of compensation for that which is lost upon vesting. Because no question about compensation arises in this Court it is convenient to do no more at this point than to refer generally to what is said on that subject later in these reasons in

(394) See at 100 [108].

connection with mining interests (395). For present purposes it is, however, necessary to notice other consequences of the conclusion that the relevant provisions of the *Land Act* 1933 are not inconsistent with the RDA.

254 Because the vesting of a reserve after 31 October 1975 was not invalid, it is not a ''past act'' under Div 2 of Pt 2 of the NTA. It becomes necessary, then, to consider the operation of Div 2B of Pt 2 of the NTA and Pt 2B of the State Validation Act.

255 As has already been noted, s 23B of the NTA defines a ''previous exclusive possession act''. An act, which includes ''the creation ... of any legal or equitable right, whether under legislation ... or otherwise'' (s 226(2)(d)), is a previous exclusive possession act if: (a) it is valid, including because of the operation of Div 2 or Div 2A of Pt 2 of the NTA (s 23B(2)(a)); (b) it took place on or before 23 December 1996 (s 23B(2)(b)); and (c) it consists of the grant or vesting of, among other things, a Scheduled interest (s 23B(2)(c)(i)) or a freehold estate (s 23B(2)(c)(ii)). The significance of the reference to Scheduled interests is touched on later (396). For the moment, it is convenient to direct attention to the vesting of a freehold estate.

256 Sub-section (3) of s 23B provides:

> ''If:
> (a) by or under legislation of a State or a Territory, particular land or waters are vested in any person; and
> (b) a right of exclusive possession of the land or waters is expressly or impliedly conferred on the person by or under the legislation;
> the vesting is taken for the purposes of paragraph (2)(c) to be the vesting of a freehold estate over the land or waters.''

A body or person in whom land is vested under s 33 of the *Land Act* 1933, and who therefore holds that land on trust for the stated purpose, has a right of exclusive possession of the land concerned. It follows that the vesting of a reserve, if it took place on or before 23 December 1996, will, if the vesting is valid, fall within the definition of previous exclusive possession act in s 23B(2). If the vesting is a previous exclusive possession act, s 12I of the State Validation Act would apply, and the extinguishment of native title rights and interests worked by the vesting of the reserve would be confirmed.

257 Section 12I of the State Validation Act uses the term ''relevant act''. This is defined in s 12I(1) so as to narrow the scope of the expression ''previous exclusive possession act'' defined in s 23B of the NTA. In this respect, the State Validation Act does not correspond to the NTA. In particular, whilst s 23B(2)(a) requires that the previous exclusive possession act took place on or before 23 December 1996, par (b) of the definition of ''relevant act'' in s 12I(1) of the State

(395) See at 170 [320]-[321].
(396) See at 174-175 [334].

Validation Act requires of certain Scheduled interests or leases that they be still in force on 23 December 1996. However, if an act already falls outside the reach of s 23B, it cannot fall within the sub-class ''relevant act'' established by s 12I(1).

258 In considering the operation of the provisions which confirm extinguishment, account must be taken of the operation of sub-ss (9A) and (9C) of s 23B. Sub-section (9A) provides:

> ''An act is not a *previous exclusive possession act* if the grant or vesting concerned involves the establishment of an area, such as a national, State or Territory park, for the purpose of preserving the natural environment of the area.''

Accordingly, a vesting which involved the establishment of an area for the purpose of preserving the natural environment of the area, as would seem to be the case with Reserve 34585, Reserve 37883 and that part of Reserve 42155 created in 1992, would not be a previous exclusive possession act as defined in s 23B. It follows that s 23E of the NTA and s 12I of the State Validation Act would not be engaged. Nevertheless, the vesting of a right of exclusive possession being valid, the vesting extinguished all native title rights and interests in the land.

259 In the case of other reserves vested before 23 December 1996, reference must also be made to sub-s (9C) of s 23B. It provides:

> ''If an act is the grant or vesting of an interest in relation to land or waters to or in the Crown in any capacity or a statutory authority, the act is not a *previous exclusive possession act*:
>
> (a) unless, apart from this Act, the grant or vesting extinguishes native title in relation to the land or waters; or
>
> (b) if the grant or vesting does not, apart from this Act, extinguish native title in relation to the land or waters —
>
> unless and until the land or waters are (whether before or after 23 December 1996) used to any extent in a way that, apart from this Act, extinguishes native title in relation to the land or waters.''

260 The expression ''statutory authority'' (s 253) in relation to the Crown in right of the Commonwealth, a State or a Territory, means any authority or body (including a corporation sole) established by a law of the Commonwealth, the State or Territory other than a general law allowing incorporation as a company or body corporate. It follows that vesting a reserve in the Crown, or in a statutory authority, after the RDA commenced operation and before 23 December 1996, will, by par (a) of sub-s (9C), be a previous exclusive possession act only if the vesting would, apart from the NTA, extinguish native title and, for the reasons already given, vesting a reserve under the *Land Act* 1933 was valid and effective to extinguish native title.

261 For the reasons given earlier, the operation of par (b) of sub-s (9C) presents some difficulty because, at first sight, it appears to proceed

from the premise that use of land, as distinct from the creation or assertion of rights or powers in respect of land, may extinguish native title. Because par (a) of sub-s (9C) is engaged it is not necessary to consider further the operation of par (b).

6. *Rights in Water and Irrigation Act* 1914

262 Reference has already been made to the fact that land was resumed under s 109 of the *Land Act* 1933 from pastoral leases used in the operation of the Lissadell, Texas Downs and Ivanhoe Stations. In addition, the Argyle Downs pastoral lease and the 1,000 acre Argyle Downs Homestead area held under freehold title were acquired under the ''bargain and sale'' transaction — a transaction said not to depend for its efficacy upon s 109. As Beaumont and von Doussa JJ pointed out (397), not all of the land resumed under s 109 was included within the claim. But the claim area did include what their Honours said (398) was ''described as vacant Crown land on which intensive activities have not occurred''. Although that land included several reserves it was not all reserved land. Their Honours described these areas as (399):

> ''important to the overall operation of the [P]roject as it provides buffer zones, drainage, protection against erosion and flooding from higher levels, and makes provision for a range of township and community purposes, and for future expansion of the scheme. There is a substantial part of the fourth farm area resumed in 1967 in the north-eastern sector of the [P]roject area which has not yet been developed. It was resumed however for the purpose of future development which is envisaged to take place in due course with the construction of a second main channel running from Lake Kununurra, the extension of the road system including a major bridge over the Keep River, a major drainage system project to protect from run-off from the hills to the north, and the installation of an irrigated farm drain network.
>
> The areas resumed were settled upon following detailed and prolonged research and engineering investigation. Regard was paid in some areas for the need to achieve rational boundaries, but we think the evidence justifies the conclusion that the areas selected were otherwise thought to be necessary to accommodate the numerous differing requirements of a project of this kind, including the need to make provision for future development and buffer zones around areas of intensive use.''

Their Honours concluded (400) that:

(397) *Western Australia v Ward* (2000) 99 FCR 316 at 429 [421].
(398) *Western Australia v Ward* (2000) 99 FCR 316 at 429 [421].
(399) *Western Australia v Ward* (2000) 99 FCR 316 at 429 [421]-[422].
(400) *Western Australia v Ward* (2000) 99 FCR 316 at 430 [422].

> ''land held for future expansion, and as a buffer zone, is land which is used in a relevant sense for the purposes of the [P]roject. Further, we consider that these lands ... with the exception only of the Mirima (Hidden Valley) National Park, come within the definition of 'works' in the *Rights in Water and Irrigation Act*. Whilst the mere vesting of lands acquired and dedicated for the purpose of the Act in the Minister may not be inconsistent with the continued enjoyment of native title rights for so long as the land remains undeveloped, once 'works' are carried out, the management and control of those works 'and all appurtenances to the same, and all lands reserved, occupied, held or used in connection with works' give rise to operational inconsistency which has the effect of wholly extinguishing native title rights.''

The Ward claimants challenged the holding that land held for future expansion, as a buffer zone, for drainage and for protection against erosion and flooding is used in a manner so as to totally extinguish native title. Further, the Ward claimants contended first that the majority erred in finding that land held for future expansion or buffer was within the definition of ''Works'' in the *Rights in Water and Irrigation Act* and secondly, that, in any event, there was not such inconsistency of use of the land as would extinguish native title.

263 Examination of these arguments and some other contentions made by Western Australia requires consideration of the *Rights in Water and Irrigation Act*. Section 3(2) of that statute provides:

> ''All lands acquired for or dedicated to the purposes of this Act, and all irrigation works constructed, or in course of construction under this Act, and all irrigation works constructed by the Government before the commencement of this Act which the Governor may, by Order in Council, declare to be subject to this Act, shall vest in the Minister on behalf of Her Majesty —
>
> (a) until such lands and works are vested in a Board, under the provisions hereinafter contained; or
>
> (b) on the dissolution of any Board in which such lands and works may have been vested.''

Two definitions in the Act must be noted. First, ''Irrigation'' is defined in s 2 as:

> ''any method of causing water from a water-course or works to flow upon and spread over land for the purpose of cultivation of any kind or of tillage or improvement of pasture, or of applying water to the surface of land for the like purpose.''

Secondly, ''Works'' is defined in s 2 as:

> ''works for the conservation, supply, and utilisation of water, together with all sources of supply, streams, reservoirs, artesian wells, non-artesian wells, buildings, machinery, pipes, drains, and other works constructed or erected for the purposes of this Act, and

all appurtenances to the same, and all lands reserved, occupied, held, or used in connection with works.''

Part III of the *Rights in Water and Irrigation Act* provides (in s 4(1)) that the ''right to the use and flow and to the control of the water'' in natural waters ''shall, subject only to the restrictions hereinafter provided, and until appropriated under the sanction of this Act, or of some existing or future Act of Parliament, vest in the Crown''. It deals with riparian rights (s 14) and allows riparian owners to apply for special licences to divert and use water (s 15). The vesting of waters in the Crown was inconsistent with any native title right to possession of those waters to the exclusion of all others.

264 In 1960, Pt III of the *Rights in Water and Irrigation Act* was proclaimed (401) to apply to the Ord River and its tributaries. In 1962, the ''Ord Irrigation District'' was constituted under Pt IV of the Act. The District was extended in 1965 and in 1973. In 1963, the Minister for Water Supply, Sewerage and Drainage, acting as the Irrigation Board for the Ord Irrigation District, made by-laws for the District. From time to time, those by-laws have been amended. They provide (402) for the protection of water, grounds, works and the like from trespass and injury by prohibiting certain conduct. It is convenient, at this point, to deal with some arguments advanced about the effect of these and some similar by-laws.

265 Western Australia contended that the by-laws made by the Minister under the *Rights in Water and Irrigation Act* extinguished any native title right to hunt or gather food that remained after the grant of a pastoral lease over the land in question. The by-laws prohibited ''[t]he removal, plucking, or damaging of any wildflower, shrub, bush, tree or other plant growing on any land reserved for or vested in the Minister within half-a-mile of any reservoir and within the District'' (403). Later, the by-laws were amended to prohibit ''[t]he shooting, trapping or taking of fauna'' on such land (404). In each case the prohibition was absolute. It follows that s 211 of the NTA (considered in *Yanner v Eaton* (405)) was not engaged. The relevant by-laws were made before the enactment of the RDA. On the land to which the by-laws applied, native title rights to hunt fauna or gather plants were extinguished on the making of the applicable by-laws.

266 This result may be contrasted with the effect on native title of by-laws to generally similar intent made in 1991 by the Shire in respect of reserves or places of public recreation and enjoyment vested in or under the control of the Shire. Those by-laws sought to prohibit acts

(401) Under s 27 of the Act.
(402) By-laws 4, 10(1).
(403) By-law 6.
(404) By-laws for the Ord Irrigation District made 10 April 1969, by-law 3(c).
(405) (1999) 201 CLR 351.

that would constitute the hunting and gathering of food. The effect of these by-laws has first to be considered against the RDA.

267 In so far as the by-laws related to land vested in the Shire, for the reasons given earlier, the vesting extinguished all native title rights and interests. In so far as the by-laws related to reserved land placed under the control of the Shire, neither the reservation of the land nor placing it under the control of the Shire extinguished any native title right to hunt and gather. The by-laws, however, prohibited that activity on the land.

268 *Only* native title rights were affected in this way and they were adversely affected without compensation. For reasons similar to those given in connection with the vesting of reserves under the *Land Act* 1933, the powers, given under that statute, to make by-laws prohibiting the exercise of native title rights over a reserve placed under the control of the Shire would deny the human right to freedom from arbitrary deprivation of property and thus be inconsistent with the RDA. The act of passing those by-laws in 1991 was a ''past act'', validated by s 19 of the NTA and s 5 of the State Validation Act. It would be a category D past act to which, by s 9 of the State Validation Act, the non-extinguishment principle applied. Division 2B of Pt 2 of the NTA and Pt 2B of the State Validation Act would not apply because the act in question is not a previous exclusive possession act or a previous non-exclusive possession act and it is not a ''relevant act'' within the definition in s 12I(1) of the State Validation Act (406).

269 Although much of the argument about the ''buffer'' and ''expansion'' areas proceeded by reference to the use made of those areas, for the reasons given earlier (407) it is necessary to begin by considering how the *Rights in Water and Irrigation Act* applied.

270 What the Act refers to as ''Works'' extends to ''all lands reserved, occupied, held, or used in connection with works''; that is, ''works for the conservation, supply, and utilisation of water''. At the most general level the Project includes works of that kind — works for the conservation, supply, and utilisation of water.

271 Two separate paths of inquiry are revealed. The first relates to reserved land. Is that land within the definition of ''Works'' in the *Rights in Water and Irrigation Act*? If it is, was the land vested under s 3(2) of that Act and, if so, what if any consequence did that vesting have for native title rights and interests? The second path of inquiry relates to vacant Crown land, but the same questions are presented. Is the land ''Works''? Was it vested? If it was, what was the consequence of vesting?

272 We deal first with reserved land. Some, but by no means all, of the land referred to as ''buffer'' and ''expansion'' areas lies within Reserve 31165, an area surrounding the southern end of Lake Argyle,

(406) The text of s 12I is set out at 182 [371].
(407) See at 114-115 [149]-[151] and 136 [213]-[215].

that was resumed in part from Lissadell and Texas Downs Stations and in part ''acquired'' under the ''bargain and sale'' transaction concerning Argyle Downs Station. Most of the rest of the ''buffer'' and ''expansion'' areas is vacant Crown land.

273 Reserve 31165 was created for ''Government Requirements''. Standing alone, that would not suggest reservation *in connection with* works of the kind with which the *Rights in Water and Irrigation Act* deals. The primary judge found, however, that (408):

> ''[t]he 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 . . .
>
> The lake-side boundary of the reserve is set at approximately the 100 m 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 expression ''in connection with'', used in the definition of ''Works'', is very broad. Plainly, the purpose for which land is reserved must first be identified from the instrument which creates the reserve. When, as here, that purpose is described in very general terms (Government Requirements) it may be permissible to inquire whether there are or were particular requirements for which the land was reserved. Here, the primary judge's finding demonstrates that the requirements were so connected with what the Act refers to as ''Works'' that the land may be said to have been reserved ''in connection with'' ''Works''.

274 Be that as it may, however, at some time between 1970 and 1973 the reserve was vested in the Minister under s 33 of the *Land Act* 1933 (409). It follows from that fact that, for the reasons given earlier, all native title rights and interests in the land were then extinguished.

275 The chief focus of argument about the operation of the *Rights in Water and Irrigation Act* was whether vacant Crown lands, in the areas earlier described, as distinct from reserves in those areas, were vested in the Minister by the operation of that statute. As earlier stated, that requires consideration of whether such lands were within the definition of ''Works''. In particular, the question is were the lands ''occupied, held, or used in connection with works''? We do not accept that the vacant Crown land can be said to be ''occupied'' or ''held'' in connection with ''Works''. Who occupies it? It is after all *vacant* Crown land. Who ''holds'' it? It is incongruous to speak of unalienated Crown land being ''held'' by the Crown. Moreover,

(408) *Ward* (1998) 159 ALR 483 at 611.
(409) *Ward* (1998) 159 ALR 483 at 630.

because ''held'' appears in a collocation which includes ''reserved'', it is not to be understood as meaning no more than set apart. It is a word which requires the identification of a holder of the land.

276 This is not to say that the land, or some parts of it, are not ''used'' in connection with ''Works''. That is a question of fact which must be answered at a greater level of specificity than the global identification of purposes for parts of it being left vacant. Especially is that so in the present case when it is remembered that the boundaries of the area of land that was resumed from the Argyle pastoral lease were defined by the pastoral leases that had been granted. They were not identified by reference to what use would be made of the areas resumed. That is, it may be that the decision to resume *all* the pastoral lease reflects no more than the fact that *some* parts of the land were to be used in connection with ''Works''. There are insufficient findings of fact to enable that inquiry to be pursued in this Court.

277 It follows, however, that the Full Court was wrong to conclude, as it did, from the findings of fact which it made or to which it referred, that the vacant Crown land was within the definition of ''Works''.

7. *The effect on native title of resumptions under the Public Works Act* 1902

278 It is convenient to return, at this point, to consider the application of the RDA to the resumption in 1975 for the Extension to the Packsaddle Plains Irrigation Area. That resumption occurred in December 1975 and thus after the RDA had come into operation. The land was resumed from the Ivanhoe Station under the *Public Works Act* for purposes that engaged the *Rights in Water and Irrigation Act*. Section 18 of the *Public Works Act* provided:

> ''Upon the publication of the notice referred to in sub-section (1) of section seventeen of this Act in the *Government Gazette* —
>
> (1) as the Governor may direct and the case require the land referred to in such notice shall, *by force of this Act*, be vested in Her Majesty, or the local authority, for an estate in fee simple in possession or such lesser estate for the public work expressed in such notice, freed and discharged from all trusts, mortgages, charges, obligations, estates, interests, rights-of-way, or other easements whatsoever; and
>
> (2) the estate and interest of *every* person in such land, whether legal or equitable, shall be deemed to have been converted into a claim for compensation under the provisions hereinafter contained.
>
> Provided that the Governor may, by the same or any subsequent notice, declare that the estate or interest of any lessee or occupier of the land shall continue uninterrupted until taken by further notice.'' (Emphasis added.)

It will be remembered that the notice that was published about the resumption of the lands in the Extension to the Packsaddle Plains

Irrigation Area spoke of vesting those lands ''in Her Majesty for an estate in fee simple in possession for the public work herein expressed, freed and discharged from all trusts, mortgages, charges, obligations, estates, interests, rights-of-way or other easements whatsoever''. In considering whether there was some inconsistency between the *Public Works Act* and the RDA it is necessary to examine what was provided by the *Public Works Act*. Both that Act and the notice that was given under it were intended to have entirely general effect on any and every kind of interest that may have existed in the land immediately before it was resumed. That conclusion is reinforced by s 18(2) which was also cast in general terms. The ''estate and interest of every person'' in the land resumed was deemed to have been converted into a claim for compensation. Section 34(1) provided:

> ''Every person having any estate or interest in any land which is taken under this Act for any public works ... shall, subject to this Act, be entitled to compensation from the Minister or local authority, as the case may be, by whose authority such works may be executed.''

The *Public Works Act* provided no different treatment of native title rights and interests from the treatment of other rights and interests in the land and it is not suggested that the practical operation of that Act resulted in the different treatment of native title rights and non-native title rights. That being so, no question of inconsistency between s 18 of the *Public Works Act* and the RDA arises.

279 It is necessary, however, to notice two other aspects of the *Public Works Act*. First, under s 34(2), a person claiming compensation in respect of an unregistered interest in the land was not entitled to claim or receive payment of any compensation in respect of that interest where any other person had applied for, and obtained, compensation in respect of the land without giving written notice with that claim of the unregistered interest. Secondly, it is at least arguable that the Act's requirement that notice of resumption be given to ''owners'' and ''occupiers'' of land (410) did not extend to native title holders. If that were the better construction of the Act, although we doubt that it is, s 10(1) of the RDA would, as a matter of federal law, supply such a right. No less importantly, the right to compensation for the extinguished interest in the land would remain unaffected. However, because the native title rights and interests which would be extinguished were unregistered interests, those rights and interests were liable to defeat by the operation of s 34(2) of the Act. In this respect, the Act does not distinguish between native title rights and other unregistered interests. The fact that native title rights and interests could not be registered does not require a different conclusion. The Act treats all interests that are not registered in the

(410) *Public Works Act*, s 17(2)(c).

same way, without regard to whether the interest in the land could be registered. And native title rights and interests are not the only form of interest in land which could not be registered. A mortgage by deposit of title deeds or the interest of a purchaser under an uncompleted contract of sale are two examples of interests which could not be registered. It is, however, possible that the practical operation of s 34(2) of the Act is such that native title holders do not enjoy the right to compensation to the same extent as non-native title holders. If so, s 34(2) would be inconsistent with the RDA and, to the extent of the inconsistency, invalid. However, this would not affect the validity of s 18 of the *Public Works Act*.

280 All this being so, there was no inconsistency between s 18 of the *Public Works Act* and the RDA. It follows that the vesting of the estate in fee simple in 1975 in respect of the Extension to the Packsaddle Plains Irrigation Area was valid and it extinguished all native title to that land. That extinguishment was confirmed, as a previous exclusive possession act, by operation of ss 23B and 23E of the NTA and s 12I of the State Validation Act.

8. *Vacant Crown land*

281 Section 47B of the NTA provides that, in certain circumstances, extinguishment by the creation of prior interests in relation to what, at the time of an application under the NTA, is vacant Crown land is to be disregarded. On the view taken by Lee J of the evidence and the application of the adverse dominion test, no occasion arose for the operation of s 47B (411). In this Court, the Ward claimants contend that s 47B did have some relevant operation in respect of some vacant Crown land within the area of the Project. The Full Court did not deal with this question. The State submits that this is to be explained by the absence of any notice of contention by the Ward claimants on the issue and that, in any event, there is an absence of the necessary evidence for the Ward claimants successfully to rely on s 47B. These matters will be for consideration by the Full Court in its further hearing and determination of the case.

J. *Mining Leases*

1. *Introduction*

282 Fifty-two mining leases were granted in respect of land within the claim area. All of the leases were granted pursuant to Div 3 of Pt IV of the *Mining Act* 1978 (WA) (the WA Mining Act). Forty-four of these mining leases were granted in respect of land within what the trial judge and the majority of the Full Court termed the ''Ord Project area''. In addition to the fifty-two mining leases, part of the Argyle mining lease falls within the claim area. It will be necessary to

(411) *Ward* (1998) 159 ALR 483 at 636-637.

consider separately the Argyle mining lease, which was granted in a particular contractual and legislative context. It will also be necessary to consider separately the single general purpose lease granted pursuant to Div 4 of Pt IV of the WA Mining Act.

283 All of these leases appear to have been granted prior to 23 December 1996 and after the commencement of the RDA. It should also be noted that a number of the mining leases were granted following 1 January 1994 (412). The WA Mining Act was amended in some respects between 1978 and 1996 but it was not suggested that anything turned on those amendments. We will, therefore, not normally make separate mention of those changes.

284 It is convenient to consider the extinguishing effect of the mining leases in general before turning to consider whether any different result should be reached respecting the Argyle mining lease or the general purpose lease.

285 The effect of the authorities as to the common law was described in *Newcrest Mining (WA) Ltd v The Commonwealth* (413) as follows:

> ''In *Gowan v Christie* (414) Lord Cairns described a 'mineral lease' as understood by the common law. His Lordship said it was: 'liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil.' With reference to this passage, Windeyer J, in *Wade v New South Wales Rutile Mining Co Pty Ltd* (415), said of the grant by the Crown of a mining lease of an area of private land that it was 'really 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'.''

286 The statement by Lord Cairns in *Gowan v Christie* was applied by the Privy Council in *Munro v Didcott* (416).

287 In *Wik* (417), Toohey J observed, with reference to *Wade*, that the term ''mining lease'' was an example of looseness of terminology which indicated that the rights and obligations of a person holding an interest so identified in particular legislation were not to be determined by the nomenclature.

288 As noted above, all of the mining leases, including the Argyle

(412) The grants of those mining leases are therefore not ''past acts'' under s 228 of the NTA, but rather ''intermediate period acts'' under s 232A of the NTA. The mining leases that were granted following 1 January 1994 are: M80/360, M80/396, M80/403.

(413) (1997) 190 CLR 513 at 616, per Gummow J.

(414) (1873) LR 2 Sc & Div 273 at 284.

(415) (1969) 121 CLR 177 at 192.

(416) [1911] AC 140 at 148-149.

(417) (1996) 187 CLR 1 at 117.

mining lease, were granted pursuant to the WA Mining Act. Section 71 of that Act provided:

> ''Subject to this Act, the Minister may, on the application of any person, after receiving a recommendation of the mining registrar or the warden in accordance with section 75, grant to the person a lease to be known as a mining lease on such terms and conditions as the Minister considers reasonable.''

Section 79 provides:

> ''(1) Where a person has applied for a mining lease and has been notified in writing by or on behalf of the Minister that the Minister has granted the mining lease to which the application relates, the applicant shall be deemed to be the holder of the lease comprising the land in respect of which the lease is granted as from the date of the written notification.
> (2) Where a written notification is given under sub-section (1) the term of the lease shall commence from the date of the written notification.''

289 A mining lease granted under s 71 is to be for an initial term of twenty-one years and is renewable (s 78). The area of land in respect of which a mining lease is granted is not to exceed 10 km^2 (s 73). The mining leases are subject to a number of covenants and conditions imposed by s 82. Sub-section (1) thereof provides, among other things, that every mining lease:

> ''shall be deemed to be granted subject to the conditions that the lessee shall —
> (a) pay the rents and royalties due under the lease at the prescribed time and in the prescribed manner;
> (b) use the land in respect of which the lease is granted only for mining purposes in accordance with this Act.''

290 Under s 84 the Minister may impose conditions for the purpose of preventing, reducing or making good, injury to the natural surface or to anything on the natural surface of the land. Section 85 details the rights of the holder of a mining lease. Sub-section (1) authorises the lessee, among other things, to ''work and mine the land in respect of which the lease was granted for any minerals'' (sub-s (1)(a)) and to ''do all acts and things that are necessary to effectually carry out mining operations in, on or under the land'' (sub-s (1)(d)). Sub-section (2) reflects the common law meaning of the term ''mining lease'', as indicated above at 158 [285]. It provides that the lessee:

> ''(a) is entitled to use, occupy, and enjoy the land in respect of which the mining lease was granted for mining purposes; and
> (b) owns all minerals lawfully mined from the land under the mining lease.''

Sub-section (3) then provides:

''The rights conferred by this section are exclusive rights for mining purposes in relation to the land in respect of which the mining lease was granted.''

The legislative history shows the nature of the mischief to which s 85(3) was directed. The WA Mining Act was enacted following a 1971 Report of a Committee of Inquiry (the 1971 Report) into the working of its predecessor, the *Mining Act* 1904 (WA). One of the deficiencies of that legislation was that it gave gold mining more attention than mining for base metals; another was that rights were limited to specific minerals and ''people could enter the land to search for other minerals while any person who had prospected the ground previously could peg claims on it''. The mining boom of the 1960s apparently gave rise to much activity of that kind (418). The Committee said (419):

''We are of opinion that duality of title, either for prospecting or actual mining, should be avoided. The party who has the prospecting title or the production title, should have the exclusive right to all the minerals in his piece of ground. It appears to us to be quite unsatisfactory for more than one party to have rights in the same ground.''

291 There are many examples of the exercise by equity of its jurisdiction to enjoin interference with the enjoyment by the plaintiff of rights (not necessarily proprietary in nature) conferred upon it by or under statute (420). The rights conferred by s 85 of the WA Mining Act would remain fixed for the duration of the grant, but the practical content and thus the scope for injunctive or other appropriate remedies would vary with the actual or intended activities of the grantee of the statutory rights. Notwithstanding the limited legislative purpose in enacting s 85(3) of the WA Mining Act, it would appear that the holder of a mining lease granted under that statute would be protected in this way against interference by others with the enjoyment of the rights conferred by s 85(1) and (2), and that this protection would not be confined to the activities of defendants asserting a concurrent right to prospect or mine. The holder of a mining lease is entitled to the law's protection (for example, by way of injunction) to prevent any person interfering with the exercise of those rights which are conferred by the grant. The RDA apart, native title rights and interests depend upon the common law. They cannot be asserted in any way that would interfere with the exercise of inconsistent statutory rights. Thus it was said in *Wik* (421) that, in certain circumstances, native title rights

(418) The 1971 Report, p 11.
(419) The 1971 Report p 14.
(420) See *Fejo* (1998) 195 CLR 96 at 123-124 [33]; *Sternhell v Bay Investments Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 213.
(421) (1996) 187 CLR 1 at 133.

''must yield'' to the statutory interests of pastoralists. The same is true in the case of the statutory rights conferred on the holders of mining leases. It will be later necessary to consider (at 162 [296] and 165-166 [306]-[308]) the impact of statute upon that operation of the common law after reference to further provisions of the WA Mining Act and regulations made thereunder.

292 Part V of the WA Mining Act is entitled ''GENERAL PROVISIONS RELATING TO MINING AND MINING TENEMENTS''. Section 113, which is found in Pt V, provides:

> ''When a mining tenement expires or is surrendered or forfeited, the owner of the land to which the mining tenement related may take possession of the land forthwith, subject to any estate or interest held by any other person other than under that mining tenement.''

293 It should also be noted that a mining lease may be applied for and granted in respect of private land (s 29), but that compensation is payable by the holder of the mining tenement prior to the commencement of mining (s 35).

294 The Mining Regulations 1981 inserted, by reg 27, the following covenants into the mining leases:

> ''Every mining lease shall contain and be subject to the following covenants that the lessee shall —
>
> (a) pay the rents and royalties due under the lease at the prescribed time and in the prescribed manner;
>
> (b) use the land in respect of which the lease is granted only for mining purposes in accordance with the Act;
>
> . . .
>
> (d) not assign, underlet or part with possession of such land or any part thereof without the prior written consent of the Minister, or of an officer of the Department acting with the authority of the Minister.''

295 In the Full Court, the majority also noted that the leases themselves contained a number of common conditions. These included (422):

- compliance with provisions 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;
- the rights of ingress to and egress from any mining operation being at all reasonable times preserved to the authorised officers of the Public Works Department, for inspection purposes;
- the development and operation of the project being carried out in such a manner so as to create the minimum practicable disturbance to the existing vegetation and natural landform;
- all topsoil being removed ahead of all mining operations from sites such as pit areas, waste disposal areas, ore stockpile areas,

(422) *Western Australia v Ward* (2000) 99 FCR 316 at 463 [580].

pipeline, haul roads and new access roads and being stockpiled for later respreading or immediately respread as rehabilitation progresses;

- at the completion of operations, all buildings and structures being removed from site or demolished and buried to the satisfaction of the State Mining Engineer;
- at the completion of operations, or progressively where possible, all access roads and other disturbed areas being covered with topsoil, deep ripped and revegetated with local native grasses, shrubs and trees to the satisfaction of the State Mining Engineer.

296 For the reasons that follow, it cannot be said that the grants of the mining leases are necessarily inconsistent with the continued existence of all native title rights and interests. That some native title rights and interests were extinguished in some areas of the mining leases is not in doubt. However, the generality of the determination renders it impossible to specify which rights have been extinguished in respect of which areas. It is convenient to consider first the position of the mining leases with respect to the NTA and the State Validation Act.

2. *The NTA and the State Validation Act*

297 The grant of a mining lease, if it is an ''act'' as defined in s 226 of the NTA, which is attributable to the State, and if it is a ''past act'' within the definition in s 228 of the NTA, is validated by s 5 of the State Validation Act. What of its effect on native title? Recourse to further definitions is necessary to answer that question.

298 A mining lease is defined by s 245(1) of the NTA to mean:

> ''a lease (other than an agricultural lease, a pastoral lease or a residential lease) that permits the lessee to use the land or waters covered by the lease solely or primarily for mining.''

The expression ''lease'' is also a defined term and includes (s 242(1)):

> ''(a) a lease enforceable in equity; or
> (b) a contract that contains a statement to the effect that it is a lease; or
> (c) anything that, at or before the time of its creation, is, for any purpose, by a law of the Commonwealth, a State or a Territory, declared to be or described as a lease.''

299 It should be apparent that the mining leases granted pursuant to the WA Mining Act at issue in this case fall within this statutory definition. This is of significance for two reasons. First, the grant of a mining lease that is invalid by reason of the RDA is a ''category C past act'' (s 231 of the NTA). The effect of a ''category C past act'' is that the non-extinguishment principle set out in s 238 is to apply (s 15 of the NTA and s 9 of the State Validation Act). Secondly, Div 2B of Pt 2 of the NTA and the equivalent provisions of the State Validation Act do not apply to the grant of a mining lease, subject to one exception (ss 23B and 23F). Although the Scheduled interests listed in

Pt 4 of Sch 1 to the NTA include in Item 36 a reference to certain leases set out in, among other Acts, the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* 1981 (WA), mineral leases are expressly excepted.

300 It should be noted, if only to show why it does *not* apply to the fifty-two mining leases, that Div 2B of Pt 2 of the NTA has a particular operation in relation to a separate lease of the kind arising under s 245(3)(a) of the NTA (s 23B(2)(c)(vii)). Section 245(3) provides for the dissection of a mining lease into separate leases if certain criteria are met. The criteria are set out in s 245(2), which requires that the mining lease be in force at the beginning of 1 January 1994 (the test time) and that either or both the following paragraphs apply:

> ''(a) the following conditions are satisfied:
>
> (i) a city, town or private residences had been wholly or partly constructed at the test time on a part of the land or waters covered by the lease;
>
> (ii) the construction was permitted by the lease;
>
> (iii) in the case of any private residences — they had been, or were being, constructed as fixtures and it was reasonably likely at the test time that, if mining under the lease were to cease at any later time, they would continue to be used as private residences;
>
> (b) the following conditions are satisfied:
>
> (i) other buildings or works had been wholly or partly constructed as fixtures at the test time, on a part of the land or waters covered by the lease, for carrying on an activity in connection with any city, town or private residences covered by paragraph (a);
>
> (ii) the construction was permitted by the lease;
>
> (iii) it was reasonably likely at the test time that, if mining under the lease were to cease at any later time, the buildings or works would continue to be used to carry on the same activity, or a similar activity, in connection with any city, town or private residences mentioned in paragraph (a).''

301 If sub-s (2) is satisfied, s 245(3) is engaged and the mining lease is taken instead to consist of separate leases in respect of:

> ''(a) the part of the land or waters in respect of which paragraph (2)(a) or (b), or both paragraphs, are satisfied; and
>
> (b) the remainder of the land or waters.''

302 The effect of s 245(3) is that the part of the mining lease upon which construction has occurred is taken to be separate from the remainder of the mining lease. Sub-section (3) operates so that the separate leases referred to are each taken to have been the subject of individual grants on the date that the original grant was made. It is the grant of the separate lease in respect of which construction has

occurred that is picked up by the definition of previous exclusive possession act in Div 2B of Pt 2 of the NTA, to which reference has already been made. Section 23B relevantly provides:

> ''(2) An act is a *previous exclusive possession act* if:
> (a) it is valid (including because of Division 2 or 2A of Part 2); and
> (b) it took place on or before 23 December 1996; and
> (c) it consists of the grant or vesting of any of the following:
> . . .
> (vii) what is taken by sub-section 245(3) (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that sub-section, assuming that the reference in sub-section 245(2) to '1 January 1994' were instead a reference to '24 December 1996'.''

(Nothing in this case was said to turn on the temporal assumption required by s 23B(2)(c)(vii).)

303 As previously noted, the NTA only provides for extinguishment in respect of acts attributable to the Commonwealth. A previous exclusive possession act under par (vii) of s 23B(2)(c) that is attributable to the State is picked up by the definition of ''relevant act'' in s 12I(1)(b) of the State Validation Act. The grant of a mining lease pursuant to the WA Mining Act is an act attributable to the State (423). Section 12I(1a) then provides:

> ''If a relevant act is attributable to the State —
> (a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned; and
> (b) the extinguishment is taken to have happened when the act was done.''

304 The State Validation Act thus operates in conjunction with the NTA to effect extinguishment of native title in respect of that part of the mining lease upon which the relevant construction occurred. Compensation is payable by the State to the holders of native title for any such extinguishment under s 12P of the State Validation Act. It should be emphasised that the same result would not necessarily be reached in respect of the ''remainder'' of the mining lease. As mentioned above, the definitions of both previous exclusive and previous non-exclusive possession acts do not extend to mining leases (ss 23B and 23F). The extinguishing effect of the ''remainder'' would therefore fall to be determined without reference to Div 2B of Pt 2 of the NTA or equivalent State provisions.

305 In the present case, the situation respecting the application of

(423) s 239 of the NTA.

s 245(2) and (3) of the NTA to the grant of the mining leases (424) may readily be resolved. A requirement of s 245(2) is that, as at 24 December 1996 (425), it must be reasonably likely that the buildings contemplated by that sub-section would continue to be used if mining under the lease were to cease. As noted above, one of the conditions common to the mining leases requires that at the completion of operations, all buildings and structures be removed from site or demolished and buried. The existence of such a condition indicates that s 245(2) could not be satisfied. Thus, s 12I(1a) of the State Validation Act is not engaged to extinguish native title in respect of any part of any of the mining leases irrespective of the existence of buildings of the kind contemplated by s 245(2).

3. *Extinguishment*

306 It remains to consider the extinguishing effect of the grants of the mining leases. Lee J held that the grant of the mining leases ''did not evince a clear and plain intention by the Crown to extinguish native title'' (426). The majority of the Full Court rejected this conclusion and held that all native title rights and interests in respect of the relevant land were extinguished. Their Honours held that ''the statutory scheme of the [WA Mining Act] and Mining Regulations establishes a regime which has an intended operation which, in the absence of explicit provision to the contrary (and none is relevantly to be found here) is inconsistent with the use or occupation of the lands leased by any other person'' (427). That reasoning, as explained earlier in this judgment, misconstrues the principles respecting extinguishment by grant of inconsistent right.

307 It is appropriate here to say something respecting one of the factors considered by the majority of the Full Court, namely the right to exclusive possession for mining purposes (s 85 of the WA Mining Act). The majority of the Full Court, referring to the limitation ''for mining purposes'', said (428):

> ''[W]hilst this limits the scope of the activities that may be pursued by the lessee upon the leased lands, it does not, in our view, follow that possession may be granted to another person.''

308 While so much may be accepted, it does not follow that all native title rights and interests have been extinguished. Whether they have will require much closer identification of the relevant native title rights and interests than has thus far been made. The grant of exclusive possession for mining purposes is directed at preventing others from carrying out mining and related activities on the relevant land.

(424) In respect of the Argyle mining lease, see at 171-175 [322]-[335].
(425) See s 245(2) in conjunction with s 23B(2)(c)(vii).
(426) *Ward* (1998) 159 ALR 483 at 580.
(427) *Western Australia v Ward* (2000) 99 FCR 316 at 464 [581].
(428) *Western Australia v Ward* (2000) 99 FCR 316 at 464 [583].

Although the lessee could prevent anyone else seeking to use the land for mining purposes, it does not follow that all others were necessarily excluded from all parts of the lease area. In understanding what ''mining purposes'' are, some assistance may be provided by the authorities (429) construing the term ''mining operations'' as it appeared in legislation giving favourable treatment to taxpayers engaged in that activity. The term embraces operations pertaining to mining beyond the extraction of minerals from the soil (430) and ''is a very large expression'' (431). Further, account must also be taken of the fact that a grant of a right (in this case to mine) encompasses those rights necessary for its meaningful exercise (432). The holder of a mining lease having a right to exclude for the specified purposes, the holder may exercise that right in a way which would prevent the exercise of some relevant native title right or interest for so long as the holder of the mining lease carries on that activity. Just as the erection by a pastoral lease holder of some shed or other structure on the land may prevent native title holders gathering certain foods in that place, so too the use of land for mining purposes may prevent the exercise of native title rights and interests on some parts (even, in some cases, perhaps the whole) of the leased area. That is not to say, however, that the grant of a mining lease is necessarily inconsistent with all native title. But due to the generality of the determination respecting the content of the native title being asserted, it is not possible, subject to one exception, to accurately determine the native title rights and interests that have been extinguished or to identify those that remain.

309 It should be apparent that the exception identified above refers to the native title right to control access to the land. This right is inconsistent with the rights of access arising under the mining leases. If the native title right to control access existed immediately prior to the grants of the mining leases, then it was extinguished by those grants. This would raise the issue of invalidity of the grant by operation of the RDA and subsequent validation by the NTA and the State Validation Act. However, for the reasons given earlier in this judgment, the native title right to control access was, before the commencement of the RDA, extinguished within the whole of the State claim area by the grants of the respective pastoral leases.

310 We have said that it is not possible to accurately determine the native title rights and interests that were extinguished at common law. This does not necessarily mean that the RDA has no operation. If it is

(429) *Parker v Federal Commissioner of Taxation* (1953) 90 CLR 489; *Federal Commissioner of Taxation v Broken Hill Pty Co Ltd* (1969) 120 CLR 240; *Commissioner of Taxation v Northwest Iron Co Ltd* (1986) 9 FCR 463; *Dampier Salt (Operations) Pty Ltd v Collector of Customs* (1995) 133 ALR 502.

(430) *Federal Commissioner of Taxation v Broken Hill Pty Co Ltd* (1969) 120 CLR 240.

(431) *Parker v Federal Commissioner of Taxation* (1953) 90 CLR 489 at 494.

(432) This is provided for in the WA Mining Act itself by s 85(1)(d).

found that native title rights and interests that survived the grant of earlier pastoral leases were extinguished or ''affected'' (433) by the grant of a mining lease, all of which were granted following the commencement of the RDA, the RDA may be engaged.

311 The WA Mining Act does not, on its face, differentiate between the holders of native title rights and interests and the holders of other forms of title. However, that is not the end of the inquiry. It is necessary to determine the effect that the WA Mining Act has on native title compared with the effect it has on other forms of title. If holders of native title do not, under the WA Mining Act, enjoy their rights and interests, in the sense discussed above, to the same extent as holders of other forms of title, s 10 of the RDA is engaged.

312 In this respect it is significant to note that, pursuant to the WA Mining Act, a mining lease may be granted in respect of what is characterised as ''private land'' (Pt III, Div 3). The expression ''private land'' was defined to mean (s 8):

> ''any land that has been or may hereafter be alienated from the Crown for any estate of freehold, or is or may hereafter be the subject of any conditional purchase agreement, or of any lease or concession with or without a right of acquiring the fee simple thereof (not being a pastoral lease within the meaning of the *Land Act* 1933 or a lease or concession otherwise granted by or on behalf of the Crown for grazing purposes only or for timber purposes or a lease of Crown land for the use and benefit of the Aboriginal inhabitants).''

It should also be noted that, pursuant to Pt III, Div 1 of the WA Mining Act, a mining lease may be granted in respect of Crown land, including land the subject of a pastoral lease (434).

313 The ''owner'' and the ''occupier'' of land the subject of mining operations are entitled to compensation. The statutory description of that entitlement was amended from time to time. Nothing was said to turn on the changes and we do not notice them. Section 123(2) provided that the owner and the occupier are ''entitled according to their respective interests to compensation for all loss and damage suffered or likely to be suffered by them resulting or arising from the

(433) s 227 of the NTA.

(434) ''Crown land'' was defined in s 8 of the WA Mining Act to mean: ''all land in the State, except — (a) land that has been reserved for or dedicated to any public purpose other than — (i) land reserved for mining or commons; (ii) land reserved and designated for public utility for any purpose under the *Land Act* 1933; (b) land that has been lawfully granted or contracted to be granted in fee simple by or on behalf of the Crown; (c) land that is subject to any lease granted by or on behalf of the Crown other than — (i) a pastoral lease within the meaning of the *Land Act* 1933, or a lease otherwise granted for grazing purposes only; (ii) a lease for timber purposes; or (iii) a lease of Crown land for the use and benefit of the Aboriginal inhabitants; (d) land reserved or constituted as a townsite under the *Land Act* 1933.''

mining'' (s 123(2)). The amount payable under s 123(2) may include compensation for (s 123(4)):

> ''(a) being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land;
> (b) damage to the natural surface of the land or any part of the land;
> (c) severance of the land or any part of the land from other land of, or used by, that person;
> (d) any loss or restriction of a right of way or other easement or right;
> (e) the loss of, or damage to, improvements;
> (f) social disruption;
> . . .
> (h) any reasonable expense properly arising from the need to reduce or control the damage resulting or arising from the mining.''

314 If the relevant land was subject to a pastoral lease, the pastoral lessee was entitled to compensation according to s 123(7) in respect of:

> ''(c) subject to section 125, any damage to improvements on that land caused by the holder and for any loss —
> (i) suffered by the lessee; and
> (ii) resulting from that damage;
> and
> (d) notwithstanding anything in section 125, any substantial loss of earnings —
> (i) suffered by the lessee; and
> (ii) resulting or arising from mining by the holder.''

315 The amount of compensation payable may be determined by agreement (s 123(3)). If no agreement is reached the owner or occupier respectively and the person liable for payment of compensation may consent to an informal determination by the warden (s 123(3)(a)). In the absence of consent, the amount of compensation is to be determined by the warden's court (435) in formal proceedings, upon the application of the owner, the occupier or the person liable for payment of compensation (s 123(3)(b)).

316 What is significant is that the ''owner'' and the ''occupier'' of land the subject of mining operations are entitled under the WA Mining Act to compensation and that they may initiate proceedings to obtain that compensation. It is also significant that the compensation payable under the WA Mining Act includes compensation for the loss of use of the land and for ''social disruption'', which may be particularly apposite in respect of any compensation for native title holders.

317 The terms ''owner'' and ''occupier'' are defined by the WA Mining Act (s 8) as follows:

(435) The warden's court is established by Pt VIII (ss 127-151) of the WA Mining Act.

''*'occupier'* in relation to any land includes any person in actual occupation of the land under any lawful title granted by or derived from the owner of the land'';

''*'owner'* in relation to any land means —

(a) the registered proprietor thereof or in relation to land not being land under the *Transfer of Land Act* 1893 the owner in fee simple or the person entitled to the equity of redemption thereof;

(b) the lessee or licensee from the Crown in respect thereof;

(c) the person who for the time being, has the lawful control and management thereof whether on trust or otherwise; or

(d) the person who is entitled to receive the rent thereof.''

It should be apparent that native title holders do not fall within pars (a), (b) and (d) of the above definition of ''owner''. Native title holders may, in an appropriate case, fall within par (c). However, all of the land in respect of which the relevant mining leases were granted had been the subject of various pastoral leases. As previously mentioned, the grants of those pastoral leases extinguished the native title right to control access to the land. Therefore, the relevant native title holders could not be described as having the ''lawful control and management'' of the land under par (c) above; they were not ''owners'' for the purposes of the WA Mining Act. It follows that the holders of native title in respect of the land subject to the various mining leases were not entitled to compensation under the WA Mining Act as ''owners'' of the relevant land. This result is no different from that which would obtain in respect of any holder of rights and interests that did not amount to the ''lawful control and management'' of the land. The RDA is therefore not engaged on this basis.

318 The question remains as to whether the native title holders may be described as ''occupiers''. It should also be observed that native title holders cannot satisfy the definition of ''occupier'' in respect of land as they do not occupy the land under any lawful title granted by or derived from the owner of the land. The Crown is not apt to be described as the ''owner'' of land the subject of native title and native title is not ''granted by or derived from'' the Crown. However, ''occupier'' is defined in s 8 so as to ''include'' the definition set out above. When the use of the term ''includes'' is contrasted with use of the term ''means'' in the definition of ''owner'', it may be that the Act does not limit what otherwise might be meant by the term ''occupier''. However, it is not necessary to reach any conclusion on this matter, nor is it necessary to determine whether the relevant native title holders were ''occupiers'' under the WA Mining Act.

319 If the holders of native title are properly described as ''occupiers'' of the relevant land, then, subject to any statutory limitation period that may arise, they are entitled to compensation according to s 123 of the WA Mining Act as ''occupiers''. This consequence would flow apart from the RDA, which would not be engaged. Therefore, there would

be no invalidity in respect of the mining leases, and to the extent that the grant of those mining leases extinguished native title, that native title would remain extinguished.

320 If the holders of native title cannot properly be described as ''occupiers'', s 10 of the RDA is engaged. As we have said (436), the fact that native title has different characteristics from other forms of title, such that native title holders may not be ''occupiers'', does not allow native title to be treated differently from those other forms of title. In this respect, the WA Mining Act would fall within the first category of discriminatory legislation set out by Mason J in *Gerhardy* (437). The WA Mining Act would have failed to confer the right to compensation upon holders of native title in circumstances where that right is conferred upon the holders of other forms of title. As explained by Mason J, s 10 would operate to confer, as a matter of federal law, the right to compensation upon those holders of native title, to the same extent as the WA Mining Act confers that right upon ''occupiers''.

321 Were it not for the special provisions of s 45 of the NTA, s 10 of the RDA would ensure that the amount of compensation would be that determined in accordance with s 123 of the WA Mining Act. Section 45 is an instance of the operation of s 7 of the NTA to control the interrelation between the NTA and the RDA (438). Section 45(1) states:

> ''If the [RDA] has the effect that compensation is payable to native title holders in respect of an act that validly affects native title to any extent, the compensation, in so far as it relates to the effect on native title, is to be determined in accordance with section 50 as if the entitlement arose under this Act.''

Section 50 is in Div 5 of Pt 2 of the NTA, which is headed ''Determination of compensation for acts affecting native title etc''. Section 50(1) states:

> ''A determination of the compensation may only be made in accordance with this Division.''

It should be emphasised that when the RDA operates in this way, the validity of the grants of the mining leases is unaffected, as is the extinguishing effect that those grants may have on any native title. The grants did not, therefore, constitute category C past acts. The result is that to the extent that the grants of the respective mining leases extinguished native title, that native title is extinguished and in place thereof, the holders of that native title have a statutory entitlement to compensation as described above.

(436) See at 104-106 [117]-[122].
(437) (1985) 159 CLR 70 at 98.
(438) See at 96-97 [99].

4. *The Argyle mining lease*

322 It remains to consider whether the particular legislative and contractual context within which the Argyle mining lease was granted leads to any different conclusion respecting the extinguishing effect of the grant.

323 The majority in the Full Court described the Argyle mining lease as follows (439):

> ''It was granted on 27 January 1983 pursuant to the Argyle Diamond Mines Joint Venture Agreement (the Agreement) which was ratified by the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* 1981 (WA) (the Ratifying Act). The need for special legislation providing for, inter alia, the grant of a mining lease, arose out of the 'project' nature of the venture, which involved the building of a substantial infrastructure, including a township, airports and roads.''

324 The Argyle mining lease originally covered 13,620 ha in area. This was extended to 59,719 ha in November 1986. It is significant that only a small portion of the lease is within the claim area and that the whole of that portion lies within the boundaries of Reserve 31165. As has already been explained (440), all native title rights and interests in respect of land within that reserve were extinguished when it was vested in the Minister at some time between its creation and 1973. The provisions of the WA Mining Act, set out above, apply to the Argyle mining lease, except as otherwise provided in the agreement (cl 15(1)).

325 The purpose and effect of the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* 1981 (WA) (the Ratifying Act) (441) should also be noted. Lee J, with whom the majority of the Full Court expressed agreement on this point, explained the background to and the purpose of the Ratifying Act as follows (442):

> ''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 WA Mining Act]. Sections 7-10 had a specific purpose, namely, to defeat the claim of that party to an interest under the *Mining Act* 1904 (WA) and [the WA Mining Act] 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 [the WA Mining Act] by the third party,

(439) *Western Australia v Ward* (2000) 99 FCR 316 at 456 [547].
(440) See at 154 [274].
(441) This Act was formerly called the *Diamond (Ashton Joint Venture) Agreement Act* 1981 (WA).
(442) *Ward* (1998) 159 ALR 483 at 578.

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.''

326 The Argyle mining lease was to be granted in respect of land which was the subject of mineral claims by CRA Exploration Pty Ltd (CRA). Under the agreement, CRA was to surrender the mineral claims and the State was to grant to the joint venturers the Argyle mining lease in respect of that land (cl 15(1)). The Ratifying Act was thus primarily directed to ensuring the validity of the CRA mineral claims. The majority in the Full Court attached significance to the provisions of s 8 of the Ratifying Act (443), sub-s (1) of which provides:

> ''Without limiting any other right, title, interest, benefit or entitlement [CRA] may have in or in respect of the subject land or any minerals found thereupon, or the effect of section 7, it is hereby expressly declared —
>
> (a) that on and from the coming into operation of this Act [CRA] has exclusive possession of the subject land for the purposes of the *Mining Act* 1904 and [the WA Mining Act];
>
> . . .
>
> and the entitlement of [CRA] to such possession . . . shall not be liable to be challenged, appealed against, reviewed, quashed, or called in question by or in any proceedings before a court whether instituted before or after the coming into operation of this Act.''

Sub-section (2) provides that sub-s (1) does not apply after the grant of the Argyle mining lease and does not ''affect any right, title, interest, benefit or entitlement of the Joint Venturers'' (s 8(2)(c)).

327 It is apparent, as Lee J noted (444), that s 8 of the Ratifying Act is confined to conferring exclusive possession upon CRA for the purposes of the WA Mining Act. The grant of exclusive possession was another step in a series of legislative measures imposed by the Ratifying Act that were directed at ensuring that the grant of the Argyle mining lease would proceed without delay and would not be subject to challenges as to its validity by, for example, holders of prior mineral claims.

328 Part IV of the Ratifying Act is entitled ''SECURITY OF DIAMOND MINING AND PROCESSING AREAS''. Section 15(1) provides:

> ''Where it appears to the Governor that the mining, treatment, processing, sorting, storage or cutting of diamonds is being, or is proposed to be, carried out —
>
> (a) on any land in the State; or
>
> (b) on or within any premises in the State,
>
> in the course of operations conducted for the purposes of or

(443) *Western Australia v Ward* (2000) 99 FCR 316 at 459 [556].
(444) *Ward* (1998) 159 ALR 483 at 579.

incidental to the implementation of the Agreement, the Governor may by Order in Council published in the *Gazette* declare that land or those premises, as the case may be, to be a designated area for the purposes of this Part.''

Section 17 then provides:

> ''(1) A person shall not —
> (a) enter or leave a designated area;
> (b) drive a vehicle into or out of a designated area; or
> (c) take or consign any property into or out of a designated area,
> other than by way of a controlled access point.
> . . .
> (3) A person shall not enter, drive a vehicle into, or take or consign any property into a designated area without the permission of a security officer on duty at a controlled access point.
> . . .
> (8) A person who —
> (a) contravenes sub-section (1) or (3)
> . . .
> commits an offence and is liable to a fine not exceeding $5000 or to imprisonment for a term not exceeding one year.''

It may be accepted that the establishment of a ''designated area'', by exercise of the power conferred upon the Governor in Council by s 15(1) of the Ratifying Act, would extinguish native title within that area. However, it was not contended (445) that the land in the Argyle mining lease within the claim area was at any time within a ''designated area''.

329 The conditions set out in the 6th Sch to the Argyle mining lease should also be noted. One such condition was that the rights of ingress to and egress from any mining operation were to be preserved to authorised officers of the Public Works Department, for inspection purposes. Another condition, inserted in November 1986, was that the provisions of the *Aboriginal Heritage Act* 1972 (WA) were to be complied with ''to ensure that no action is taken which is likely to interfere with or damage any Aboriginal site''.

330 The majority of the Full Court concluded that native title was extinguished entirely in respect of that part of the claim area covered by the Argyle mining lease. Beaumont and von Doussa JJ said (446):

> ''It seems to us that, as in the case of the [Project], the very size of the infrastructure of such a major project as the Argyle Venture, when coupled with the nature and intensity of the large range of activities contemplated in its execution, all indicate the existence of

(445) *Ward* (1998) 159 ALR 483 at 578.
(446) *Western Australia v Ward* (2000) 99 FCR 316 at 458 [554].

a situation of complete inconsistency. In our view, it is inevitable that any native title rights must totally yield to the lessee's rights (and obligations) under the Agreement, the Ratifying Act, the [WA Mining Act] and the mining lease itself.''

Their Honours continued (447):

''[I]t is true that the Ratifying Act, s 8(1)(a), confers upon the Joint Venturers exclusive possession of the land for specific purposes only; that is, for the purposes of the *Mining Acts*; and that, consistently with this restriction on use, the lease is a lease of the land 'for all minerals'. But, in our view, it does not follow from the circumstance that a lessee is granted exclusive possession of land for a nominated purpose, that others may possess the leased premises for other purposes. The fact that a lessee is granted exclusive possession for residential or commercial purposes only, does not carry with it an implication that the lessor is at liberty to lease the premises to a third party for a different purpose.''

331 Observations made earlier in the context of the other mining leases respecting the right of exclusive possession for mining purposes are again relevant here. Further, it is not to the point to say that the land could not be leased to a third party for a different purpose. Native title rights and interests are allodial and do not depend upon, and do not derive from, any kind of grant attributable to the Commonwealth or the State. It should be apparent that incidents of native title that may be described as usufructuary in nature, such as the right to hunt, may be able to be exercised over part or all of the land the subject of the relevant mining lease.

332 Their Honours concluded that (448): ''[t]here is a substantial element of permanence in the mining use authorised here, a use which is physically inconsistent with the native title rights claimed. In our view, this is of a scale and dimension sufficient to extinguish those rights entirely.''

333 This conclusion should not be accepted. The provisions of the Ratifying Act and of the agreement do not require the conclusion that the grant of the Argyle mining lease was necessarily inconsistent with all native title. Exclusive possession was granted for mining purposes only.

334 Reference should also be made here to the possibility of extinguishment by operation of ss 245(3) and 23B(2)(c)(vii) of the NTA in conjunction with the State Validation Act as discussed previously. In this respect it is of significance that no mention was made by Lee J of the existence of any buildings or of a township on the relevant part of the Argyle mining lease and none of the parties to

(447) *Western Australia v Ward* (2000) 99 FCR 316 at 459 [558].
(448) *Western Australia v Ward* (2000) 99 FCR 316 at 460 [559].

the appeal in the Full Court or in this Court contends otherwise. It is therefore unlikely that any of the buildings of the kind contemplated by s 245(2) exist in respect of that part of the Argyle mining lease within the claim area. Further, no argument having been advanced by reference to the Scheduled interest provisions in s 23B(2)(c)(i) and Sch 1 of the NTA, it is not possible to say whether there is a lease, other than a mineral lease, in relation to the area claimed which is a lease of a kind mentioned in Item 36 of Sch 1.

335 Thus, for the reasons set out above, this Court is unable to determine the precise extinguishing effect, if any, of the grant of the Argyle mining lease. However, given the conclusions expressed above concerning Reserve 31165, it is unnecessary to do so.

5. *The general purpose lease*

336 The majority of the Full Court said (449):

> ''A general purpose lease is an interest granted under s 86 of the [WA Mining Act]. Within the claim area there is only one such lease, G80/5, held by Mr J L Woodhead, a party to Alligator Airways' appeal. This lease is also within lands resumed or acquired for the [Project]. This lease was granted on 2 August 1989. The land leased has been used to contain crushing and screening plants, and for associated stockpiling.''

337 It should be added that the general purpose lease was for an area of 4.5 ha. It was granted pursuant to Div 4 of Pt IV of the WA Mining Act. Such a lease has a term of twenty-one years with a right of renewal for a further term of twenty-one years (s 88) and is for a maximum area of 250 ha (and later 10 ha) (s 86(3)). The lease entitles the lessee to the exclusive occupation of the land for one or more of the following purposes (s 87(1)):

> ''(a) for erecting, placing and operating machinery thereon in connection with the mining operations carried on by the lessee in relation to which the general purpose lease was granted;
> (b) for depositing or treating thereon minerals or tailings obtained from any land in accordance with this Act;
> (c) for using the land for any other specified purpose directly connected with mining operations.''

338 The general purpose lease was subject to a number of conditions that are not relevantly different to those set out previously in respect of the mining leases.

339 The majority of the Full Court again concluded that all native title rights and interests were extinguished in relation to the leased area. Their Honours said (450):

(449) *Western Australia v Ward* (2000) 99 FCR 316 at 464 [585].
(450) *Western Australia v Ward* (2000) 99 FCR 316 at 467 [589].

> ''Again, we have difficulty accepting the trial judge's conclusion that there was no extinguishment here. The express grant of exclusive possession (albeit for specified purposes) together with the strict imposition of the regime of control by the Minister for Mines of the lessee's operations (by virtue of the provision of the statutory scheme and the lease conditions), all combine to create rights and obligations, the exercise and performance of which are inconsistent with native title ... This outcome is reinforced by the circumstance that the subject area offers even less space for concurrent activities than the maximum area available under the [WA Mining Act] for grant as a mining lease.''

340 For the reasons set out earlier in this judgment, this reasoning should not be accepted. The grant of the general purpose lease was not necessarily inconsistent with all native title rights and interests in respect of that land.

341 This Court cannot identify the actual native title rights and interests extinguished by the respective grants of the various relevant mining interests referred to above. That identification requires further findings of fact and a more precise determination of the content of the native title rights and interests being asserted. However, it is apparent that the right to control access to the land is inconsistent with the rights of access arising under each of the relevant grants, although, for the reasons set out earlier in this judgment, the grant of the relevant pastoral leases had already extinguished that right.

342 It should be emphasised that a finding that native title rights and interests were extinguished by the grant of any of the relevant mining interests may engage the RDA and require consideration of the various issues referred to earlier in these reasons (451).

K. *Other Transactions Alleged to Effect Extinguishment in Western Australia*

1. *Introduction*

343 Some leases, other than pastoral and mining leases, have been granted over parts of the land in Western Australia that is the subject of claim. Three kinds of lease must be considered: a conditional purchase lease under s 62 of the *Land Act* 1898, special leases under Pt VII of the *Land Act* 1933 and leases of reserved land under s 32 of the *Land Act* 1933.

2. *Conditional purchase lease*

344 A conditional purchase lease under s 62 of the *Land Act* 1898 was granted, in 1910, to Connor Doherty Durack Ltd over about 2,000 acres of land in the Goose Hill area then held by the company under

(451) See at 167-170 [311]-[321].

the Ascot pastoral lease. In 1918, the lease was resumed pursuant to s 9 of the *Land Act* 1898.

345 In the Full Court, Beaumont and von Doussa JJ said (452):

> ''The trial judge held that the grant of the conditional purchase lease did not extinguish native title. We are unable to agree with this conclusion. In its form and terms, the grant was in the form of a lease with a right to purchase upon compliance with the conditions of the lease. The lease was for a small area of land. The lease was not for a confined purpose such as grazing. The contemplation of the parties, as expressed in the lease, was that the grant would mature into an estate in fee simple, not revert to the Crown at the expiration of the term.''

Their Honours found (453) that the nature and extent of reservations in the form of conditional purchase lease were ''less extensive'' than those that were found in the forms of pastoral lease considered in *Wik*. There was, however, in their Honours' opinion, one consideration which decided the issue (454):

> ''That consideration is that the prescribed form for a pastoral lease required by s 92 [of the *Land Act* 1898] contained a reservation in favour of Aboriginal people, whereas the 9th Sched form [of conditional purchase lease] required by ss 55(3) and 62 contained no such reservation. That omission in our opinion is a clear indication that under a conditional purchase lease native title rights were not excepted from the possessory rights granted to the lessee.''

Their Honours then referred to *Davies v Littlejohn* (455) and to what was said by Isaacs J in *Moore and Scroope v Western Australia* (456) as support for the conclusion (457) that the grant of the lease pointed to the intention of the parties being that the lessee would permanently retain the land, becoming, in due course, the holder of the fee simple.

346 In fact the lessee did not become the holder of the fee simple. Rather, following resumption in 1918, the area the subject of the conditional purchase lease, as part of a larger area of land, was reserved for a purpose which, in June 1918, was amended to ''for use and requirements of the Government of the State in connection with the Wyndham Freezing, Canning and Meat Export Works'' (458). As Lee J found (459), on 27 September 1918 a permit to occupy this land was issued under s 16 of the *Land Act* 1898 to the Wyndham Freezing,

(452) *Western Australia v Ward* (2000) 99 FCR 316 at 469 [603].
(453) *Western Australia v Ward* (2000) 99 FCR 316 at 469 [603].
(454) *Western Australia v Ward* (2000) 99 FCR 316 at 469-470 [603].
(455) (1923) 34 CLR 174 at 183, per Knox CJ.
(456) (1907) 5 CLR 326 at 346-347.
(457) *Western Australia v Ward* (2000) 99 FCR 316 at 470 [606].
(458) *Western Australia v Ward* (2000) 99 FCR 316 at 414 [370].
(459) *Ward* (1998) 159 ALR 483 at 570-572.

Canning and Meat Export Works (the Meat Works), a State trading concern incorporated under the *State Trading Concerns Act* 1916 (WA).

347 Section 16 of the *Land Act* 1898 provided that after payment of the purchase money and fee payable for a Crown grant, and having performed all conditions, a purchaser would, on application, receive a permit to occupy, being a certificate that the purchaser was entitled to a Crown grant.

348 A permit to occupy was issued to the Meat Works but no Crown grant issued. Between 1918 and 1962 the land was used for grazing and watering cattle on their way to the works at Wyndham. In 1969, by an instrument of transfer said to be made under the *Transfer of Land Act* 1893 (WA), the Meat Works transferred and surrendered the land to the Crown in right of Western Australia.

349 The majority of the Full Court, contrary to the opinion of Lee J (460), rightly held that the grant of the permit to occupy wholly extinguished any native title rights and interests in the land (461). As the majority said (462), the grantee of the permit to occupy ''obtained a right to exclusive possession [of the land] which was intended to continue in perpetuity''.

350 In these circumstances, it is not necessary to decide whether the majority were correct in their conclusions about the effect of the grant of a conditional purchase lease.

3. *Special leases*

351 In the Full Court, reference was made to a number of special leases granted over land in the claim area (463). Some of those related to land outside the determination area and they may, therefore, be put aside. Others were granted over land that was later resumed in connection with the Project. Some leases in the form of special leases were granted over reserved land. One special lease (SL3116/3010) granted in 1962 pursuant to s 116 of the *Land Act* 1933 to Northern Australian Estates Ltd related to land within the determination area that had previously been subject only to a pastoral lease.

352 It is convenient to examine the issues raised by special leases by reference to the lease last mentioned. It was for a term of twenty-one years but was terminable on six months' notice by either party. It was a lease for ''the special purpose of Grazing''. It related to land in the northern part of the claim area and was almost completely surrounded by the Carlton Hill pastoral lease.

353 In the Full Court, Beaumont and von Doussa JJ held that the grant of this lease did not bring about any further extinguishment of native

(460) *Ward* (1998) 159 ALR 483 at 572.
(461) *Western Australia v Ward* (2000) 99 FCR 316 at 415 [373].
(462) *Western Australia v Ward* (2000) 99 FCR 316 at 415 [373].
(463) *Western Australia v Ward* (2000) 99 FCR 316 at 471-475 [609]-[628].

title than had been effected by a preceding pastoral lease extinguishing ''exclusivity'' of native title rights to the land (464). In this Court, Western Australia submitted that the grant of the special lease wholly extinguished native title.

354 Much of what has been said about pastoral leases applies with equal force to special leases under Pt VII of the *Land Act* 1933. Special leases are a statutory form of interest in land provided for by an Act which, although it provided for leases and licences as different kinds of interest, did not always treat leases and licences separately (465). The form of special lease prescribed in the 21st Sched to the Act, and adopted in the lease to Northern Australian Estates Ltd, contained a number of provisions qualifying the interest that was given. It was granted for a stated purpose. Power to resume up to one-twentieth part of the land for works of a public nature was reserved. The right to take timber and materials for use in public works was reserved and the lessee was forbidden to destroy timber or scrub. Minerals were reserved to the Crown. Importantly, there was a proviso for re-entry.

355 Unlike a pastoral lease, however, the interest granted by a special lease was not precarious. There was no general provision (466) which would determine the lease upon reservation, sale or its other disposal by the Crown. Nor were there provisions applicable to special leases that were equivalent to s 106 of the *Land Act* 1933 which, in the case of pastoral leases, reserved to the Crown the right to depasture stock and gave to ''any person'' the right to pass over any part of the land that was unenclosed or, if enclosed, was unimproved. As the Full Court rightly held (467), the statutory reservation in favour of Aboriginal peoples did not apply to a special lease, even if that special lease were for the purpose of grazing.

356 That the nature of the tenure granted by a special lease was different from a pastoral lease can be seen, not only from the considerations already mentioned, but also from consideration of the purposes for which special leases could be granted. Section 116 provided a number of specific purposes for which a special lease might be granted, including taking guano, quarrying, and for sites for various kinds of buildings or other works. Section 116(14) provided that a special lease might be granted for ''any other purpose approved by the Governor by notice in the *Gazette*''. In 1934 (468), grazing was approved as a purpose for the grant of a special lease. At least some of the uses specified in the Act (for example, as ''sites for tanneries, factories, saw or other mills, stores, warehouses, or dwellings'' (s 116(5))) are uses in which it might ordinarily be expected that the user would wish

(464) *Western Australia v Ward* (2000) 99 FCR 316 at 472 [617], 474 [627].
(465) See at 127 [180].
(466) cf *Land Act* 1933, s 106.
(467) *Western Australia v Ward* (2000) 99 FCR 316 at 473 [621].
(468) *Western Australia v Ward* (2000) 99 FCR 316 at 473 [618].

to control access to the land. One of the stated purposes (quarrying) could be the subject of a licence under s 118. Other purposes could not.

