BRENNAN CJ,

DAWSON, TOOHEY, GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

Matter No B8 of 1996

THE **WIK** PEOPLES APPELLANTS

AND

THE STATE OF QUEENSLAND & ORS RESPONDENTS

Matter No B9 of 1996

THE THAYORRE PEOPLE APPELLANTS

AND

THE STATE OF QUEENSLAND & ORS RESPONDENTS

ORDER

1. Each appeal allowed in part.

2. Set aside the answers given by Drummond J to Question 1B(b), (c) and (d) and Question 1C(b), (c) and (d). Affirm the answers given by Drummond J to Question 1C(a), Question 4 and Question 5.

3. Answer Questions 1B, 1C, 4 and 5 as follows:

Question 1B

" If at any material time Aboriginal title or possessory title existed in respect of the land demised under the pastoral lease in respect of the Holroyd River Holding a copy of which is attached hereto (pastoral lease):

(a) [not pressed]

(b) does the pastoral lease confer rights to exclusive possession on the grantee?

If the answer to (a) is 'no' and the answer to (b) is 'yes':

(c) does the creation of the pastoral lease that has these two characteristics confer on the grantee rights wholly inconsistent with the concurrent and

continuing exercise of any rights or interests which might comprise such Aboriginal title or possessory title of the ***Wik*** *Peoples and their predecessors in title which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?*

(d) did the grant of the pastoral lease necessarily extinguish all incidents of Aboriginal title or possessory title of the ***Wik*** *Peoples in respect of the land demised under the pastoral lease?"*

Answer

(b) No.

(c) Does not arise.

(d) Strictly does not arise but is properly answered No.

Question 1C

" If at any material time Aboriginal title or possessory title existed in respect of the land demised under the pastoral leases in respect of the Mitchellton Pastoral Holding No 2464 and the Mitchellton Pastoral Holding No 2540 copies of which are attached hereto (Mitchellton Pastoral Leases):

(a) was either of the Mitchellton Pastoral Leases subject to a reservation in favour of the Thayorre People and their predecessors in title of any rights or interests which might comprise such Aboriginal title or possessory title which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?

(b) did either of the Mitchellton Pastoral Leases confer rights to exclusive possession on the grantee?

If the answer to (a) is 'no' and the answer to (b) is 'yes':

(c) does the creation of the Mitchellton Pastoral Leases that had these two characteristics confer on the grantee rights wholly inconsistent with the concurrent and continuing exercise of any rights or interests which might comprise such Aboriginal title or possessory title of the Thayorre People and their predecessors in title which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?

(d) did the grant of either of the Mitchellton Pastoral Leases necessarily extinguish all incidents of Aboriginal title or possessory title of the Thayorre

People in respect of the land demised under either of the Mitchellton Pastoral Leases?"

Answer

(a) No.

(b) No.

(c) Does not arise.

(d) Strictly does not arise but is properly answered No.

Question 4

" May any of the claims in paras 48A to 53, 54 to 58(a), 59 to 61, 61A to 64 and 65 to 68 of the further amended statement of claim [being claims of alleged breach of fiduciary duty and failure to accord natural justice] be maintained against the State of Queensland or Comalco Aluminium Limited notwithstanding the enactment of the Comalco Act, the making of the Comalco Agreement, the publication in the Queensland Government Gazette *of 22 March 1958 pursuant to s 5 of the Comalco Act of the proclamation that the agreement authorised by the Comalco Act was made on 16 December 1957 and the grant of Special Bauxite Mining Lease No 1?"*

Answer

No.

Question 5

" May any of the claims in paras 112 to 116, 117 to 121, 122 to 124, 125 to 127, 128 to 132, and 141 to 143 of the further amended statement of claim [being claims of alleged breach of fiduciary duty and failure to accord natural justice] be maintained against the State of Queensland or Aluminium Pechiney Holdings Pty Ltd notwithstanding the enactment of the Aurukun Associates Agreement Act 1975, the making of the Aurukun Associates Agreement, the publication in the Queensland Government Gazette *of the proclamation of the making of the agreement pursuant to the Act and the grant of Special Bauxite Mining Lease No 9?"*

Answer

No.

4. The respondents who opposed the orders sought in relation to Question 1B(b), (c) and (d) pay the costs of the proceedings in this Court of the ***Wik*** *Peoples relating to that question.*

5. The respondents who opposed the orders sought in relation to Question 1C(b), (c) and (d) pay the costs of the proceedings in this

Court of the Thayorre People and the ***Wik*** *Peoples relating to that question. The Thayorre People pay the costs of the proceedings in this Court of the respondents relating to Question 1C(a).*

6. The ***Wik*** *Peoples pay the respondents' costs of the proceedings in this Court relating to Questions 4 and 5.*

7. Remit the matters to the Federal Court with respect to the costs of the proceedings before Drummond J or otherwise in that Court.

23 December 1996

On appeal from the Federal Court of Australia.

Representation:

W Sofronoff, QC, with R W Blowes and G C Newton for the appellants in B8/96 and for the nineteenth respondents in B9/96 (instructed by Ebsworth & Ebsworth)

M H Byers, QC, with J W Greenwood, QC, G E Hiley, QC and P M McDermott for the appellants in B9/96 and for the nineteenth respondents in B8/96 (instructed by Bottoms English)

P A Keane, QC, Solicitor-General for the State of Queensland, with G J Gibson, QC, G J Koppenol and D A Mullins for the first and third respondents in each matter (instructed by B T Dunphy, Crown Solicitor for the State of Queensland)

G Griffith, QC, Solicitor-General for the Commonwealth, with D J McGill, SC and M A Perry for the second respondent in each matter (instructed by the Australian Government Solicitor)

H B Fraser, QC, with P L O'Shea and J K Bond for the fourth respondent in each matter (instructed by Blake Dawson Waldron)

G A Thompson for the fifth respondent in each matter (instructed by

Feez Ruthning)

No appearance for the sixth respondent

G M G McIntyre for the seventh respondent in each matter (instructed by S M Coates)

P J Favell for the eighth respondent in each matter (instructed by Farrellys)

D J S Jackson, QC, with J D McKenna for the ninth to twelfth respondents and the fourteenth to eighteenth respondents in each matter (instructed by Corrs Chambers Westgarth)

S L Doyle, SC for the thirteenth respondent in each matter (instructed by Clayton Utz)

Interveners:

D Graham, QC, Solicitor-General for the State of Victoria, with M Sloss intervening on behalf of the Attorney-General for the State of Victoria (instructed by R C Beazley, Victorian Government Solicitor)

R J Meadows, QC, Solicitor-General for the State of Western Australia, with C A Wheeler, QC and K M Pettit intervening on behalf of the Attorney-General for the State of Western Australia (instructed by P A Panegyres, Crown Solicitor for Western Australia)

B M Selway, QC, Solicitor-General for the State of South Australia, with E E David intervening on behalf of the Attorney-General for the State of South Australia (instructed by M D Walter, Crown Solicitor for South Australia)

D M J Bennett, QC, with R J Webb intervening on behalf of the Attorney-General for the Northern Territory (instructed by the Solicitor for the Northern Territory)

J L Sher, QC, with B A Keon-Cohen intervening for the Northern Land Council and the Central Land Council (instructed by B Midena, Principal Legal Officer of the Northern Land Council)

G M G McIntyre intervening on behalf of the Kimberley Land Council, the Nanga-Ngoona Moora-Joonga Association Aboriginal Corporation, the Western Desert Punturkurnuparna Aboriginal Corporation and the Ngaanyatjarra Land Council (instructed by the DCH Legal Group)

R H Bartlett intervening on behalf of Ben Ward, John Toby, Jimmy Ward, Ronnie Carlton, Jeff Janama, Button Jones, Ben Barney, Dodger Carlton, Kim Aldus, Paddy Carlton, Rita Gerrard, Murphy Simon, Sheba Dignari, Joe Lissadell, Chocolate Thomas and Peter Newry on behalf of the Miriuwung

and Gajerrong People (instructed by the Aboriginal Legal Service of Western Australia)

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

CATCHWORDS

The **Wik** Peoples v The State of Queensland & Ors

The Thayorre People v The State of Queensland & Ors

Aborigines - Native Title- Grant of pastoral leases pursuant to *Land Act* 1910 (Q) and *Land Act* 1962 (Q) - History of pastoral tenures and disposal of Crown land considered - Whether leases conferred rights to exclusive possession - Application of principles of statutory construction - Whether legislative intention to confer possession to exclusion of holders of native title rights - Rights and obligations of pastoral lessees determined by reference to the language of the statute authorising the grant and terms of the grant - Grant for "pastoral purposes only" - Whether grant of pastoral lease necessarily extinguished all incidents of Aboriginal title - Whether clear and plain intention to extinguish exists - Inconsistency of native title rights and rights conferred on pastoral lessees - Whether grant or exercise of the rights may operate to extinguish - Whether reversion to the Crown - Whether reversion inconsistent with continued existence of native title rights - Effect of non-entry into possession of lease.

Aborigines - Native title - State legislation authorising making of agreement - Agreement to have statutory force - Agreement providing for the grant of mining leases - Statutory construction - Whether challenge to validity of agreement contrary to plain intention of the legislation - Whether relief available for alleged breaches in execution of agreement - "authorise".

Land Act 1910 (Q).

Land Act 1962 (Q).

Aurukun Associates Agreement Act 1975 (Q).

Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957 (Q).

BRENNAN CJ

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1. Introduction

In proceedings brought in the Federal Court, the **Wik** Peoples and the Thayorre People claim to be the holders of native title over certain areas of land in Queensland. Those areas include or consist of land known as the Holroyd River Holding and the Mitchellton Pastoral Leases. In 1915 and 1919, pastoral leases had been granted by the Crown to non-Aboriginal lessees over the Mitchellton Pastoral Leases pursuant to *The Land Act* 1910 (Q) ("the 1910 Act"). In 1945, under the same Act a pastoral lease had been granted by the Crown to non-Aboriginal lessees over the Holroyd River Holding. In 1973, another pastoral lease had been granted over the same area under *The Land Act* 1962-1974 (Q) ("the 1962 Act")[1]. The **Wik** Peoples claim that their native title was not extinguished by the granting of pastoral leases but constitutes "a valid and enforceable interest in the land co-existing with the interests of the lessees under the Pastoral Leases and exercisable at all times during the continuation of the Pastoral Leases". The Thayorre People, who were joined as respondents to the **Wik** Peoples' application filed a cross-claim seeking, inter alia, declarations that:

"On their proper construction and in the events which happened the leases which the Crown granted over the Mitchellton Holding [in] 1915 and again [in] 1919 allowed the co-existence of use for pastoral purposes only by the lessees with use for the purposes of aboriginal title by the Thayorre people;

...

Any reversion held by the Crown in respect of the Mitchellton leases was held in trust for the Thayorre people and the exercise by them of their aboriginal title over the claimed land; [and]

At all times during the terms of the leases which the Crown granted over the Mitchellton Holding ... the Thayorre people were entitled to the unimpaired enjoyment and exercise of their aboriginal title over the claimed lands."

Without deciding whether the claimants are the holders of native title in respect of the land that had been leased, Drummond J determined as a preliminary issue[2] the effect of the grant of the respective pastoral leases upon any native title then subsisting over the land the subject of the grant of the pastoral leases. His Honour's decision on this issue was expressed in the answers to two questions[3]:

" 1B. If at any material time Aboriginal title or possessory title existed in respect of the land demised under the pastoral lease in respect of the Holroyd River Holding a copy of which is attached hereto (pastoral lease):

(a) is the pastoral lease subject to a reservation in favour of the **Wik** Peoples and their predecessors in title of any rights or interests which might comprise such Aboriginal title or possessory title which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?

(b) does the pastoral lease confer rights to exclusive possession on the grantee?

If the answer to (a) is 'no' and the answer to (b) is 'yes':

(c) does the creation of the pastoral lease that has these two characteristics confer on the grantee rights wholly inconsistent with the concurrent and continuing exercise of any rights or interests which might comprise such Aboriginal title or possessory title of the **Wik** Peoples and their predecessors in title which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?

(d) did the grant of the pastoral lease necessarily extinguish all incidents of Aboriginal title or possessory title of the **Wik** Peoples in respect of the land demised under the pastoral lease?"

Question 1B was answered as follows:

"as to question 1B(a): No;

as to question 1B(b): Yes;

as to question 1B(c): Yes;

as to question 1B(d): Yes."

" 1C. If at any material time Aboriginal title or possessory title existed in respect of the land demised under the pastoral leases in respect of the Mitchellton Pastoral Holding No 2464 and the Mitchellton Pastoral Holding No 2540 copies of which are attached hereto (Mitchellton Pastoral Leases):

(a) was either of the Mitchellton Pastoral Leases subject to a reservation in favour of the Thayorre People and their predecessors in title of any rights or interests which might comprise such Aboriginal title or possessory title which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?

(b) did either of the Mitchellton Pastoral Leases confer rights to exclusive possession on the grantee?

If the answer to (a) is 'no' and the answer to (b) is 'yes':

(c) does the creation of the Mitchellton Pastoral Leases that had these two characteristics confer on the grantee rights wholly inconsistent with the concurrent and continuing exercise of any rights or interests which might comprise such Aboriginal title or possessory title of the Thayorre People and their predecessors in title which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?

(d) did the grant of either of the Mitchellton Pastoral Leases necessarily extinguish all incidents of Aboriginal title or possessory title of the Thayorre People in respect of the land demised under either of the Mitchellton Pastoral Leases?"

Question 1C was answered as follows:

"as to question 1C(a): No;

as to question 1C(b): Yes - both did;

as to question 1C(c): Yes;

as to question 1C(d): Yes - the grant of the first of these leases extinguished Aboriginal title."

The **Wik** Peoples also claim declarations which challenge the validity of Special Bauxite Mining Leases which had been granted by the State to certain mining companies in purported pursuance of *The Commonwealth Aluminium Corporation Pty Limited Agreement Act* 1957 (Q) and the *Aurukun Associates*

Agreement Act 1975 (Q). Two further questions were decided by Drummond J as preliminary issues relating to these claims. The questions and his Honour's answers were as follows:

"Question 4

May any of the claims in paragraphs 48A to 53, 54 to 58(a), 59 to 61, 61A to 64 and 65 to 68 of the Further Amended Statement of Claim [being claims of alleged breach of fiduciary duty and failure to accord natural justice] be maintained against the State of Queensland or Comalco Aluminium Limited notwithstanding the enactment of the Comalco Act, the making of the Comalco Agreement, the publication in the Queensland Government Gazette of 22 March 1958 pursuant to s 5 of the Comalco Act of the proclamation that the Agreement authorised by the Comalco Act was made on 16 December 1957 and the grant of Special Bauxite Mining Lease No 1?

Question 4 is answered: No.

Question 5

May any of the claims in paragraphs 112 to 116, 117 to 121, 122 to 124, 125 to 127, 128 to 132 and 141 to 143 of the Further Amended Statement of Claim [being claims of alleged breach of fiduciary duty and failure to accord natural justice] be maintained against the State of Queensland or Aluminium Pechiney Holdings Pty Ltd notwithstanding the enactment of the Aurukun Associates Agreement Act 1975, the making of the Aurukun Associates Agreement, the publication in the Queensland Government Gazette of the proclamation of the making of the Agreement pursuant to the Act and the grant of Special Bauxite Mining Lease No 9?