357 All this being so, the majority in the Full Court erred in not concluding that the grant of a special lease granted the lessee a right of exclusive possession. It follows that the lease to Northern Australian Estates Ltd was an exclusive pastoral lease (469) and, having been granted in 1962, its grant was valid. It follows from those considerations and from s 23B(2)(c)(iv) of the NTA that its grant was a previous exclusive possession act.

4. *Leases of reserves*

358 It is convenient to deal next with leases of reserves and, in the course of doing so, to deal with those leases of reserves which took the form of special leases. Under s 32 of the *Land Act* 1933, the Governor was authorised to lease a reserve for any purpose if it was not immediately required for the purpose for which it was made. The term of such a lease could not exceed ten years, but if the land was to be leased for more than one year, applications for the lease had to be sought by notice in the *Government Gazette*.

359 In 1956, a lease of part of Reserve 2049 (for Travellers and Stock) and Reserve 16729 (for Use and Requirements of the Government of the State in connection with the Wyndham Freezing, Canning and Meat Export Works) was granted to R G Skuthorp. In 1972, a lease of a slightly larger area was granted to E J and M S Lilly. Much, but not all, of this land had been the subject of the permit to occupy in favour of the Meat Works that has been dealt with earlier.

360 In 1958, a lease of part of Reserve 1059 (for public utility) was granted under s 32 of the *Land Act* 1933 to R G Skuthorp. The lease was for a purpose described as ''business and garden area''.

361 In 1977, an area of land comprising part of three reserves (Reserve 1061 for ''Public utility'', Reserve 1164 also for ''Public utility'' and Reserve 18810 for ''Tropical Agriculture'') was leased pursuant to s 32 of the *Land Act* 1933 to Ivanhoe Grazing Co Pty Ltd (Ivanhoe). The lease was for a term of one year, renewable annually, and was for grazing purposes. Therefore, it was a pastoral lease within the definition of s 248 of the NTA.

362 In 1992, a lease of approximately the same area as was the subject of the lease to Ivanhoe was granted to Crosswalk. It, too, was subject to a condition that without the prior approval of the Minister, it was not to be used for any purpose other than grazing.

363 In 1990, a lease of 8,000 m^2 of reserve land was granted under s 32 of the *Land Act* 1933 to Messrs Harman and Osborn. This lease was terminated in 1992 and a new lease, for the purpose of ''tourist and travel stop facility'', was issued to G & J Harman.

(469) NTA, s 248A.

364 In 1990, the first of two leases of reserved land was granted to the Agricultural Protection Board, a State government instrumentality. A second lease was issued with effect from 1 April 1992 to correct a misdescription of the land the subject of the lease. Each of these leases was to provide a camp and facilities for officers of the Agricultural Protection Board who worked in the Noogoora Burr Quarantine Area.

365 The majority of the Full Court held that some but not all of these leases wholly extinguished native title. Their Honours distinguished between the leases according to the differences in their conditions and the intensity of use that was likely to have been made of the land (470). Western Australia abandoned its cross-appeal about the effect of the leases to the Agricultural Protection Board. They can, therefore, be put to one side.

366 Section 32 of the *Land Act* 1933 authorised the grant of a lease of a reserve ''for any purpose, at such rent and subject to such conditions as [the Governor] may think fit''. The section (which is found in Pt III of the Act) said nothing that required the adoption of any particular form of lease. Yet in the 4th Sched to the Act there was provided a form of what was described as a ''Lease under Part III''. That form of lease provided for a peppercorn rental. Given the generality of s 32, the power to lease given by that section should not be read as confined to granting a lease in or substantially to the effect of the form in the 4th Sched. It may also be noted that, the land being reserved, it fell outside the definition of ''Crown lands'' in s 3 of the Act. It follows that the provisions of Pt VII of the Act, about Special Leases, could not be engaged. Those provisions dealt only with a grant of a lease of any *Crown land*.

367 It is convenient to deal first with the lease of part of Reserves 1061, 1164 and 18810 to Ivanhoe.

368 The lease, granted on 29 September 1977, was said, in its heading, to be under ss 32 and 116 of the *Land Act* 1933. The reference to s 116 was, for the reasons just given, inapposite. The term of the lease was one year, renewable from year to year, but determinable, after the first year, on three months' notice. The term was said to commence on 1 October 1966 but that does not mean that the grant was made then. Having regard to the requirements of the *Land Act* 1933 (including s 13 with its provision that leases be signed and s 7(2) with its provision that ''grants and other instruments'' are ''valid and effectual in law'' to vest an interest) the grant of a lease occurred on 29 September 1977. The lease was for the purpose of grazing. The lease provided that the Crown might resume and enter upon possession of part of the lands for various purposes in the nature of public works. Power was given to the Crown to take timber, quarry, search for minerals and the like. Minerals and petroleum were reserved to the Crown. There was a proviso for re-entry. The lease recorded that it

(470) See, eg, *Western Australia v Ward* (2000) 99 FCR 316 at 478 [641].

was issued subject to the condition that the public should have ''free and uninterrupted use of the roads or tracks'' on the land and that the lessee not destroy timber or scrub.

369 The lease that was granted was not a statutory interest in land. The features of the interest granted were not prescribed by the Act but were determined by the nature of the agreement reached and the grant made. The rights thus granted to Ivanhoe were, therefore, rights as lessee of the land, as that term is understood in the general law. Ivanhoe was thus granted a right of exclusive possession of the land.

370 That being so it is not to the point to inquire, as the majority of the Full Court did, how it would be expected that the lessee would use the land or whether that use could be compatible with the continued exercise of native title rights or interests. The lessee having been granted a right of exclusive possession, the right thus granted was inconsistent with the continued existence of native title rights and interests and, subject to the operation of the RDA and the NTA, those latter rights were extinguished.

371 As a ''past act'', the grant of the lease, if invalid by operation of the RDA, was validated by s 19 of the NTA and s 5 of the State Validation Act. The lease, being validated by Div 2 of Pt 2 of the NTA, was a previous exclusive possession act under Div 2B of Pt 2 of the NTA. However, it was not a ''relevant act'' under s 12I(1) (471) of the State Validation Act as it was not still in force on 23 December 1996. Therefore s 12I of the State Validation Act was not engaged.

372 However, the later lease, granted in 1992 to Crosswalk, was a lease in respect of approximately the same area of reserve and on terms not significantly different from the lease to Ivanhoe. The Crosswalk lease was renewed from year to year and it was in force on 1 January 1994 and 23 December 1996. That being so, it was a ''past act'' validated by Div 2 of Pt 2 of the NTA and s 5 of the State Validation Act. As an exclusive pastoral lease, validated in this way, it was a previous exclusive possession act under s 23B(2)(c)(iv) of the NTA and a ''relevant act'' under s 12I(1)(b) of the State Validation Act. It was a relevant act attributable to the State and extinguished any native title at the date of its grant (s 12I(1a)). Because s 12I of the State Validation Act had this effect, resort to s 6 for extinguishment was neither necessary nor open (s 12I(2)).

(471) Section 12I of the State Validation Act provides: ''(1) In this section — '*relevant act*' means a previous exclusive possession act — (a) under section 23B(2)(a), (b) and (c)(ii) of the NTA (including because of section 23B(3)); or (b) under section 23B(2)(a), (b) and (c)(i), (iii), (iv), (v), (vi), (vii) or (viii) of the NTA if the Scheduled interest or lease concerned was still in force on 23 December 1996. (1a) If a relevant act is attributable to the State — (a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned; and (b) the extinguishment is taken to have happened when the act was done. (2) If this section applies to the act, sections 6, 8 and 12B do not apply to the act.''

373 Some of the other leases of reserves that have been referred to earlier (the 1956 lease of Reserves 2049 and 16729 to R G Skuthorp and later in 1972 to E J and M S Lilly and the 1958 lease to Skuthorp of Reserve 1059) were in a form not significantly different from the leases to Ivanhoe and to Crosswalk. All these leases were granted before the commencement of the RDA. For the reasons stated in relation to those last-mentioned leases, the leases in respect of Reserves 2049, 16729 and 1059 would have wholly extinguished native title had native title not previously been wholly extinguished by the grant of the permit to occupy the land (472).

374 The leases in 1990 to Harman and Osborn and later in 1992 to G & J Harman were substantially in the form of the 21st Sched to the Act. For the reasons given earlier it was not necessary to adopt that form, but it was open to the Governor to lease a reserve on those, or for that matter any other, terms. Again, for the reasons given earlier in connection with the grant of special leases, the leases to Harman and Osborn and to G & J Harman granted the lessee a right to exclusive possession. Because those leases were granted after 1975, but before 23 December 1996, account must be taken of Div 2 and, in some cases, Div 2B of Pt 2 of the NTA.

375 The lease to Harman and Osborn in 1990 was found by the majority in the Full Court (473) to be a ''commercial lease'' as that term is defined in s 246 of the NTA. That finding is not challenged. It follows that, as the majority held, the grant of the lease (and its annual renewal) was a past act which was a category A past act (474). If the lease was still in force on 23 December 1996, by the path described with respect to the Crosswalk lease, the grant was validated and native title extinguished.

L. *Minerals and Petroleum*

376 At first instance, the determination made by Lee J provided that, in the determination area, the native title holders had ''the right to use and enjoy resources'' of the area, ''the right to control the use and enjoyment of others of resources'' of the area, ''the right to trade in resources'' of the area and ''the right to receive a portion of any resources taken by others'' from the area (475). ''Resources'' was not defined in the determination but there is no reason to conclude that it did not encompass all forms of resources, including minerals of all kinds. The determination provided that the native title holders' rights to resources (and other rights) were ''concurrent'' with various other interests but that their exercise ''may be regulated, controlled, curtailed, restricted, suspended or postponed'' by reason of the nature

(472) See at 178 [349], 180 [359], [360].
(473) *Western Australia v Ward* (2000) 99 FCR 316 at 479 [651].
(474) *Western Australia v Ward* (2000) 99 FCR 316 at 479-480 [651].
(475) *Ward* (1998) 159 ALR 483 at 639.

and extent of those other interests. Those other interests included the interests of lessees or licensees under the WA Mining Act and the interests of holders of tenements under the *Mining Act* 1904, the *Petroleum Act* 1936 (WA) and the *Petroleum Act* 1967 (WA) (476).

377 The majority of the Full Court held (477) that, by s 117 of the *Mining Act* 1904, and s 9 of the *Petroleum Act* 1936, the Crown appropriated to itself an interest in the minerals described in the *Mining Act* 1904, and in petroleum, ''which amounts to full beneficial ownership, and that accordingly any native title that may have existed in relation to minerals or petroleum has been extinguished''.

378 Section 117 of the *Mining Act* 1904, as originally enacted, provided:

> ''SUBJECT to the provisions of this Act and the regulations —
> (1) Gold, silver, and other precious metals on or below the surface of all land in Western Australia, whether alienated or not alienated from the Crown, and if alienated whensoever alienated, are the property of the Crown.
> (2) All other minerals on or below the surface of any land in Western Australia which was not alienated in fee simple from the Crown before the first day of January, One thousand eight hundred and ninety-nine, are the property of the Crown.''

''Minerals'' was defined in s 115 of that Act as:

> ''Antimony, bismuth, copper, iron, lead, manganese, mercury, silver, and tin, and the ores and earths of these metals, and gems and precious stones. The term also includes coal and oil, and any mineral which the Governor may from time to time by proclamation bring under the provisions of this Part of this Act.''

379 Section 9 of the *Petroleum Act* 1936, again as originally enacted, provided:

> ''Notwithstanding anything to the contrary contained in any Act, or in any grant, lease, or other instrument of title, whether made or issued before or after the commencement of this Act, all petroleum on or below the surface of all land within this State, whether alienated in fee simple or not so alienated from the Crown is and shall be deemed always to have been the property of the Crown.''

380 In this Court, the Ward claimants contended that the declaration of Crown ''property'' found in s 117 of the *Mining Act* 1904 ''was intended as merely a confirmation of existing rights to minerals and did not manifest a clear and plain intention to extinguish and thereby expropriate the native title interest''. In this regard, the Ward claimants placed some emphasis upon s 117(2). Until s 15 of the *Land Act* 1898 came into operation (on 1 January 1899) Crown grants of land in

(476) *Ward* (1998) 159 ALR 483 at 640, 644.
(477) *Western Australia v Ward* (2000) 99 FCR 316 at 452 [525]-[526].

Western Australia contained a reservation of only gold, silver and other precious metals in or under the land (478). Accordingly, s 117(2) of the *Mining Act* 1904 did not disturb the alienation of other minerals by grants in fee simple that had been made before that time. Thus, so it was submitted, the *Mining Act* 1904 should be understood as not disturbing *any* existing interests in minerals. It was to be understood as providing only for the establishment of a new system for the allocation of mining rights. The ''property'' taken by the Crown under s 117 was submitted to be no more than a power to dispose of the minerals. This understanding of the Act was reinforced, so it was said, when regard was had to the express provision made by ss 122 and 123 of the Act for resumption of land for mining purposes.

381 As Beaumont and von Doussa JJ pointed out (479), the claimants had, in pre-trial particulars, alleged that they ''dug for and used stones, ochres and minerals on and from the land'' and that they ''shared, exchanged and/or traded resources derived on and from the land''. At trial there was evidence that the claimants dug for and used ochre. Their Honours concluded (480) that the trial judge had been right to hold that ''this aspect of the [claimants'] traditional connection with the area claimed was established on the evidence''. Ochre being, in their Honours' view, neither a mineral as defined in first the *Mining Act* 1904 and then the WA Mining Act, nor petroleum as defined in the *Petroleum Act* 1936, they concluded (481) that the native title right to dig for ochre was unaffected by those Acts.

382 For the reasons given earlier, questions of extinguishment first require identification and consideration of the native title right or interest that is in issue. Beaumont and von Doussa JJ pointed out (482) that there was no evidence of any traditional Aboriginal law, custom or use relating to petroleum either in the State or in the Territory. Nor, assuming ochre is not a mineral, was there any evidence of any traditional Aboriginal law, custom or use relating to *any* of the substances dealt with in either the *Mining Act* 1904 or the WA Mining Act. (No party contended that ochre fell within the relevant definitions.) In these circumstances, no question of extinguishment arises. No relevant native title right or interest was established.

383 Even if such a right had been established then, as Beaumont and von Doussa JJ held, those rights would have been extinguished by s 117 of the *Mining Act* 1904 and s 9 of the *Petroleum Act* 1936.

384 As has already been pointed out, by s 3 of the *Western Australia Constitution Act*:

> ''The entire management and control of the waste lands of the

(478) See, eg, Land Regulations 1887, reg 16.
(479) *Western Australia v Ward* (2000) 99 FCR 316 at 449-450 [514].
(480) *Western Australia v Ward* (2000) 99 FCR 316 at 453-454 [534].
(481) *Western Australia v Ward* (2000) 99 FCR 316 at 454 [540].
(482) *Western Australia v Ward* (2000) 99 FCR 316 at 455 [541].

> Crown in the colony of Western Australia, and of the proceeds of the sale, letting, and disposal thereof, *including all royalties, mines, and minerals*, shall be vested in the legislature of that colony.'' (Emphasis added.)

All minerals and petroleum, on or under Crown lands, were thus subject to legislative disposition. Reserving them to the Crown and vesting ''property'' in them in the Crown had several consequences. First, it was no longer necessary (if it ever had been necessary) to consider questions of prerogative rights to some but not all minerals. Thenceforth, upon the subsequent alienation of land by the Crown, all minerals on or under the land would remain vested in the Crown. Secondly, the Crown could, and did, deal with minerals separately from the land and could thereafter, and did, grant separate rights to search for and recover them. But unlike the fauna legislation considered in *Yanner v Eaton* (483), the vesting of property in minerals was no mere fiction expressing the importance of the power to preserve and exploit these resources (484). Vesting of property and minerals was the conversion of the radical title to land which was taken at sovereignty to full dominion over the substances in question no matter whether the substances were on or under alienated or unalienated land.

385 None of the features of the legislation upon which the Ward claimants relied require a different conclusion. The provisions for resumption of land were directed to the resumption of interests in land that had been created under Land Regulations and, later, under the *Land Act* 1898. The provisions for resumption in the *Mining Act* 1904 were to be understood in the legislative context provided by s 117 of that Act where property in the minerals was generally vested in the Crown. Sections 122 and 123 were intended to facilitate their recovery. In most cases that would be done by resuming other interests in the land, as opposed to bringing any title to minerals to an end. Only in those cases where title to some minerals had been passed by earlier grants was there any question of resuming title to the minerals. For the reasons given earlier, however, these questions of extinguishment do not arise. No native title right or interest in minerals or petroleum was established.

M. *Fishing*

386 It will be recalled that the determination made by the Full Court included among the other interests in the determination area ''[o]ther interests held by members of the public arising under the common

(483) (1999) 201 CLR 351.

(484) *Yanner v Eaton* (1999) 201 CLR 351 at 369 [28], per Gleeson CJ, Gaudron, Kirby and Hayne JJ; at 397 [114]-[117], per Gummow J; *Toomer v Witsell* (1948) 334 US 385 at 402, per Vinson CJ.

law''. As the reasons of Beaumont and von Doussa JJ reveal (485), this provision was included in the determination to reflect the common law's recognition of a public right to fish and navigate in the tidal waters of the coastal sea of Australia. The Ward claimants contended that the determination should not recognise the public right to fish in tidal waters as an ''other interest'' within s 225(c) of the NTA because, so it was argued, the public right to fish is ''not a proprietary right''. The Ward claimants further contended that the majority had erred in holding, as they did (486), that the public right to fish had the effect of extinguishing the exclusivity of native title rights to fish in the intertidal waters which form part of the claim area.

387 Section 225(c), and its requirement that there be a determination of ''the nature and extent of any other *interests* in relation to the determination area'', must be understood in the light of the definition of ''interest'' contained in s 253. That definition is very wide. It extends to ''any other right ... in connection with ... the land or waters'' in question. It follows that, contrary to the contention of the Ward claimants, the public right to fish was properly to be recognised in the determination of native title as an ''other interest''.

388 If the evidence otherwise established that the claimants had, under traditional law and custom, an exclusive right to fish in tidal waters, that exclusivity has been extinguished. As has been explained in the joint reasons in *The Commonwealth v Yarmirr* (487), there is a fundamental inconsistency between a native title right and interest said to amount to a right to occupy, use and enjoy waters to the exclusion of all others or a right to possess those waters to the exclusion of all others and public rights of navigation over and fishing in those waters. Likewise, there is a fundamental inconsistency between the public right to fish in tidal waters and a native title right and interest said to amount to an exclusive right to fish those waters.

N. *Northern Territory*

1. *General*

389 In 1863 (488), an area of what was then the colony of New South Wales was annexed to the colony of South Australia. That area was to become the Northern Territory. It remained under the control of the colony and then the State of South Australia until surrendered to the Commonwealth in 1911 (489). Section 7 of the *Northern Territory*

(485) *Western Australia v Ward* (2000) 99 FCR 316 at 374-375 [216].
(486) *Western Australia v Ward* (2000) 99 FCR 316 at 482 [660].
(487) (2001) 208 CLR 1 at 67-68 [96]-[98].
(488) By Letters Patent issued pursuant to s 2 of the *Australian Colonies Act* 1861 (Imp). See McLelland, ''Colonial and State Boundaries in Australia'', *Australian Law Journal*, vol 45 (1971) 671, at p 677.
(489) *Northern Territory Surrender Act* 1907 (SA); *Northern Territory Acceptance Act* 1910 (Cth).

Acceptance Act 1910 (Cth) (the Acceptance Act) continued in force all laws in force in the Territory at the time of acceptance, but stated that those laws could be altered or repealed by or under any law of the Commonwealth. Section 10 stated:

> ''All estates and interests, held by any person from the State of South Australia within the Northern Territory at the time of the acceptance, shall continue to be held from the Commonwealth on the same terms and conditions as they were held from the State.''

390 In *Kruger v The Commonwealth* (490), in a passage later adopted by Gleeson CJ and Gummow J (491), Dawson J explained the status of the Territory prior to the commencement of the Self-Government Act as follows (492):

> ''Under s 122 of the Constitution, the parliament may make laws 'for the government of any Territory surrendered by any State to and accepted by the Commonwealth, or of any Territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth'. The Northern Territory was surrendered to and accepted by the Commonwealth pursuant to an agreement with South Australia in 1907. That agreement was ratified and approved by the [Acceptance Act]. Pursuant to s 111 of the Constitution, the Northern Territory thereupon became, and remains, 'subject to the exclusive jurisdiction of the Commonwealth'.
>
> Upon acquiring exclusive jurisdiction over the Northern Territory, the Commonwealth enacted the *Northern Territory (Administration) Act* 1910 (Cth). Section 13(1) of that Act empowered the Governor-General to make Ordinances having the force of law in the Northern Territory. Under s 13(2) and (3) Ordinances were required to be laid before the Houses of Parliament, either of which had the power of disallowance. Until 1947, the powers of the Governor-General remained essentially unchanged, although under the *Northern Australia Act* 1926 (Cth) the Northern Territory was divided into two territories (known as North and Central Australia) which were separately administered [(493)]. In 1947 the *Northern Territory (Administration) Act* 1947 (Cth) amended the earlier Act of the same name to create a legislative council for the Northern Territory. A new section, s 4U, provided that '[s]ubject to this Act, the Council may make Ordinances for the peace, order and good government of the Territory'. Further sections were added which provided that such Ordinances had no effect until assented to by the Administrator of

(490) (1997) 190 CLR 1.
(491) *Northern Territory v GPAO* (1999) 196 CLR 553 at 576-577 [40].
(492) *Kruger* (1997) 190 CLR 1 at 49-50.
(493) The 1926 statute was repealed and the Territory was again brought under a single administration by the *Northern Territory (Administration) Act* 1931 (Cth).

the Northern Territory according to his discretion (s 4V), and that the Governor-General had power to disallow any Ordinance within six months of the Administrator's assent (s 4W).''

391 With effect from 1 July 1978, the Self-Government Act established the Northern Territory of Australia as a body politic under the Crown (s 5) and provided for the Legislative Assembly of the Territory to have power, subject to that statute, to make laws for the peace, order and good government of the Territory (s 6) (494). The status of the Territory is of significance for the operation of the RDA in respect of laws of the Territory (495) as distinct from its operation respecting State laws (496).

392 There are two categories of ''acts'' which could potentially affect native title within the claim area in the Territory. The first category encompasses the grants of various pastoral leases. The second concerns the dedication and leasing of portions of land for a public purpose, namely the establishment and expansion of the Keep River National Park (the Park). It is necessary to bear in mind that the various grants and leases occurred at different stages in the development and status of the Territory.

393 The claimed area in the Territory comprises some 590 km^2 bordering Western Australia. This consists of NT Portions 1801, 3121, 3541, 3542 and 3863. No issue now arises respecting Portions 3541, 3542 and 3863. Portions 3541 and 3542 are Aboriginal community living areas within the boundaries of the Park and granted under the *Lands Acquisition Act* 1978 (NT) to the Bindjen Ningguwung Aboriginal Corporation and the Nyawamnyawam Dawang Aboriginal Corporation respectively. NT Portion 3863 is occupied by an Aboriginal community living area adjacent to the Park and similarly granted to the Dumbral Aboriginal Community Association. What is at issue in this Court is the subsistence of native title in respect of NT Portions 1801 and 3121. These comprise the Park and are subject to Special Purposes Lease No 475 (SPL 475) and Crown Lease Perpetual No 581 (CLP 581) respectively.

394 Before this Court there are two appeals challenging the treatment by the Full Court of native title in the area of the Park. The Ningarmara claimants, by appeal No P63, complain that the majority of the Full Court erred in holding that, whilst the grant of pastoral leases in the Territory did not extinguish all native title rights and interests, it did permanently extinguish those rights and interests to the extent of inconsistency. The Territory, by its appeal (No P62), complains that the Full Court erred in failing to hold that SPL 475 and CLP 581 extinguished any native title right to make decisions about the use and enjoyment of the land, including a non-exclusive native title right to

(494) *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 587.
(495) See *GPAO* (1999) 196 CLR 553 at 580-583 [53]-[60].
(496) See the previous discussion concerning the RDA at 107-109 [127]-[133].

do so for purposes other than pastoral purposes. The Territory relies upon other alleged extinguishing acts to which reference will be made later in these reasons. The Territory also asserts that the Full Court erred in law in failing to find that the construction of certain improvements on land in the Park wholly extinguished native title rights and interests in relation to the land on which the improvements were constructed. That ground of appeal may be put to one side. It rests upon notions of ''operational inconsistency'' which have been rejected in principle earlier in these reasons (497).

395 It is convenient to begin with the issues respecting pastoral leases in the Territory.

2. *Pastoral leases*

396 Five pastoral leases in all have been granted over the Territory claim area. It is undisputed between the parties that there was entry under each pastoral lease. The doctrine of interesse termini was abolished on 1 December 2000 when s 115(1) of the *Law of Property Act* 2000 (NT) came into force. But given the above consensus between the parties, nothing turns upon that doctrine whilst it was in force in the Territory.

397 The first pastoral lease was PL 1603. This was granted in 1893 and covered most of the claim area. Another pastoral lease, PL 1897, was granted in 1896 and covered the balance of the claim area. Both leases were granted for terms of forty-two years pursuant to the *Northern Territory Crown Lands Act* 1890 (SA) (the 1890 Lands Act). The 1890 Lands Act empowered the Governor to ''grant, lease, or otherwise alienate any Crown lands'' (s 6(a)). The term ''Crown lands'' was defined in s 5:

> ''[to] mean and include all lands in the Northern Territory, except —
>
> I Lands reserved for or dedicated to any public purpose:
>
> II Lands lawfully granted, or contracted to be granted, in fee simple by or on behalf of the Crown:
>
> III Lands subject to any lease or licence lawfully granted by or on behalf of the Crown:
>
> And shall include all lands which, having been granted or held under lease or application for lease shall have been or shall be surrendered, or, having been reserved or dedicated, shall have been or shall be lawfully resumed by Proclamation, or having been lawfully held by any person for any estate or interest shall have been or shall be lawfully forfeited or resumed, or which by any means whatsoever shall have been resumed, or shall have reverted to the Crown.''

398 Part V (ss 59-76) of the 1890 Lands Act was entitled ''PASTORAL

(497) See at 114-115 [149]-[151].

LEASES''. Leases for pastoral purposes could be granted for a period not exceeding forty-two years at a specified minimum rental (s 59). Every lease was subject to covenants prescribing minimum stocking levels (s 60). Section 60 also provided:

> ''And every such lease shall also contain such other covenants, conditions, and stipulations as shall be prescribed by the regulations.''

399 All pastoral leases granted under the 1890 Lands Act were subject to the condition that, during the currency of the lease, the Governor may resume possession of all or any part of the lands leased for any one of a number of public purposes (s 63).

400 Section 97, in Pt VII (entitled ''MISCELLANEOUS PROVISIONS''), provided for the imposition of penalties in respect of ''[a]ny person who shall unlawfully occupy any Crown lands or other lands in the Northern Territory vested in the Crown, either by residing or by erecting any building or hut thereon, or by clearing, enclosing, or cultivating any part thereof''.

401 Regulations were promulgated in 1891 pursuant to the power conferred by s 100 of the 1890 Lands Act. Regulation 39 thereof provided:

> ''Every lease ... shall be subject to such conditions as the Governor in Council shall think necessary to insert therein for the protection of the aborigines, or for securing to the public the right of passing over any part of the said land, and to the Crown the right of authorising, by permit, licence, or lease, persons to enter upon the land for the purpose of searching for gold or other minerals, or for any purpose of public defence, safety, improvement, convenience, or utility.''

402 Both pastoral leases were granted for ''pastoral purposes'' and both contained the following exception in favour of the ''Aboriginal Inhabitants'':

> ''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 would have been entitled to do if this lease had not been made.''

403 Both leases also contained exceptions preserving access rights for certain purposes in favour of persons with ''travelling stock'' and

persons authorised by the Minister or other lawful authority (498). The leases also contained covenants to pay rent, rates and taxes, to insure, to keep in good repair, and to destroy vermin and noxious weeds.

404 On 8 May 1929 a new lease, PL 119, was granted pursuant to the *Crown Lands Ordinance* 1927 (NT) (the 1927 Lands Ordinance) which applied in what was then administered as North Australia. The new pastoral lease was granted pursuant to s 45 of the 1927 Lands Ordinance in exchange for a number of prior pastoral leases, including the two previous pastoral leases that covered the claim area (499). PL 119 thus encompassed the entire claim area. It also included substantial portions of land outside the claim area — in total, PL 119 covered an area of some 4,312 square miles. In accordance with s 46, the lease was to expire on 30 June 1965.

405 The lease reserved to the Crown a right of entry and inspection, all minerals, a power of resumption and ''all timber and timber trees, and all trees producing bark, resin, or valuable substances''. The lease was also expressed to be subject to ''a reservation in favour of the aboriginal natives of North Australia''.

406 Section 21, found in Pt III, Div 1 (ss 11-33) of the 1927 Lands Ordinance, which applied to leases generally, further defined the content of rights so reserved. It is significant to note two such further definitions. Sub-section (a) provided that:

> ''a reservation of a right of entry and inspection shall be read as a reservation of a right in favour of any member of the [North Australia Commission (500)], or any officer authorized in writing by any member of the Commission, at all reasonable times and in any reasonable manner, to enter upon the leased land or any part of it and to inspect the leased lands and any improvements, stock, and crops thereon.''

Sub-section (e) provided that:

> ''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

(498) For an analysis of the history of exceptions in favour of Aborigines see Dalziel, ''Pastoral Leases in the Northern Territory and the Reservation of Aboriginal Rights, 1863-1931'', *University of New South Wales Law Journal*, vol 22 (1999) 462.

(499) Section 45 provided: ''(1) The holder of any lands in North Australia, under a pastoral lease from the Crown in existence at the commencement of this Ordinance may, until the thirtieth day of June One thousand nine hundred and twenty-eight, surrender his lease in exchange for a pastoral lease of the lands or part thereof under this Ordinance. (2) A lease granted under this section may include adjacent lands in two or more surrendered leases, whether in actual contact or not.''

(500) Appointed under the *Northern Australia Act* 1926 (Cth).

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.''

407 Section 20 mandated a number of standard covenants and conditions with respect to all leases. These included provisions with respect to rent, surrender and forfeiture and, significantly, ''a covenant by the lessee that he will use the land only for the purposes for which it is leased'' (s 20(f)).

408 Part III, Div 2 (ss 34-58) was headed ''Pastoral Leases''. Section 34 required all pastoral leases to contain certain reservations, covenants, conditions and provisions. These included the above reservations in respect of timber (sub-s (a)) and ''the aboriginal inhabitants'' (sub-s (b)). Section 34 also required the inclusion of covenants with respect to stocking levels (sub-s (c)), the destruction of vermin and noxious weeds (sub-s (d)) and the cutting or destroying of timber (sub-ss (e) and (f)). Also included was a covenant by the lessee ''that he will not obstruct any public roads, paths, or ways, or interfere with the use thereof by any person, and will not interfere with travelling stock lawfully passing through the leased land'' (sub-s (g)).

409 On 30 July 1952, the lease was re-executed with a reduction in rental and an apparent reduction, not presently relevant, in the area of land the subject of the lease.

410 On 27 October 1958, pursuant to ss 48A-48D of the *Crown Lands Ordinance* 1931 (NT) (the 1931 Lands Ordinance), PL 119 was surrendered in exchange for a pastoral lease, PL 552, granted under s 48D of that Ordinance. This new pastoral lease was expressed to be for a term of fifty years and again encompassed the entire claim area. It was subject to similar reservations, covenants and conditions to the previous pastoral lease, including a ''reservation in favour of the aboriginal inhabitants of the Northern Territory'' that was expressed in identical terms to the previous reservation (s 24(e)).

411 Some aspects of the scheme of the 1931 Lands Ordinance should be noticed. Part III was headed ''LEASES''; Div 1 thereof (ss 14-36) was entitled ''Leases Generally''. Section 23 required that all leases (other than miscellaneous leases) contain certain reservations, covenants, conditions and provisions similar to those required by s 20 of the 1927 Lands Ordinance. Section 23(f) included the covenant that the lessee only use the land for the purposes for which it is leased. Division 2 (ss 37-59) was entitled ''Pastoral Leases''. Section 37 required that all pastoral leases contain additional reservations, covenants, conditions and provisions similar to those required under s 34 of the 1927 Lands Ordinance.

412 In 1979, PL 552 was exchanged for another pastoral lease, PL 809,

known as the Newry Lease. This covered the entire claim area in the Territory. It was granted on 21 March 1979 following amendments to the 1931 Lands Ordinance effected by the *Crown Lands Ordinance (No 3)* 1978 (NT) (the 1978 Lands Ordinance). The Newry Lease was granted on terms that were similar to the previous pastoral leases. It included a ''reservation in favour of the Aboriginal inhabitants of the Northern Territory''. However, s 24(2), inserted by the 1978 Lands Ordinance, defined this reservation in a manner different to that found in the earlier Ordinances:

> ''Subject to sub-section (3), 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.''

413 Sub-sections (3), (4), (6) and (7) were also introduced by the 1978 Lands Ordinance. They provide:

> ''(3) Subject to sub-section (4), a reservation in favour of the Aboriginal inhabitants of the Northern Territory in any lease under this Ordinance does not apply to that part of the leased land which is within 2 kilometres of a homestead.
>
> (4) Where an Aboriginal or a group of Aboriginals was at the date of commencement of the *Aboriginal Land Ordinance* 1978 residing within 2 kilometres of a homestead and was entitled to use educational, medical or other facilities provided for his or their use within that area, the Aboriginal or group of Aboriginals may reside within 2 kilometres of the homestead and use the educational, medical and other facilities provided for him or them until the Aboriginal or group of Aboriginals ceases to reside permanently within 2 kilometres of the homestead or until adequate facilities of a similar nature are provided on a site suitable to the Aboriginal or group of Aboriginals.
>
> . . .
>
> (6) Where a lease under this Ordinance contains a reservation in favour of the Aboriginal inhabitants of the Northern Territory a person shall not, without just cause, interfere with the full and free

exercise, by the persons thereby entitled, of the rights reserved to them.

Penalty: 2,000 dollars.

(7) For the purposes of sub-section (6) 'just cause' includes reasonable acts taken by or on behalf of a lessee or another person having an interest in a lease to ensure the proper management of the lease for the purposes for which it was granted.''

414 The Newry Lease, PL 809, was expressed to expire on 30 June 2008. However, it was lawfully surrendered on 9 March 1987, that is to say it was no longer in force on 1 January 1994 (501). Prior to surrender, some events occurred which are of potential significance. In 1969, s 116A was inserted into the 1931 Lands Ordinance (502); it provided that a person having a right to a Crown lease had ''a right of exclusive possession of the land to be included in the lease but that right is subject to the reservations, covenants, conditions and provisions to be contained in the lease''. That section was repealed in 1981, after all of the pastoral leases had been granted.

415 Providing that those entitled to a grant of a pastoral lease are to have a right of exclusive possession suggests that the lease, once granted, is thought to give that right. It is, however, not necessary to explore that question because the right was recognised to be subject to the reservations contained in the lease. The leases now in question were subject to the reservations in favour of Aboriginal persons that have been noted. In the context of the NTA, that reservation suffices to take the pastoral leases outside the Act's definition of ''exclusive pastoral lease''. A right of exclusive possession was *not* conferred.

416 In respect of the pastoral leases, the majority of the Full Court said (503):

> ''[W]e agree with the trial judge that the pastoral leases granted in the Territory did not totally extinguish native title rights. On the contrary, the reservations express a clear intention that those native title rights described in the reservations are held back from the grant, and remain Aboriginal rights for the enjoyment of Aboriginal people . . . [W]e also agree with the trial judge that the reservations, even in the forms expressed in s 21 of [the 1927 Lands Ordinance] and s 24(2) of [the 1931 Lands Ordinance], did not operate to extinguish all native title rights, and to substitute statutory rights.
>
> As with the reservations in favour of Aboriginal people in the State, we consider that the express reservations in the Territory on the one hand demonstrate clearly and plainly that the pastoral leases, notwithstanding the use of traditional common law language and concepts indicative of the grant of a lease entitling the lessee to

(501) See s 229(3) of the NTA.
(502) By the *Crown Lands Ordinance (No 3)* 1968, s 4.
(503) *Western Australia v Ward* (2000) 99 FCR 316 at 406-407 [339]-[340].

exclusive possession, did not extinguish all native title by granting pastoral lessees possession that was exclusive of the interests of Aboriginal people. However, on the other hand, they operate to define the scope of the Aboriginal rights which were preserved. Insofar as the terms of the reservations did not include Aboriginal rights, those rights were susceptible to extinguishment, and were extinguished to the extent of inconsistency with rights granted under the pastoral lease.''

Their Honours continued (504):

''The grant of coexisting rights to be present on the land however had the inevitable effect that native title which hitherto consisted of exclusive rights to possess, occupy, use and enjoy the land ceased to be exclusive, and the native title right to make decisions about the land was abrogated to the extent that such a right conflicted with the right of the pastoral lessee to make decisions about the use of the land for pastoral purposes, including to make improvements required or envisaged by the pastoral leases, and to comply with covenants in the pastoral leases. The rights reserved to Aboriginal people were confined to rights of access for a specified purpose.''

417 It is apparent, for the reasons set out above (505), that the reservations in favour of Aboriginal people did not define or confine the rights that native title holders could exercise in the manner suggested by the majority of the Full Court. However, the grants of the respective pastoral leases were inconsistent with the continued existence of the native title right to control access to and make decisions about the land. Those rights were inconsistent with the right of the pastoral lessee to use the land for pastoral purposes. The respective pastoral leases were not necessarily inconsistent with the continued existence of all native title rights and interests. As with the pastoral leases granted in respect of Western Australia, the pastoral leases we are here concerned with did not confer upon the lessee the right to exclude native title holders from the land. The grants of the respective pastoral leases were therefore ''non-exclusive pastoral leases'' within the definition in s 248B of the NTA.

418 The Newry Lease, dated 21 March 1979, is the only pastoral lease which, given its date, might attract the operation of the RDA. If the RDA did work an invalidity, s 4 of the Territory Validation Act would validate the grant. However, the grant of the Newry Lease would not be either a category A or a category B past act because it was not still in force on 1 January 1994. Therefore, it must be a category D past act and the non-extinguishment principle in s 238 of the NTA would apply.

(504) *Western Australia v Ward* (2000) 99 FCR 316 at 407 [343].
(505) See at 126-129 [179]-[186].

419 However, the grants of all the pastoral leases predate 23 December 1996. If valid (including, in the case of the Newry Lease, by the operation of s 4 of the Territory Validation Act) they are ''previous non-exclusive possession acts'' within the meaning of s 23F of the NTA. That attracts Pt 3C of the Territory Validation Act.

420 Under s 3B of the Territory Validation Act, an ''act'' is a ''previous non-exclusive possession act'' if it satisfies s 23F of the NTA. If a previous non-exclusive possession act is attributable to the Territory under s 239 of the NTA (506), or under what was s 4C of the Territory Validation Act, but since the *Lands and Mining (Miscellaneous Amendments) Act* 1998 (NT) is now s 9NA, the provisions of Pt 3C are engaged.

421 Part 3C (ss 9K-9NA) is entitled ''EFFECT OF PREVIOUS NON-EXCLUSIVE POSSESSION ACTS ON NATIVE TITLE''. Section 9L of the Territory Validation Act is headed ''Rights and interests that are not inconsistent with native title'' and parallels sub-s (1)(a) of s 23G of the NTA. Section 9L provides:

> ''To the extent that a previous non-exclusive possession act involves the grant of rights and interests that are not inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned —
>
> (a) the rights and interests granted by the act; and
>
> (b) the doing of any activity in giving effect to them,
>
> prevail over the native title rights and interests but do not extinguish them.''

Section 9M is headed ''Rights and interests that are inconsistent with native title'' and parallels the remainder of s 23G of the NTA. It provides:

> ''(1) To the extent that a previous non-exclusive possession act involves the grant of rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned —
>
> (a) if, apart from this Act, the act extinguishes the native title rights and interests — the native title rights and interests are extinguished; and
>
> (b) in any other case — the native title rights and interests are suspended while the lease concerned, or the lease as renewed, re-made, re-granted or extended, is in force.
>
> (2) The extinguishment under sub-section (1)(a) is taken to have happened when the act was done.''

422 The right to be asked permission to use or have access to the land was inconsistent with the rights asserted under the various pastoral leases. Therefore, independently of any operation of the Territory

(506) See Territory Validation Act, s 3(2).

Validation Act, the consecutive pre-RDA grants of the pastoral leases extinguished this native title right. Paragraph (a) of s 9M(1) of the Territory Validation Act thus was attracted and the relevant native title right extinguished.

423 If it were necessary to consider the Newry Lease, standing independently of what had gone before, a different result would apply. Paragraph (b) of s 9M(1) of the Territory Validation Act would be attracted, with the result that native title rights and interests were suspended whilst the Newry Lease was in force or any renewal or regrant or extension was in force.

424 To the extent that the grants of the pastoral leases involved the grant of rights and interests not inconsistent with native title rights and interests in relation to the land or waters covered by the respective pastoral leases, the rights and interests granted, and the doing of any activity in giving effect to them, prevailed over the native title rights and interests but did not extinguish them. That is, s 9L of the Territory Validation Act was engaged.

425 Again, for the reasons given respecting the pastoral leases in the State, it is not possible accurately to determine those native title rights and interests which were unaffected by the grants of the respective pastoral leases to which s 9L applies and those in respect of which there was extinguishment by operation of par (a) of s 9M(1) or suspension (in the case of the Newry Lease) by the operation of par (b) of s 9M(1).

3. *The Keep River National Park and leases to the Conservation Land Corporation*

426 By instrument registered 3 September 1979, approximately 262 km^2 of land comprising NT Portion 1801 were surrendered by the holder of the Newry Lease to the Territory. This surrendered portion then was the subject of a grant by an instrument which was dated 6 June 1980 (that is to say several years after the commencement of the RDA) and styled ''Special Purposes Lease''. The instrument (SPL 475) recited that the Minister for Lands and Housing in the name of the Territory and in pursuance of the *Special Purposes Leases Act* 1953 (NT) (the SPL Act) granted to the Conservation Land Corporation (the Corporation) a lease of the surrendered portion of the Newry Lease:

> ''to hold unto the [Corporation] in perpetuity yielding and paying therefor an annual rental of ten cents if and when demanded by the Minister subject to re-appraisement in accordance with section 11A of the [SPL Act].''

The lease was stated to commence on 11 January 1980. It contained a covenant:

> ''That [the Corporation] will use the land only for the purposes for which it is leased;
> viz, For the purpose of carrying out the functions of the

Conservation Commission of the Northern Territory ['the Commission'] in accordance with the *Conservation Commission Act* and the *Territory Parks and Wildlife Conservation Act*.''

The SPL Act did not require, nor did the instrument contain, any reservation in favour of Aboriginal people.

427 The term ''special purpose'' was defined in s 3 of the SPL Act as meaning:

> ''any purpose other than a private residential purpose within a town, or a site for a town, within the meaning of the *Crown Lands Ordinance*, a pastoral, agricultural or mining purpose.''

Section 4(1) empowered the Minister, in the name of the Territory, to ''grant a lease for a special purpose of any unleased land belonging to the Crown or the Territory in the Northern Territory''. Such a grant might be made under this provision to various persons and entities including (par (e)):

> ''to a statutory corporation established under a law of the Commonwealth or of a State or Territory, if the special purpose is within the powers of the corporation.''

The lease was required to be for a term of years or in perpetuity as determined by the Minister and specified in the lease instrument (s 8(1)(a)).

428 Section 9 of the SPL Act imposed a prohibition in the following terms:

> ''The land comprised in a lease granted under this Ordinance shall not be used for any purpose other than the purpose, or a purpose ancillary to the purpose, for which the lease was granted.''

429 Where the subject land had been included in a pastoral lease and surrendered for the purpose of enabling the grant of a lease under the SPL Act, the Minister was empowered by s 5B(1) to proceed to grant a lease under that statute notwithstanding that applications had not been invited under s 5A or that the right to the lease had not been offered by auction under s 5AB.

430 The Minister was empowered by s 23(1) of the SPL Act, by notice in writing to the lessee, to forfeit a lease where the lessee had failed to comply with a covenant or condition of the lease, the land was being used in contravention of the restriction imposed by s 9, or the purpose for the grant had been fulfilled or was no longer capable of fulfilment. Land comprised in a Special Purposes Lease was subject to resumption for a number of purposes specified in s 28. Resumption attracted compensation under s 32.

431 The majority of the Full Court rejected the challenge by the Territory to the conclusion of the primary judge that SPL 475 did not extinguish so much of native title as had not been extinguished by the

preceding pastoral leases (507). The primary judge had noted that a perpetual lease is a creature unknown to the common law, and that SPL 475 was an interest prescribed by statute and granted for a statutory purpose.

432 However, the point of present importance here, as in *Wilson v Anderson* (508), is that, once a statute creates a lease for a term identified as perpetual, there is a dimming in the brightness of the line which otherwise divides a fee simple and the understanding of a lease as ''a time in the land'' (509). It is true that the interest created by SPL 475 might be brought to an end by the exercise of the statutory powers of forfeiture and resumption. However, whilst it is the fee simple absolute, that is to say perpetual and not determinable by any special event, which is most frequently encountered, the common law also knew the determinable fee and the fee simple to which a condition was attached by which the estate might be cut short (510).

433 Like the special leases created under Pt VII of the *Land Act* 1933 (WA), and referred to earlier in these reasons (511), the interest granted by SPL 475 was not precarious in the same way as a pastoral lease. The same conclusion, with regard to the conferral of exclusive possession, should be reached with respect to SPL 475 as was reached with respect to the special leases granted under the State legislation.

434 The primary judge, and the majority of the Full Court, drew no distinction between SPL 475 and CLP 581. This was the instrument headed ''Crown Lease Perpetual'' granted for a term in perpetuity to commence on 9 March 1987. By instrument registered on 9 March 1987, a portion of land adjoining SPL 475, namely NT Portion 3121, was surrendered by the holder of the Newry Lease. This surrendered portion, containing an area of about 31,340 ha, then became the subject of CLP 581. The relevant source of power for the grant was the *Crown Lands Act* 1931 (NT). Section 5 of that statute defined ''Crown lands'' as meaning ''all lands of the Territory'' but as not including reserved or dedicated lands. Section 14(1) stated:

> ''Subject to this Act, the Minister may, in the name of the Territory by instrument in the prescribed form, grant an estate in fee simple in or a lease of Crown land.''

435 Section 23 provided for three species of ''lease'': (a) a pastoral lease (for which detailed provision was made in ss 37-59A); (b) a lease for a term of years for a purpose other than pastoral purposes; and (c) a lease in perpetuity. CLP 581 was in category (c).

(507) *Western Australia v Ward* (2000) 99 FCR 316 at 409 [351], 411 [359].
(508) (2002) 213 CLR 401.
(509) *Walsingham's Case* (1573) 2 Plowden 547 at 555 [75 ER 805 at 816]; *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386 at 389-392; *Landale v Menzies* (1909) 9 CLR 89 at 125; *Wik* (1996) 187 CLR 1 at 201.
(510) Megarry and Wade, *The Law of Real Property*, 6th ed (2000), pp 64-71.
(511) See at 178-180 [351]-[357].

436 Section 24 made detailed provisions respecting the content of a reservation in favour of the Aboriginal inhabitants of the Territory in any lease granted under the statute, but did not require the inclusion of such a reservation. None was expressed in CLP 581. Section 23A provided for the inclusion of covenants, including, in par (e): ''a covenant by the lessee that he will, subject to this Act, use the land only for the purposes for which it is leased.''

437 Clauses 2, 3 and 4 of CLP 581 stated:

> ''2. The lease shall be in Perpetuity.
> 3. The purpose of the lease ('the lease purpose') is for the purpose of carrying out the functions of the [Commission] in accordance with the *Conservation Commission Act* and the *Territory Parks and Wildlife Conservation Act*.
> 4. This lease is granted under and subject to the said Act and the Regulations for the time being in force thereunder, and is conditional upon compliance by the Lessee, with the covenants and conditions to be complied with by the Lessee, and shall, subject to the said Act and the Regulations, be liable to be determined and forfeited for non-compliance with any such covenant or condition.''

438 Section 103 conferred upon the Administrator a power of resumption of any Crown lands the subject of a lease. Section 106 provided for compensation in respect of the exercise of power under s 103. Section 103 was not used in the creation of CLP 581 or SPL 475.

439 The same conclusion respecting CLP 581 should be reached as that with respect to SPL 475. That is to say, there was a conferral of exclusive possession with the consequence that so much of native title rights and interests as had survived the loss of the right to be asked permission to use or have access to the land, consequent upon the preceding pastoral leases, was, subject to the operation of the RDA, extinguished.

440 Section 10(1) of the RDA operated in respect of the acts attributable to the Territory, being the grants under Territory legislation of SPL 475 and CLP 581, in the manner described earlier in these reasons (512) when dealing with the interrelation between federal and Territory legislation.

441 Section 10(1) of the RDA operated in relation to the grants in the second of the ways identified by Mason J in *Gerhardy* (513), and thus invalidated the grants. However, the grants were ''past acts'' within the definition in s 228 of the NTA. As ''past acts'' attributable to the Territory, they were, by force of s 4 of the Territory Validation Act, valid and to be taken always to have been valid. Each of SPL 475 and CLP 581 was described by a law of the Territory as a lease and

(512) See at 107-109 [127]-[133].
(513) See at 100 [107].

therefore answered the definition of ''lease'' in s 242 of the NTA. However, neither was a commercial lease, an agricultural lease, a pastoral lease or a residential lease. That had the result that the relevant ''past acts'' did not fall within the definition of ''category A past act'' in s 229 of the NTA.

442 The question then arises as to whether one or other of SPL 475 and CLP 581 was a ''category B past act'' within the meaning of s 230. The leases were not mining leases and the grants were made before 1 January 1994, and were in force on that date. It follows that the definition in s 230 will be satisfied unless there was, in the terms of par (d)(i) of the definition, ''a grant by the Crown in any capacity to the Crown, or to a statutory authority of the Crown, in any capacity''. If there has been a grant of such a description, then the definition of ''category B past act'' is not satisfied.

443 It then is necessary to determine whether the grantee, in each case the Corporation, answered the description of ''a statutory authority of the Crown''. The term ''statutory authority'' is defined in s 253 as follows:

> ''*statutory authority*, in relation to the Crown in right of the Commonwealth, a State or a Territory, means any authority or body (including a corporation sole) established by a law of the Commonwealth, the State or Territory other than a general law allowing incorporation as a company or body corporate.''

444 Is the Corporation a ''statutory authority'' within the meaning of this definition? To answer that question it is necessary to turn to the *Conservation Commission Act* 1980 (NT) (514) (the Conservation Act). Part IV (ss 26-39) of that statute is headed ''CONSERVATION LAND CORPORATION''. Section 27 establishes the Corporation as a body corporate. Its membership comprises two persons appointed by the Minister (s 30). Provision is made in s 32 for the determination by the Minister of the appointment of members. The functions of the Corporation are detailed in sub-ss (1) and (2) of s 39. These state:

> ''(1) The function of the Corporation is to acquire, hold and dispose of real property (including any estate or interest in real property) in accordance with this Act and it may acquire and hold such property, notwithstanding any other law in force in the Territory which would restrict or otherwise limit the capacity of the Corporation to acquire and hold such property.
>
> (2) The Corporation has power to do all things necessary or convenient to be done for or in connection with or incidental to the carrying out of its function.''

However, s 39(6) states that it is the Commission which has the care,

(514) By the *Conservation Commission Amendment Act* 1995 (NT) this Act was renamed the *Parks and Wildlife Commission Act* (NT).

control and management of all land acquired or held by the Corporation.

445 The Commission itself is established as a body corporate by s 9 of the Conservation Act. The Commission also plays a vital part in the financial affairs of the Corporation. This appears from sub-ss (3) and (4) of s 39. These state:

> ''(3) Any moneys payable to the Corporation for or incidental to the acquisition of any estate or interest in real property may be advanced by the Commission on such terms and conditions as the Commission thinks fit.
>
> (4) Any moneys payable to the Corporation in respect of any estate or interest in real property held or disposed of by the Corporation shall be paid to the Commission, whose receipt shall be a sufficient discharge therefor, and any moneys payable by the Corporation in respect of any estate or interest in real property held by the Corporation may be paid by the Commission.''

446 It is apparent from the structure of the Conservation Act, including its provision for the incorporation of the Corporation and the Commission and the relationship between them, that the Conservation Act does not answer the description in the definition of ''statutory authority'' in s 253 of the NTA of ''a general law allowing incorporation as a company or body corporate''. The Corporation does answer the description in the definition, in relation to the Crown in right of the Territory, of an authority or body established by a law of the Territory. It follows that the grants made by the Minister in the name of the Territory, acting under the SPL Act and the *Crown Lands Act*, were grants by the Crown in its Territory capacity to a statutory authority of the Crown within the meaning of par (d)(i) of s 230 of the NTA. That means that those grants were not category B past acts.

447 In argument, significance was sought to be attached to s 29(1) of the Conservation Act. This states:

> ''The Corporation is not an authority or instrumentality of the Crown and is not, for the purposes of the *Interpretation Act* or the *Financial Administration and Audit Act*, a statutory corporation.''

Whether the Corporation is an authority or instrumentality of the Crown so as to attract, for example, the common law doctrines respecting Crown immunity as they exist in the Territory is not a question that presently arises. Nor does there arise any question as to whether for that inquiry a statement such as that in s 29(1) is necessarily conclusive as to the stated lack of identity between the Corporation and the Crown (515). The criterion of operation selected by the NTA is so drawn as to present a different question where the term ''statutory authority'' is used in relation to the Crown in right of

(515) cf *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 at 405, 411-412.

the Territory. What is identified are authorities or bodies established by a law of the Territory which is not a general law allowing incorporation as a company or body corporate. In this way there is eschewed in the NTA the doctrines respecting Crown immunity and the inapplicability to the executive branch of government of statutory provisions worded in general terms which are discussed in such authorities as *Bropho v Western Australia* (516).

448 The result is that s 7 of the Territory Validation Act, dealing with category B past acts, has no operation in respect of SPL 475 and CLP 581. However, these grants were category D past acts within the meaning of s 232 of the NTA. Section 8 of the Territory Validation Act provides that to category D past acts ''[t]he non-extinguishment principle applies''. That expression, by force of s 3(2) of the Territory Validation Act, has the same meaning as it has in s 238 of the NTA. The findings of fact and the terms of the determination made by the Full Court are not such as to enable one here to determine whether, in respect of the remaining native title rights and interests after the extinguishment effected by the pastoral leases, the respective grants were wholly or partly inconsistent with the continued existence, enjoyment and exercise of the native title rights and interests in question. If wholly inconsistent, the effect of s 238(3) is that the native title continues to exist in its entirety but the rights and interests have no effect in relation to the grants. If there is partial inconsistency, there is the continued existence of native title in its entirety but, by force of s 238(4), the rights and interests have no effect in relation to the grants ''to the extent of the inconsistency''. These are matters upon which no conclusion can be reached by this Court.

449 It also is necessary to consider the operation of Div 2B of Pt 2 of the NTA or its equivalent in ss 3A and 3B and Schs 1 and 2 of the Territory Validation Act upon the native title rights and interests remaining after the partial extinguishment effected by the pastoral leases. SPL 475 and CLP 581 were leases rendered valid by the Territory Validation Act. They were granted on or before 23 December 1996 and conferred a right of exclusive possession over particular land. It follows that par (1) of the definition of ''previous exclusive possession acts'' in Sch 1 to the Territory Validation Act is met.

450 However, par (5) of that definition states:

> ''An act is not a previous exclusive possession act if the grant or vesting concerned involves the establishment of an area, such as a national or Territory park, for the purpose of preserving the natural environment of the area.''

Reference has already been made to the identification in both SPL 475

(516) (1990) 171 CLR 1; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 345-347 [14]-[18].

and CLP 581 of the purpose of carrying out functions of the Commission in accordance with the Conservation Act and the *Territory Parks and Wildlife Conservation Act* (NT) (the Parks and Wildlife Act).

451 The land the subject of SPL 475 was, on 15 April 1981, by declaration of the Administrator under s 12(1) of the Parks and Wildlife Act declared to be a park in respect of which no person other than the Corporation holds a right, title or interest.

452 The majority of the Full Court noted that ''[a]lthough it appears that [the land comprising CLP 581] was leased to the Corporation with the intention that it would later be included in the [Park], no declaration to this effect has been made'' (517). However, the statement in CLP 581 of the purpose of the lease and the imposition upon the Corporation of a requirement of compliance with that statement of purpose is sufficient to meet the prescription in par (5) of the definition of ''previous exclusive possession acts'' in Sch 1 to the Territory Validation Act that the grant involve the establishment of an area such as a Territory park for the purpose of preserving the natural environment of the area.

453 That conclusion is sufficient to deny to both grants the character of previous exclusive possession acts effecting an extinguishment under the equivalent in the Territory Validation Act of s 23C(1) and other provisions of Div 2B of Pt 2 of the NTA.

454 It therefore is unnecessary to determine whether in addition to par (5) of the definition the exclusionary provision in par (7) also applied. That provision resembles s 23B(9C) of the NTA, a matter considered earlier in these reasons when dealing with corresponding provisions in the State Validation Act (518).

455 The Territory also relied as an extinguishing act upon the adoption of plans of management for the Park. Section 18 of the Parks and Wildlife Act provides for the preparation by the Commission of plans of management in respect of a park declared under s 12. The plan is to contain ''a detailed description of the manner in which it is proposed to manage the park'' (s 18(3)). Interested persons are to be invited to make representations in connection with the proposed plan and the Commission is to give due consideration to such representations (s 18(7), (8)). The Administrator may accept the plan (s 18(10)), which then is to be laid before the Legislative Assembly (s 19(1)), which may pass a resolution disallowing the plan (s 19(2)). The plan may be amended or revoked by the Commission at any time (s 20).

456 It is apparent from s 21 that the adoption of a plan of management is not itself an act which may achieve extinguishment beyond that already effected by the vesting in the Corporation which, by hypothesis, has already occurred under s 12(7). It will be necessary to

(517) *Western Australia v Ward* (2000) 99 FCR 316 at 407 [346].
(518) See at 149-150 [259]-[261].

return shortly to the significance of s 12(7). The plan of management regulates the respective conduct of their affairs by the Commission and the Corporation. Section 21 states:

> ''While a plan of management is in force, the Commission and the Corporation shall perform their duties and functions and exercise their powers in relation to the park or reserve to which the plan relates in accordance with that plan and not otherwise.''

457 It remains to consider the declaration by the Administrator, with respect to SPL 475, made on 15 April 1981. The declaration was expressed to be made pursuant to s 12(1) of the Parks and Wildlife Act. This provided that the Administrator may:

> ''(a) by notice in the *Gazette*, declare an area of land in respect of which —
> (i) all the right, title and interest is vested in the Territory; or
> (ii) no person, other than the Territory or the Corporation, holds a right, title or interest,
> to be a park or reserve.''

The declaration of the land as a park stated that no person other than the Corporation held a right, title or interest.

458 The expression ''right, title or interest'' is a broad one and is apt to include native title rights and interests. To the extent that at the date of the declaration there remained unextinguished native title rights and interests, the power in s 12(1) of the Parks and Wildlife Act could not be enlivened. Contrary to the statement in that declaration, persons other than the Corporation held a right, title or interest in the land.

459 The Parks and Wildlife Act does not contain provisions for compensation. This absence reflects the basis upon which s 12(1) operates, namely that no private right, title or interest will be destroyed by the creation of a park or reserve. The same reasoning underlies s 12(7). This stated:

> ''Upon the declaration of a park or reserve under sub-section (1), all right, title and interest both legal and beneficial *held by the Territory* in respect of the land (including any subsoil) within the park or reserve, but not in respect of any minerals, becomes, by force of this sub-section, vested in the Corporation.'' (Emphasis added.)

The hypothesis is that there will be no legal or beneficial right, title and interest held by any private party.

460 The Territory relies upon the declaration of 15 April 1981 as an extinguishing act. However, if, as indicated above, the exercise of the power under s 12(1) miscarried because of the existence of subsisting native title rights or interests not previously extinguished, it cannot be effective as an extinguishing act. No question of invalidity under the RDA then would arise. There would be no consequential questions respecting validation under the NTA and the Territory Validation Act.

4. *Minerals and petroleum in the Northern Territory*

461 As has previously been pointed out in considering the State claim area, no native title right or interest in minerals or petroleum was established at trial in relation to either the State or Territory claim areas. Questions of extinguishment, therefore, do not arise.

PART 3 — OTHER

O. *Procedural and Other Issues*

462 Although, in the end, nothing turns on them, it is convenient to mention at this point some procedural and like questions that were debated on the hearing of the appeals, lest it be thought that they have been overlooked.

463 Western Australia contended that a ground of appeal advanced by the Ward claimants in relation to the ''buffer'' or ''expansion'' areas in the Project area, and the arguments in support of that ground, travelled beyond the limits of the special leave to appeal that had been granted. Western Australia contended that, if that was not so, leave to advance the ground should be revoked. It is not profitable to extend an already long judgment by analysing the differences between the way in which the Ward claimants formulated their draft grounds of appeal, at the time of the application for special leave, and the grounds set out in the Notice of Appeal that was filed. All parties have had full opportunity to make submissions about all the substantive issues raised by the several appeals.

464 The Full Court was wrong to attribute to the Project the significance which it did and, for this and the other reasons that have been given, the orders and the determination of the Full Court must be set aside, and the matters remitted to that Court for further hearing and determination. As part of that reconsideration, the Full Court will have to examine how the 1998 Act and the State Validation Act apply in relation to these ''buffer'' and ''expansion'' areas. In these circumstances, the Ward claimants should not be precluded from making the arguments that they advanced in this Court about the areas in question and, if needs be, they should have leave to do so.

465 By notices of contention, Western Australia and the Alligator respondents sought to contend that parts of the determination of the Full Court, by which it was (in effect) determined that native title had been partly or wholly extinguished, could be upheld on grounds different from those given by the Full Court. In part, those contentions focused upon what was said to be an absence of evidence of the exercise by the claimants of rights that they asserted. For the reasons given earlier, if it is the fact that the claimants have not exercised the asserted right, or there is no evidence of them having done so, that is not determinative of the claim. Standing alone, the fact that there has been no recent exercise of the right does not necessarily deny the possibility that native title can be established. The other matters relied

on by Western Australia in its notice of contention have been dealt with in the course of the reasons given earlier.

466 The contentions of the Alligator respondents included contentions directed to particular leases, licences or uses of land. The applicable principles have been identified in these reasons. The particular application of those principles will be a matter to be dealt with on the remitter of the proceedings. The matters raised by a notice of contention given by Crosswalk and Baines River Cattle Co Pty Ltd are dealt with sufficiently in the reasons.

P. *Summary*

467 As is apparent from what has been said, the determination made by the Full Court should be set aside and the matters remitted to that Court for further consideration in accordance with the reasons of this Court. That being so, it is convenient to attempt to summarise some of the principal conclusions that we have reached.

468 At the risk of stating the obvious, it is as well to say, however, that the summary is not intended to be any more than a general indication of what we have held. The summary is not to be read, let alone applied, as if it were a statute. The reasons *must* be considered as a whole.

1. Because what is claimed in the present matters are claims made *under* the NTA, for rights *defined* in the NTA, it is that statute which governs (519).
2. The NTA must be applied in the form in which it stands at the date of the determination by the Full Court (520). The State and Territory Validation Acts for which the NTA provides must, therefore, be considered.
3. The NTA provides that there can be partial extinguishment or suspension of native title rights (521).
4. Questions of extinguishment first require identification of the native title rights and interests that are alleged to exist (522).
5. Whether native title rights have been extinguished by a grant of rights to third parties or an assertion of rights by the executive requires comparison between the legal nature and incidents of the right granted or asserted and the native title right asserted (523). For that reason the term ''operational inconsistency'' is useful, if at all, only by way of analogy (524). The adverse dominion approach to extinguishment is wrong, not least because it obscures the objective nature of this comparison (525).

(519) See at 60 [2] and 64-69 [14]-[25].
(520) See at 86-87 [65]-[71].
(521) See at 63 [9], 69-70 [26]-[29] and 89 [76].
(522) See at 91-95 [83]-[95].
(523) See at 89-91 [78]-[82].
(524) See at 114-115 [149]-[151].
(525) See at 89-90 [76]-[80].

6. To apply Pt 2 of the NTA and the State and Territory Validation Acts to transactions taking place after 31 October 1975, it is necessary to consider the operation of the RDA. In some cases the RDA is inconsistent with State legislation to the extent that the State legislation permitted transactions with land that would otherwise extinguish native title rights and interests. The RDA invalidates the State legislation to that extent (526). Notwithstanding the later introduction of self-government in the Northern Territory, the RDA continued to speak in respect of Territory laws thus requiring the disregarding of Territory laws imposing a discriminatory burden or prohibition. In some cases, then, the provisions of Pt 2 of the NTA may be engaged in respect of Territory land (527).
7. The native title rights and interests protected by the NTA are rights in relation to land or waters where, among other things, the peoples concerned, by traditional laws and customs, have a connection with the land or waters. In so far as claims to protection of cultural knowledge go beyond denial or control of access to land or waters, they are not rights protected by the NTA. The law respecting confidential information, copyright or fiduciary duties may afford some protection to such rights (528). The absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection as required by s 223(1)(b) of the NTA (529).
8. Because questions of extinguishment require analysis of the legal effect of particular dealings with land, reference to the ''Ord Project'', as a geographic or economic entity, is not of assistance (530).
9. Whether the whole or some parts of the geographical area of the Ord Project falls within the definition of ''public work'' in s 251D of the NTA cannot be resolved on the findings of fact made so far (531).
10. The grant of a pastoral lease in Western Australia extinguished the native title right to control access to, or the use to be made of, the land. The grant of a pastoral lease did not give a right of exclusive possession. Native title rights and interests, other than the right just mentioned, probably continued unaffected by the grant, but to what extent we cannot say from the present findings of fact. To the extent that rights and interests granted by a pastoral lease were not inconsistent with native title rights and

(526) See at 99-107 [104]-[126].
(527) See at 107-109 [127]-[133].
(528) See at 84-85 [57]-[61].
(529) See at 85-86 [62]-[64].
(530) See at 112-116 [141]-[156].
(531) See at 115-116 [153]-[156].

interests, the rights and interests under the lease prevailed over, but did not extinguish, native title rights (532).

11. Resumption of land under s 109 of the *Land Act* 1933 did not extinguish native title (533).
12. Reserving land in Western Australia pursuant to the *Land Acts* was inconsistent with the right to be asked permission to use or have access to the land. Reserving land before 31 October 1975 therefore extinguished that right, but did not otherwise extinguish native title (534). After 31 October 1975, account must be taken of the RDA and Pt 2 of the NTA and of the State Validation Act. Reservation after that date of land that had not been and was not the subject of a pastoral lease was inconsistent with the RDA. By operation of the provisions of Pt 2 of the NTA and the State Validation Act, reservation would, in effect, suspend the native title right to speak for country for so long as the land remained reserved (535).
13. In the case of some parts of some reserves in Western Australia, the ''public work'' provisions of the NTA and the State Validation Act may be engaged. We cannot say from the present findings of fact whether that is so (536).
14. Vesting land in a body or person under s 33 of the *Land Act* 1933, before 31 October 1975, passed the legal estate of the land and thereby extinguished all native title rights and interests in the land (537). The vesting of a reserve under s 33 after 31 October 1975 was valid, the relevant State legislation not being inconsistent with the RDA (538). Because vesting land under s 33 vested a right of exclusive possession to the land it extinguished native title and, in some but not all cases, it was a previous exclusive possession act (539). The extinguishing effect of previous exclusive possession acts is confirmed by Div 2B of Pt 2 of the NTA and Pt 2B of the State Validation Act. The vesting of land under s 33 which did not amount to a previous exclusive possession act (as, for example, vesting for the purposes of preserving the natural environment of an area) was, nonetheless, valid and effective to extinguish native title (540).
15. Land referred to as ''buffer'' or ''expansion'' areas in connection with the Ord Project must be considered by reference to particular transactions affecting the land, not as a general class of land. So,

(532) See at 123 [170] and 126-131 [177]-[195].
(533) See at 133-135 [201]-[208].
(534) See at 135-138 [209]-[221].
(535) See at 138-139 [222].
(536) See at 139 [223].
(537) See at 143-145 [235]-[244] and 146-147 [249].
(538) See at 147-148 [253].
(539) See at 148-150 [254]-[261].
(540) See at 149 [258].

for example, Reserve 31165 having been vested under the *Land Act* 1933 in the Minister and having been vested before 31 October 1975, all native title rights and interests to the land were extinguished (541). All other land reserved for purposes so closely connected with what the *Rights in Water and Irrigation Act* defines as ''Works'' that they may be said to have been reserved ''in connection with'' Works will have vested in the Minister by operation of that Act and thereby extinguished native title (542). Whether other buffer or expansion areas, such, for example, as vacant Crown land, can be said to fall within the definition of ''Works'' in the *Rights in Water and Irrigation Act*, and were thus vested in the Minister, depends on the determination of whether those areas have been ''used in connection with'' Works at a greater level of specificity than the present findings of fact permit (543).