Question 5 is answered: No."

The **Wik** and the Thayorre Peoples appealed to the Full Court of the Federal Court. The appeal was removed into this Court pursuant to s 40(1) of the*Judiciary Act* 1903 (Cth). It is convenient first to refer to the issues arising from the grant of the pastoral leases.

2. The content of the pastoral leases

The first Mitchellton lease, issued under the 1910 Act in 1915, was forfeited for non-payment of rent in 1918. The second lease, issued under the 1910 Act in 1919, was surrendered in 1921. Possession was not taken by the lessees under either lease. Since 12 January 1922 the land has been reserved for the benefit of Aborigines or held for and on their behalf. The first Holroyd lease, issued under the 1910 Act in 1945, was surrendered in 1973. The second

lease, issued under the 1962 Act, is for a term of 30 years from 1 January 1974. None of the leases contained an express reservation in favour of Aboriginal people. The power to issue leases under the 1910 Act was vested in the Governor in Council[4] by s 6:

" (1) Subject to this Act, the Governor in Council may, in the name of His Majesty, grant in fee-simple, or demise for a term of years, any Crown land within Queensland.

(2) The grant or lease shall be made subject to such reservations and conditions as are authorised or prescribed by this Act or any other Act, and shall be made in the prescribed form, and being so made shall be valid and effectual to convey to and vest in the person therein named the land therein described for the estate or interest therein stated.

(3) The rights of the Crown in gold and other minerals, and the reservations with respect to the same which are to be contained in all Crown grants and leases, are declared and prescribed in '*The Mining on Private Land Act of* 1909.'

(4) In addition to any reservation authorised or prescribed by this Act or any other Act in any grant or lease made after the commencement of this Act, there may be reserved for any public purposes, whether specified or not, a part of the land comprised therein of an area to be specified, but without specifying the part of the land so reserved. And it is hereby declared that all such reservations in all grants and leases made before the commencement of this Act are valid to all intents and purposes."

Similar provisions are contained in s 6 of the 1962 Act, except that the sub-section dealing with the Crown's mineral rights is extended to cover the rights in petroleum declared and prescribed in *The Petroleum Acts* 1923 *to* 1958 (Q). "Crown land" was defined by s 4 of the 1910 Act as follows:

"All land in Queensland, except land which is, for the time being -

(a) Lawfully granted or contracted to be granted in fee-simple by the Crown; or

(b) Reserved for or dedicated to public purposes; or

(c) Subject to any lease or license lawfully granted by the Crown: Provided that land held under an occupation license shall be deemed to be Crown land".

An identical definition of the term appeared in s 5 of the 1962 Act.

The leases issued under the 1910 Act recited that the respective lessees were "entitled to a Lease of the Land described in the Schedule endorsed on these Presents for the term, and at the yearly rent, hereinafter mentioned, and with, under, and subject to the conditions, stipulations, reservations, and provisoes in the said Act, and hereinafter contained".

In consideration of the premises and the rent, the Crown did "DEMISE AND LEASE unto the said [lessee] (hereinafter with their Successors in title designated 'the Lessee') and their lawful assigns, ALL THAT portion of Land situated in [name of district] ... to hold unto the Lessee and their lawful assigns, for pastoral purposes only, for and during the term of [number of years] ... subject to the conditions and provisoes in Part III, Division I of the said Act, and to all other rights, powers, privileges, terms, conditions, provisions, exceptions, restrictions, reservations, and provisoes referred to ... in ... the said Act, and '*The Mining on Private Land Act of* 1909'". In addition to the reservations in *The Mining on Private Land Act*, the second Mitchellton lease included reservations under *The Petroleum Act of* 1915. Both Holroyd leases included reservations under *The Petroleum Act of* 1923 (as amended) and the second Holroyd lease included reservations under the *Mining Act* 1968-1974.

The second Holroyd lease is not expressed to be limited "for pastoral purposes only" but otherwise is in similar terms although granted under the 1962 Act. It contains further express conditions requiring the lessees to erect a manager's residence and effect other improvements on the land (including fencing the land) within 5 years. Although question 1B relates to the operation and effect of the second Holroyd lease, the land title history of both of the parcels of land in question in these proceedings must take account of the operation and effect of the leases issued under the 1910 Act. For reasons that will appear, it is not necessary to examine the effect of the 1962 Act and the second Holroyd lease issued under that Act upon native title. It is sufficient to note that, in all material respects, the operation and effect on native title (if any then subsisted) of the pastoral lease issued under the 1962 Act would be the same as the operation and effect on native title of the pastoral leases issued under the 1910 Act. Hereafter, the references to particular sections are to the sections in the 1910 Act.

Each lease contained reservations with respect to the Crown's mineral rights and a reservation[5] in these terms:

"WE DO FURTHER RESERVE the right of any person duly authorised in that behalf by the Governor of Our said State in Council 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."

The leases under the 1910 Act were issued "pursuant to Part III, Division I" of that Act and were expressed to be subject to "the conditions and provisoes of Part III, Division I". That Division provided for the Minister by notification to declare any Crown land to be open for pastoral lease and to specify "the areas to be leased, the term of the lease ... and the rent per square mile during the term"[6]. Applications for a pastoral lease were lodged with a land agent and, when issued to a successful applicant, commenced "on the quarter day next ensuing after the date of acceptance of his application"[7]. The term of a lease was divided into 10-year periods, the rent for periods after the first being fixed by the Land Court[8]. Every lease was subject to the condition that the "lessee shall, during the term, pay an annual rent at the rate for the time being prescribed"[9].

The submissions on behalf of the **Wik** Peoples (the **Wik** submission) and the Thayorre People (the Thayorre submission) are directed to establishing two basic points: that the pastoral lessees did not acquire a right to exclusive possession of the land the subject of the leases and, even if they did, it is not the right to exclusive possession that extinguished native title but only the exercise of that right to exclude the holders of native title. These basic points were supplemented by two subsidiary arguments, namely, that native title was not extinguished but merely suspended during the term of a lease and that the Crown held any reversion as a fiduciary for the holders of native title. In addition submissions were made specific to the claims made against the mining companies.

The submissions made by the **Wik** and Thayorre Peoples were supported by some respondents and opposed by others. Leave to intervene was granted without objection to the States of Victoria, Western Australia and South Australia, the Northern Territory and (this being an exceptional case) to certain Aboriginal Land Councils and representatives of certain other Aboriginal Peoples. The principal issues in the case were raised by the **Wik** and Thayorre Peoples on the one hand and by the State of Queensland on the other. These issues were addressed by other parties and interveners but it will be convenient to refer chiefly to those parties' submissions as the source of the submissions in the following discussion.

3. The rights of a lessee under the pastoral leases

The **Wik** and Thayorre submissions first point to the magnitude of the area of the land the subject of the leases and its capacity to permit concurrent use by Aboriginal inhabitants and pastoral lessees as indications that the lessees were not intended to acquire a right to possession exclusive of the Aboriginal inhabitants. The Holroyd River Holding was 1,119 square miles in area; the Mitchellton Lease was 535 square miles in area. If the granting of the leases were intended to exclude the Aboriginal inhabitants who had been the

traditional inhabitants of these areas, it is submitted that the granting of the leases would have been "truly barbarian", for the Aboriginal inhabitants would thereby have become trespassers on their traditional land.

The quoted phrase is taken from my judgment in *Mabo v Queensland [No 2]*[10] (hereafter *Mabo [No 2]*) where it was used in reference to a possible construction of a statutory provision[11] which made it an offence for a person to be found in occupation of Crown land, not being a lessee or licensee. To construe such a provision as applying to Aboriginal inhabitants would have left them practically without anywhere in the country to live and, on that account, would have been "truly barbarian". The term "person" in the statute was read down so as not to include traditional Aboriginal occupiers. The question that arises as to the operation of a pastoral lease is different. That question is whether the pastoral lessee acquires a right to exclusive possession of the area of land the subject of the lease. If the pastoral lessee acquires a right to exclusive possession, it does not follow that the Aboriginal inhabitants are necessarily turned into trespassers. It would not be an offence to be found in occupation of land subject to a pastoral lease. A pastoral lessee, who took no steps during the term of the lease to exclude known Aboriginal inhabitants from the leased land, must be taken to have consented to their presence on the land. But if, in exercise of a right to exclusive possession, the Aboriginal inhabitants were excluded by the lessee, the exclusion would be an example of events referred to in *Mabo [No 2]*[12]: "Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement"[13]. That was the consequence of the exercise of the Crown's power to confer on the colonial settlers an authority or purported authority to exclude Aboriginal inhabitants from the parcels of land granted to the settlers by the Crown. But the adversely discriminatory treatment suffered by the holders of native title is not now in issue; what is in issue is the legal effect of the Crown's grant of pastoral leases over land that was or might have been the subject of native title.

The construction of the 1910 Act or the effect of a lease issued under Pt III Div I of that Act is not to be ascertained by reference to whether a pastoral lessee in fact excluded Aboriginal inhabitants from the land. It must be ascertained by reference to the language used in the Act and reflected in the instrument of lease. If, on its true construction, a pastoral lease under the Act conferred on the lessee a right to exclusive possession, that right is not to be qualified by the presence on the leased land of the traditional Aboriginal inhabitants at the time when the lease was granted or by their continued presence thereon after the lease was granted.

A number of arguments were put that the 1910 Act and the leases granted thereunder did not confer exclusive possession on the Crown lessees. First, the **Wik** submission contends that the statutory procedure for removing

persons in unlawful occupation of a pastoral lease showed that the person in or entitled to possession of the leased land was not the lessee but the Crown. And, if that be so, the lease must be construed as no more than a licence. Section 204 of the 1910 Act read as follows:

" Any Commissioner or officer authorised in that behalf by the Minister who has reason to believe that any person is in unlawful occupation of any Crown land or any reserve, or is in possession of any Crown land under colour of any lease or license that has become forfeited, may make complaint before justices, who shall hear and determine the matter in a summary way, and, on being satisfied of the truth of the complaint, shall issue their warrant, addressed to the Commissioner or to such authorised officer or to any police constable, requiring him forthwith to remove such person from such land, and to take possession of the same on behalf of the Crown; and the person to whom the warrant is addressed shall forthwith carry the same into execution.

A lessee or his manager or a licensee of any land from the Crown may in like manner make a complaint against any person in unlawful occupation of any part of the land comprised in the lease or license, and the like proceedings shall thereupon be had."

The successor to s 204 of the 1910 Act, namely, s 373 of the 1962 Act, extended the range of applicants for a warrant to licensees and persons "purchasing any land from the Crown". A person in either of these categories may not have a right to exclusive possession.

These sections are drafted without much recognition of the different interests of the Crown, Crown lessees and licensees and purchasers, but the purpose of these provisions is clear enough. It is not to eject a person in possession, for the person to be removed might not have been in possession but merely in "unlawful occupation". The purpose is to procure the removal of a person who has no right to remain on the land. The taking of possession under the warrant was the step which restored to the applicant party the full enjoyment of the party's interest that had been impaired by the presence of the person removed. Absent this statutory procedure, a pastoral lessee could secure the ejectment of a person having no right to be or to remain on the land only by bringing civil proceedings in the Supreme Court[14]. The **Wik** submission says that "the like proceedings" to be had on an application by a person in one of the categories mentioned in the last paragraph of s 204 would lead to the issue of a warrant "to take possession ... on behalf of the Crown". Therefore, so the argument runs, the Crown must be the party in possession. That would be a bizarre construction.

The section assumes that a person may be in possession under colour of a forfeited lease or licence. If a forfeited lease or licence can create a colour of

possession, an existing pastoral lease must be taken - for the purpose of the section at least - to confer a right to possession. And, if a lessee who applies for a warrant is in possession, it could not have been intended that the issue of a warrant should result in the lessee's dispossession. The "like proceedings" must mean that the warrant of removal issues in favour of the applicant for the warrant who has demonstrated his title to relief in the same way as it issues in favour of the Crown when an application is made by or on behalf of the Crown. A provision corresponding with the last paragraph of s 204 was introduced in a statutory predecessor of s 204 in 1869[15], perhaps to avoid the necessity for litigation between adjoining landholders in the Supreme Court as had occurred in *McGavin v McMaster* in the year before. There is no substance in the submission based on s 204.

Next, both the **Wik** and the Thayorre submissions placed some reliance on the reservation in the lease of the Crown's right to nominate any person to enter upon the land for any purpose and at any time to show that the pastoral lessee did not acquire a right to exclusive possession. That reservation, together with certain statutory provisions[16] authorising access to land the subject of a pastoral lease and the restriction placed by the leases (other than the second Holroyd lease) on the use of the land "for pastoral purposes only", are said to negative a legislative intention to confer a right to exclusive possession on the pastoral lessees. The reservation, far from implying that the lease did not confer a right to exclusive possession, implies that, without the reservation, the lessee would have been entitled to refuse entry to any person[17]. The reservation was not a reservation from the grant of a third party interest in the land but a reservation to the Governor in Council of a power to authorise a third party to enter. Similarly, the statutory provisions conferred authority to enter on leased land when such entry would otherwise have been in breach of the rights of the lessee. And the restriction on use of the land was consistent with a lessee's right to exclusive possession.

In *Goldsworthy Mining Ltd v Federal Commissioner of Taxation*[18], a dredging lease issued under the *Land Act* 1933-1965 (WA) over a portion of the seabed contained several reservations which restricted the use to which the demised premises could be put by the lessees, permitted the Crown and others to use any part of the demised premises for navigation, and imposed on the lessees obligations of an important kind (including consenting to the grant of easements or rights over the demised premises). Mason J held that those provisions were consistent with the lessees' right to exclusive possession. "Indeed", his Honour said[19], "the provisions assume the existence of that right". And, in *Glenwood Lumber Company v Phillips*[20], the Privy Council said:

"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."

If, as a matter of construction, it is right to hold that the right to exclusive possession was conferred on a pastoral lessee, the statutory provisions that authorised entry onto leased land for a variety of purposes were qualifications of that right but they did not destroy it. They merely limited the enjoyment of that right to the extent that the particular statute prescribed. For example, s 205 which authorised the depasturing of stock other than sheep along stock routes traversing pastoral leases was simply what it purported to be: a statutory exception to the right which, as an incident of the right to exclusive possession, the lessee would otherwise have had to exclude the stock and the persons driving the stock[21].

However, there are certain statutory provisions which authorised the suspension or termination of a lessee's right to exclusive possession. The clearest example was the statutory power to resume for particular purposes a portion of land subject to a pastoral lease. That power, contained in Pt VI Div VI of the 1910 Act, did not deny that the land resumed was in the exclusive possession of the lessee prior to the resumption. Another example is found in *The Petroleum Act of*1923 (Q). Assuming the power to grant a petroleum lease under that Act extended to the grant of a petroleum lease over "private land" (which included pastoral leaseholds[22]), it may be that the petroleum lease conferred a right to exclusive possession on the petroleum lessee that suspended the right to exclusive possession otherwise exercisable by a pastoral lessee[23]. But that is not to say that the pastoral lessee's interest in land the subject of a pastoral lease was altered by the mere existence of a power to grant a petroleum (or other mining) lease over the same land. The problems of mining leases over land already leased by the Crown arise precisely because the Crown has already disposed of the leasehold estate in the land.