16. Resumption of land in Western Australia under the *Public Works Act* before 31 October 1975 extinguished all native title rights and interests because the resumption notice directed that the land shall vest in the Crown for an estate in fee simple. Resumption after 31 October 1975 was not inconsistent with the RDA and, in any event, was a previous exclusive possession act validated by the NTA and the State Validation Act (544).
17. The grant of mining leases in Western Australia would have extinguished the right to be asked permission to use or have access in relation to the whole of the area of the lease had it not been earlier extinguished by the grant of pastoral leases. Whether other native title rights and interests in relation to land were inconsistent with the rights granted under a mining lease is, for the reasons given in connection with pastoral leases, a question that cannot be answered on the findings of fact that have been made so far (545).
18. The same conclusions are reached about the Argyle mining lease and the general purpose lease as are reached in connection with other mining leases (546).
19. The grant of a permit to occupy land under the *Land Act* 1898 wholly extinguished native title rights and interests (547).
20. The grant of special leases under s 116 of the *Land Act* 1933 wholly extinguished native title rights and interests (548).
21. The grant before 31 October 1975 of leases of reserved land

(541) See at 154 [274].
(542) See at 150-154 [262]-[273].
(543) See at 154-155 [275]-[277].
(544) See at 133-134 [203]-[204] and 155-157 [278]-[280].
(545) See at 162-167 [296]-[310] and 176 [341].
(546) See at 171-176 [322]-[342].
(547) See at 177-178 [346]-[349].
(548) See at 178-180 [351]-[357].

under s 32 of the *Land Act* 1933 wholly extinguished native title rights and interests. Grants after 31 October 1975, to persons other than the Crown or a ''statutory authority'', were previous exclusive possession acts and, where still in force on 23 December 1996, were ''relevant acts'' within the definition in the State Validation Act and therefore wholly extinguished native title rights and interests (549).

22. The evidence established no native title right to or interest in any mineral or petroleum. No question of extinguishment arises (550).
23. The public right to fish is an ''other interest'' within s 225(c) of the NTA and is, therefore, to be recorded in the determination. Any exclusive right to fish in tidal waters has been extinguished (551).
24. The successive grants of pastoral leases over what is now the Territory claim area were inconsistent with the continued existence of the native title right to be asked permission to use or have access to the land. They were not, however, necessarily inconsistent with the continued existence of all native title rights and interests. They were non-exclusive pastoral leases (552) and Pt 3C of the Territory Validation Act was engaged (553).
25. The Special Purposes Lease and Crown Lease Perpetual to the Conservation Land Corporation conferred exclusive possession on the lessee (554). Their grant was a grant by the Crown in its Territory capacity to a statutory authority of the Crown within the meaning of s 230(d)(i) of the NTA (555) and a category D past act (556). They were not previous exclusive possession acts under the NTA and the Territory Validation Act (557). It is not possible to say, on the present findings of fact, what effect their grant had on native title rights and interests that remained unextinguished by the earlier grants of pastoral leases (558).

Q. *Orders and Further Proceedings*

469 As has been mentioned earlier, it follows from the reasons that have been given that each of the appeals should be allowed, pars 4 and 6 of the orders of the Full Court of the Federal Court made on 3 March 2000, the whole of the order of the Full Court made on 11 May 2000 and the determination of native title made on 11 May 2000 should be

(549) See at 180-183 [358]-[375].
(550) See at 185 [382], 207 [461].
(551) See at 186-187 [386]-[388].
(552) See at 190-196 [396]-[417].
(553) See at 197-198 [419]-[425].
(554) See at 198-201 [426]-[439].
(555) See at 202-204 [443]-[447].
(556) See at 204 [448].
(557) See at 204-205 [449]-[453].
(558) See at 204 [448].

set aside and the matters remitted to the Full Court for further hearing and determination.

470 It will be necessary for the Full Court to consider the various questions to which reference has been made in these reasons and for that purpose to make such further findings of fact as the evidence permits. Whether, in the course of that further hearing, any party should have liberty to tender further evidence (559) is a matter about which we express no view.

471 All parties to the appeals in this Court can be seen to have had some measure of success but it cannot be said that any party has clearly won or lost the appeals, no matter whether those appeals are looked at as a single set of related proceedings or are looked at separately. In those circumstances, there should be no order as to the costs of the appeals in this Court. The costs of the proceedings at trial and in the Full Court of the Federal Court, both before and after the making of this Court's orders disposing of these appeals, should be in the discretion of that Court.

472 MCHUGH J. I agree with the orders proposed by Callinan J. With one exception, I agree with his Honour's reasons for making those orders. But I would also add some comments of my own concerning the important issue of whether pastoral leases issued in Western Australia and the Northern Territory before the enactment of the *Racial Discrimination Act* 1975 (Cth) extinguished native title rights.

473 Professor Maitland famously said that the ''forms of action we have buried, but they still rule us from their graves'' (560). The reasoning of Gleeson CJ, Gaudron, Gummow and Hayne JJ in these cases indicates a similar truth about *Wik Peoples v Queensland* (561). *Wik* held that pastoral leases issued under the *Land Act* 1910 (Q) and the *Land Act* 1962 (Q) did not confer rights of exclusive possession to the areas the subject of those leases. *Wik* also held that the grants of pastoral leases in Queensland did not necessarily extinguish the incidents of any native titles in respect of those areas.

474 *Wik* is one of the most controversial decisions given by this Court. It subjected the Court to unprecedented criticism and abuse, though the criticism and abuse were mild compared to that directed to the United States Supreme Court (562) after its two decisions in *Brown v Board of Education of Topeka* (563). No doubt the decision in *Wik* was controversial because to most people it was unexpected. There were at least three matters that led people to believe that the grant of a pastoral lease extinguished any native title in respect of the land, the subject of the lease. First, statements by the majority Justices in *Mabo v*

(559) *Federal Court of Australia Act* 1976 (Cth), s 27.
(560) Maitland, *The Forms of Action at Common Law* (1948), p 2.
(561) (1996) 187 CLR 1.
(562) See, eg, Powe, *The Warren Court and American Politics* (2000), pp 34-39, 58-70.
(563) (1954) 347 US 483 and (1955) 349 US 294.

Queensland [No 2] (564) had indicated that the grant of a lease extinguished native title. Secondly, the preamble to the *Native Title Act* 1993 (Cth) had declared that this Court had ''held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates''. Thirdly, the *Land Act* 1910 (Q) and the *Land Act* 1962 (Q) described pastoral leases as leases and were perceived as vesting in the lessee an estate or interest in the land. And, if that was not enough, for 126 years Queensland lawyers had taken the view that a pastoral lease gave a legal right of exclusive possession to the land (565).

475 But to the surprise of most people who had thought about the matter, a narrow majority of Justices of this Court held in *Wik* that the claims of pastoral lessees and native-title holders could be reconciled. Despite the description of pastoral leases as leases in the *Land Act* 1910 (Q) and the *Land Act* 1962 (Q) and the long held professional opinion as to their legal effect and nature, the majority Justices held that pastoral leases were not in fact leases, as lawyers understood that term. The majority held that the rights given by the ''leases'' and the rights of native title were not necessarily inconsistent. Whether or not the grant of a pastoral lease extinguished native title rights depended upon the particular rights conferred by the lease and the incidents of the relevant native title. In *Mabo [No 2]*, Brennan J had said that the Australian Aborigines had been ''dispossessed of their land parcel by parcel, to make way for expanding colonial settlement'' (566). *Wik* held that henceforth Aborigines could only be dispossessed of their land, the subject of a Queensland pastoral lease, metre by metre. They could be dispossessed only after a federal court had held that a native title right claimed in relation to a particular place was necessarily inconsistent with the rights of the pastoral lessee.

476 The Federal Parliament responded to *Wik* by enacting Act No 97 of 1998 (Cth) which, among other things, ensured that the reasoning in the *Wik* decision would henceforth be confined to narrow areas. But as the reasons of the majority Justices in this case show, the ideas that generated that decision still haunt the corridors of native title law. In particular, they have survived its burial in relation to pastoral and mining leases.

477 *Wik* is also probably the source of the self-contradictory term ''non-exclusive possession'' that appears prominently in Act No 97 of 1998 (Cth). The common law understands the concept of joint possession. But possession that is not exclusive is a contradiction in terms, for the

(564) (1992) 175 CLR 1.

(565) *Wildash v Brosnan* (1870) 1 QCLLR 17 at 18; *Macdonald v Tully* (1870) 2 QSCR 99 at 106.

(566) *Mabo [No 2]* (1992) 175 CLR 1 at 69.

right of general control and exclusion is central to the concept of legal possession.

478 Few terms in law are as difficult to define as ''possession'' (567). What it means in one branch of the law may be different from what it means in another branch of the law. The policy behind particular branches of the law has always played a part in determining what constitutes ''possession'' for the purposes of those branches. Thus, in *Director of Public Prosecutions v Brooks* (568), Lord Diplock pointed out that the ''technical doctrines of the civil law about possession are irrelevant to this field of criminal law''. But that said, Ormrod LJ was surely right in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* (569) when he said that the ''general principle appears to be that, until the contrary is proved, possession in law follows the right to possess''. Inherent in the notion of the right to possess is the right of physical control (570) of a corporeal thing with the intention of keeping control for one's benefit. Persons may have the right to *joint* physical control of a corporeal thing and yet have possession in the legal sense. But a person cannot have legal possession of that thing unless he or she either has actual control of, or the legal right to control, it. A person who has no legal right to exclude the world at large, or to exclude all but one with a superior title, does not have legal possession. That is not to say that a person cannot have possession of a corporeal thing unless that person has the right to exclude all others at all times. As I indicate below, a person may have possession of land or premises even though other persons have a right to enter, use or inspect the land or premises for particular purposes or at particular times. But that said, control or the legal right to control is central to the common law's concept of possession. The drafter of Act No 97 of 1998 (Cth) appears to have confused occupation with possession. Non-exclusive occupation is an intelligible term; non-exclusive possession is not.

479 Brennan CJ, Dawson J and I dissented in *Wik*. Brennan CJ held that pastoral leases granted under the *Land Act* 1910 (Q) and the *Land Act* 1962 (Q) were leases in the legal sense of that term. Dawson J and I agreed with the judgment of Brennan CJ. I thought then, and I think now, that the reasoning of Brennan CJ was correct. But that does not mean that I think that *Wik* should be overruled or not followed in Queensland cases. Mere disagreement with a decision is not a ground for overruling it. As Brandeis J pointed out in *Burnet v Coronado Oil & Gas Co* (571), ''[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be

(567) *Towers & Co Ltd v Gray* [1961] 2 QB 351 at 361.
(568) [1974] AC 862 at 867.
(569) [1975] QB 94 at 114.
(570) Paton and Derham, *Jurisprudence*, 4th ed (1972), p 558.
(571) (1932) 285 US 393 at 406.

settled than that it be settled right''. It does not follow, however, that either *Wik* or its reasoning governs these appeals.

480 As the judgment of Callinan J shows, *Wik* has no ratio decidendi. The lack of a ratio decidendi makes the case of limited precedent value. But even if his Honour's analysis of the reasons of the majority in *Wik* was not correct, *Wik* could only have limited value as a precedent when construing the legislation of another jurisdiction. Judicial decisions on statutory terms can never give more than guidance as to the meaning of the same terms in different statutes unless the statutes are not materially different in context, history and purpose. That is because context, history and purpose influence the legal meaning of statutory terms. The dictionary and grammatical meaning of terms do not always correspond with their legal meaning.

481 A judicial decision on a statute is likely to be of even less assistance in construing another statute when the judicial decision turned on an inference or inferences drawn from the statute as a whole. That was the case in *Wik*. Because the structure, terms and history of the statutes involved in the present cases are materially different from those of the *Land Act* 1910 (Q) and the *Land Act* 1962 (Q), *Wik* does not govern their construction. The present cases must be decided as a matter of principle, not in terms of the authority of *Wik*. And the first question of principle that arises is, what is meant by the legal term ''lease''? The second question is, what distinguishes a lease from other interests?

Lease

482 A lease is a conveyance by way of *demise* of lands or tenements (572), for a life or lives, or for years or at will (573). It is a contract by which a person having an estate in land or tenements transfers a portion of his or her interest in that estate to another person, usually in consideration of the payment of rent or other recompense (574). The consideration is paid for the exclusive possession and profits of the land or tenements. However, the grant of exclusive possession may constitute a lease although no rent is reserved (575).

483 *Halsbury's Laws of Australia* (576) describes a lease as follows (footnotes omitted):

> ''A 'lease' or 'tenancy' of land is a means by which a lesser estate in the land than that originally held by the grantor (termed the

(572) In ordinary speech, tenement now refers to a house or building. But its legal meaning ''is everything in which a man can have an estate of freehold and which is connected with land'': *Re Lehrer and the Real Property Act 1900-1956* [1961] SR (NSW) 365 at 370, per Jacobs J.

(573) Spencer, *Woodfall's Law of Landlord and Tenant*, 21st ed (1924), p 154.

(574) Foa, *The Relationship of Landlord and Tenant*, 6th ed (1924), p 7; *Curling v Mills* (1843) 6 Man & G 173 at 184 [134 ER 853 at 858], per Maule J.

(575) *Weston v Ray* [1946] VLR 373 at 377, per O'Bryan J.

(576) vol 16, par [245-1].

'lessor') is transferred, creating an on-going relationship, to another person (termed the 'lessee'), so as to give the lessee exclusive possession of the demised premises for an ascertainable period of time, with the grantor retaining a reversionary interest in the property. The term 'lease' may refer to the grant, that which is granted and the document by which it is granted. A lease is a demise and as such confers an interest in rem in the legal estate of the subject matter of the lease. One usual incident of this interest is an obligation to pay rent.''

Demise

484 The usual words by which a lease is made are ''demise and lease'', ''lease'', ''let'' and ''grant''. But any words that amount to a grant of legal possession will constitute a lease (577). The principle was stated long ago in *Bacon's Abridgment of the Law* (578):

> ''whatever words are sufficient to explain the intent of the parties, that the one shall devest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose.''

485 The use of the word ''demise'' to describe what the grantor gives and the grantee receives is the most powerful indication that the instrument is a lease and not a licence. In the context of leaseholds, a demise means the grant of an estate in the land or tenements, as opposed to a licence or permission to go on the land or tenement. And, subject to any reservations or exceptions in the instrument, the grant gives legal possession to the grantee sufficient to exclude any person, including the lessor, whose right of entry is not within the reservations or exceptions.

486 Unfortunately and incorrectly, in my opinion, the majority judgments in *Wik* failed to give proper weight to the use of the term

(577) *Wilkinson v Hall* (1837) 3 Bing (NC) 508 at 532-533 [132 ER 506 at 515], per Tindal CJ; *Curling v Mills* (1843) 6 Man & G 173 [134 ER 853]; *Duxbury v Sandiford* (1898) 80 LT 552 at 553; Foa, *The Relationship of Landlord and Tenant*, 6th ed (1924), p 80; Spencer, *Woodfall's Law of Landlord and Tenant*, 21st ed (1924), p 162; *Blackstone's Commentaries on the Laws of England*, 18th ed (1829), vol 2, p 317; *Bacon's Abridgment of the Law* (1832), vol 4, pp 816-817.

(578) (1832), vol 4, pp 816-817. This passage was cited with approval in *Wilkinson v Hall* (1837) 3 Bing (NC) 508 at 532-533 [132 ER 506 at 515], per Tindal CJ, and *Duxbury v Sandiford* (1898) 80 LT 552 at 553.

''demise'' in the *Land Act* 1910 (Q) and the *Land Act* 1962 (Q). Indeed, Gummow J said (579):

> ''To reason that the use of terms such as 'demise' and 'lease' in legislative provisions with respect to pastoral leases indicates (i) the statutory creation of rights of exclusive possession and that, consequently, (ii) it follows clearly and plainly that subsisting native title is inconsistent with the enjoyment of those rights, is not to answer the question but to restate it.''

487 With great respect, that statement is wrong. It is true that the use of the terms ''demise'' and ''lease'' in a statute is not a conclusive indication that the grantee of the demise or lease has a right of exclusive possession to land. But it is also true that the use of those terms does not restate the question whether exclusive possession has been granted. That is because the terms ''lease'' and ''demise'' signify that the grantee of the ''lease'' has the legal right to exclusive possession of the premises described.

488 Thus, as Mr Peter Butt has said (footnotes omitted) (580):

> ''A lease (or 'demise') gives the tenant *the right* to exclusive possession — the right to exclude all others from the land. This includes the right to exclude even the landlord, subject only to any rights the landlord has by law or under the agreement, such as the right to enter and view the state of repair. Further, a lease gives the tenant an interest in the land (the 'demised premises') itself.'' (Emphasis added.)

489 To describe a letting as a lease is a powerful indication that the letting is a lease and not a licence (581). The term ''lease'' ''imports that *exclusive possession* is given of the premises conveyed'' (582). The use of the term — particularly as a verb — indicates the grantor has transferred to the grantee part of the grantor's estate and with it the right of legal possession to the part transferred. If other provisions in the instrument of grant are necessarily inconsistent with the transfer of an interest in the land or tenements, they rebut the presumption of such a transfer. But provisions that merely give rise to indefinite inferences or are equivocal in their nature do not negate the presumption that arises from the use of the term ''lease''. It has a well-understood meaning. Describing a letting as a lease is not conclusive where the rights granted or excepted are inconsistent with the legal right to

(579) *Wik* (1996) 187 CLR 1 at 195. See also at 117, per Toohey J; at 152, per Gaudron J; at 245, per Kirby J.

(580) Butt, *Land Law*, 4th ed (2001), p 251.

(581) *Chaka Holdings Pty Ltd v Sunsim Pty Ltd* [1987] NSW ConvR ¶55-367 at 57,299-57,300.

(582) Foa, *The Relationship of Landlord and Tenant*, 6th ed (1924), p 7 (emphasis in the original).

exclusive possession (583). But only compelling considerations in the statute or instrument or surrounding circumstances can lead to the conclusion that the drafter of the statute or instrument has not used the term ''lease'' in its ordinary and natural meaning.

490 The use of the term ''demise'' in a statute or instrument is perhaps an even more powerful indication of the grant of exclusive possession than the use of the term ''lease''. That is because ''demise'' is a technical term whose effect is to transfer the whole, or in the case of leaseholds part, of the estate of the grantor to the grantee. When it is used in an instrument — whether the instrument is a statute, a deed or a contract — it means that an interest in land has passed from the grantor to the grantee. So strong is the presumption that its use signifies the transfer of an estate or interest that the presumption can only be overcome by other provisions in the instrument that necessarily contradict its technical — indeed ordinary — meaning.

491 In *Young & Co v Liverpool Assessment Committee* (584), Avory J said:

> ''The terms of the lease, in my opinion, establish an exclusive occupation. The word 'demise' prima facie alone would be sufficient to establish that. I do not go so far as to say that where the word 'demise' is used in a lease or agreement no evidence would be admissible to displace the presumption arising from its use, but the word prima facie would establish an exclusive occupation.''

492 Dictionaries, legal dictionaries, conveyancing texts and precedents and case law are at one in indicating that a demise constitutes the transfer of an estate or interest in land or hereditaments to the grantee. Thus, *The Oxford English Dictionary* (585) says that ''demise'' means ''[t]o give, grant, convey, or transfer (an estate) by will or by lease''. *The Macquarie Dictionary* (586) says that a ''demise'' is ''to transfer (an estate, etc) for a limited time; lease''. The *Collins Dictionary of the English Language* (587) says that its effect is ''to transfer (an estate, etc) for a limited period; lease''. *Webster's Third New International Dictionary* (588) says that a demise is ''the conveyance of an estate (as by lease for a number of years)''. *The Random House Dictionary of the English Language* (589) says that a ''demise'' is ''to transfer (an estate or the like) for a limited time; lease''.

493 Unsurprisingly, legal dictionaries are to the same effect. Thus, *The*

(583) *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 at 413, per Lord Hoffmann.
(584) [1911] 2 KB 195 at 215.
(585) 2nd ed (1989), vol 4, p 440.
(586) 3rd ed (1997), p 574.
(587) (1979), p 394.
(588) (1976), p 599.
(589) 2nd ed (1987), p 530.

Oxford Companion to Law (590) defines ''demise'' as a ''grant, particularly of lands for a term of years, but the term is also applied to the grant of an estate in fee or for life''. *Jowitt's Dictionary of English Law* (591) defines it as ''a grant; it is applied to an estate either in fee or for a term of life or years ... In its ordinary sense, to demise is to grant a lease of lands or other hereditaments''. Similarly, *Butterworths Australian Legal Dictionary* (592) says that, in property law, a ''demise'' is ''to convey an estate of freehold''.

494 Text books and forms of precedents for conveyancing also make it clear that a ''demise'' conveys an estate or interest in land and that it is a term that clearly distinguishes a lease from a licence to enter land. Thus in referring to the operative words in a lease, Professor Strahan, in his *A Concise Introduction to Conveyancing* (593) said (footnotes omitted):

> ''*Operative Words* — After the parties, then, in most leases, follow the witnessing clause and operative words ... The word *demise* is the apt word for leasing. Formerly the usual phrase was 'demise, grant, and to farm let,' but now the one word 'demise' is invariably used. Any other word or words, however, making clear the intention to grant a lease would be equally effectual in passing a term. Whatever the language used the passing of the term creates the relation of landlord and tenant and this very relation implies a covenant for quiet enjoyment by the lessor so long at least as the lessor's interest in the land continues. The word 'demise,' however, if used, implies an absolute covenant on the lessor's part for title ... besides the implied covenant for quiet enjoyment.''

495 *Evatt and Beckenham's Conveyancing Precedents and Forms* (594) gives many precedents of leases, the majority of which refer to ''the demised premises'' to describe the premises that are the subject of the lease. Many precedents in that work use words such as the following to create the leasehold estate:

> ''... WITNESSETH that in consideration of the rent hereinafter reserved and of the covenants on the part of the lessee hereinafter contained the said *A hereby demises unto the said B* ALL THAT messuage or dwelling-house etc ...'' (595) (Emphasis added.)

> ''... WITNESSETH that in consideration of the rent hereinafter

(590) (1980), pp 349-350.
(591) 2nd ed (1977), vol 1, p 588.
(592) (1997), pp 343-344.
(593) Strahan, *A Concise Introduction to Conveyancing*, 2nd ed (1921), p 130.
(594) Myers and Hogan, *Evatt and Beckenham's Conveyancing Precedents and Forms*, 3rd ed (1951), vol 2.
(595) Precedent 12, p 558. See also Precedent 5, p 542; Precedent 19, p 580; Precedent 20, p 583.

reserved and of the covenants on the part of the lessee hereinafter contained *the lessor doth hereby demise unto the lessee ALL* . . .'' (596) (Emphasis added.)

''. . . AND WHEREAS the lessee has erected on the adjoining piece of land shown coloured blue on the said plan certain buildings for use as an office and store in connection with the premises comprised in the principal lease in pursuance of an agreement that *the same should be demised to the lessee* as an addition to the premises demised by the principal lease upon the terms hereinafter appearing . . .'' (597) (Emphasis added.)

496 *The Australian Encyclopaedia of Forms and Precedents* (598) contains a number of precedents concerning grants of powers of attorney in relation to leases and land where the word ''demise'' is used (599).

497 *Halsbury's Laws of England* (600) states (footnote omitted):

''The relationship of landlord and tenant is one of contract, but a lease also operates as a conveyance. The usual word for this purpose is 'demise' or 'let', but neither those words nor any formal words of conveyance are necessary.''

498 *Halsbury's Laws of Australia* (601) also says that a demise ''is a conveyance of an interest in land''.

499 Subject to any express contrary provision (602), the operative word ''demise'' in a lease also implies a covenant on the part of the lessor for the lessee's quiet enjoyment during the term (603). The covenant for quiet enjoyment means that the lessor covenants that no one can disturb the lessee's possession and occupation except in accordance with the terms of the lease. The implied covenant is personal to the grantor (604). However, an express covenant for quiet enjoyment

(596) Precedent 11, p 556.
(597) Precedent 15, p 569.
(598) 3rd ed, vol 10.
(599) See Precedent 30.70 for example: ''. . . the principal empowers and authorises the agent in the name and on behalf of the principal to do the following acts deeds and things or any of them. . . . 5. *To grant leases and accept surrenders*. To demise and let for such period as he shall think fit any of those buildings farms and land belonging to the principal situate at ____ . . .''
(600) 4th ed (reissue), vol 27(1), par [106].
(601) vol 16, par [245-10].
(602) *Line v Stephenson* (1838) 5 Bing (NC) 184 [132 ER 1075]; *Hall v City of London Brewery Co Ltd* (1862) 2 B&S 736 [121 ER 1245]; *Geary v Clifton Co* [1928] 3 DLR 64 at 67, per Wright J.
(603) *Hart v Windsor* (1843) 12 M & W 67 at 85 [152 ER 1114 at 1121], per Parke B; *Markham v Paget* [1908] 1 Ch 697 at 716, per Swinfen Eady J; *Sixty-Third & Halsted Realty Co v Chicago City Bank & Trust Co* (1939) 20 NE 2d 162 at 167, per Hebel J; *Evans v Williams* (1942) 165 SW 2d 52 at 55-56, per Perry CJ.
(604) *Swan v Stransham* (1566) 3 Dyer 257b [73 ER 570]; *Adams v Gibney* (1830) 6 Bing 656 [130 ER 1434]; *Monypenny v Monypenny* (1861) 9 HLC 114 at 139

excludes an implied one (605). Where the word ''demise'' is used, there are also implied covenants that the lessor will do all that is necessary to effect the creation of the leasehold estate (606). Except where the lease is by parol, the term ''demise'' also implies a covenant that the lessor has sufficient title to grant the lease (607). It does not, however, imply any covenant as to use or repair (608).

500 Because the term ''demise'' implies a covenant for quiet enjoyment and other covenants that are disadvantageous to the lessor, lessors have commonly modified or excluded the covenants that would otherwise arise from the use of the term ''demise''. As the editors of *Hogg's Conveyancing and Property Law in NSW* (609) stated, it is to the lessor's advantage to enter into a modified covenant for quiet enjoyment. When that is done, the lessor is not bound by covenants, implied from the use of the words ''grant and demise'', that operate more widely.

Lease or licence

501 The distinction between a lease or demise and a licence hinges on whether a legal right to exclusive possession of the land or tenement has passed (610). Thus, as *Halsbury's Laws of Australia* (611) states (footnotes omitted):

> ''Except in exceptional circumstances, a transaction will be characterised as a lease where a grantor has given the recipient exclusive possession of the relevant premises for a limited duration and retained a reversionary interest in the premises. 'Exclusive possession' is a right which permits the holder to exclude other persons from the property. A lessee having exclusive possession of the demised premises can restrict all persons, including the lessor, from the demised premises, subject to any contrary statutory provision and certain exceptions.''

502 Accordingly, a contract giving a person the legal right to exclusive possession of land or tenement for a determinate period, however

(604) *cont*
[11 ER 671 at 681], per Lord St Leonards; *Penfold v Abbott* (1862) 32 LJQB 67; *Taylor v Caldwell* (1863) 3 B&S 825 [122 ER 309].

(605) *Line v Stephenson* (1838) 5 Bing (NC) 184 [132 ER 1075].

(606) *Holder v Taylor* (1614) Hob 12 [80 ER 163]; *Knox v Gildea* (1848) 11 ILR 474 at 482, per Perrin J; *Baynes & Co v Lloyd & Sons* [1895] 1 QB 820.

(607) *Bandy v Cartwright* (1853) 8 Ex 913 [155 ER 1624]; *Evans v Williams* (1942) 165 SW 2d 52 at 55, per Perry CJ.

(608) *Hart v Windsor* (1843) 12 M & W 67 at 85 [152 ER 1114 at 1121], per Parke B.

(609) Collins and Flattery (eds), *Hogg's Conveyancing and Property Law in NSW*, 2nd ed (1924), p 276.

(610) Collins and Flattery (eds), *Hogg's Conveyancing and Property Law in NSW*, 2nd ed (1924), p 268.

(611) vol 16, par [245-15].

short, is a lease (612). When the cases talk of exclusive possession, they speak of legal possession. It is the right to legal possession that constitutes a lease. Indeed, it is a pity that the term ''exclusive possession'' was ever used, although its use dates back to about 1830. As Mr D W McMorland has pointed out (613): ''Between 1830 and 1950 a number of cases used the phrase 'exclusive possession' to indicate the distinguishing feature of a tenancy, but it is always quite clear that it is used in the sense of the legal right to sue in trespass.''

503 The adjective ''exclusive'' adds nothing to the concept of possession. As the editor of *Salmond on Jurisprudence* has pointed out (614), ''exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realised at the same time''. It is the legal right to possession, not the physical fact of exclusive ''possession'' or occupation, that is decisive. That is why a lessee can bring an action for ejectment although driven from the premises and why at common law the lessee could bring an action for ejectment although he or she had not yet entered upon the land. The legal right to possession before entry gave rise to an interesse termini that enabled the lessee to bring an action of ejectment and, after entry, an action for trespass to the land as well as ejectment.

504 In contrast, a licence to use land ordinarily confers only a personal right that is enforceable in contract but not by an action in trespass or ejectment. The right of the occupant to bring an action of ejectment and after entry an action in trespass for wrongful entry on the land has always been the mark of the lessee (615). The lessee may bring such an action against a third party and even the lessor (616). In contrast to the lessee, a licensee, whose occupation is wrongly terminated or interfered with, must sue in contract or for some tort other than trespass to the land. If wrongly ejected from the land, the licensee cannot maintain an action in ejectment. If ejected by the grantor, the licensee may be able to obtain an injunction restraining the grantor from breaching the personal contract. If ejected by a stranger, the licensee may have an action in trespass to the person or some other tort. But in neither case is the action of ejectment or trespass to land available to the licensee.

505 In some cases, a licence may be granted for value. If it is and it is granted for a definite period, it will not be revocable until the expiration of that period. In some cases, the licence may even be granted in perpetuity and will be irrevocable. The distinction between the grant of a licence to use land that is irrevocable or irrevocable for a

(612) *Landale v Menzies* (1909) 9 CLR 89 at 100-101, per Griffith CJ.
(613) McMorland, ''Lease or Licence?'', in Hinde (ed), *Studies in the Law of Landlord and Tenant* (1975) 11, at p 14.
(614) Fitzgerald (ed), *Salmond on Jurisprudence*, 12th ed (1966), p 287.
(615) *Radaich v Smith* (1959) 101 CLR 209 at 222, per Windeyer J.
(616) *Radaich v Smith* (1959) 101 CLR 209 at 222, per Windeyer J.

fixed period and the grant of a lease is often a fine one. As Lord Davey, speaking for the Judicial Committee of the Privy Council, pointed out in *O'Keefe v Malone* (617), ''[a]n exclusive and transferable licence to occupy land for a defined period is not distinguishable from a demise''. Nevertheless, once the right of exclusive possession is given, the letting is not a licence but a lease (618). And the strongest indications that the grant is a lease and not a licence are the use of the terms ''demise'' and ''lease''.

506 In *Radaich v Smith* (619), Windeyer J summed up the difference between a lease and a licence as follows:

> ''What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given *a legal right of exclusive possession* of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because **a legal right of exclusive possession** is a tenancy and the creation of such a right is a **demise**. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second.'' (Bold added.)

507 An instrument giving a legal right to exclusive possession is a lease although it contains exceptions or reservations or restrictions on the purposes for which the land or tenements may be used (620). Thus in *Glenwood Lumber Co v Phillips* (621), in return for the payment of an annual rent, a ''licence'' gave the holder the right to hold an area of land for twenty-one years for the purpose of cutting timber. The Judicial Committee held that the licensee had a lease of the land for twenty-one years. Lord Davey said (622):

> ''It is not, however, a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.''

(617) [1903] AC 365 at 377.

(618) *Radaich v Smith* (1959) 101 CLR 209 at 223, per Windeyer J; *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* (1966) 115 CLR 1 at 7, per Windeyer J; *Dampier Mining Co Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 408 at 428, per Mason and Wilson JJ.

(619) (1959) 101 CLR 209 at 222.

(620) *Glenwood Lumber Co v Phillips* [1904] AC 405 at 408, per Lord Davey; Spencer, *Woodfall's Law of Landlord and Tenant*, 21st ed (1924), p 155.

(621) [1904] AC 405.

(622) *Glenwood Lumber Co* [1904] AC 405 at 408.

508 In *King v Eversfield* (623), the tenant agreed ''to use the said premises as garden ground only''. Despite this limitation, the Court of Appeal held that there was a tenancy from year to year. In fact, there was no dispute that a lease had been created; the only issue was whether it was a tenancy from year to year or a quarterly tenancy.

509 In *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (624), Mason J held that an instrument that ''demises and leases'' (625) to joint venturers a portion of part of the sea-bed for seven years at a ''yearly rent'' was a lease and not a licence. His Honour so held although the use to which the demised premises could be put was limited and the Crown and others had rights to navigate vessels over the demise. In addition, the joint venturers had to consent to the granting of such easements over the demised premises as were ''reasonably necessary for the overall development or use of the harbour of Port Hedland'' (626). Far from these reservations and exceptions being inconsistent with the legal right to exclusive possession, his Honour thought (627) that they ''assume the existence of that right''.

510 Nor is it inconsistent with the grant of a lease that the document of grant gives members of the public a limited right of entry on the demised premises. In *Whangarei Harbour Board v Nelson* (628), the plaintiff, a leasing authority under the *Public Bodies' Leases Act* 1908 (NZ), had granted what was described as a lease of land that was within its jurisdiction. The plaintiff contended that the grant was merely a licence because the agreement reserved to the public the right to enter the land at all reasonable times and to remain there for the purpose of picnics and excursions. The Supreme Court of New Zealand held that the agreement was a lease. Ostler J said (629):

> ''this case is even stronger than that of *Glenwood Lumber Co v Phillips* (630). In the document before me the reservation is in favour of third persons, and the reservation is expressly assented to by the lessee. This shows that the lessee was intended to have exclusive possession. If this were not so, what reason would there be for the insertion of a covenant by which he (the lessee) agrees specifically to confer limited rights upon third persons? The rights conferred on members of the public by cl 6 are not inconsistent with the enjoyment of exclusive possession on the part of the lessee. The possession of the lessee is paramount.''

(623) [1897] 2 QB 475.
(624) (1973) 128 CLR 199.
(625) *Goldsworthy Mining* (1973) 128 CLR 199 at 212.
(626) *Goldsworthy Mining* (1973) 128 CLR 199 at 213.
(627) *Goldsworthy Mining* (1973) 128 CLR 199 at 213.
(628) [1930] NZLR 554.
(629) *Whangarei Harbour Board* [1930] NZLR 554 at 560.
(630) [1904] AC 405.

Other indications of exclusive possession

511 A strong indication that legal possession has passed to the occupant is a provision defining the circumstances in which the grantor can enter the land or premises (631). A grantor who has retained legal possession of land needs no express permission to enter the land (632). In *Dalton v Eaton* (633), a clause in a farming agreement gave the grantor the right to re-enter the land, the subject of the letting, in certain circumstances. They included the right to enter and plough the land ''as soon as the crops shall have been removed''. Lamont JA, who gave the leading judgment, said (634):

> ''These provisions, giving the plaintiff a right to re-enter upon the lands and re-take possession thereof, were entirely unnecessary unless the plaintiff had given to the Eatons the exclusive possession of the land. They are consistent only with the fact that the plaintiff had parted with his right of possession.''

512 Another strong — nearly conclusive — indicator of a lease is a power conferred on the grantor to re-enter and determine the letting for the failure to pay rent (635). An express covenant for quiet enjoyment is another almost conclusive indicator of the right to exclusive possession. Because the covenant for quiet enjoyment implies the right of exclusive possession in the grantee, it is implied whenever there is a relationship of lessor and lessee (636). When a covenant for quiet enjoyment is expressly granted, it points almost irresistibly to a relationship of lessor and lessee.

513 However, the strongest indication of the right to legal possession is a clause in the agreement that demises land or a tenement to the grantee. As I have already pointed out, a demise gives an estate in the land or tenement to the grantee and is inconsistent with a licence. A demise is an irrefutable indication that the grantee has the right of legal possession to the land or tenement the subject of the demise, a point that appears to have been overlooked by all the Justices who formed the majority in *Wik*. A demise carries with it the exclusive possession of the land or tenements. An agreement that gives a demise cannot be a licence, for a licence that gives exclusive possession is a contradiction in terms. In *Radaich v Smith* (637), Windeyer J said:

(631) *Facchini v Bryson* [1952] 1 TLR 1386 at 1388-1389, per Somervell LJ.
(632) *Shell-Mex and BP Ltd v Manchester Garages Ltd* [1971] 1 WLR 612; [1971] 1 All ER 841.
(633) [1924] 1 DLR 493.
(634) *Dalton* [1924] 1 DLR 493 at 495.
(635) *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513 at 525, per Jenkins LJ; at 529, per Parker LJ.
(636) *Kenny v Preen* [1963] 1 QB 499 at 511, per Pearson LJ. See also *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513 at 525, per Jenkins LJ; at 529, per Parker LJ.
(637) (1959) 101 CLR 209 at 223.

> ''If there be any decision ... that a person legally entitled to exclusive possession for a term is a licensee and not a tenant, it should be disregarded, for it is self-contradictory and meaningless.''

514 Unfortunately in *Wik*, the majority Justices appeared to assume that the expressions ''demise'', ''lease'' and ''grant'' in the *Land Act* 1910 (Q) and the *Land Act* 1962 (Q) were estate neutral. Their Honours gave little, if any, weight to the ordinary meaning of those terms. If they had, they could not have found for the Aboriginal claimants unless they found in the statutes some provision that was necessarily inconsistent with the transfer of an interest in the land to the pastoral lessees. None of the provisions, to which they referred as indicating that the lessees did not have exclusive possession, were necessarily inconsistent with the transfer of an estate or interest in the land to the lessees. Certainly, s 204 of the *Land Act* 1910 (Q) and s 373(1) of the *Land Act* 1962 (Q), which gave a summary remedy of ejection, were not necessarily inconsistent with a transfer of an interest in the land to the lessees. They provided no ground for concluding that this summary remedy was a pastoral lessee's only remedy. They provided no ground for concluding that a pastoral lessee could not bring an action in ejectment in the Supreme Court. That is the right of every lessee. Yet, by necessary implication, the majority judgments in *Wik* denied that right.

515 Moreover, Kirby J wrongly thought (638) ''[t]hese sections [ss 204 and 373(1)] uniformly provide for the removal of trespassers by the taking of possession 'on behalf of the Crown' ''. His Honour saw this as an indication that ''exclusive possession did not repose in the lessee''. But his Honour overlooked that these sections provided two remedies, as the judgments of Gaudron and Gummow JJ in *Wik* (639) made plain. The first was a remedy, given to the Land Commissioner or a person authorised by the Minister, to take possession *of Crown land* ''on behalf of the Crown''. The second was a remedy given to a ''lessee or his manager or a licensee of any land *from the Crown*'' (emphasis added) to recover the land from ''any person in unlawful occupation of any part of the land comprised in the lease or license''.

516 In *Wik* the majority Justices seemed to have overlooked that, if their construction of the legislation was correct, a pastoral ''lessee'' could not have brought an action for ejectment in the Supreme Court or sued in trespass for wrongful entry on the ''lessee's'' land. Instead of giving words such as ''demise'', ''lease'' and ''grant'' their ordinary meanings, the majority Justices in *Wik* looked for other indications of exclusive possession in the legislation. Finding none, they concluded that pastoral leases did not give exclusive possession. With great respect, the correct approach was to examine whether there was

(638) *Wik* (1996) 187 CLR 1 at 246.
(639) (1996) 187 CLR 1 at 146, 192.

anything in the legislation that was necessarily inconsistent with the ordinary meaning of the term ''demise'' and other terms that pointed overwhelmingly to the transfer of part of the lessor's estate to the pastoral lessee.

517 Another indicator that was once conclusive evidence of a lease was a prohibition against sub-letting or assigning the occupancy (640). But now that it is possible to assign licences, a prohibition against assigning is no longer as clear an indication of a lease as it once was. Nevertheless, it is still a strong indication that the grantor has parted with the legal possession of the land or tenement. When combined with such terms as ''lease'', ''grant'' or ''demise'', it makes an irresistible case for a transfer of legal possession.

Possession and occupation

518 In determining whether a legal right to exclusive possession has been given, it is important to distinguish between exclusive possession and occupation or sole occupation. The failure to do so is one reason why, in my respectful opinion, the reasoning of the majority Justices in *Wik* went askew. A person may retain legal possession — exclusive possession — even though some other person has sole physical occupation of land. Possession and occupation — even sole occupation — are different concepts (641). As Windeyer J pointed out in *Radaich v Smith* (642), ''persons who are allowed to enjoy sole occupation in fact are not necessarily to be taken to have been given a right of exclusive possession in law''. In *Chrystall v Ehrhorn* (643), Edwards J pointed out that giving exclusive use and occupation of land to a contractor was not the same as giving the contractor a lease of the land. Although the agreement in that case gave the contractor ''the sole use of at least 140 acres'' of land to graze the employer's cows, the agreement was merely a contract by the employer to employ the contractor ''to perform certain services'' (644).

519 In *Wik*, the majority Justices thought that the known presence of Aboriginals on pastoral leases was inconsistent with the grant of exclusive possession. But with great respect this was to confuse occupation with possession. The difference between actual occupation and the legal possession that makes the occupier a lessee is illustrated by the case of the person who occupies a room in a residential building. That person may be a tenant or a lodger. But the bare fact of occupation — even sole occupation — of the room will not make the person a tenant. Despite the sole occupation, the landlord may have the

(640) *Young & Co v Liverpool Assessment Committee* [1911] 2 KB 195 at 210, per Lord Alverstone CJ; *Facchini v Bryson* [1952] 1 TLR 1386 at 1389, per Somervell LJ.
(641) *Peakin v Peakin* [1895] 2 IR 359; *Chrystall v Ehrhorn* [1917] NZLR 773 at 780, per Edwards J.
(642) (1959) 101 CLR 209 at 223.
(643) [1917] NZLR 773.
(644) *Chrystall* [1917] NZLR 773 at 780-781.

right at any time to enter the room. If so, the occupier is a lodger. In *Allan v Overseers of Liverpool* (645), Blackburn J pointed out:

> ''A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger.''

520 During Lord Denning's time as a judge of the English Court of Appeal, he and other members of that Court developed tests for distinguishing leases and licences that would have changed the law, if they had prevailed. Notwithstanding that an occupier had exclusive possession, the Court of Appeal would hold that the agreement between the owner and the occupier was a licence if the parties described the letting as a licence or an intention to grant a licence could be imputed to the parties (646). In *Marchant v Charters* (647), Lord Denning MR said, as he had said in many other cases:

> ''What is the test to see whether the occupier of one room in a house is a tenant or a licensee? It does not depend on whether he or she has exclusive possession or not.''

521 But in *Street v Mountford* (648), the House of Lords rejected these attempts by the Court of Appeal to change the traditional principles for determining whether a letting was a lease or licence. Their Lordships held that ''the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent''.

522 The fact that in Queensland and elsewhere Aboriginals were known to occupy areas of land that were the subject of pastoral leases is not a reason for refusing to give terms such as ''demise'', ''lease'' and ''grant'' their ordinary legal meanings. The occupation of the land by Aboriginals is no more inconsistent with the legal possession of the land being in the pastoral lessee than the sole occupation of a room by

(645) (1874) LR 9 QB 180 at 191-192. See also *Street v Mountford* [1985] AC 809 at 817-818, per Lord Templeman.

(646) *Errington v Errington* [1952] 1 KB 290 at 297-298; *Murray Bull & Co Ltd v Murray* [1953] 1 QB 211 at 217, per McNair J; *Abbeyfield (Harpenden) Society Ltd v Woods* [1968] 1 WLR 374 at 376; [1968] 1 All ER 352 at 353; *Shell-Mex and BP Ltd v Manchester Garages Ltd* [1971] 1 WLR 612 at 615; [1971] 1 All ER 841 at 843; *Marchant v Charters* [1977] 1 WLR 1181 at 1185; [1977] 3 All ER 918 at 922.

(647) [1977] 1 WLR 1181 at 1185; [1977] 3 All ER 918 at 922.

(648) [1985] AC 809 at 826, per Lord Templeman.

a lodger is inconsistent with legal possession of the room being in the owner of the boarding house.

523 In *Wik* (649), Toohey J thought that the known presence of Aboriginals on the land to be leased made it:

> ''unlikely that the intention of the legislature in authorising the grant of pastoral leases was to confer possession on the lessees to the exclusion of Aboriginal people even for their traditional rights of hunting and gathering.''

524 But if this was so, why did the legislature use language such as ''lease'' and ''demise'' that signify the grant of the right to exclusive possession? If the legislature intended to protect the traditional rights of the Aboriginal people, why did it not do so expressly? Why did it not make the grant of pastoral leases subject to reservations in favour of the Aboriginal people? After all, such provisions were in force in Western Australia from at least 1864.

525 In *Wik*, Kirby J said (650):

> ''It was not government policy to drive [Aboriginals] into the sea or to confine them strictly to reserves. In these circumstances, it is not at all difficult to infer that when the Queensland Parliament enacted legislation for pastoral leases, it had no intention thereby to authorise a lessee to expel such Aboriginals from the land. Had there been such a purpose, it is not unreasonable to suggest that the power of expulsion would have been specifically provided.''

526 With great respect, what his Honour regarded as an inference was no more than speculation. And the passage, as a whole, does not face up to the language that the Parliament used. By the use of terms such as ''demise'' and ''lease'', the Queensland Parliament gave pastoral lessees the power to expel anyone — including, unjust as it was, the power to expel Aboriginals.

527 In seeking explanations of the terms and purposes of the Queensland legislation, it is impossible to overlook the racist nature of Australian society at the relevant times. It was a society that championed a White Australia policy, carefully chose the words of s 117 of the Constitution so that Chinese and other aliens could not receive its protection and drafted its Constitution so that the Aboriginal people were treated as non-persons.

528 A more likely explanation, or speculation, than that put forward by Toohey and Kirby JJ is that the majority of the legislature simply ignored or turned a blind eye to the position of the Aboriginal people. Given the racist nature of Australian society at material times, it would not surprise me that, if the Aboriginal people had complained of the injustice of their treatment, the legislature would have replied as the

(649) (1996) 187 CLR 1 at 120.
(650) *Wik* (1996) 187 CLR 1 at 246.

Athenian representatives cynically replied (651) to the Melians from whom they were demanding tribute:

> ''[Y]ou know as well as we do that, when these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.''

529 Marx thought that law was a body of rules that upheld what the dominant class in a particular society called its rights. But you do not have to be a Marxist to recognise that at least on occasions the dominant class in a society will use its power to disregard the rights of a class or classes with less power. On any view, that is what the dominant classes in Australian society did — and in the eyes of many still do — to the Aboriginal people.

530 Within the framework of the common law and the widespread issue of Crown grants of land, this Court in *Mabo [No 2]* did what it could to remedy one of the injustices that the Aboriginal people had suffered — the dispossession of their lands. But consistent with the proposition that the grant of an estate in fee simple or a lease extinguishes native title rights, the grant of the ordinary pastoral lease before the enactment of the *Racial Discrimination Act* 1975 (Cth) must be taken to have extinguished native title rights in respect of land the subject of those leases. *Wik* held that in Queensland pastoral leases did not have that effect. And that holding must be followed. But the decision in *Wik* does not control the outcome of these cases. And, as I have indicated, I find the diverse reasoning of the majority Justices in that case unpersuasive.

The present leases

531 From very early in the history of Western Australia, the Crown granted pastoral leases in terms that indicated that they were leases giving exclusive possession to the grantee. Thus, Ch IV of the Land Regulations 1864 (WA) empowered the Governor ''to grant Pastoral Leases for any term not exceeding 8 years, and for quantities of land not exceeding ten thousand acres in any one lease''. The form of the lease stated:

> ''... Our Governor ... do by these Presents *demise and lease* unto the said Lessee, ALL that piece or parcel of Land described in the Schedule hereunder written, with the Appurtenances; Except and always reserved to Us ... and also to except from sale and reserve to Us, Our Heirs and Successors, and to enter upon and dispose of in such other manner as for the public interest ... such part or parts

(651) Thucydides, *History of the Peloponnesian War*, Warner trans, rev ed (1972), p 402.

of the said *demised* Premises as may be required for public roads, or other internal communications by land or water, or for the use and benefit of the Aboriginal inhabitants of the country . . .'' (652) (Emphasis added.)

532 The form of lease also empowered:

''any person or persons to enter, pass over, through, and out of any such part of the said demised Premises, while passing from one part of the country to another, with or without horses, stock, teams, or other conveyances, on all necessary occasions; *and full right to the aboriginal natives of the Colony at all times to enter upon any unenclosed part* of the said demised Premises for the purpose of seeking their subsistence therefrom in their accustomed manner: and also full right to any person or persons to enter on any part of the said demised Premises to examine the mineral capabilities thereof . . .'' (653) (Emphasis added.)

533 It then provided that the grantee was:

''TO HAVE AND TO HOLD the premises hereby demised (except as aforesaid, and subject to the powers, reservations, and conditions herein and in the said Regulations contained), unto the said Lessee, his Executors, Administrators and allowed Assigns for the term of years, to be computed from the 1st day of January 18 . Yielding and Paying for the same, always in advance, during the said term, unto Us, Our Heirs and Successors, the rent or sum of on the first day of January in each year, without deduction, except such deduction as the said Lessee, his Executors, Administrators, or allowed Assigns, may be entitled to under the present existing or any future Land Regulations . . .'' (654)

534 The next material step in the history of pastoral leases in Western Australia was the *Land Act* 1898 (WA). Section 4 of that Act authorised the Governor to dispose of the Crown lands within the Colony. Section 91 provided:

''ANY Crown lands within the Colony which are not withdrawn from selection for pastoral purposes, and which are not required to be reserved for any public purpose, may be leased for pastoral purposes at the several rates of rental, and subject to the conditions hereinafter prescribed.''

535 The 24th Sched to the 1898 Act contained a form of pastoral lease which declared:

''. . . in consideration of the rents herein after reserved on the part of

(652) Land Regulations 1864 (WA), Form L.
(653) Land Regulations 1864 (WA), Form L.
(654) Land Regulations 1864 (WA), Form L.

the said Lessee , Executor, Administrators, and Assigns to be paid, and in exercise of the powers in this behalf to Us given by 'The Land Act 1898,' Do by these Presents *Demise and Lease* unto the said Lessee, the natural surface of ALL THAT piece or parcel of land described in the Schedule hereto ... EXCEPT and always reserved to Us, Our Heirs and Successors, full power during the term hereby granted, from time to time to sell to any person or persons all or any unsold portion of the said *demised* Premises ... and also to except from sale, and reserve to Us ... such part or parts of the said *demised* Premises as may be required for public roads ... or for the use and benefit of the Aboriginal inhabitants of the country ... *and 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* ... TO HAVE AND TO HOLD the Premises hereby *demised* (except as aforesaid, and subject to the powers, reservations, and conditions herein and in the said Act contained ...).'' (Emphasis added.)

536 The *Land Act* 1898 (WA) was amended on a number of occasions before it was superseded by the *Land Act* 1933 (WA). Of these amendments, the most important for present purposes, was the *Land Act Amendment Act* 1932 (WA). Section 2 enacted:

''Crown land open for selection for pastoral purposes may be leased under and subject to the provisions of Part X of the principal Act, as amended by section thirty of the Land Act Amendment Act, 1917, and by this Act, for a term expiring on the thirty-first day of December, one thousand nine hundred and eighty-two, in the form or to the effect of the Schedule to this Act:

Provided that the annual rent shall, at the expiration of the first fifteen years and of every succeeding period of fifteen years of the term, be subject to re-assessment by the Minister on the advice of the Board of Appraisers ...''

537 The form of the lease described in the Schedule was slightly different from that in the 24th Sched to the 1898 Act but its substance was the same. This is made clear by ss 6 and 7 of the 1932 Act which provided:

''6. (1) Any lessee holding a pastoral lease granted under Part X of the principal Act, pursuant to the Land Act Amendment Act, 1917, may, at any time within one year from the commencement of this Act, apply for leave to surrender such lease, and for a new lease under section two of this Act: Provided that if the lease is subject to any registered mortgage or encumbrance the consent of the mortgagee or encumbrancer shall be necessary.

(2) If the application is approved and a new lease is granted, the following provisions shall apply:—

(a) With respect to leases to which paragraph (c) of sub-section (1) of section two of the Land Act Amendment Act, 1931, applies, the rent payable under such new lease shall not, until after the thirty-first day of December, one thousand nine hundred and forty-eight, exceed such rent as would have been payable under the surrendered lease as re-appraised under that paragraph; but a re-assessment of the rent to be paid after that date shall be made under section two of this Act, and shall have effect from and inclusive of the first day of January, one thousand nine hundred and forty-nine; and

(b) With respect to leases to which paragraph (d) of sub-section (1) of section two of the Land Act Amendment Act, 1931, applies, the rent payable under such new lease shall not exceed the rent payable under the surrendered lease until the first day of January, one thousand nine hundred and forty-two; but a re-assessment of the rent shall then be made under section two of this Act, to have effect from that date; and

(c) To such extent as improvements were effected prior to the surrender of the lease, the lessee shall be exempt from the provisions of sub-section (3) of section thirty of the Land Act Amendment Act, 1917.

7. Subject to this Act, the provisions of the principal Act and of the Acts amending the same in force at the commencement of this Act, relating to pastoral leases granted under the principal Act as amended by the Land Act Amendment Act, 1917, shall apply to leases granted under this Act.''

538 The Schedule to the *Land Act Amendment Act* 1932 (WA) provided:

''... We ... in exercise of the powers in this behalf to Us given by the Land Act, 1898, and the Acts amending the same, do by these presents lease to of hereinafter called 'the Lessee,' which term includes the Lessee, his executors, administrators, and assigns ... the natural surface of all that piece or parcel of land situated and containing acres as delineated in the plan hereon: To hold unto the Lessee for pastoral purposes under and subject to the provisions of the Land Act, 1898 ... for the term of years ... Yielding and Paying therefor unto Us ... the yearly rent of ... Provided always, and it is hereby declared, that if the rent hereby reserved ... is not duly paid by the Lessee ... or in case of the breach by the Lessee of any condition on which, in accordance with the said Acts this lease is granted; or if the Lessee assigns or underlets the demised premises or any part thereof without Our said Minister's approval, in writing first obtained; then these presents shall become void, and the term hereby granted shall be absolutely and indefeasibly forfeited, and it shall thereupon be lawful for Us, Our Heirs and Successors, into and upon the demised premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy as if this deed-poll had never

been executed, without making any compensation to the Lessee . . .''

The lease was granted subject to the powers, conditions and reservations in the *Land Act* 1898 (WA), the *Mining Act* 1904 (WA) and the *Forests Act* 1918 (WA).

539 The *Land Act* 1898 (WA) was repealed by the *Land Act* 1933 (WA). Section 7 of the *Land Act* 1933 (WA) authorised the Governor ''to dispose of the Crown lands within the State, in the manner and upon the conditions prescribed by this Act or by regulations made thereunder''. Section 13 provided that all leases, licences, transfers and instruments disposing of Crown lands were to be signed or signed and sealed by the Minister or by an officer authorised in that behalf by the Governor. Section 23(1) of the Act provided that, if any holder of land under the Act failed to perform the prescribed conditions or pay the rent, ''the lease or other holding and the lands therein, and all improvements thereon, as well as any rent or purchase money that may have been paid, may be forfeited''. However, s 23(2)(a) provided that the Governor might for any cause deemed sufficient ''waive any forfeiture and re-instate any lessee or licensee as of his former estate, and on any terms and conditions as he may think fit''. Section 24(1) declared that the land comprised in any leases and licences held under that Act or any Act thereby repealed which might become forfeited should, if not required for any public purpose, be made available for re-selection. Section 24(3) declared:

''Provided that if the Minister shall so order, any forfeited land shall revest, together with all improvements thereon, in His Majesty, his heirs and successors, for his or their former estate therein.''

540 The *Land Act* 1933 (WA) provided for leases of various classes of land including towns, suburban land, agricultural and grazing land as well as pastoral leases.

541 Part VI dealt with pastoral leases. Section 90 provided that any Crown lands within the State, with some exceptions, might ''be leased for pastoral purposes at the rent, and subject to the conditions hereinafter prescribed''. In the South-West division of the State, leases could be granted for blocks of not less than three thousand acres (s 92). In the Eucla division, the North-West division and the Eastern division of the State, leases could be granted in blocks of not less than twenty thousand acres (ss 93, 94, 95). In the Kimberley division of the State, leases could be granted in blocks of not less than fifty thousand acres when on a frontage or not less than twenty thousand acres when no part of the boundary was on a frontage (s 96(1)). A frontage block was a block that had its lesser boundary on a lake, river, or main stream, or other water channel, or on an estuary, or the seashore (s 96(3)).

542 Section 98 provided:

''(1) Crown land open for selection for pastoral purposes may be

> leased for a term expiring on the thirty-first day of December, one thousand nine hundred and eighty-two at an annual rent to be determined by the Minister . . .''

543 Section 104 of the Act provided that when any portion of land ''held under pastoral lease is transferred or surrendered, the rent for the land transferred and retained shall be subject to re-appraisement''. Section 105 declared that a pastoral lease gave ''no right to the soil, or to the timber, except to such timber as may be required for domestic purposes, for the construction of buildings, fences, stockyards, or other improvements on the lands so occupied''. Section 113(1) provided that the maximum area held under a pastoral lease should not exceed one million acres and that the Governor might fix the maximum area to be held in specified districts or localities at less than one million acres. No person could become ''beneficially interested in any lease of pastoral land to an extent whereby the aggregate area of pastoral land in which such person is beneficially interested would exceed one million acres'' (s 113(2)).

544 The 19th Sched contained the form of pastoral lease. There was no material difference between the form of lease prescribed in the 19th Sched and that provided in the Schedule of the *Land Act Amendment Act* 1932 (WA).

545 Part VII of the Act dealt with special leases and licences. Section 116 empowered the Governor to grant leases of any Crown land for a variety of purposes. The purposes included: obtaining guano or other manure, stone, gravel, sand or earth; collecting and manufacturing salt; sites for hotels, stores, smithies, bathing houses, bathing places, bridges, tanneries, factories, sawmills, warehouses, dwellings, wharves, jetties, ship building, market gardens and fishing stations; and works supplying water, gas or electricity.

546 Section 117 provided that the Governor might ''lease any town, suburban, or village lands on such terms as he may think fit''. Section 118 provided that the Minister might grant ''a license in the form of the Twenty-second Schedule to any person to quarry, dig for, and carry away any rock, soil, or other material on any land vested in the Crown, not being on a goldfield or in a mining district, for building purposes and to make bricks or any other commodity''.

547 Section 143 provided that no transfer, mortgage or sub-lease of any lease or licence under the Act should be valid or operative until approved in writing by the Minister or an officer of the Department authorised in that behalf by the Governor.

548 The *Land Act* 1933 (WA) was amended by the *Land Act Amendment Act* 1934 (WA). Section 11(c) of the 1934 amending legislation added a new sub-section to s 106 of the principal Act. It provided:

> ''(2) 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.''

The pastoral leases gave the legal right to exclusive possession

549 In my view, the pastoral leases in Western Australia gave to the lessee a legal right to exclusive possession of the land the subject of the lease. No doubt leases issued under legislation do not always have the same legal effect and incidents as a lease at common law. But when a statute uses such well-known legal terms as ''lease'' and ''demise'', the natural conclusion is that those terms have the same meaning as they do at common law. In *Conway v The Queen* (655), Gaudron A-CJ, Hayne and Callinan JJ and I pointed out:

> ''When a statute enters a field that has been governed by the common law, the pre-existing common law almost invariably gives guidance as to the statute's meaning and purpose. That is because the meaning of legislation usually depends on a background of concepts, principles, practices and circumstances that the drafters 'took for granted or understood, without conscious advertence, by reason of their common language or culture' (656).''

The terms of the statute may make one or more incidents of the background common law concepts or principles inapplicable. But, subject to that qualification, the statutory term should be given its common law meaning unless the context or purpose of the statute points irresistibly to the opposite conclusion. In *Minister for Lands and Forests v McPherson* (657), Kirby P said:

> ''In the case of an interest called a 'lease', long known to the law, the mere fact that it also exists under a statute will not confine its incidents exclusively to those contained in the statute. On the face of things, the general law, so far as it is not inconsistent with the statute, will continue to operate.''

550 Under the 1864 Regulations, the certain grants of land for pastoral purposes were called leases. The Governor did ''demise and lease'' the parcels of land which were described as the ''demised premises''. In *Moore and Scroope v Western Australia* (658), Griffith CJ said, of these terms in the 1887 Regulations, that they created ''an estate in the land which could not be diminished by the Crown by means of any disposition of the land inconsistent with the continuance of the estate so created''. As his Honour pointed out, that proposition was subject to the reservation in the lease that empowered the Crown to sell the land.

551 The grant under the 1864 Regulations also reserved the right of ''aboriginal natives'' to enter upon the land ''for the purpose of seeking their subsistence therefrom in their accustomed manner''. But

(655) (2002) 209 CLR 203 at 207-208 [5].
(656) *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 196.
(657) (1991) 22 NSWLR 687 at 696.
(658) (1907) 5 CLR 326 at 336.

this reservation did not negative the grant of the legal right to exclusive possession. Indeed, that reservation was about as clear an indication that the pastoral lessee had the legal right to exclusive possession as could be imagined (659). The reservation was necessary to prevent the lessee from excluding the Aboriginal natives. Unless the lease had given the lessee the legal right to exclude all others, the reservation would be irrelevant. The same comment can be made in respect of reservations that allowed third parties to enter the demised premises for various purposes. Anyone at that time who thought that such reservations were inconsistent with the legal right to exclusive possession simply did not understand the law relating to leases. No doubt then, and certainly now, few leases drawn by conveyancers did not contain one or more reservations and exceptions. But as *Glenwood Lumber Co v Phillips* (660), *Dalton v Eaton* (661), *Whangarei Harbour Board v Nelson* (662), *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (663) and numerous other cases show, the reservation of a right of entry to the grantor or others is not only consistent with, but indicative of, the grantee having the legal right to exclusive possession. To reject that proposition would be to deny the efficacy of the work of generations of conveyancers who have never doubted that they were creating leases although the instrument of grant contained extensive reservations and exceptions in favour of others. Exceptions and reservations are not inconsistent with the right of the grantee to exclude any person who does not come within an exception or reservation. They are not inconsistent with the right of the grantee to bring ejectment or sue for damages for trespass to land. Exceptions and reservations do not put the grantee in the position of a licensee who, by definition, cannot bring an action for ejectment or trespass to land but must depend on his or her contractual rights.

552 Nor did the fact that the lease was for pastoral purposes only indicate that the lessee did not have the legal right to exclusive possession. Indeed, the objection that no right of exclusive possession could have been intended because the lease was for pastoral purposes is the one that I find most difficult to understand. Until the seventeenth century, leases were usually for a life or lives. The concept of a lease for a term of years was introduced into the law mainly because of the need for leases for agricultural purposes for a term of years, which was usually twenty-one years (664). A very large number of leases now demise, and for 300 years have demised, land and premises for particular uses. Common examples are leases for agricultural,

(659) cf *Whangarei Harbour Board v Nelson* [1930] NZLR 554 at 560.
(660) [1904] AC 405.
(661) [1924] 1 DLR 493.
(662) [1930] NZLR 554.
(663) (1973) 128 CLR 199.
(664) Holdsworth, *A History of English Law*, vol VII (1925), pp 240-241.

agistment or mining purposes and leases of land or premises for use as an hotel, hospital, crematorium, industrial site or shop. The modern shopping-centre lease almost invariably confines the use of the individual shops to the sale of particular classes of merchandise or the provision of particular services. Building leases for ninety-nine years — where land is leased for the purpose of subdivision and the building and renting of houses on the subdivided lots — have long been common in England and are not unknown in Australia (665). As Callinan J points out in his judgment, there is nothing about the grant of a lease for pastoral purposes that is inconsistent with the lessee having the legal right to exclusive possession of all the holding.

553 The lease under the 1864 Regulations also permitted it to be assigned to ''allowed Assigns''. The right to assign is a powerful indication that the grantee has an estate in the land and not a mere licence to use the land (666). When the right to assign is given in the context of a ''demise and lease'' of land, it points irresistibly to the grant of an estate in the land and with it the legal right to exclusive possession.

554 Finally, the Western Australian legislation has not given any remedy equivalent to the summary remedy given by ss 204 and 373(1) of the Queensland *Land Acts* of 1910 and 1962. The presence of those sections in that legislation appears to have played a leading part in convincing the majority Justices in *Wik* that Queensland pastoral leases did not give a legal right of exclusive possession.

555 For the above reasons, pastoral leases under the 1864 Regulations gave the lessee the right to exclusive possession of the land the subject of the lease. The grant extinguished any native title rights that existed in respect of the land. Although no one then knew it, such rights were replaced by the right of entry given to all Aboriginals to enter the land ''for the purpose of seeking their subsistence therefrom in their accustomed manner''.

556 Nothing in the subsequent history of the Western Australian legislation changed the nature or legal effect of pastoral leases in that State. Indeed, provisions such as those conferring a right of re-entry on failure to pay rent or on assigning or sub-letting without consent point irresistibly to the grant of an estate in the land. A lessor who had not parted with the possession of the land would not need this power of re-entry.

557 Pastoral leases in the Northern Territory took a simpler form than those in Western Australia but also gave the legal right of exclusive possession.

(665) See, eg, *Re Marshall-Reynolds; Ex parte McLachlan* (1968) 88 WN (Pt 1) (NSW) 292.

(666) *Young & Co v Liverpool Assessment Committee* [1911] 2 KB 195; *Facchini v Bryson* [1952] 1 TLR 1386.

558 Similarly, mining leases in Western Australia were true leases. The form of mining lease provided:

> ''... Our Governor ... do by these presents *grant and demise* unto the said Lessee, his executors, administrators, and allowed assigns, ALL copper and lead mines, and veins, beds, netts, and bunches of copper and lead ore, and all other mines and minerals whatsoever (except the precious metals and coal) lying within or under ALL THAT PIECE OR PARCEL OF LAND specified in the Schedule hereunder written, *together with the said land* ...'' (667) (Emphasis added.)

559 Subject to one matter, for the above reasons, the analysis of Callinan J of the legislation in this case and the effect of that legislation on leases and native title rights is correct. The matter to which I refer is the statement in his Honour's judgment (668) that native-title holders come within the definition of ''occupier'' in the *Mining Act* 1978 (WA). I do not think that it can be said that the title of native-title holders has been ''granted by or derived from the owner of the land''. If my view had prevailed in this case, it would have been necessary to examine the consequence of this difference. But since the judgments of Callinan J and me are dissenting judgments, it is unnecessary to pursue the matter. Subject to this matter, I agree with the orders proposed by Callinan J.

560 I also agree with his Honour that the current state of the law of native title ''can hardly be described as satisfactory'' (669). The present case took eighty-three days to hear at first instance and fifteen days on appeal to the Full Court of the Federal Court. The orders of the majority Justices in these appeals now send the case back to the Federal Court for further hearing. Further evidence may be taken, and further litigation in this Court is a possibility. The *Yorta Yorta Case* (670) took even longer to hear at first instance — 114 days. By the standards set by those two cases, *Yarmirr v Northern Territory* (671) was quickly disposed of at first instance. It took only twenty-three days.

561 The dispossession of the Aboriginal peoples from their lands was a great wrong. Many people believe that those of us who are the beneficiaries of that wrong have a moral responsibility to redress it to the extent that it can be redressed. But it is becoming increasingly clear — to me, at all events — that redress cannot be achieved by a system that depends on evaluating the competing legal rights of landholders and native-title holders. The deck is stacked against the

(667) Land Regulations 1865 (WA), Form Z.
(668) Reasons of Callinan J at 356 [854].
(669) Reasons of Callinan J at 397-398 [969].
(670) *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606.
(671) (1998) 82 FCR 533.

native-title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict. And it is a system that is costly and time-consuming. At present the chief beneficiaries of the system are the legal representatives of the parties. It may be that the time has come to think of abandoning the present system, a system that simply seeks to declare and enforce the legal rights of the parties, irrespective of their merits. A better system may be an arbitral system that declares what the rights of the parties *ought to be* according to the justice and circumstances of the individual case. Implementing such a system in the federal sphere may have constitutional difficulties but may not be impossible. At all events, it is worth considering.

562 KIRBY J. The issues raised in these four appeals from the Full Court of the Federal Court of Australia (672) are described in the reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ (the joint reasons). The ultimate questions concern the recognition and extinguishment of native title in a determination area in the north of Western Australia and in adjacent parts of the Northern Territory (the area).