It remains a question of construction whether a pastoral lease issued pursuant to Pt III Div I of the 1910 Act confers on the lessee a right to exclusive possession. That question is to be determined by reference to the terms of the lease and of the Act under which it was issued. It is not a necessary consequence of the description of the instruments issued pursuant to Pt III Div I of the 1910 Act as leases that they conferred a right of exclusive possession on the lessee. The question whether the lessees acquired a right to exclusive possession does not depend on what the parties called the instrument except in so far as their description of the instrument indicates the rights which it confers. As the Privy Council observed in *Glenwood Lumber Company v Phillips*[24], it is not a question of words but of substance. Thus, their Lordships held in *O'Keefe v Malone*[25] that an exclusive and transferable licence to occupy land for a defined period is in truth a lease. Conversely, a

true lease confers on the lessee a right to exclusive possession, albeit that right might be subject to particular reservations or exceptions[26]. In *Radaich v Smith*[27] Windeyer J said:

"Whether the transaction creates a lease or a licence depends upon intention, only in the sense that it depends upon the nature of the right which the parties intend the person entering upon the land shall have in relation to the land. When they have put their transaction in writing this intention is to be ascertained by seeing what, *in accordance with ordinary principles of interpretation*, are the rights that the instrument creates. If those rights be the rights of a tenant, it does not avail either party to say that a tenancy was not intended. And conversely if a man be given only the rights of a licensee, it does not matter that he be called a tenant; he is a licensee. 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." (Some emphasis added.)

Although it is the substance of the rights conferred and not the description of the instrument conferring them which is the ultimate touchstone for determining whether a lease has been granted, the ordinary rules of interpretation require that, in the absence of any contrary indication, the use in a statute of a term that has acquired a technical legal meaning is taken prima facie to bear that meaning[28]. Under the 1910 Act, the power to grant a pastoral lease was a power to "demise for a term of years"[29]; a "lease" was declared to be effectual to vest "the estate or interest therein stated"[30]; a pastoral lease was granted for a term[31] commencing on a quarter day[32] in respect of a specified area of land[33]; there was an obligation to pay the rent[34]; provision was made for a "surrender" of a lease[35] and for forfeiture[36] and, on forfeiture, the land reverted to His Majesty and could have been dealt with again under the Act[37]. This is the language of lease.

In *American Dairy Queen (Q'ld) Pty Ltd v Blue Rio Pty Ltd*[38] I observed in reference to the similar provisions of the 1962 Act:

"By adopting the terminology of leasehold interests, the Parliament must be taken to have intended that the interests of a lessee, transferee, mortgagee or sublessee are those of a lessee, transferee, mortgagee or sublessee at common

law, modified by the relevant provisions of the Act. The incidents of those interests are the incidents of corresponding interests at common law modified by the relevant provisions of the Act."

This is the long-established and hitherto accepted approach to the operation of Crown Lands legislation in Australia. In *Attorney-General of Victoria v Ettershank*[39], the opinion of the Privy Council defined the effect of a "lease" issued under the Land Acts in force in Victoria:

"What the Act of 1862 authorizes and prescribes in the case of a selector, is that he shall receive 'a lease,' and by sect 22 such lease is to contain 'the usual covenant for payment of rent, and a condition for re-entry on non-payment thereof.' When, therefore, the statute authorizes a lease with these usual and well understood-provisions, it is reasonable to suppose that the Legislature intended that it should operate as a contract of the like nature made between private persons."

The statutes of the Australian colonies regulating the alienation of interests in unalienated land have been construed as controlling the Crown's capacity to contract for the alienation of interests and the Crown's capacity to grant interests in such land. The principle applicable in New South Wales as in other Australian colonies was that the Crown was "only authorized to dispose of Crown lands in accordance with the provisions of the Crown Lands Acts"[40]. In *Cudgen Rutile (No 2) Ltd v Chalk*[41] Lord Wilberforce said:

" As a starting point, their Lordships accept as fully established the proposition that, in Queensland, as in other states of the Commonwealth of Australia, the Crown cannot contract for the disposal of any interest in Crown lands unless under and in accordance with power to that effect conferred by statute. In Queensland the legal basis for this power, and for the limitations upon it, is to be found in the Constitution Act of 1867, of which section 30 provides for the making of laws regulating the sale, letting, disposal and occupation of the waste lands of the Crown, and section 40 vests the management and control of the waste lands of the Crown in the legislature."

Illustrative of this view is the judgment of Isaacs J in *O'Keefe v Williams*[42], where his Honour repeated a view he had earlier[43] expressed:

"'It may fairly be said that the whole frame of the *Crown Lands Act* shows that the legislature has merely enacted the method and conditions upon which the Crown may contract for the disposal of its interest in the public lands.' And that involves the position that the Crown may contract to give a lease, and may contract by a lease. It cannot contract either for or by a lease in any terms contrary to the Statute; and where the Statute declares what rights the lease

when granted shall confer, in other words declares its legal effect, the Crown when granting such a lease grants those rights."

The use of well understood conveyancing terms in statutes authorising the disposition of interests in unalienable land was taken to import the interests and rights ordinarily attributed to those terms[44]. The substantive rights conferred on a Crown lessee are equated with the rights of a lessee under a lease at common law granted within the confines of the empowering statute. The substantive rights of a Crown lessee thus include the right of exclusive possession. In *Goldsworthy Mining Ltd v Federal Commissioner of Taxation*[45], Mason J held "the language of lease" to indicate an agreement by the Crown to give the lessee the right of exclusive possession.

However, there is a passage in a judgment of Isaacs J in *Davies v Littlejohn*[46] in which his Honour speaks of conditional purchases under the *Crown Lands Consolidation Act* 1913 (NSW) not as contracts but as creatures of statute. He said of the Act:

"It creates them, shapes them, states their characteristics, fixes the mutual obligation of the Crown and the purchaser, and provides for the mode in which they shall cease to exist, either by becoming unconditional purchases or by termination *en route*. ... Whatever estates, interests or other rights are created by the Crown must owe their origin and existence to the provisions of the statute. In other words, they are statutory or legal estates, interests and rights. They are not and cannot be equitable, that is, owing their existence to some doctrine or principle of equity."

His Honour's approach was followed by the Full Court of the Supreme Court of Victoria in *In re Brady*[47] in defining the right to a grant in fee simple possessed by a Crown lessee who had complied with the conditions of the lease and was entitled to the grant on payment of a specified amount. Both of these cases were concerned to distinguish between a statutory right to acquire the fee and an ordinary contract of sale under which the respective rights of vendor and purchaser are affected by equitable principles. In *Davies v Littlejohn*, Isaacs J was concerned to demonstrate that the Crown had no vendor's lien on the unpaid price of land held on conditional purchase. As the purchaser under a conditional purchase (unlike a purchaser under an ordinary contract for the sale of land) acquired no interest in the land until the statutory conditions were fulfilled, the Crown (unlike a vendor under an ordinary contract for the sale of land) parted with no interest. Accordingly, there was no occasion for equity to protect the Crown by a vendor's lien for the unpaid balance of the purchase price. The scheme for conditionally purchasing land was statutory and there was "no room for equity to intervene and modify the nature of a conditional purchase as Parliament has shaped it"[48]. Of course the conditions which entitle a person to the grant of a freehold estate under a

conditional purchase are prescribed by statute; *non constat* that a lease issued by the Crown in exercise of its statutory powers is not truly a lease conferring, or in accordance with the statute conveying, a leasehold estate.

The reasoning in *Davies v Littlejohn* casts no doubt on the orthodox characterisation as leases at common law of leases issued by the Crown under Crown Lands legislation. *Attorney-General of Victoria v Ettershank*[49] makes the distinction between a lease contractually binding on the Crown though issued in accordance with the statute and a purely statutory right to acquire the fee that is conferred on a lessee:

"It was said that the right to the grant of the fee was not given by contract but by statute. It is true that the right is created by the statute, but it is conferred upon the holder of a lease, and accrues to him by reason of such lease, and only upon payment of the full rent agreed to be paid under it. It is a statutory right annexed to the lease, and an implied term of the contract, and therefore may be properly said to be founded on and to arise out of it."

This passage was cited by Isaacs J in *O'Keefe v Williams*[50].

The Court of Appeal of New South Wales in *Minister for Lands and Forests v McPherson*[51] was right to view *Davies v Littlejohn* and *O'Keefe v Williams* as cases dealing with distinct subjects. Mahoney JA said[52]:

" I do not think that the principles adopted in *Davies v Littlejohn* are inconsistent with those adopted in *O'Keefe v Williams*. In *O'Keefe v Williams*, the court was concerned with the implications to be drawn from or in the context of a transaction under which a right of occupation amounting to a lease had actually been granted. It was held not inconsistent with the statutory nature or origin of that right that other rights should be implied. In *Davies v Littlejohn*, the court was concerned with the nature of an agreement to buy Crown lands which had not yet resulted in the creation of a term or estate: the issue was whether the agreement which existed provided the basis for the creation of the equitable lien."

Kirby P, after referring to both cases, said[53]:

"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."

I respectfully agree. In *Davies v Littlejohn*, Isaacs J simply followed the principle established by *Attorney-General of Victoria v Ettershank*. Indeed, he did not think it necessary to refer to *Attorney-General of Victoria v*

Ettershank or to either of the *O'Keefe v Williams* appeals in which he had cited that case[54]. Whatever may be said of conditional purchases, a Crown lease issued under s 6(1) of the 1910 Act was effective to convey and vest "the land therein described for the estate or interest therein stated"[55]. The lessee acquired more than a bundle of statutory rights: the lessee acquired a leasehold estate.

Although the 1910 Act did not expressly confer on a Crown lessee the right to exclusive possession - a circumstance on which the Thayorre submission places particular emphasis - that right is the leading characteristic of a leasehold estate, distinguishing the lease from a licence, as Lord Templeman pointed out in *Street v Mountford*[56]. If the 1910 Act intended the lease to confer no more than the rights expressed by the Act, there would have been little point in distinguishing between leases and licences which share many statutory features. Yet the distinction is clearly made. I see no basis, consistently with authority, for denying to lessees holding under Crown leases issued under the 1910 Act (or under the 1962 Act) the right of exclusive possession characteristic of a leasehold estate.

Notwithstanding the language of lease that is found in both Pt III Div I of the 1910 Act and the instruments of lease of the subject lands, the Thayorre submission characterises a pastoral lease as a mere profit à prendre - an interest in the land which authorises the pastoralist to enter on the land of another (presumably on the land of the holders of native title) for the sole purpose of grazing stock. That view of a pastoral lease was rejected by the Colonial Land and Emigration Office in April 1849[57] and, in 1870, the Full Court of the Supreme Court of Queensland held[58] that a pastoral lessee had an "exclusive right to the land". After the enactment of the 1910 Act, the Full Court held that the Crown and its lessees were in the same position, subject to statute, as a landlord and tenant at common law[59]. A pastoral lease under Regulations pursuant to the *Australian Waste Lands Act* (Imp)[60] by which the Crown purported to "demise and lease" to a lessee a parcel of land in Western Australia was said by Griffith CJ in *Moore and Scroope v The State of Western* Australia[61] to create "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" subject, however, to a reservation which - in that case - empowered the Crown to sell the land demised. It has never hitherto been doubted that a Crown lease conferred an estate on a lessee taking possession under the lease[62]. Although the Thayorre submission that the depasturing of stock can be made the subject of a profit à prendre is correct, it does not follow that the right to depasture stock conferred by a pastoral lease is a mere profit à prendre.

In *Falklands Islands Co v The Queen*[63] the Privy Council considered an instrument described as a licence "to depasture stock on 10,000 acres [of the

Falkland Islands], the limits of which were strictly defined in the instrument, for a term of twenty years, in consideration of an annual rent of [sterling]10". The instrument contained a reservation "securing to the Crown the right of re-entering on the lands for the purpose of making roads, canals, and other works of public utility, the right to cut timber, and to search for and carry away stones or other materials which might be required for making or keeping such works in repair, and also reserving to the Crown all mines of gold, silver, precious metals, and coal, with full liberty to search for and carry away the same"[64]. Their Lordships classified the instrument as a lease, expressing the opinion that[65] -

"though this is entitled a licence to depasture stock, it is in law a demise of the land therein contained, to which the ordinary rights of a lessee attach, and consequently, that the land thereby demised, subject to the rights of the Crown and the performance of the conditions contained in the licence, belong to the Falkland Islands Company as their exclusive property during the period of the lease."

If the pastoral leases in the present case conferred no more than a profit à prendre, it would be necessary to attribute ownership of the land to the Crown from whom the postulated profit à prendre was derived. But if the "licence" in the Falkland Islands case conferred "exclusive property" rights on the lessee, a fortiori, the pastoral leases in the present case must be classified as true leases conferring a right to exclusive possession on the pastoral lessee.

In order to rebut this conclusion, the Thayorre submission (and perhaps the **Wik** submission[66]) contends for a presumption against the Crown's intending to derogate from native title and for a construction of s 6 of the 1910 Act and of the pastoral leases granted thereunder that would leave native title subsisting. The submission points to the difference in the position of the holders of native title who are said to be vulnerable and the position of the Governor in Council who is said to have the dominant power to alienate interests in land subject to native title. That difference is said to give rise to a fiduciary duty owed by the Crown to the holders of native title which, if I understand the submission correctly, creates a presumption that the legislature did not intend to extinguish native title and that, by reason of that presumption, the grant of a pastoral lease did not extinguish native title.

To compare the relative positions of the Crown and the holders of native title is not to show the existence of any relevant fiduciary duty. Even if there were some fiduciary relationship, it could not affect the interpretation to be placed on s 6 of the 1910 Act[67]. Indeed, the proposition that the Crown is under a fiduciary duty to the holders of native title to advance, protect or safeguard their interests while alienating their land is self-contradictory. The sovereign power of alienation was antipathetic to the safeguarding of the holders of

native title. In conferring the power of alienation, Parliament imposed no guidelines to be observed in its exercise. The power was to be exercised as the Governor in Council saw fit. At the time when the 1910 Act conferred the power of alienation on the Governor in Council, native title was not recognised by the courts. The power was not conditioned on the safeguarding or even the considering of the interests of those who would now be recognised as the holders of native title.

In the case of the Holroyd River Holding, the pastoral lessee went into actual possession of the land but in the case of the Mitchellton Leases, no lessee ever went into actual possession. At common law, a lessee who had not entered into possession had an interest known as *interesse termini* which carried a right to enter[68] and to maintain an action for ejectment[69] but not an action for trespass[70]. And, as the lessee acquired no estate in the land prior to taking possession, no reversion expectant on the termination of the leasehold interest arose until possession was taken[71]. The landlord's estate remained unaffected until possession was taken by the tenant.

However, s 6(2) of the 1910 Act provided, inter alia, that "[t]he grant or lease ... shall be made in the prescribed form, and being so made shall be valid and effectual to convey to and vest in the person therein named the land therein described for the estate or interest therein stated". Whatever be the position in other States, in Queensland s 6(2) vested in the named lessee the estate or interest conferred by the instrument of lease when the instrument was "so made", that is, "made in the prescribed form"[72]. True it is that the sub-section was concerned with the form of the instrument, but that is not surprising when the issue of the lease is merely the Crown's response to the lessee's application for a lease of an area which the Minister has declared open for pastoral lease[73]. It follows that on the grant of a pastoral lease under the 1910 Act, the pastoral lessee was, in point of law, in possession of the land demised, irrespective of the lessee actually going into possession of the land. It follows that, in point of law, the lessees of the Mitchellton Leases were in the same position as a lessee at common law who entered into possession forthwith on the granting of the lease. In my opinion, the lessees under each pastoral lease had possession and a right to exclusive possession at the latest from the moment when the lease was issued. And, for reasons presently to be stated, the Crown had the reversion expectant on the termination of the lease.

4. Inconsistency between a lessee's rights and the continued right

to enjoy native title

The **Wik** and Thayorre submissions then raise their second basic point, namely, whether extinguishment of native title is effected by mere inconsistency between the continued right of indigenous inhabitants at

common law to the enjoyment of native title and the pastoral lessee's right to exclusive possession created or conferred pursuant to the 1910 Act or whether it is a practical inconsistency between the exercise of those respective bundles of rights that can alone extinguish native title. These submissions contended for the latter view for the reason, it was submitted, that extinguishment required proof of a clear and plain intention to extinguish native title.

As I held in *Mabo [No 2]*, 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"[74]. Those rights, although ascertained by reference to traditional laws and customs are enforceable as common law rights. That is what is meant when it is said that native title is recognised by the common law[75]. Unless traditional law or custom so requires, native title does not require any conduct on the part of any person to complete it, nor does it depend for its existence on any legislative, executive or judicial declaration. The strength of native title is that it is enforceable by the ordinary courts. Its weakness is that it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant. Native title is liable to be extinguished by laws enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it[76]. Such laws or acts may be of three kinds: (i) laws or acts which simply extinguish native title; (ii) laws or acts which create rights in third parties in respect of a parcel of land subject to native title which are inconsistent with the continued right to enjoy native title; and (iii) laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title.

A law or executive act which, though it creates no rights inconsistent with native title, is said to have the purpose of extinguishing native title, does not have that effect "unless there be a clear and plain intention to do so"[77]. Such an intention is not to be collected by enquiry into the state of mind of the legislators or of the executive officer but from the words of the relevant law or from the nature of the executive act and of the power supporting it. The test of intention to extinguish is an objective test.

A law or executive act which creates rights in third parties inconsistent with a continued right to enjoy native title extinguishes native title to the extent of the inconsistency, irrespective of the intention of the legislature or the executive and whether or not the legislature or the executive officer adverted to the existence of native title[78]. In reference to grants of interests in land by the Governor in Council, I said in *Mabo [No 2]*[79]:

" A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title. The extinguishing of native

title does not depend on the actual intention of the Governor in Council (who may not have adverted to the rights and interests of the indigenous inhabitants or their descendants), but on the effect which the grant has on the right to enjoy the native title."

Third party rights inconsistent with native title can be created by or with the authority of the legislature in exercise of legislative power but, as the power of State and Territory legislatures is now confined by the *Racial Discrimination Act* 1975 (Cth), a State or Territory law made or executive act done since that Act came into force cannot effect an extinguishment of native title if the law or executive act would not effect the extinguishment of a title acquired otherwise than as native title[80].

The third category are laws and acts by which the Crown acquires a full beneficial ownership that extinguishes native title. That may occur by acquisition of native title by or under a statute, in which case the question is simply whether the power of acquisition has been validly exercised. Or the Crown, without statutory authority, may have acquired beneficial ownership simply by appropriating land in which no interest has been alienated by the Crown. (Such an acquisition by the Crown in right of a State or Territory would have occurred, if at all, before the *Racial Discrimination Act* came into force.) In the latter case, the appropriation of the land gives rise to the Crown's beneficial ownership only when the land is actually used for some purpose inconsistent with the continued enjoyment of native title - for example, by building a school or laying a pipeline. Until such a use takes place, nothing has occurred that might affect the legal status quo. A mere reservation of the land for the intended purpose, which does not create third party rights over the land, does not alter the legal interests in the land[81], but the Crown's exercise of its sovereign power to use unalienated land for its own purposes extinguishes, partially or wholly, native title interests in or over the land used[82].

In considering whether native title has been extinguished in or over a particular parcel of land, it is necessary to identify the particular law or act which is said to effect the extinguishment and to apply the appropriate test to ascertain the effect of that law or act and whether that effect is inconsistent with the continued right to enjoy native title. In the present case, it would be erroneous, after identifying the relevant act as the grant of a pastoral lease under the 1910 Act to inquire whether the grant of the lease exhibited a clear and plain intention to extinguish native title. The question is not whether the Governor in Council intended or exhibited an intention to extinguish native title but whether the right to exclusive possession conferred by the leases on the pastoral lessees was inconsistent with the continued right of the holders of native title to enjoy that title.

On the issue of a pastoral lease under the 1910 Act, the lessee acquired an estate. There is no legal principle which would defer the vesting of, or qualify, that estate in order to allow the continuance of a right to enjoy native title. Given that the pastoral lessee acquired a right to exclusive possession at latest when the lease was issued, there was an inconsistency between that right and the right of any other person to enter or to remain on the land demised without the lessee's consent. Assuming that access to the land is an essential aspect of the native title asserted, inconsistency arises precisely because the rights of the lessee and the rights of the holders of native title cannot be fully exercised at the same time. As Mahoney J observed in *Hamlet of Baker Lake v Minister of Indian Affairs*[83] with reference to Indian land rights in Canada:

" The coexistence of an aboriginal title with the estate of the ordinary private land holder is readily recognized as an absurdity. The communal right of aborigines to occupy it cannot be reconciled with the right of a private owner to peaceful enjoyment of his land. However, its coexistence with the radical title of the Crown to land is characteristic of aboriginal title".

If a holder of native title had only a non-accessory right, there may be no inconsistency between that right and the rights of a pastoral lessee.

The law can attribute priority to one right over another, but it cannot recognise the co-existence in different hands of two rights that cannot both be exercised at the same time[84]. To postulate a test of inconsistency not between the rights but between the manner of their exercise would be to deny the law's capacity to determine the priority of rights over or in respect of the same parcel of land. The law would be incapable of settling a dispute between the holders of the inconsistent rights prior to their exercise, to the prejudice of that peaceful resolution of disputes which reduces any tendency to self-help. To postulate extinguishment of native title as dependent on the exercise of the private right of the lessee (rather than on the creation or existence of the private right) would produce situations of uncertainty, perhaps of conflict. The question of extinguishment of native title by a grant of inconsistent rights is - and must be - resolved as a matter of law, not of fact. If the rights conferred on the lessee of a pastoral lease are, at the moment when those rights are conferred, inconsistent with a continued right to enjoy native title, native title is extinguished[85].

The submission that inconsistency in the practical enjoyment of the respective rights of the native title holders and of the pastoral lessees, not inconsistency between the rights themselves, determines whether native title has been extinguished is founded on the notion that the 1910 Act and pastoral leases should be given a restrictive operation so as to permit, as far as possible, the continued existence of native title. If that notion is not applied, there is "a

significant moral shortcoming in the principles by which native title is recognised," to adopt a dictum of French J[86].

So much can be admitted. The position of the traditional Aboriginal inhabitants of the land demised by the Mitchellton leases is a good illustration. If it be right to hold that the mere grant of those leases extinguished the native title of the traditional Aboriginal inhabitants, the law will be held to destroy the legal entitlement of the inhabitants to possess and enjoy the land on which they are living and on which their forebears have lived since time immemorial. That would be a significant moral shortcoming. But the shortcoming cannot be remedied by denying the true legal effect of the 1910 Act and pastoral leases issued thereunder, ascertained by application of the general law. The questions for decision by this Court are whether, on the issue of the Mitchellton and Holroyd River leases under s 6 of the 1910 Act, there was an inconsistency between the rights of the lessees and the continued right of the **Wik** and Thayorre Peoples to enjoy their native title and, if there were an inconsistency, which set of rights prevailed. For the reasons stated, the lessees had the right of exclusive possession and that right was inconsistent with native title (except for non-accessory rights, if any) and, as the right of exclusive possession was conferred on the lessees by the Crown as the sovereign power, that right prevailed and the rights of the holders of native title were extinguished.

That does not mean that the holders of native title became trespassers. Their continued presence on the land would have been expected and probably known by the lessees. Unless the lessees took some action to eject them, their presence on the land would have been impliedly consented to. It appears that the holders of native title were never trespassers on the Mitchellton leases and, if their occupation of the Holroyd River Holding was not objected to, they were never trespassers on that land. Nevertheless, consistently with s 6(2), the inhabitants of the land demised became liable to exclusion by the lessee once the lease issued. From this it follows that native title could not co-exist with the leasehold estate.

The holders of native title did not acquire a possessory title. A possessory title arises from possession that is adverse to the title of the true owner. Until the Crown lessees acquired their respective titles, the holders of native title held the land by virtue of that title. After the Crown lessees acquired their titles, the continued occupation by the erstwhile holders of native title is explicable by lessors' consent rather than by possession adverse to the lessors' possession.

The next question is: was native title extinguished on and by the issuing of the leases or was native title merely suspended during the terms of the respective leases? The answer to this question depends on the nature of the Crown's reversion.

5. The nature of the Crown's reversion

In *Mabo [No 2]* I expressed the view[87]:

"If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium."

If this be the correct view, there is no occasion for the revival of native title. The Crown's title to the land on reversion would be inconsistent with a continued right to enjoy native title. The **Wik** and Thayorre submissions together raise two grounds of challenge to the view I expressed in *Mabo [No 2]*: first, that a pastoral lease is issued in exercise of a statutory power, not in exercise of the Crown's proprietary rights in the land and that the interest of the Crown on reversion is no more than the radical title or, alternatively, no more than the minimum proprietary interest required to support the leasehold interest possessed by the lessee; and second, the rights and interest of the native title holders are suspended only to the extent necessary to admit the interest of the pastoral lessee and, on expiry of the term[88] or earlier determination of the lease, revive[89].

The **Wik** and Thayorre submissions treat the grant of a pastoral lease as no more than an exercise of a statutory power conferring statutory rights, having no significance for the Crown's beneficial interest in the land demised. So viewed, the way is open to contend that native title is merely suspended during the currency of a lease and, when the lease is determined, the Crown has no reversionary interest but only its original radical title burdened by the native title. It is submitted that, although s 135 of the 1910 Act provided that on forfeiture or other determination of a lease prior to expiry of the term "the land shall revert to His Majesty and become Crown land, and may be dealt with under this Act accordingly", that section said nothing as to the Crown's legal and beneficial interest in the land but merely ensured that the Crown dealt with the land after it reverted to His Majesty in accordance with the Act. This argument accounts for the application of s 135 to the expiry of licences as well as to the determination of leases.

If it were right to regard Crown leaseholds not as estates held of the Crown but merely as a bundle of statutory rights conferred on the lessee, it would be equally correct to treat a "grant in fee simple" not as the grant of a freehold estate held of the Crown but merely as a larger bundle of statutory rights. If the grant of a pastoral lease conferred merely a bundle of statutory rights exercisable by the lessee over land subject to native title in which the Crown (on the hypothesis advanced) had only the radical title, the rights of the lessee would be jura in re aliena: rights in another's property. And, if leases were of

that character, an estate in fee simple would be no different. Then in whom would the underlying or residual common law title subsist? Presumably, in the holders of native title. But such a theory is inconsistent with the fundamental doctrines of the common law[90]. And it would equate native title with an estate in fee simple which, ex hypothesi, it is not. To regard interests derived from the Crown as a mere bundle of statutory rights would be to abandon the whole foundation of land law applicable to Crown grants. In *Mabo [No 2]*, Deane and Gaudron JJ declared that the general common law system of land law applied from the establishment of the first Australian colony. Their Honours said[91]:

"It has ... long been accepted as incontrovertible that the provisions of the common law which became applicable upon the establishment by settlement of the Colony of New South Wales included that general system of land law[92]. It follows that, upon the establishment of the Colony, the radical title to all land vested in the Crown. Subject to some minor and presently irrelevant matters, the practical effect of the vesting of radical title in the Crown was merely *to enable the English system of private ownership of estates held of the Crown to be observed in the Colony*. In particular, the mere fact that the radical title to all the lands of the Colony was vested in the British Crown did not preclude the preservation and protection, by the domestic law of the new Colony, of any traditional native interests in land which had existed under native law or custom at the time the Colony was established." (Emphasis added.)

The English system of private ownership of estates held of the Crown rests on "two fundamental doctrines in the law of real property"[93], namely, the doctrine of tenure and the doctrine of estates.

By the interlocking doctrines of tenure and estates, the land law provides for the orderly enjoyment in succession of any parcel of land. The doctrine of tenure creates a single devolving chain of title and the doctrine of estates provides for the enjoyment of land during successive periods[94]. The doctrines of tenure (with its incident of escheat[95]) and estates ensure that no land in which the Crown has granted an interest is ever without a legal owner[96]. The creation of a tenure, however limited the estate in the particular parcel of land may be, establishes exhaustively the entire proprietary legal interests which may be enjoyed in that parcel of land. If the interests alienated by the Crown do not exhaust those interests, the remaining proprietary interest is vested in the Crown. In *In re Mercer and Moore*[97], Jessel MR said:

"If a freehold estate comes to an end by death without an heir, or by attainder, it goes back to the Crown on the principle that all freehold estate originally

came from the Crown, and that where there is no one entitled to the freehold estate by law it reverts to the Crown."

In this country, the Crown takes either by reversion on expiry of the interest granted or by escheat on failure of persons to take an interest granted. It is unnecessary for present purposes to distinguish between them[98].

By exercise of a statutory power to alienate an estate in land, the Crown creates, subject to statute, a tenure[99] between the Crown and the alienee. It follows that, subject to statute - and all powers of alienation of interests in land in Australia are governed by statute[100] - where a leasehold estate is the only proprietary interest granted by the Crown in a parcel of land[101] and the lessee is in possession, a legal reversionary interest must be vested in the Crown. Such an interest is the necessary foundation for the existence of a right to forfeit for breach of condition[102].

An exercise of the statutory power of alienation of an estate in land brings the land within the regime governed by the doctrines of tenure and estates. Once land is brought within that regime, it is impossible to admit an interest which is not derived mediately or immediately from a Crown grant or which is not carved out from either an estate or the Crown's reversionary title. Native title is not a tenure[103]; it is not an interest held of the Crown, mediately or immediately. It is derived solely from the traditional laws and customs of the indigenous peoples. Consistently with our constitutional history and our legal system, it is recognised as a common law interest in land provided it has not been extinguished by statute, by a valid Crown grant of an estate inconsistent with the continued right to enjoy native title or by the Crown's appropriation and use of land inconsistently with the continued enjoyment of native title. As the majority judgment in *Western Australia v The Commonwealth. Native Title Act Case*[104] said:

"Under the common law, as stated in *Mabo [No 2]*, Aboriginal people and Torres Strait Islanders who are living in a traditional society possess, subject to the conditions stated in that case, native title *to land that has not been alienated or appropriated* by the Crown." (Emphasis added.)