563 The native title application was brought under the *Native Title Act* 1993 (Cth) (the NTA) on behalf of the Miriuwung and Gajerrong community, those represented by Cecil Ningarmara and the Balangarra peoples — all of whom are Aboriginal Australians. The land tenures existing within the area include vacant Crown land, public reserves, pastoral leases, mining leases and several other leases and holdings. The native title rights and interests claimed in relation to the area included (but were not confined to) the right to exclusive possession, occupation, use and enjoyment of land and waters, the right of some members to ''speak for the land'', the right to the use and enjoyment of ''resources'' of the area and the right to protect ''cultural knowledge'' in relation to the area.

564 The extinguishment of native title in this case is governed by the NTA and the State and Territory Acts that supplement it (673). I agree in this regard with the joint reasons and with the general approach taken there to construing the NTA and the State and Territory Acts concerned (674). Those Acts provide the principles of extinguishment that apply to the various land tenures and uses of land in the area.

565 My interpretation of some of the concepts mentioned in the NTA, and reflected in the applicable State and Territory laws, differs from that advanced in the joint reasons. However, I concur generally with those reasons. This is an area of law where there is a very high premium on certainty. It is therefore one where an individual judge

(672) *Western Australia v Ward* (2000) 99 FCR 316. In the Full Court Beaumont and von Doussa JJ, in joint reasons, constituted the majority. In respect of certain matters of approach and conclusions, North J dissented.

(673) *Wilson v Anderson* (2002) 213 CLR 401 at 456-457 [137], 459-460 [144]-[147].

(674) Joint reasons at 62-64 [4]-[12], 77-79 [41]-[45], 110-112 [135]-[140].

should be willing, as I am, to surrender personal preferences on particular issues in favour of a clear statement of the applicable law. Nevertheless, whilst concurring generally, I wish to record the following reservations in relation to the ''recognition'' of native title rights and interests and their ''extinguishment''.

General principles

566 The NTA outlines the applicable principles for the recognition of native title and its extinguishment. Where ambiguous, such provisions should be given a construction that is consistent with the principles of fundamental human rights, as expressed in international law. There is no aspect of those principles that is clearer or more emphatic than that which forbids adverse discrimination for reasons of race. Also of relevance is the international law that protects the interests of indigenous peoples, who are often specially vulnerable to racial and other forms of discrimination (675). The NTA itself contemplates that this should be so (676).

567 Because the statutory concepts of ''recognition'' and ''extinguishment'' are themselves ambiguous or informed by the approach of the common law, this Court should adopt, and consistently apply, several interpretative principles in giving those concepts meaning. First, it should observe the principle that, in the case of any ambiguity, the interpretation of the statutory text should be preferred that upholds fundamental human rights rather than one that denies those rights recognition and enforcement (677). Secondly, so far as is possible, it should take into account relevant analogous developments of the common law in other societies facing similar legal problems. Thirdly, a clear and plain purpose is required for a statute to extinguish property rights, particularly where the legislation purports to do so without compensation (678).

Recognition of native title under the NTA

568 *Relation to the general law*: The recognition of Aboriginal law by Australian law began with *Mabo v Queensland [No 2]* (679). It is now governed by the NTA, which, in s 223, essentially restates Brennan J's

(675) International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 7 March 1966, ATS 1975 No 40: see *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 131 [294].

(676) NTA, Preamble.

(677) *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 367 [44], per Gaudron J; at 417-419 [166]-[167] of my own reasons.

(678) *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 414-416 [27]-[34]; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 328-329 [121]-[122]. See also the discussion of this issue in *Wilson v Anderson* (2002) 213 CLR 401 at 457-459 [139]-[143].

(679) (1992) 175 CLR 1.

words (680). However, it should be noted that such ''recognition'' does not affect the underlying Aboriginal law. That system of law operates separately, regardless of any recognition or extinguishment by the NTA or any other legislative regime (681).

569 *Native title, not permitted activities*: The joint reasons explain how s 223(1) of the NTA prescribes inquiries in relation to the ''rights and interests . . . possessed under the traditional laws . . . and . . . customs'' and the ''connection with'' land or waters enjoyed by those laws and customs (682). The result of these inquiries is said to give rise to a list of activities and uses recognised as ''native title rights and interests''.

570 In native title determinations, I agree that the specification of the rights and interests will be necessary to determine their ''relationship'' with other interests in the area (683) and possible inconsistencies with those other interests. However, I do not agree that recognition of native title rights and interests should be unduly narrowed for this purpose. The object of the NTA is the recognition of ''native *title*'', rather than the provision of a list of activities permitted on, or in relation to, areas of land or waters the subject of a claim to native title. As was stated in *Mabo [No 2]* and incorporated into the NTA, native title involves the recognition, by the laws of Australia, of the traditional rights and interests of Australia's original peoples.

571 Two contested aspects of the native title rights and interests claimed in the present matter may be instanced to demonstrate the divergence of my approach regarding recognition, from that expressed in the joint reasons. The asserted native title right to the use of ''resources'' in the area (684) illustrates the ease with which a narrow interpretation of s 223(1) of the NTA would remove the beneficial operation of the NTA to accord full recognition to the interests and aspirations of native title holders. A similar conclusion might be drawn with respect to the right to maintain and protect cultural knowledge associated with the area (685).

572 *Resources — minerals and petroleum*: The primary judge, Lee J, concluded that the native title claimants enjoyed the right to use, enjoy and trade in the ''resources'' of the area (686). ''Resources'' is a most imprecise word, with a wide import. It is broad enough to include all things that can be used, including minerals and petroleum, as well as ochre (assuming it is not a mineral), along with all other natural

(680) *Mabo [No 2]* (1992) 175 CLR 1 at 58-63.
(681) French, ''The Role of the High Court in the Recognition of Native Title'', *University of Western Australia Law Review*, vol 30 (2002) 129, at p 147.
(682) Joint reasons at 66 [17]-[18].
(683) NTA, s 225(d); see also s 62(2).
(684) See par 3(e)-(h) in the determination of Lee J: *Ward v Western Australia* (1998) 159 ALR 483 at 639.
(685) See par 3(j) in the determination of Lee J: *Ward v Western Australia* (1998) 159 ALR 483 at 640; *Western Australia v Ward* (2000) 99 FCR 316 at 483-484 [666].
(686) *Ward v Western Australia* (1998) 159 ALR 483 at 639.

resources of the area (687). In this case, the focus was on the effect of certain legislation in relation to minerals and petroleum only. Regarding those specific resources I agree with the joint reasons as to the extinguishing effect of the *Mining Act* 1904 (WA) and the *Petroleum Act* 1936 (WA). However, I wish to explain a divergence in the approach concerning the *recognition* of native title rights to such resources.

573 There were differing views in the Full Federal Court. North J, in dissent, concluded that the determination of native title to ''resources'' was broad enough to include minerals and petroleum, where these exist (688). In contrast, the majority of the Full Court held that Lee J's determination should be restricted to the use of ochre, excluding petroleum or other minerals (689). This seems to have been based, in part, upon the argument that ''minerals that are mined by modern methods'' cannot form part of native title rights (690) and, in part, upon a view of the evidence that the only rights to resources that had been proved were the use of ochre.

574 In relation to the capacity of the common law to recognise change and development in traditional laws and customs, I prefer North J's approach (691). It supports the recognition of historical uses of resources, such as ochre. It also includes other minerals. It envisages the extension of such recognition to modern conditions, developed over time, so as to incorporate the use of other minerals and resources of modern relevance. Such an approach is generally consistent with the authority of this Court (692) and decisions in Canada (693). When evaluating native title rights and interests, a court should start by accepting the pressures that existed in relation to Aboriginal laws and customs to adjust and change after British sovereignty was asserted over Australia. In my opinion, it would be a mistake to ignore the possibility of new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined, in the times preceding settlement.

575 The second issue is one of evidence. I acknowledge the need in a native title claim for the claimants to prove how their traditional laws and customs in relation to the land and waters claimed have given rise to the propounded rights and interests in resources in the claim area.

(687) See eg, mention of evidence of use of bush foods and bush medicines: *Ward v Western Australia* (1998) 159 ALR 483 at 538.
(688) *Western Australia v Ward* (2000) 99 FCR 316 at 526-527 [826].
(689) *Western Australia v Ward* (2000) 99 FCR 316 at 450 [517], 453-454 [533]-[540].
(690) *Western Australia v Ward* (2000) 99 FCR 316 at 450 [517].
(691) *Western Australia v Ward* (2000) 99 FCR 316 at 528 [829]-[831].
(692) *Mabo [No 2]* (1992) 175 CLR 1 at 61, 70, 110; *Yanner v Eaton* (1999) 201 CLR 351 at 381-382 [68]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 131-132 [295]-[296].
(693) *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513 at 525-529; *R v Sparrow* [1990] 1 SCR 1075 at 1093.

Evidence of a traditional use of ochre has been noted (694). Nonetheless, because of the principle of equality of the rights of all Australians before the law, where a native title claim is otherwise established as conferring possession, occupation, use and enjoyment of the land and waters to the exclusion of others (695), there is, in my view, a presumption that such right carries with it the use and enjoyment of the minerals and like resources of the land and waters. In a case where such extensive native title rights are found, there would be no need to conduct a separate inquiry regarding the identity of those resources (696). It is unnecessary in this case to make a specific finding in relation to the existence of a native title right to minerals or petroleum because of the conclusion I favour regarding the extinguishing effect of the relevant legislation (697). But in another case, where the legislation was different, it could be vital.

576 *Cultural knowledge*: The Aboriginal appellants submitted that this Court should reinstate the finding at first instance of a native title right to ''maintain, protect and prevent the misuse of cultural knowledge'' of the native title holders, associated with the area (698). The right to protect cultural knowledge was not well defined in submissions before this Court. However, it is clear that it includes many elements, such as restricting access to certain sites or ceremonies and restricting the reproduction of artwork or other images. I agree with the joint reasons that there is a need for a degree of specificity in determining such claims. This itself might sometimes create problems because of the internal rules of some Aboriginal communities, that cultural knowledge, or at least some of it, is to be treated as a secret: not to be shared with strangers to that community whether indigenous or non-indigenous, indeed sometimes not to be shared even with all members of the community itself. However, if the NTA protects the right and interest in question, procedures of the courts and other decision-makers could facilitate means of proof and challenge that involved the minimum intrusion upon secrecy where this is itself part of the cultural knowledge that is afforded statutory protection (699).

577 In order for a native title right to be recognised under the NTA, the critical threshold question is whether it is a right or interest ''in

(694) *Ward v Western Australia* (1998) 159 ALR 483 at 538; *Western Australia v Ward* (2000) 99 FCR 316 at 453 [533].

(695) *Mabo [No 2]* (1992) 175 CLR 1 at 76; cf NTA, s 225(e).

(696) cf joint reasons at 91-93 [83]-[87].

(697) cf *Western Australia v Ward* (2000) 99 FCR 316 at 483 [666].

(698) *Ward v Western Australia* (1998) 159 ALR 483 at 640. This is similar to the right granted in *Hayes v Northern Territory* (1999) 97 FCR 32 at 148-149 [169]: ''the right to ... safeguard the cultural knowledge associated with the land and waters ... within the determination area.'' To date that finding in *Hayes* has not been subject to an appeal.

(699) Black, ''Developments in Practice and Procedure in Native Title Cases'', *Public Law Review*, vol 13 (2002) 16, at pp 20-25.

relation to'' land or waters (700). The phrase ''in relation to'' is obviously very broad. In *O'Grady v Northern Queensland Co Ltd* (701), albeit in a different context, that phrase was held to require a ''relevant relationship, having regard to the scope of the Act'' (702). The exact formulation of the connection varied as between the members of the Court, from a ''sufficient'' connection, albeit indirect (703), to a ''direct'' rather than merely ''incidental'' connection, due to the additional word ''arising'' qualifying the otherwise broad phrase in the legislation (704). What is therefore required in this context is a real relationship, or connection, between the interest claimed and the relevant land or waters.

578 The issue of connection must be considered in the light of Aboriginal tradition and the development of the law of native title. To date, the phrase ''in relation to'' has not been the subject of much elucidation in native title decisions. Nor has it presented any difficulty to claimants. This may be explained by the fact that, so far, the native title rights claimed have generally related *physically* to land or waters in a manner analogous to common law property concepts (705). Thus, there has been little need to elaborate the well-established principle that native title is sui generis and should not be restricted to rights with precise common law equivalents. This principle has been accepted in Australia (706) and in other jurisdictions (707). However, an occasion now arises for its application.

579 At one end of the spectrum, the right to protect cultural knowledge is a right familiar to Australian property lawyers, that of restricting access to a physical area of land or waters. There is no doubt that this is a right ''in relation to'' land or waters (708). At the other extreme, the right concerns restricting access not to physical parts of the land or waters in question, but to representations, images or oral accounts relating to such land or waters. One example would be restricting the reproduction of a Dreaming story relating to a particular site, where the reproduction could be proved to contravene Aboriginal law.

580 Would such a claim of right be one ''in relation to'' land or waters? The relationship between the right and the land or waters need not be

(700) NTA, s 223(1).
(701) (1990) 169 CLR 356.
(702) *O'Grady* (1990) 169 CLR 356 at 367, per Dawson J.
(703) *O'Grady* (1990) 169 CLR 356 at 365, per Brennan J (diss).
(704) *O'Grady* (1990) 169 CLR 356 at 374, per Toohey and Gaudron JJ.
(705) eg, rights of entry onto land, rights to take fauna or flora.
(706) *Mabo [No 2]* (1992) 175 CLR 1 at 85, 89, reinforced by the NTA Preamble stating native title's ''unique character''; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 215; *Fejo v Northern Territory* (1998) 195 CLR 96 at 130 [53], 152 [108].
(707) *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 403; *R v Sparrow* [1990] 1 SCR 1075 at 1112; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1081-1082 [112]-[113].
(708) Joint reasons at 84 [59].

physical although, obviously, it is easier to prove it if a physical element is shown. It has been accepted that the connection between Aboriginal Australians and ''country'' is inherently spiritual (709) and that the cultural knowledge belonging to Aboriginal people is, by indigenous accounts, inextricably linked with their land and waters, that is, with their ''country''. In evidence, the Ningarmara appellants described the ''land-relatedness'' of their spiritual beliefs and cultural narratives. Dreaming Beings located at certain sites, for example, are narrated in song cycles, dance rituals and body designs. If this cultural knowledge, as exhibited in ceremony, performance, artistic creation and narrative, is inherently related to the land according to Aboriginal beliefs, it follows logically that the right to protect such knowledge is therefore related to the land for the purposes of the NTA (710). Indeed, as stated in *Yanner v Eaton* (711):

> ''an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.''

It also follows that the right to protect cultural knowledge is, in my view, sufficiently connected to the area to be a right ''in relation to'' land or waters for the purpose of s 223(1) of the NTA.

581 This construction is consistent with the purposes of the NTA, as evinced in the Preamble, including the *full* recognition of the rich culture of Aboriginal peoples and the acceptance of the ''unique'' character of native title rights. It is further supported by Australia's ratification of international instruments which expressly provide for the protection of fundamental human rights (712). In my opinion, such rights include the right of indigenous people to have ''full ownership, control and protection of their cultural and intellectual property'' (713) and that (714):

(709) *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 357-358; cf *The Commonwealth v Tasmania* (the *Tasmanian Dam Case*) (1983) 158 CLR 1 at 158-159.

(710) For evidence of the land-relatedness, see *Western Australia v Ward* (2000) 99 FCR 316 at 539-540 [865].

(711) (1999) 201 CLR 351 at 373 [38].

(712) International Covenant on Civil and Political Rights done at New York on 19 December 1966, ATS 1980 No 23; International Covenant on Economic, Social and Cultural Rights done at New York on 19 December 1966, ATS 1976 No 5. See also Howden, ''Indigenous Traditional Knowledge and Native Title'', *University of New South Wales Law Journal*, vol 24 (2001) 60.

(713) cf *Draft United Nations Declaration on the Rights of Indigenous Peoples*, prepared by the United Nations Working Group on Indigenous Populations, adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its 36th meeting, 26 August 1994, resolution 1994/45, Art 29.

(714) cf *Draft United Nations Declaration on the Rights of Indigenous Peoples*, prepared by the United Nations Working Group on Indigenous Populations, adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its 36th meeting, 26 August 1994, resolution 1994/45, Art 12.

''[i]ndigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.''

582 The joint reasons describe the right claimed as ''akin to a new species of intellectual property'' (715). They state that the general law or statute law may provide avenues for its protection (716). That may be so. However, it must also be accepted that the established laws of intellectual property are ill-equipped to provide full protection of the kind sought in this case (717). The Preamble to the NTA expressly states that the Act aims to supplement the rights available under the general law.

583 In *Bulun Bulun v R & T Textiles Pty Ltd* (718) a suggestion was made that recognition of native title rights analogous to intellectual property rights would fracture a so-called ''skeletal principle'' of the common law of Australia, by contravening the ''inseparable nature of ownership in land and ownership in artistic works'' (719) and that therefore such recognition would be contrary to s 223(1)(c) of the NTA (720). The assertion of such a ''skeletal principle'' in that case was an obiter dictum. I would make the following comments.

584 The ''skeletal principle'' metaphor stems from Brennan J's statements in *Mabo [No 2]* (721). In *The Commonwealth v Yarmirr* (722), I acknowledged the importance of s 223(1)(c) of the NTA in ensuring that rights and interests repugnant to, or destructive of, basic legal principles of Australian law would not be recognised. The protection of some aspects of cultural knowledge might have such a consequence. However, in my respectful view, such repugnancy has not been demonstrated in the facts of these appeals.

585 An application of Brennan J's statement regarding ''skeletal principles'' should consider his Honour's reasoning in its entirety. Skeletal principles are not immutable. When they offend values of justice and human rights, they can no longer command ''unquestioning adherence''. A balancing exercise must be undertaken to determine

(715) Joint reasons at 84 [59].
(716) Joint reasons at 84-85 [61].
(717) See, eg, *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481 at 484, 490.
(718) (1998) 86 FCR 244.
(719) *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244 at 256.
(720) See joint reasons at 84 [60].
(721) (1992) 175 CLR 1 at 29-30.
(722) (2001) 208 CLR 1 at 115-116 [258].

whether, if the rule were overturned, the disturbance ''would be disproportionate to the benefit flowing from the overturning'' (723).

586 There is one further possibility that I should mention. It concerns the possible availability of a constitutional argument for the protection of the right to cultural knowledge, so far as it is based upon the spirituality of Australia's indigenous people. That involves the application of s 116 of the Constitution, which provides a prohibition on laws affecting the free exercise of religion. The operation of that section has not been argued in these appeals. However, it has been the subject of academic comment in relation to the NTA and its impact on indigenous culture and spirituality (724). The full significance of s 116 of the Constitution regarding freedom of religion has not yet been explored in relation to Aboriginal spirituality and its significance for Aboriginal civil rights. Yet there is at least one judicial comment that the ''Aboriginal religion of Australia ... must be included'' (725) in the definition, given that Aboriginal societies ordinarily have a religious basis (726). One thing is certain — the section speaks to all Australians and of all religions. It is not restricted to settlers, their descendants and successors, nor to the Christian or other organised institutional religions. It may be necessary in the future to consider s 116 of the Constitution in this context. At the least, it could influence the construction of the NTA so far as to avoid the possibility of invalidity by reason of s 116 (727).

587 Recognition of the native title right to protect cultural knowledge is consistent with the aims and objectives of the NTA, reflects the beneficial construction to be utilised in relation to such legislation and is consistent with international norms declared in treaties to which Australia is a party. It recognises the inherent spirituality and land-relatedness of Aboriginal culture. In my view it is within the scope of s 223 of the NTA. I would therefore disagree with the joint reasons that such a right is not susceptible to recognition under the NTA (728).

The NTA and principles of extinguishment

588 *The test for extinguishment*: As in *Wilson v Anderson* (729), the test for extinguishment must begin with the NTA, although, as that Act

(723) *Mabo [No 2]* (1992) 175 CLR 1 at 30.

(724) See Grutzner, ''Invalidating Provisions of the Native Title Act 1993 (Cth) on Religious Grounds: Section 116 of the Constitution and the Freedom to Exercise Indigenous Spiritual Beliefs'', in Boge (ed), *Justice for All? Native Title in the Australian Legal System* (2001), p 85.

(725) *Church of the New Faith v Commissioner of Pay-roll Tax (Vict)* (1983) 154 CLR 120 at 151.

(726) *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167.

(727) *Acts Interpretation Act* 1901 (Cth), s 15A.

(728) Joint reasons at 84 [60]; see also *Western Australia v Ward* (2000) 99 FCR 316 at 483-484 [666], per Beaumont and von Doussa JJ; cf at 539-541 [863]-[869], per North J.

(729) (2002) 213 CLR 401 at 456-457 [137], 459-460 [144]-[147].

itself provides, the common law retains a role. The NTA establishes a regime which contemplates that when an ''act'' is characterised as a previous exclusive or non-exclusive possession act, it works extinguishment of all native title or only that native title which is inconsistent with the rights in question. In some cases the effect is merely suspension of native title rights. In characterising the acts, a court must not apply general property law, as such, but must acknowledge the shift in Australia's legal foundations worked in *Mabo [No 2]* (730). Specifically, the meaning of ''exclusive'', as developed in this Court's decision in *Wik Peoples v Queensland* (731), must be applied on a case by case basis (732). Further, an ''act'' will not extinguish native title under the NTA unless there is a clear and plain intention to do so (733).

589 I agree with the joint reasons that a previous exclusive possession act will extinguish native title. I also agree that the relationship of all other interests with those of the asserted native title raises the question of inconsistency which must be answered in order to determine which, if any, native title rights are extinguished or suspended. This presents mixed questions of law and fact that must be remitted to the Full Court for decision in accordance with the proper application of the law to the facts as they are ultimately found to be. In order to resolve the questions of inconsistency, the inconsistency of incidents test should be applied (734). In doing so, a court's attention must be focused on the nature and extent of any non-indigenous interests in land, measured against the relevant rights and interests proved by the native title claimants.

590 The terms of pastoral leases, for example, usually confer rights and interests to make improvements necessary for pastoral activities and to prevent others from engaging in pastoral activities on the same land. The fact that extensive reservations for Aboriginal people co-exist with the pastoral leases in these appeals is indicative of the fact that the presence of native title holders on the subject land is not necessarily regarded in law as — and is not in fact — inconsistent with the enjoyment of such leases by those to whom the land is demised. Similarly, the terms of mining leases usually confer exclusive possession only to the extent necessary to prevent others from carrying out mining (735). The ''reasonable user'' test propounded by

(730) *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182.
(731) (1996) 187 CLR 1.
(732) See my reasons in *Wilson v Anderson* (2002) 213 CLR 401 at 461 [151].
(733) *Wilson v Anderson* (2002) 213 CLR 401 at 456-459 [137]-[143]; joint reasons in this case at 89 [78].
(734) *Wik* (1996) 187 CLR 1 at 185, 221, 238 and see *Wilson v Anderson* (2002) 213 CLR 401 at 466 [167] and joint reasons in this case at 89-90 [79].
(735) Joint reasons at 159-162 [290]-[296].

Beaumont and von Doussa JJ is, in my view, useful in this context (736).

591 *Inconsistency and qualified exclusivity*: This case raises questions of exclusivity and inconsistency. In *Yarmirr* (737), I expressed a dissenting opinion in relation to these matters. I held that the rights claimed in that case could retain a characteristic of exclusivity while being qualified by other public rights in the same area (738). In that case I held that the claimed right to ''speak for country'' could, therefore, be recognised as a form of exclusive title (739).

592 In the same way I would favour the recognition and non-extinguishment of the right to ''speak for country'' in this case. This right to ''speak for country'' is another of the claimed rights, which, like the right claimed in relation to the protection of cultural knowledge, was not well defined during oral argument or in written submissions. However, within its broad ambit, it obviously contains a range of specific rights (740). These include the right to determine the uses of the country concerned, to protect that country from degradation and to care for it spiritually.

593 It follows from my reasons in *Yarmirr* (741) that I would not personally favour the view that the grant of non-exclusive mining leases in Western Australia and the Northern Territory or reserving lands in Western Australia were sufficient to extinguish otherwise exclusive elements of native title. Certainly, I do not agree that the native title right to ''speak for country'' was necessarily extinguished in respect of such interests (742).

594 I acknowledge that my view was not accepted by the majority in *Yarmirr*. It is thus a minority opinion. Until it finds favour in a majority in this Court or until legislation validly so provides, I must accept that the categorisation of exclusivity, accepted by the majority in *Yarmirr*, applies to the present appeals. Whatever may be the right and duty of a Justice of this Court to adhere to a minority opinion concerning the meaning and application of the Constitution (where a duty is owed to a fundamental instrument of government under which other laws are made), in matters of statute and common law a clear holding of the Court is binding on all Justices. It must be given effect. The joint reasons in these appeals give effect to the approach adopted by the majority in *Yarmirr*. Even where I differ, I am therefore bound to follow the holding in *Yarmirr* and thus the approach and conclusions stated in the joint reasons which follow from that decision.

(736) *Western Australia v Ward* (2000) 99 FCR 316 at 403 [329], 478 [641].
(737) (2001) 208 CLR 1.
(738) *Yarmirr* (2001) 208 CLR at 127 [285].
(739) *Yarmirr* (2001) 208 CLR 1 at 134-141 [301]-[317].
(740) Joint reasons at 64-65 [14].
(741) (2001) 208 CLR 1 at 136 [305].
(742) cf joint reasons at 138-139 [222], 166 [309].

Conclusion and orders

595 Uncontrolled by a binding decision of this Court, I would not find that new sources of authority in relation to land and waters were automatically inconsistent with the rights and interests asserted by the native title claimants. In my opinion, to accept that approach is to endorse the broader concept of extinguishment advanced by Brennan CJ in his dissent in *Wik* but rejected by the majority of this Court. In my view, the holding in *Wik* should not be re-opened. Least of all would that be an appropriate course, given that substantial and complex amendments to the NTA were enacted by the Federal Parliament upon the basis that *Wik* correctly stated the law.

596 However, just as others must accept the ratio decidendi in *Wik* so I must accept the majority holding in *Yarmirr* in preference to my own opinions, as expressed in the latter case. Therefore, whilst continuing to prefer my own view, I must submit to the majority's reasoning so far as it influences the approach to be taken to the diverse questions presented in these appeals. Most crucially, the difference between my opinion and the opinions expressed in the joint reasons would manifest itself in a lesser willingness on my part to regard supervening third party rights and interests as inconsistent with the continued enjoyment in law and fact of native title rights and interests; the broader view that I would take as to what the latter may lawfully include under the NTA and State and Territory counterpart laws; and the stricter view that I would favour as to the ''clear and plain intention'' that must be established in legislation to have the consequence of depriving those who can establish continuing native title of the rights and interests that go with it.

597 It is pointless in these appeals, in reasons that are already very extensive, to elaborate my views at length, tracing where they lead for the individual claims. This is an area of law where past experience suggests that certainty has its own merit and where individual judges should be willing to surrender their personal preferences so as to contribute to certainty of binding principle and to discourage attempts to undo that principle without compelling reason.

598 Such an approach also has the advantage of giving to courts, administrators and the parties clear guidance as to the legal authority that commands the assent of five members of this Court. It thus gives effect to the authority of this Court, expressed in succeeding decisions that have come to the Court for resolution. The judicial dissenter is entitled initially to express his or her minority opinion. That opinion may be adhered to where there is no rule that binds or where the source of the dissent is the higher law of the Constitution. But otherwise, in the end, the dissenter must submit to the law as expressed in the majority opinions. As I do.

599 I therefore agree with the joint reasons save as they deal with the particular issues that I have isolated in these reasons. My difference

with the joint reasons in that respect does not affect the orders proposed in those reasons. I therefore agree in those orders.

CALLINAN J.

I. INTRODUCTION

600 This judgment is divided and subdivided into several parts. The first outlines the interests and parties involved and the outcome of proceedings in the Full Federal Court. The second deals with some preliminary matters raised by the appeals, including the operation of the *Racial Discrimination Act* 1975 (Cth) and the holding in *Wik* (743). The third is concerned with the effect of tenures and interests relied on as extinguishing native title. The fourth touches upon the relevance of international law to these appeals. The fifth and sixth parts summarise my conclusions and state the orders that I would make.

601 The paragraph numbers and specific topics with which they deal are as follows:

(743) *Wik Peoples v Queensland* (1996) 187 CLR 1.

The disposition of the appeals to the Full Court of the Federal Court

602 In these native title claims, the Full Court of the Federal Court (Beaumont and von Doussa JJ, North J dissenting) allowed appeals by the State of Western Australia (the State), Crosswalk Pty Ltd and Baines River Cattle Co Pty Ltd (Crosswalk), Alligator Airways Ptd Ltd and others (the Alligator appellants), Argyle Diamond Mines Pty Ltd and the Argyle Diamond Mine Joint Venture (Argyle), and the Northern Territory in part, and dismissed an appeal by the Kimberley Land Council (744). Beaumont and von Doussa JJ identified the various areas affected by the decision as follows (745):

> ''No extinguishment has occurred in respect of Booroongoong (Lacrosse Island), Kanggurryu (Rocky Island), and the north-west extremity of the mainland area of the mainland portion of the determination area encompassing Shakespeare Hill and Cape Donnet, outside the limits of the former Carlton Hill Station pastoral lease 3114/1058. In respect of those areas, and Reserve 40260 which is outside the area of the Ord Project, and is subject to the operation of s 47A of the NTA, there should be a determination that the common law holders of native title are entitled as against the whole world to possession, occupation, use and enjoyment of these parts of the determination area. A determination in similar terms was made in *Mabo [No 2]*.
>
> In respect of Reserves 26600, 31221, 40536 and 41401, each for 'Use and Benefit of Aboriginal Inhabitants', Reserve 31504 for 'Arts and Historical — Aborigines' and Reserve 32446 'Native Paintings', being reserves within the Ord Project area to which s 47A of the NTA applies there should be a determination that the common law holders of native title are entitled as against the whole world to possession, occupation, use and enjoyment of those parts of

(744) *Western Australia v Ward* (2000) 99 FCR 316 at 482-483 [661].
(745) *Western Australia v Ward* (2000) 99 FCR 316 at 483 [663]-[665].

the determination area, save that their entitlement does not affect the public works comprising the Ord Project.

In the balance of the determination area where native title has not been wholly extinguished, we have held that the exclusivity of native title rights to possess, occupy, use and enjoy the land has been extinguished. To the extent that legislation (in the case of nature reserves, minerals and petroleum) or executive action (in the case of pastoral and other kinds of lease) have created rights in the Crown or third parties that are inconsistent with the continued enjoyment of native title rights and interests, native title rights and interests yield to the extent of the inconsistency and are extinguished.''

603 The determination that emerged as a result of the holdings of the Full Court was as follows:

''DETERMINATION

THE COURT ORDERS, DECLARES AND DETERMINES THAT:

1. Native title exists in the 'determination area' save for the areas of land or waters described in the Second Schedule. The determination area is that part of the land or waters within the area depicted by red outline on the map in the First 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 existing in the determination area is held by the Miriuwung and Gajerrong People, and in respect of that part of the determination area known as Booroongoong (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 paragraph 7 hereof the nature and extent of the native title rights and interests in:

The whole of the land in the Glen Hill pastoral lease;

The whole of Reserve 40260;

Booroongoong (Lacrosse Island);

Kanggurryu (Rocky Island);

The north-west extremity of the mainland portion of the determination area encompassing Shakespeare Hill and Cape Donnet, being the mainland lying outside the limits of the following former leases 3114/1058, 396/508 and 2163/98;

The whole of NT portion 3541 (Policeman's Hole);

The whole of NT portion 3542 (Bucket Springs); and

The whole of NT portion 3863 (Bubble Bubble)

are an entitlement as against the whole world to possession, occupation, use and enjoyment of these parts of the determination area.

4. Subject to paragraph 7 hereof the nature and extent of the native title rights and interests in Reserves 26600, 31221, 40536 and

41401, each for 'Use and Benefit of Aboriginal Inhabitants', Reserve 31504 for 'Arts and Historical — Aborigines' and Reserve 32446 'Native Paintings', being reserves within the Ord Project area to which s 47A of the *Native Title Act* 1993 (Cth) ('NTA') applies, are an entitlement as against the whole world to possession, occupation, use and enjoyment of these parts of the determination area, save that their entitlement does not affect the public works comprising the Ord Project.

5. Subject to paragraphs 7, 8, 9 and 10 hereof the nature and extent of the native title rights and interests existing in the balance of the determination area are as follows:

(a) a right to possess, occupy, use and enjoy the land;
(b) a right to make decisions about the use and enjoyment of the land;
(c) a right of access to the land;
(d) a right to use and enjoy the traditional resources of the land;
(e) a right to maintain and protect places of importance under traditional laws, customs and practices in the determination area.

6. The nature and extent of other interests in relation to the determination area are the interests created by the Crown or created otherwise, as set out in the Third Schedule.

7. There is no native title right or interest in minerals and petroleum in the State as defined in the *Mining Act* 1904 (WA), the *Mining Act* 1978 (WA), the *Petroleum Act* 1936 (WA) and the *Petroleum Act* 1967 (WA), or in the Territory as defined in the *Minerals (Acquisition) Act* (NT) and the *Petroleum Act* 1984 (NT). In all nature reserves or wildlife sanctuaries created in Western Australia in the determination area before the *Racial Discrimination Act* 1975 (Cth) came into operation, native title to take fauna has been wholly extinguished.

8. To the extent that any inconsistency exists between the native title rights and interests referred to in paragraph 5 hereof and the rights conferred by other interests referred to in paragraph 6 hereof the native title rights and interests must yield to such other rights.

9. The native title rights and interests referred to in paragraph 5 hereof are not exclusive of the rights and interests of others.

10. The native title rights and interests described in paragraphs 3, 4 and 5 are subject to regulation, control, curtailment or restriction by valid laws of Australia.

11. (a) Declare that the rights and interests from time to time comprising the native title area are held by the common law holders.

(b) Direct that, within 3 months of the date of this determination, a representative of the common law holders nominate in writing to the Federal Court a prescribed body corporate to perform the functions mentioned in s 57(3) of the

NTA. Reserve liberty to apply to a single judge of the Court in that connection.

FIRST SCHEDULE

. . .

SECOND SCHEDULE

Native title has been wholly extinguished in the following parts of the determination area (with the exception of the reserves specified in paragraphs 3 and 4 of the Determination):

1. All the land identified in Exhibits 21A and 21B as:

I. Diversion Dam and Works Area (1960);

II. First Farm Area (1960);

III. Second Farm Area (1961);

IV. Kununurra Townsite (1961) except for the area now comprised in Reserve 37883 — Mirima (Hidden Valley) National Park;

V. Third Farm Area (1960-1962);

VI. Kimberley Research Station Extension (1963);

VII. Fourth Farm Area and Levy Bank (1967);

VIII. Packsaddle Farm Area (1972 and 1975);

IX. The lands resumed from the Lissadell and Texas Downs Pastoral Leases in 1972, which now comprise part of Reserve 31165 (and include that part of Special Agreement Lease M259SA which is within the determination area).

2. The land formerly comprised in the Argyle Downs Pastoral Lease, and the freehold land surrounding the former Argyle Downs homestead (King Location 2) acquired by the Minister of Works under an Agreement for Sale signed on 23 November 1970.

3. Land in Reserves (being lands outside the areas already described in this Schedule).

I. The whole of former Reserve 16729 ('Use and Requirements of the Government of the State').

II. The whole of Reserve 34724 ('Preservation of Historic Relics').

III. The whole of Reserve 40978 ('Repeater Station Site').

IV. The whole of Reserve 39016 ('Repeater Station Site').

V. The whole of Reserve 42710 ('Quarantine Checkpoint').

4. Land in leases (being lands outside the areas already described in this Schedule).

I. Pastoral leases

(a) Those parts of pastoral leases granted in the determination area under the *Land Regulations* 1882 (WA), the *Land Regulations* 1887 (WA) and the *Land Act* 1898 (WA) which were 'enclosed and improved' within the meaning of the reservations in favour of Aboriginal people contained in the said pastoral leases.

(b) Those parts of pastoral leases granted in the determination

area under the *Land Act* 1933 (WA) which were or are enclosed or improved within the meaning of s 106(2) of the *Land Act* 1933. Without limiting the generality of this subparagraph of the determination, it is declared that in land the subject of pastoral leases 3114/640 (Ivanhoe Station), 3114/1176 (Carlton Hill Station), 3114/1001 (Lissadell Station) and 3114/995 (Texas Downs Station) the areas agreed as 'enclosures' in Exhibit 55, Schedules 1A to 1F, are enclosed lands within the meaning of s 106(2).

II. Other leases

The whole of the land in lease 152/140 (Wallace and Others);
The whole of the land in lease 332/1175 (R G Skuthorp) being portion of Reserve 1059;
The whole of the land in lease 332/2141 (G & J Harman) being portion of Reserve 1061;
The whole of the land in lease 152/745 (Ah Kim);
The whole of the land in lease 152/836 (Favell);
The whole of the land in lease 152/570 (Ah Ying) being portion of Reserve 1600.

III. Mining Leases

M80/012 in area 95C, 96;
M80/014 in area 95C, 96;
M80/339 in area 95C, 96;
M80/347 in area 5;
M80/401 in area 95C, 96;
M80/402 in area 96;
M80/360 in area 29, 95M;
M80/079 in area 29, 95M.

THIRD 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 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 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 licensees 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 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 s 46(1A) of the *Lands Acquisition Act* 1979 (NT).

(i) Other interests held by members of the public arising under the common law.''

604 All parties to the appeals to the Full Court of the Federal Court are parties to the appeals to this Court, although the State has withdrawn some of its grounds of appeal. The issues raised in sum by all notices of appeal do, however, remain live by reason of the reliance by parties on the same side of the record as the State upon those withdrawn grounds.

The issues raised

605 In addition to questions regarding the true nature of the land tenures involved and the rights to which they give rise, the appeals raise complex questions as to the relationship between the *Racial Discrimination Act* 1975 (Cth) (the RDA) and the *Native Title Act* 1993 (Cth). The following questions accordingly need to be answered.

606 First, at common law, what is the effect of the activity or act or the grant of the interest on native title? Each may extinguish native title wholly or partly.

607 Secondly, when did the activity or act or the grant of interest take place? If it took place before 31 October 1975 (when the RDA commenced), then the RDA does not apply to it. If the activity or act or the grant took place after 31 October 1975, then the possible effect of the RDA must be considered. The RDA may invalidate the grant or action, or it may not.

608 Thirdly, if the activity or act or grant is valid but has not wholly extinguished native title at common law, does it fall within the provisions of the *Native Title Act* (or complementary State and Territory legislation) dealing with ''previous exclusive possession acts'' and ''previous non-exclusive possession acts''? Those pro-

visions will need to be considered only when it is alleged that native title has survived a valid grant, act or activity. If, on the other hand, native title has been completely extinguished by a valid grant or activity or act, that will generally be the end of the inquiry, and it will be unnecessary to answer the questions that follow.

609 Fourthly, if the activity or act or grant is invalid because of the operation of the RDA, does the *Native Title Act* (or complementary State or Territory legislation) validate it? This in turn requires consideration whether the activity or act or the grant is validated as a ''past act'' or ''intermediate act'' under the *Native Title Act* and related State and Territory legislation, and into what category of past or intermediate act the activity or act or the grant falls.

610 Finally, does the validated activity, act or grant fall within the provisions of the *Native Title Act* (or complementary State and Territory legislation) dealing with ''previous exclusive possession acts'' and ''previous non-exclusive possession acts''? If it does, then the consequences for native title are to be determined under the provisions dealing with ''previous exclusive possession acts'' and ''previous non-exclusive possession acts''. Otherwise, the category of past act or intermediate act will decide the issue.

611 Before considering the effect of each activity or act or grant on native title, a number of subsidiary matters need to be considered. I will deal with them first.

II. Preliminary Issues in the Appeals

What was the applicable law?

612 The Full Court of the Federal Court did not consider the amendments to the *Native Title Act* in 1998 which introduced provisions relating to ''previous exclusive possession acts'' and ''previous non-exclusive possession acts'' (746). Nor did their Honours consider the effect of the *Titles (Validation) and Native Title (Effect of Past Acts) Act* 1995 (WA) (the State Validation Act), the relevant amendments to which commenced after the trial judge delivered judgment. Their Honours did not do so for two reasons. First, because they found that native title was wholly extinguished by the Ord Project, they did not regard it as necessary to explore the effect of that legislation (747). Secondly, they followed Federal Court authority which had held that a right of appeal to that Court was an appeal in the strict sense, so that they were bound to apply the law as it stood at the date of the hearing at first instance (748). That authority has now

(746) These will be considered in more detail later in these reasons.
(747) See, eg, *Western Australia v Ward* (2000) 99 FCR 316 at 482 [659].
(748) *Western Australia v Ward* (2000) 99 FCR 316 at 482 [659].

effectively been overruled by this Court in *CDJ v VAJ* (749) and *Allesch v Maunz* (750).

613 Accordingly, as Gleeson CJ, Gaudron, Gummow and Hayne JJ say in their reasons, their Honours were mistaken in the second respect. The version of the *Native Title Act* incorporating the 1998 amendments as well as the State Validation Act in force at the time of the hearing of the appeal were applicable law. As will become apparent when I deal with the effect of the previous exclusive possession act regime, however, I do not think that their Honours in the Full Court erred in the first respect.

Is partial extinguishment of native title possible?

614 It is convenient to refer to the indigenous peoples on whose behalf the claims for determinations under the *Native Title Act* are made as the ''claimants''.

615 The first argument of the claimants was that it was not appropriate to describe native title as a bundle of rights: it was, in effect, monolithic, and not therefore susceptible to partial extinguishment. That argument was accepted by Lee J at first instance and rejected by the majority in the Full Court. There, their Honours said (751):

> ''In our opinion the rights and interests of indigenous people which together make up native title are aptly described as a 'bundle of rights'. It is possible for some only of those rights to be extinguished by the creation of inconsistent rights by laws or executive acts. Where this happens 'partial extinguishment' occurs. In a particular case a bundle of rights that was so extensive as to be in the nature of a proprietary interest, by partial extinguishment may be so reduced that the rights which remain no longer have that character. Further, it is possible that a succession of different grants may have a cumulative effect, such that native title rights and interests that survived one grant that brought about partial extinguishment, may later be extinguished by another grant.
>
> In our opinion the trial judge erred in holding that there is no concept at common law of partial extinguishment of native title.''

616 Their Honours were correct. In *Yanner v Eaton* (752), in relation to matters unaffected by my dissent in that case, I collected a number of statements made by the Justices of this Court which reflected a universal view to that effect:

> ''In both *Mabo [No 2]* and *Wik* the Justices of this Court discuss, at length, native title but attempt no definition of it. Perhaps this is

(749) (1998) 197 CLR 172.
(750) (2000) 203 CLR 172.
(751) *Western Australia v Ward* (2000) 99 FCR 316 at 349-350 [109]-[110].
(752) (1999) 201 CLR 351 at 408-409 [152]-[153].

because not only is it, as it has been described, fragile (753), but also because to non-indigenous people it may be a somewhat elusive concept. But neither its fragility nor its elusiveness absolves the Court from identifying native title rights in any case calling for their consideration. In the former case Brennan J discussed some of its nature and incidents (754): 'Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty . . .'

The language of the Justices of this Court when reference is made to native title has tended to be couched, as perhaps it only can be, in terms of 'incidents' (755), 'nature' (756), 'rights' (757), 'traditions' (758), 'customs' (759) and 'entitlements' (760).''

617 To that I would add what Deane and Gaudron JJ said in *Mabo v Queensland [No 2]* (761):

> ''The *personal* rights conferred by common law native title do not constitute an estate or interest in the land itself. They are extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive possession.'' (Emphasis added.)

618 In any event, the *Native Title Act*, under which the claimants sought relief, contemplates the possibility of partial extinguishment by the use of the expressions ''partial extinguishment'' (762) and ''complete'' extinguishment (763) and is, therefore, to the same effect as the concept of native title as a bundle of rights capable of incremental or

(753) See, eg, *Fejo v Northern Territory* (1998) 195 CLR 96 at 151.
(754) *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58.
(755) See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58, per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185, per Gummow J.
(756) See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58, per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185, per Gummow J.
(757) See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 60, per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126, per Toohey J; at 185, 203, per Gummow J.
(758) See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58, 61, per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126, per Toohey J; cf *Fejo v Northern Territory* (1998) 195 CLR 96 at 128.
(759) See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58, 61, per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126, per Toohey J; cf *Fejo v Northern Territory* (1998) 195 CLR 96 at 128.
(760) See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 61-62, per Brennan J; *Walden v Hensler* (1987) 163 CLR 561 at 565, per Brennan J.
(761) (1992) 175 CLR 1 at 110.
(762) *Native Title Act*, s 23G, s 23I.
(763) *Native Title Act*, s 4(6), s 23A(2).

partial extinguishment as recognised in the passages in the cases to which I referred in *Yanner*.

Inconsistency is the test for extinguishment

619 The claimants made much of statements in the case law that legislation or executive action must evince a ''clear and plain intention'' to extinguish native title. I agree generally with Gleeson CJ, Gaudron, Gummow and Hayne JJ that references to ''clear and plain intention'' distract attention from the real inquiry, which is whether the rights or interests asserted or conferred by executive governments or granted under a law are consistent with the existence of native title (764). This is especially so because in this field of discourse there is no doubt that, except to the extent expressly stated, legislatures and colonial and State Executives did not intend to preserve native interests in, or title to, land; and those who were parties to instruments of title, leases or licences would hardly have contemplated the existence, let alone intended the survival, of native title rights and interests (765). If the rights and interests asserted or conferred by executive governments or granted under a law are inconsistent with native title, then the effect is extinguishment, no more and no less (766). Any imputed knowledge or intention on the part of those making the grant is irrelevant (767). Because that is so, it will generally be necessary to compare the particular nature of native title rights asserted and proved, to the extent that they are recognisable by the common law, with the rights and interests granted under the relevant law to determine whether there is inconsistency (768).

620 I say ''generally'' for a reason. In some cases, a comparison will be unnecessary. It is well settled that the grant of some interests will extinguish all native title rights, whatever the content of the latter. In *Mabo [No 2]*, Deane and Gaudron JJ said (769):

> ''[Native title rights] are extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a *lease conferring the right to exclusive possession*.'' (Emphasis added.)

(764) Reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at 89-90 [78]-[80].

(765) See C Boge, ''A Fatal Collision at the Intersection? The Australian Common Law and Traditional Aboriginal Land Rights'', in Boge (ed), *Justice for All? Native Title in the Australian Legal System* (2001) 1, at pp 30-31.

(766) Estates or interests which derive directly from the common law are not subject to a title which can be said to have its origin in a different system of customs and traditions: see *Fejo v Northern Territory* (1998) 195 CLR 96 at 130 [53]. That explains why suspension of native title by an inconsistent interest is not possible at common law.

(767) This is not to deny that extrinsic materials, such as parliamentary debates, which bear on the nature of the interests granted may occasionally be useful.

(768) *Wik* (1996) 187 CLR 1 at 185, per Gummow J.

(769) *Mabo [No 2]* (1992) 175 CLR 1 at 110.

621 Gaudron J expressly agreed with that statement in *Wik* (770).

622 In *Fejo v Northern Territory* (771), the Court unanimously held that an estate in fee simple extinguished native title. The joint judgment (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) explained the reasons for that conclusion in these words (772):

> ''The rights of native title are rights and interests that relate to the use of the land by the holders of the native title. For present purposes let it be assumed that those rights may encompass a right to hunt, to gather or to fish, a right to conduct ceremonies on the land, a right to maintain the land in a particular state or other like rights and interests. They are rights that are inconsistent with the rights of a holder of an estate in fee simple. Subject to whatever qualifications may be imposed by statute or the common law, or by reservation or grant, the holder of an estate in fee simple may use the land as he or she sees fit *and may exclude any and everyone from access to the land*.'' (Emphasis added.)

623 In a separate judgment in that case, Kirby J said (773):

> ''Fee simple interests, whether granted by or under statute or otherwise . . . have well settled legal features. The most important of these, missing in the pastoral leases considered in *Wik*, is the right in law to exclusive possession. Of its nature, that right cannot co-exist with native title.''

624 It follows from these and other authorities (774) that grants of freehold and ordinary leases at common law extinguish native title. They do so because, subject to whatever legal reservations and limitations are imposed by statute or by the grant itself, they give the holder of the interest a right of exclusive possession as that right is to be understood at common law; that is, effective control over who may and who may not have access to the land. (I will explain later why I use the word ''effective''.) If that right is sufficient to extinguish native title in the case of freehold estates and demises, then other interests which confer that right on the grantee will also extinguish native title. There can be no logical distinction between demises and these other interests. As will be apparent later, particularly in the context of pastoral leases, the existence of some reservations or restrictions on the use that may be made of leased land is compatible with a right of exclusive possession. In such cases, any native title

(770) (1996) 187 CLR 1 at 135.
(771) (1998) 195 CLR 96.
(772) *Fejo* (1998) 195 CLR 96 at 128 [47].
(773) *Fejo* (1998) 195 CLR 96 at 150-151 [105].
(774) See, eg, *Wik* (1996) 187 CLR 1 at 176, per Gummow J; *Yanner v Eaton* (1999) 201 CLR 351 at 395-396 [107]-[108], per Gummow J; *Wilson v Anderson* (2002) 213 CLR 401 at 427 [36], per Gaudron, Gummow and Hayne JJ.

rights and interests over the same land will be extinguished, so that there will be no need to identify those rights and interests (775).

625 Because inconsistency between native title and other rights and interests is the test for extinguishment, I agree with the majority of the Full Court that the test for extinguishment adopted by Lee J from the judgment of Lambert JA in *Delgamuukw v British Columbia* (776) was the wrong one. The ''adverse dominion'' test propounded by Lambert JA has three elements: first, there must be a clear and plain intention to extinguish native title; secondly, there must be an act that demonstrates an ''exercise of permanent adverse dominion''; and thirdly, unless the legislation provides that extinguishment arises on creation of the tenure inconsistent with native title, there must be ''actual use'' of the land. None of these elements forms part of Australian law. The requirement of a ''clear and plain intention'', as I said earlier, distracts attention from the proper inquiry and is inappropriate in circumstances in which the known intention was almost certainly to the contrary. The requirement of an ''exercise of permanent adverse dominion'' is totally at odds with the authorities making it clear that leases may extinguish native title. The claimants' attempts to circumvent this problem by treating ''exercise of permanent adverse dominion'' as ''an exercise of adverse dominion lasting *a long time*'' (whatever that may mean) are unconvincing (777). And a requirement of ''actual use'' would set at nought the principle that it is inconsistency in *rights* which determines extinguishment.

626 Something should be said about the suggestion of the other member of the Full Court, North J, that native title would not be extinguished if there were a ''minor or insignificant inconsistency between the rights or interests created and native title'' (778). His Honour attempted to demonstrate this by a rather unlikely example (779):

> ''For the sake of argument imagine an area of vacant Crown land outside a bush town. The local aboriginal community is able to establish native title to that land on the basis of a connection with the land reaching back for many hundreds of years. The site is of

(775) See *Wik* (1996) 187 CLR 1 at 86, per Brennan CJ; at 154-155, per Gaudron J (accepting that if the pastoral leases there had conferred a right of exclusive possession, native title would have been extinguished, but differing as to whether the leases did confer exclusive possession).

(776) (1993) 104 DLR (4th) 470 at 670-672.

(777) Three members of the Court in *Mabo [No 2]* would have found that leases to establish a sardine factory over the islands of Dauar and Waier for twenty years would have extinguished native title over the land: see *Mabo [No 2]* (1992) 175 CLR 1 at 15, per Mason CJ and McHugh J; at 71-73, per Brennan J. It is difficult to see how that would be the case if the adverse dominion requirement were Australian law.

(778) *Western Australia v Ward* (2000) 99 FCR 316 at 489 [689].

(779) *Western Australia v Ward* (2000) 99 FCR 316 at 489 [690]. That a responsible government would grant a lease of land for a day for a race meeting rather than a licence or other limited right is almost inconceivable.

central spiritual significance, is used regularly for ceremony as well as for hunting and gathering, and it is not used by others at all. The local shire decides to hold a race meeting on the land as part of the celebration of the twenty-fifth anniversary of the settlement of the town, and approaches the Commonwealth for permission to use the land for the purpose. The Commonwealth grants to the shire an exclusive possession lease for the day of the race meeting. The shire has no expectation that the event will be repeated in later years. The exclusive possession lease creates rights in the lessee which are temporarily inconsistent with some of the rights and interests dependent upon the existence of native title. The law could not hold that the inconsistent rights granted to the shire for one day bring to an end the native title of the aboriginal community dating back hundreds of years. *Such a result is not necessary to achieve the protection of the granted rights. Rather, the exercise of rights under traditional aboriginal law dependent upon the holding of native title which are inconsistent with the granted rights are suspended for the day of the race meeting. Thereafter, those rights may be exercised again*.'' (Emphasis added.)

On this basis, his Honour reached the following conclusion (780):

''[A] grant by the Crown of a lease which confers exclusive possession on the lessee does not extinguish native title where the duration of the lease is less than the duration of native title. The exercise of rights and interests dependent on native title is suspended during the term of the lease. Those rights continue once the lease expires.''

627 Both the conclusion and the reasoning that underpins it should be rejected. They are contrary to the numerous authorities that have settled that a lease can extinguish native title (781). Furthermore, his Honour seeks to make a distinction between grants in fee simple and leases which has no support in principle. Consider the effect of a grant of a determinable fee simple on native title. Had the Commonwealth, to give another fanciful example, granted a determinable fee simple (782) over the site ''until the Council paints the town hall red'', then all native title to the land would unquestionably be extinguished.

(780) *Western Australia v Ward* (2000) 99 FCR 316 at 513 [776].

(781) Nothing in s 23G(1)(b) of the *Native Title Act* changes this result. That provision leaves it to the common law to determine the effect of inconsistent rights and interests upon grant. For reasons already advanced, the effect in such cases is extinguishment, not suspension. Section 23G(1)(b)(ii) and its State and Territory equivalents will operate only when, apart from the *Native Title Act*, the act does not extinguish native title rights and interests. That will essentially be limited to cases in which the RDA invalidates an act and thus deprives it of extinguishing effect at common law.

(782) On the determinable fee simple, see Gray and Gray, *Elements of Land Law*, 3rd ed (2000), pp 294-295.

That would be so despite any Commonwealth expectation that the Council would paint the hall red the following day; regardless of whether the Council in fact painted the hall on the expected day or in fifty years time; and irrespective of any continuing Aboriginal connection with the land (783). Extinguishment would occur because the incidents of a fee simple, particularly exclusive possession, are inconsistent with native title rights (784). The legal presumption which is said to provide the basis for the recognition of native title by the common law, that the sovereign does not intend to displace antecedent title to land (785), would be rebutted by the creation of the inconsistent interest (786). Precisely the same principles apply in the case of a lease. If the grant confers a right of exclusive possession, it matters not whether the term of the demise is one day or 1,000 years (787): there is still an inconsistency of incidents (788). To speak of *suspension* of native title by lease is to seek to ''convert the fact of continued connection with the land into [an indestructible] right to maintain that connection'' (789). Such an argument was rejected in *Fejo*, and must be rejected here.

Extinguishment at common law and previous exclusive possession acts under the Native Title Act 1993 *(Cth)*

628 Section 223 of the *Native Title Act* provides:

''*Native title*

Common law rights and interests

(1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those

(783) *Fejo* (1998) 195 CLR 96 at 128 [46].

(784) *Fejo* (1998) 195 CLR 96 at 131 [55], [58].

(785) *Western Australia v The Commonwealth* (the *Native Title Act Case*) (1995) 183 CLR 373 at 422-423.

(786) See *Mabo [No 2]* (1992) 175 CLR 1 at 63, per Brennan J: ''Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power.''

(787) As North J himself observed in the Federal Court (*Western Australia v Ward* (2000) 99 FCR 316 at 514 [780]): ''In principle there is no distinction between the grant of a short term interest or a long term interest. The extinguishment consequences must follow in the same way in either case.''

(788) *Wik* (1996) 187 CLR 1 at 86, per Brennan CJ.

(789) *Fejo* (1998) 195 CLR 96 at 128 [46].

laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting sub-section (1), *rights and interests* in that sub-section includes hunting, gathering, or fishing, rights and interests.''

629 In *The Commonwealth v Yarmirr* (790), I observed that s 223(1) was almost a verbatim restatement of a passage from the judgment of Brennan J in *Mabo [No 2]* (791). That indicates that the legislature wished to keep intact, so far as possible, the jurisprudential basis of native title that had been formulated in that case. Another indication of this aim comes from the subheading to the provision: ''Common law rights and interests.'' Moreover, the adoption, without elaboration, of the expression repeatedly used in *Mabo [No 2]* and *Wik*, ''exclusive possession'', points in the same direction. They make it clear, in my opinion, that the legislature was not intending to create some sort of special statutory title for indigenous people, but was adopting the characteristics of, and limitations on, native title so far revealed in the case law (792). That case law demonstrated that native title would not be recognised by the common law if it had been surrendered to the Crown or extinguished at any stage since sovereignty was acquired (793). It follows that native title will not be recognised under s 223(1)(c) of the *Native Title Act* if it has been extinguished at common law.

630 The question is what relationship extinguishment under the common law has with the provisions in Pt 2, Div 2B of the *Native Title Act*. That Division provides that certain acts attributable to the Commonwealth that were done on or before 23 December 1996 completely or partially extinguish native title. The definition of ''previous exclusive possession act'' in s 23B is the starting point. It relevantly provides:

''*Previous exclusive possession act*

. . .

Grant of freehold estates or certain leases etc on or before 23.12.1996

(2) An act is a *previous exclusive possession act* if:

(790) (2001) 208 CLR 1 at 151-152 [341].

(791) (1992) 175 CLR 1 at 58.

(792) *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 86-88 [165]-[170], per McHugh J.

(793) *Mabo [No 2]* (1992) 175 CLR 1 at 70, per Brennan J; *Fejo* (1998) 195 CLR 96; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 90 [177], per McHugh J. It was also clear that, at the acquisition of sovereignty (and not at some later date), native title had to be possessed under the traditional laws and customs observed by the indigenous inhabitants: see *Mabo [No 2]* (1992) 175 CLR 1 at 57, per Brennan J. This criterion for recognition has become embodied in s 223(1)(a).

(a) it is valid (including because of Division 2 or 2A of Part 2); and
(b) it took place on or before 23 December 1996; and
(c) it consists of the grant or vesting of any of the following:
(i) a Scheduled interest (see section 249C);
(ii) a freehold estate;
(iii) a commercial lease that is neither an agricultural lease nor a pastoral lease;
(iv) an exclusive agricultural lease (see section 247A) or an exclusive pastoral lease (see section 248A);
(v) a residential lease;
(vi) a community purposes lease (see section 249A);
. . .
(viii) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters.

. . .
Construction of public works commencing on or before 23.12.1996
(7) An act is a *previous exclusive possession act* if:
(a) it is valid (including because of Division 2 or 2A); and
(b) it consists of the construction or establishment of any public work that commenced to be constructed or established on or before 23 December 1996.''

The remainder of s 23B excludes various acts from the definition of ''previous exclusive possession act''.

631 Section 23C states the effect on native title of previous exclusive possession acts. It provides:

''*Confirmation of extinguishment of native title by previous exclusive possession acts of Commonwealth*
Acts other than public works
(1) If an act is a previous exclusive possession act under sub-section 23B(2) (including because of sub-section 23B(3)) and is attributable to the Commonwealth:
(a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned; and
(b) the extinguishment is taken to have happened when the act was done.
Public works
(2) If an act is a previous exclusive possession act under sub-section 23B(7) (which deals with public works) and is attributable to the Commonwealth:
(a) the act extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated; and
(b) the extinguishment is taken to have happened when the construction or establishment of the public work began.

Other extinguishment provisions do not apply

(3) If this section applies to the act, sections 15 and 22B do not apply to the act.''

632 Section 23D preserves conditions or reservations in favour of Aboriginal peoples or Torres Strait Islanders despite the extinguishment of native title brought about by s 23C.

633 Section 23E enables a State or Territory to make laws confirming the extinguishment of native title. It is cast in these terms:

''*Confirmation of extinguishment of native title by previous exclusive possession acts of State or Territory*

If a law of a State or Territory contains a provision to the same effect as section 23D or 23DA, the law of the State or Territory may make provision to the same effect as section 23C in respect of all or any previous exclusive possession acts attributable to the State or Territory.''

634 A number of submissions of the claimants contended or assumed that when an act was a ''previous exclusive possession act'', the extinguishment of native title had to occur under Pt 2, Div 2B of the *Native Title Act* and its State and Territory equivalents. It was therefore important for the Full Court to consider the effect of those provisions, but the majority had regarded it as unnecessary to do so because of the extinguishing effect at common law of various interests (794).

635 In my opinion, those submissions are misguided. Part 2, Div 2B of the *Native Title Act* is not designed to be the sole basis for the extinguishment of native title rights and interests by the acts there identified. The fact that an act (for example, a grant of freehold) is a ''previous exclusive possession act'' does not necessarily mean that extinguishment of native title took place *under* the Act (795). That is so for several reasons. As explained above, native title that has already been extinguished at common law cannot be ''recognised'' under s 223(1)(c), unless the *Native Title Act* directs that such extinguishment must be disregarded (796). There is nothing in the Act to suggest that different principles apply to previous exclusive possession acts; indeed, the opposite is the case. It would be peculiar in the extreme to think that Pt 2, Div 2B might revive native title already extinguished at common law simply in order to extinguish it. Such a construction of Div 2B is also denied by s 23J, which provides

(794) *Western Australian v Ward* (2000) 99 FCR 316 at 482 [659], per Beaumont and von Doussa JJ.

(795) Nor does Div 2B preclude the possibility that extinguishment under the common law may be wider, in some respects, than that brought about under the Act. The grant of mining leases and interests for national parks, for example, may well have a wider extinguishing effect on native title than that provided for by Div 2B.

(796) See *Native Title Act*, ss 47, 47A and 47B.

that native title holders are entitled to compensation for any extinguishment under that Division, but ''only to the extent . . . that the native title rights and interests were not extinguished otherwise than under [the] Act''. That section expressly contemplates that native title can be extinguished otherwise than under the *Native Title Act*; it must mean extinguishment at common law. The State and Territory equivalents are to the same effect (797). For these reasons, the previous exclusive possession act provisions do not preclude extinguishment at common law. Accordingly, when complete extinguishment is said to have occurred at common law, there will often be no need to invoke the provisions of Pt 2, Div 2B. It is only when Pt 2, Div 2B might bring about extinguishment that is wider than, or different from, the common law that its provisions will need to be specifically addressed. All this is to explain my statement earlier in these reasons that if native title has been completely extinguished at common law by a valid grant or action, that will generally be the end of any inquiry.

Does native title include the right to exploit minerals?

636 The next matter of general importance argued by the claimants was that the Full Court erred in holding that native title rights to resources were rights of a customary or traditional kind and did not include minerals and petroleum (798). It is necessary to deal with this matter, because, although Lee J held that the claimants had rights to use and enjoy and control the use and enjoyment by others of resources of the area the subject of the determination, his Honour did not identify which resources were intended to be covered by the determination. His Honour did, however, make this finding (799):

> ''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 archeological evidence suggested that sources of ochre within Miriuwung and Gajerrong country were limited and that all locations of ochre were associated with sacred sites.''

637 No suggestion was made by any party, nor was there evidence to show, that the claimant peoples had ever sought to use any subterranean resources (except ochre, and obviously rock or stone and root materials to the extent that these required shallow excavation) for any purposes.

638 It is important to appreciate that native title in respect of land, although it will be enforced by the common law to the extent possible, is quite different from title to land, especially fee simple title, at common law. If it were of a similar quality to, for example, fee simple

(797) See, eg, State Validation Act, s 12P.
(798) *Western Australia v Ward* (2000) 99 FCR 316 at 454-455 [541].
(799) *Ward v Western Australia* (1998) 159 ALR 483 at 538.

at common law, absent effective statutory provision to the contrary, it would entitle the owner to whatever lay beneath the surface (800) of the land (except for royal minerals) and to the air space above it (801). To use the language of both *Mabo [No 2]* (802) and ss 223 and 225 (803) of the *Native Title Act*, the bundle of rights possessed by the claimants never included ''rights'' to take or use minerals or any practice of, or ''interest'' in, doing so. There was no evidence of any traditional custom governing, let alone habit of seeking or using minerals from the land. To put the matter again in the language used by the *Native Title Act* (s 223(1)(a)), there was no 'traditional custom observed'' of exploiting minerals. It follows, in my opinion, that both independently of the *Native Title Act* and in accordance with it, a right to seek or use subterranean materials or minerals (apart from ochre, rocks, and root materials or stones for traditional, ceremonial, ritual or customary use) or a right to inhibit, dictate or influence the rights of others to do the same, was never, and is not now, a right or interest capable of forming part of native title. Any rights of indigenous people with respect to the use of land for mining purposes must find their source in special provisions to that effect.

639 I do not propose to refer to United States authorities upon which some of the claimants rely to maintain a claim to ownership of minerals (804). Those authorities are distinguishable by reason of the special treaty arrangements made with the Indian peoples whose lands were affected thereby and considered in those cases.

640 I would add, in any event, that even if some native title interest in minerals in Western Australia had been proved, as Gleeson CJ, Gaudron, Gummow and Hayne JJ have said, those rights would have been extinguished by s 117 of the *Mining Act* 1904 (WA) and s 9 of

(800) *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 185, per Windeyer J.

(801) *Graham v KD Morris & Sons Pty Ltd* [1974] Qd R 1; *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479.

(802) (1992) 175 CLR 1.

(803) ''*Determination of native title*. A *determination of native title* is a determination whether or not native title exists in relation to a particular area (the *determination area*) of land or waters and, if it does exist, a determination of: (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and (b) the nature and extent of the native title rights and interests in relation to the determination area; and (c) the nature and extent of any other interests in relation to the determination area; and (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease — whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.''

(804) *United States v Shoshone Tribe of Indians* (1938) 304 US 111; *United States v Klamath and Moadoc Tribes of Indians* (1938) 304 US 119.

the *Petroleum Act* 1936 (WA) (805). I would also agree with the Full Court (806) and with the submissions of the Commonwealth that, if some native title interest in minerals in the Northern Territory had been proved, s 3 of the *Minerals (Acquisition) Ordinance* 1953 (NT) (807) would have extinguished it. It is simply impossible to read that provision as doing anything other than giving the Crown beneficial ownership of all minerals.

Cultural knowledge

641 Lee J at first instance found that (808):

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

642 That finding gave rise to his Honour's determination in these terms (809):

> ''Subject to para (5) 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:
>
> . . .
>
> (j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the 'determination area'.''

643 The majority in the Full Court held that ''a right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the 'determination area''' could not be the subject of a determination of native title under s 225 of the *Native Title Act* (810).

644 What the *Native Title Act* (s 223) defines as native title or native title rights and interests are rights acknowledged, and traditional customs observed, ''in relation to land''. Of course the phrase ''in

(805) Reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at 185 [382]-[383].

(806) *Western Australia v Ward* (2000) 99 FCR 316 at 455 [542]-[544].

(807) Section 3 provided: ''All minerals existing in their natural condition, or in a deposit of waste material obtained from any underground or surface working, on or below the surface of any land in the Territory, not being minerals, which, immediately before the commencement of this Ordinance, were the property of the Crown or of the Commonwealth, are, by force of this Ordinance, acquired by, and vested absolutely in, the Crown in right of the Commonwealth.''

(808) *Ward* (1998) 159 ALR 483 at 538.

(809) *Ward* (1998) 159 ALR 483 at 639-640.

(810) *Western Australia v Ward* (2000) 99 FCR 316 at 483 [666], per Beaumont and von Doussa JJ.

relation to'' is a phrase of wide ambit. But as with any phrase, it has to be construed in context. The context here is of rights and interests in or with respect to land, and not knowledge about or reverence for it, no matter how culturally significant that knowledge or reverence might be to those who possess it. The existence of that cultural significance does not mean that the bare knowledge and reverence of themselves can constitute a native title right or interest in relation to land within the meaning of the Act. Physical presence is essential. The Full Court was therefore correct to hold that any rights to maintain, protect and prevent the misuse of cultural knowledge could not be the subject of the determination of native title.

645 I need only add that a claim to equate cultural knowledge or reverence with some form of proprietary interest in land is to highlight a fundamental difficulty with which, in my respectful opinion, *Mabo [No 2]*, *Wik*, and their statutory manifestations in the *Native Title Act* do not completely deal — of demonstrating satisfactorily that matters of concern to Aboriginal people which are, in their cultures, spiritually but not physically related to land can be recognised in a truly meaningful way by the common law.

Operational inconsistency

646 The claimants also argued that the Full Court erred in holding that the primary judge had wrongly adopted a test of extinguishment by reference to operational inconsistency exclusively. Something should be said about ''operational inconsistency''. In constitutional law, the invocation of the doctrine may suffer from the defect that, unless and until there is an actual clash between activities undertaken or authorised by the Commonwealth and those of the State, parties affected thereby may be uncertain as to their obligations and rights. Whatever might be said about the utility and correctness of a doctrine of operational inconsistency under s 109 of the Constitution as a test in constitutional law (811), in the current discourse it should be treated with caution. It may provide no more than an analogy for testing whether what is actually lawfully done on land in the exercise of executive power in fact or potentially interferes with, or is inconsistent with, one or more native title rights or interests (812). Authorised use,

(811) *Victoria v The Commonwealth (The Kakariki)* (1937) 58 CLR 618 at 630-631; *The Commonwealth v Western Australia* (the *Mining Act Case*) (1999) 196 CLR 392 at 417 [61]-[62], per Gleeson CJ and Gaudron J; at 439-441 [139]-[145], per Gummow J; at 478 [259], per Hayne J.

(812) *Wik* (1996) 187 CLR 1 at 165-166, per Gaudron J; at 203, per Gummow J; *Yanner v Eaton* (1999) 201 CLR 351 at 396 [110]-[111], per Gummow J. If a legislative power or grant does not extinguish all native title but it authorises actions (for instance, constructing dams, drilling bores, building houses) that, if performed, would not be readily compatible with the existence of some native title rights (eg, rights to conduct ceremonies), the native title rights are extinguished over the area when the activities are performed. It matters not whether this is called ''operational inconsistency'' or not; the principle is clear. I would reject the

of course, is only one of the ways in which extinguishment may occur, others being by statute and by a grant in sufficiently ample terms.

647 What I have said above represents the position at common law. There is, however, a very serious question whether the *Native Title Act* and complementary State and Territory legislation leave any room for the application of a notion of ''operational inconsistency''. Sections 23G(1)(a) and 44H of the *Native Title Act* appear to be based on a misconception of the common law, insofar as they state that rights and interests which do not extinguish native title upon grant can never extinguish native title, but only prevail over it. Because of my conclusions regarding pastoral leases and the rights that they confer, it is, however, unnecessary for me to discuss the precise effect of these sections on extinguishment.

Spiritual connection not sufficient

648 In the Full Court, Beaumont and von Doussa JJ explained the impact of European settlement on the indigenous peoples' capacity to possess and use the land in this way (813):

> ''With the arrival of European settlement, the ways in which the indigenous people were able to possess, occupy, use and enjoy their rights and interests in the land underwent major change. The indigenous population was substantially reduced in numbers, and land uses introduced by the settlers killed or frightened off much of the resources of the land upon which the indigenous inhabitants depended for their day to day sustenance. In these circumstances, the presence of members of the community on large areas of the determination area understandably diminished. In some areas of concentrated settler activity the reasonable inference is that Aboriginal presence became impracticable, save as people employed in the pastoral enterprises that had moved on to their lands. The evidence paints a clear picture of it being *impracticable after European settlement for members of the indigenous population to maintain a traditional presence on substantial parts of the determination area*.'' (Emphasis added.)

Their Honours nonetheless found that a spiritual connection was sufficient to establish a connection (814):

(812) *cont*
submissions of the Commonwealth that, at common law, such acts only prevail over native title, but do not extinguish it. Those submissions are based on the proposition that only the sovereign can extinguish native title and that it cannot delegate that power to private persons. I do not accept that proposition and its logical implication, which is that acts which are directly authorised by legislative or executive power, and which are inconsistent with native title rights continuing to be exercised over a particular area, always fail to extinguish native title.

(813) *Western Australia v Ward* (2000) 99 FCR 316 at 381-382 [241].

(814) *Western Australia v Ward* (2000) 99 FCR 316 at 382 [243].

> ''Actual physical presence upon the land in pursuit of traditional rights to live and forage there, and for the performance of traditional ceremonies and customs, would provide clear evidence of the maintenance of a connection with the land. However, the spiritual connection, and the performance of responsibility for the land can be maintained even where physical presence has ceased, either because the indigenous people have been hunted off the land, or because their numbers have become so thinned that it is impracticable to visit the area. The connection can be maintained by the continued acknowledgment of traditional laws, and by the observance of traditional customs. Acknowledgment and observance may be established by evidence that traditional practices and ceremonies are maintained by the community, insofar as that is possible, off the land, and that ritual knowledge including knowledge of the Dreamings which underlie the traditional laws and customs, continue to be maintained and passed down from generation to generation. Evidence of present members of the community, which demonstrates a knowledge of the boundaries to their traditional lands, in itself provides evidence of continuing connection through adherence to their traditional laws and customs.''

They added (815):

> ''In circumstances where it is impracticable for the descendant community to continue a physical presence, it may nevertheless maintain its spiritual and cultural connection with the land in other ways. Whether it has done so will be a question of fact, involving matters of degree, to be assessed in all the circumstances of the particular case.''

649 What I have already said about cultural knowledge largely applies to claims based on a spiritual connection. To the extent their Honours' remarks might imply that ''traditional laws'' may be acknowledged and ''traditional customs'' may be observed off the land simply because it would be impractical to visit or occupy the land, they are potentially misleading. It will often be the case that laws and customs are so intimately related to physical presence on the land that to attempt to acknowledge or observe them in other surroundings would be to transform their character irrevocably. The observance elsewhere of customs that formerly took place on the land may itself be a sign that they are no longer traditional. Lack of continued physical presence is a factor of great, indeed decisive weight in determining whether ''traditional laws'' are presently acknowledged and ''traditional customs'' are presently observed.

650 In any event, I do not, with respect, agree with Beaumont and von

(815) *Western Australia v Ward* (2000) 99 FCR 316 at 383 [244].

Doussa JJ that a ''connection'' in s 223(1)(b) of the *Native Title Act* can mean a purely spiritual or religious connection. It is true that the word ''connection'' is undefined and ordinarily is one of wide import. But in the context of the *Native Title Act*, an Act which is concerned with the enjoyment of land and not reflection about it, I consider that the term must require at least physical presence. As it has been put, the common law could only protect native title rights and interests that involved ''physical presence on the land, and activities on the land associated with traditional social and cultural practices'' (816). It could not protect other aspects of the spiritual connection. As Toohey J noted in *Mabo [No 2]* (817):

> ''It is the fact of the presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights . . . It is presence amounting to occupancy which is the foundation of the title and which attracts protection, and it is that which must be proved to establish title. *Thus traditional title is rooted in physical presence*.'' (Emphasis added.)

In the light of these considerations, and the fact that s 223 is in terms designed largely to enact the common law as it was formulated in *Mabo [No 2]*, I do not think that a religious connection with the land, in the absence of an actual physical presence, can give rise to native title rights in relation to the land. In my opinion, it would be illogical to conclude that it did. To do so would be to accept that the mere handing down of ritual knowledge and the performance of traditional practices (so far as practicable) in an urban environment thousands of kilometres from the claimed area by Aborigines who perhaps had never seen the land (for several generations) could nonetheless form the basis of a connection enabling those Aborigines to exclude all others from that land. It follows that the reasoning of Beaumont and von Doussa JJ in this regard should not be accepted. There must be a continued physical presence on the land in controversy before the relevant connection can arise under s 223(1)(b) of the *Native Title Act*. On the facts of this case, that connection was not established.

The Racial Discrimination Act 1975 *(Cth)*

Section 10 *applies only to racially discriminatory laws*

651 I am grateful to Gleeson CJ, Gaudron, Gummow and Hayne JJ for

(816) *Western Australia v Ward* (2000) 99 FCR 316 at 348 [104].

(817) (1992) 175 CLR 1 at 188 (footnote omitted). See also Gray and Gray, ''The Idea of Property in Land'', in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (1998) 15, at pp 18-27. The authors argue that the common law has always emphasised the empirical reality of possessory control over land. If that be accepted, then the fact that claimants do not maintain a physical presence on land tells against them.

their examination of s 9 of the RDA. I agree with their Honours that the key provision of the RDA is s 10(1), which provides:

> ''If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.''

652 At first sight, s 10 might appear to have operation whenever a complainant can demonstrate that he or she is of a particular race, colour, or national or ethnic origin; that persons other than the complainant are of another race, colour, or national or ethnic origin; and that, by reason of the law in question, the complainant does not enjoy a right that is enjoyed by some or all of the other persons, or does not enjoy the right to the same extent.

653 It is, however, clear from both authority and principle that s 10 cannot be given such a broad operation. In *Gerhardy v Brown*, for instance, Mason J described the function of the provision in these words (818):

> ''Section 10 is not aimed at striking down a law which is discriminatory or is inconsistent with the Convention. Instead it seeks to ensure a right to equality before the law by providing that persons of the race *discriminated against by a discriminatory law* shall enjoy the same rights under that law as other persons.'' (Emphasis added.)

This insistence on construing s 10 as limited to racially discriminatory laws derives from the Constitution. For s 10 to be a valid law of the Commonwealth, it must be supported by the external affairs power (s 51(xxix)) (819). However, the only way in which the external affairs power will support s 10 is if the provision can be regarded as

(818) *Gerhardy* (1985) 159 CLR 70 at 94. See also *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at 205, per Wilson J.

(819) Section 10 and other provisions of the RDA cannot be supported by the races power (s 51(xxvi)). That power authorises the Parliament, when it so chooses, to make beneficial or detrimental laws with respect to a particular race: see *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186, per Gibbs CJ; at 244, per Wilson J; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 380 [86], per Gummow and Hayne JJ. The provisions of the RDA purport, however, to apply to all races and so are not supported by s 51(xxvi) of the Constitution: see *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186-187, per Gibbs CJ; at 210, per Stephen J; at 243, per Aickin J; at 244-245, per Wilson J; at 261-262, per Brennan J.

implementing the obligations laid down in the International Convention on the Elimination of all Forms of Racial Discrimination (the Convention), specifically the obligations in Arts 2 and 5. Article 2 of the Convention relevantly states:

> ''1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> . . .
>
> (c) Each State Party shall take effective measures to review governmental, national and local policies, and to *amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists*.'' (Emphasis added.)

Article 5 provides that, in compliance with the fundamental obligations laid down in Art 2 of the Convention, States Parties undertake ''to prohibit and to eliminate racial discrimination in all its forms and to guarantee [everyone's right] to equality before the law'', notably in the enjoyment of specified rights. It is, therefore, to avoid issues of validity that s 10 ''should be read in the light of the Convention as a provision which is directed to lack of enjoyment of a right arising by reason of a law whose purpose or effect is to create racial discrimination'' (820). But that simply raises the question of what is meant by ''racial discrimination'' under the Convention.

The concept of racial discrimination under the Convention

654 Article 1.1 of the Convention defines ''racial discrimination'' as follows:

> ''[T]he term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.''

It is sufficient to note two elements of this definition. First, there must be differential treatment ''based on'' race, colour, descent, or national or ethnic origin. The words ''based on'' are critical. Secondly, the treatment must have the purpose or effect of nullifying or impairing the exercise or recognition, on an equal footing, of human rights and fundamental freedoms. Unless both elements are present, there is no

(820) *Gerhardy v Brown* (1985) 159 CLR 70 at 99, per Mason J.

racial discrimination (821). It follows that without differential treatment ''based on'' race, colour, descent, or national or ethnic origin, the impact of a law on the human rights and fundamental freedoms of one group or another, subject to one qualification, is not relevant. This flows from the definition in Art 1.1 itself.

655 Whether differential treatment ''based on'' race, colour, or national or ethnic origin has occurred will often be clear. When a law selects race (broadly defined as in the Convention) or some attribute specific to a race as the criterion for different rights and obligations, no problem is posed. It is when a law chooses as its criterion something other than race (that is, an apparently neutral criterion) that it may become difficult to determine whether the differential treatment is in truth ''based on'' race.

656 It is necessary to say something about the concept of ''indirect discrimination''. As I understand it, indirect discrimination is said to occur when the criterion used is facially neutral, but the adverse impact on a particular race is such that the law can be called discriminatory (822). To find ''indirect discrimination'', there is no need for a discriminatory intention: Bowen CJ and Gummow J noted in *Secretary, Department of Foreign Affairs and Trade v Styles* (823) that indirect discrimination consists of ''practices which are fair in form and intention but discriminatory in impact and outcome'' (824).

657 However, in the context of the Convention, such a concept of discrimination strikes me, with respect, as inapplicable (825). It does not reflect the clear language of Art 1.1 (826). If the criterion for differential treatment, for conferring rights and imposing obligations on people, is not chosen with any race or ethnic group in mind, how

(821) Lerner, *The UN Convention on the Elimination of all Forms of Racial Discrimination* (1980), p 28.

(822) The seminal American case is that of *Griggs v Duke Power Co* (1971) 401 US 424. The use of indirect discrimination in anti-discrimination statutes is discussed in *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 357-358, per Mason CJ and Gaudron J; at 392, per Dawson and Toohey JJ; at 402, per McHugh J. For Australian criticism of *Griggs*, see Tucker, *The Rehnquist Court and Civil Rights* (1995), pp 192-193.

(823) (1989) 23 FCR 251 at 255.

(824) See also *Street v Queensland Bar Association* (1989) 168 CLR 461 at 487-488, per Mason CJ; at 509-510, per Brennan J; at 566, per Gaudron J; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478-479, per Gaudron and McHugh JJ.

(825) It is worth noting that the Convention was opened for signature on 7 March 1966, several years before the concept of ''indirect discrimination'' was introduced into American law by *Griggs*.

(826) Article 31 of the Vienna Convention on the Law of Treaties states that a treaty ''shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose''. In elucidating this provision, this Court has made it clear that primacy must be given to the text of the treaty: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 255, per McHugh J; at 277, per Gummow J.

does the fact that the treatment may affect a particular racial group more than another mean that it is suddenly ''based on race''? A law providing a financial incentive to all those who completed university would clearly have a greater impact on people of particular races who were unable to avail themselves of the incentive because of their inability to matriculate (for example, by reasons of remoteness from sophisticated educational facilities, or a lack of fluency in English); but it could not be said, on that account, to be racially based. So too with a law making it an offence to use certain narcotics. Even if persons of a particular race used a narcotic more than others in the community (say, for traditional religious ceremonies), the proscription of all use of that narcotic could not be regarded as creating a distinction or restriction ''based on race'' unless there were some evidence that the law was targeted at members of a particular race (827). Any different conclusion, in my view, would distort the words of the Convention (828). As these examples illustrate, laws of general application which employ non-racial criteria, and the purpose of which is not to create racial distinctions, exclusions, restrictions or preferences, are not discriminatory laws. That is because race, nationality, colour and ethnicity are not the bases on which any differences in treatment are founded.

658 It might be suggested at this point that the Convention, being concerned with racial equality, demands a more expansive definition of ''racial discrimination'' than Art 1.1 in its terms would suggest (829). Meron, for instance, maintains that the Convention is

(827) cf *Employment Division, Department of Human Resources of Oregon v Smith* (1990) 494 US 872. The case involved a general criminal law that applied to the use of sacramental peyote. The respondents had used sacramental peyote at a ceremony of their Native American Church and had been fired from employment. As a result, they were denied unemployment compensation. The Supreme Court rejected the respondents' claim that the free exercise clause of the First Amendment exempted them from the general criminal law and required them to be eligible for unemployment compensation.

(828) Indirect discrimination does not encompass ''reasonable'' distinctions. Even though the concept of indirect discrimination purports to capture facially neutral distinctions that have an adverse impact on particular racial groups, it will not include such distinctions if they are ''reasonable'' in the circumstances: see, eg, RDA, s 9(1A); *Sex Discrimination Act* 1984 (Cth), s 7B; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 582-583, per McHugh J (observing that discrimination frequently involves the notion of unjustified or unreasonable discrimination, but rejecting the application of that notion to s 117 of the Constitution). The concept is far removed from Art 1.1. A ''reasonable'' distinction whatever its adverse impact, is apparently not ''based on race''; but an ''unreasonable'' distinction which has exactly the same impact is.

(829) A similar argument has been made with respect to anti-discrimination statutes: see *Street v Queensland Bar Association* (1989) 168 CLR 461 at 487-488, per Mason CJ; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 357-358, per Mason CJ and Gaudron J. Their Honours there expressed the view that it would make little sense to construe anti-discrimination statutes as intended to deal only with discriminatory purpose. With respect, I think it is not right to assume

designed to promote racial equality, not merely colour neutral values (830). Because past acts of discrimination ''have created systemic patterns of discrimination in many societies'' (831), he claims that indirect discrimination is directly proscribed under the Convention. The argument, however, suffers from several defects. In particular, it overlooks the possibility that the goals of the Convention may be attained by eliminating explicit or otherwise deliberate racial distinctions as well as by the use of ''special measures'' (832) in favour of disadvantaged groups (833). It makes no serious attempt to reconcile the language of Art 1.1 with the concept of indirect discrimination expounded in *Griggs v Duke Power Co* (834). Further-

(829) *cont*
that all anti-discrimination statutes, regardless of their specific wording and their legislative history, were intended to deal with both direct and indirect discrimination. There is no principled basis for holding that the language of anti-discrimination statutes should be stretched, strained or otherwise surgically enhanced to accommodate a supposed intention.

(830) Meron, *Human Rights Law-Making in the United Nations* (1986), pp 13-15. The Committee on the Elimination of Racial Discrimination also adopts this view: see General Recommendation XIV (1993), par 2 in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev4, (2000) at pp 143-144. However, the views of the Committee and of other United Nations human rights bodies are not binding on States, are often controversial, and represent neither State practice nor opinio juris (the recognition by States that a practice is binding as a matter of law).

(831) Meron, *Human Rights Law-Making in the United Nations* (1986), p 14.

(832) Article 1.4 states that special measures for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights shall not be deemed racial discrimination, provided that they do not lead to the maintenance of separate rights for different racial groups and are not continued after the objectives for which they were taken have been achieved. Article 2.2 states that States Parties shall take special and concrete measures, in the social, economic, cultural and other fields, to ensure the adequate development and protection of certain racial groups for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms; but this shall not lead to the maintenance of unequal or separate rights for different racial groups after the objectives for which the measures were taken have been achieved. The Commonwealth Parliament, in the preamble to the *Native Title Act*, has indicated that the legislation is a special measure under Art 1.4.

(833) It is important to recognise the possibility that the goals of the Convention may be pursued by limited means. In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 248, Dawson J observed that the purposes of international instruments are not necessarily to be pursued at all costs. As he explained: ''The purpose of an instrument may instead be pursued in a limited way, reflecting the accommodation of differing viewpoints, the desire for limited achievement of objectives, or the constraints imposed by limited resources.'' See also *Rodriguez v United States* (1987) 480 US 522 at 525-526.

(834) (1971) 401 US 424. *Griggs* was concerned with the quite different provisions of Title VII of the *Civil Rights Act* 1964. §703(a)(2) of Title VII made it unlawful for an employer to ''limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's

more, it does not explain why those who drafted the Convention would impose upon themselves an obligation to change ''without delay, whatever the cost and without regard to competing priorities'' general fiscal or social policies which have the effect, though not the intent, of perpetuating the disadvantaged position of certain racial groups (835). Such considerations favour the interpretation of ''racial discrimination'' that I prefer and which, I believe, better accords with the language and context of the relevant Articles.

659 My opinion, therefore, is that ''indirect discrimination'' in the sense discussed in *Waters v Public Transport Corporation* (836) has no role to play under the Convention (837). As a result, when a law chooses as its criterion for differential treatment something that is not readily referable to race, colour, or national or ethnic origin, a complainant will need to show that the creation of a racial distinction was, in reality, the purpose of the law before he or she can invoke s 10 of the RDA. Adverse impact of itself on one group or another will not be enough (838). This conclusion is impelled primarily by the language of Art 1.1 of the Convention, in the light of which s 10 of the RDA must be read if it is to be valid (839). Such an approach does not deny, of course, that the impact of a measure might in practice be so limited, distinctive, or, indeed, significant for a particular race that an inference of purpose might very readily be drawn (840). The relevance of these points will become clear later in these reasons.

(834) *cont*
race, color, religion, sex, or national origin''. §703(h) provided it was not unlawful for an employer ''to give and to act upon the results of any professionally developed ability test provided that such test ... is not designed, intended or used to discriminate because of race, color, religion, sex or national origin''. It has been pointed out that the disparate impact test is a gloss on the specific statutory language of §§703(a)(2) and 703(h) of Title VII: see *Board of Education of the City School District of New York v Harris* (1979) 444 US 130 at 157-158, per Stewart J (dissenting).

(835) Meron, *Human Rights Law-Making in the United Nations* (1986), pp 15-16.

(836) (1991) 173 CLR 349.

(837) See Lerner, *The UN Convention on the Elimination of all Forms of Racial Discrimination* (1980), p 28: ''The intention of the drafters of Article 1 was to cover in its first paragraph all kinds of acts of discrimination among persons, as long as they were based on *motivations of a racial nature*, in the broad sense of the word.'' (Emphasis added.)

(838) Compare *Washington v Davis* (1976) 426 US 229, holding that mere discriminatory effect without discriminatory purpose is not sufficient to found a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

(839) See *Gerhardy v Brown* (1985) 159 CLR 70 at 85, per Gibbs CJ: ''Although the validity of s 10(1) was not argued before us, there can be no doubt that its provisions will be valid only if they conform to, and carry into effect, the provisions of the Convention.''

(840) As the majority judgment in *Washington v Davis* makes clear, ''an invidious discriminatory purpose may often be inferred from the totality of the relevant

The authority of Mabo [No 1]

660 I am mindful that in *Mabo [No 1]* (841), there are remarks which might suggest that s 10 will operate even if there is no racial discrimination in the sense that I have found. Mason CJ, for instance, described the operation of s 10 in these terms (842):

> ''[Section] 10 makes no reference to 'a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin'. The section is simply concerned with the existence of inequality before the law in the enjoyment of a relevant right; the inequality is then remedied by the grant of the right to those to whom it has been denied.''

Likewise, Deane J posed the question whether ''the practical effect'' of the legislation there challenged would be to produce a situation where the Torres Strait Islanders or the Meriam people did not enjoy a right that was enjoyed by persons of another race, colour or national or ethnic origin, or enjoyed it to a more limited extent than such other persons (843). Taken at face value, these remarks might imply that there is no need for a law to be designed at creating a racial distinction before s 10 will intervene. Indirect discrimination, they might appear to suggest, may attract the operation of s 10.

661 It is, however, vital to bear in mind the context in which these remarks were made. The law considered in *Mabo [No 1]* clearly created a distinction or restriction ''based on race, colour, descent or national or ethnic origin''. That was its whole purpose. It was aimed at extinguishing the rights of Aborigines and Torres Strait Islanders, and no one else. As Brennan, Toohey and Gaudron JJ observed (844):

> ''[The Queensland Act] on its true construction would extinguish the traditional legal rights on which the plaintiffs rely in their statement of claim. As the Minister's second reading speech evidences, *this was the objective which the passing of [the Act] was intended to secure*.'' (Emphasis added.)

Deane J also noted that the ''purpose, operation and effect'' of the Act, on the construction given by the State of Queensland, would be to extinguish native title rights and interests completely (845). As the Act purposely singled out native title holders, the critical issue was whether it had the effect of denying them rights to own and inherit property on an equal footing with others in the community. On that

(840) *cont*
facts, including the fact, if it is true, that the law bears more heavily on one race than another'': *Washington* (1976) 426 US 229 at 242, per White J.
(841) (1988) 166 CLR 186.
(842) *Mabo [No 1]* (1988) 166 CLR 186 at 198.
(843) *Mabo [No 1]* (1988) 166 CLR 186 at 231.
(844) *Mabo [No 1]* (1988) 166 CLR 186 at 214.
(845) *Mabo [No 1]* (1988) 166 CLR 186 at 231.

point, the majority and minority differed (846). It was not necessary for their Honours in *Mabo [No 1]* to consider the concept of racial discrimination under the Convention, or how s 10 might apply to a law which was of general application but had an adverse, or more significant, practical effect on members of a particular race; and I do not read their comments as specifically directed to these matters. I would not, therefore, take their Honours to have concluded that a law of quite general application, the purpose of which was not to create any racial distinctions, exclusions, restrictions or preferences, would create racial discrimination under the Convention so as to attract s 10. Those questions were simply not raised in that case. If I am mistaken in my reading of *Mabo [No 1]*, then I would regard their Honours' comments as obiter dicta which, with respect, I need not and would not follow.

The applicability of s 10 *to native title rights*

662 As noted above, s 10(1) requires a comparison of the fundamental right enjoyed by persons of a particular race, colour or national or ethnic group with the fundamental right enjoyed by persons of another race, colour or national or ethnic group. For the comparison under s 10(1) to be made, however, the right enjoyed by the two groups must be the same or must be equivalent to each other. So much is obvious from the terms of the provision.

663 In the cases in which this Court has considered the operation of s 10(1) of the RDA and native title, the relevant right has been identified as the human right to own and inherit property. For example, in *Mabo [No 1]*, Brennan, Toohey and Gaudron JJ described the effect of s 10(1) in these words (847):

> ''[Section] 10(1) ... clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community.''

The joint judgment in *Western Australia v The Commonwealth* (the *Native Title Act Case*) (848) expressed a similar view.

664 The judgments of the majority in each case rested upon an unaddressed assumption. That assumption, as Gleeson CJ, Gaudron,

(846) I prefer the approach of Wilson J (at 204-205). Equality before the law in Art 5 of the Convention appears to me to be concerned largely with formal, legal equality. The enjoyment of political rights on the basis of universal suffrage, the right to inherit, and the other rights there mentioned all make it apparent that the provision is aimed at redressing clear racial restrictions and limitations on the enjoyment of those rights. However, this is no occasion on which to re-open the correctness of the decision in *Mabo [No 1]*.

(847) *Mabo [No 1]* (1988) 166 CLR 186 at 219.

(848) (1995) 183 CLR 373 at 437.

Gummow and Hayne JJ correctly, with respect, observe, was that native title rights were the equivalent of rights of ownership enjoyed by others in the community. If native title rights did not amount to rights of ownership, then there would be no relevant comparison to be made under s 10(1) (849). Native title could be extinguished without infringing the RDA.

665 However, I do not think that this Court can assume that native title rights and interests necessarily amount to rights of ownership equivalent to those enjoyed by others in the community. This Court has recently said that native title rights and interests may include interests that do not amount to ''property'' as that term is understood at common law (850). Further, the Court has occasionally described native title rights and interests as ''personal rights'' (851). Native title rights are also often held communally. That of itself is no bar to descent and inheritance of them, but it does give rise to problems of identification of the community and the respective entitlements and obligations of members of it. In view of the characteristics of native title as revealed in this Court's jurisprudence (for example, its fragility and elusiveness), it will be important in due course to decide whether native title rights and interests do amount to rights of ownership enjoyed by others in the community. However, because in this case no party directed their submissions to this matter, the answer to that question can await another day. I therefore proceed on the assumption that the extinguishment of native title rights and interests can attract the RDA.

The effect of s 10 *of the RDA on racially discriminatory laws*

666 In *Gerhardy v Brown* (852), Mason J explained the effect of s 10(1) in two situations. The first was an omission by a State law to make enjoyment of a right universal, thereby causing discrimination against persons of a particular race, colour or ethnic group. Of this situation, Mason J said (853):

> ''If racial discrimination arises under or by virtue of State law because the relevant State law merely omits to make enjoyment of the right universal, ie by failing to confer it on persons of a particular race, then s 10 operates to confer that right on persons of that particular race. In this situation the section proceeds on the footing that the right which it confers is complementary to the right created by the State law. *Because it exhibits no intention to occupy the field occupied by the positive provisions of State law to the*

(849) *Mabo [No 1]* (1988) 166 CLR 186 at 243, per Dawson J.
(850) *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 38-39 [12]-[14], per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
(851) *Mabo [No 2]* (1992) 175 CLR 1 at 110, per Deane and Gaudron JJ.
(852) (1985) 159 CLR 70.
(853) *Gerhardy* (1985) 159 CLR 70 at 98.

exclusion of that law the provisions of the State law remain unaffected.'' (Emphasis added.)

667 The second situation is an imposition by a State law of a discriminatory prohibition or restriction on persons of a particular race. Mason J described the effect of s 10(1) in this situation as follows (854):

> ''When racial discrimination proceeds from a prohibition in a State law directed to persons of a particular race, forbidding them from enjoying a human right or fundamental freedom enjoyed by persons of another race, by virtue of that State law, s 10 confers a right on the persons prohibited by State law to enjoy the human right or fundamental freedom enjoyed by persons of that other race. This necessarily results in an inconsistency between s 10 and the prohibition contained in the State law.''

668 Whilst I would respectfully agree with these comments, I think it important to emphasise that the effect of the RDA depends upon settled principles relating to inconsistency under s 109 of the Constitution. Those principles make it clear that when a Commonwealth law grants a right and a State law prohibits the exercise of that right, then the State law is inoperative or invalid to the extent of the inconsistency (855). Section 10 of the RDA ensures that persons of a particular race enjoy a right enjoyed by persons of another race, or enjoy the right to the same extent. Any State or Territory legislation that impedes the exercise or enjoyment of the rights conferred by s 10 is therefore inoperative. The clearest example of such a law would be one that expressly prohibits persons of a particular race from exercising rights enjoyed by others (for example, a colour bar). However, not all discriminatory State and Territory legislation will take that form, as Mason J recognised. For instance, a State law might provide an express right of compensation for persons of a particular race, and this would typically mean that only persons of that race could claim compensation. Section 10, however, would not invalidate that law, but would simply provide a right of compensation for other races. As the State law and the RDA could both operate, there would be no inconsistency under s 109 of the Constitution.

669 The particular way in which the State or Territory law affects native title (which is characteristically held by persons of a particular race or ethnic origin) is therefore crucial to a determination whether the State or Territory law is invalid.

(854) *Gerhardy* (1985) 159 CLR 70 at 98-99.

(855) See, eg, *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 477, per Knox CJ and Gavan Duffy J; *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151; *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237.

The Native Title Act, Mabo [No 2] and Wik

670 Because so much of the language of the *Native Title Act* has its genesis in the judgment of Brennan J in *Mabo [No 2]*, resort to that case continues to be useful and, indeed, necessary.

671 In *Mabo [No 2]* (856), Brennan J (with whom Mason CJ and McHugh J agreed) said that the first inquiry should be whether there is inconsistency between the rights granted and the rights and interests of the claimant peoples. A similar approach was taken by Toohey J in *Wik* (857). In the latter, however, the other members of the majority took as their first inquiry the question whether the leases granted under Queensland legislation there conferred exclusive possession (858), although Gummow J regarded that expression as one of limited utility (859). ''Exclusive possession'' is the expression which is now used in the *Native Title Act* (see, eg, ss 23A, 23B and 248A). It necessitates an inquiry into whether a pastoral lease in fact conferred a right of exclusive possession over the land or water covered by the lease. Because it is the expression used in the *Native Title Act*, as amended after *Wik*, it is important to remember that the Court's task is to construe the statute, particularly s 248A, which I quote below. I repeat, however, that because the *Native Title Act* in its current form is relevantly a response to, and in several respects is effectively an enactment of, *Wik*, especially in its use of the expression ''exclusive possession'', reference to that case remains necessary.

> ''248A *Exclusive pastoral lease*
> An *exclusive pastoral lease* is a pastoral lease that:
> (a) confers a right of exclusive possession over the land or waters covered by the lease; or
> (b) is a Scheduled interest.''

672 It is convenient that I first make some observations generally about pastoral leases and the judgments in *Wik*. But before doing so, I think it important to notice that the section refers not simply to exclusive possession but a ''right of exclusive possession'' over land or waters covered by such a lease; in other words, it is the right, and not merely the fact of exclusive possession, as that expression is properly to be understood, either continuously or from time to time, to which regard must be had.

673 Before *Mabo [No 2]* (860), although the indigenous people and some anthropologists and others had regarded it as an unjust, and at least an arguably incorrect result, it had generally been assumed that the law in

(856) (1992) 175 CLR 1 at 68.
(857) (1996) 187 CLR 1 at 108.
(858) *Wik* (1996) 187 CLR 1 at 154-155, per Gaudron J; at 240, per Kirby J.
(859) *Wik* (1996) 187 CLR 1 at 195.
(860) (1992) 175 CLR 1.

relation to claims of land rights by indigenous peoples was as stated in *Milirrpum v Nabalco Pty Ltd* (861):

> ''The doctrine of communal native title contended for by the natives did not form, and never had formed, part of the law of any part of Australia. Such a doctrine has no place in a settled colony except under express statutory provisions. Throughout the history of the settlement of Australia any consciousness of a native land problem inspired a policy of protection and preservation, without provision for the recognition of any communal title to land . . .
>
> [T]he natives had established a subtle and elaborate system of social rules and customs which was highly adapted to the country in which the people lived and which provided a stable order of society remarkably free from the vagaries of personal whim or influence. The system was recognised as obligatory by a definable community of aboriginals which made ritual and economic use of the areas claimed.''

674 No question of native title fell for consideration in any case in this Court before *Mabo [No 1]* although, had the appellant's defence in *Walden v Hensler* (862) been differently formulated, such a question might at least have arisen there as it did in *Yanner v Eaton* (863).

675 In *Mabo [No 2]*, this Court found, in a case brought by the indigenous inhabitants of the Murray Islands off the north coast of the mainland of Australia, that not only those people but also the indigenous inhabitants of the mainland of Australia, held, and were entitled to assert, against the whole world, a form of native title in respect of lands which they had occupied and with which they had maintained a relevant connection.

676 The response of the Federal Parliament to the decision in *Mabo [No 2]* was to enact the *Native Title Act*. The Prime Minister himself, the Hon Mr Keating, as a measure of the importance of the legislation, took responsibility for its passage through the House of Representatives. In the second reading speech, he said this of the intended relationship between the Act and pastoral leases granted by the States and the Northern Territory (864):

> ''I draw attention also to the recording in the preamble of the bill of the government's view that under the common law past valid freehold and leasehold grants extinguish native title.''

677 The Prime Minister's expectations, and presumably those of the legislature which enacted the *Native Title Act*, with respect to that

(861) (1971) 17 FLR 141 at 143.
(862) (1987) 163 CLR 561.
(863) (1999) 201 CLR 351.
(864) Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993, pp 2879-2880.

matter were not realised. In *Wik*, the Wik and Thayorre indigenous peoples persuaded this Court by majority of four Justices to three (Toohey, Gaudron, Gummow and Kirby JJ, Brennan CJ, Dawson and McHugh JJ dissenting) to a different opinion.

678 In these appeals, no party seeks to re-open the decision in the *Wik Case*, and, whilst it is true that the *Native Title Act* was amended following upon and in response to the *Wik Case*, the amendments appear to have relevantly done no more than appropriate the expression ''exclusive possession'' used in the reasons for the judgments of the majority and to enact it without any elaboration or clarification, so far as pastoral leases are concerned.

679 It follows that, although the decision in *Wik* is in no way under challenge, it will be necessary in these appeals to identify the ratio and the common threads in the reasoning of the majority, each of whom wrote a separate judgment, for three reasons: first, because some of the parties contend that the relevant Western Australian legislation is distinguishable and confers more ample rights, including a right to exclusive possession, upon pastoral lessees in that State than the legislation and leases granted pursuant to it in Queensland; secondly, the judgments of the majority in *Wik* may clarify any ambiguity in the term ''exclusive possession'', which is appropriated and left apparently unqualified and unexpounded by the legislation; and, thirdly, to ascertain whether, in the amended *Native Title Act* and *Wik*, there is to be found a clear principle to govern these appeals. A comparison between the meaning and effect of the Queensland legislation, as found by the majority in *Wik*, and the meaning and effect of the Western Australian and Northern Territory legislation authorising the grant of pastoral leases in those jurisdictions will therefore be necessary.

680 There is no doubt as to the conclusion of the majority in *Wik*: that the pastoral leases then before the Court and granted under the relevant Queensland legislation did not confer exclusive possession upon the lessees and that, therefore, they did not necessarily extinguish native title or all of the rights and interests constituting it there. However, in reaching those conclusions, the reasoning of their Honours in the majority was not unanimous; and, although the members of the majority were influenced by some of the same matters, it is far from clear how much weight and significance each attached to those matters, and, in some instances, which if any of them were decisive.

681 Toohey J made what I take to be a summary of the features of the legislation under which the pastoral leases were granted that led him to conclude that they did not confer exclusive possession. His Honour's summary is set out in this passage (865):

> ''A pastoral lease under the relevant legislation granted to the

(865) *Wik* (1996) 187 CLR 1 at 122.

> lessee possession of the land for pastoral purposes. And the grant necessarily gave to the lessee such possession as was required for the occupation of the land for those purposes. As has been seen, each lease contained a number of reservations of rights of entry, both specific and general. The lessee's right to possession must yield to those reservations. There is nothing in the statute which authorised the lease, or in the lease itself, which conferred on the grantee rights to exclusive possession, in particular possession exclusive of all rights and interests of the indigenous inhabitants whose occupation derived from their traditional title. In so far as those rights and interests involved going on to or remaining on the land, it cannot be said that the lease conferred on the grantee rights to exclusive possession. That is not to say the legislature gave conscious recognition to native title in the sense reflected in *Mabo [No 2]*. It is simply that there is nothing in the statute or grant that should be taken as a total exclusion of the indigenous people from the land, thereby necessarily treating their presence as that of trespassers or at best licensees whose licence could be revoked at any time.''

In essence, his Honour was influenced by these factors: the lessee was given such possession as was required for the pastoral purpose; several specific and general rights of entry were reserved; the grant did not confer in terms exclusive possession (866), and this was so notwithstanding the absence of any conscious legislative recognition of native title.

682 It can be seen that his Honour makes no reference in the passage quoted to either s 203 or s 204 of the *Land Act* 1910 (Q), although he had earlier made a passing reference to s 203 in discussing and ultimately dismissing an argument by the State of Queensland that the section had the effect of rendering any person occupying Crown land and not lawfully claiming under a subsisting lease or licence, including an Aborigine, a trespasser (867). Without making any analysis of the section of the kind undertaken by Gummow J, for example, his Honour did no more than adopt a statement made by Brennan J in *Mabo [No 2]* in which his Honour referred to an earlier analogue of s 203 in these terms (868):

> ''To construe s 91 or similar provisions as applying to the Meriam people in occupation of the Murray Islands would be truly barbarian. Such provisions should be construed as being directed to those who were or are in occupation under colour of a Crown grant

(866) His Honour did not refer to the fact that conventional leases at common law rarely contained a grant in terms of ''exclusive possession''. That right is to be inferred from the use of the term ''lease''.

(867) *Wik* (1996) 187 CLR 1 at 120-121. See also at 113-114 where Toohey J sets out s 203 without discussing its effect.

(868) *Mabo [No 2]* (1992) 175 CLR 1 at 66.

or without any colour of right; they are not directed to indigenous inhabitants who were or are in occupation of land by right of their unextinguished native title.''

683 On the other hand, Gaudron J and Gummow J construed ss 203 and 204 as providing strong, affirmative indications that a pastoral lease was a form of licence rather than a true lease.

684 Gaudron J was impressed by the fact that ''the only right expressly [relevantly] conferred on pastoral lessees ... was that conferred by s 204 of the Act, namely, to take action for the removal of persons in 'unlawful occupation' '' (869).

685 The last matter was one of several matters which formed the basis of her Honour's conclusion that a pastoral lessee in Queensland did not enjoy a right of exclusive possession. The strongest indications to that effect, her Honour said, were that the Queensland Act conferred rights on authorised persons to enter upon the subject land to remove materials from it; that the Act denied the lessee rights in respect of, or rights to control access to, trees or timber; and that it authorised the depasturing of stock, if a stock route or road passed through the property (870). In this context, her Honour also referred to the right of any person, duly authorised ''at all times to go upon the said Land, or any part thereof, for any purpose whatsoever, or to make any survey, inspection, or examination of the same''.

686 The last significant indication which her Honour emphasised was the vastness of the areas of the leases. Of that, she said this (871):

> ''Moreover, the vastness of the areas which might be made the subject of pastoral leases and the fact that, inevitably, some of them would be remote from settled areas militate against any intention that they should confer a right of exclusive possession entitling pastoralists to drive native title holders from their traditional lands. Particularly is that so in a context where, in conformity with the prescribed form, the grants were expressed to be made 'for pastoral purposes only'.''

687 Gummow J too was of the opinion that the language of ss 203 and 204 of the legislation was highly important. As part of his Honour's discussion of the meaning of the word ''unlawful'' or ''unlawfully'' in s 204, he said this (872):

> ''In the result, whichever shade of meaning is given to that term [ie unlawfully] as used in s 204, as to which it is unnecessary to express any concluded opinion, s 204 did not render indigenous inhabitants relying upon their native title liable to removal from land

(869) *Wik* (1996) 187 CLR 1 at 154.
(870) *Wik* (1996) 187 CLR 1 at 154.
(871) *Wik* (1996) 187 CLR 1 at 154.
(872) *Wik* (1996) 187 CLR 1 at 194 (fn omitted).

which was for the time being Crown land or land comprised in a lease or licence from the Crown, by warrant issued at the instance either of officers of the Crown or the lessee or licensee.

Further, the reasoning which leads to the construction of s 203 which does not render those holding native title trespassers upon the subject lands applies at least as forcefully to the construction of the phrase 'unlawful occupation of any Crown land' in the first paragraph of s 204. This is not to be read as directed to authorising the Crown to expel indigenous inhabitants from occupation of land enjoyed in exercise of their unextinguished native title. That being so, no different interpretation should be given to the phrase 'unlawful occupation' in the second paragraph of s 204. The presumption is that the same meaning should be given to the same phrase where it occurs in the same provision and the context here does not suggest the contrary.

Finally, the terms of s 204 are of some assistance in an analysis of those particular forms of tenure created by the 1910 Act which are identified by expressions using the terms 'lease' and 'licence'. The second paragraph of s 204, which must be read with the first, authorises a lessee and licensee of any land from the Crown to take proceedings in the same manner as a Commissioner or officer authorised by the Minister. If successful, this will lead to the issue of a warrant for the removal of the unlawful occupiers and thereafter to what is identified as the taking of 'possession' of the subject land 'on behalf of' the lessee or licensee. The section treats indifferently the nature of the enjoyment of such a lessee or licensee by use of the same term, 'possession', to identify it.''

688 And later, his Honour stated four propositions, one of which was a repetition in summary form of his Honour's earlier expression of opinion with respect to the meaning of s 204 of the Act. His Honour said this (873):

''The foregoing supports four propositions. First there is apparent the mixing together or combination in the statutory regime for pastoral leases and occupation licences of elements which in an analysis under the common law of leases and licences would be distinct. Secondly, the terms of the 1910 Act providing for pastoral leases were apt to identify the characteristics and incidents of that statutory interest. Thirdly, those characteristics were not such as to approximate what under a lease as understood at general law may have been a right to exclude as trespassers persons exercising rights attached to their subsisting native title. Fourthly, the contrary

(873) *Wik* (1996) 187 CLR 1 at 201 (fn omitted). The three Justices in the minority in *Wik* (Brennan CJ, with whom Dawson and McHugh JJ agreed) described the submission of the *Wik* peoples with respect to s 204 of the Queensland Act as involving ''a bizarre construction'': *Wik* (1996) 187 CLR 1 at 73.

conclusion, that native title holders were rendered trespassers as a consequence of rights given by pastoral leases, would be at odds with the interpretation of the phrase 'unlawful occupation' which, as indicated earlier in these reasons, is to be given its use in s 204 of the 1910 Act.''

689 The other member of the majority, Kirby J, mentioned s 204 only once in his reasons for judgment. His Honour said that it was one of a number of indications that the *Land Act* 1910 (Q), in terms, did not operate to repose exclusive possession in the lessee (874): ''A residue of actual possessory right was retained to the Crown, not a mere reversion expectant.'' His Honour went on to say that the legislation contained provisions subjecting pastoral leases to reservations and conditions, but he was unwilling to hold that the presence of these, by themselves, denied the instrument the character of a lease (875):

> ''Although such exceptions to the right of peaceful enjoyment of the entire land referred to in the lease do not throw much light on the legal character of the interest thereby created, by their number and variety, they do emphasise the point that the interest in the land which was granted by a pastoral lease was a peculiar statutory interest . . . peculiar to, and apt for, the conditions of the countryside described.''

690 Their Honours in the majority all referred to the history of grants of pastoral leases in this country, a history which their Honours thought militated against grants of exclusive possession to pastoralists under pastoral leases (876). But I do not take their Honours to be saying that the history was by any means decisive of the issue. Three of the majority (Toohey, Gaudron and Kirby JJ) thought that the vastness of the areas covered by the pastoral leases in question in *Wik* was a factor indicative of an ''imputed'' intention not to confer exclusive possession and to leave open the possibility of the survival of at least

(874) *Wik* (1996) 187 CLR 1 at 246.

(875) *Wik* (1996) 187 CLR 1 at 246.

(876) *Wik* (1996) 187 CLR 1 at 110-112, 119-120, per Toohey J; at 140-143, per Gaudron J; at 173-175, per Gummow J; at 226-230, per Kirby J. Their Honours' use of history, particularly despatches from Earl Grey to the Governor of New South Wales, Sir Charles FitzRoy, has not escaped criticism by professional historians and other academics. See Fulcher, ''Sui Generis History? The Use of History in *Wik*'', in Hiley (ed), *The Wik Case: Issues and Implications* (1997), p 51; Fulcher, ''The *Wik* Judgment, Pastoral Leases and Colonial Office Policy and Intention in NSW in the 1840s'', *Australian Journal of Legal History*, vol 4 (1998) 33; Brennan, *The* Wik *Debate: Its Impact on Aborigines, Pastoralists and Miners* (1998), pp 44-48; Tucker, ''Litmus-Testing Judicial Authority: Comparing the *Wik Peoples and Thayorre People v The State of Queensland* and *United Steelworkers of America v Weber*'', *Sydney Law Review*, vol 20 (1998) 244, at pp 286-288; C Boge, ''A Fatal Collision at the Intersection? The Australian Common Law and Traditional Aboriginal Land Rights,'' in Boge (ed), *Justice for All? Native Title in the Australian Legal System* (2001) 1, at pp 30-31.

some native title rights and interests in respect of the land (877). I say ''imputed'' because, as I have already pointed out, it is not suggested that the colonial and State legislatures which made provision for the grant of pastoral leases turned their minds to the preservation, let alone the existence, of native title or native title rights. It is also clear from the history that they either came to ignore and, in some instances, defied instructions from the English colonial office that the Aboriginal inhabitants not be obstructed in their customary usages and way of life.

691 It follows that the only matter upon which the Justices in the majority in *Wik* were unanimous was that (the presumably ''vast'') pastoral leases under the *Land Act* 1910 (Q) did not necessarily confer a right of exclusive possession upon the grantees and did not necessarily extinguish native title or native title rights and interests because the Queensland Act did not so provide. There was not, however, unanimity as to either the particular sections which produced that result, or whether, absent the enactment of sections in that form, the same result would have been inevitable. On the other hand, three Justices, the minority, expressly rejected any reliance upon ss 203 and 204 of the *Land Act* 1910 (Q) relating to the grant of pastoral leases as a basis for concluding that those leases did not confer exclusive possession.

692 For myself, with respect, the fact that pastoral leases might have unique and new features adapted to the different conditions of the colonies would not lead me to a conclusion that a pastoral lease was not a true lease (albeit in somewhat modified form). Nor would the fact that a new and indeed convenient possessory remedy was devised for the remote circumstances of pastoralists and the primitive system of communications in existence.

693 Indeed, if parties choose to use the word ''lease'', particularly when one of them is the executive government acting under legislation using that term and other distinctive terms such as ''licence'' and ''reservation'', and with legal advice available to it, it is a reasonable assumption that the parties intended to bring into existence a lease (878). As Brennan J said in *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (879):

> ''By adopting the terminology of leasehold interests, the Parliament must be taken to have intended that the interests of a lessee,

(877) *Wik* (1996) 187 CLR 1 at 130, per Toohey J; at 154, per Gaudron J; at 232-233, per Kirby J.

(878) *Attorney-General (Vict) v Ettershank* (1875) LR 6 PC 354 at 370; *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 213; *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 693-697, per Kirby P; at 712, per Mahoney JA; *Wik* (1996) 187 CLR 1 at 74-81, per Brennan CJ; at 151, per Gaudron J.

(879) (1981) 147 CLR 677 at 686.

transferee, mortgagee or sublessee are those of a lessee, transferee, mortgagee or sublessee at common law, modified by the relevant provisions of the Act.''

694 Exclusive possession, as it may once have existed, is, in practice, now non-existent or almost completely so, and has been for a long time. That is the reason why earlier I referred to effective exclusive possession. Local authorities, public utilities and various governmental officials are authorised by statute, ordinances and by-laws to enter upon privately held land and premises, including those held in fee simple, for many purposes. And, there are many provisions in legislation, including subordinate legislation, regulating land use in such a way as to impair or intrude upon owners' use and possession of land; for example, vegetation protection orders (880), planning laws restricting heights of buildings, building footprints and site coverage (881), and, of course, legislation with respect to mining which override possessory rights otherwise enjoyable by any owners, lessees and other occupiers. It has always been recognised that, although a lease is ''a contract for the exclusive possession of lands or tenements for some certain number of years or other determinate period'', it may contain ''certain reservations or a restriction of the purpose for which the possession may be used''; and that even what is described as a licence may be regarded in law as a lease (882). *Woodfall* states only these as the essentials of a lease (883):

> ''1. There must be a lessor, who is able to make the lease. 2. There must be a lessee, who is capable of taking the thing demised. 3. There must be a thing demised which is demisable. 4. If the thing demised or the term expressed to be granted be not grantable, without a deed, or the party demising be not able to grant without a deed, the lease must be made by deed, containing a sufficient description of the lessor, the lessee, the thing demised, the term granted, and the rent and covenants: and all necessary circumstances, as signing, sealing, delivery, etc, must be observed. 5. If it be a lease for years, it must have a certain commencement, at least when it takes effect in interest or possession, and a certain determination, either by an express enumeration of years, or by

(880) eg, Chapter 22 of the Local Laws of the Brisbane City Council provides that, unless an exemption applies, vegetation may only be removed after Council approval (Ordinance 23(2)). The Council has power to enter land to give effect to vegetation protection orders (Ordinance 35) and is not obliged to compensate persons affected (Ordinance 38).

(881) See, eg, the various considerations set out in the Brisbane City Council Development Codes, provided in the Brisbane City Plan 2000 which is given effect by the *Integrated Planning Act* 1997 (Q). Heritage legislation imposes other restrictions on what may be done with land: see *Queensland Heritage Act* 1992 (Q), Pt 4, Pt 5, Div 1.

(882) *Woodfall's Law of Landlord and Tenant*, 20th ed (1921), p 153.

(883) *Woodfall's Law of Landlord and Tenant*, 20th ed (1921), p 156.

> reference to a certainty that is expressed, or by reducing it to a certainty upon some contingent event, which must happen before the death of the lessor or lessee. 6. There must be an acceptance of the thing demised, and of the estate by the lessee.''

To these should be added a requirement that there be no internal indication (in the instrument or the legislation authorising it) that the parties did not in fact intend that a lease be granted. Those essentials would all seem to have been present in the pastoral leases under consideration in *Wik*.

695 I acknowledge, of course, that I am bound to apply such ratio as exists in *Wik* to the extent that it remains binding after the amendments to the *Native Title Act* and to the extent that the instruments and facts of this case are indistinguishable from those that were before this Court in *Wik*. But I would follow the course explained and adopted by McHugh J in *Re Tyler; Ex parte Foley* (884):

> ''The divergent reasoning of the majority judges in *Re Tracey* and *Re Nolan* means that neither of those cases has a ratio decidendi. But that does not mean that the doctrine of stare decisis has no relevance or that the decisions in those cases have no authority as precedents. Because it is impossible to extract a ratio decidendi from either of the two cases, each decision is authority only for what it decided. But what is meant by saying that a case, whose ratio decidendi cannot be discerned, is authority for what it decided? It cannot mean that a court bound by that decision is bound only by the precise facts of the case. Stare decisis and res judicata are different concepts.
>
> In my opinion, the true rule is that a court, bound by a previous decision whose ratio decidendi is not discernible, is bound to apply that decision when the circumstances of the instant case 'are not reasonably distinguishable from those which gave rise to the decision'. In *Great Western Railway Co v Owners of SS Mostyn* ('*The Mostyn*'), Viscount Dunedin, after concluding that no binding ratio decidendi could be extracted from the House's decision in *River Wear Commissioners v Adamson* said: 'Now, the judgment is binding. What, therefore, I think is our duty on this occasion is to consider the statute for ourselves in the light of the opinions, diverging as they are, and to give an interpretation; but that interpretation must necessarily be one which would not, if it applied to the facts of *Wear v Adamson*, lead to a different result.' ''

696 As will appear, the pastoral leases in Western Australia and the Northern Territory and the legislation under which they were granted have relevantly different provisions from those that the Court considered in *Wik*. A ratio in *Wik* is, to say the least, elusive. Those

(884) (1994) 181 CLR 18 at 37-38 (fnn omitted).

matters, together with some features of pastoral leases and activities which received little or no attention in *Wik*, lead me to the conclusion that the pastoral leases here do operate to extinguish native title rights.

III. EXTINGUISHING TENURES AND INTERESTS

Pastoral leases in Western Australia

697 The history and incidents of pastoral leases in Western Australia were summarised, in a way which I am generally content to accept, in the reasons of the majority in the Full Court (885):

> ''The first pastoral leases in the claim area were granted under the Land Regulations 1882 (WA). These pastoral leases:
> - conferred no right to soil or timber (r 82);
> - were subject to reservations of (r 85):
>   - — the right to lay out public roads;
>   - — the right to take indigenous produce, rock or soil for public purposes;
>   - — the right to cut and remove timber;
>   - — the right to sell any mineral land;
>   - — the right to sell any portion of the pastoral lease and exercise a right of immediate entry;
>   - — the right to depasture stock on 'unenclosed or enclosed but otherwise unimproved land';
>   - — the right of any person to pass over 'such unenclosed or enclosed but otherwise unimproved land, with or without horses, stock or vehicles on all necessary occasions'; and
> - were subject to a power to immediately determine the pastoral lease over any land which may be reserved, sold or otherwise disposed of under the Regulations, compensation being provided only for improvements (rr 79 and 81).
>
> Leases were issued in the form prescribed in the Schedule No 11, which expressly declared the above exceptions and reservations and in addition declared a right of entry for mineral exploration and provided: '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 exception and reservation in favour of Aboriginal people 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 colony. Responsible self-government commenced in the colony in 1890. The *Land Act* 1898 (WA) in ss 106 and 107

(885) *Western Australia v Ward* (2000) 99 FCR 316 at 394-397 [296]-[305].

maintained the exceptions and reservations, upon the grant of a pastoral lease which had been contained in the Land Regulations 1882 (WA). Section 92 of the Act provided that all pastoral leases were to be issued in the form set out in Schedule No 24, and that form repeated the reservation and exception in favour of Aboriginal people set out in the Schedule No 11 to the Land Regulations 1882 (WA).

The *Land Act* 1933 (WA) consolidated and amended the *Land Act* 1898 (WA). The terms and conditions of pastoral leases remained largely unchanged save for one important omission. The form of the pastoral lease, contained in the Nineteenth Schedule, did not include a reservation in respect of an Aboriginal right of access. However, by the *Land Act Amendment Act* 1934 (WA), s 106(2) was inserted. As the State contends that the *Land Act* 1933 (WA), as amended by the insertion of s 106(2), had the effect of extinguishing native title, and substituting a statutory right of Aboriginal access, it is necessary to consider s 106 in its entirety. The section appears in Pt VI of the *Land Act* 1933 (WA) which deals with pastoral leases. Section 90 provides that any Crown lands within the State which are not withdrawn from selection for pastoral purposes, and which are not required to be reserved, may be leased for pastoral purposes at the rent, and subject to the conditions thereinafter prescribed. Section 96 makes provision for pastoral leases in the Kimberley Division. Section 97 deals with the position and boundaries of leases. Sections 98 to 101 deal with the term, rent, and review of assessment of rent. Section 102 requires that every pastoral lease shall be granted on condition that improvements as prescribed be effected by the lessee. Section 103 provides for the forfeiture of pastoral leases, if the lease is not stocked in a prescribed manner. Section 104 provides for the re-appraisement of rent in certain circumstances. Section 105 provides that a pastoral lease gives no right to soil, and a very restricted right to timber, and s 107 requires a pastoral lessee desiring to ringbark trees to obtain prior permission. The remaining sections of Pt VI make provision for withdrawal or resumption of land, compensation for improvements, and the surrender and transfer of leases. That is the setting within which s 106 appears. The marginal note for the section is 'Reservations'. The section as enacted in the *Land Act* 1933 (WA) read:

> 'The right is reserved to the Minister —
>
> (a) to lay out, declare open, and make, either permanently or for temporary use, public roads through any land held under pastoral lease:
>
> (b) to take away any indigenous produce, rock, soil, or other material; and to fell, cut, and remove all or any timber, sandalwood, or other woods which may be required for public purposes, from any such land:
>
> (c) to issue licenses to any persons to cut, remove, and cart

away any timber, sandalwood, or other woods or to quarry, dig for, and cart away any rock, soil, or other material growing or being upon any such land;

(d) to sell, lease, or otherwise dispose of any mineral land comprised within the limits of any pastoral lease:

(e) to sell, lease, or otherwise dispose of any other portion of such lease subject to the provisions of this Act, at any time, and with a right of immediate entry, but subject to section one hundred and eight; and

(f) to depasture any horses or cattle in the employ of the Government while working on or passing over the said land, and to water them at any natural sources there, together with a right for any person to pass over any such land which may be unenclosed, or enclosed but otherwise unimproved, with or without horses, stock, or vehicles, on all necessary occasions.'

Those provisions were renumbered s 106(1) by the *Land Act Amendment Act*, and s 106(2) provided:

'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 is accepted by the parties 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* came into operation.

Section 106(2) has not been amended since its insertion, although a number of the reservations in s 106(1) have been repealed.

Pastoral leases have always been deemed 'Crown land' for the purposes of land and resource management: see the *Land Act* 1898 (WA), s 3; the *Land Act* 1933 (WA), s 3; the *Mining Act* 1904 (WA), s 3; the *Mining Act* 1978 (WA), s 8; the *Petroleum Act* 1936 (WA), s 4; the *Petroleum Act* 1967 (WA), s 5; the *Land Drainage Act* 1925 (WA), s 6; the *Wildlife Conservation Act* 1950 (WA), s 6; and the *Conservation and Land Management Act* 1984 (WA), s 11.

The duration of pastoral leases has been for long periods. Under the Land Regulations 1882 (WA) leases could be granted for up to thirteen years, under the Land Regulations 1887 (WA), up to twenty years, and under the *Land Act* 1898 (WA) up to thirty years. Under the *Land Act* 1933 (WA) pastoral leases could be granted up to fifty years. The areas covered by pastoral leases in the Kimberley Division have covered large areas, varying from 10,000 to about 993,364 acres. Many exceeded 250,000 acres.

In summary, pastoral leases under the Land Regulations (WA) of 1882 and 1887 were granted on conditions that expressly excepted and reserved to Aboriginal people a right to enter upon 'any unenclosed or enclosed but otherwise unimproved' parts of the lease 'for the purpose of seeking their subsistence therefrom in their accustomed manner', and from 1934 the legislation provided a right for them at all times to enter upon 'unenclosed and unimproved

parts' of the lease 'to seek their sustenance in their accustomed manner'.''

698 The Full Court held that the grant of pastoral leases in Western Australia almost, but did not quite, extinguish native title rights: they extinguished all native title rights except those that were covered by the reservation in s 106(2) of the *Land Act* 1933 (WA) or its predecessors. The reservations, the Full Court held, defined the extent of the native title rights that could survive.

699 In my view, the pastoral leases in Western Australia extinguished all native title rights and interests. They did so because, subject to the reservations imposed by relevant Acts under which they were granted and contained in the instruments of lease, they conferred upon lessees a right of exclusive possession under the common law and under s 248A of the *Native Title Act*. That right obliterated all native title in respect of leased land. It will be necessary to deal with the reservations in favour of Aborigines in greater detail later. First, however, I will set down what I perceive to be the correct starting point for a discussion of pastoral leases. Next I will dispose of several arguments that the pastoral leases here did not confer a right of exclusive possession.

700 It is at least a rebuttable presumption that the general law of leases will apply to an interest called a ''lease'' by the legislature and the parties to it, and that the interest will and does confer a right to exclusive possession, insofar as exclusive possession can exist. A similar approach was applied by Kirby P (with whom Meagher JA agreed) in the case of *Minister for Lands and Forests v McPherson* (886). In that case, his Honour rejected the argument that a conditional purchase lease, being an interest that did not exist at common law, was purely a creature of statute, and that the relevant legislation precluded the grant of equitable relief against forfeiture. His Honour expressed himself in this way (887):

> ''The clear principle ... is that the first duty of the Court is to examine the statute to see whether, consistently with its terms, other rights and obligations that would apply by the general law attach to the statutory entitlements and duties of the parties. *In the case of an interest called a 'lease', long known to the law, the mere fact that it also exists under a statute will not confine its incidents exclusively to those contained in the statute. On the face of things, the general law, so far as it is not inconsistent with the statute, will continue to operate*. Thus, the answer to whether relief against forfeiture of a statutory lease under the Act is available to a party having an interest in that lease depends not upon any broad exclusion of the general law ... but *upon a detailed consideration of whether that*

(886) (1991) 22 NSWLR 687.

(887) *McPherson* (1991) 22 NSWLR 687 at 696-697. The statement was approved and quoted in the dissenting judgment of Brennan CJ in *Wik* (1996) 187 CLR 1 at 80.

law is compatible with the provisions of the Act, specifically those providing for forfeiture.'' (Emphasis added.)

701 It should be emphasised that the inquiry is into whether particular incidents of the general law (such as the right of exclusive possession) are compatible with the terms of the legislation and the instrument of the grant. The inquiry is not whether a ''lease'' under statute or regulation is on all fours with the common law. That approach confuses the issue, because it is possible for a ''lease'' under statute to depart, as I have pointed out, from some of the conventional forms of a lease at common law but to have all of the other incidents of an ordinary common law lease (888). For instance, a statutory ''lease'' for commercial premises may vest upon grant, not actual entry; but this departure from the common law would hardly indicate that the ''lease'' did not confer a right of exclusive possession. The same could be said of a grant of a perpetual lease for a suburban holding, a creature unknown to the common law. It follows that I would not hold that because legislation providing for a ''lease'' might depart from an aspect or aspects of the common law with respect to leases, the ''lease'' in question must lack the most basic incident of a common law lease — the right to exclusive possession (889).

702 It has been suggested in this case that because of various rights retained by the Crown, including the right to resume the land covered by a pastoral lease in whole or in part, subject to a right to compensation in respect of improvements only, a pastoral lease should be regarded as precarious (890). I do not, with respect, consider that to be so. A lease in those terms is less fragile or precarious than a tenancy at will. It is also subject to no greater uncertainty than, for example, a tenancy for a fixed period that is liable to earlier termination on the death of a tenant. In any event, the precariousness

(888) In *O'Keefe v Williams* (1910) 11 CLR 171, it was held that the Crown was in the same position as a lessor and was obliged to let the holder of an exclusive occupation licence quietly enjoy the premises. In *Wik* (1996) 187 CLR 1 at 198, Gummow J said that pastoral leases would attract equitable relief against forfeiture; (at 245), Kirby J also noted that relief against forfeiture would be available and the lessee would be able to enforce a covenant for quiet enjoyment. It is not possible, in my view, to reconcile the implication of these parts of the common law with a conclusion that pastoral leases do not confer a right of exclusive possession.

(889) In *Wik*, Gaudron J and Gummow J both seemed to rely on the fact that pastoral leases could be granted in perpetuity to support the notion that such leases were ''sui generis'': *Wik* (1996) 187 CLR 1 at 153, per Gaudron J; at 201, per Gummow J. However, perpetual leases are now recognised as conferring a right of exclusive possession, despite the fact they are unknown to the common law: see reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at 199-200 [431]-[432]; *Wilson v Anderson* (2000) 213 CLR 401 at 434 [58]-[60], per Gaudron, Gummow and Hayne JJ.

(890) Reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at 123 [170].

or otherwise of the interest granted is not the determinant of the true character of the interest.

703 In important respects, moreover, the interest conferred by pastoral leases was no more precarious than other leasehold interests under the Regulations and the Land Acts. Several of the sections to which Gleeson CJ, Gaudron, Gummow and Hayne JJ in their Honours' reasons refer apply to virtually all leases under the legislation, including those (such as special leases, and leases of town land) which confer a right of exclusive possession. Section 32 of the *Land Act* 1898 (WA), for instance, provided (891):

> ''Subject to the provisions of this Act, if any holder of land under this Act fails or neglects to comply with, perform, or fulfil all or any of the prescribed conditions under which he holds such land, or if at any time the rent or instalment of purchase money is not paid as prescribed, the lease or other holding and the lands therein, and all improvements thereon, as well as any rent or purchase money that may have been paid, may be forfeited.''

Likewise, the provisions requiring forfeited leases, and the land comprised in them, to be offered up to the public were of general application (892). They therefore offer no support to the idea that pastoral leases, as opposed to other types of lease under the Land Acts, do not confer exclusive possession.

704 Nor do I think anything turns upon rights retained by the Crown as lessor to take soil and timber, or to authorise others to do so. Reservations and exceptions of these kinds have been familiar to conveyancers in this country and in England for more than 100 years (893). How, then, it may be asked, can their presence in pastoral leases support the notion that such leases are sui generis and do not confer exclusive possession?

705 Reliance was also placed by the claimants, both here and in *Wik*, upon the retention of an unrestricted right of passage by the Crown

(891) See also *Land Act* 1933, s 23.

(892) *Land Act* 1898, s 33; *Land Act* 1933, s 24.

(893) See, eg, *Boyle v Olpherts* (1841) 4 I Eq R 241 (construing a lease that ''excepted and reserved ... all royalties, minerals, fullers' earth, clay for bricks, coal-pits, quarries of lime, slate or stone, and bogs and turf-mosses whatsoever, together with all woods and underwoods ... saving always, and reserved out of this exception to the lessee, his heirs and assigns, liberty to dig, cut and take lime, slate, or other stone and turf-moss to be spent and employed on the premises, and not elsewhere''); *Quinn v Shields* (1877) 11 IR CL 254 (construing a provision ''excepting and always reserving out of [the] grant ... all woods, underwoods, and timber trees which were on the said demised premises on the 13th of January, 1806 ... and all mines, minerals, coals, and quarries of marble, freestone, limestone, and slate ... and all mosses and turbaries, except such reasonable quantity thereof as the said grantees ... may want for their own consumption''); *Woodfall's Law of Landlord and Tenant*, 20th ed (1921), pp 222-223; *Halsbury's Laws of England*, 4th ed (reissue), vol 27(1), par 161.

and others authorised by it across land the subject of pastoral leases. Such a right does not deprive a lease of the character of a lease (894). A right of passage is in the nature of an easement by way of implied grant by the lessee to the lessor (895). It might be as extensive as the parties wished. Its presence offers no basis for thinking that what is treated by the parties as a lease is in reality something else.

706 That understanding is supported by Australian case law. One of the issues in *ICI Alkali (Aust) Pty Ltd v Federal Commissioner of Taxation* (896) was whether a company which was granted a Miscellaneous (Salt) Lease under the *Mining Act* 1930 (SA) could claim taxation deductions for improvements on leased land. The Commissioner of Taxation argued that it could not. Counsel for the Commissioner submitted that the company held a licence, not a lease; and he referred to the reservations and the qualifications on the alleged lessee's rights as indications that the interest conferred no right of exclusive possession. He pointed out that the alleged lessee had to permit a pastoral lessee to have access to and to use the land for domestic purposes and for the purpose of walking stock to and from certain surface water. The lessee was obliged not to prevent any person who held a right, privilege or authority under the *Mining Act* 1930 (SA) or regulations from exercising it. The lessee was, in addition, restricted to using and occupying the premises for the purpose of working for, mining and obtaining salt; the lessee might not mine for other substances such as gold. Notwithstanding these matters, McInerney J at first instance stated that he was disposed to think that the lease in question conferred ''a leasehold interest within the ordinary acceptance of the term'' (897). On appeal to the High Court (898), Barwick CJ (with whom Mason J agreed) was more emphatic:

> ''In my opinion, the conclusion that [the Miscellaneous (Salt) Lease] was relevantly a lease was so clearly right that no elaboration or, indeed, any discussion of that matter is required.''

707 In *Goldsworthy Mining Ltd v Federal Comissioner of Taxation* (899), the appellant there also sought to claim taxation deductions

(894) The lease to Crosswalk Pty Ltd under s 32 of the *Land Act* 1933 contained this condition: ''The public shall have at all times free and uninterrupted use of roads and tracks which may exist on the demised land *consistent with the efficient operation of the lease*'' (emphasis added). Despite the lease consisting of over 7,000 ha, there is no reason to doubt that it conferred exclusive possession: see reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at 181-182 [368]-[369], [372].

(895) *Durham and Sunderland Railway Co v Walker* (1842) 2 QB 940 [114 ER 364].

(896) [1977] VR 393.

(897) *ICI Alkali* [1977] VR 393 at 401.

(898) *ICI Alkali* (1978) 53 ALJR 220 at 223; 22 ALR 465 at 470.