It was only in respect of unalienated and unappropriated land that native title was recognised as subsisting. Thus I noted in *Mabo [No 2]*[105]:

" As the Governments of the Australian Colonies and, latterly, the Governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last two hundred years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands. They were dispossessed by the Crown's exercise of its sovereign powers to grant land to whom it

chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes."

Native title is not recognised in or over land which has by alienation become subject to inconsistent rights or which has by Crown use become unavailable for continued enjoyment of native title.

The provisions of the 1910 Act admit of no interest in land the subject of a pastoral lease being held by any person other than the Crown, the lessee and persons taking an interest under the lease. Historically, it is impossible to suppose that Parliament, in enacting the 1910 Act (or, for that matter, the 1962 Act) might have intended that any person other than the Crown should have any reversionary interest in land subject to a pastoral lease. In 1910 (as in 1962), no recognition was accorded by Australian courts to the existence of native title in or over land in Australia. On the contrary, the common understanding was that, from the beginning of colonial settlement, Crown grants were made out of the Crown's proprietary title to all land in the colony[106]. The 1910 Act makes it clear that, on the issue of a pastoral lease, the reversion was held by the Crown. Rent was a debt "due to His Majesty"[107], the Minister was the recipient of a notice of intention to surrender[108] and forfeiture was enforced only if the Governor in Council so decided[109]. On forfeiture, the land reverted to His Majesty[110]; on forfeiture or surrender, improvements to the property were deemed to be vested in the Crown but were to be paid for by the "incoming lessee, selector, or purchaser"[111]; and provision was made for dealing with land "pursuant to a certificate given under '*The Escheat (Procedure and Amendment) Act*, 1891'"[112]. The last-mentioned Act provided a simplified procedure for ascertaining "the failure of the heirs or next-of-kin of an intestate, or the alienage of a grantee, or such other facts, as may be necessary to establish the title of Her Majesty in right of the Crown or otherwise"[113]. The procedure was prescribed in order to determine, inter alia, questions arising "as to the title of Her Majesty in right of the Crown to any land or interest in land in any case of escheat or alleged escheat"[114]. Thus, the 1910 Act treated the Crown as having not only the power to issue a lease and thus entitle the lessee to a leasehold estate but also as having the reversionary interest which, under the ordinary doctrines of the common law, a lessor had to possess in order to support and enforce the relationship of landlord and tenant. The 1910 Act also conferred certain statutory rights on pastoral lessees, the exercise of which would require the carving of further proprietary interests out of the reversion. The lessee of a pastoral lease whose term had expired had a priority right[115], if the land was then open to selection[116], to apply for a selection, some categories of which conferred a right to acquire the selection in fee simple[117] and others a right to take it on perpetual lease[118]. These interests were clearly intended to be carved out of the Crown's reversionary title, not out of the title of a third party.

The **Wik** submission then denies the Crown's title to the reversion on the ground that it is not assignable. That objection could as easily be raised to the proprietary interest of the Crown. But the Crown "assigns" a proprietary interest in its land by grant unless the Crown has acquired an interest that is assignable, for example, the interest of a sub-lessor.

It is only by treating the Crown, on exercise of the power of alienation of an estate, as having the full legal reversionary interest that the fundamental doctrines of tenure and estates can operate. On those doctrines the land law of this country is largely constructed. It is too late now to develop a new theory of land law that would throw the whole structure of land titles based on Crown grants into confusion. Moreover, a new theory which undermines those doctrines would be productive of uncertainty having regard to the nature of native title. That is a problem which will be examined in the next section.

6. Temporary suspension of native title

The second limb of the **Wik** and Thayorre attack on the notion of the Crown's title on reversion limits that title to a nominal period after the determination of the lease. This submission is supported by the thirteenth respondent ("ATSIC") which submits that the Crown should not be taken, upon the granting of a limited estate, to appropriate to itself ownership of the reversion for an unlimited time. At common law, a lessor who grants a leasehold estate needs an estate out of which the leasehold estate is carved[119], else there can be no demise[120]. The lessor needs no more to support the grant than an estate greater (or deemed to be greater) than the estate granted[121]. The demise in a pastoral lease would be supported if the Crown's reversion were limited to some nominal period beyond the term of the lease. That would be a sufficient estate to allow the Crown to enforce conditions binding on the lessee[122].

Must the Crown's title be treated as any greater when the land is subject to a claim of native title? The hypothesis of the submission must be that native title subsists notwithstanding the demise of the land for the term of the pastoral lease and that the Crown acquires no more than a nominal proprietary interest sufficient to support the lease. Upon the determination of the lease, native title revives - assuming there are persons who satisfy the qualifications of native title holders - and burdens the Crown's radical title in the same way as native title burdened that title prior to alienation. Logically, this hypothesis would attribute to the Crown no more than a radical title (that is essentially a power of alienation controlled by statute) whenever there might be a gap in or cesser of the proprietary interest of an alienee. It would treat that proprietary interest as a bundle of statutory rights to which the doctrines of tenure and estates had no necessary application. No land would escheat to the Crown, at least while there were any surviving holders of native title. That cannot be

accepted. Even if the grant of a lease were seen merely as an exercise of sovereign power and not as an alienation of property, the land would go back to the Crown on the determination of the lease, if not as a matter of title then as a matter of seigniory[123].

Nevertheless, the hypothesis seems to be internally consistent. But it fails to attribute to the doctrines of tenure and estates their function of maintaining the skeleton of the law of real property unless native title is treated as the equivalent of an estate in remainder, falling into possession on the determination of a prior estate. Of course, native title is not an estate and to treat native title as falling into possession on the determination of a prior estate is to create problems of title not easy to resolve. If the holders of native title were recognised as the owners of an estate in remainder in the land, could the priority right to a selection enjoyed by a lessee[124] be exercised? And would the holders of native title have become liable to pay for the improvements to the land effected during the expired lease?[125] To what extent was the discretion to enforce a forfeiture against a lessee affected by the supposed subsistence of native title in the land? In the unusual event of the determination of an estate in fee simple, would the land revert to the Crown or would it be taken by the holders of native title? And, since the*Racial Discrimination Act* 1975 (Cth) commenced, would the provisions[126] which annex statutory rights to a pastoral lease (for example, a right to receive an offer of a new lease) be ineffective by reason of s 109 of the Constitution?

These questions indicate some of the problems that arise once the fundamental doctrines that govern the title to land granted by the Crown under the 1910 Act are departed from. In my opinion, the common law could not recognise native title once the Crown alienated a freehold or leasehold estate under that Act. Consequently, the common law was powerless to recognise native title as reviving after the determination of a pastoral lease issued under the 1910 Act. Does equity provide any relief to the erstwhile holders of native title?

7. The claims for equitable relief

The **Wik** and Thayorre submissions assert the existence of a fiduciary duty owed by the Crown to the indigenous inhabitants of the leased areas. The duty is said to arise from the vulnerability of native title, the Crown's power to extinguish it and the position occupied for many years by the indigenous inhabitants vis-à-vis the Government of the State. These factors do not by themselves create some free-standing fiduciary duty. It is necessary to identify some action or function the doing or performance of which attracts the supposed fiduciary duty to be observed[127]. The doing of the action or the performance of the function must be capable of affecting the interests of the beneficiary and the fiduciary must have so acted[128] that it is reasonable for the beneficiary to believe and expect that the fiduciary will act in the interests

of the beneficiary (or, in the case of a partnership or joint venture, in the common interest of the beneficiary and fiduciary[129]) to the exclusion of the interest of any other person or the separate interest of the beneficiary[130].

In the present case the only relevant function performed by the Crown is the exercise of the power of alienation. That is the only power the exercise of which relevantly affects native title. With all respect for the opposing view, I am unable to accept that a fiduciary duty can be owed by the Crown to the holders of native title in the exercise of a statutory power to alienate land whereby their native title in or over that land is liable to be extinguished without their consent and contrary to their interests.

The exercise of statutory powers characteristically affects the rights or interests of individuals for better or worse. If the exercise of a discretionary power must affect adversely the rights or interests of individuals, it is impossible to suppose that the repository of the power shall so act that the beneficiary might expect that the power will be exercised in his or her interests. The imposition on the repository of a fiduciary duty to individuals who will be adversely affected by the exercise of the power would preclude its exercise. On the other hand, a discretionary power - whether statutory or not - that is conferred on a repository for exercise on behalf of, or for the benefit of, another or others might well have to be exercised by the repository in the manner expected of a fiduciary[131]. Thus in*Guerin v The Queen*[132], the Crown accepted a surrender by an Indian band of native title to land in order that the land be leased by the Crown to a third party. The statutory scheme which provided for the surrender to the Crown and its subsequent dealing with the land imposed on the Crown the duty to act "on the band's behalf"[133], as "the appointed agent of the Indians ... and for their benefit"[134] or for their "use and benefit"[135]. Similarly, in the United States the statutory scheme for dealing with Indian land requires the sanction of a "treaty or convention entered into pursuant to the Constitution"[136]. The scheme has its origin in the *Indian Nonintercourse Act* 1790 (US)[137] which, in its successive forms, has been held to impose on the Federal Government "a fiduciary duty to protect the lands covered by the Act"[138].

The power of alienation conferred on the Crown by s 6 of the 1910 Act is inherently inconsistent with the notion that it should be exercised as agent for or on behalf of the indigenous inhabitants of the land to be alienated. Accordingly, there is no foundation for imputing to the Crown a fiduciary duty governing the exercise of the power.

This conclusion precludes the acceptance of a further submission made on behalf of the **Wik** and Thayorre Peoples. That submission sought to impose a constructive trust in their favour of the Crown's reversionary interest in the leased land. If the constructive trust be viewed as a remedial institution,

as Deane J viewed it in *Muschinski v Dodds*[139], it is nevertheless available "only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles"[140]. Given that no fiduciary duty was breached by the Crown in issuing the pastoral leases under s 6 of the 1910 Act and that the issue of those leases destroyed native title, there is no principle of law or equity which would require the imposition of a constructive trust on the reversion to restore what the holders of native title had lost.

The **Wik** submission raises another equitable basis of relief. It is said that, by reason of the acquiescence of the State and the pastoral lessees in the continued exercise by the **Wik** Peoples of their native title rights, it would be unconscionable now to hold them liable to ejectment without investigation of the basis or bases on which they have remained in occupation. The propounded basis of relief depends, of course, on contested issues of fact but that basis was not pleaded. Prior to the hearing in this Court, the submission was not argued. It would not be appropriate to express any view on the merits of the submission at this stage. This appeal relates to the answers given by Drummond J to the questions determined as preliminary issues. Those questions turn on the subsistence of native title, not on the existence of an equity which would entitle the **Wik** Peoples to remain on the land to continue to exercise the rights which they would have been entitled to enjoy if native title still subsisted.

In the result, I would hold the answers given by Drummond J to questions 1B and 1C to be correct. The **Wik** and Thayorre Peoples' claims fail because native title was extinguished on the issue of the leases under s 6 of the 1910 Act. It is unnecessary to advert to the effect of the 1962 Act. The principles of the law may thus be thought to reveal "a significant moral shortcoming" which can be rectified only by legislation or by the acquisition of an estate which would allow the traditions and customs of the **Wik** and Thayorre Peoples to be preserved and observed. Those avenues of satisfaction draw on the certainty of proprietary rights created by the sovereign power. Such rights, unlike the rights of the holders of native title, are not liable to extinguishment by subsequent executive action.

8. Claims against Comalco, Pechiney and Queensland

The Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957 (Q) ("the Comalco Act") provided for the making of an agreement between the State of Queensland and Comalco. Section 2 provides:

" The Premier and Chief Secretary is hereby authorised to make, for and on behalf of the State of Queensland, with Commonwealth Aluminium

Corporation Pty Limited, a company duly incorporated in the said State and having its registered office at 240 Queen Street, Brisbane, in the said State, the Agreement a copy of which is set out in the Schedule to this Act (herein referred to as 'the Agreement')."

Section 3 provides:

" Upon the making of the Agreement the provisions thereof shall have the force of law as though the Agreement were an enactment of this Act.

The Governor in Council shall by Proclamation notify the date of the making of the Agreement."

The Agreement set out in the schedule required the State, inter alia, to grant to Comalco a Special Bauxite Mining Lease for an initial term of 84 years[141]. The form of lease was prescribed[142]. The Agreement was made on 16 December 1957 and the lease was issued on 3 June 1965 as ML7024.

The **Wik** submission contends that the Agreement and ML7024 were entered into in disregard of the rules of procedural fairness and in breach of the State's fiduciary duty to the **Wik** Peoples and that Comalco was a party to that breach. It is further contended that the State and Comalco were unjustly enriched by the breach. Relief is claimed on the footing that the decisions to enter into the Agreement and to grant ML7024 were invalid and that the Agreement and ML7024 are invalid. The relief claimed relates to impairment or loss of the **Wik** Peoples' enjoyment of native title rights and possessory rights in or over the land leased and the benefits derived by Comalco from exploiting the lease. Comalco's response is that, as s 3 gives the Agreement the force of law, no claim by the **Wik** Peoples can be based on any irregularity or breach of duty that might have occurred in the course of negotiating or executing the Agreement.

Section 3 was referred to by Dunn J in *Commonwealth Aluminium Corporation Limited v Attorney-General*[143] in these terms:

"By providing, in s 3, that upon the making of the Agreement its provisions 'shall have the force of law as though the Agreement were an enactment of this Act,' legal effect is given to provisions which otherwise would lack such effect, because of such legislation as I have already discussed. The Agreement remains something apart from the Act, however, the legislative artifice adopted in order to give it effect does not make it, in point of law, 'an enactment of this Act'."

This judgment led to the submission that the effect of s 3 was limited to the overriding of particular legislative impediments to the making or

implementation of the Agreement. That is too narrow a view of the operation of s 3. To take one example: that view would not admit that mandamus might have gone to compel the granting of the Special Bauxite Mining Lease pursuant to cl 8 of the Agreement, although the State's obligation to grant that lease was the leading purpose of theComalco Act.

However, the sufficiency of the Comalco response turns on the operation attributed to s 2 as well as to s 3 of the Comalco Act. Although s 2 authorises, but does not command, the Premier and Chief Secretary to make the Agreement, the authorisation it gives is unqualified by any requirement as to the performing of a fiduciary duty or the according of natural justice. So soon as the Agreement is in fact made, s 3 operates to give it the force of law "as though [it] were an enactment of this Act". It follows that, the Agreement having been made, the powers conferred by the Agreement acquire the force of statutory powers. Thus s 3 operates to give validity to what is done in their exercise[144]. Therefore the granting of the Special Bauxite Mining Lease was valid. Moreover, whatever consequences flowed to the **Wik** Peoples from the granting of that lease could not be actionable loss or damage, for those consequences were the result of an act sanctioned by the Comalco Act.

Nor could relief be granted in relation to the benefits derived by Comalco's exploitation of the lease for those benefits flowed to Comalco from the granting of the lease pursuant to legislative authority.

The Comalco response is thus good in law.

The **Wik** claim against Aluminium Pechiney Holdings Pty Limited (Pechiney) and the submission in support arise from the making and implementing of an Agreement (the "Associates Agreement") authorised by the *Aurukun Associates Agreement Act* 1975 (Q). The Associates Agreement provided for the grant of a Special Bauxite Mining Lease[145] for 42 years[146] in a form set out in the Fourth Schedule to that Agreement[147]. The provisions of the *Aurukun Associates Agreement Act*, the allegations in the statement of claim with respect to the making of the Associates Agreement under that Act and the relief claimed are indistinguishable from the provisions of the Comalco Act and the allegations and the relief claimed against Comalco. Pechiney's response, substantially identical to Comalco's response, is also good in law. The claim against Pechiney seeks relief in respect of an earlier agreement (the "Access Agreement") between the Director of Aboriginal and Islanders' Advancement and certain corporations including Pechiney. The Access Agreement was scheduled to the Associates Agreement, the latter being given the force of law. The third respondent (The Aboriginal and Islander Affairs Corporation) is the statutory successor of the Director and is sued in that capacity. An account is sought against both Pechiney and the third respondent by reason of their entry into the Access

Agreement and the obtaining of benefits under it. However, in *The Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna*[148]the Privy Council held that the *Aurukun Associates Agreement Act* ratified the Access Agreement and recognised it as valid and subsisting. There is no reason to dissent from that view, the consequence of which is that neither entry into the Access Agreement nor the obtaining of benefits under it can give rise to a cause of action in the **Wik** Peoples. It follows that the answers given by Drummond J to questions 4 and 5 were correct.

I would dismiss the appeals and make orders for costs against the **Wik** Peoples and the Thayorre People in favour of those parties who opposed their claims. I would make no order as to the costs to be paid to or by other parties.

DAWSON J. In the *Native Title Act Case*[149] I indicated that I intended to follow the decisions of this Court in *Mabo v Queensland [No 1]*[150] and*Mabo v Queensland [No 2]*[151]. Following that course, I am able to express my agreement with the judgment of the Chief Justice in these matters. I have nothing which I wish to add.

TOOHEY J.

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Introduction

These proceedings, which were removed into this Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth), have their origin in an action brought by the **Wik** Peoples in the Federal Court of Australia. That action was initiated before the coming into operation of the *Native Title Act* 1993 (Cth). The catalyst for the action was the decision of this Court in *Mabo v Queensland [No 2]*[152].

The proceedings in the Federal Court were described by Drummond J in the following terms[153]:

"The action was brought by the **Wik** Peoples, an Aboriginal clan or group, for a declaration that it has certain native title rights over a large area of land in North Queensland. They also claim damages and other relief, if it be found that their native title rights have been extinguished. One of the respondents is the Thayorre People, another Aboriginal clan or group, who have cross-claimed for a similar declaration in respect of lands that, in part, overlap those the subject of the **Wik** Peoples' claim."

However, by the time of his Honour's judgment the **Wik** Peoples had included an alternative claim under the *Native Title Act* though that claim is not the subject of the judgment or of this appeal. Although his Honour speaks of "native title rights"[154], that is not precisely the language of the relevant pleadings. Paragraph 8 of the statement of claim in its amended form filed on behalf of the **Wik** Peoples asserts that "The **Wik** peoples and their predecessors in title are and have always been the holders of Aboriginal title in ... the claimed land". "Aboriginal title" is defined in par 1 of the statement of claim as meaning

"title to land arising by virtue of Aboriginal tradition and recognised by the common law of Australia and has the same meaning as 'native title' as defined in the*Native Title Act*, 1993 (CTH)".

"Native title" and "native title rights and interests" have a common definition in s 223 of the *Native Title Act*. Each expression 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."

The significance of the definition for the appeal by the **Wik** Peoples lies largely in a system of "rights and interests" to which the definition adverts. This will become clearer as these reasons progress.

The cross-claim of the Thayorre People also uses the language of "aboriginal title". Their statement of claim does not define that title quite in the way that the pleading of the **Wik** Peoples does; rather it describes the expression by reference to their and their predecessors' occupation and use of the land claimed and their connection with it

"in accordance with a system of rights, duties and interests exercised, acknowledged and enjoyed by Thayorre individuals, families, clans and groups in accordance with their traditional laws and customs".

Nevertheless, they claim title by reason of "a system of rights, duties and interests". Again, the significance of this formulation will emerge later in these reasons.

Accordingly, references in the judgment of Drummond J to native title rights must be understood in light of the pleadings, as must the use of the expression in these reasons.

The land claimed by the **Wik** Peoples and the Thayorre People ("the appellants") includes land over which pastoral leases were granted by the Crown. The former claim encompasses land the subject of the Holroyd River Holding lease ("the Holroyd lease"). The Mitchellton pastoral leases ("the Mitchellton leases") were granted over land within the area of claim by the Thayorre People and also by the **Wik** Peoples. Central to the claims was the argument that native title rights had survived the granting of these pastoral leases. Save in one respect, which is discussed later in these reasons under the heading "Non-entry into possession", no attack was made by the appellants on

the efficacy of the pastoral leases. In effect the **Wik** Peoples and the Thayorre People each argued for native title or aboriginal title, "co-existing" with the interests of the lessees. In the event of an inconsistency between rights exercisable by a lessee and rights exercisable by the holders of native or aboriginal title, the appellants accepted that the former would prevail. While accepting the language of extinguishment, the appellants were disposed to argue in terms of restrictions on the enforceability of their rights.

On 29 January 1996 Drummond J gave judgment on five preliminary questions which had been identified for the purposes of the proceedings in the Federal Court[155]. In the course of those answers, his Honour held that each of the leases in question conferred on the lessee "rights to exclusive possession" of the land and that thereby the grant of each lease "necessarily extinguish[ed] all incidents of Aboriginal title ... in respect of the land demised under the pastoral lease". This is a considerable over-simplification of Drummond J's judgment but it will suffice at this stage in order to show how the matters come before this Court[156]. It should be noted, however, that his Honour did not decide whether the appellants are the holders of native title rights in respect of the leased land. That matter was not explored and is shut out by his Honour's answers to the questions. The result is to clothe the principal questions with a certain unreality.

Drummond J also answered questions bearing on claims by the appellants against the State of Queensland, Comalco Aluminium Ltd, and Aluminium Pechiney Holdings Pty Ltd[157]. By those claims the **Wik** Peoples challenged the validity of Special Bauxite Mining Leases which had been granted by the State to mining companies under the authority of Queensland legislation.

On 22 March 1996 Spender J granted the appellants leave to appeal to the Full Court of the Federal Court against the judgment of Drummond J. Leave was necessary because his Honour's judgment was interlocutory and did not dispose finally of the proceedings. Notices of motion were filed in the Federal Court seeking removal of both matters to the High Court. An order to that effect was made on 15 April.

An amended notice of appeal filed in this Court on 28 May excised any challenge to the answer given by Drummond J to the first question asked of him, namely, whether the power of the Queensland Parliament at the time of its establishment and thereafter was subject to a limitation that prevented it from enacting laws providing for the grant of pastoral leases that do not preserve native title rights. His Honour answered that question adversely to the appellants.

In its present form the notice of appeal is primarily a challenge to the conclusion of Drummond J that the grant of the Holroyd lease and the Mitchellton leases in each case extinguished any native title rights in the land. When the hearing began in this Court, leave to intervene was granted to State and Territory governments and others. However, the Court made it clear that it proposed to deal only with the particular questions raised by the notice of appeal, questions which related specifically to the Holroyd and Mitchellton leases.

His Honour's approach to the significance of the pastoral leases in question, dictated as he considered by the majority judgment of the Full Court of the Federal Court in *North Ganalanja Aboriginal Corp v Queensland*[158], was in the following terms[159]:

" I regard the majority decision as binding authority that the executive act of granting a pastoral lease under Crown lands legislation that does not differ materially from the Land Act 1902 will extinguish any native title rights that existed in respect of the Crown land the subject of the lease, provided the lease confers a right to exclusive possession for other than a short period on the lessee and also provided the lease does not contain a reservation sufficient to preserve those native title rights."

The conclusion reached by the Full Court in *North Ganalanja* was that the 1904 pastoral lease under consideration in that case necessarily extinguished any native title rights that may have existed in the land leased, for the reason that the lease conferred a right of exclusive possession on the lessee. This right of exclusive possession, though limited in time to the duration of the lease, was held sufficient to extinguish all native title rights. Drummond J observed[160]:

"I also regard the majority decision as authority binding on me that a lease will confer a right to exclusive possession sufficient to have that extinguishing effect, notwithstanding the fact that the lessee's interest is fettered by conditions and statutory limitations of the kind to which the 1904 lease was subject and notwithstanding that the grant is expressed to be 'for pastoral purposes only', as was the 1904 lease".

Nevertheless, his Honour qualified this approach, at least to the extent of recognising that there may be a question of degree involved in determining whether a pastoral lease does extinguish native title rights where a short term is involved. He referred also to the extent of any restrictions imposed by the lease and the statute pursuant to which it was granted as matters relevant to the issue whether

"the particular lease truly does confer a right of exclusive possession or at least a right of possession sufficiently exclusive to extinguish native title"[161].

The Holroyd River Holding lease

The story of the Holroyd lease begins with Instrument of Lease No 4652, dated 8 February 1945. It is titled "Lease of Pastoral Holding under Part III, Division 1 of '*The Land Acts*, 1910 to 1943'"[162]. The lease is expressed to be for "pastoral purposes only". The lessee is identified as Marie Stuart Perkins and the term of the lease is 30 years from 1 October 1944 at a yearly rent. The area leased is 1,119 square miles. Reference is made in the instrument to a notification dated 8 June 1944

"declaring the said land open for Pastoral Lease, and to all other rights, powers, privileges, terms, conditions, provisions, exceptions, restrictions, reservations, and provisoes referred to, contained, or prescribed in and by the said Acts[163], '*The Mining on Private Land Acts*, 1909 *to* 1929,' and *The Petroleum Acts*, 1923 *to* 1939,' or any Regulations made or which may hereafter be made under the aforesaid Acts or any of them".

The lease also contains reservations of minerals and petroleum and rights of access for the purpose of searching for and obtaining them. It concludes:

"AND WE DO FURTHER RESERVE the right of any person duly authorised in that behalf by the Governor of Our said State in Council 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".

On 20 December 1972 the then lessees, John Herbert Broinowski, John Darling, James Maurice Gordon and Ross Farm Pty Limited, applied under s 155 of*The Land Acts* 1962 to 1967 for the grant of a new lease of the holding. The application contains a description of the land by the lessees: natural waters only; bloodwood, ironwood, stringy bark, ti-tree, messmate, ironstone ridges with some melon-hole country, some spear grass with some kangaroo, purely breeding country; approximately one beast to 60 acres; country suitable for cattle breeding only; no improvements; no accommodation.

There followed correspondence between the Land Administration Commission and the lessees, as a result of which the subsisting lease was surrendered so that a new lease might issue. The new lease, which is the current lease, is Instrument of Lease No 4652, dated 27 March 1975. It is titled "Lease of Pastoral Holding under Part VI, Division 1, of the *Land Act* 1962-1974". It is not expressed to be for "pastoral purposes only". It identifies the former lessees as the new lessees. It is for a term of 30 years

from 1 January 1974 at a yearly rent. It is expressed to be subject to statutory and other reservations similar to those contained in the earlier lease. It is granted upon condition that within five years from the commencement of the lease the lessees carry out a number of improvements by way of buildings, an airstrip, internal fencing, dams, a set of main yards and dip; sow 100 acres at least as a seed production area; and "Enclose the holding with a good and substantial fence". The lessees are further required "during the whole term of the lease [to] maintain all improvements".

In his judgment Drummond J said[164]:

"The question[165] focuses solely on the current lease and ignores the earlier lease because the current lease is no doubt considered to be typical of a number of leases granted over lands in the area of the applicants' claim not previously leased."

His Honour concluded[166]:

"This lease is subject to substantially less onerous restrictions than was the 1904 lease considered in the *North Ganalanja* case ... There is no ground for holding that this lease is so different in any material respect from the 1904 lease that it should not be held ... to confer on the lessee the right to exclusive possession of the area of the lease. It follows that, upon the grant of this lease, any native title rights the applicants held in respect of those lands were extinguished, unless the lease contained a reservation sufficient to preserve those rights to the applicants."

Nevertheless, reference is made in these reasons from time to time to the earlier lease.

The Mitchellton Pastoral Holding leases

These leases were granted over lands within the area of claim by the Thayorre People.

The story of this leasehold begins with Instrument of Lease No 2464, dated 25 May 1915. It is titled "Lease of Pastoral Holding under Part III, Division 1 of 'The Land Act of 1910'". The lessees were Alfred Joseph Smith, Thomas Alexander Simpson and Marshall Hanley Woodhouse. It is expressed to be for "pastoral purposes only". The term of the lease is 30 years from 1 April 1915 at a yearly rent. The area leased is 535 square miles. The lease has reservations which are similar to, though not identical with, the reservations in the Holroyd lease. There is no reservation of petroleum; the *Petroleum Act* had not then been enacted.

The lessees never took possession of the holding. On 20 July 1918 the lease was forfeited, "the lessees having failed to pay the annual rent due". Shortly thereafter the Mitchellton area was declared open for pastoral lease.

Instrument of Lease No 2464, dated 14 February 1919, was also granted under Pt III Div 1 of *The Land Act* 1910 (Q). It was of the same land as the 1915 lease. The lessee was Walter Sydney Hood. The lease is expressed to be for "pastoral purposes only". It was for a term of 30 years from 1 January 1919. The lease was subject to reservations under *The Mining on Private Land Act* 1909 (Q) and *The Petroleum Act* 1915 (Q). Like the previous lease, it concluded with a reservation, concerning the right of entry by authorised persons, in the general terms noted in the Holroyd lease.

On 9 September 1919 Mr Hood transferred his interest as lessee to The Byrimine Pastoral Properties Limited. On 12 October 1921 the company surrendered the lease pursuant to s 122 of *The Land Act* 1910. On 8 July 1921 the Chief Protector of Aboriginals had written to the Under Secretary, Home Secretary's Department, Brisbane, noting that the Chief Protector's Office had not been consulted at the time of the lease in 1919 and that "there are about 300 natives roaming on this country, and when the company starts operations the natives will doubtless be hunted off". The Chief Protector noted that there was a suggestion that the lease might be allowed to lapse. In that event, he said, "I would strongly urge that, before allowing anyone else to obtain possession, this Department be first consulted as regards the need for reserving the area for native purposes". On 12 January 1922, an Order in Council reserved the land, the subject of the former leases, for the use of Aboriginal inhabitants of Queensland. The reservation of the land did not extinguish any native title rights then in existence[167].

Speaking of the Mitchellton leases, Drummond J said[168]:

" The lease considered in the *North Ganalanja* case, supra, and those granted under the *Land Act* 1910 confer substantially the same rights on the lessee and subject him to substantially the same restrictions: the 1904 lease was subject to a more restrictive limitation than the Mitchellton Pastoral Leases in that it was subject to a condition reserving to the Crown unrestricted right to resume land for reserves without compensation (save for improvements)."