(899) (1973) 128 CLR 199.

for improvements on leased land (900). The Solicitor-General for the Commonwealth argued that the taxpayer was not a lessee because the instrument did not confer a right of exclusive possession and was therefore not a lease. In support of this argument, the Solicitor-General pointed to several extensive reservations and limitations on the purported lessee's rights. These included a reservation in favour of the Crown, its agents, invitees and licensees to pass, repass and to navigate vessels in or over the demised premises; a reservation of all minerals and petroleum on or below the surface of the premises; a requirement that the lessee permit the Crown and any vessel to use any part of the premises for navigation, anchorage or other purpose incidental to shipping; and a requirement that the lessee would consent to the granting of easements or rights in or over the premises as might from time to time be necessary for the overall development or use of the harbour of Port Hedland. Despite the breadth of these reservations, Mason J found that they were compatible with a right of exclusive possession. As he explained (901):

> ''Although these provisions restrict the use to which the [lessee] may put the premises and impose obligations of an important kind, in my view they are not inconsistent with existence of a right of exclusive possession in the [lessee]. Indeed the provisions assume the existence of that right. Some of the provisions are novel but their introduction is explicable by reference to the relationship of the premises to the navigable channel which it underlies and to the harbour of Port Hedland.''

These cases demonstrate that substantial reservations and qualifications on a lessee's rights do not by any means point to an absence of exclusive possession. They also demonstrate that there are no closed categories of leases or of provisions that may be contained in them. As ways of life, of commerce, of grazing, of cultivation, of using land generally have changed and will continue to change, so too will the arrangements of lessors and lessees to give effect to those changes. The ingenuity of conveyancers is constantly called upon in any sophisticated society to devise terms adapted to the particular circumstances of that society and commercial activity conducted within it. A modern lease of a store in a large suburban drive-in shopping centre, with its strict requirements, de facto profit sharing between lessee and lessor, expanded rights of entry for the lessor, and obligations imposed as to trading hours, would look to a nineteenth century conveyancer a rather different creature from a lease of a

(900) The relevant provision was s 88(2) of the *Income Tax Assessment Act* 1936 (Cth), which enabled a person ''who in the year of income [was] a lessee of land'' to claim a deduction for improvements on the land. The appellant held an instrument described as a ''Special Lease for Mining Operations'' under s 116 of the *Land Act* 1933 and the *Iron Ore (Mount Goldsworthy) Agreement Act* 1964 (WA).

(901) *Goldsworthy Mining* (1973) 128 CLR 199 at 213.

country estate in England, or a nineteenth century London building lease. The presence of exceptions and reservations in forms adapted to particular times and circumstances should not, and does not, of itself have the consequence that what the parties have described and treated as a lease is not to be regarded as a lease and does not confer exclusive possession (save, of course, to the extent expressly reserved or excepted).

708 Something further needs to be said about an exception or reservation with respect to soil and timber. These, especially the former, are part of the fabric of the subject matter of the lease; they will usually form part of the reversion to be restored to the lessor at the end of the term in the same way as a building on land the subject of a demise has to be restored, properly maintained, fair wear and tear only excepted. They have nothing to say about non-exclusivity of possession.

709 It has been suggested that because pastoral leases have their source in the same legislation as licences, and some provisions apply indiscriminately to both, pastoral leases are to be equated with the latter and should not be regarded as true leases. To me, this suggests the contrary. It suggests that the legislature has understood and drawn a distinction between leases and licences, although there may be some commonality of incidents between them stated in the legislation for convenience and brevity of expression. But, in any event, the fact that there is some commonality of incidents does not mean that there is no distinction at all between leases and licences. Other leases in the Land Regulations and Land Acts (for instance, special leases) do confer a right of exclusive possession. That suggests that pastoral leases do likewise.

710 The fact that a lease is granted for a purpose, even a very restricted purpose, is of no significance (902). The restriction on purpose is an inhibition on the nature of the use and is not an inhibition on the times or the extent to which land covered by the lease may be used. It says nothing about the intensity of the permissible use. There would, moreover, be very few leases, if any, granted in modern times which permitted unrestricted use of the demised property. Indeed, current commercial practice would restrict lessees to the pursuit of not only carefully identified purposes but also of purposes which in no way endanger any statutory licences, planning approvals or the lessor's position under other legislation applying to the subject matters of the leases.

711 In *Wik*, there were assumptions, largely unstated, but little discussion of, and little or no evidence about, the nature of large pastoral holdings or the extent of the activities carried out by pastoralists on them. The leases there were granted for ''pastoral purposes'', an expression relevantly synonymous with ''grazing purposes'', the term used in the *Land Act* 1898 and the *Land Act* 1933.

(902) Contrast reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at 127 [180].

It is important, in my opinion, to do what was not done in *Wik*; that is, to identify the scope and extent of the ordinary, reasonable activities of graziers in pursuing grazing or pastoral purposes to determine what support, if any, the nature of those activities gives to the notion that pastoral leases do not confer, and the pursuit of pastoral or grazing purposes do not require, exclusive possession.

712 What would a grazier ordinarily and reasonably expect to be able to do for pastoral purposes on a pastoral lease? A pastoralist would need, and certainly expect to have, access to every part of the land, at any and all times, in order, for example, to rescue stock that may have become isolated or stranded; to reach, erect and repair internal and boundary fencing; to introduce and maintain artificial pasture which might involve ripping and sowing vast areas either aerially or on the ground; to burn off; to plough the land; to clean the land; to eradicate noxious vegetation and vermin; to erect bores, wells and dams; to cross and recross every part of the land to check and oversee it and muster stock roaming on it; to give effect to good rotation practices; and to depasture stock on every square kilometre of it as required. The notion that, except for express exception made in legislation or the instrument of lease, there should be any inhibition upon the pursuit of these activities as and when it was desirable or indeed merely convenient to the lessee to undertake them would strike anyone engaged in the pastoral industry as a remarkable one. When regard is had to these matters, it is difficult to imagine why the expression ''grazing purposes'' should be thought to indicate a lack of desire or need for exclusive possession or how any use or occupation involved in the exercise of native title rights is reasonably compatible with a lease for pastoral purposes.

713 Authority does not suggest that ''pastoral purposes'' or ''grazing purposes'' involve an absence of exclusive possession. In *Falkland Islands Co v The Queen* (903), the Privy Council had no hesitation in construing an instrument entitled ''a licence to depasture stock'' as a ''demise of the land therein contained, to which the ordinary rights of a lessee [attached]''. These rights, their Lordships made clear, included a right of exclusive possession (904). Similarly, in *O'Keefe v Malone* (905), the Privy Council observed that an exclusive occupation licence for ''grazing purposes'' was indistinguishable from a lease under the general law; and Griffith CJ expressly agreed with that proposition in *O'Keefe v Williams* (906). The use of the words

(903) (1863) II Moore NS 266 at 273 [15 ER 902 at 904-905].

(904) *Falkland Islands Co* (1863) II Moore NS 266 at 273 [15 ER 902 at 905].

(905) [1903] AC 365 at 369, 377.

(906) (1910) 11 CLR 171 at 191: ''In my opinion the substantial relation between the Crown and the holder of an occupation licence is that of landlord and tenant. An opinion to that effect was expressed by the Judicial Committee in the case of *O'Keefe v Malone* [1903] AC 365. If and so far as that expression of opinion is not binding on this Court I respectfully adopt it.''

''pastoral purposes'' or ''grazing purposes'' by itself does not support any proposition that pastoral lessees lack exclusive possession (907).

714 As I have pointed out, some of the Justices in *Wik* were impressed by the ''vastness'' of the areas covered by the leases (908). I cannot, with respect, accept this as a criterion of the absence of exclusive possession, not only for the reasons that I have just stated, but also because of the uncertainty to which such a criterion gives rise. How vast must the area be to deny a right to exclusive possession? Is the answer to be affected by the productivity of the land covered by the lease or the intensity of the activities or the practices of a particular pastoralist? Is the answer to depend upon benevolent or harsh climatic conditions from time to time? The imprecision of an answer to these questions rules out, in my view, the use of size as a test of exclusivity or otherwise of possession (909).

The reservations

715 I turn now to the reservation in Western Australian leases in favour of Aborigines. Contrary to the holding of the majority in the Full Court (910), I would accept the submission advanced, and then withdrawn, by the State of Western Australia but taken up by Crosswalk and the Pastoralists and Graziers Association of Western Australia (Inc) that s 106(2) (911) of the *Land Act* 1933 confirms the extinguishment of native title by replacing it with new rights available to others and defined in terms more limited than a bundle of native title rights at common law might ordinarily be defined. Section 106(2) does not confine the rights it confers to the claimants: it refers to ''the aboriginal natives'', that is, any and all Aboriginal peoples. A right available to a larger community is not consistent with the existence of a pre-existing right available to a smaller section of that community only. The reservation here is in favour of the totality of the Aboriginal community. Any other view of the operation of the sub-section would not sit comfortably with the notion that native title is a communal title, available for enjoyment by a discrete, smaller community who have

(907) I note that in *Wik* (1996) 187 CLR 1 at 150, Gaudron J (with whom Gummow J agreed on this point) discussed the remarks of Griffith CJ and Isaacs J in *O'Keefe v Williams*. Her Honour distinguished the case by saying that it was concerned with different legislation and that their Honours had proceeded on the view that the Privy Council had held in *O'Keefe v Malone* that occupation licences were leases. Her Honour said that the Privy Council in fact did not. Griffith CJ, however, expressly agreed with the Privy Council, and was not merely acting on an assumption about what *O'Keefe v Malone* had held.

(908) *Wik* (1996) 187 CLR 1 at 130, per Toohey J; at 154, per Gaudron J; at 232-233, per Kirby J.

(909) See also *Anderson v Wilson* (2000) 97 FCR 453 at 515 [253]-[254], per Beaumont J.

(910) *Western Australia v Ward* (2000) 99 FCR 316 at 397 [306].

(911) This was inserted by Act No 47 of 1934.

exercised their rights over time in a particular traditional way over identified areas and have maintained their connection with the land.

716 In *Wade v New South Wales Rutile Mining Co Pty Ltd* (912), Windeyer J pointed out that the words ''reserve'' and ''reservation'' were to be understood in the Australian law of real property as the keeping back of a thing otherwise granted. The text of s 106(2) (unlike the marginal note) is neither expressed to be a reservation nor does it answer the description of a reservation as stated by Windeyer J. But whether the right conferred upon the Aboriginal peoples is to be regarded in the strict sense as a reservation or not does not in my opinion matter. If anything was kept back from a pastoral lessee, at most it could only have been the subject matter of the reservation, an entitlement of a lesser nature than what had earlier existed (being *all* native title rights in respect of the land) and, accordingly, it would follow that nothing else was held back from a pastoral lessee. But, in any event, the better view is that a grant, whether described as a reservation or not, to all of a significantly larger group of people rather than to a section of them formerly enjoying larger, but particular and different, rights merely confirms the extinguishment of those larger rights by the lease (913).

717 Section 223(3) and (4) of the *Native Title Act* do not assist the claimants. They provide:

> ''*Native Title*
>
> . . .
>
> *Statutory rights and interests*
>
> (3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression *native title* or *native title rights and interests*.
>
> . . .
>
> *Case not covered by subsection (3)*
>
> (4) To avoid any doubt, sub-section (3) does not apply to rights and interests created by a reservation or condition (and which are not native title rights and interests):
>
> (a) in a pastoral lease granted before 1 January 1994; or
>
> (b) in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994.''

(912) (1969) 121 CLR 177 at 194.

(913) The *Native Title Act* itself recognises that ''non-exclusive pastoral leases'' which amount to previous non-exclusive possession acts may contain reservations or conditions in favour of Aborigines: see s 23H.

718 The creation and grant of fresh rights to *all* Aboriginal peoples does not constitute a ''conversion'' or ''replacement'' of *existing* rights enjoyed by a smaller community of Aboriginal people, the earlier local inhabitants or custodians. For the same reason, the rights freshly created or granted are entirely statutory, and not native title rights as referred to within s 223(4) of the *Native Title Act*.

719 The word ''accustomed'' used in s 106(2) of the *Land Act* 1933 does not, in my opinion, assist the claimants. That word is intended to refer to the methods and practices pursued by the Aboriginal entrants, and is not used as a means of identifying or designating a smaller community which may traditionally have come upon or occupied the land.

720 In my opinion, therefore, not one of the features of Western Australian pastoral leases which were identified by the majority in the Full Court leads to a conclusion that the leases did not confer exclusive possession as that expression is to be understood in leasing parlance and in the *Native Title Act*. The decision in *Wik* dictates no different conclusion. There is no majority opinion in *Wik* as to the features determinative of the existence or otherwise of exclusive possession. The Western Australian legislation and leases are different in form from the relevant Queensland legislation and leases. And, in any event, in my respectful opinion, the majority judgments in *Wik* were not based on a full and proper appreciation of the true nature and extent of the legitimate pursuit of pastoral or grazing purposes. The decision in *Wik*, so far as it relates to exclusive possession, which I take to have the same meaning in the *Native Title Act* as it has at common law, has application only to leases of approximately the same size, in the same districts, in the same form, and issued under the same Act as those the subject of that case (914).

Permit to occupy Crown land prior to the issue of Crown grant in Western Australia

721 The next category of land in issue is land in respect of which a permit to occupy existed before a Crown grant was issued. The majority in the Full Court presented the history of that land in this way (915):

> ''In January 1918 Reserve 16729 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 ha outside the township of Wyndham. A major part of this land is outside the determination area. In June 1918 the purpose of the reserve was amended to 'for use and requirements of the

(914) See *Jones v Bartlett* (2000) 205 CLR 166 at 224 [204]-[205], per Gummow and Hayne JJ (recognising that there will be ''leeways of choice'' in distinguishing earlier decisions that appear to have no ratio decidendi).

(915) *Western Australia v Ward* (2000) 99 FCR 316 at 414-415 [370]-[372].

Government of the State in connection with the Wyndham Freezing, Canning and Meat Export Works'. The Wyndham Freezing Canning and Meat Works (the meat works) was conducted by a body incorporated as a State Trading Concern. The works were established in June 1918. On 27 September 1918 a permit to occupy rural lands was granted to the meat works. Section 16 of the *Land Act* 1898 (WA) provided 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 the form set out in the appropriate Schedule to the Act, being a certificate that the purchaser is entitled to a Crown grant. The trial judge held that between 1918 and 1962 the reserve was used for grazing and watering of cattle before the cattle were taken to the meat works at Wyndham. However, it seems that a grant in freehold to the meat works did not proceed as there is no record of the issue of a sealed deed of grant as required by s 12 of the *Land Act* 1898 (WA). His Honour noted that the history of the matter suggested that the Crown regarded the interest accorded by the permit as sufficient for the purposes for which the reserve was to be used. His Honour held that neither the permit nor the manner of use of the land for the purpose for which the reserve was created demonstrated a clear and plain intention by the Crown to extinguish native title in the land, and he noted that the reserve was a substantial area which remained undeveloped save for its use for the purposes of grazing and watering cattle.

The fulfilment of the conditions for the grant of a permit under s 16 entitled the grantee to a grant in fee simple, and the purpose of the permit was to authorise entry for the taking of possession of the land in advance of the completion of the formalities associated with the sealing and recording of a grant in fee simple. A grant in fee simple would undoubtedly have extinguished native title.

The permit to occupy authorised and empowered the meat works:

> '... at any time after the date hereof, to enter upon the said tract or parcel of land, and to hold and enjoy the same for its absolute use and benefit; subject to the provisos contained in the prescribed form of Crown Grant for rural lands under ''*The Land Act* 1898''.'''

722 The holding and enjoyment of land by a grantee for its ''absolute use and benefit'' is, in terms, indisputably, in my opinion, inconsistent with the existence of any other rights or interests in, or in respect of, the land. I agree with the majority of the Full Court that native title rights have been extinguished in respect of this land (916).

(916) *Western Australia v Ward* (2000) 99 FCR 316 at 415 [373].

Conditional purchase leases in Western Australia

723 The only conditional purchase lease to be considered in these appeals is 136/62. It lay wholly within the area that later became the subject of the permit to occupy granted to the Wyndham Freezing, Canning and Meat Export Works in 1918. As stated above, that permit had the effect of wholly extinguishing native title. For completeness, however, I will consider whether the conditional purchase lease also extinguished native title rights and interests.

724 Conditional purchase lease 136/62 was formally issued to Connor Doherty and Durack Ltd on 30 July 1910. The area comprised in the lease was some 2,000 acres within an expanse of land in and around Goose Hill held by the company as part of the Ascot pastoral lease. The lease was resumed pursuant to s 9 of the *Land Act* 1898 by proclamation dated 9 January 1918.

725 At the time that the conditional purchase lease was granted s 62 of the *Land Act* 1898 relevantly provided:

> ''Any pastoral lessee in the Kimberley . . . who shall have in his possession . . . at least ten head of sheep or one head of large stock for each one thousand acres leased, may apply to purchase . . . any Crown land within his lease . . . not exceeding in the aggregate one per cent of the total area held by such lessee under pastoral lease . . . on the same terms, and subject to the same conditions as are prescribed for purchase under section fifty-five, except the condition of residence . . .''

726 Section 55 of the *Land Act* 1898 provided for the conditional purchase of agricultural lands elsewhere in the State. Several of its features should be noted. First, s 55(3) provided that on application for conditional purchase from the Crown, accompanied by ''the first instalment'' (that is, rent payable under the lease) ''and on approval of the application by the Minister, a lease in the form of the Ninth Schedule shall be issued for twenty years''. It will be necessary to examine the form of such a lease shortly.

727 Secondly, s 55(4) required the lessee to take possession of the land and reside upon it. It relevantly provided:

> ''The lessee shall, within six months from the date of his lease, take in his own person possession of the land, and shall reside upon it and make it his usual home without any other habitual residence, during at least six months in each year for the first five years from the date of the commencement of his lease, and if possession be not taken as aforesaid the land shall be forfeited . . .''

728 Thirdly, s 55(5) imposed conditions as to fencing and other improvements to be carried out within each of two, five and ten years.

729 Fourthly, s 55(6) provided that at the expiration of the lease, or at any time after five years, if all the conditions as to fencing and

improvements had been complied with, and the full purchase money and fee had been paid, a Crown grant of the land would issue.

730 Furthermore, the form of the Ninth Schedule reflected the language of leases under the common law. It recited that in exercise of the powers given under the *Land Act* 1898 His Majesty did ''demise to the Lessee ... the natural surface and so much of the land as is below the natural surface to a depth of [200] feet all that piece or parcel of land ... to have and to hold the said land hereby demised subject to the powers, reservations, and conditions contained herein ... for the term of Twenty years''. It referred to ''rent'' payable, and forbade the lessee from assigning or subletting any part of the premises without the Minister's approval. It also provided that upon the expiration of the term or after five years, upon proof of compliance with the conditions and payment, the lessee would be entitled to a Crown grant in fee of the demised lands.

731 In my view, it is clear that a conditional purchase lease under the *Land Act* 1898 conferred a right of exclusive possession on the lessee and extinguished all native title rights and interests in respect of the land. The trial judge said that a conditional purchase lease was not known to the common law (917). However, it by no means follows that the interest created by Parliament lacked all of the incidents of a common law lease (918). In this case, there are powerful indications that exclusive possession was granted. The lessee was required to ''take ... possession of the land'' and to ''reside upon it and make it his usual home without any other habitual residence'', save in certain circumstances. He was required to fence and improve the land. He was obliged to pay ''rent'' and was forbidden to ''assign'' or ''underlet'' the premises without approval. Upon payment of rent and fulfilment of the other conditions he was to receive nothing but absolute ownership. Whilst the lessee was performing the conditions which, when satisfied, would entitle him to a grant, he was in a like position to a purchaser under, for example, a terms contract, and in a situation similar to that of an owner in equity. The Crown, in a position analogous to a vendor, also had to keep itself ready, willing and able to make the unqualified grant when the conditions were satisfied (919). To claim, in these circumstances, that the lessee held an interest that fell significantly short of a common law lease (because it lacked exclusive possession) is implausible.

(917) *Ward* (1998) 159 ALR 483 at 617.

(918) The fact that an interest is unknown to the common law does not answer whether it may have the incidents of common law leases. If such reasoning were accurate, a perpetual lease — something also unknown to the common law — could never confer exclusive possession, even though it would be closer to a fee simple than a normal lease.

(919) Compare *KLDE Pty Ltd v Commissioner of Stamp Duties (Q)* (1984) 155 CLR 288 at 297, per Gibbs CJ, Mason, Wilson and Dawson JJ. The contract there was unconditional but there is nonetheless a relevant similarity.

732 Nothing in either *Moore and Scroope v Western Australia* (920) or *Davies v Littlejohn* (921) affects my conclusion. The majority of the Full Court were correct in their Honours' analysis of these cases, and I respectfully adopt what they said (922):

> ''In *Moore and Scroope v Western Australia* the question was whether homestead and grazing leases granted under the *Homesteads Act* 1893 (WA) and the *Land Act* 1898 (WA) were 'sales' within the meaning of the Land Regulations 1887 (WA). The question was answered in the affirmative. Homestead and grazing leases were forms of conditional purchase. Isaacs J, referring to provisions of the *Homesteads Act*, said (at 346-347): 'Section 23 requires him also to comply with conditions which obviously point to the intention of his permanently retaining the land as against the Crown. By s 25, if he had duly paid his rent and observed the conditions, he is entitled on payment of fees to a Crown grant of the lands. Section 26 permits him to accelerate the granting of title. Section 29 recognises rights properly attributable to a virtual purchaser of the land. Broadly looked at, the issue of a homestead lease is only the first step in a continuous and connected process by which the Crown transfers for a fixed price its land to a permanent settler. A homestead lessee would undoubtedly regard the land as his, subject only to payment of the deferred price, and compliance with the conditions. There is no intention that his interest in the land shall terminate in thirty years; on the contrary the intention is that it shall then or sooner ripen by virtue of his contract into absolute ownership.'
>
> In our opinion that reasoning may be applied equally to a conditional purchase lease. The grant of the lease points to the intention of the parties that the lessee will permanently retain the land, becoming in due course the holder of an estate in fee simple.
>
> The question in *Davies v Littlejohn* was whether the expression 'charges or encumbrances' in a Will included the unpaid instalments owing to the Crown under the terms of a 'conditional purchase' under the *Crown Lands Acts* of New South Wales. That question was answered in the negative. The issue in the case did not concern the nature of the possessory interest held by the purchaser under the transaction.''

733 I mention only one other matter bearing on this topic. The reservations in the 9th Sched do not, in my opinion, detract from the grant of exclusive possession. The 9th Sched reserved a power to resume and enter upon any portion of the land which might be deemed necessary for roads, tramways, railways and other works or purposes

(920) (1907) 5 CLR 326.
(921) (1923) 34 CLR 174.
(922) *Western Australia v Ward* (2000) 99 FCR 316 at 470 [605]-[607].

of public utility or convenience without compensation except in certain limited situations (923). It also reserved the power to take timber and materials for public works. But these reservations do not deny the right to exclusive possession. Virtually identical reservations were included in other sorts of leases, such as special leases for the erection of wharves, jetties and storehouses, and these conferred exclusive possession (924). In addition, similar reservations were also common in freehold grants by the Crown (925). It follows that the presence of the reservations does not lend any support to the idea that conditional purchase leases involved less than exclusive possession. Accordingly, those leases extinguished native title rights and interests in full.

Special leases in Western Australia

734 There were twenty special leases granted within the claim area. One was issued under reg 114 of the Land Regulations 1887 (WA) (the 1887 Regulations), and several were issued under s 152 of the *Land Act* 1898. Others were issued under s 116 of the *Land Act* 1933. Some of the special leases were outside the determination area, and there is no need to examine those.

735 Regulation 114 of the 1887 Regulations empowered the Governor to grant leases of any portion of land not exceeding 25 acres for the erection of wharves, storehouses, slips for building or repairing vessels, quarries, baths, works for supplying water or gas to any town, market gardens or any other special purpose. There was no prescribed form of lease. The regulation specified that the lease would be on such conditions as to rent or otherwise as shall be determined by the Governor in Council.

736 Section 152 of the *Land Act* 1898 was cast in similar language. It provided for the grant of special leases not exceeding 25 acres in area and for a term not exceeding twenty-one years in the form or to the effect of the 29th Sched. The purposes for which special leases could be granted were the same as those stated in reg 114 of the 1887 Regulations. The prescribed form of lease contained reservations similar to those recited in a conditional purchase lease.

737 In my view, special leases granted under the 1887 Regulations extinguished native title in full. There is nothing in those regulations to suggest that special leases granted under reg 114 did not confer a right of exclusive possession or, indeed, were anything other than common

(923) The power was limited to resuming no more than one-twentieth of the land and compensation had to be provided for land on which there were buildings.

(924) *Land Act* 1898, 29th Sched.

(925) See, eg, *Campbell v Dent* (1864) 3 SCR (NSW) (L) 58, where the grant reserved to the Crown all stone, gravel, indigenous timber and other materials required for naval or public purposes; and *City of Keilor v O'Donohue* (1971) 126 CLR 353, where the grant reserved to the Queen ''all such parts and so much of the said Land as may hereafter be required for making Public Ways, Canals, or Railroads, in, over, and through the same, to be set out by Our Governor for the time-being''.

law leases. On the contrary, many of the purposes for which leases could be granted — the erection of wharves, storehouses, slips for building or repairing vessels, quarries, baths, works for supplying water or gas to any town — are plainly incompatible with other uses of the land by others or with the occupation by others of the land. It follows that leases under reg 114 extinguished all native title rights and interests.

738 The same conclusion follows for special leases under the *Land Act* 1898. It is true that these leases, unlike those granted under the 1887 Regulations, contained a reservation of indigenous timber and reserved the right to resume the land for public purposes without compensation in certain circumstances; but the presence of these, for the reasons that I have already given, does not indicate that the leases did not confer a right of exclusive possession. Similar reservations were common even in freehold grants (926). Further, the purposes for which leases could be granted again indicate that exclusive possession had to have been conferred. Accordingly, I am of the opinion that special leases under the *Land Act* 1898 extinguished native title in its entirety.

739 Section 116 of the *Land Act* 1933 requires somewhat more consideration. It provided that the Governor could grant ''leases of any Crown land in the form of the Twenty-first Schedule, for a term not exceeding twenty-one years'' for various purposes. The purposes were these:

> ''(1) For obtaining and removing therefrom guano or other manure;
> (2) For obtaining and removing therefrom stone, gravel, sand, or earth;
> (3) For sites for hotels, stores, smithies, or similar buildings;
> (4) For sites for bathing-houses, bathing-places, bridges, or ferries;
> (5) For sites for tanneries, factories, saw or other mills, stores, warehouses, or dwellings;
> (6) For sites for wharves, jetties, quays, and landing-places, or for sites for the depositing of materials;
> (7) For the working of mineral springs or artesian wells;
> (8) For sites for ship and boat-building, or repairing and marine and general engineering works;
> (9) For the collection and manufacture of salt;
> (10) For taking, diverting, conserving, and using water for mining, agricultural, industrial, and other purposes;
> (11) For works for supplying water, gas, or electricity;
> (12) For market gardens;
> (13) For fishing stations, and for the purpose of drying, canning, or preserving fish;

(926) *Campbell v Dent* (1864) 3 SCR (NSW) (L) 58; *City of Keilor v O'Donohue* (1971) 126 CLR 353.

(14) For any other purpose approved by the Governor by notice in the *Gazette* . . .''

740 The form of the instrument in the 21st Sched recited that in exercise of the powers given under the *Land Act* 1933 His Majesty did ''demise and lease to the said lessee the natural surface and so much of the land as is below the natural surface to a depth of . . . feet of all that piece or parcel of land . . . to have and to hold the premises hereby demised subject to the powers, reservations and conditions herein'' for a term of specified years. The form also made provision for several reservations. Notably, the Crown retained the power to resume up to one-twentieth of the land for public purposes without compensation, and reserved the right to take timber and materials for public works.

741 In my view, special leases under s 116 also extinguished native title rights and interests.

742 First, for the reasons that I have already given, the existence of reservations enabling resumption for public purposes and enabling the Crown to take indigenous timber and materials is not inconsistent with a right of exclusive possession, just as it is not so in the case of special leases under the *Land Act* 1898.

743 Secondly, several of the purposes in s 116 clearly support a finding that exclusive possession was granted. It is difficult to imagine how lessees could operate ''sites for hotels, stores, smithies, or similar buildings'', or ''sites for tanneries, factories, saw or other mills, stores, warehouses, or dwellings'' without a right to exclude others. Yet if a lease under s 116 for these purposes involves exclusive possession, there is no reason to think that a lease granted under the same section for other purposes does not.

744 Finally, the language of s 116 and the 21st Sched is redolent of common law leases. This Court has recognised, and I would reiterate, that such language suggests that a right of exclusive possession is an incident of special leases. In *Goldsworthy Mining Ltd v Federal Comissioner of Taxation* (927), Mason J rejected an argument that a ''Special Lease for Mining Operations'' issued under s 116, as modified by the *Iron Ore (Mount Goldsworthy) Agreement Act* 1964, did not confer a right of exclusive possession. One strand of his reasoning was the fact that s 116 in its original form authorised ''the grant of a lease, not a licence'' (928). In *Dampier Mining Co Ltd v Federal Commissioner of Taxation* (929), Mason and Wilson JJ made a similar point. In the course of rejecting an argument that a dredging lease issued under s 116 carried no right of exclusive possession, their Honours observed:

(927) (1973) 128 CLR 199.
(928) *Goldsworthy Mining* (1973) 128 CLR 199 at 212-213.
(929) (1981) 147 CLR 408 at 428.

''That section authorises the grant of a lease, not a licence. Throughout the language is that of demise.''

745 It follows that special leases issued under s 116 of the *Land Act* 1933 conferred a right of exclusive possession. That right was inconsistent with the continuing existence of any native title rights and interests. The majority in the Full Court erred in finding that special leases for some purposes extinguished native title but others, such as the lease for grazing, did not.

The effect of the RDA

746 All special leases except one were granted before the commencement of the RDA. The great bulk of special leases could not, therefore, have been affected in any way by the RDA.

747 There was, however, one special lease purportedly granted to K J Lilly in 1977 in the Goose Hill area under s 116 of the *Land Act* 1933. That lease was for ''grazing'' and was for a period of five years. The majority in the Full Court observed that the evidence indicated that a formal lease in accordance with the 21st Sched had not issued; and noted that the absence of a formal lease in the appropriate form was one of the grounds advanced by the claimants in support of the contention that there had been no valid grant to K J Lilly (930). They found it unnecessary, however, to deal with that contention (931).

748 Given the possibility that there was no valid grant in 1977, I do not consider that I should express a concluded view on whether the special lease granted in 1977 was invalidated by the RDA. I will only say that, at present, I can see no cogent reason for thinking that the valid grant of special leases after 31 October 1975 attracted s 10 of the RDA. The power to grant special leases under s 116 was of general application; it did not use any racial criteria; nor did any party suggest that its purpose was to create a distinction or restriction based on race, colour or ethnicity. For those reasons, I very much doubt whether s 116 would be a racially discriminatory law to which s 10 applied. It is not, however, necessary to determine this matter here.

Leases under s 32 *of the Land Act* 1933 *(WA)*

749 Several leases of reserved land were granted under s 32 of the *Land Act* 1933. It provided:

> ''When any reserve is not immediately required for the purpose for which it was made, the Governor may grant a lease or leases thereof, for not exceeding ten years, for any purpose, at such rent and subject to such conditions as he may think fit: Provided no lease for a term exceeding one year shall be granted unless applications are called for by notice in the *Gazette*.''

(930) *Western Australia v Ward* (2000) 99 FCR 316 at 473-474 [623].
(931) *Western Australia v Ward* (2000) 99 FCR 316 at 475 [628].

It is apparent that there was no requirement in the *Land Act* 1933 for the lease to be in any particular form. Although the 4th Sched to the Act was entitled ''Lease under Part III'', nothing required that the lease be in the form of that Schedule.

750 In my view, therefore, nothing in the *Land Act* 1933 suggests that a ''lease'' granted under s 32 was to be anything but a conventional lease. Even if the Schedule were relevant to a characterisation of the interest that could be granted under s 32, nothing in it negatives a right of exclusive possession. The Crown reserved a right to enter and resume any part of the lands for the purpose of roads, tramways and other purposes of public use, utility or convenience, with compensation for improvements only. It reserved minerals, and it also reserved the right to enter, dig and take away timber and stones. These reservations were very similar to those in the prescribed forms for conditional purchase leases and special leases, which conferred on the lessee a right of exclusive possession. It follows, in my view, that the grant of leases under s 32 would extinguish native title over the reserved land.

751 It is nonetheless desirable to consider the leases individually in order to see whether there is any possible argument that the instruments of lease themselves negatived a right of exclusive possession (932), and to deal with the effect of the RDA on leases granted after 1975.

Lease of part of reserve 1059

752 On 21 October 1958, a lease under s 32 was granted to R G Skuthorp. The lease was for ''Business and Garden Area''. It was from year to year, but the Minister could terminate it at any time after the first year upon giving three months notice. It contained a number of reservations similar to those in the 4th Sched.

753 In my opinion, the lease conferred a right of exclusive possession that extinguished all native title. The terms of the lease are entirely consistent with a grant of exclusive possession. The majority of the Full Court were correct to have so found.

754 I should make it clear, however, that it was, in my opinion, erroneous for the majority in the Full Court to have considered as a material factor the size of the area leased. That factor cannot deny the conferral of exclusive possession in this lease or in the others considered below. Because an area is large does not mean that some undefined part of it may be exclusively possessed and some other part cannot be. When a lessor grants a lease for a purpose, the whole of the area leased may generally be used for that purpose as intensively as the lessee sees fit.

(932) Whether instruments that were not true leases could be granted under s 32 is a matter I need not discuss.

Leases of parts of reserves 1061, 1164 *and* 18810

(a) Ivanhoe and Crosswalk leases

755 The majority in the Full Court described the Ivanhoe and Crosswalk leases in this way (933):

> ''A lease was granted in October 1977 to the Ivanhoe Grazing Co Pty Ltd for portions of these reserves under s 32 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 and determinable after the first year on three months notice by either side. The lease was granted for the purpose of 'grazing', and covered some 7,425 ha 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 whole of the leased reserves were within the Noogoora Burr Quarantine Area. It was a condition of the lease that the public had free and uninterrupted use of the roads and tracks which exist on the land. That lease was cancelled in 1987.
>
> In 1993 a lease of approximately the same area of the reserves was issued to Crosswalk for a term of one year commencing in July 1992, again determinable on three months notice after the first year. The leased area is known as King Locations 736 and 744. The lease comprised in part a printed form completed with particulars of the lease, and in part a schedule of additional conditions. The terms of the printed form contained terms, conditions and reservations similar to those contained in the lease of reserve 1059 to Mr Skuthorp. There is no reservation in favour of Aboriginal people.
>
> The schedule of conditions require that the land not be used for any purpose other than grazing without the prior approval of the Minister. Conditions 4 and 5 provide: '4. The Lessee shall not without the previous consent in writing of the Minister assign, transfer, mortgage, sublet or part with the possession of the demised land. 5. The land shall be continuously occupied and used by the Lessee for the purpose specified to the satisfaction of the Minister.' Other conditions required the fencing of external boundaries within twelve months, the maintenance of improvements, the permission of the Minister for the erection of structures, imposed a restriction against cutting down or damaging live timber or scrub and a condition permitting the Minister or his representative to enter the land to inspect the property at any reasonable time. The schedule also contains conditions providing for the holder of a miner's right to enter, a right in the lessee at any time within three calendar months following the expiration of the term or early determination

(933) *Western Australia v Ward* (2000) 99 FCR 316 at 477 [637]-[639].

> of the lease to take down and remove building structures and improvements, an obligation to make good the land thereafter and to leave 'the demised land' in a clean, neat and tidy condition to the satisfaction of the Minister, and a condition reserving to the Minister power to direct the number of stock depasturing on the demised land.''

756 Their Honours also noted that the lease to Crosswalk contained this condition relating to the use of roads and tracks:

> ''The public shall have at all times free and uninterrupted use of roads and tracks which may exist on the demised land consistent with the efficient operation of the lease.''

Having regard to this condition, their Honours found that the lease did not confer a right of exclusive possession. Native title rights, they held, could co-exist with the grant of the lease (934).

757 I take a different view. Both the Ivanhoe lease and the Crosswalk lease conferred a right of exclusive possession that was inconsistent with native title rights and interests. The fact that it was a condition of both leases that the public might have uninterrupted use of roads and tracks does not mean that the lessee lacked exclusive possession. It only meant that if the lessee infringed the condition, the lease might be forfeited. In any case, the presence of conditions and reservations such as these does not negative the conferral of exclusive possession. The cases of *ICI Alkali (Aust) Pty Ltd v Federal Commissioner of Taxation* (935) and *Goldsworthy Mining Ltd v Federal Comissioner of Taxation* (936) deny any such proposition. Accordingly, the leases extinguished native title in entirety.

758 Something needs to be said about the effect of s 10 of the RDA on the Crosswalk lease. Section 32 was an entirely general provision which in form and purpose created no distinction, restriction or exclusion based on race. In my view, it was not a racially discriminatory law to which s 10 of the RDA applied.

759 Even if s 32 were to be characterised as a racially discriminatory law, the lease would be validated under Pt 2, Div 2 of the *Native Title Act* and s 5 of the State Validation Act. The lease was in force on 1 January 1994 and 23 December 1996. Because it conferred a right of exclusive possession, it was an ''exclusive pastoral lease'' as defined in s 248A of the *Native Title Act*. As an exclusive pastoral lease in force on 23 December 1996, it was a previous exclusive possession act (s 23B(2)(c)(iv)) that, by virtue of s 12I of the State Validation Act, extinguished native title upon grant.

(934) *Western Australia v Ward* (2000) 99 FCR 316 at 478 [641].
(935) [1977] VR 393.
(936) (1973) 128 CLR 199.

(b) Leases to Harman

760 The majority in the Full Court described these leases in terms which I am content to adopt (937):

> ''In January 1991 a lease was purportedly granted to Messrs Harman and Osborn for an initial one year term commencing 1 July 1990 for an area of 8,000 m^2. The lessees operated a fishing safari known as 'Ultimate Adventures'. The area was used as a basic camp facility for tourists engaged in fishing excursions conducted by the lessees.
>
> It seems that administrative difficulties arose in relation to the issue of the lease and a transfer to new proprietors of the business. The lease was therefore terminated on 31 December 1992 and a new lease was issued in respect of the same area to G & J Harman. Again the lease was for an initial term of one year commencing on 1 July 1993 and thereafter from year to year determinable after the first year on three months notice for the purpose of 'tourist and travel stop facility'.
>
> The fact that this lease, and a number of other leases of reserves proved in evidence, were granted for one year, and thereafter from year to year, was no doubt a response to the requirement in s 32 of the *Land Act* 1933 (WA) that no lease be granted for a term exceeding one year unless applications are called for by notice in the *Government Gazette*.
>
> The lease comprises a printed form in terms . . . as required by . . . the *Land Act* 1933 (WA), and a typed schedule of additional conditions. Additional condition 1 provides that the land shall not be used for any purpose other than 'tourist Camp Facility' without prior approval in writing from the Minister. Condition 4 imposes a restriction on dealing with the lease without the consent of the Minister. Conditions 5 and 6 provide: '5. The land shall be continuously occupied and used by the Lessee for the purpose specified to the satisfaction of the Minister. 6. The lessee shall maintain existing and future improvements to the satisfaction of the Minister.'
>
> Further conditions impose restrictions on cutting down living timber or scrub, a prohibition on keeping dogs on the land, a requirement to install and maintain at the lessees' expense 'firefighting and control equipment to the approval of the Minister', and a right to remove improvements within the three months immediately following the expiration of the term, and a condition relating to the disposal of effluent and rubbish. The improvements on the land consist of a residence, kitchen area, bough sheds for tourist camping, a barbeque facility, water tank, a pump, waterlines, ablution facilities and a generator for power. These improvements

(937) *Western Australia v Ward* (2000) 99 FCR 316 at 478-479 [642]-[646].

were apparently carried out under the first lease, and before the grant of the lease to G & J Harman but the second lease envisaged that the improvements would be used and maintained.''

761 It is unambiguously clear, in my opinion, that the lease to Harman and Osborn in 1991 and the later lease to G & J Harman would have extinguished all native title rights and interests over the land, subject only to the RDA. The 21st Sched (938) was the form used for special leases, which conferred a right of exclusive possession for reasons that I have already given. Nothing about the form of the leases therefore negatives a right of exclusive possession. Indeed, the permitted use of both leases (for tourism facilities) and the additional conditions in the lease to G & J Harman make it apparent that exclusive possession was to be conferred. Continuously using and occupying the land as a tourist camp, and maintaining existing and future improvements would be all but impossible if there were no right to control access to the premises. Consequently, native title over the land was extinguished.

762 I do not consider that the RDA invalidated the grant of the leases. That is because s 32 was not a racially discriminatory law. However, if s 10 of the RDA did have an invalidating effect, then the lease to G & J Harman was validated under Div 2 of the *Native Title Act* and s 5 of the State Validation Act. The majority in the Full Court, in an unchallenged finding, found that this lease was a ''commercial lease'' as defined in s 246 of the *Native Title Act* (939). They also found that it was a category A past act. If it had been in force on 23 December 1996, then it would have been a previous exclusive possession act that, by virtue of s 12I of the State Validation Act, extinguished native title upon grant. On the other hand, if it had not been in force on 23 December 1996, it would have been a category A past act that, by virtue of s 6 of the State Validation Act, had exactly the same effect.

Leases of reserves 2049 *and* 16729

763 The majority in the Full Court described these leases as follows (940):

> ''In January 1956 a lease of portion of Reserve 2049 and of Reserve 16729 was granted to Mr R G Skuthorp, the area was approximately 2,440 ha, and the purpose of the lease was for grazing. It was a lease from year to year determinable on three months notice after the first year. It was cancelled in 1969. In April 1972 a lease of a slightly larger area, 2,936 ha, including the above land, was granted to E J & M S Lilly, again for a term of one year, renewable at the will of the Minister, and determinable on three

(938) See reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at 181 [366] and 182 [370], where it is stated that these leases were substantially in the form of the 21st Sched.

(939) *Western Australia v Ward* (2000) 99 FCR 316 at 479-480 [651].

(940) *Western Australia v Ward* (2000) 99 FCR 316 at 480 [654].

months notice on either side. Both leases were granted under s 32 of the *Land Act* 1933 (WA).''

764 Their Honours observed that much of the land contained in the leases had been subject to the permit to occupy. They also noted that the reservations in the leases were extensive, and similar to those contained in the 1958 lease of part of reserve 1059 to R G Skuthorp. However, they distinguished these leases from that one. The basis for that distinction, they said, lay in the sizes of the area leased and the lease purposes (941):

> ''The differences between the leases concern the areas leased and the purpose of the leases. One was for 80 acres for the purpose of 'Business and Garden Area', the other was in excess of two thousand hectares for grazing. Do these factors in themselves provide a sufficient ground for distinguishing the two cases? Having regard to the emphasis given in the majority judgments in *Wik* to the limited purpose of the lease we conclude that a distinction should be drawn. We are not satisfied that the grant of the lease to E J & M S Lilly for grazing wholly extinguished native title rights which survived the early grants and use of Reserve 2049.''

765 Their Honours here fell into error. Grazing purposes and the size of the area leased do not indicate a denial of exclusive possession or convert what would otherwise be a lease into a licence. For the reasons given in relation to the lease of part of reserve 1059, the lease to E J & M S Lilly extinguished all native title rights and interests. Because that lease was issued before 31 October 1975, the RDA can have no application to it.

Roads in Western Australia

766 Because I agree generally with what the majority in the Full Court said in relation to roads (942), it is unnecessary for me to say anything other than that either the dedication or identification by the State or the Territory of land for road or road purposes or the regular (not unlawful) use of a strip of land for road purposes would extinguish native title in respect of land otherwise subject to native title rights (943). To hold otherwise would be to contemplate regular conflicts, indeed physical collisions, in fact, on the ground.

Reserves in Western Australia

Background

767 Western Australia submitted that the creation of a reserve involved the dedication of land for a purpose, and contemplated a use that was

(941) *Western Australia v Ward* (2000) 99 FCR 316 at 481 [655].
(942) *Western Australia v Ward* (2000) 99 FCR 316 at 415-416 [374]-[376].
(943) See *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151 at 170, per Drummond J.

inconsistent with another purpose or use: alternatively, the ''vesting'' of a reserve in the user or occupier thereof evinced an intention that the reserve be held adversely to, and inconsistently with, any native title rights.

768 Reference was made to the Letters Patent and Commission to Captain James Stirling of 1831, the twenty-fifth clause of which dealt with reserves:

> ''And it is Our Pleasure and We do further direct you to require and authorize the said Surveyor General further to report to you what particular Lands it may be proper to reserve in each County Hundred and Parish so to be surveyed by him as aforesaid for Public Roads and other internal communications whether by Land or Water or as the Site of Towns Villages Churches School Houses or Parsonage Houses or as places for the interment of the Dead or as places for the future extension of any existing Towns or Villages or as places fit to be set apart from recreation and amusement of the Inhabitants of any Town or Village or for promoting the health of such Inhabitants or as the sites of Quays or Landing Places which it may at any future time be expedient to erect form or establish on the Sea Coast or in the neighbourhood of navigable Streams or which it may be desirable to reserve for any other purpose of public convenience utility health or enjoyment and you are specially to require the said Surveyor General to specify in his Reports and to distinguish in the Charts or Maps to be subjoined to those Reports such Tracts pieces or parcels of Land in each County Hundred and Parish within Our said Territory as may appear to him best adapted to answer and promote the several public purposes before mentioned. And it is Our Will and We do strictly enjoin and require you that you do not on any account or on any pretence whatsoever grant convey or demise to any person or persons any of the Lands so specified as fit to be reserved as aforesaid nor permit or suffer any such Lands to be occupied by any private person for any private purposes Provided nevertheless and We do hereby authorize you to grant to any person or persons as occasion may require any lots of Land as the sites of Houses or other buildings to be by them erected in any Town or place within Our said Territory with such small portions of Land as may be fit to grant as appurtenant to any such Town Allotments and to be holden and enjoyed therewith any thing hereinbefore contained to the contrary notwithstanding.''

769 Subsequent legislation reflected the Letters Patent and Commission by generally explicit provision for public use (944).

770 The history of the reservation of Crown land in this country for various public purposes is traced by Windeyer J in *Randwick*

(944) See, eg, Land Regulations 1882 (WA), regs 29-34; 1887 Regulations, regs 32, 33, 36.

Corporation v Rutledge (945). His Honour there was discussing reservations made by the early governors of New South Wales under their Commissions to make grants of land in that colony. Relevantly, those Commissions were the same as the Commission to Captain Stirling which I have quoted.

771 The reasoning of the majority in the Full Court on this aspect of the cases is to be found in the following paragraphs (946):

> ''The trial judge pointed out that under the legislation an offence of unlawful occupation of public lands applied equally to vacant Crown land and land reserved for or dedicated to any public purpose: the *Land Act* 1898 (WA), s 135 and the *Land Act* 1933 (WA), s 164. His Honour referred to *Mabo [No 2]* (947), per Brennan J and (at 114), per Deane and Gaudron JJ, and to *Wik* (948), per Gummow J. At these references members of the High Court explain why, in similar legislation proscribing unlawful occupation by 'any person', such a provision is not directed to native title holders in occupation of land, and does not evidence a legislative intention to extinguish native title. In our opinion his Honour was correct to apply that reasoning, and correct in his conclusion that the creation of reserves, without more, did not extinguish native title. The power in s 32 of the *Land Act* 1933 (WA) to lease reserves not immediately required 'for any purpose' supports this conclusion.
>
> His Honour, correctly in our opinion, held that the effect of the 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 public purposes: see *Wik*, per Gummow J (949). By reserving land for a public purpose it protected the land from sale, but did not alter the control of the land which remained with the Crown. No rights were created in favour of third parties, and accordingly no question of the enjoyment of rights by others inconsistent with the continuation of native title could arise. If the land were both reserved and dedicated for a public purpose, for example by the classification of reserved land and as Class A under s 31 of the *Land Act* 1933 (WA), an issue might then arise as to whether the dedication created rights in members of the public, or a section of the public: see *Randwick Municipal Council v Rutledge* (950). If so, a further question would arise as to whether the rights created in members of the public were inconsistent with the continued enjoyment of asserted native title rights.

(945) (1959) 102 CLR 54 at 71-76.
(946) *Western Australia v Ward* (2000) 99 FCR 316 at 418-419 [386]-[389].
(947) (1992) 175 CLR 1 at 66.
(948) (1996) 187 CLR 1 at 190-194.
(949) *Wik* (1996) 187 CLR 1 at 200-201.
(950) (1959) 102 CLR 54 at 74, per Windeyer J.

In respect of these issues, Brennan J in *Mabo [No 2]* (951) said: 'Native title was not extinguished by the creation of reserves nor by the mere appointment of ''trustees'' to control a reserve where no grant of title was made. To reserve land from sale is to protect native title from being extinguished by alienation under a power of sale . . .' and (952): 'The power to reserve and dedicate land to a public purpose and the power to grant interests in land are conferred by statute on the Governor in Council of Queensland and an exercise of these powers is, subject to the *Racial Discrimination Act*, apt to extinguish native title . . .' Then, after considering the effect of the grant of a lease, his Honour continued in a passage to which we have already referred (953): 'Where the Crown grants land in trust or reserves and dedicates land for a public purpose, the question whether the Crown has revealed a clear and plain intention to extinguish native title will sometimes be a question of fact, sometimes a question of law and sometimes a mixed question of fact and law. Thus, if a reservation is made for a public purpose other than for the benefit of the indigenous inhabitants, a right to continued enjoyment of native title may be consistent with the specified purpose — at least for a time — and native title will not be extinguished. But if the land is used and occupied for the public purpose and the manner of occupation is inconsistent with the continued enjoyment of native title, native title will be extinguished. A reservation of land for future use as a school, a courthouse or a public office will not by itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native title which would thereby be extinguished. But where the Crown has not granted interests in land or reserved or dedicated land inconsistently with the right to continued enjoyment of native title by the indigenous inhabitants, native title survives and is legally enforceable.'

It follows that whilst the mere reservation of land for a public purpose has not extinguished native title, it will be necessary in the case of each reservation to consider whether there is also a dedication which has created inconsistent rights in the public, or a use which has this effect, having regard to the nature of the purpose.''

The submissions of Western Australia with respect to reserves

772 Western Australia contends that it is not necessary to consider the particular nature of any dedication for a reserve. The State submits that it is clear that the Crown could earmark particular land for future use

(951) (1992) 175 CLR 1 at 66.
(952) *Mabo [No 2]* (1992) 175 CLR 1 at 67.
(953) *Mabo [No 2]* (1992) 175 CLR 1 at 68.

or future more intensive use and refrain from its alienation (954). Regulation 29 of the Land Regulations 1882 (WA), it is submitted, itself expressly makes the distinction. It confers power both ''to sell or to except from sale, and either to reserve to Her Majesty, her heirs and successors, or to dispose of in such other manner'' for the purpose specified. ''To except from sale'' is an expression and concept different from, and additional to, ''to reserve''. To reserve to ''Her Majesty, her heirs and successors'' is the appropriation of beneficial ownership.

773 The State further submits that the designation of particular purposes of reserves is significant: a simple reservation for ''government purposes'' or ''public purposes'' would suffice to except from sale. But the dedication goes further. That this is so is supported by reg 32 of the Land Regulations 1882, which allowed a change in the purpose of a reserve but only upon notice of thirty days in the *Government Gazette*, and by order of the Governor. The particular purposes therefore are expressed for a reason which is not merely to except from sale.

774 In *Brunswick Corporation v Baker* (955), the High Court examined the phrase ''dedicated to the public as a highway''. Isaacs J, for the Court, said that the dedication of a public way over private land is in reality a gift to the public (956). His Honour also accepted that dedication is an attribute of the land and carries with it the obligation of the inhabitants to repair (957). The analysis in *Baker*, according to the State, is inconsistent with the proposition that land comprising a dedicated highway could lawfully be used by a local government or a land owner for other purposes. The same meaning applies to the reserves in question, all the more so since the designated purposes, from 1887 until recently, have included ''roads''.

775 Furthermore, in the relevant legislation, there is provision for reserves to be vested or leased or granted in each case subject to a ''trust'' for the purpose, or on conditions to ensure the purpose is fulfilled (958).

776 The Act of 63 Vict No 24 (1899) of Western Australia was entitled ''An Act to secure the Permanency of certain Reserves''. The provisions of that Act were incorporated in the *Land Act* 1933 as s 31. The effect of s 31 is to create classes of reserves. Class A reserves are those which ''shall for ever remain dedicated to the purpose declared'' until Parliament otherwise provides. Class B reserves are those which are both reserved from sale, and reserved from being dealt with

(954) *Williams v Attorney-General (NSW)* (1913) 16 CLR 404.
(955) (1916) 21 CLR 407.
(956) *Baker* (1916) 21 CLR 407 at 416.
(957) *Baker* (1916) 21 CLR 407 at 418.
(958) Land Regulations 1882, reg 33; 1887 Regulations, reg 36; *Land Act* 1898, s 42; *Land Act* 1933, s 33.

otherwise than for the stated purpose, unless certain other conditions for Parliament's endorsement are met. All other reserves are similarly dedicated but the dedication is reversible by executive act according to procedures set out in the *Land Act* 1933.

777 The submissions of Western Australia are generally correct. The creation and dedication (959) of reserves here did give rise to rights in the public, or a section of it, for public purposes. An analogy may be drawn with dedication for public charitable purposes. In *Bathurst City Council v PWC Properties Pty Ltd* (960), the Court (Gaudron, McHugh, Gummow, Hayne and Callinan JJ) said this:

> ''The decision of the Privy Council in *Brisbane City Council v Attorney-General (Q)* is illustrative of two relevant principles: that the spirit and intendment of the Preamble to the Statute of Elizabeth (43 Eliz I c 4) should be given no narrow or archaic construction, and that the understanding of judges in the community in which they live of what a particular activity (in that case the conduct of shows for agricultural and other purposes) involves may be accepted as a proper understanding of the nature of that activity (961).
>
> The vesting of land in a town centre in a local authority for the purpose of a publicly accessible free car park has some elements at least of a charitable trust for public purposes. The question, as formulated by Barwick CJ in *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation* (962), is whether a purpose beneficial to the community is 'within the equity of the preamble to the Statute of Elizabeth'. The Preamble refers to 'Bridges, Ports, Havens, Causeways ... and Highways'. Freely accessible car parks on one view might be regarded as 'Havens' from the 'Highways' or as so necessarily incidental to the latter in modern times as to be almost indistinguishable in public purpose and utility from them: there is an analogy between a highway and a car park affording a haven from, and a secure place of resort near and accessible to, a highway.

(959) In my view, the word ''dedication'' is used in a wide sense in the Land Regulations and Land Acts as a synonym of ''devotion''; and land reserved for a particular public purpose was also dedicated to that purpose. The Land Regulations and Land Acts did not draw any clear distinction between reservation and dedication. Section 3 of the *Land Act* 1898, for instance, defined ''Crown Lands'' as lands ''vested in Her Majesty, and not for the time being *reserved for or dedicated to* any public purpose'' (emphasis added). There was no provision in the remainder of the Act for ''dedications'', only for reserving land and disposing of it. The *Land Act* 1933, while using the word ''dedicated'' in relation to Class A reserves, otherwise did not distinguish between land reserved for a particular purpose, and land dedicated to it. All this strongly suggests that land reserved for a particular purpose is treated in the legislation as being dedicated to that purpose, and that ''dedicated'' has a wide meaning similar to ''devoted''.

(960) (1998) 195 CLR 566 at 582-583 [34]-[36] (some footnotes omitted).

(961) *Brisbane City Council* [1979] AC 411 at 422-423.

(962) (1971) 125 CLR 659 at 667.

An example of the recognition of a charitable trust of this nature may be provided by the judgment of Hart J in *Mareen Development Pty Ltd v Brisbane City Council* (963). Clause 12 of an *Ordinance of the City of Brisbane* provided that an applicant for approval of a subdivision was to transfer to the Council three link strips at the end or on the side of existing dedicated roadways. In the Full Court, Hart J referred to the acquisition made by the Council free of cost and, speaking of the strip in question, concluded (964): 'It could not have been the intention of the Ordinance that the Council was to make a profit from them from future subdividers. In these circumstances I think it holds the strip in trust for Town Plan purposes.' ''

778 The fact that the Executive might not wish immediately to put into effect a particular use of reserved land does not mean that the State does not appropriate the identified land as suitable for a future public purpose or purposes. The dedication, indeed, the mere creation, of a reserve is a clear signal that the land is henceforth to be in the public domain, and is to be used in a way which will be of advantage to the public, or, to repeat the language of the Letters Patent and Commission to Captain Stirling, ''of public convenience utility health or enjoyment''. The beneficial rights of the public or a section thereof, as a result of the dedication and vesting (when that has occurred), and the legislative and regulatory history of reserves in Western Australia all produce the result that native title rights may not subsist with the public rights conferred. Inevitably, the exercise of any native title rights would conflict with the public rights arising out of the creation and dedication of the reserves, which, if they are to be enjoyed, may not be subject to the inhibitions that the enjoyment of native title rights would impose.

779 I cannot, with respect, agree that native title rights to use the land survived the creation of reserves because the provisions of the Land Acts (965) penalising ''unlawful or unauthorised use or occupation'' of Crown lands and lands reserved for or dedicated to any public purpose did not apply to native title holders (966). It begs the question to assert that, *because* s 135 of the *Land Act* 1898 and s 164 of the *Land Act* 1933 did not apply to native title holders in exercise of their rights to use the land, *therefore* the reservation did not extinguish all native title rights to use the land. It would be just as erroneous to declare that, because the penalty provisions were not intended to apply to native

(963) [1972] Qd R 203; special leave refused *Brisbane City Council v Mareen Development Pty Ltd* (1972) 46 ALJR 377.
(964) *Mareen Development* [1972] Qd R 203 at 216.
(965) *Land Act* 1898, s 135; *Land Act* 1933, s 164.
(966) Reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at 138 [220]-[221].

title holders, special leases over Crown land (967), or leases of land set apart as town or suburban land (968) could never extinguish native title. In my view, the correct approach is to determine what effect the reserves had on native title before considering the applicability of s 135 of the *Land Act* 1898 and its later equivalent. Otherwise, references to the penalty provisions are misplaced.

Reserves and the RDA

780 The question that arises next is what effect does s 10 of the RDA have on reserves created after 31 October 1975. The answer to that question depends on whether the *Land Act* 1933 dealt with holders of native title differently from people of other races.

781 The *Land Act* 1933, on its face, did not single out native title holders or use racial criteria as a basis for any differential treatment. The introductory words of s 29 conferred a general power:

> ''The Governor may, subject to such conditions and limitations as he thinks fit, reserve to His Majesty, or dispose of in such manner as for the public interest may seem fit, any lands vested in the Crown that may be required for the following objects and purposes . . .''

Reserves could be created for a wide variety of purposes; they could be ''for the use or benefit of the aboriginal inhabitants'' (969), ''for places necessary for the embellishment of towns, or for the health, recreation, or amusement of the inhabitants'' (970), and for a host of other objects. None of these purposes, however, indicate that the power to create reserves, taken on its own, is racially discriminatory.

782 However, the power in s 29 cannot be taken on its own. The *Land Act* 1933 also made provision for the resumption of land for reserves. Section 11 relevantly provided:

> ''The Governor may by proclamation resume, for any of the purposes specified in section twenty-nine of this Act, any portion of land held as a homestead farm, or timber lease, or special lease, or leased by the Crown with a right of purchase, if in the public interest he shall deem it necessary; and the owner of such land, upon making claim as required by the *Public Works Act* 1902, in case he shall be entitled to compensation under this Act, shall be

(967) The penalty provisions applied not only to Crown land and lands reserved for or dedicated to a public purpose, but also to land set apart as town or suburban land. ''Crown lands'' were defined in s 3 of the *Land Act* 1933 to include ''all lands of the Crown vested in His Majesty, except land which is, for the time being, reserved for or dedicated to any public purpose, or granted or lawfully contracted to be granted in fee simple or with the right of purchase''. Special leases, like pastoral leases, were included in the definition of ''Crown lands''.

(968) *Land Act* 1933, s 117.

(969) *Land Act* 1933, s 29(a).

(970) *Land Act* 1933, s 29(j).

compensated for such resumption, either by a grant of land, subject to the same conditions and equal in area to that resumed, or, at the option of the owner, by a refund of the proportion of purchase money paid on the resumed portion . . .''

783 The claimants might have argued that s 11 attracts the operation of the RDA because it has a practical effect which distinguishes between native title holders and others: compensation is expressly available to holders of various leases whose interest in land is resumed for reserves, whereas none is stated to be available to native title holders when their native title is extinguished by the creation of reserves, assuming that those rights have not already been extinguished.

784 In my opinion, however, such an argument would have to be rejected. The creation of reserves after the commencement of the RDA did not attract the operation of s 10, because the *Land Act* 1933 is not a racially discriminatory law. The availability of compensation is not ''based on race, colour, descent, or national or ethnic origin'', as the Convention requires. Instead, the difference in treatment is based on a facially neutral criterion: the holding of certain forms of title under the *Land Act* 1933. As I have explained earlier, when a criterion is facially neutral, there will need to be *some* evidence that the purpose of the law was to distinguish between racial or ethnic groups before that different treatment can fairly be described as ''based on'' race or ethnicity. Here there is none. There was no material presented from which a discriminatory purpose might be inferred; there was nothing, for instance, to indicate that Aborigines could not, or typically did not, hold the types of leases that attracted compensation, or, for that matter, that they held leases of the kind that did not (971). The category of those who are not entitled to compensation under s 11 is a wide one. It would embrace not only native title holders, but also pastoral lessees, whose land can be resumed without compensation except for improvements (972); all holders of unregistered interests in land such as easements; and certain licence holders, such as those who hold a licence to quarry specified land (973). In these circumstances, it would be wrong to find that the creation of reserves was racially discriminatory and was invalidated or otherwise affected by s 10 of the RDA. In my view, therefore, s 10 has no application to reserves created after the RDA commenced.

785 However, even if s 10 of the RDA did apply, I do not consider that it would have the effect of invalidating the creation of reserves. If discrimination exists, it does so because the holders of certain title are compensated for the extinction of their interests while native title holders are not. The discrimination arises not from a positive bar on

(971) Nor was any evidence presented to show that others did not have or assert non-statutory or unregistered rights in respect of the land.

(972) *Land Act* 1933, s 109.

(973) *Land Act* 1933, s 118.

the enjoyment of a right, but from a failure to make a right universal (974). That being the case, s 10 of the RDA would operate to confer upon native title holders a right of compensation for any native title rights that might have been extinguished.

Nature reserves and the conservation of fauna and flora

786 The majority in the Full Court held that, because native title had not been wholly extinguished by the creation of reserves, it was necessary to consider the effect of legislation for conservation purposes on native title (975). Because of my conclusion that the creation of reserves extinguishes native title completely, it is strictly unnecessary for me to deal with that issue. For completeness, however, and because *Mabo [No 2]* and the legislation enacted after it have injected uncertainty into what were previously thought to be settled principles of land law, I will express my views.

787 Regulations 44(2) and 46 of the Wildlife Conservation Regulations 1970 made under the *Wildlife Conservation Act* 1950 (WA) applied at all relevant times to nature reserves. The former provided as follows:

> ''A person shall not —
> (a) camp on any sanctuary; or
> (b) build, erect or transport any tent, shed, outhouse, cottage, building, or any structure whatsoever in any sanctuary,
> except by permission in writing of the Conservator of Wildlife and in a part set aside for such purpose pursuant to the Act and regulations.''

Regulation 46 was expressed in lengthy and elaborate terms. It provided:

> ''Except as the Conservator of Wildlife may authorise in pursuance of a management scheme or working plan or in the administration of the Act and these regulations, a person shall not, in respect of any native reserve or wildlife sanctuary —
> (a) remove or disturb any humus, leaf mould, rotting vegetation, soil, stone, sand, rock or gravel;
> (b) cut, pick, pull, break, remove, injure, poison, strip or destroy any tree, shrub, herb, grass or other plant or part thereof, whether living or dead;
> (c) post, stick, stamp, stencil, paint, draw or otherwise affix any mark, lettering, notice, advertisement, sign or document of any description, or have in his possession on any sanctuary any material of any description capable of being used for such purposes;
> (d) cut or make any tracks, landing strip or parking area, jetty, mooring, resting or launching area for any vehicle, vessel,

(974) *Gerhardy v Brown* (1985) 159 CLR 70 at 98.
(975) *Western Australia v Ward* (2000) 99 FCR 316 at 442-443 [486].

aeroplane, helicopter or hovercraft, or use, operate or park such a vehicle, vessel, aeroplane, helicopter or hovercraft other than in a place lawfully set aside for that purpose;

(e) interfere in any manner with the water supply in any sanctuary including any lake, swamp, watercourse, river, drainage flow, well, water hole, or dam, whether natural or artificial, or use any water therefrom;

(f) sail, tow or operate any vessel of any description except in such part or parts lawfully set aside or reserved for that purpose;

(g) drive, tow or operate any vehicle of any description except on a road or track lawfully set aside or reserved for that purpose;

(h) misconduct himself or indulge in any riotous or indecent conduct;

(i) in any way disturb, interfere with, frighten, drive, molest or take any fauna or other animal, whether by noise or any other means, in or in the vicinity of any sanctuary;

(j) take, carry, operate, fire or use any firearm, throw or discharge any missile or explosives, except that a licensed shotgun may be used on a game reserve in the manner prescribed in these regulations;

(k) take, ride or drive, graze or agist any dog, cat, fox, horse, cattle . . . or suffer or allow any such exotic bird or animal to remain on any sanctuary;

(l) cut, construct or maintain any private track, road, tramway, railway or other means of transport or communication, or lay any telephone line, electric light or power line, waterpipe line, gas pipe line or carry out any other works or drain or clear or prepare any part of any sanctuary for any purpose;

(m) light any fire, other than in an authorised fireplace, or burn or clear by any means whatsoever any tree, shrub, grass or other plant, whether living or dead;

(n) introduce, place, drop, spray, fog, mist or otherwise use or discharge any dangerous, poisonous or noxious substance;

(o) do or take anything which may interfere in any manner with the natural environment; or

(p) refuse to leave any sanctuary when so directed by any warden.''

788 The conclusion of the majority in the Full Court as to the effect of these regulations was stated in this way (976):

''The . . . regulations relied upon impose very stringent and extensive control over human activities within nature reserves and wildlife sanctuaries. However, they do not prohibit entry to or presence within nature reserves and wildlife sanctuaries and in our opinion do not impose a regime of control that wholly prevents the continued enjoyment of all native title rights and interests in relation

(976) *Western Australia v Ward* (2000) 99 FCR 316 at 448 [508].

> to the land within them. Nevertheless, the exercise of control by the Authority evidences a clear and plain intention to control access to nature reserves and wildlife sanctuaries, and to make decisions regarding human activities on the land. The extinguishment of an exclusive native title right to control access also has the consequence of extinguishing an exclusive right of possession and occupancy that might otherwise have existed.''

789 With respect, I do not agree. The regulations are extraordinarily comprehensive: they purport to make unlawful any interference in any way with the natural environment, whether by lighting fires, by disturbing vegetation, or even by disturbing leaf mould. No native title right could, in my opinion, be meaningfully or usefully exercised consistently with the catalogue of prohibitions. Indeed, it is significant that neither the Full Court nor the claimants have attempted to identify any possible surviving native title. The regulations extinguish native title in entirety.

790 It is necessary to give some separate consideration to fauna.

791 One of the permitted purposes for the creation of reserves under the *Land Act* 1933 was for the ''conservation of timber, and indigenous flora or fauna'' (977).

792 The *Wildlife Conservation Act* provides in s 14(1) that all wildlife is protected subject to a power to except species from that protection. It is framed in these words:

> ''Except to the extent which the Minister declares by notice published in the *Government Gazette* pursuant to the provisions of this section all fauna is wholly protected throughout the whole of the State at all times.''

793 Section 22 provides:

> ''(1) The property in fauna, until lawfully taken is, by virtue of this Act, vested in the Crown.
> (2) The provisions of the last preceding sub-section do not entitle any person to compensation.''

794 Section 23 provides for an exception to s 14(1): Aboriginal people may hunt native fauna for domestic consumption but not in a ''nature reserve''.

795 A ''nature reserve'' was defined in the *Wildlife Conservation Act* as a reserve declared under the *Land Act* 1933 to be for conservation of flora or fauna. There are three important matters to note about nature reserves.

(977) *Land Act* 1933, s 29(g). It should be noted that all the paragraphs of s 29, including s 29(g), were repealed by the *Acts Amendment (Reserves) Act* 1982 (WA), s 6, and replaced by a general provision providing that ''the purpose for which any such lands are so reserved or disposed of shall be specified in the reservation or disposition''.

796 First, as already mentioned, s 23 does not apply; that is, the general exception of Aboriginal people does not extend to nature reserves. They are prohibited, along with all others, from taking fauna.

797 Secondly, regulations prohibiting the taking of any wildlife in a nature reserve have been in place at all relevant times (978).

798 Finally, the regulations made detailed provision for the control of vermin and other matters in a nature reserve but only upon special authority (979).

799 In my opinion, ss 14(1) and 22 of the *Wildlife Conservation Act*, together with, in particular, reg 46(l) and (o), necessarily preclude any exercise of, and extinguish, native title rights to take fauna, or inland flora, in the Western Australian nature reserves. The Full Court so concluded and was right to reach that conclusion.

Effect of the RDA and the Native Title Act

800 The majority in the Full Court, however, went on to say that for nature reserves created after the commencement of the RDA, s 211 of the *Native Title Act* applied. The majority expressed themselves in this way (980):

> ''Insofar as those [native title] rights were extinguished before the RDA, s 211 of the NTA (which preserves certain native title rights, including the right to hunt, where a licence would otherwise be required to do so) can have no application. However, where nature reserves or wildlife sanctuaries have been created after the RDA came into force, s 211 would by force of s 109 of the Constitution override the provisions of s 23 of the *Wildlife Conservation Act*, and the native title rights to take fauna would not be wholly extinguished. *In our opinion the creation of the nature reserves and wildlife sanctuaries has an impact on native title holders in the area concerned that is much greater than the impact on other members of the Australian community who at most hold common law rights to hunt game, and is discriminatory*.'' (emphasis added.)

801 With respect, this approach conflates the operation of the RDA with the operation of s 211 of the *Native Title Act*. The two are quite distinct. The first question that should be answered is whether s 10 of the RDA invalidated either the creation of the nature reserves or the *Wildlife Conservation Act* and regulations after 31 October 1975. Only if that question is answered affirmatively can one consider whether s 211 has any role to play.

802 For the reasons that I have stated in relation to all reserves in Western Australia, I do not consider that the creation of nature reserves under a law of quite general application attracts the operation

(978) Wildlife Conservation Regulations, regs 42, 46.
(979) Wildlife Conservation Regulations, reg 42(2)(b).
(980) *Western Australia v Ward* (2000) 99 FCR 316 at 446-447 [504].

of s 10 of the RDA. There is nothing about the creation of a nature reserve, as opposed to any other form of reserve, to suggest a different answer. But there are other reasons for concluding that the prohibitions in the *Wildlife Conservation Act* and the regulations made under it remained in force. The prohibitions were of general application: they made it unlawful for all persons, irrespective of their race or origin, to hunt fauna in nature reserves. They did so for the legitimate purpose of environmental protection. Because they could not possibly be said to create distinctions ''based on race'', they are not laws to which s 10 of the RDA has application. Any disproportionate impact on native title holders — a matter about which the Full Court took no evidence — is of no relevant consequence. It is not open for indigenous people to acquire immunity from the general laws of the land by resorting to a claim that they are exercising their native title rights. Those rights are neither more nor less elevated than other rights recognisable by the common law, except to the extent that an enactment, according to its true effect, gives them a different status. The conclusion of the Full Court on this point was, therefore, mistaken. The reserves created in 1977 (34585) and in 1992 (42155) were therefore valid, and the *Wildlife Conservation Act* and the regulations extinguished any surviving native title.

The Rights in Water and Irrigation Act 1914 *(WA)*

Vesting of irrigation works

803 The Ward claimants challenge the findings of the majority in the Full Court that native title was extinguished over lands held for future expansion of the Ord Project or for buffer zones because these were ''works'' within the meaning of the *Rights in Water and Irrigation Act* 1914 (WA).

804 Section 3 of the *Rights in Water and Irrigation Act* relevantly provided:

> ''(1) The general administration of this Act shall be under the control of the Minister.
> (2) All lands acquired for or dedicated to the purposes of this Act, and all irrigation works constructed, or in course of construction under this Act, and all irrigation works constructed by the Government before the commencement of this Act which the Governor may, by Order in Council, declare to be subject to this Act, shall vest in the Minister on behalf of Her Majesty —
> (a) until such lands and works are vested in a Board, under the provisions hereinafter contained; or
> (b) on the dissolution of any Board in which such lands and works may have been vested.''

This section raises two questions. First, what was the effect of the vesting of land in the Minister or a Board? Secondly, did the land set

apart for future expansion and as buffer zones come within the definition of ''irrigation works'' under s 3(2)?

805 The first question can be answered shortly. The effect of the vesting of the land in the Minister or Board was to pass the legal estate in any irrigation works to the Minister or Board. Section 34 of the *Rights in Water and Irrigation Act* contemplated that the Minister or a Board may have, and may exercise, more than the management or control of the works in question. It specifically empowered the Governor in Council to place ''works'' constructed by the Minister under the ''management and control'' of the Board, or to ''absolutely vest'' such works in the Board on such terms and conditions as the Governor thinks fit. In distinguishing between management and control and vesting, the section conveys and means that the vesting of ''works'' under s 3(2) effected the transfer of the property in the land on which the ''works'' were situated. Consequently, any native title over land covered by ''irrigation works'' is extinguished (981).

806 The cases in which it has been held that the vesting of streets, sewers and other works in a public authority confers no greater interest than necessary for the performance of the authority's functions are distinguishable (982). They did not involve legislation which, in its terms, drew a clear distinction between control and management, on the one hand, and vesting, on the other. Furthermore, as Browne-Wilkinson V-C explained in *Sheffield City Council v Yorkshire Water Services Ltd* (983), the subject matter in each of those cases was not expressed to be the land itself, but discrete pieces of property such as a street and its paving, or the components of a sea wall. This supported the conclusion that no interest in the land itself was transferred upon vesting. In contrast, the ''works'' that could be vested under s 3(2) of the *Rights in Water and Irrigation Act* were not confined to discrete items such as pipes, drains and so forth, but included ''all lands reserved, occupied, held, or used in connection with works''. Accordingly, the cases on the vesting of sewers, streets and sea walls in public authorities are distinguishable. They do not indicate that the vesting of ''works'' in the Minister or Board fails to extinguish native title.

(981) I add that this conclusion receives further support from the fact that the Board could make by-laws for the ''protection of the water and every part of the works from trespass or injury'': s 59(9) of the *Rights in Water and Irrigation Act*. If native title were not extinguished over works vested in the Minister, it is difficult to see how by-laws made under s 59(9) could exclude native title holders from ''trespassing'' over any part of works; for such native title holders would be authorised to be on that property.

(982) *Mayor of Tunbridge Wells v Baird* [1896] AC 434; *Attorney-General (Quebec) v Attorney-General (Can)* [1921] 1 AC 401 at 409; *Port of London Authority v Canvey Island Commissioners* [1932] 1 Ch 446.

(983) [1991] 1 WLR 58 at 69; [1991] 2 All ER 280 at 289.

807 The second question requires more detailed consideration. The definition of ''irrigation'' in s 2 is as follows:

> ''*'Irrigation'* means any method of causing water from a water-course or works to flow upon and spread over land for the purpose of cultivation of any kind or of tillage or improvement of pasture, or of applying water to the surface of land for the like purpose.''

''Works'' was defined in these terms:

> ''*'Works'* means works for the conservation, supply, and utilisation of water, together with all sources of supply, streams, reservoirs, artesian wells, non-artesian wells, buildings, machinery, pipes, drains, and other works constructed or erected for the purposes of this Act, and all appurtenances to the same, and all lands reserved, occupied, held, or used in connection with works.''

The critical part of the definition is ''occupied, held, or used in connection with works''. The land in question here is all ''held'' in connection with works. Further, it is also ''used in connection with works''. It has long been recognised that land may be ''used'' even if little or no physical activity takes place upon it. In *Council of the City of Newcastle v Royal Newcastle Hospital* (984), the ultimate question was whether an expanse of bushland owned by a public hospital was rateable. The State enactment provided that land was not rateable if it was ''used or occupied by the hospital ... for the purposes thereof''. Despite the fact that the expanse was in an unimproved condition, a majority of the High Court found that the land was used or occupied by the hospital for its purposes (985). That was because the hospital maintained the land in its natural state to provide a barrier against noise, dust and fumes, and to afford opportunities for future expansion. On appeal, the Privy Council agreed. Writing for their Lordships, Lord Denning explained (986):

> ''An owner can use land by keeping it in its virgin state for his own special purposes. An owner of a powder magazine or a rifle range uses the land he had acquired nearby for the purpose of ensuring safety even though he never sets foot on it. The owner of an island uses it for the purposes of a bird sanctuary even though he does nothing on it, except prevent people building there or disturbing the birds. In the same way this hospital gets, and purposely gets, fresh

(984) (1957) 96 CLR 493. See also *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603 at 617 [22], per Gleeson CJ, Gummow, Kirby and Callinan JJ.

(985) *Royal Newcastle Hospital* (1957) 96 CLR 493 at 504-505, per Williams J; at 505, per Webb J; at 515, per Taylor J.

(986) *Newcastle City Council v Royal Newcastle Hospital* (1959) 100 CLR 1 at 4; [1959] AC 248 at 255.

air, peace and quiet, which are no mean advantages to it and its patients.''

The phrase ''in connection with'' also has a wide import (987), although its exact ambit will depend on the statutory context. It signifies a relationship of some sort, as one judge (Macfarlane J) has noted (988):

''One of the very generally accepted meanings of 'connection' is 'relation between things one of which is bound up with or involved in another'; or again 'having to do with'.''

Here, ''in connection with'' signifies that there must be a relationship between the use of the land and ''works'' (in its extended statutory meaning). There is nothing in the statutory context to suggest that the phrase should have any more narrow a meaning. Accordingly, so long as it can be fairly said that the use of the land has ''to do with'' the works, the relevant land will fall within the definition.

808 The majority in the Full Court rightly found, therefore, that vacant Crown land for the buffer zones and future expansion was ''used in connection with works''. These conclusions follow naturally from other findings which they were entitled to make. One of these findings concerned the developed area of the Ord Project, which was not challenged in this Court. Their Honours described the area thus (989):

''The Alligator appellants colourfully, but we think accurately, emphasised the *interrelated and interdependent elements* of the Ord Project by saying that *practically the entire area that has been developed is linked and criss-crossed with irrigation supply channels and drains* such that the Ord Project can in a practical sense be regarded as a 'living, breathing entity, protected from heavy external natural runoff by levies and hillside drains, with water distributed by a precise combination of gravity and pumping and drained back into the Ord and Keep River Systems by means of artificial drainage linking up with natural drainage patterns'.'' (Emphasis added.)

Another finding was that the lands resumed from the pastoral leases served various functions linked to the Ord Project (990):

''All [the] components of the Ord Project were included in initial plans. Areas resumed from pastoral leases were carefully planned, having regard to immediate and prospective needs. Areas resumed took account of such diverse factors as the need for buffer zones

(987) *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465 at 479-480, per Wilcox J.
(988) *Re Nanaimo Community Hotel Ltd* [1944] 4 DLR 638 at 639; affd on appeal [1945] 3 DLR 225.
(989) *Western Australia v Ward* (2000) 99 FCR 316 at 425 [410].
(990) *Western Australia v Ward* (2000) 99 FCR 316 at 424-425 [410].

against spray drift, control of erosion and flooding on lands above the irrigation areas, weed control, the need for high land for stock in the wet, the progressive expansion of the irrigation areas, the management of human activity around and below the dams and on the banks of the lakes, and the control of stock and erosion in the catchment areas. On the last topic, for example, by 1960 it was estimated that 12 million tons of material were being eroded from the 17,800 square mile Ord River catchment area each year. The yearly silt load of the River was approximately one-eighth of the anticipated capacity of the proposed diversion dam. The protection and regeneration programs led to the resumption of pastoral land in the catchment area.''

Their Honours said this about vacant Crown land (991):

''[T]he land which is claimed is important to the overall operation of the project as it provides buffer zones, drainage, protection against erosion and flooding from higher levels, and makes provision for a range of township and community purposes, and for future expansion of the scheme. There is a substantial part of the fourth farm area resumed in 1967 in the north-eastern sector of the project area which has not yet been developed. It was resumed however for the purpose of future development which is envisaged to take place in due course with the construction of a second main channel running from Lake Kununurra, the extension of the road system including a major bridge over the Keep River, a major drainage system project to protect from run-off from the hills to the north, and the installation of an irrigated farm drain network.''

It is apparent from these passages that Beaumont and von Doussa JJ were of the view that the whole of the developed area consisted of ''works''. That is clear from the definition of the term, which covers not only irrigation supply channels and drains, but also the sources of supply, such as streams, and the land reserved, occupied or used in connection with works. Their Honours also found that the vacant Crown land provided buffer zones, drainage, protection against erosion and flooding, and sites for future expansion of the irrigated area. These findings were derived from the plans for the Ord Project itself. It was clearly open to their Honours to make them.

809 Land serving as a buffer zone against spray drift is clearly ''used in connection with works'' for it is designed to protect irrigated land on which works are situated or used. Land retained and used for protection against erosion and flooding in the developed area is no different. Land set aside for the expansion of a network of farm drains and other future development stands in the same position: it is purposely designated and used as the site of future works. In none of

(991) *Western Australia v Ward* (2000) 99 FCR 316 at 429 [421].

these cases is there any straining of language to say that the vacant Crown land in question was ''used in connection with works''. It follows that the Full Court was correct to find that all such lands were vested in the Minister under s 3(2). They were ''irrigation works'' and extinguished all native title rights and interests.

Application of Pt III of the Act to the Ord Project

810 The State submitted that, upon application of Pt III of the *Rights in Water and Irrigation Act* (992), any native title to property in the beds of water-courses, lakes, lagoons, swamps or marshes, and any native title rights to control the use and flow of waters, were extinguished.

811 Consideration whether Pt III of the *Rights in Water and Irrigation Act* extinguished native title rights demands close attention to its provisions. Section 4(1) of the *Rights in Water and Irrigation Act* provided:

> ''The right to the use and flow and to the control of the water at any time in any water-course, and in any lake, lagoon, swamp or marsh, and in any spring, and subterranean source of supply shall, subject only to the restrictions hereinafter provided, and until appropriated under the sanction of this Act, or of some existing or future Act of Parliament, vest in the Crown.''

812 Section 5(1) provided that where a water-course, lake, lagoon etc forms part of the boundary of a parcel of land previously alienated by the Crown, the bed thereof shall, for the purposes of the Act, be deemed to have remained the property of the Crown, and not to have passed with the land so alienated. A similar provision was found in s 5(2), except that it applied prospectively to land alienated by the Crown.

813 Section 6 stated:

> ''Except as hereinafter provided, or except under the sanction of this Act or of some existing or future Act of Parliament, no person shall divert or appropriate any water from any water-course, or from any lake, lagoon, swamp or marsh, save in the exercise of the general right of all persons to take water for domestic and ordinary use, and for watering cattle or other stock from any water-course, and from any lake, lagoon, swamp or marsh, vested in the Crown and to which there is access by a public road or reserve.''

814 Section 7(a) permitted the owner or occupier of any land adjacent to any water-course, lake, lagoon etc, the bed of which is declared to have remained the property of the Crown, to access the portion of the

(992) In 1960, under s 27(5) of the *Rights in Water and Irrigation Act*, it was declared by proclamation that Pt III of the Act applied to the Ord River and its tributaries. In 1962, under s 28 of that Act, by Order in Council the Ord Irrigation District was constituted. It was subsequently extended in 1965 and 1973.

bed to which the land is adjacent, and to use that portion as if the *Rights in Water and Irrigation Act* had not been passed. That permission, however, did not apply when the portion had been actually appropriated by or under the sanction of the Crown for the purposes of the Act. Section 7(b) enabled the owner or occupier to ''have and pursue against any person trespassing upon such portion any remedy for such trespass which such owner or occupier might have had and pursued'' if the Act had not been passed.

815 Section 14 provided that all owners and occupiers of land alienated by the Crown through or contiguous to which runs any water-course, lake, lagoon etc shall have rights free of charge to the water for domestic and ordinary use of themselves and their families and servants, and for watering cattle and other stock.

816 Section 15 enabled owners or occupiers of land alienated from the Crown before the commencement of the Act to apply to the Minister for a special licence to continue taking and diverting water in the manner in which they had been accustomed.

817 Section 16 allowed the Minister to grant a licence to any owner or occupier of land to take, use, or dispose of water from any water-course, lake, lagoon, swamp or marsh on such terms and on such conditions as may be prescribed.

818 Section 17 regulated the right of any owner or occupier of lands adjoining the bed of any water-course, lake, lagoon etc to take and use water from that source if the water has been wholly or partially supplied from, or whose volume may be increased by, public works under the *Rights in Water and Irrigation Act*.

819 The majority in the Full Court held that these provisions did not provide evidence of an intention to extinguish native title rights. They did, however, find that the provisions of Pt III of the *Rights in Water and Irrigation Act* extinguished the *exclusivity* of native title holders to use and enjoy the water (993).

820 In my opinion, the conclusion of the majority in respect of Pt III was mistaken. It was correct to say, as Beaumont and von Doussa JJ did, that the vesting of the beds of water-courses, lakes, lagoons etc in the Crown under s 4(1) did not transfer the legal estate in the beds to the Crown, but conferred only such powers of control and management as were necessary for the purposes of the *Rights in Water and Irrigation Act* (994). This much is clear, to my mind, from s 7(a) of the Act, which drew a distinction between portions of beds vested in the Crown and portions which have been appropriated by or under the sanction of the Crown. If the Crown had beneficial ownership of the beds vested in it under s 4, that distinction would make no sense. Their Honours did not err in that respect.

821 Their Honours were, however, in error in not focusing upon whether

(993) *Western Australia v Ward* (2000) 99 FCR 316 at 423 [405].
(994) *Western Australia v Ward* (2000) 99 FCR 316 at 422 [400].

the control vested in the Crown was consistent with continuing native title rights over the beds of water-courses, lakes and lagoons, and native title rights to control the use of water. I do not consider that it was. At this point, I observe that, if it were correct that native title rights flowed from a ''right to speak for country'', then, by parity of reasoning, because the Crown undoubtedly has ''spoken'' for the land since the first non-indigenous settlement, that would be evidence of extinguishment of native title, for two authorities could not in practical terms speak for the land. The *Rights in Water and Irrigation Act* makes it clear, in my opinion, that any rights to take and use water are derived from it alone. Section 6, for instance, prohibited persons from diverting or appropriating water from any water-course, or from any lake, lagoon, swamp or marsh, except as provided for by the Act or in exercise of ''the general right of all persons to take water for domestic and ordinary use, and for watering cattle or other stock''. This was not, as the majority concluded (995), a provision that preserved existing rights to take and appropriate water; on the contrary, it conferred on *all* persons, regardless of their rights to be on the land on which the water-course, lake, lagoon, swamp or marsh might be located, a new statutory right to take water for certain purposes (996). This supports the conclusion that, absent any rights conferred by the statute, no other right to take water existed.

822 Section 14 likewise was not concerned with the preservation of existing rights. It provided for the owners and occupiers to have rights free of charge to water from water-courses, lakes, lagoons etc on land for the domestic and ordinary use of themselves and their respective families and servants, and for watering cattle and other stock. I cannot, with respect, read this as directed to preserving and regulating any rights that owners and occupiers might otherwise have had to the water. Rather, by spelling out the extent to which owners and occupiers have riparian rights, s 14 conferred a statutory right to take water free of charge that would otherwise not exist.

823 Section 16 provided another indication that, absent the statute, there is no right to take and use water. It is difficult to explain why the statute would require licences to take, use and dispose of water from any water-course, lake, lagoon, swamp or marsh if other rights, such as native title rights, to take and use that water existed under the general law.

824 I do not regard s 7 as providing any contrary indication. It seems to me that the express statement that a right to access and use beds declared to have remained property of the Crown exists, only confirms the inference that, apart from the statute, there would be no right to do

(995) *Western Australia v Ward* (2000) 99 FCR 316 at 422 [401].

(996) The right to take water from any water-course, lake, lagoon, swamp or marsh was limited to those vested in the Crown and to which there was access by a public road or reserve.

any of these things. The same is the case with the provision for maintaining any remedy for trespass.

825 Accordingly, Pt III of the *Rights in Water and Irrigation Act* extinguished any native title to property to or in respect of the beds of water-courses, lakes, lagoons, swamps or marshes, and any native title rights to control the use and flow of waters. This occurred well before the commencement of the RDA.

826 I am also of the opinion that the by-laws made under the *Rights in Water and Irrigation Act* extinguished any native title rights to obtain sustenance from the land. The Ord Irrigation District By-laws of 1963, as amended from time to time, imposed prohibitions and obligations that were inconsistent with the exercise of any native title rights to hunt, forage and take water. Among other things, the by-laws forbade entry into certain areas (997); prohibited taking or using water from any of the works or any water-courses within the District (998); prevented the removal, plucking or damaging of any plant growing on land reserved for or vested in the Minister within a half-mile of any reservoir and within the District (999); and forbade persons from shooting, trapping or taking fauna on that land (1000). These by-laws did not simply control native title, as the majority concluded (1001). Rather, they extinguished all native title rights to obtain sustenance from the land, for the latter could in no way be exercised once the by-laws came into force. As the by-laws were enacted before the RDA commenced, their validity cannot be called into question on that account.

827 Further by-laws to similar effect were made in 1991 by the Shire of Wyndham-East Kimberley under the *Local Government Act* 1960 (WA). Those by-laws applied to all reserves and places of public recreation or enjoyment vested in or under the control of the Shire. Among other things, they prevented shooting, snaring, injuring or destroying any bird or animal (1002); prohibited the destruction or damaging of, or interference with any tree, shrub, flower, plant, soil or grass (1003); and forbade the lighting of a fire other than in a designated fire place (1004). As with the by-laws considered in the previous paragraph, these also extinguished all native title rights to hunt and forage. But because they were enacted after the commencement of the RDA, it is necessary to determine whether s 10 of that Act rendered them invalid.

828 In my opinion, s 10 of the RDA did not render the by-laws invalid.

(997) By-law 4.
(998) By-law 9.
(999) By-law 6.
(1000) By-law 6(2), made 10 April 1969.
(1001) *Western Australia v Ward* (2000) 99 FCR 316 at 423 [406].
(1002) By-law 3(e).
(1003) By-law 3(f).
(1004) By-law 6(g).

That is because the by-laws did not create ''racial discrimination'', as the term is defined under the Convention. The by-laws did not use racial criteria; they prohibited activities that could be, and undoubtedly were, engaged in by people of many different racial origins. They were designed to apply indiscriminately to everyone. They could not, therefore, be said to create a distinction or preference ''based on'' race, colour, or national or ethnic origin, as the Convention requires. The fact that they might have the effect of extinguishing any native title rights is beside the point. That would only matter if indirect discrimination were covered by the Convention. For the reasons I have given earlier, it is not. Section 10 of the RDA thus had no application to the by-laws promulgated by the Shire of Wyndham-East Kimberley in 1991.

Resumptions under the Public Works Act 1902 *(WA)*

829 Section 10 of the *Public Works Act* 1902 (WA) empowered the Crown, the Government, or any local authority, when authorised under any Act to undertake, construct or provide any public work, to acquire the land required for that purpose under the provisions of the *Public Works Act*. Section 17 of the *Public Works Act* provided for the publication of a notice in the *Gazette* that certain land had been set apart, taken or resumed under the Act for the public purpose therein expressed. The Minister was obliged to cause a copy of the notice to be served on each owner and on each occupier of land residing within the State (s 17(2)(c)(ii)) (1005).

830 Section 18 spelled out the effect of the resumption:

> ''Upon the publication of the notice referred to in s 17(1) in the *Government Gazette* —
> (1) as the Governor may direct and the case require the land referred to in such notice shall, by force of this Act, be vested in Her Majesty, or the local authority, for an estate in fee simple in possession or such lesser estate for the public work expressed in such notice, freed and discharged from all trusts, mortgages, charges, obligations, estates, interests, rights-of-way, or other easements whatsoever; and
> (2) the estate and interest of every person in such land, whether legal or equitable, shall be deemed to have been converted into a claim for compensation under the provisions hereinafter contained.
>
> Provided that the Governor may, by the same or any subsequent notice, declare that the estate or interest of any lessee or occupier of the land shall continue uninterrupted until taken by further notice.''

(1005) ''Occupier'' in s 17 was defined to mean ''a person who, in exercise of a right of possession, is in actual occupation of the land, but does not include anyone who is in occupation of the land merely as a member of the family or household of that person''. The definition would appear to be capable of including native title holders.

831 Portions of land in the Packsaddle Plains area were resumed under these provisions for the second stage of the Ord River Irrigation Project. The resumptions took place in November 1972 and December 1975. The *Gazette* notices in each case described the land, expressed the purpose for which it had been set apart, taken or resumed, and stated:

> ''[T]he said lands shall vest in Her Majesty for an estate in fee simple in possession for the public work herein expressed, freed and discharged from all trusts, mortgages, charges, obligations, estates, interests, rights-of-way or other easements whatsoever.''

832 In my view, it is clear from the terms of s 18 and the notices that the land resumed was freed from all prior interests and estates and was vested in the Crown. Since that is so, all native title rights and interests over the land resumed were extinguished. The majority of the Full Court were correct in so holding.

833 The remaining question then is whether the RDA invalidated the resumption that took place in December 1975. I do not consider that it did. Section 34 of the *Public Works Act* relevantly provided:

> ''(1) *Every person having any estate or interest in any land* which is taken under this Act for any public works ... shall, subject to this Act, be entitled to compensation from the Minister or local authority, as the case may be, by whose authority such works may be executed.
>
> (2) Where compensation is claimed by a person whose estate or interest in the land taken is not duly registered or notified in the Office of Land Titles or Registry of Deeds, and any other person has applied for and obtained compensation in respect of the same land, and without giving written notice with his claim of such unregistered estate or interest, such first-mentioned person shall not be entitled to claim or receive payment of any compensation whatever in respect of such estate or interest.'' (Emphasis added.)

There was no racial restriction on persons who might claim compensation under s 34(1). Native title holders could have applied for compensation under that provision just as others having an interest or estate in land might. The words ''having any ... interest in any land'' are wide enough to embrace native title rights. It is true that, under s 34(2), the interests of native title holders could be defeated if another person had obtained compensation in respect of the same land and had not given notice of the unregistered native title interests. However, this simply placed native title rights in the same position as other unregistered interests. Accordingly, there was no racial discrimination and the RDA did not affect the resumption. The effect of the resumption was to extinguish title and interests of any kind of all holders and occupiers of the relevant land.

Ord Project: public works under the Native Title Act

834 Section 23B(7) of the *Native Title Act* provides:

> ''An act is a *previous exclusive possession act* if:
> (a) it is valid (including because of Division 2 or 2A); and
> (b) it consists of the construction or establishment of any public work that commenced to be constructed or established on or before 23 December 1996.''

835 Section 23C(2) then provides:

> ''If an act is a previous exclusive possession act under sub-section 23B(7) (which deals with public works) and is attributable to the Commonwealth:
> (a) the act extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated; and
> (b) the extinguishment is taken to have happened when the construction or establishment of the public work began.''

836 ''Public work'' is an expression defined in s 253 of the *Native Title Act* and includes a major earthwork established by or on behalf of the Crown, a local government body or other statutory authority of the Crown in any of its capacities. Section 251D states 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''. These words are important, as will become evident shortly.

837 Section 23E of the *Native Title Act* allows a State or Territory law to make provision to the same effect as s 23C in respect of any previous possession acts attributable to the State or Territory. The relevant Western Australian provision is s 12J of the State Validation Act. It mirrors the language of s 23C(2) of the *Native Title Act*, except that it refers to an act attributable to the State. Section 4(2) of the State Validation Act ensures that words or expressions used in s 12J and other provisions have the same meaning as in the *Native Title Act*. The effect of all these provisions is that if native title existed on land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated, then native title is wholly extinguished.

838 The majority in the Full Court did not doubt that the magnitude and nature of the Ord Project created ''an operational necessity for the Crown to have the legal right of complete control, to be exercised as and when necessary over human activity in the area'' (1006). They said

(1006) *Western Australia v Ward* (2000) 99 FCR 316 at 435 [442].

this about the effect of the public works provisions in the *Native Title Act* (1007):

> ''The Ord Project involved the construction or establishment of major earthworks. In our opinion all the lands resumed under s 109 of the *Land Act* 1933 (WA), and the *Public Works Act*, and the former Argyle Downs pastoral lease, come within the meaning of 'public works on the land . . . concerned', just as they come within the meaning of 'irrigation works' under the *Rights in Water and Irrigation Act*.''

This was a clear finding that the land in the buffer zones and drainage areas was land on which public works were situated. It is also clear from their Honours' earlier reasons concerning the *Rights in Water and Irrigation Act* (1008) and s 251D that they found the vacant Crown land ''necessary for, or incidental to, the construction, establishment or operation of the [public] work''. There was ample evidence on which their Honours could make such findings (1009). Having regard to the magnitude of the Ord Project and the need to control and manage the land within it for the multifarious incidental purposes of erosion control, the provision of a buffer, the avoidance of pollution, the preservation, where possible, of the natural environment, and flood mitigation, I consider that the findings were correct. Accordingly, native title over the entire Ord Project was extinguished by virtue of s 12J.

839 I would add only this. It will be rare that the decision taken by the Executive (otherwise than in bad faith) with respect to the expanse of property acquired or set aside for, and therefore forming part of the implementation of, a particular purpose will be open to challenge. Minds might well differ as to how much property is ''required'', what is a sufficient buffer, whether in the case of a dam provision should be made to accommodate a twenty or a 200 year flood, and where the cordon sanitaire to protect against erosion or pollution should be located. But that minds may differ, indeed very reasonably differ on these questions, will not normally justify a finding that the setting aside or appropriation included more land than was necessary for, or genuinely incidental to, the relevant works (1010). These are matters for the Executive of the day. As a general rule, for any attack to be successfully mounted it will need to be shown that the powers were exercised in truth for an unauthorised purpose or in bad faith, the onus in respect thereof lying upon the challenger (1011).

(1007) *Western Australia v Ward* (2000) 99 FCR 316 at 438 [452].
(1008) *Western Australia v Ward* (2000) 99 FCR 316 at 434-435 [439]-[441].
(1009) *Western Australia v Ward* (2000) 99 FCR 316 at 424-425 [410].
(1010) *Native Title Act*, s 251D.
(1011) *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 192-193, per Gibbs CJ.

Mining leases

840 Just as it is necessary to understand what is involved in the pursuit of pastoral or grazing purposes in order to appreciate what a grazier or pastoralist actually does on, or in respect of, a pastoral lease, and what he or she needs to carry out that purpose, so it is necessary to have a proper appreciation of the way in which land is occupied and utilised for mining purposes. Accordingly, in short, it is necessary to have regard to what may be involved in modern mining operations. It is possible to discuss the nature of these with some confidence because, as Australia has long relied on the export of minerals for its prosperity, the means by which they are won has passed into common knowledge.

841 Because Western Australia is a famous and longstanding gold mining province, it is relevant and convenient to say something first about mining for gold. These are notorious facts about that activity. The metal may occur both on the surface and underground. Because veins of it may dip and bend, pinpointing their precise subterranean location is a notoriously difficult task usually involving very extensive drilling right up to, if necessary, the boundaries of a mining tenement. Even that may not afford a sufficient basis for the prediction of where, underneath the surface, gold may be found. So too, Executives, in granting mining tenements, may be expected to confine them to prospective areas. Any gold miner would regard the whole of the subject matter of a mining lease as territory available for exploration and exploitation.

842 Gold, other than alluvial gold, tends to occur in hard and heavy rock. Its presence is usually measured in terms of grams to the tonne. Because the precious metal forms such a small part of the volume and weight of the material in which it occurs, it must be extracted and processed to a relatively high degree of refinement on site: the cost of removing to another site the rock in which the gold is contained, even if otherwise practicable, would be prohibitively expensive. The extraction of gold is undertaken by crushing and subsequent chemical processes, including, on occasions, the use of a dangerous poison such as cyanide. The pulverised rock and earth from which the gold is extracted needs to be stored. Sometimes this material, the tailings, will be set aside on the land to cater for the possibility of reprocessing or the improvement of techniques, which may lead to retrieving gold not isolated during the original extraction processes. The processes will generally also require a considerable quantity of water. These matters provide further reason for a gold miner to regard the whole of the land covered by a mining lease as an essential part of the mine and, therefore, as required for mining purposes.

843 Access to, and use of, the surface is likely to be required for one or more of exploration, exploitation by winning the mineral on and below the surface, plant for the extraction and processing of the mineral, the deposition of overburden and the earth and rock from which the gold is won. It may also be required for access to and from the mine, access

to any water resources on or near it, and, for use as a buffer against the noise, noxious by-products and residues that the winning, crushing and processing operations may produce. Subject only to specific restrictions or conditions imposed by the grantor of the mining lease, it would be inconceivable to a gold miner that he or she did not have exclusive possession and use of all the land within a mining lease for gold mining purposes. Further, subject only to reservations, exceptions or conditions in the lease, the undertaking of the activities to which I have just referred is incompatible with other uses of the land, including the traditional uses of the Aboriginal people.

844 What I have said in relation to gold mining, with minor qualifications only, will apply to the mining of other valuable minerals such as silver, platinum, nickel and diamonds except that the last may occur in gravel pipes rather than as veins in hard rock. It will also apply generally to the mining of many base metals. A feature that the mining and processing of these valuable minerals have in common is the need for security on site, in consequence of which the area covered by the lease either in whole or in part will be enclosed and access closely supervised and restricted.

845 It is equally a matter of common knowledge that the winning of other minerals such as coal and iron ore may involve huge open cut mines occupying much of the surface, the movement of very large pieces of equipment, and the availability of extensive open spaces for the placement of overburden pending the rehabilitation of the land after the mining operation has ceased. In the case of coal, preparation and treatment facilities are usually erected on site and require much water for the washing of the mineral before its consignment to blast furnaces, powerhouses and so on. These again are factors pointing to an expectation that the whole of the land the subject of a mining lease, unless otherwise expressly stated, will be available for mining purposes.

846 Without attempting a comprehensive discussion of what mining may, or customarily does involve, what I have so far said provides a sufficient context for any comparison of the rights and interests conferred by a mining lease with native title rights and interests.

847 As the Full Court said, there were fifty-two mining leases granted in respect of land within the claim. All were granted after the commencement of the RDA and all were granted under Pt IV, Div 3 of the *Mining Act* 1978 (WA). The material provisions of that Division can be summarised as follows: 1. Subject to the Act, the Minister may, on the application of any person, after receiving the statutory recommendation of the mining registrar or the warden (under s 75 — see below), grant a mining lease on such terms and conditions as the Minister considers reasonable (s 71). 2. The area of land leased shall not exceed 10 km^2 (s 73). 3. Upon application, the Minister shall grant a mining lease, or a general purpose lease, to the holder of a prospecting licence or of an exploration licence. Otherwise, the Minister may refuse or grant a mining lease, whether or not the

warden recommends it (s 75). 4. Subject to the Act, a mining lease shall remain in force (a) for an initial term of twenty-one years; and (b) upon application, for a further term or terms of twenty-one years successively (s 78). 5. Every mining lease shall be subject to conditions that the lessee shall, among other things, (a) pay rents and royalties; (b) use the land in respect of which the lease is granted only for mining purposes in accordance with the Act; (c) unless exempted, comply with the prescribed expenditure conditions; (d) not assign, underlet or part with possession of such land or any part thereof without consent (s 82(1)). 6. The Minister may impose reasonable conditions for the prevention or reduction of injury to the natural surface of the land, including a condition that mining operations shall not be carried out within such distance of the natural surface of the land leased, as the Minister may specify (s 84). 7. Subject to the Act, a mining lease authorises the lessee (a) to work and mine the land for any minerals; (b) to take and remove from the land any minerals and dispose of them; (c) to take and use water; and (d) to do all acts and things necessary to carry out mining operations effectually (s 85(1)). 8. Subject to the Act, the lessee is ''entitled to use, occupy, and enjoy the land in respect of which the mining lease was granted for mining purposes'' (s 85(2)(a)); and ''owns all minerals lawfully mined from the land'' (s 85(2)(b)). The rights conferred are ''exclusive rights for mining purposes in relation to the land in respect of which the mining lease was granted'' (s 85(3)). Regulation 27 of the Mining Regulations 1981 (WA) also inserted a number of covenants into mining leases. Among these was a covenant (reg 27(b)) that the lessee shall ''use the land in respect of which the lease is granted only for mining purposes in accordance with the Act''.

848 The majority of the Full Court held that mining leases extinguished all native title rights and interests over the land in relation to which the leases had been granted. In my view, that conclusion was plainly correct. Indeed, were it not for the presence of the words ''for mining purposes'' in s 85 of the *Mining Act* 1978, I would have regarded any other proposition as unarguable. It has been suggested, however, that because the exclusivity of the rights to use, occupy and enjoy the land is limited to certain purposes (1012), the exclusive possession conferred on the lessees is restricted to those areas in fact used for mining.

849 With that suggestion, I respectfully disagree. The language of the *Mining Act* 1978 is perfectly compatible with the existence of exclusive possession over the entire property. As mentioned above, s 85(2) of the *Mining Act* 1978 entitles the lessee ''to use, occupy, and enjoy *the land in respect of which the mining lease was granted* for mining purposes'' (emphasis added). A right to use, occupy and enjoy land for a certain purpose (for instance, mining) ordinarily means that one can go anywhere upon the land, and use any or all parts of it, in

(1012) Reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at 165-166 [308].

order to carry out that purpose. That being the case, even on an ordinary and natural interpretation of s 85(2), the rights that it confers are not restricted to those areas of the land in fact used for mining purposes at any one time. There is nothing in s 85(3) which affects this conclusion. All that provision does is to make the rights to use, enjoy and occupy the land exclusive; it does no more. The words ''for mining purposes'' in that provision merely serve to identify the object for which the powers in s 85(2) are granted. They make it clear that exclusive possession is conferred on the lessee *so that* he or she can conduct mining over and under the land. But that fact offers no support to the idea that exclusive possession fails to apply to any portion of the land where mining operations either have ended or are yet to commence, or any land which serves as a buffer to the physical operations. In this respect, a mining lease is no different from a lease for commercial purposes, a dredging lease (1013), or a lease for the collection and manufacture of salt (1014); in each case, the fact that the lessee is granted exclusive possession for a specified purpose does not mean that someone else can occupy or use the land simply because the relevant purpose is not being visibly pursued on every square metre of the demised premises.

850 I would add that the consequences of adopting the contrary interpretation are daunting. It is well settled that the consequences of a particular reading are relevant to the interpretation of statutes and the Constitution (1015). As Judge Cardozo put it (1016): ''Consequences cannot alter statutes, but may help to fix their meaning.'' The notion that exclusive possession exists only in respect of the areas in fact used for mining, if true, would invite constant dispute about whether areas covered by the lease were actually being used for mining or were incidental to that activity. It would mean that the holder of a mining lease could sue a native title holder (1017) for trespass if the latter were on land incidentally being used for mining purposes; on a different part of the land, perhaps no further than 100 m away, the lessee might have no remedy. Every case would hinge on a judge's appreciation of the pursuit of a mining purpose, ranging from the taking of samples on

(1013) *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199.

(1014) *Land Act* 1933, s 116(9).

(1015) *Metropolitan Coal Co of Sydney Ltd v Australian Coal and Shale Employees' Federation* (1917) 24 CLR 85 at 99, per Isaacs and Rich JJ; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305, per Gibbs CJ; at 321, per Mason and Wilson JJ; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 532 [43], per Gleeson CJ and McHugh J; at 604-605 [278], per Callinan J; *Brunton v Commissioner of Stamp Duties* [1913] AC 747 at 759; *Shannon Realties v Ville de St Michel* [1924] AC 185 at 192; Bennion, *Statutory Interpretation*, 3rd ed (1997), pp 758-775.

(1016) *In re Rouss* (1917) 116 NE 782 at 785.

(1017) Precisely the same principles would apply to any previous title holder, such as a pastoral lessee.

the surface to dredging. An intention to bring about such capricious and unpredictable results — with their obvious potential to retard mining and promote conflicts — should not readily be imputed to a legislature absent clear language (1018). As that legislature has expressly conferred *exclusive* rights on the lessee to use, occupy and enjoy the land in question, there is no basis for imputing that intention to the legislature at all. It follows that the right of exclusive possession is clearly conferred over the entire area of land covered by the lease. It is not confined to areas on which ''sensitive'' or more obvious mining activities are carried out. Accordingly, native title rights and interests were totally extinguished by the grant of the mining leases.

The effect of the RDA

851 As noted earlier, s 10 of the RDA only operates in the context of racially discriminatory laws. If a law gives persons, regardless of their race, a right of compensation for damage to their property, there cannot be said to be any racial discrimination. In my view, the *Mining Act* 1978 is such a law. I will explain why this is so.

852 Part VII of the *Mining Act* 1978 deals with compensation in respect of mining. Section 123(2) provides:

> ''Subject to this section and to sections 124 and 125, the owner and occupier of any land where mining takes place are entitled according to their respective interests to compensation for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining, whether or not lawfully carried out in accordance with this Act, and a person mining thereon is liable to pay compensation in accordance with this Act for any such loss or damage, or likely loss or damage, resulting from any act or omission on his part or on the part of his agents, sub-contractors or employees or otherwise occasioned with his authority.''

The amount payable under this provision may include compensation for ''being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land'' (s 123(4)(a)), and ''any loss or restriction of a right of way or other easement or right'' (s 123(4)(d)) (1019).

853 It is clear that any person who is an ''owner'' or an ''occupier'' is

(1018) As Lord Shaw of Dunfermline explained in *Shannon Realties v Ville de St Michel* [1924] AC 185 at 192-193: ''Where the words of a statute are clear they must, of course, be followed; but, in their Lordships' opinion, where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.''

(1019) From 1985 the compensation provision also covered ''social disruption'' (s 123(4)(f)).

entitled to compensation. Section 8 of the *Mining Act* 1978 defines these terms in this way:

> ''*'occupier'* in relation to any land includes any person in actual occupation of the land under any lawful title granted by or derived from the owner of the land;
>
> . . .
>
> *'owner'* in relation to any land means —
>
> (a) the registered proprietor thereof or in relation to land not being land under the *Transfer of Land Act* 1893 the owner in fee simple or the person entitled to the equity of redemption thereof;
>
> (b) the lessee or licensee from the Crown in respect thereof;
>
> (c) the person who for the time being, has the lawful control and management thereof whether on trust or otherwise; or
>
> (d) the person who is entitled to receive the rent thereof.''

854 In my opinion, each of these definitions is capable of applying to native title rights and interests. It can be seen that the definition of ''occupier'' is expressed inclusively and does not exclude occupation according to its ordinary meaning of being in possession by having a physical presence on land. Native title holders may also come within par (c) of the definition of ''owner'' because they may be persons who had the lawful control or management of the land, or lawful control or management of some of the elements of proprietorship of land, such as possession, or a right to resort to sacred sites or to take water or vegetation from it.

855 The *Mining Act* 1978 therefore should not be read so as to preclude Aboriginal people from claiming compensation for loss or damage to their land. They have the same rights to claim compensation as others with an interest in land. Accordingly, the *Mining Act* 1978 is not a racially discriminatory law and s 10 does not operate to invalidate the grant of mining leases. Native title remains extinguished in full.

Argyle lease

856 The detailed conditions of the Argyle lease were before the Full Court. The majority stated the background to the grant of the Argyle lease in these terms (1020):

> ''The Argyle Joint Venture is the holder of a Special Agreement Lease (M259SA). It was granted on 27 January 1983 pursuant to the Argyle Diamond Mines Joint Venture Agreement (the Agreement) which was ratified by the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* 1981 (WA) (the Ratifying Act). The need for special legislation providing for, inter alia, the grant of a mining lease, arose out of the 'project' nature of the venture, which involved the building of a substantial infrastructure, including a

(1020) *Western Australia v Ward* (2000) 99 FCR 316 at 455-457 [547]-[550].

township, airports and roads. Lease M259SA was varied in several respects in 1986, when the boundaries were altered, and the Minister imposed conditions on the Lease which, inter alia, provided for compliance with the *Aboriginal Heritage Act* 1972 (WA). As mentioned, the diamond mine lies to the south-west of Lake Argyle, and part only of M259SA is within the determination area . . .

Some of the provisions of the Agreement should be mentioned:

- the Agreement required the Joint Venturers to submit proposals to the Minister for the mining and recovery of diamonds from the mining area; the construction of plant, facilities, roads and town sites; the provision of utilities and services, water supply and power supply; and the provision of an airstrip and other works or facilities desired (cl 7);
- the Agreement provided for the grant, on application by the Joint Venturers, of a mining lease of the lands specified. The lease was to be subject to the *Mining Act* 1978 (WA) and in the form in the Schedule to the Agreement. It was to be 'for all minerals' (cl 15(1)). It was to have a term of twenty-one years, with a right in the Joint Venturers to renew for further successive terms of twenty-one years (cl 15(2));
- provision was also made for some access over the mining lease. The Joint Venturers agreed to 'permit the State and third parties with the consent of the State (with or without stock vehicles and rolling stock) to have access to and to pass over the mining lease (by separate route, road or railway) so long as that access and passage does not unduly prejudice or interfere with the operations of the Joint Venturers . . .' (cl 15(4)); and
- provision was made for the payment to the State of a profit-based royalty (cll 29, 29A, 29B, 29C (the last three clauses were inserted by amendments made in 1983)).

The form of lease in the Schedule to the Act was expressed to be a lease of the lands 'for all minerals', subject to specified exceptions, including petroleum.

Some of the provisions of the Ratifying Act should be noticed:

- 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 (s 7);
- pending the grant of the mining lease, CRA Exploration, one of the Joint Venturers, was declared to have, inter alia, 'exclusive possession of the subject land for the purposes of the *Mining Act* 1904 and the *Mining Act* 1978' (s 8(1)(a));
- any right title or interest etc in the subject land that might otherwise have been acquired under the *Mining Act* 1904 (WA) and *Mining Act* 1978 (WA) by any person other than the Joint Venturers shall not be so acquired and is extinguished (s 9); and
- where it appears to the Governor that the mining, treatment, processing, sorting, storage or cutting of diamonds is being, or

> is proposed to be, carried out on any land or premises within the State, the Governor may by Order in Council declare that land or premises to be a 'designated area' (s 15(1)). Entry to, and egress from, a designated area is regulated for purposes related to security (s 17).''

Their Honours also noted that the provisions of the *Mining Act* 1978 were to apply to the lease except as otherwise provided in the Agreement (cl 15(1)). They concluded that the lease had completely extinguished native title (1021).

857 I respectfully agree. As I have said, exclusive possession under the *Mining Act* 1978 meant exclusive possession over the entire land the subject of a mining lease. The fact that the purpose of the grant of exclusive possession was for mining purposes did not change that conclusion. Here, cl 15(1) of the Agreement made it clear that the Argyle lease was to be subject to the *Mining Act* 1978 and was, to all intents and purposes, a mining lease with some additional special provisions. The Ratifying Act also made it clear that the interests which were conferred by the lease necessitated exclusive possession as that term was to be understood in the *Mining Act* 1978. As a result, the Argyle lease extinguished all native title rights and interests.

858 I turn next to the question whether s 10 of the RDA operated to invalidate the grant of the lease. In my view, it did not. As the Agreement makes clear, the Argyle lease was a mining lease and subject to provisions of the *Mining Act* 1978. That Act treated native title holders and other holders of interests in land alike for compensation purposes. There was, therefore, no racial discrimination, and s 10 of the RDA simply did not apply.

General purpose lease

859 One general purpose lease in the claim area was granted on 2 August 1989. It was granted within lands resumed or acquired for the Ord River Irrigation Project.

860 Part IV, Div 4 of the *Mining Act* 1978 deals with general purpose leases. It provides that the leases generally have a term of twenty-one years, with a right of renewal for another twenty-one years (s 88). The maximum area that can be leased is 10 ha (s 86(3)) (1022). Every lease entitles the lessee and his agents and employees to the exclusive occupation of the land for one or more of these purposes: for erecting, placing and operating machinery in connection with mining operations; for depositing or treating minerals or tailings; or for any other specified purpose directly connected with mining operations (s 87). The Minister may impose conditions to prevent or reduce injury to land (s 90).

(1021) *Western Australia v Ward* (2000) 99 FCR 316 at 458-462 [554]-[572].

(1022) If I were to accept that ''vastness'' implied non-exclusivity (and I do not), then ''smallness'', here a mere 10 ha, would imply exclusivity.

861 Regulation 36 of the Mining Regulations 1981 also provides that the lease shall contain the following covenants by the lessee:

> ''(a) pay the rents due under the lease at the prescribed time and in the prescribed manner; (b) use the land in respect of which the lease is granted only for the purposes specified in the lease; (c) not assign, underlet or part with possession of such land or any part thereof without the prior written consent of the Minister, or of an officer of the Department acting with the authority of the Minister; (d) lodge with the Department at Perth such periodical reports as are approved by the Director General of Mines as being required in respect of a general purpose lease; (e) promptly report in writing to the Minister details of all minerals of economic significance discovered in, on or under the land the subject of the lease; and (f) be liable to have the lease forfeited if he is in breach of any of the covenants or conditions thereof.''

862 The majority of the Full Court held that native title rights and interests had been extinguished in respect of the land the subject of the general purpose lease. In my view, that conclusion is unimpeachable. Section 87 of the *Mining Act* 1978 entitles a lessee, his agents and employees to exclusive occupation ''of the land in respect of which the general purpose lease was granted'' for the purposes there specified. The right of exclusive possession of the land was conferred so that the specified purposes could be pursued anywhere on that property. There is no warrant for construing s 87 as limiting exclusive possession to those areas of the land which were occasionally *in fact* used for the purposes of the lease. That construction would lead to incongruous results, just as it would in the case of mining leases. It would also be difficult to reconcile with the fact that other purposive leases, such as leases for commercial purposes, and special purpose leases for, say, obtaining and removing guano (1023) or obtaining stone, gravel, sand or earth (1024), grant a right of exclusive possession over the whole of the demised premises. By conferring on the lessee a right of exclusive possession, the general purpose lease completely extinguished native title rights and interests over the land.

863 What effect, if any, did the RDA have on the grant of the general purpose lease? The compensation provisions in the *Mining Act* 1978 permitted an ''owner'' or ''occupier'' of land to be compensated for loss or damage arising from mining. For the reasons given earlier, an ''owner'' or ''occupier'' might be the holder of native title. The RDA therefore did not invalidate the grant of the general purpose lease. Native title rights and interests remained extinguished in their entirety.

(1023) *Land Act* 1933, s 116(1).
(1024) *Land Act* 1933, s 116(2).

Transfer of Land Act 1893 *(WA)*

864 Before considering the effect of the *Transfer of Land Act* 1893 (WA), it is convenient to provide some background to the legislation for the registration of Crown leases in the State.

865 No provision for the registration of Crown leases under the *Transfer of Land Act* existed until 1909. In that year, the *Transfer of Land Act Amendment Act* 1909 (WA) was passed, enabling Crown leases issued before or after the commencement of the *Transfer of Land Act Amendment Act* to be registered. By s 10(2) of the *Transfer of Land Act Amendment Act*, if a Crown lease was registered under the *Transfer of Land Act*, that registration was complete authentication of the leasehold estate, despite any provision to the contrary in the Land Acts. The requirement that no estate or interest under the operation of the *Land Act* 1898 was to pass unless it was registered in a departmental register was accordingly rendered inapplicable (1025). Registration under the *Transfer of Land Act* ensured that the Crown lease could be dealt with as if it had been granted by a registered proprietor and registered in the ordinary way (1026).

866 Both the Ward claimants and the State made submissions regarding the effect of s 68 of the *Transfer of Land Act* on native title. Section 68 relevantly provides:

> ''Notwithstanding the existence in any other person of any estate or interest whether derived by grant from the Crown or otherwise which but for this Act might be held to be paramount or to have priority the proprietor of land or of any estate or interest in land under the operation of this Act shall except in case of fraud hold the same subject to such encumbrances as may be notified on the folium of the register book constituted by the certificate of title; but absolutely free from all other encumbrances whatsoever except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser. Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations exceptions conditions and powers (if any) contained in the grant thereof . . .''

Section 4(1) of the *Transfer of Land Act* defines ''encumbrances'' in this way:

(1025) This requirement was introduced by the *Land Act Amendment Act* 1906 (WA). The requirement was later embodied in the *Land Act* 1933, s 151.

(1026) *Transfer of Land Act*, s 81C.

''‘Encumbrances’ shall include all prior estates interests rights claims and demands which can or may be had made or set up in to upon or in respect of the land.''

867 The State submitted that s 68, which provides for the indefeasibility of registered title, extinguished any surviving native title rights over pastoral leases which were registered under the *Transfer of Land Act*. The State contended that native title was an ''encumbrance'' as defined in s 4(1) of the *Transfer of Land Act* and, as it was not notified on the register, the holder of a pastoral lease held that title absolutely free of all encumbrances, including the native title rights and interests.

868 The Ward claimants, on the other hand, submitted that s 68 had no extinguishing effect on native title. They maintained that s 68 was qualified by the effect of its opening words, which made it clear that only those interests which might otherwise have priority or be held to be paramount would be affected. As native title could never be said to be paramount or to have priority, then s 68 did not apply. The Ward claimants then referred to Canadian authority for the proposition that native title, being inalienable, could not be registered or the subject of a caveat (1027). They also pointed out that s 68 preserved the effect of any reservations on the grant.

869 The first argument of the Ward claimants should be rejected. The opening words of s 68 of the *Transfer of Land Act* do not restrict the application of that provision to estates or interests that are capable of being paramount or having priority. The use of the words ''might be held'', as opposed to ''would be held'', indicates that the provision was intended to apply to any estate or interest in land, *whether or not* it would have priority but for the Act. And, after all, the effect of the decision of this Court in *Wik* is to allow native title holders a degree of paramountcy in the sense that, unless and until exclusive possession is conferred upon someone else, native title holders can continue to exercise their native title rights over land leased for pastoral purposes, and may compete for resources on the property such as water and flora. The construction that I prefer accords with the evident purpose of s 68: to ensure that all encumbrances were to be notified on the register and that those who dealt with registered title could be sure that no other legal burdens of any kind could be set up in respect of the land. It would subvert the clear object of s 68 if an estate or interest in land could burden the interest of a registered lessee. For these reasons, the opening words of s 68 should not be read as qualifying the effect of the rest of the section.

870 The other arguments of the Ward claimants rest largely on the view that native title cannot be registered under the *Transfer of Land Act* or cannot be the subject of a caveat. However, so far as caveats are

(1027) See, eg, *Re Uukw and the Queen in Right of British Columbia* (1987) 37 DLR (4th) 408; *Skeetchestn Indian Band v British Columbia (Registrar of Land Titles)* [2001] 1 CNLR 310.

concerned, it is far from clear that this view is correct. If it be assumed that native title rights amount to interests in land which are capable of being recognised and protected by the common law, there seems to be no reason why they cannot be protected by a caveat under s 30 or s 137 (1028). Section 30 of the *Transfer of Land Act* is framed very widely; it enables ''[a]ny person claiming *any* estate or *interest* in the land described'' (emphasis added) to lodge a caveat with the Registrar. This language would appear to extend naturally to native title rights. Section 137 of the *Transfer of Land Act* in its ordinary terms is also apt to cover native title rights and interests. It relevantly provides:

> ''*Any beneficiary or other person claiming any estate or interest in land under the operation of this Act* or in any lease mortgage or charge under any unregistered instrument document or writing or under any equitable mortgage or charge by deposit without writing or by devolution in law *or otherwise* may lodge a caveat with the Registrar in the form in the Eighteenth Schedule hereto or as near hereto as circumstances will permit forbidding the registration of any person as transferee or proprietor of and of any instrument affecting such estate or interest either absolutely or until after notice of the intended registration or dealing be given to the caveator or unless such instrument be expressed to be subject to the claim of the caveator as may be required in such caveat . . .'' (Emphasis added.)

871 Furthermore, the Canadian authorities do not support the Ward claimants' submission that native title falls outside the ambit of conventional Torrens system legislation and remains unaffected by it. In *Paulette v The Queen* (1029), the Supreme Court of Canada held that it was impossible to file a caveat to protect Aboriginal title under the *Land Titles Act*, RSC 1970. Central to the Supreme Court's reasoning was the fact that the land in respect of which the caveat was to be filed was unpatented Crown land; that is, land which had never been alienated by the Crown: having regard to the historical development of the *Land Titles Act*, the Supreme Court held that such land could not be subject to a caveat, whether to protect Aboriginal title or otherwise (1030). It is clear, therefore, that the decision in *Paulette* says nothing about whether a caveat may be lodged to protect native title (or indeed any other interest in land) after Crown grants have issued.

872 *Re Uukw and the Queen in Right of British Columbia* (1031) at first glance appears to offer more support to the Ward claimants. In that case, the Court of Appeal of British Columbia held that Aboriginal claimants could not register their rights under the *Land Title Act*,

(1028) Butt, ''The Native Title Act: a property law perspective'', *Australian Law Journal*, vol 68 (1994) 285, at p 286.
(1029) [1977] 2 SCR 628.
(1030) *Paulette* [1977] 2 SCR 628 at 644-645.
(1031) (1987) 37 DLR (4th) 408.

RSBC 1979. The Court's holding, however, flowed from the statutory scheme in existence there. It was an implicit requirement of the *Land Title Act* that the Registrar might only register a certificate of lis pendens or accept a caveat if the interest claimed were capable of registration (1032). Before registering any interest or estate, the Registrar had to be satisfied that it was ''a good safe holding and marketable title'' (1033). As native title rights were inalienable except to the Crown, they lacked the necessary ''marketability'' to be registered (1034). But in contrast to the British Columbian legislation, the *Transfer of Land Act* neither provides for registration of lis pendens nor contains any requirement that caveatable interests be ''marketable'' (1035). For these reasons, I do not consider that the reasoning in *Uukw* applies to, or is of any assistance in answering, the question whether a caveat to protect native title may be lodged under the *Transfer of Land Act*.

873 The subsequent decision of the British Columbia Court of Appeal in *Skeetchestn Indian Band v British Columbia (Registrar of Land Titles)* is no different. That case reaffirmed that *Uukw* was good law in the Province. In rejecting the proposition that native title could be registered, Southin JA based her reasons on the relevant legislative history of the Province. Her Honour expressed her conclusion in these terms (1036):

> ''There is nothing in the legislative history of this Province, up to and including the enactment in 1978 of the statute now in issue, to warrant the conclusion that the Legislature intended the claims put forth here by the appellants to be registrable, for in the minds of the Legislature there was no such 'estate or interest in land' in this Province, a proposition which was affirmed by three judges of the Supreme Court of Canada in *Calder v British Columbia* (1037), although later rejected.''

MacKenzie JA (with whom Rowles JA agreed) saw no reason to overturn *Uukw* (1038). It is apparent that *Skeetchestn Indian Band*, being concerned with registration under the laws of British Columbia, does not stand for the proposition that native title is broadly incompatible with protection by caveat under the Torrens system. Accordingly, I incline to the view that native title can be protected by a caveat under s 30 or s 137 of the *Transfer of Land Act*.

(1032) *Uukw* (1987) 37 DLR (4th) 408 at 416-417.
(1033) *Uukw* (1987) 37 DLR (4th) 408 at 418.
(1034) *Uukw* (1987) 37 DLR (4th) 408 at 418.
(1035) As suggested below, however, there may be a requirement that registrable interests be ''transferable''.
(1036) *Skeetschestn Indian Band v British Columbia (Registrar of Land Titles)* [2001] 1 CNLR 310 at 335 [63].
(1037) [1973] SCR 313.
(1038) *Skeetchestn Indian Band* [2001] 1 CNLR 310 at 337-338 [74]-[75].

874 As to whether native title can be registered, I note that the *Transfer of Land Act* contains provisions, among other things, for registering leasehold and freehold grants from the Crown, and for registering dealings with the land. Part IV, Div 1 of the Act, however, contemplates that dealings that are registrable are also capable of being transferred to anyone. Because native title is inalienable except to the Crown, that would suggest that native title rights and interests cannot be registered.

875 If it were accepted that native title could be protected by a caveat under the *Transfer of Land Act*, even if the title could not necessarily be registered, then the submissions of the Ward claimants would fail. Native title rights and interests would not be wholly outside the *Transfer of Land Act*. As a result, they would be subject to s 68. That section confers indefeasibility of title on holders of registered titles, at once freeing them from all encumbrances not notified on the folium of the register book and curing defects in title (1039). The extensive definition of ''encumbrances'' extends, as a matter of ordinary language, to native title rights and interests on registered pastoral leases. In the absence of fraud (1040), all such native title rights and interests are extinguished by virtue of s 68. Because native title interests are treated no differently in this respect from other unregistered interests, no question of the operation of the RDA would arise.

876 There is one other matter which should be discussed on this topic. In *Hayes v Northern Territory* (1041), Olney J considered whether a miscellaneous lease which was defective in form, but which had been registered under the *Real Property Act* 1886 (NT), was a ''previous exclusive possession act'' as defined under the *Native Title Act*. His Honour found it was not, and commented (1042):

> ''[The argument that registration extinguishes native title] does not sit comfortably with either the general thrust of dicta ... which emphasise the need for a clear and plain intention in order to extinguish native title, or with the requirement of s 23B(2)(a) of the *Native Title Act* that the initial criterion to establish a previous exclusive possession act is that the act is valid.''

The exact purport of his Honour's reasoning is unclear: on one view, he says no more than that the ''previous exclusive possession act'' provisions of the *Native Title Act*, which provided that the act first had to be ''valid'', precluded an invalidly granted lease from being cured

(1039) See *Breskvar v Wall* (1971) 126 CLR 376.

(1040) It is clear that fraud, meaning actual fraud, involves more than notice that registration will defeat a prior interest; it must involve something in the nature of ''personal dishonesty or moral turpitude'': *Wicks v Bennett* (1921) 30 CLR 80 at 91. See also *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491.

(1041) (1999) 97 FCR 32.

(1042) *Hayes* (1999) 97 FCR 32 at 89-90 [111].

by the *Real Property Act* 1886 (NT); on another view, his Honour was suggesting that native title always existed as an exception to indefeasibility of title. I doubt, with respect, whether his Honour was correct on either view. The word ''valid'' in s 23B(2)(a) of the *Native Title Act* means just that. I can discern nothing in the *Native Title Act* to suggest that the grant of an interest that is subsequently cured by registration somehow falls outside the previous exclusive possession act provisions or remains forever ''invalid''. Nor, for the reasons given above concerning s 68 of the *Transfer of Land Act*, do I see any substance in the idea that native title is immune to extinguishment under Torrens system legislation. Perhaps it was the reference to a ''clear and plain intention'' to extinguish native title that led to error in *Hayes*. In any event, I consider that the case is no authority as to the effect of native title on statutory indefeasibility, a matter which it is unnecessary for me to decide finally in these appeals because of my conclusion that native title is extinguished in any event.

Section 47B *of the Native Title Act*

877 In relation to vacant Crown land surrounding Lake Argyle and areas formerly part of the Ivanhoe pastoral lease, the Ward claimants sought to rely on s 47B of the *Native Title Act*, which directs courts to disregard prior extinguishment of native title in certain circumstances. The section relevantly provides:

> ''*Vacant Crown land covered by claimant applications*
> *When section applies*
> (1) This section applies if:
> (a) a claimant application is made in relation to an area; and
> (b) when the application is made, the area is not:
> (i) covered by a freehold estate or a lease; or
> (ii) covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose; or
> (iii) subject to a resumption process (see paragraph (5)(b)); and
> (c) when the application is made, one or more members of the native title claim group occupy the area.
> *Prior extinguishment to be disregarded*
> (2) For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by the creation of any prior interest in relation to the area must be disregarded.''

The phrase ''subject to a resumption process'' is defined in s 47B(5) as follows:

''(b) an area is *subject to a resumption process* at a particular time (the *test time*) if:

(i) all interests last existing in relation to the area before the test time were acquired, resumed or revoked by, or surrendered to, the Crown in any capacity; and

(ii) when that happened, the Crown had a bona fide intention of using the area for public purposes or for a particular purpose; and

(iii) the Crown still had a bona fide intention of that kind in relation to the area at the test time.''

878 The State and Crosswalk submitted that, because Lee J had considered that s 47B did not apply and the matter was not raised in the Full Court, then special leave on this point should be revoked. Alternatively, they submitted that the requirements of s 47B were not satisfied, because the vacant Crown land fell within the exceptions there stated or there had never been extinguishment.

879 It is unnecessary for me to reach a conclusion on the revocation of special leave because I am of the view that the alternative submissions of the State and Crosswalk should be accepted. The Ward claimants sought to rely on s 47B in respect of areas within the Ord River Irrigation Project. But the whole of the Ord River Irrigation Project fell within various exceptions to s 47B. Leased land, including land covered by mining leases, fell within s 47B(1)(b)(i). The reserves fell within the exception in s 47B(1)(b)(ii): they were reservations or dedications made or conferred by the Crown under which the whole or a part of the land or waters in the area was to be used for public purposes or for a particular purpose. Furthermore, other parts of the Ord River Irrigation Project, such as the Packsaddle resumptions, fell within the description of ''subject to a resumption process'' in s 47B(5)(b). There was necessarily no room for the operation of s 47B over the land covered by the Ord River Irrigation Project.

Public right to fish

880 Regarding the inter-tidal zone where the majority in the Full Court found there was a public right to fish (1043), I would agree in substance with what Gleeson CJ, Gaudron, Gummow and Hayne JJ have stated in their reasons for judgment. However, I would add that if evidence were led to establish that the claimants had an exclusive right to fish in tidal waters, that right could not be recognised by the common law. It could not be recognised because it would be inconsistent with public rights to fish in tidal waters and public rights of navigation (1044).

(1043) *Western Australia v Ward* (2000) 99 FCR 316 at 482 [660].
(1044) *The Commonwealth v Yarmirr* (2001) 208 CLR 1.

Other leases and interests in Western Australia

Interests of the Alligator appellants

881 The Alligator appellants submitted that their several interests extinguished native title. Aside from mining leases and a general purpose lease, these interests comprised the following: a lease of the Kona Lakeside Tourist Park; leases of houses adjacent to the Lake Argyle Tourist Village; leases for a crushing plant; the lease of the Old Laboratory Building and Yard close to Lake Argyle Dam; a lease to the Kununurra Water Ski Club Inc; aquaculture licences for barramundi farming; and a jetty licence to Alligator Airways Pty Ltd.

882 It is unnecessary to say anything further about mining leases and the general purpose lease, as I have already discussed their effect on native title. I examine each of the other interests below. Before doing so, however, I point out that many of the interests were granted after 31 October 1975 and so the potential application of s 10 of the RDA will need to be considered.

Lease of the Kona Lakeside Tourist Park

883 This lease commenced on 1 July 1993, and it was assigned to the Alligator appellants on 29 March 1996. It covers a strip of land between Lake Kununurra and freehold land owned by the operators of the Kona Lakeside Tourist Park. The land is used as an adjunct to the Tourist Park; the permitted use of the lease is ''foreshore recreation''.

884 The lease is in a portion of reserve 41812, which was created under s 29 of the *Land Act* 1933 on 2 August 1991. Under s 33 of the *Land Act* 1933, the reserve was vested jointly in the Water Authority of Western Australia and the Shire of Wyndham-East Kimberley on the same day. The Shire and the Water Authority of Western Australia then granted the lease under s 33(2) of the *Land Act* 1933 (1045). It will be necessary to consider the effect of that sub-section a little later.

885 As these steps took place after the commencement of the RDA, their effect on native title first involves consideration whether the creation and vesting of reserve 41812 were invalidated. All subsequent dealings with the land are dependent on the validity of the creation and vesting of the reserve. I have already stated my reasons for holding that the creation and vesting of a reserve under ss 29 and 33 of the *Land Act* 1933 are not acts that attract the operation of s 10 of the RDA. Because that is so, any native title would have been extinguished by the creation and vesting of the reserve (1046). There are, however, a

(1045) Section 33 of the *Land Act* 1933 in its original form was repealed and re-enacted by Act 53 of 1948. Section 33(2) was part of the new provision.

(1046) I add that, even if the creation and vesting of the reserve had been invalidated by the RDA, the reserve would be validated as a category D past act because of s 19 of the *Native Title Act* and s 5 of the State Validation Act. Although the non-extinguishment principle applies to category D past acts, so that the creation and

number of other reasons why, in my view, any native title rights would have been wholly extinguished.

886 The lease was granted by the Shire of Wyndham-East Kimberley and the Water Authority of Western Australia under s 33(2) of the *Land Act* 1933. That provision empowered the Governor, by Order in Council, to direct that land reserved shall vest in and be held by any person (including a municipality) for the purpose for which the land was reserved. It also empowered the Governor to confer on that person power to lease the whole or part of the land. There is no indication in the *Land Act* 1933 that such a lease was anything but a common law lease. There was, for example, no requirement that the lease take any particular form unless the Governor directed (1047). This suggests that the lease was simply a conventional demise, and that, as such, it conferred on the lessee a right of exclusive possession.

887 The instrument of lease also contained no indication to negative a right of exclusive possession. The covenants to permit the lessor to view the premises after giving reasonable notice (cl 3.5), to comply with all reasonable directions of the lessor in providing for public pedestrian access during daylight hours (cl 3.31), and not to remove trees and shrubs without the lessor's approval (cl 3.27) do not suggest that exclusive possession was not conferred. These are standard sorts of covenants in many commercial leases. To put the matter beyond doubt, the instrument contained an express covenant that the lessee was entitled to quiet possession (1048). In my opinion, the lease clearly therefore conferred on the lessee a right of exclusive possession which was inconsistent with the existence of all native title rights.