His Honour then went on to say (as he had said in the case of the Holroyd lease) that each of the leases issued under the 1910 legislation was subject to a less burdensome range of limitations and restrictions than the lease considered in *North Ganalanja*. He concluded[169]:

"It therefore follows that each of these leases should be held to confer the right to the exclusive possession of the leased area on the lessees. The grant of

the first of the Mitchellton Pastoral Leases must therefore be taken to have extinguished any native title rights the Thayorre People may previously have enjoyed with respect to the leased lands."

Pastoral leases: general observations

At the heart of the argument in the present case - 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.

Expressed with that generality, the proposition tends to conceal the nuances that are involved. The first step is to consider whether the relevant grants did in truth confer possession of the land on the grantees to the exclusion of all others including the holders of native title rights. That question is not answered by reference only to general concepts of what is involved in a grant of leasehold. The language of the statute authorising the grant and the terms of the grant are all-important. The second step is to determine whether, if such a grant did confer exclusive possession, native title rights were necessarily extinguished. This second step has within it two elements. The first looks at inconsistency, that is, whether and to what extent native title rights are inconsistent with the exclusive possession which the grant of a pastoral lease is said to carry. The second asks whether native title rights are thereby truly extinguished or whether they are simply unenforceable while exclusive possession vests in the holder of the pastoral lease. Because of the answers I propose to the questions asked, this second element does not arise for consideration.

The grant of the pastoral leases with which these appeals are concerned did not take place in an historical vacuum. It reflected the history of land grants in Queensland. That history cannot be understood without some reference to what had taken place in New South Wales of which Queensland earlier formed part.

Pastoral leases: an historical survey[170]

When the Australian colonies were first established there was no doubt as to the power of the Crown with respect to the disposition of waste lands. The Royal Prerogative was initially the source of grants of land in Australia[171]. The situation was explained by Windeyer J in *Randwick Corporation v Rutledge* in these terms[172]:

"The early Governors had express powers under their commissions to make grants of land. ... The colonial Act, 6 Wm IV No 16 (1836), recited ... that the

Governors ... had authority 'to grant and dispose of the waste lands' ... And when in 1847 a bold argument, which then had a political flavour, challenged the right of the Crown, that was to say of the Home Government, to dispose of land in the colony, it was as a legal proposition firmly and finally disposed of by Sir *Alfred Stephen CJ*: *The Attorney-General v Brown*".

Attorney General v Brown[173] was not followed in *Mabo [No 2]* but its historical role remains.

The need for statutory regulation was brought about by movements in New South Wales in the late 1820s to occupy large areas of land to depasture stock. The "squatters" moved on to land to which they had no title. The land was unsurveyed, their activities were uncontrolled. And of course they had no security. The colonial authorities met the movement of squatters with a system of occupation licences. The *Crown Lands unauthorized Occupation Act* 1839 (NSW)[174]established a Border Police force

"for the mutual protection and security of all persons lawfully occupying or being upon Crown Lands beyond the limits allotted for location".

The Act made it unlawful to occupy Crown lands beyond the limits of location without a valid lease or license; it imposed a penalty for unauthorised occupation. The protective reference to persons "being upon Crown Lands" was clearly wide enough to include Aborigines.

It was in 1842 that the management and disposal of Crown land was first brought under statutory control with the enactment of the *Sale of Waste Lands Act*1842 (Imp)[175]. "The year 1846 saw the first step taken along a road which led to the subsequent invention of a multitude of Australian tenures of new types."[176] In that year the *Sale of Waste Lands Act Amendment Act* 1846 (Imp)[177] authorised the making of Orders in Council. An Order in Council was issued in 1847 in respect of New South Wales. This made it lawful for the Governor to grant leases of land in unsettled districts for any term not exceeding 14 years for pastoral purposes. Dr Fry has described this Order in Council as having a two-fold significance in the New South Wales of the day.

"It brought to an end the policy of concentration of settlement, which was to have been achieved by the Crown refusing to alienate the fee simple of, or to lease, any land outside 'the nineteen counties' around Sydney or outside small areas around Hobart, Melbourne and Brisbane. It also introduced a system of Crown leasehold tenures which led to the whole of Australia being transformed in subsequent decades into a patchwork quilt of freeholdings, Crown leaseholdings, and Crown 'reserves'."[178]

Less than a decade later the English authorities, through the *New South Wales Constitution Act* 1855 (Imp), surrendered their control over Crown lands. Thereafter, the entire management and disposal of Crown lands was vested in the New South Wales legislature.

It is against this background that one goes to the situation in what later became the State of Queensland. By Proclamation dated 10 February 1842[179] the District of Moreton Bay ceased to be a penal settlement. Pursuant to the provisions of the *Crown Lands unauthorized Occupation Acts of 1839-1841*, a Commissioner of Crown Lands was appointed for the Moreton Bay District. Other Districts were proclaimed as settlement expanded in the move to open up new land for pastoral purposes.

In June 1859 Queensland became a separate colony. The laws of New South Wales, including laws regulating the "sale, letting, disposal and occupation" of waste lands, remained in force until repealed or varied by the legislature of the new colony. By Order in Council of 6 June 1859 the Queensland legislature was empowered to make laws with respect to waste lands. By s 30 of the *Constitution Act* 1867 (Q), "it shall be lawful for the Legislature of this colony to make laws for regulating the sale letting disposal and occupation of the waste lands of the Crown within the said colony". Section 40 vested the "entire management and control of the waste lands belonging to the Crown in the said Colony of Queensland ... in the Legislature of the said colony". The local legislature adopted the form of pastoral lease tenure which had evolved in New South Wales. Many statutes were passed between 1860 and 1962 which provided for or affected pastoral leases. It is unnecessary to detail them; it suffices to say they reflected a regime designed to meet a situation that was unknown to England, namely, the occupation of large tracts of land unsuitable for residential but suitable for pastoral purposes. Not surprisingly the regime diverged significantly from that which had been inherited from England. It resulted in "new forms of tenure"[180]. Regard must be had to the extraordinary complexity of tenures in Australia, perhaps most of all in Queensland. This can be seen most readily in the writings of Dr Fry.

While Australia inherited the English law of tenure, it must be remembered that the system of tenures had by then undergone much change. In 1788 socage and copyhold were the only lay tenures recognised by English law and frankalmoin was the only spiritual tenure. Frankalmoin was then obsolescent; it was never specified in any Australian grant. No land has been held here on copyhold tenure. Socage is the only form of tenure that, for practical if not theoretical purposes, has existed in this country.

As early as 1905 the authors of what became the standard real property text for New South Wales had written[181]:

"The law of real property now in force here, and the law on the same subject in force in England, present more numerous and more striking differences and divergences than are found in any other branch of equal importance. ... The English law of real property ... has ... received a strong impress of feudalism ... It was therefore natural that this medieval growth, when transplanted to new and uncongenial soil, should soon begin to wither in its weakest branches - that is to say, in the principles which derived the least support from public utility and convenience, and presented the most striking departures from modern notions of reason and justice."

What is important about this history of legislation, both in New South Wales and Queensland, is that it is essentially the story of the relationship between the Crown and those who wished to take up land for pastoral purposes. It reflects the desire of pastoralists for some form of security of title and the clear intention of the Crown that the pastoralists should not acquire the freehold of large areas of land, the future use of which could not be readily foreseen.

Writing in 1946-1947, Dr Fry commented[182]:

"A century of subsequent legislation by the various legislatures of Australia has developed a new system of land tenures in the various Australian States and Territories, so that it is now possible to say, with a very high degree of accuracy, that the constitutional supremacy of Australian Parliaments and the Crown over all Australian lands, as much as the feudal doctrines of the Common Law, is the origin of most of the incidents attached to Australian land tenures."

Of course Dr Fry was not writing with the principles enunciated in *Mabo [No 2]* in mind. His starting point was clear: "Rights in respect of any land in Australia must therefore be derived either directly or indirectly from the Crown, or not at all."[183] *Mabo [No 2]* has shown his starting point to be too narrow. What is important for present purposes is Dr Fry's focus on legislation rather than feudal doctrine in order to identify the incidents of tenure. This reinforces the need to look at the relevant statutory provisions, rather than simply apply feudal notions of tenure without considering their place in the statutory scheme. Thus in *R v Toohey; Ex parte Meneling Station Pty Ltd*, where the question was whether a grazing licence under the *Crown Lands Act* 1931 (NT) conferred an "estate or interest" in the land within the meaning of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), Mason J said[184]:

"The grazing licence is the creature of statute forming part of a special statutory regime governing Crown land. It has to be characterized in the light of the relevant statutory provisions without attaching too much significance to

similarities which it may have with the creation of particular interests by the common law owner of land."

These comments apply with particular force to Queensland where, at least at the time Dr Fry was writing, there were approximately 70 different kinds of Crown leasehold and Crown perpetual leasehold tenures. To approach the matter by reference to legislation is not to turn one's back on centuries of history nor is it to impugn basic principles of property law. Rather, it is to recognise historical development, the changes in law over centuries and the need for property law to accommodate the very different situation in this country.

Pastoral leases lie in the grant of the Crown. They are the creature of statute and the rights and obligations that accompany them derive from statute. In light of this, it is pertinent to turn to the legislation pursuant to which the leases the subject of these appeals were granted.

The *Land Act* 1910

The grants in question were of course of Crown land. The first Holroyd lease and both Mitchellton leases were granted pursuant to and subject to the conditions and provisos of Pt III Div 1 of the *Land Act* 1910 (Q).

The 1910 Act is described in its long title as

"An Act to Consolidate and Amend the Law relating to the Occupation, Leasing, and Alienation of Crown Land."

Section 6(1) empowers the Governor in Council, in the name of His Majesty, to "grant in fee-simple, or demise for a term of years, any Crown land within Queensland". "Crown Land" is defined[185] as

"All land in Queensland, except land which is, for the time being -

(a) Lawfully granted or contracted to be granted in fee-simple by the Crown; or

(b) Reserved for or dedicated to public purposes; or

(c) Subject to any lease or license lawfully granted by the Crown: Provided that land held under an occupation license shall be deemed to be Crown land".

Part III of the Act deals with Pastoral Tenures. The term pastoral tenures is wider than pastoral leases since it includes occupation licenses granted under Pt III[186]. Division 1 of Pt III prescribes the machinery whereby Crown land may be declared open for pastoral lease for a term not exceeding 30 years and

competing applications dealt with. When the term of any lease exceeds 10 years, the term is to be divided into periods, the last period to be of such duration as to permit the other period or periods to be of 10 years duration[187]. Division 1 contains other provisions relating to the computation of rent. Subject to what is said in the general provisions of the Act, little more appears as to the rights and obligations attaching to pastoral leases.

Division 11 of Pt III deals with occupation licenses. Section 45 empowers the Minister to declare Crown land to be open for occupation under occupation license. A yearly rent is payable. Each license expires on 31 December of the year in which it is granted but is renewable from year to year[188]. While Pt III makes specific provision for pastoral leases and occupation licenses in respect of term and rent, other parts of the Act apply equally to both.

There are two other sections of the 1910 Act which should be noted because of the attention paid to them (or their counterparts in later legislation) in argument. The first is s 135 which reads:

"If the license or lease of any land is determined by forfeiture or other cause before the expiration of the period or term for which it was granted, then, unless in any particular case other provision is made in that behalf by this Act, the land shall revert to His Majesty and become Crown land, and may be dealt with under this Act accordingly."

This section has relevance to the concepts of radical title and reversion to the Crown which are discussed later in these reasons.

The other provision is s 203 which reads:

"Any person, not lawfully claiming under a subsisting lease or license or otherwise under any Act relating to the occupation of Crown land, who is found occupying any Crown land or any reserve, or is found residing or erecting any hut or building or depasturing stock thereon, or clearing, digging up, enclosing, or cultivating any part thereof, shall be liable to a penalty not exceeding twenty pounds."

This provision was relied upon by the respondents as evidencing the exclusive possession of a pastoral lessee. I shall return to s 203 when dealing with that question.

As already noted, the leases granted under the 1910 Act[189] were expressed to be for "pastoral purposes only". "Pastoral purposes" is not defined in the Act nor are the grants of lease specific as to what the expression entails. Clearly it includes the raising of livestock. It also includes things incidental

thereto such as establishing fences, yards, bores, mills and accommodation for those engaged in relevant activities. But the use to which the land may be put is circumscribed by the expression "pastoral purposes only"; the rights of the lessee are to be determined accordingly.

The *Land Act* 1962

The second Holroyd lease, the one on which Drummond J focused, was granted in pursuance of Pt VI Div 1 of the *Land Act* 1962-1974.

The 1962 Act is described in its long title as

"An Act to Consolidate and Amend the Law relating to the Alienation, Leasing and Occupation of Crown Land."

With some transposition of words, the long titles of the 1910 and 1962 Acts are the same. The definition of "Crown land" in the 1962 Act is the same as that in the 1910 Act. The power to make grants and leases is virtually the same. In the 1962 Act s 6(1) empowers the Governor in Council, in the name of Her Majesty, to "grant in fee-simple, or demise for a term of years or in perpetuity, or deal otherwise with any Crown land within Queensland".

Part III of the 1962 Act deals with Pastoral Tenures which it identifies as pastoral leases, stud holdings (not found in the 1910 Act) and occupation licenses. Occupation licenses are dealt with similarly in both Acts. Part III Div 1 of the 1962 Act prescribes the machinery whereby Crown land may be declared open for pastoral lease. Section 49(1) identifies

"the following classes of tenure, namely:-

(a) pastoral holding; or

(b) pastoral development holding; or

(c) preferential pastoral holding".

These classes of pastoral lease are not defined. But s 49(1) provides that land may be declared open for pastoral lease under pastoral development holding "only where the cost of developing the land will be abnormally high, and where developmental conditions are imposed calculated to improve the carrying capacity and productivity of the land and to develop the public estate". A preferential pastoral holding carries an obligation of personal residence if the notification so provided[190].

Mention is made earlier in these reasons of the improvements and development specified in the second Holroyd lease which is a pastoral

holding. While the lease is not expressed to be for pastoral purposes only, no other activity is authorised. The term of such a pastoral lease is to be determined by the Minister and may not exceed 30 years[191].

By force of s 4(2), all leases granted under repealed Acts and subsisting at the commencement of the 1962 Act "shall be deemed to have been granted or issued under the provisions of this Act relating to the tenure or class or mode of a class of tenure hereunder which is analogous thereto".

Before leaving this survey of the 1962 Act, two provisions should be mentioned. In dealing with the 1910 Act mention was made of s 135 which provided that on the determination of a lease before the expiration of the term, the land reverted to His Majesty and became Crown land. That provision has its counterpart in s 299(1) of the 1962 Act with, however, an additional requirement that the person in occupation give peaceful possession to the Land Commissioner, "otherwise such person shall be a trespasser upon Crown land"[192].

The other provision was s 203 of the 1910 Act relating to persons on Crown land, "not lawfully claiming under a subsisting lease or license or otherwise under any Act relating to the occupation of Crown land". It has its counterpart in s 372 of the 1962 Act.

Leases: exclusive possession

The 1910 Act and the 1962 Act say little as to the rights conferred by a pastoral lease. What of the lease itself? In each of the leases with which this appeal is concerned, the Crown "DO HEREBY ... DEMISE AND LEASE" the land in question.