888 I do not think that the grant of the lease was invalidated by the RDA. Section 33(2) was a provision of general application that was not expressed to be based on any racial criteria. There was no evidence that, despite its general form, its purpose was to create a racial distinction of some kind. The grant of the lease therefore did not attract s 10 of the RDA, as that section, for reasons that I have given, does not extend to indirect or, in effect, accidental discrimination.

889 If there were any doubt about the validity of the lease because of the RDA, I would accept the submissions of the Alligator appellants that the lease was a previous exclusive possession act that completely extinguished native title. In order to demonstrate that point, however, it is first necessary to show how the *Native Title Act* and complementary State legislation validated the lease. Section 14(1) of the *Native Title Act* provides that if a past act is attributable to the

(1046) *cont*
vesting of the reserve would not, on its own, extinguish native title, that fact cannot alter the effect of the lease granted under s 33(2) of the *Land Act* 1933.

(1047) *Land Act* 1933, s 33(3).

(1048) Clause 4. This is an indication that exclusive possession was conferred: see *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 214.

Commonwealth, the act is valid, and is taken always to have been valid. Section 15 of the *Native Title Act* then sets out the effect on native title of category A, B, C and D past acts. The States and Territories, by virtue of s 19 of the *Native Title Act*, are empowered to validate past acts by passing laws to the same effect as s 15.

890 Section 229(3) of the *Native Title Act* states that a category A past act consists, among other things, of the grant of a commercial lease if the grant was made before 1 January 1994 and the lease was in force on 1 January 1994. The lease here met all of those criteria. It was a ''commercial lease'' as defined under s 246 of the *Native Title Act*, as it permitted the lessee to use the land solely or primarily for business or commercial purposes. It was granted on or before 1 January 1994, and it was in force on 1 January 1994. It fell within no relevant exception to category A past acts. Thus, the lease was a category A past act. Section 5 of the State Validation Act ensures that all past acts attributable to the State are valid and are taken always to have been valid. It follows that, even if the RDA had invalidated the grant of the lease, it was validated by Western Australian legislation.

891 Section 23B(2) of the *Native Title Act* provides that an act is a previous exclusive possession act if it is valid, it took place on or before 23 December 1996, and it consists, among other things, of the grant of a commercial lease that is neither an agricultural lease nor a pastoral lease. The grant of the lease to the operators of the Kona Lakeside Tourist Park met all these criteria for a previous exclusive possession act.

892 Section 23C(1) provides that a previous exclusive possession act extinguishes native title in relation to land covered by the lease concerned; and the extinguishment is taken to have happened when the act was done (1049). Section 23E empowers States and Territories to legislate to the same effect as s 23C in respect of any or all previous exclusive possession acts. The Western Australian equivalent of s 23C(1) is s 12I of the State Validation Act (1050). By virtue of that provision, the lease extinguished native title on the land in entirety.

Leases of houses adjacent to the Lake Argyle Tourist Village

893 As at 1992, there were six houses on the land adjacent to the Lake Argyle Tourist Village. One has recently been demolished. All were built originally for government employees associated with the construction of the Ord River Dam. Since the 1980s, four of the houses have been leased to private persons. Copies of the leases do not, however, appear in the materials.

894 In my view, the *Native Title Act* has the effect of extinguishing all

(1049) Under s 23C(3) of the *Native Title Act*, if an act is a previous exclusive possession act, s 15 does not apply to it.

(1050) Section 12I(1) did impose an additional requirement that the previous exclusive possession act still be in force on 23 December 1996. The lease here was.

native title over the land well before the houses were leased, and well before the RDA commenced. Section 23B(7) of the *Native Title Act* provides:

> ''*Previous exclusive possession act*
>
> . . .
>
> *Construction of public works commencing on or before 23.12.1996*
>
> (7) An act is a *previous exclusive possession act* if:
>
> (a) it is valid (including because of Division 2 or 2A); and
>
> (b) it consists of the construction or establishment of any public work that commenced to be constructed or established on or before 23 December 1996.''

Section 23C(2) provides:

> ''*Confirmation of extinguishment of native title by previous exclusive possession acts of Commonwealth*
>
> . . .
>
> *Public works*
>
> (2) If an act is a previous exclusive possession act under sub-section 23B(7) (which deals with public works) and is attributable to the Commonwealth:
>
> (a) the act extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated; and
>
> (b) the extinguishment is taken to have happened when the construction or establishment of the public work began.''

895 Section 253 of the *Native Title Act* defines ''public work'' to include a building, or a structure that is a fixture, established by or on behalf of the Crown, a local government body or other statutory authority of the Crown in any of its capacities. It is an agreed fact that all the houses were built for employees of government associated with the construction of the Ord River Dam and were in the possession and under the control of the Public Works Department. In my opinion, the houses, as buildings established by or on behalf of the Crown, were ''public works''. This conclusion is important to what follows.

896 Section 23E of the *Native Title Act* allows a State or Territory law to make provision to the same effect as s 23C in respect of any previous possession acts attributable to the State or Territory. The key State provision is s 12J of the State Validation Act. It mirrors the language of s 23C(2) of the *Native Title Act*, except that it refers to an act attributable to the State. The effect of the *Native Title Act* and this State provision is that if native title existed on land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated, then native title is wholly extinguished. That is what occurred here.

897 Even if native title rights somehow survived after 1972, then, subject only to the RDA, the leases granted after that date would have extinguished them. It is unthinkable that leases of houses or dwellings

did not confer a right of exclusive possession. That right was inconsistent with all native title rights over the area. As the instruments of lease are not available to this Court, however, it is unnecessary to discuss the potentially invalidating operation of the RDA or to state my opinion on whether such leases, if rendered invalid, would be validated by the *Native Title Act* and complementary State legislation (1051).

Leases for crushing plant

898 Leases for a crushing plant cover a portion of land in reserve 29277. There was agreement as to some facts about this land. Reserve 29277 was created under s 29(1) of the *Land Act* 1933 on 16 August 1968 for the purpose of ''irrigation works''. On 7 August 1970, it was vested in the Minister of Public Works for the purpose of ''irrigation works'', with power to lease. This vesting occurred under s 33(2) of the *Land Act* 1933.

899 The leases of the crushing plant were granted under s 33(2) of the *Land Act* 1933 between 1977 and 1991. Each lease was of short duration, and the material provisions of each lease were similar. In the 1977 lease, the lessee covenanted not to erect or make any buildings or improvements on the demised premises without the consent in writing of the lessor (cl 2(c)); to permit the lessor by its agents or servants at all reasonable times to enter upon and view the condition of the land (cl 2(e)); and not to assign, underlet or part with possession of the demised land without the lessor's prior consent in writing (cl 2(k)). In return, the lessor covenanted that the lessee would ''peaceably hold and enjoy the demised premises ... without any interruption'' by the lessor (cl 3(a)).

900 In my opinion, native title was completely extinguished over the land covered by the leases. That was so for two reasons. First, the creation of reserve 29277 and its vesting in the Minister for Public Works extinguished all native title rights and interests over the land. The RDA did not affect the extinguishing effect of these acts.

901 Secondly, any surviving native title would have been extinguished by the grant of the leases under s 33(2) of the *Land Act* 1933. As I have explained earlier, that provision authorised the grant of a lease conferring a right of exclusive possession inconsistent with native title. Further, nothing in the instruments suggests that the interests granted were anything but true leases; indeed, the express covenant for a right of quiet enjoyment is a further clear indication that exclusive

(1051) If the leases had been in force on 1 January 1994, there is a strong argument that, as ''residential leases'', they would have been category A past acts that were validated by virtue of s 19 of the *Native Title Act* and s 5 of the State Validation Act. If the leases were granted between 1 January 1994 and 23 December 1996, they might also have been validated as category A intermediate period acts under s 22F of the *Native Title Act* and s 12A of the State Validation Act.

possession was conferred. It follows that the leases granted from 1977 onward would have extinguished any possible remaining native title.

902 If the grant of the leases under s 33(2) of the *Land Act* 1933 had extinguished any native title, it would be necessary to consider the effect of s 10 of the RDA. In my view, s 10 of the RDA would not have invalidated the grant of the leases. That is because s 33(2) of the *Land Act* 1933 was not a discriminatory law. It was a provision of general application that was not expressed to be based on any racial criteria. Nor was there any evidence that its purpose was to create a racial distinction or restriction of some kind. Its impact on native title was, accordingly, not relevant. Section 10 had no application to leases granted under s 33(2). They remained valid.

Lease of the Old Laboratory Building and Yard close to Lake Argyle Dam

903 The Old Laboratory Building was constructed before 1972. The Public Works Department at the time used it as a laboratory for testing of rock core samples and concrete during the construction of the Lake Argyle Dam. From the middle of the 1970s until 1988, fishing boat operators also used it to store fishing gear as well as fish in freezers. In 1988, the Water Authority of Western Australia by letter permitted Lake Argyle Fisheries to commence leasing the building on a monthly tenancy.

904 The Public Works Department, the Water Authority of Western Australia and the Water Corporation have successively used the Yard, which is adjacent to the Old Laboratory Building, to store vehicles, fuel, chemicals and tools. In 1995, the Water Authority of Western Australia, by memorandum of agreement, agreed to let a portion of the Yard on a yearly tenancy.

905 Neither tenancy seems to have been granted under any legislative provision or other express authority. The validity of each has been challenged. There were no agreed facts as to precisely who constructed the Old Laboratory Building. It seems to me likely that the Old Laboratory Building and the Yard were used, not unlawfully, for public works in a manner not compatible with native title; and that they were subsequently let, probably in pursuance of the prerogative of the Crown (1052). On balance, it is unlikely that native title would have survived these apparently lawful uses. A conclusion is, however, unnecessary because any native title has otherwise been extinguished.

Lease to the Kununurra Water Ski Club Inc

906 The lease to the Kununurra Water Ski Club Inc commenced on

(1052) Whether the *Land Act* 1933 left room for the prerogative is not a matter that I need consider.

1 July 1992 and was for a term of twenty-one years (1053). It covers land and waters within reserves 29297 and 41812. The portions of those reserves were vested in the Shire of Wyndham-East Kimberley under s 33(2) of the *Land Act* 1933, and the lease was granted under the same provision.

907 The lease contained a number of covenants, some of which need consideration. The lessee covenanted to permit the lessor at all reasonable times to enter and view the state of repair and condition of the demised premises and to carry out any repairs (cl 3.5); to use the premises solely for the Ski Club and related water/land recreational activities and for other purposes expressly approved in writing by the Council of the lessor from time to time (cl 3.11); not to erect any buildings or structures without the prior written consent of the lessor (cl 3.18); not to assign, sublet or part with possession of the demised premises without the written consent of the lessor and the Minister for Lands first being obtained (cl 3.20); and to deliver up possession of the premises at the expiry or determination of the lease (cl 3.23). The lessor also covenanted to let the lessee have quiet possession of the premises (cl 4.0).

908 In my opinion, native title over the land was wholly extinguished for several reasons. First, the creation of reserves 29297 and 41812 and the vesting of those reserves in the Shire of Wyndham-East Kimberley under s 33(2) of the *Land Act* 1933 extinguished all native title rights and interests over the land. Section 10 of the RDA did not apply to invalidate the creation and vesting of the reserves, because, as I have already explained, s 33(2) was not a racially discriminatory law.

909 Secondly, the grant of the lease under s 33(2) of the *Land Act* 1933 extinguished any native title that might have remained. That provision enabled the grant of a lease conferring a right of exclusive possession. In addition, nothing in the instrument of lease suggested that a right of exclusive possession was somehow absent. It followed that the grant of the lease, subject only to the RDA, extinguished native title. In my view, s 10 of the RDA did not apply to the lease granted under s 33(2) of the *Land Act* 1933, because the latter was not a discriminatory law. There was, therefore, no reason to think that native title survived.

910 Thirdly, even assuming (for the sake of argument only) that the RDA operated to invalidate the lease, the *Native Title Act* and complementary Western Australian legislation would have validated it. The grant of the lease would have been a category B past act (1054) upon which s 19 of the *Native Title Act* and s 5 of the State Validation Act operated to ensure validity.

911 The validation of the lease would, in turn, have completely extinguished native title. That is because the lease, once valid, would

(1053) An earlier lease was, according to the Alligator appellants, overtaken by this one. The earlier lease therefore requires no consideration.

(1054) *Native Title Act*, s 230.

have been a previous exclusive possession act. It would be a valid act which took place on or before 23 December 1996, and which consisted of the grant of a ''community purposes lease'' (1055): a lease that permits the lessee to use the land or waters covered by the lease solely or primarily for community, religious, educational, charitable or sporting purposes (1056). Western Australia, acting under s 19 of the *Native Title Act*, has legislated to ensure that previous exclusive possession acts attributable to it, if they were in force on 23 December 1996, extinguished native title upon the doing of the act (1057). Accordingly, the lease here would have extinguished all native title from the moment it was granted.

Aquaculture licences for barramundi farming

912 Various fishing licences were issued on an annual basis under the *Fisheries Act* 1905 (WA) and, later, under the *Fish Resources Management Act* 1994 (WA). These licences were for the farming of barramundi in parts of Lake Argyle. As the *Fisheries Act* 1905 has been repealed, it is convenient to deal with licences issued under the *Fish Resources Management Act* (1058).

913 Section 90(a) of the *Fish Resources Management Act*, among other things, makes it an offence for a person to engage in aquaculture unless the person is authorised to do so under an aquaculture licence. ''Aquaculture'' is defined in s 4(1) as ''the keeping, breeding, hatching or culturing of fish''.

914 Section 91 provides for a limited number of exceptions to s 90.

915 Section 92 enables the Executive Director of the Fisheries Department of Western Australia to grant aquaculture licences if the Executive Director is satisfied of certain conditions. A licence normally remains in force for a period of twelve months from the day on which it is granted or renewed (s 93).

916 Section 97(1) empowers the Minister to grant to any person a lease authorising that person, or persons acting on his behalf, to occupy or use an area of land or water for the purposes of aquaculture. Section 97(3) provides:

(1055) *Native Title Act*, s 23B(2)(c)(vi).

(1056) *Native Title Act*, s 249A(a).

(1057) State Validation Act, s 12I.

(1058) It is unnecessary to determine whether the issue or grant of licences under the *Fish Resources Management Act* is a future act within the meaning of ss 24HA and 233 of the *Native Title Act*. No party addressed submissions on that point and its determination would require findings about the native title rights and interests possessed by the claimants and how the licences affected the exercise of those rights and interests. I therefore confine myself to dealing with the submissions of the Alligator appellants.

''*Grant of aquaculture leases*

. . .

(3) Subject to the provisions of this Act and the lease, a lease vests in the lessee —

(a) the exclusive right during the currency of the lease —

(i) to keep, breed, hatch and culture the species of fish within the leased area; and

(ii) to take the species of fish from the leased area; and

(b) the ownership of all fish specified in the lease that are within the leased area.''

917 The Alligator appellants submitted that the grant of aquaculture licences extinguished any native title rights. They contended, in particular, that it would create an intolerable situation for unauthorised persons to have access to the aquaculture site, and that this might lead to stress to the fish and bacterial infection.

918 I am sympathetic to these concerns. I cannot, however, conclude that an aquaculture licence by itself extinguishes all native title in respect of the site. All that such licences do is to remove a prohibition imposed on engaging in aquaculture by s 90(a) of the *Fish Resources Management Act* (1059). They appear to confer no proprietary right of any kind in the fish. The contrast between such licences and aquaculture leases, which expressly vest exclusive rights in the lessee to keep, breed and take fish of certain species, is obvious. Any rights to exclude native title holders, or, for that matter, any other persons in the community, must be found in the property rights of those who also have aquaculture licences, and in the laws relating to theft, unlawful entry or being in a designated fishing zone (1060). Native title would not be extinguished by these licences.

Jetty licence to Alligator Airways Pty Ltd

919 Alligator Airways Pty Ltd holds a licence to construct, use and maintain a private jetty under the *Jetties Act* 1926 (WA). The licence commenced on 1 October 1985. The Alligator appellants submit that the licence extinguishes any native title rights over the site identified in the instrument.

920 It is necessary to consider the relevant provisions of the *Jetties Act* and the licence. Section 7(1) of the *Jetties Act* provides that the Minister may grant a licence on such terms and conditions as he thinks fit to any person for the erection or construction of a jetty or for the maintenance and use of any jetty.

921 Section 8 provides that no private jetty shall be constructed except pursuant to a licence granted under the Act, and no jetty shall be used

(1059) That prohibition, moreover, is narrow. It is not directed to breeding or taking fish for personal consumption.

(1060) Fish Resources Management Regulations 1995, reg 71(1)(a).

or maintained as a private jetty except pursuant to a lease or licence granted under the Act.

922 The term ''private jetty'' is defined in s 3 as a ''jetty used and maintained by any person not being a person representing or acting on behalf of the Government''.

923 The *Jetties Act* does not expressly spell out the rights that a private jetty licence confers, apart from exempting a holder from the penalty referred to in s 8. It could be argued that the use of the word ''licence'', in contrast to the word ''lease'' in s 7, suggests that what is conveyed may be no more than an authority to use land or waters. On that basis, native title would not be extinguished at all.

924 In my opinion, however, that argument cannot be accepted. The *Jetties Act* makes it plain that a private jetty licence confers a right of exclusive possession over the site identified. The construction, use and maintenance of a private jetty all necessitate control over the site of the jetty. It is difficult to imagine how a private jetty could be properly constructed, used or maintained if persons could come and go on the site at will. A private jetty licence is therefore, in my opinion, an example of a licence that typically confers a right of exclusive possession (1061).

925 This conclusion is reinforced by provisions of the *Jetties Act* relating to the acquisition of property. Section 6(1)(b) provides that the Governor may authorise the Minister to ''acquire any private jetty from any person who is entitled thereto''. Under s 6(2), the provisions of the *Land Administration Act* 1997 (WA) apply to the acquisition of the jetty as if it were land required for a public work. By treating the acquisition of private jetties as akin to an acquisition of land, the *Jetties Act* indicates that a jetty licence is to be regarded as conferring substantial proprietary rights. That supports the notion that a private jetty licence is more than a mere permission to build or repair a jetty, and confers on the holder rights analogous to, indeed as good as, those of a property holder.

926 Nothing in the terms of the licence itself contradicts this analysis. The licence attracted an ''annual rental'', and the licensee was obliged not to assign or transfer the rights conferred without the consent of the Minister. The prior written consent of the Minister was needed to make any alterations to the jetty. Either the licensee or the Minister could terminate the licence on one month's notice in writing. None of these features, in my view, are inconsistent with the conclusion that a licence to use and maintain a private jetty carried with it a right to control access to the site of the jetty. That right, being a right of exclusive possession, extinguished native title.

927 In my view, s 10 of the RDA had no effect on the grant of the private jetty licence. The power to grant a licence to construct, use or maintain private jetties is entirely general. It is not expressed to

(1061) See Gray and Gray, *Elements of Land Law*, 3rd ed (2000), pp 355-356.

depend on racial criteria or considerations. There is nothing, moreover, in the *Jetties Act* to suggest that its purpose was to create a racial distinction, restriction, exclusion or preference of any kind. It follows that the power to grant private jetty licences was not a racially discriminatory law to which s 10 of the RDA applied. The grant of the licence thus extinguished native title.

Lease to Baines River Cattle Co Pty Ltd

928 Crosswalk also submitted that the lease to the Baines River Cattle Co Pty Ltd (Baines River) extinguished all native title rights and interests.

929 The lease is over land that formed part of reserve 31165. The reserve was vested in the Minister for Works in January 1972 pursuant to s 33(2) of the *Land Act* 1933. It appears that, under that provision, the Minister granted a lease for grazing purposes on 1 November 1970 and another on 1 November 1980 (1062). The lease to Baines River covers the land formerly subject to those leases, and was expressed to have commenced on 1 November 1985.

930 The covenants and terms of the lease to Baines River are similar to those in the previous leases. The lessee covenanted not to use the land otherwise than for the purpose of grazing cattle and for purposes incidental thereto (cl 2(d)); not to fell, injure or destroy any timber, bush or shrub on the land except for the purpose of constructing stockyards, fences and similar improvements without first obtaining the consent of the lessor (cl 2(f)); not to erect any buildings or improvements except fences, borders, yards and other improvements not exceeding in cost the sum of $2,500 that were of a usual and normal nature on pastoral properties without the prior consent in writing of the lessor (cl 2(k)); and not to ''assign underlet encumber or part with the possession of the demised land or any part thereof'' without first obtaining the consent of the lessor in writing (cl 2(u)(i)). The lessor in turn covenanted for the lessee to have quiet possession during the term of the lease (cl 3(a)). The instrument of lease also provided that, if the land were required for a public purpose or any public work, the lessor could determine the lease on twelve months notice and at the expiration of that time he could enter the land and take possession of it paying only the value of the improvements on the land erected by the lessee (cl 4(d)(ii), (e)).

931 In my opinion, native title over the leased area was wholly extinguished. That is so for two main reasons. First, the creation and vesting of reserve 31165 would have extinguished all native title rights

(1062) *Ward v Western Australia* (1998) 159 ALR 483 at 630-632. Crosswalk submitted that the lease to Baines River was granted under s 32 of the *Public Works Act*. The trial judge doubted whether that was the case, and thought the relevant provision was s 33 of the *Land Act* 1933. I shall make the same assumption in these reasons.

and interests to the land. Because the reserve was created and vested before 31 October 1975, the RDA could not have invalidated those acts.

932 Secondly, the grant of the leases under s 33(2) of the *Land Act* 1933 would have extinguished any remaining native title. As I have explained earlier, s 33(2) empowered a person in whom a reserve has been vested to grant a common law lease. Furthermore, nothing in the instruments of lease indicate that exclusive possession was not conferred. The covenants requiring the lessee to obtain the consent of the lessor before making certain improvements, destroying wood, or assigning, subletting or ''parting with possession'' are entirely consistent with a right of exclusive possession. Indeed, the covenant of quiet possession and the consistent use of terminology associated with demises all point to the lessee having a right to control access to the property. It follows that the leases granted over the land would have extinguished any extant native title rights and interests.

933 I would add this only. If the lease granted to Baines River extinguished any native title rights and interests that survived past 31 October 1975, the RDA would not have invalidated it. Section 10 of the RDA would not have applied because s 33(2) of the *Land Act* 1933 created no distinction, restriction, exclusion or preference ''based on'' race or colour. Even if it had applied, the *Native Title Act* and the State Validation Act would have validated the lease and brought about extinguishment. As an ''exclusive pastoral lease'' granted before 1 January 1994 and still in force on 23 December 1996, the lease, by virtue of s 12I of the State Validation Act, would have extinguished all native title upon grant (1063). Whatever route is taken, therefore, the conclusion must be that no native title over the land exists.

Pastoral leases in the Northern Territory

934 I move to the claims made in respect of pastoral leases in the Northern Territory. Much of what I have said concerning Western Australian leases is relevant to these also. Again I am grateful for the summary of the history of Northern Territory leases stated by the majority in the Full Court (1064):

> ''There have been in all, five pastoral leases granted over the claim area in the Territory. Most of the area was subject to a pastoral lease granted in 1893, and the balance of the area was subject to another pastoral lease granted in 1897. These two leases were granted under the *Northern Territory Crown Lands Act* 1890 (SA). The leases were in statutory form under Regulations made under the Act which in substantial respects were similar to the

(1063) The lease would first have been validated as a category A past act as it was a pastoral lease granted before 1 January 1994 and was still in force on that date: see *Native Title Act*, s 229(3)(c).

(1064) *Western Australia v Ward* (2000) 99 FCR 316 at 405-406 [334]-[337].

pastoral leases issued by the State. Under s 6 of the Act, the Governor was empowered to alienate Crown lands. Section 60 required pastoral leases to contain covenants to stock the leased land, and to contain prescribed terms. Regulation 39 prescribed that pastoral leases shall contain a condition for the protection of Aborigines. The leases were for terms of forty-two years, and were granted 'for pastoral purposes'. They contained reservations in respect of timber and minerals, for resumption, and for entry by the Minister and any person authorised by him to lay roads, and for access by any person to use roads and tracks to cross the land, and to do so with travelling stock where that right was conferred by any Act or Regulation. The leases contained covenants to pay rent, rates and taxes, to insure, to keep in good repair, and to destroy vermin and noxious weeds. Of present importance, each lease contained a reservation in the following terms: '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 would have been entitled to do if this lease had not been made . . .'

In 1929 a new lease was granted in exchange for the two earlier leases, which covered the entire claim area within the Territory. The new lease was granted pursuant to the *Crown Lands Ordinance* 1927 (NT). In accordance with s 34(b) of the Ordinance the pastoral lease contained a reservation in favour of Aboriginal Inhabitants of North Australia. The reservation in the lease was in terms that are not materially different from the reservation stipulated in the earlier leases. The lease was granted for a term of almost forty years. Before it expired it was re-executed on 30 July 1952, and in 1958 it was exchanged for a new lease granted under the *Crown Lands Ordinance* 1931 (NT). Both leases covered the entire claim area within the Territory, and indeed a much wider area beyond the boundaries of the claim. The new lease was stated to be for a period of fifty years, but in 1979 was exchanged for another lease granted under the *Crown Lands Ordinance* 1931 (NT), expressed to be for a period of thirty years. This lease (the Newry lease) also covered the entire claim area within the Territory.

The lease granted in 1958 included a reservation in favour of Aboriginal people similar to that contained in the earlier leases. The Newry lease however, issued in 1979, following the 1978 amendments to the *Crown Lands Ordinance* 1931 (NT), expressed the terms of the reservation in favour of Aboriginal people differently. Its covenants and reservations were otherwise similar. Section 24(2) provided:

'(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 1969, s 116A had been inserted into the *Crown Lands Ordinance* 1931 (NT) which provided that a person who had acquired a right to a Crown lease had, until the lease was granted or the right to the lease forfeited or determined, 'a right of exclusive possession of the land to be included in the lease but that right is subject to the reservations, covenants, conditions and provisions to be contained in the lease'. That section was repealed in 1981, after the last of the leases was granted.''

935 Although much of what I have said in relation to pastoral leases in Western Australia applies to such leases in the Territory, there are two further reasons why pastoral leases in respect of lands in the latter were effective to extinguish native title. The first is that, by virtue of the last-mentioned section, there was conferred, in express and unmistakable terms, upon those who had a right to a Crown lease ''a right of exclusive possession''. This is an unambiguous indication that Crown leases also conferred exclusive possession on the lessee. Nothing turns, for the reasons that I have already given, on the proviso that the right was subject to reservations, covenants, conditions and provisions in the lease. Every demise is subject to the covenants contained in it, which may include reservations and various entitlements of the lessor to enter or allow others to enter the leased property without detracting from the lessee's right to enjoy exclusive possession of it (1065). Secondly, because, once again, the leases (at least until the 1978 amendments) conferred upon a much wider group of Aboriginal people various rights that may aptly be described as being in the nature of native title rights, it is clear that any specific rights of a smaller community (traditional native title holders of the

(1065) *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199.

subject land) were lost and subsumed in the rights of the larger group (Aborigines of the Northern Territory).

Other interests in the Northern Territory

Perpetual leases

936 Other interests require consideration. These were described by the majority in the Full Court as follows (1066):

> ''The claim area in the Territory is currently comprised of five tenements covering land surrendered to the Crown in 1979, 1987 and 1990. The Territory contends that the grant of these tenements extinguished any remaining native title, or alternatively, in the case of tenements now held by the Conservation Land Corporation (the Corporation), permitted activities which have had that effect.
>
> In 1979 NT Portion 1801 was surrendered from the Newry pastoral lease, and in 1980 it was leased in perpetuity to the Corporation. The lease [SPL 475] to the Corporation is a special purpose lease under the *Special Purposes Leases Act* 1953 (NT), expressed to be for the purpose of carrying out the functions of the Conservation Commission, now the Parks and Wildlife Commission (the Commission). In 1981 NT Portion 1801 was declared the Keep River National Park.
>
> In 1987 the adjoining NT Portion 3121 was surrendered from the Newry pastoral lease, and was leased in perpetuity to the Corporation under the *Crown Lands Act* (NT) for the purpose of carrying out the functions of the Commission [CLP 581]. Although it appears that NT Portion 3121 was leased to the Corporation with the intention that it would later be included in the Keep River National Park, no declaration to this effect has been made.
>
> In 1989 and 1990 three freehold grants were made within the claim area of the Territory to each of the Binjen Ningguwung Aboriginal Corporation, the Nyawamnyawam Dawang Aboriginal Corporation and the Dumbral Aboriginal Community Association. These freehold areas are known as Bucket Springs, Policeman's Hole and Bubble Bubble respectively. Bucket Springs and Policeman's Hole were excised from land leased to the Corporation, thus if the grants to the Corporation extinguished native title, there was no remaining native title which could have been extinguished by the freehold grants. Bubble Bubble, which adjoins NT Portion 3121 was acquired from the Newry lease. Similarly, to the extent that the pastoral leases had partially extinguished native title, the extinguished rights were already destroyed regardless of the effect of the subsequent transaction.

(1066) *Western Australia v Ward* (2000) 99 FCR 316 at 407-408 [344]-[349]. Nothing more need be said about the freehold grants in 1989 and 1990, as they are not the subject of appeal.

The Corporation and the Commission were established under the *Parks and Wildlife Commission Act*. The function of the Corporation is to acquire, hold and dispose of real property (including any estate or interest in real property) in accordance with the Act. Section 29 provides that the Corporation is not an authority or instrumentality of the Crown, and is not subject to the control or direction of the Minister or the Crown (1067). The functions of the Commission include promoting the conservation and protection of the natural environment of the Territory; establishing and managing parks, reserves and sanctuaries; and carrying out such other functions as are conferred on it by the Act (s 19). One of the functions conferred on the Commission by the Act is to have the care, control and management of all land acquired by the Corporation (s 39(6)). The Commission, in the performance of its functions and the exercise of its powers, is subject to the direction of the Minister (s 22).

Both the *Special Purposes Leases Act* and the *Crown Lands Act* provide for the grant of leases in perpetuity, subject to a covenant that the land will be used only for the purpose for which it is leased. Each Act provides for forfeiture of the lease in the event that it is used for some other purpose. Neither Act required, nor did the leases that were granted contain, reservations in favour of Aboriginal people. Both leases specified that they were granted for the purpose of carrying out the functions of the Commission in accordance with the *Territory Parks and Wildlife Conservation Act*, and for no other purpose. Notably, the *Territory Parks and Wildlife Conservation Act* provides:

> '122(1) Subject to sub-section (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 sub-section (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.' ''

937 Section 122 is not a true reservation of pre-existing common law native title rights. It defines new statutory rights to be enjoyed by the traditional users of the land, and does not preserve native title rights and interests. So much is clear from s 12(1) of the *Territory Parks and Wildlife Conservation Act* (NT), which (as I shall explain below) contemplated that parks and reserves could not be declared in respect of land over which private parties had *any* subsisting property rights or interests. Section 122 was therefore enacted on the assumption that it

(1067) See *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 at 404, 423.

was necessary to permit native title holders to set foot on park land for hunting, food gathering, and religious or ceremonial purposes. It had nothing to do with recognising or preserving any existing right. But, in any event, those of the lands formerly subject to pastoral leases are ones in respect of which native title had already been extinguished by the grants for the reasons that I have given.

938 In my opinion, the perpetual leases to the Corporation extinguished native title. It is true, as Gaudron J observed in *Wik*, that a perpetual lease is a creature unknown to the common law (1068). That does not mean, however, that a perpetual lease is lacking in the incidents of a conventional lease. As I have said, it is possible for Parliaments to modify one or more of the incidents of a common law lease but to keep the others intact, as they have done with leases that vest upon grant instead of possession. It is unthinkable that the forms of leases should remain fixed forever, or that, because their terms are adapted for different times, places and circumstances, they should cease to be regarded as leases on that account alone. In the case of a perpetual lease, Parliament has effectively strengthened the tenure of the lease, bringing it closer to freehold. It would be a curious result indeed if the strengthening of the tenure in this way were to defeat one of the most basic incidents of a lease at common law: the right to exclusive possession. The existence of that right is compatible with wide reservations in favour of third parties, but, at common law, it is incompatible with the existence of native title. Where, as here, there was no reservation in favour of Aborigines, there is no basis for concluding that the perpetual lease failed to confer exclusive possession or was somehow akin to a licence. It follows that, subject only to the RDA, perpetual leases extinguished native title in full.

Effect of the RDA

939 In my view, the RDA had no application to the grant of perpetual leases to the Corporation. The grant of the leases did not occur under racially discriminatory laws to which s 10 of the RDA applied. It is true that the grants of the leases would have obliterated any remaining native title rights and interests, and it may also be true that only native title rights and interests could have been extinguished. However, it is to be emphasised that the concept of racial discrimination does not encompass everything that has a disparate impact on members of racial groups; the definition of the term requires that a law create a distinction, restriction, exclusion or preference ''based on'' race, colour or ethnicity. There was no evidence to suggest that provisions of the *Crown Lands Act* 1931 (NT) or the *Special Purposes Leases Act* 1953 (NT) authorising the grant of perpetual leases were in any way ''based on'' race. Those provisions were general in form and apparently benign in intention. Under them, it was possible for persons

(1068) *Wik* (1996) 187 CLR 1 at 153; see also at 201, per Gummow J.

of any race or background to hold Crown leases or special purpose leases, and to be compensated for the resumption thereof (1069). To find that the provisions were ''based on race'' because of their impact on native title, in circumstances in which that impact was not intended and there was an intention to give indigenous people generally other rights, would be to embrace ''indirect discrimination''. I am not prepared to do that. Accordingly, s 10 of the RDA had no operation, and native title remained extinguished.

Declaration of land under the Territory Parks and Wildlife Conservation Act (NT)

940 Section 12(1) of the *Territory Parks and Wildlife Conservation Act* provided:

> ''Subject to this section and to section 14, the Administrator may —
> (a) by notice in the *Gazette*, declare an area of land in respect of which —
> (i) all the right, title and interest is vested in the Territory; or
> (ii) no person, other than the Territory or the Corporation, holds a right, title or interest,
> to be a park or reserve.''

Section 12(7) of the *Territory Parks and Wildlife Conservation Act* provided:

> ''Upon the declaration of a park or reserve under sub-section (1), all right, title and interest both legal and beneficial held by the Territory in respect of the land (including any subsoil) within the park or reserve, but not in respect of any minerals, becomes, by force of this sub-section, vested in the Corporation.''

941 The Territory submitted that the Full Court had erred because it had failed to find that native title had been extinguished by the declaration in respect of NT Portion 1801 in 1981 (1070).

942 In my opinion, the declaration under s 12(1) of the *Territory Parks and Wildlife Conservation Act* did not extinguish native title rights and interests that might have survived the grant of the perpetual lease. Section 12(1) in terms contemplated that a declaration could only be made in respect of land in which ''all the right, title and interest is vested in the Territory'' or in which no other person holds a right or interest. If there were other rights and interests, a park or reserve could not be declared. If native title rights and interests survived the grant of the perpetual lease over NT Portion 1801, a declaration under s 12(1) could not validly have been made. It follows that the declaration in 1981 did not, of itself, extinguish native title rights and interests.

(1069) *Special Purposes Leases Act*, ss 28, 32; *Crown Lands Act*, ss 103, 106.
(1070) *Western Australia v Ward* (2000) 99 FCR 316 at 410 [355].

Legislative regime governing the Keep River National Park

943 The Territory also submitted that the legislative regime for management of the Keep River National Park extinguished any native title rights to make decisions about the use and enjoyment of land in the Park. More specifically, the Territory contended that the regulations, by-laws and management plan promulgated under the *Territory Parks and Wildlife Conservation Act* brought about this result.

944 I find it a little difficult to understand what the majority of the Full Court meant by referring to a ''non-exclusive right to make decisions about the use of the land'' (1071). I consider that a right to make decisions about the use of the land is either subsumed within the right to use the land or it is another, less clear way of describing what Gleeson CJ, Gaudron, Gummow and Hayne JJ in their reasons term the right to speak for country (1072), a matter to which I have already referred. The latter right was necessarily brought to an end by the grant of pastoral leases in the Territory. Had it survived the pastoral leases, it would have been extinguished, along with all other native title rights, by the grant of the perpetual leases to the Corporation. There was thus no right to speak for country by the time that the Park was declared in 1981.

945 Given this conclusion, it seems to me that the Territory's submissions are best interpreted as directed to what native title rights to use and enjoy the land were extinguished by the legislative regime. It is convenient to consider each element of that regime separately.

946 Sections 18-21 of the *Territory Parks and Wildlife Conservation Act* provide for the preparation of a plan of management as soon as practicable after a park or reserve has been declared. Persons interested are to be invited to make representations concerning the plan and the Commission must give consideration to those representations (s 18(7), (8)). The plan is to be laid before the Legislative Assembly, which may choose to disallow it (s 19(2)). Once approved, the plan comes into force and the Commission is required to perform its functions and exercise its powers for the park to which the plan relates in accordance with the plan and not otherwise (s 21).

947 In my opinion, the plan of management did not bring about any further extinguishment of native title rights to use and enjoy the land. As stated earlier, s 12(1) and (7) of the *Territory Parks and Wildlife Conservation Act* contemplate that no other person has a proprietary interest in a park. It is in that context that the management plan is adopted. The plan has nothing to do with native title rights and interests or with other proprietary rights, but is concerned simply with the manner in which the Commission is to exercise its powers and

(1071) *Western Australia v Ward* (2000) 99 FCR 316 at 411 [358].
(1072) Reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at 93-94 [90]-[91].

perform its functions. Accordingly, if native title rights or other rights to use the land in the Park do survive, then the mere fact that a plan of management has been adopted does not mean that they are extinguished.

948 I turn now to the by-laws. These were made under s 71 of the *Territory Parks and Wildlife Conservation Act* and were promulgated on 24 January 1984. Several deserve mention. By-law 11 prohibited the lighting of fires in a park or reserve when the Commission had in place a total fire ban or had displayed a sign prohibiting lighting or maintaining a fire in a place or area. By-law 17 prohibited damaging, injuring, destroying, interfering with or removing any animal except on certain conditions. By-law 18 prohibited digging or interfering with the soil, stone or other material forming part of a park or reserve, and removing, marking, damaging, defacing or otherwise interfering with a rock or natural feature, or a tree, shrub or plant except as provided in a plan of management in force under the Act. By-law 26 was framed in this way:

> ''A person shall not in a park or reserve throw, roll or discharge any object so that any person or wildlife is or may be put in danger or fear, or any damage to the park or reserve or any property therein is or may be caused.''

949 In my opinion, subject to the RDA, these by-laws would have extinguished many native title rights and interests to use the land within the Park. The by-laws did not simply regulate native title but prohibited activities that might be typically regarded as part of the native title rights and interests. For instance, they prohibited fires from being lit in any area that the Commission specified; they stopped the hunting of animals save in limited situations; they prevented all digging and removing of plants and soil; and they ensured that no one could discharge or throw an object to endanger any animal. Any native title *right* to light fires, dig or hunt would clearly have been extinguished, because such rights could not be exercised in accordance with these qualified and absolute prohibitions (1073). Other native title rights, such as rights to enter and perform cultural or spiritual activities, may, however, have survived. If necessary, the issue of what native title rights survived should be remitted to the Full Court for consideration.

950 Because the by-laws came into force after 31 October 1975 and would have extinguished any extant native title rights to light fires, dig or hunt, the effect of the RDA needs to be considered. In my view, s 10 of the RDA does not apply to invalidate the by-laws since they are of general application, and there is no suggestion that their purpose

(1073) Of course, Aborigines could still exercise their statutory rights under s 122 of the *Territory Parks and Wildlife Conservation Act* to conduct traditional hunting and other activities. Such rights, however, are not native title rights and interests.

was to create any distinctions, preferences or restrictions based on race. That conclusion makes it unnecessary to consider the effect of s 211 of the *Native Title Act*.

951 I do not find it necessary to engage in an extended discussion of the effect of the Keep River National Park Local Management Committee Regulations, which were promulgated on 12 August 1992. Those regulations dealt with the establishment of a Committee to advise the Commission on issues relevant to the management of the Park. The regulations provided that Aborigines should be represented on the Committee (1074). The Committee's advisory functions are expressly subjected to the *Territory Parks and Wildlife Conservation Act* and the plan of management (1075), and the existence of the Committee does not directly affect the Commission's functions or its powers. It is therefore doubtful whether the establishment of the Committee has any relevance to a determination whether the legislative regime governing the Keep River National Park extinguishes native title rights and interests. Native title rights to use and enjoy the land are not extinguished by the regulations.

Improvements in the Keep River National Park

952 The Territory submitted that improvements by the Commission extinguished native title on the land on which the improvements were made. The majority in the Full Court described these improvements in these words (1076):

> ''The improvements consist of unsealed access and service roads, small unsealed car parking areas for visitors to the park, walking tracks including a foot bridge and track markers, interpretive signs for visitors, boundary fences and cattle grids, a building housing a ranger station, a communications aerial, workshop, rangers' houses, an 'airstrip', bores and watering points, a gravel pit, an information shelter, a bird hide and camping facilities for visitors. The 'airstrip' is a rough, unsealed area in an open section of country, with an airsock erected on a pole. These improvements are depicted in photographs. A number of the improvements were placed on the land by the former pastoral lessee, at times when the reservation in favour of Aboriginal people preserved access to 'every part' of the lands. The evidence indicates that improvements effected by the Commission are carried out after consultation with the Aboriginal inhabitants who include the native title holders.''

953 Some of the improvements were carried out by pastoralists; others were carried out by the Commission pursuant to its statutory

(1074) Keep River National Park Local Management Committee Regulations, reg 4(1).
(1075) Keep River National Park Local Management Committee Regulations, reg 9(1).
(1076) *Western Australia v Ward* (2000) 99 FCR 316 at 410-411 [358].

powers (1077). The Territory accepted that the dates of construction of the improvements could not be ascertained, and said that there was insufficient evidence to determine whether the improvements were public works and previous exclusive possession acts under s 23B(7) of the *Native Title Act*. That being so, and as I have already held that native title has been wholly extinguished over the pastoral leases and over the area covered by the perpetual leases, it would not be profitable to speculate about the effect of each improvement in the Keep River National Park.

IV. Irrelevance of International Law to These Appeals

954 The Human Rights and Equal Opportunity Commission (HREOC), as intervener, made a number of submissions concerning the interpretation of the *Native Title Act*, the relevance of international law to the development of the common law and, surprisingly, the Constitution. It is strictly unnecessary for me to discuss these matters, given the conclusions that I have reached; however, as my silence on these matters might otherwise be regarded as acquiescence, I shall briefly address them.

955 The first submission was that the Court should strain to construe the *Native Title Act* in a way consistent with Australia's obligations under the Convention and the International Covenant on Civil and Political Rights (the ICCPR). HREOC contended that the presumption that the courts construe domestic statutes to accord with international obligations should not be limited to cases of ambiguity, and that the courts, wherever possible, should read statutes consistently with international law. On this basis, partial extinguishment ought to be rejected and native title should be recognised as something akin to an estate in land of a kind familiar to the common law.

956 I would reject these submissions. The task of this Court and other courts in Australia is to give effect to the will of Australian Parliaments as manifested in legislation (1078). Courts may not flout the will of Australia's democratic representatives simply because they believe that, all things considered, the legislation would ''be better'' if it were read to cohere with the mass of (often ambiguous) international obligations and instruments. Consistency with, and subscription to, our international obligations are matters for Parliament and the Executive, who are in a better position to answer to the international community than tenured judges. Where legislation is not genuinely ambiguous, there is no warrant for adopting an artificial presumption as the basis

(1077) *Parks and Wildlife Commission Act* (NT), s 20(2)(b).

(1078) *Tasmania v The Commonwealth and Victoria* (1904) 1 CLR 329 at 358, per O'Connor J; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 75-76, per Dawson J; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 415-416 [31], per Kirby J.

for, in effect, rewriting it (1079). In this case, the *Native Title Act* makes it abundantly clear that partial extinguishment is possible — a position that, incidentally, accords with the common law. Consequently, there is no substance in HREOC's submission to the contrary.

957 HREOC's second submission was that the common law was obliged to develop in accordance with international law. In order for Australia to meet its obligations under the Convention and the ICCPR, it was essential for the common law to treat native title as an estate and to deny the possibility of partial extinguishment. To do so, HREOC contended, was to do no more than to recognise that the values of human rights and justice were as much an aspiration of the Australian legal system as they were of the international legal regime.

958 This submission should also be rejected. There is no requirement for the common law to develop in accordance with international law (1080). While international law may occasionally, perhaps very occasionally, assist in determining the content of the common law, that is the limit of its use. The proposition that international law — itself often vague and conflicting (1081) — demands that the common law of Australia be moulded in a particular way, apparently without regard for precedent, the conditions in this country, or the fact that governments and individuals may have reasonably relied on the law as it stands is unacceptable. To embrace it would be to deny that Australian courts have long shaped the law for the peculiar circumstances of this country, without the need to resort to shifting prescriptions often designed for different times, places and circumstances.

959 It is no answer to say that justice and human rights are an aspiration of our legal system. Of course they are. But justice and some human rights may be contestable concepts, capable of being interpreted differently at different times, and capable of eliciting different views from reasonable people (1082). It is hardly self-evident that inter-

(1079) *Polites v The Commonwealth* (1945) 70 CLR 60 at 69, per Latham CJ; at 75-76, per Starke J; at 78, per Dixon J; at 79, per McTiernan J; at 81, per Williams J.

(1080) *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 486.

(1081) See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 392: ''[E]ven those with experience in public international law sometimes find it difficult to ascertain the extent of Australia's obligations under agreements with other countries.''

(1082) See Waldron, *Law and Disagreement* (1999), p 225: ''No one in [philosophy] now believes that the truth about rights is self-evident or that, if two people disagree about rights, one of them at least must be either corrupt or morally blind.'' See also Campbell, ''Democracy in a World of Global Markets'', in Sampford and Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (2001) 78, at p 81: ''[T]here is [an] embarrassing persistence, indeed exponential increase, of disagreement as to [the content of human rights] at the level of precision at which they have to be applied to concrete situations . . . All can agree, for instance, that there is, or should be, a right to life, but disagreement abounds over capital punishment, voluntary

national law's pronouncements on these matters should be treated as final.

960 I turn now to the third and most adventurous of the submissions. Its flavour can be derived from these extracts (1083):

> ''[It cannot] be disputed that the Constitution bespeaks an underlying commitment to the rule of law. While the occasion has yet to arise for consideration of all that may follow from Dixon J's statement in *The Communist Party case* that the rule of law forms an assumption in accordance with which the Constitution is framed, it is tolerably clear that government under the Constitution requires lawful conduct by all organs of government ... Covering clause 5 and s 71 combine to institutionalise the rule of law, which includes an expectation that all organs of government will act and have acted lawfully. The Constitution makes no allowance for any organ of government to behave unlawfully. Hence, the heavy onus on those asserting unlawful breach of constitutional limits on legislative competence. The Executive is bound to work under laws made by the Parliament. And the separation of judicial power guards against unlawfulness in the exercise of legislative and executive power.
>
> The Commission submits that it is but a small and logically compelling step to say that lawfulness is supplied not only by national law, but also by international law ... So long as the capacity of the Commonwealth Parliament to legislate contrary to the requirements of international law is fully recognised and conceded, the High Court should continue to expect (that is, unless disallowed by explicit contrary words) that the Commonwealth has exercised its legislative powers in accordance with that law. To interpret the Constitution as intended to set up a nation which could be an outlaw in the international community of nations by reason of mere incidental implication would violate the underlying value of a nation committed to the rule of law.''

961 Many things could be said about this submission, but I will confine myself to three. First, if HREOC is claiming that there is a constitutional implication that prevents the legislature and Executive from acting in violation of international law, then it is flatly contrary to authority and principle. The provisions of the Constitution are not to be read in conformity with international law (1084). It is an anachronistic error to believe that the Constitution, which was drafted

(1082) *cont*
euthanasia and the duty of states to provide the prerequisites of a healthy existence.''

(1083) Submissions of HREOC, pars 25-26 (fnn omitted).

(1084) *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, per Latham CJ; at 74, per Rich J; at 75-76, per Starke J; at 77-78, per Dixon J; at 79, per McTiernan J; at 81, per Williams J; *Horta v The Commonwealth* (1994) 181 CLR 183 at 195; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 383-386, per Gummow

and adopted by the people of the colonies well before international bodies such as the United Nations came into existence, should be regarded as speaking to the international community (1085). The Constitution is *our* fundamental law, not a collection of principles amounting to the rights of man, to be read and approved by people and institutions elsewhere. The approbation of nations does not give our Constitution any force, nor does its absence deny it effect. Such a consideration should, therefore, have no part to play in interpreting our basic law (1086).

962 Secondly, if HREOC is claiming that there is a constitutional implication preventing the Executive alone from acting in breach of international law, it is also mistaken. The scope of the Commonwealth's executive power is generally coterminous with the scope of its legislative powers (1087). It has been recognised that the Commonwealth, in reliance on the external affairs power, can legislate in a manner that is inconsistent with our international obligations (1088). It can, for example, give force to treaties that would be void at international law (1089). Once that is accepted, it follows that the Executive cannot be bound by international law in the manner that HREOC asserts. If the ''rule of law'' allows legislative power to make laws in breach of international law, how can the executive power — which generally encompasses matters that could validly be effected by legislation — be fettered? To that there seems no satisfactory answer.

963 Finally, the submission by HREOC would undermine the long settled principle that provisions of an international treaty do not form part of Australian law unless validly incorporated by statute. It has repeatedly been held that the separation of the legislative and executive arms of government necessitates that treaties be implemented domestically under statute (1090). However, HREOC's

(1084) *cont*
and Hayne JJ; *AMS v AIF* (1999) 199 CLR 160 at 180, per Gleeson CJ, McHugh and Gummow JJ.

(1085) *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-418.

(1086) Compare *Stanford v Kentucky* (1989) 492 US 361, where the United States Supreme Court rejected the use of international norms in determining the scope of the Eighth Amendment.

(1087) *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 362-363, per Barwick CJ; at 373-374, per Gibbs J; at 396-398, per Mason J.

(1088) *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, per Latham CJ; at 74, per Rich J; at 75-76, per Starke J; at 77-78, per Dixon J; at 79, per McTiernan J; at 81, per Williams J.

(1089) *Horta v The Commonwealth* (1994) 181 CLR 183 at 195.

(1090) *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582-583, per Barwick CJ and Gibbs J; *Simsek v Macphee* (1982) 148 CLR 636 at 641-642, per Stephen J; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 193, per Gibbs CJ; at 224, per Mason J; at 253, per Brennan J; *Kioa v West* (1985) 159 CLR 550 at 570-571, per Gibbs CJ; *Dietrich v The Queen* (1992) 177 CLR 292 at 305, per Mason CJ and McHugh J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287, per Mason CJ and Deane J; at 316-317, per

approach would effectively reverse that principle. By giving priority to the principles assumed by the Executive, by permitting judges to construe legislation in a way that violated the intention of Parliament, it would elevate the Executive to a position that it has never enjoyed under our Constitution. That is another reason for rejecting the submission (1091).

V. SUMMARY OF HOLDINGS

964 It is useful to summarise the conclusions that I have reached. Before doing so, however, I emphasise that what follows is no more than a summary, and is not a substitute for the reasons that I have given.

1. The resolution of these appeals requires consideration of the effect of legislative and executive action on native title under the general law. It also requires ascertaining whether s 10 of the RDA applied to invalidate the legislation or act in question, whether the amended *Native Title Act* and complementary State or Territory legislation validates the legislation or act, and, if so, what the effect of that validation is.
2. Partial extinguishment of native title is recognised both at common law and under the *Native Title Act*.
3. Inconsistency between the legislation or executive action and native title will result in extinguishment of native title rights and interests. To determine whether there is inconsistency, it is generally necessary to compare native title rights and interests with the interests granted or authorised by the Executive or a law. It is not, however, necessary to do so when the interest validly granted confers a right of exclusive possession. That right is inconsistent with the existence of native title. The ''adverse dominion'' approach to extinguishment, and the approach espoused by North J in the Full Court, should both be rejected.
4. Native title that has previously been extinguished at common law by legislation or by executive action cannot be recognised under

(1090) *cont*
McHugh J. A contrast may be drawn with the position under the Constitution of the United States of America. Article VI of the United States Constitution relevantly provides: ''This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.'' As a result, self-executing treaties can create rights and impose liabilities without being implemented by legislation passed in Congress.

(1091) I would add that the statement of Dixon J in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 that the rule of law was an assumption in accordance with which the Constitution was framed meant no more than that the Parliament could not decide the limits of its constitutional power. It simply expresses the notion encapsulated in the saying ''The stream cannot rise above its source.'' Fairly interpreted, it provides no support for the notion that judges are empowered to strike down legislation on the basis that it infringes some unwritten aspect of the rule of law.

s 223(1)(c) of the *Native Title Act*. There is nothing about the ''previous exclusive possession act'' regime in the *Native Title Act* which indicates that native title that has been extinguished over the past two centuries may be restored in order to be extinguished by previous exclusive possession acts.

5. Native title does not include the right to exploit minerals. No evidence was presented which demonstrated that there were native title rights to exploit minerals or petroleum, or any right to inhibit the exploitation of those resources.
6. Cultural knowledge does not constitute a native title right or interest ''in relation to land or waters''.
7. Operational inconsistency as a test for extinguishment must be treated with caution as it affords only an analogy for testing whether acts which are authorised by enactment are inconsistent with native title.
8. The maintenance of a spiritual connection does not suffice to found a ''connection with the land or waters'' under s 223(1)(b) of the *Native Title Act*. It is essential that claimants maintain a physical presence on the land. In relation to some areas, the claimants did not do so.
9. Section 10(1) of the RDA applies to racially discriminatory legislation and acts authorised by such legislation if they took place after 31 October 1975. Laws of general application, the purpose of which is not to create racial distinctions, restrictions, exclusions or preferences are not racially discriminatory laws. Section 10(1) operates on discriminatory laws either by invalidating them or the acts which they authorise, or by conferring upon native title holders the right which has been denied them. The precise way in which it operates depends on characterisation of the racially discriminatory legislation.
10. The grant of pastoral leases in Western Australia extinguished all native title rights and interests. The decision of this Court in *Wik* is distinguishable. It should be confined largely to its own situation.
11. The grant of a permit to occupy land under the *Land Act* 1898 extinguished all native title rights and interests over the land.
12. The conditional purchase lease granted under the *Land Act* 1898 conferred on the lessee a right of exclusive possession that extinguished all native title rights and interests over the leased land.
13. The grant of special leases under the Land Regulations and Land Acts conferred on lessees a right of exclusive possession. All native title rights and interests over the leased lands were therefore extinguished.
14. The dedication or identification by the State of land for road or road purposes or the regular (not unlawful) use of a strip of land for road purposes extinguished native title in respect of land otherwise subject to native title rights.

15. Leases of reserves under s 32 of the *Land Act* 1933 extinguished native title completely. The RDA did not invalidate the grant of those leases.
16. The creation of reserves under the Land Regulations, the *Land Act* 1898 and the *Land Act* 1933 involved the creation of rights in the public that were inconsistent with native title. All native title rights and interests over the lands reserved were extinguished. The RDA did not operate to invalidate the creation of reserves after 31 October 1975.
17. By-laws enacted to preserve fauna under the *Wildlife Conservation Act* were inconsistent with the existence of any remaining native title right to hunt fauna in nature reserves in Western Australia. These by-laws were of general application and did not attract the RDA.
18. The vesting of ''irrigation works'' in the Minister under s 3 of the *Rights in Water and Irrigation Act* extinguished all proprietary and personal interests in those works. The Crown land set apart for future expansion of the Ord Project and used, among other things, as buffer zones fell within the definition of ''irrigation works''. Native title over that land was therefore extinguished.
19. The application of Pt III of the *Rights in Water and Irrigation Act* extinguished all native title rights to control the flow and use of water in the Ord Irrigation District and any native title to property in the beds of water-courses, lakes, lagoons, swamps and marshes.
20. The by-laws made under the *Rights in Water and Irrigation Act* extinguished native title rights to hunt fauna and enter certain areas. Those by-laws were of general application and were not racially discriminatory. The by-laws made in 1991 by the Shire of Wyndham-East Kimberley were valid and effective.
21. Resumptions of land under the *Public Works Act* extinguished all native title rights and interests over that land. The RDA did not invalidate the resumption that took place in December 1975.
22. The ''public works'' provisions of the *Native Title Act* and the State Validation Act extinguished native title over vacant Crown land used, among other things, as buffer zones and as areas for future expansion of the Ord Project. There is no sound basis for disturbing the findings of the Full Court which led to this result.
23. The grant of mining leases under the *Mining Act* 1978 conferred on the lessees a right of exclusive possession over the land. That right was inconsistent with, and thus extinguished, all native title. The RDA did not invalidate the grant of any mining lease.
24. The grant of the Argyle lease extinguished all native title rights and interests. It was not invalidated by the RDA.
25. The general purpose lease granted under the *Mining Act* 1978 extinguished all native title rights and interests. The RDA did not invalidate that grant.
26. Pastoral leases and other leases registered under the *Transfer of*

Land Act were rendered indefeasible and were freed from all encumbrances not notified on the register. The effect of registering such leases was to extinguish any surviving native title in respect of the land.

27. Section 47B of the *Native Title Act* did not apply to areas of the Ord Project to revive extinguished native title.
28. The public right to fish should be recorded in the determination because it is an interest under s 225(c) of the *Native Title Act*, and any exclusive right to fish cannot be recognised by the common law.
29. Several interests of the Alligator appellants, such as the grant of licences to construct, use and maintain private jetties under the *Jetties Act*, extinguished any surviving native title. Aquaculture licences granted under the *Fish Resources Management Act*, however, did not. If it is necessary to decide whether the leases of the Old Laboratory Building and Yard extinguished native title, the matter should be remitted to the Full Court.
30. The grant of pastoral leases in the Northern Territory extinguished all native title rights and interests over that land. The decision of this Court in *Wik* is distinguishable.
31. The perpetual leases in the Northern Territory granted under the *Crown Lands Act* and the *Special Purposes Leases Act* extinguished all native title rights and interests. The RDA did not operate to invalidate the grant of those leases.
32. The declaration under s 12(1) of the *Territory Parks and Wildlife Conservation Act* in 1981 did not extinguish native title rights and interests that might have survived the grant of the perpetual leases.
33. The by-laws promulgated under s 71 of the *Territory Parks and Wildlife Conservation Act* extinguished any surviving native title rights to light fires, hunt and dig. But neither the management plan for the Keep River National Park nor the Keep River National Park Local Management Committee Regulations brought about any further extinguishment of native title.
34. On the present facts, it is inappropriate to decide whether improvements in the Keep River National Park extinguished native title.
35. There is no warrant for moulding the common law of native title to meet our international obligations or for straining the language of the *Native Title Act* to achieve the same result.

VI. Conclusion and Orders

965 It follows from what I have said that the title of the claimants has been extinguished with respect to all lands the subject of these appeals. That extinguishment occurred for the most part on the grant of pastoral leases over the lands. Most of the further dealings that have occurred have, or would have, produced the same result.

966 I add this. The first non-indigenous people who occupied this

country brought with them their common and statutory law which had long included a doctrine of adverse possession and settled notions about the use and occupation of land (1092). These were closely connected ideas: land was to be used and enjoyed, and those who possessed, used and enjoyed the land should own it, albeit, at first, transiently. As Blackstone put it (1093):

> ''For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted.''

967 Those early non-indigenous settlers also brought with them a knowledge of agriculture and husbandry, and of domestic, commercial and official construction of a kind completely different from that of the indigenous peoples. To the undiscriminating, and perhaps insensitive and unimaginative eyes of the former it must have appeared that much of this large continent was not in fact being used or enjoyed, or certainly not so in a way that was familiar. After discussing the use and occupation of Crown lands by reference to the Old Testament, Blackstone says this of migration (1094):

> ''Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother-country was over-charged with inhabitants; which was practised as well by the Phoenicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.''

968 Activities of this kind undoubtedly occurred in Australia. Some were utterly indefensible. It is possible to understand, again without condoning, that others of them might have occurred, in part because of different conceptions about land and how it might be possessed, used or owned. The different conceptions held by the new settlers, much the

(1092) *Cholmondeley v Clinton* (1820) 2 Jac & W 1 at 141 [37 ER 527 at 577-578] (referring to Bracton and Plowden).

(1093) *Commentaries on the Laws of England*, Am ed (1803), bk 2, c 1, p 3 (fn omitted).

(1094) *Commentaries on the Laws of England*, Am ed (1803), bk 2, c 1, p 6.

stronger of the peoples, were bound to prevail. This was inevitable when those who were more powerful had a well settled, longstanding body of property law in written texts, statutes and cases, and those whom they dispossessed depended for the assertions of their rights to occupy and use the land upon traditional oral customs and practices. Perhaps it was equally significant that the new settlers brought with them a transparent system of legal enforcement and courts to give effect to the resolution of disputes over property. To these new settlers, it might also have appeared, whether it was true or not, that the country was so sparsely populated that disputes did not arise between competing indigenous people over land.

969 The problems for the indigenous people were compounded by the difficulty of finding any conceptual common ground between the common and statutory law of real property and Aboriginal law with respect to land. It seems likely that the first settlers would have regarded the two as incompatible, that whatever the Aboriginal peoples possessed by way of title to land was too foreign, fragile and elusive to withstand and survive the common law (1095). *Mabo [No 2]* was a brave judicial attempt to redress the wrongs of dispossession. But its ''recognition'' of native title has involved the courts in categorising and charting the bounds of something that, being sui generis, really has no parallel in the common law. The Court has endeavoured to find a way of recognising, and to a degree protecting, that anomalous interest without unduly disturbing the law of Australian property (1096). The results of this enterprise can hardly be described as satisfactory. The decisions of this Court and of lower courts have resulted in something that is not strictly property, as common lawyers would understand it, being regarded as a burden on the Crown's radical title. Long settled understandings about land law relating to exclusive possession and leases have been questioned (1097). Parliament has been compelled to intervene, repeatedly, to secure the validity of acts that were never before thought to be problematic (1098). And we now have a body of law that is so

(1095) On the fragility of native title, see *Fejo* (1998) 195 CLR 96 at 151 [106], per Kirby J; *Yanner v Eaton* (1999) 201 CLR 351 at 408 [152].

(1096) Sackville, ''The Emerging Australian Law of Native Title: Some North American Comparisons'', *Australian Law Journal*, vol 74 (2000) 820, at p 833.

(1097) *Wik* (1996) 187 CLR 1, which distinguished or did not apply statements in *Macdonald v Tully* (1870) 2 QSCR 99, *Wildash v Brosnan* (1870) 1 QCLLR 17, *O'Keefe v Malone* [1903] AC 365, *O'Keefe v Williams* (1910) 11 CLR 171 and *Mabo [No 2]* (1992) 175 CLR 1. See also Sackville, ''The Emerging Australian Law of Native Title: Some North American Comparisons'', *Australian Law Journal*, vol 74 (2000) 820, at pp 833-834; *Anderson v Wilson* (2000) 97 FCR 453 at 463 [45], per Black CJ and Sackville J (querying the utility of the concept of exclusive possession in determining whether extinguishment of native title has occurred).

(1098) See *Native Title Act*, Pt 2, Divs 2, 2A, 2B; Brennan, *The* Wik *Debate: Its Impact on Aborigines, Pastoralists and Miners* (1998), pp 40-43; Sackville, ''The

complicated, shifting and abstruse that it continues to require the intervention of this Court to resolve even the most basic issues, such as the effect of freehold (1099) or leases on native title (1100). Judging from the submissions to this Court and the native title legislation that we have had to consider, few people, if any, have been able to thread this labyrinth of Minos unscathed (1101). To these drawbacks flowing from the recognition of native title may be added others: considerable uncertainty has been created; commercial activity and therefore national prosperity has been inhibited; much time and money have been expended on litigation (1102); and, I fear, the expectations of the indigenous people have been raised and dashed.

970 I do not disparage the importance to the Aboriginal people of their native title rights, including those that have symbolic significance. I fear, however, that in many cases because of the chasm between the common law and native title rights, the latter, when recognised, will

(1098) *cont*
Emerging Australian Law of Native Title: Some North American Comparisons'', *Australian Law Journal*, vol 74 (2000) 820, at p 831.

(1099) *Fejo* (1998) 195 CLR 96.

(1100) So far, these appeals have generated two different views of the effect of true leases on native title — that of Lee J, with whose opinions North J agreed in substance, and those of Beaumont and von Doussa JJ. This is despite the fact that leases were the subject of dicta by members of this Court in several cases commencing with *Mabo [No 2]*.

(1101) It is clear from submissions to this Court, for instance, that several parties relied heavily upon dicta in *Mabo [No 2]* (1992) 175 CLR 1 at 68, per Brennan J relating to the ''use'' of reserved land. Language reflecting the idea that ''use'' may bring about extinguishment is also found in the *Native Title Act*, s 23B(9C)(b). It will be apparent from these reasons and those of Gleeson CJ, Gaudron, Gummow and Hayne JJ, however, that Brennan J's references to ''use'' give rise to different understandings. The issue is really whether the *rights* created in persons or the rights asserted by the Crown are inconsistent with native title.

Likewise, language in s 23G(1)(b)(ii) of the *Native Title Act* suggesting that native title may be ''suspended'' upon the grant of rights and interests that are inconsistent with it can only be attributed to the uncertainty created by *Wik* (1996) 187 CLR 1 at 133. The use of terms such as ''suspended'' and ''extinguished'' in s 23G(1)(b) demonstrates emphatically that the legislators and their legal advisers could not ascertain the outcome of *Wik* with anything resembling confidence.

(1102) On the time taken for native title hearings, see Boge, ''The Emerging Law of Native Title Practice: Select Issues and Observations'', in Boge (ed), *Justice for All? Native Title in the Australian Legal System* (2001) 101, at pp 102-103. On the inhibition of commercial activity and the uncertainty to which the *Native Title Act* and *Wik* gave rise, see Brennan, *The* Wik *Debate: Its Impact on Aborigines, Pastoralists and Miners* (1998), pp 21-29, 40-43, 49-50. These appeals illustrate the extraordinary time spent in resolving native title claims. The hearing at first instance, which began on 17 February 1997, lasted eighty-three days. The appeals to the Full Court of the Federal Court occupied a total of two weeks. The appeals to this Court were heard over two sitting weeks in March 2001. The decision has been reserved for a year and a half. Resolution of many of the issues raised has not occurred and the cases are now to be remitted to the Full Court. It is difficult to be confident that this Court has seen the last of them.

amount to little more than symbols. It might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately futile or unsatisfactory, in my respectful opinion, attempt to fold native title rights into the common law (1103).

971 I remain bound by *Mabo [No 2]* and *Wik* to the extent that they are reflected in the *Native Title Act*. Until such time as parties wish to question their correctness, I must apply them. In the meantime, however, this Court should do what it can to provide indigenous people, governments, lawyers, academics and members of the general community with clear, logical and final rules for determinations of native title. It is for this reason that I have attempted to deal with all interests and, where possible, to avoid remitter to the Federal Court.

972 In accordance with these reasons, I would dismiss the claimants' appeals and allow the appeals by the State, Crosswalk, the Alligator appellants, and the Northern Territory.

973 The claimants should pay the costs of the appeals.

1. *Each of the appeals is allowed.*
2. *Paragraphs* 4 *and* 6 *of the orders of the Full Court of the Federal Court made on* 3 *March* 2000*, the whole of the order of the Full Court of the Federal Court made on* 11 *May* 2000 *and the determination of native title made on* 11 *May* 2000 *are set aside and the matters remitted to the Full Court for further hearing and determination.*
3. *There is no order as to the costs of the appeals in this Court.*
4. *The costs of the proceedings at trial and in the Full Court of the Federal Court, both before and after the making of this Court's orders disposing of these appeals, are to be in the discretion of the Full Court.*

Solicitor for the appellant and respondent the State of Western Australia, *P A Panegyres*, Crown Solicitor for that State.

Solicitors for the appellants and respondents Ben Ward and others,

(1103) In *Mabo [No 2]* (1992) 175 CLR 1 at 42, per Brennan J, it was stated that a change in the law was necessary to make the common law non-discriminatory. But this Court and other legal bodies are founded on a post-dream time legal order. Although some may contend that we should, we do not in fact recognise Aboriginal criminal law, tort law or any aspects of indigenous laws, nor do we pretend to. The question then is why the common law of property, which had been regarded as settled for more than a century, should have been changed to recognise sui generis interests in land that had no counterpart in our legal system. See Sackville, ''The Emerging Australian Law of Native Title: Some North American Comparisons'', *Australian Law Journal*, vol 74 (2000) 820, at p 830 (observing that the discrimination argument is not obvious).

on behalf of the Miriuwung and Gajerrong People, *Aboriginal Legal Service of Western Australia*.

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Solicitors for the respondents Crosswalk Pty Ltd and another, *Hunt & Humphry*.

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Solicitor for the Mirimbiak Nations Aboriginal Corporation, *Mirimbiak Nations Aboriginal Corporation*.

PTV