At the forefront of the respondents' case was the argument that an essential feature of a lease is that it confers exclusive possession on the lessee. In their submission, it followed that the instruments, being pastoral leases, conferred on the lessees exclusive possession of the land. To pose the issue in that way is to focus unduly on leasehold interests as known to the common law and to give insufficient recognition to the fact that the pastoral lease is a creature of statute. Accordingly, the rights it confers and the obligations it imposes must be determined by reference to the applicable statutory provisions. That is not to say that reference to leasehold interests at common law does not aid an understanding of these rights and obligations. But it must not be allowed to obscure the particular nature of a pastoral lease under the relevant legislation. And it must not divert attention from the basic question whether the grant of a pastoral lease was so inconsistent with the existence of native title rights that those rights must be regarded as having been extinguished. With those observations in mind, I turn to a consideration of leasehold interests.

The headnote to *Radaich v Smith*[193] reads:

" In determining whether an instrument creates a lease as opposed to a licence, the decisive factor in favour of a lease is whether the right which the instrument confers is one to the exclusive possession of the premises for a term."

Put that way, the point is not so much that a "lease" confers exclusive possession; it is that the conferring of exclusive possession is an indication that the arrangement in question is a lease rather than, say, a licence[194].

Radaich v Smith and many other cases in which the character of a lease has been considered were decided in the context of commercial transactions, often entered into against the background of legislation that controlled rents and evictions. The factual background had generally been a written contract, described as a licence in order to avoid the operation of legislation. It is in this context that the following passage from the judgment of Windeyer J must be considered[195]:

"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."

The particular context in which emphasis has been placed on exclusive possession is further illustrated by *Street v Mountford*, where the question was whether an agreement gave rise to a tenancy protected under the *Rent Acts* (UK). Lord Templeman, with whom the other Law Lords agreed, "gratefully adopt[ed] the logic and the language of Windeyer J"[196] for the purposes of determining whether as a result of an agreement relating to residential accommodation the occupier was a lodger or a tenant. Neither Windeyer J nor Lord Templeman was speaking in a context which throws light on the position of a "lessee" whose rights depend on statute. It is a mistake to apply what is said in these passages to the present appeals unless it accords with the relevant statute and has regard to the presence on the land of the indigenous people.

The inconclusiveness for the present context of descriptive terms such as lease and licence is illustrated by *O'Keefe v Malone* which concerned licences granted under the *Crown Lands Act* 1889 (NSW). Lord Davey, delivering the advice of the Privy Council, spoke of the need to examine the rights actually conferred on the grantee and said[197]:

"An exclusive and transferable licence to occupy land for a defined period is not distinguishable from a demise, and in the legislative language of the Land Acts the words 'leased,' 'lease,' and 'lessee,' are frequently used as words of a generic import, including lands held under occupation licence, or the licence or the holder thereof."

The point is that the rights and obligations of a person holding an interest under the legislation involved in the present appeals are not disposed of by nomenclature. A closer examination is required. The looseness of terminology in this area is further illustrated by the term "mining lease" which, as used in the*Mining Act* 1906 (NSW), was described by Windeyer J in *Wade v New South Wales Rutile Mining Co Pty Ltd*[198] as "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"[199].

Likewise, the question has arisen whether an arrangement described as a lease may fall short of the grant of a right of exclusive possession. It arose in*Goldsworthy Mining Ltd v Federal Commissioner of Taxation*[200] with respect to a dredging lease of an area of sea-bed issued under the *Land Act* 1933(WA). The respondent in that case argued that reservations in favour of the Crown and others by way of access for navigation, and the reservation of all minerals and petroleum showed that there was no right of exclusive possession in the appellant. Mason J rejected the argument, holding in effect that the reservations were explicable by reason of the relationship of the sea-bed to the navigable channel which it underlay. Indeed, his Honour thought that the very existence of access reservations assumed a right of exclusive possession. It is clear that Mason J found such a right in the terms of the overall arrangement, not simply in the use of the expression "demises and leases". A similar approach may be found in *Glenwood Lumber Company v Phillips* where the Privy Council said[201]:

"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."

The instrument in question was a licence of land for the purpose of cutting timber, granted pursuant to a Newfoundland statute.

Certainly, the authorities point to exclusive possession as a normal incident of a lease. They do not exclude, however, an inquiry whether exclusive possession is in truth an incident of every arrangement which bears the title of lease. Furthermore, those authorities, which are directed to commercial transactions between individual persons or corporations, are not concerned whether something that is underpinned by common law recognition, namely,

native title rights, are excluded by the grant by the Crown of what is described as a pastoral lease over land to which those rights attach.

There is a passage in the judgment of Brennan J in *American Dairy Queen (Q'ld) Pty Ltd v Blue Rio Pty Ltd*[202] which may seem to tell against some of the considerations just mentioned. His Honour said of a lease by a trustee of land reserved under *The Land Act* 1962-1981 (Q):

"By adopting the terminology of leasehold interests, the Parliament must be taken to have intended that the interests of a lessee, transferee, mortgagee or sublessee are those of a lessee, transferee, mortgagee or sublessee at common law, modified by the relevant provisions of the Act."

These remarks were made in a particular context, namely, whether a sublessee of the land could assign its interest at common law. The further sublease proposed was an entirely commercial transaction. It did not involve the title of the Crown. There is no comparison with the situation in the present appeals. Furthermore, examination of how pastoral leases came about in Queensland and the more basic question of tenures under Queensland law shows that his Honour's observation cannot be transposed so as to throw light on the position of native title rights. The same may be said of the observation of Mason J in the same case[203] that the rule that courts will construe a statute in accordance with common law principles "applies to the principles of the common law governing the creation and disposition of rights of property".

Pastoral leases: exclusive possession?

It is not surprising that the terminology of pastoral leases was employed by the legislature. And it is important to bear in mind that although the second Holroyd lease was granted in 1975 (the Mitchellton leases in 1915 and 1919), the regime under which all the leases were granted was established before the turn of the century and was itself part of the historical development of the colony. The regime is best understood by seeing what had preceded it, as outlined earlier in these reasons.

It is apparent from a despatch from Sir George Gipps, transmitting the *Crown Lands unauthorized Occupation Act* to the Secretary of State that one of its aims was "for the purpose of putting a stop to the atrocities which have been committed both on them [the natives] and by them"[204]. Furthermore, under the Regulations made pursuant to that Act a licence could be cancelled if the licensee was convicted "of any malicious injury committed upon or against any aboriginal native or other persons". The whole tenor of these provisions indicates a contemplation that Aborigines would be upon licensed lands.

The thrust of contemporary documents, in particular communications by the Secretary of State, Earl Grey, to the Governor of New South Wales make it clear that Aborigines were not to be excluded from land under pastoral occupation[205]. In the first of these two despatches, Earl Grey wrote of pastoral occupation:

"I think it essential that it should be generally understood that leases granted for this purpose give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such Land as they may require within the large limits thus assigned to them, but that these Leases are not intended to deprive the Natives of their former right to hunt over these Districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil except over land actually cultivated [or] fenced in for that purpose."

In the second, Earl Grey repeated his earlier view that the intention was "to give only the exclusive right of pasturage in the runs, not the exclusive occupation of the Land, as against Natives using it for the ordinary purposes".

The Queensland legislation aimed at giving pastoralists some security of tenure in regard to their pastoral activities. The authorities in England expressed almost constant concern that the grant of pastoral leases should not be used to prevent Aborigines from using the land for subsistence purposes. And a similar concern was expressed within Australia. Thus in his 1900 Annual Report the Northern Protector of Aboriginals, Walter Roth, warned against the dispossession of blacks from their hunting-grounds and sources of water supply "by their lands being rented for grazing rights at a nominal figure". He added:

"Carrying the present practice (might against right) to a logical conclusion, it would simply mean that, were all the land in the north to be thus leased, all the blacks would be hunted into the sea."[206]

The Protector repeated his forebodings in his report of 1903[207].

Against this background, it is 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. Nevertheless, "intention" in this context is not a reference to the state of mind of the Crown or of the Crown's officers who, for instance, made a grant of land. What is to be ascertained is the operation of the statute and the "intention" to be discerned from it[208].

Some reference should be made to the authorities upon which the respondents relied. In *Macdonald v Tully* the Full Court of the Supreme Court of

Queensland said of a plaintiff who had paid rent to the Crown and occupied and stocked Crown lands under *The Tenders for Crown Lands Act* 24 Vic No 12 (Q), though no formal lease had been granted to him[209]:

"This right of the plaintiff to occupy was, in our opinion, capable of being maintained against any disturber, whether assuming to disturb in virtue of an alleged lease or otherwise."

But, despite the generality of the statement, it is clear that the Court was directing its attention to the position of third parties in the conventional sense, not to Aborigines whose traditional land might fall within the lease. The same may be said of the observation of the Full Court in *Wildash v Brosnan*[210] that a pastoral lessee had an "exclusive right to the land".

Reference was made earlier in these reasons to s 203 of the 1910 Act and its counterpart, s 372 of the 1962 Act. The respondents contended that the effect of the provision was to render a trespasser any person occupying Crown land who was "not lawfully claiming under a subsisting lease or license". This was said to include Aborigines. The answer to this contention was given by Brennan J in *Mabo [No 2]* when dealing with s 91 of the *Crown Lands Alienation Act* 1876 (Q), the predecessor of this provision. His Honour said[211]:

"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 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."

In the course of argument reference was made to the decision of this Court in *Yandama Pastoral Co v Mundi Mundi Pastoral Co Ltd*[212] as pointing to exclusivity of possession on the part of a holder of a pastoral lease. But this was a case in which one pastoral company, relying on certain statutory provisions, claimed the right to take travelling stock across the land comprised in a pastoral lease held by another pastoral company. The judgments turned on the language of the statutory provisions. There was however a strong dissent from Isaacs J who thought it astonishing to hear it argued[213]

"that - while in the very act of liberalizing the conditions of pastoral settlement in the more distant parts of the State on virgin land ... the Legislature of South Australia had deliberately adopted the suicidal and inconsistent policy of making the passage of healthy travelling stock, not only always more difficult than it already was, but in a vast number of cases impossible".

His Honour's judgment is lengthy, involving a detailed consideration of the history of pastoral leases in South Australia. It is apparent that his view of the statutory provisions was influenced by that history which he regarded[214] as establishing that "*the right of owners of travelling stock to pass* - a right more or less regulated, but basically a right - over Crown lands, including lands let by the Crown for pasturage, is *part of the constant and traditional policy and law of South Australia*".

While the appellants may find some support for their argument in the dissenting judgment of Isaacs J, the decision itself turns on statutory language. Certainly, the decision offers no support for the proposition that exclusivity of possession is a necessary ingredient of a pastoral lease.

A pastoral lease under the relevant legislation granted to the 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.

It follows that Question 1B(b) and Question 1C(b), which ask whether the pastoral leases "confer rights to exclusive possession on the lessee", must be answered "No". As the questions are framed, the question of extinguishment strictly does not then arise. But for these reasons to be meaningful, one must go on and consider to what extent the grant of a pastoral lease under the 1910 Act or 1962 Act necessarily extinguished native title rights.

That a concept of feudal tenure brought to Australia but subjected to change through a complex system of rights and obligations adapted to the physical, social and economic conditions of the new colony, in particular the disposition of large areas of land (often unsurveyed) for a limited term for a limited purpose, should determine the fate of the indigenous people is a conclusion not lightly to be reached. The continuance of native title rights of some sort is consistent with the disposition of land through the pastoral leases. I say "of

some sort" because there has been no finding by the Federal Court whether such rights existed in respect of the leased land and, if they did, the nature of those rights. That is a matter to which I shall return.

Extinguishment

The idea of extinguishing title to land raises a number of questions, particularly when the title said to have been extinguished does not derive from the common law but has been recognised by the common law. When land is acquired by the Crown for the purposes of public works, the title of the registered proprietor is in truth extinguished by force of the notice of acquisition or resumption. The title vests in the Crown by force of statute though registration may be required under the Torrens system. But that is hardly the situation here when what is contended is that the grant of a pastoral lease of itself effected an extinguishment of native title rights.

In *Mabo [No 2]* Brennan J said[215]:

" 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."

His Honour cited, in support of the initial proposition, *Joint Tribal Council of the Passamaquoddy Tribe v Morton*[216]. There are other authorities which assert or assume the power to extinguish traditional title[217]. The general proposition is not questioned by the appellants. And although fiduciary obligations on the part of the State of Queensland were asserted by the appellants, it is unnecessary to pursue this aspect in order to deal with the questions posed by the appeals.

Mason CJ and McHugh J agreed with the reasons for judgment of Brennan J. Deane and Gaudron JJ said that, like other legal rights,

"the rights conferred by common law native title and the title itself can be dealt with, expropriated or extinguished by valid Commonwealth, State or Territorial legislation"[218].

I said that there is "precedent for the proposition that the Crown has power to extinguish traditional title"[219]. But I raised a number of questions. Is the power exercisable only with the consent of the titleholders or is it exercisable unilaterally? I added[220]:

"the plaintiffs did not contest the Crown's power to extinguish traditional title by clear and plain legislation. That concession was properly made, subject to a consideration of the implications that arise in the case of extinguishment without the consent of the titleholders."

Later in his judgment Brennan J said[221]:

" However, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive."

The need for clarity of intention is spelled out in the judgments of other members of the Court[222].

In *Western Australia v The Commonwealth* (*Native Title Act Case*) the following passage appears[223]:

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

It is with the concept of inconsistency that these appeals are much concerned.

During the hearing of these appeals attention focused on a passage in the judgment of Brennan J in *Mabo [No 2]* where his Honour said[224]:

" A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title."

In this regard Deane and Gaudron JJ said:

" The personal rights conferred by common law native title ... 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"[225].

In the circumstances of the case, I held that whether the leases in question were effective to extinguish traditional title was something it was unnecessary to answer[226].

The recital in the preamble to the *Native Title Act* that

"The High Court has:

...

(c) 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"

reads too much into the judgments in *Mabo [No 2]* so far as the reference to leasehold estates is concerned unless particular attention is given to what is meant by that term. At their highest, the references are obiter. It has been generally accepted that a grant of an estate in fee simple extinguishes native title rights since this is the largest estate known to the common law.

It is fair to comment that while there are passages in the judgments of the Court dealing with the circumstances in which native title may be extinguished, no great attention has been focused on the idea itself. Hitherto it has not been necessary to do so. What is meant by extinguishment is alluded to by Macfarlane JA in*Delgamuukw v British Columbia* when he said[227]:

" Before concluding that it was intended that an aboriginal right be extinguished one must be satisfied that the intended consequences of the colonial legislation were such that the Indian interest in the land in question, and the interest authorized by the legislation, could not possibly co-exist."

There is a further passage in the judgment of Macfarlane JA which strikes a chord in the present appeals:

" It is clear that the mischief at which many of the Colonial Instruments was directed was the agitation in the colony attendant upon the influx and presence of miners seeking gold. Governor Douglas needed authority to stabilize the situation. A plan to attract permanent settlers, and establish them on the land was urgently required. The aboriginal peoples were not the problem. The acquisition of Indian lands was not the design, although attendant upon settlement was the need to reconcile the conflicting interests of the aboriginals and of the settlers. But the urgent question was settlement and the establishment of British authority in the colony. One should assume that the object was to achieve the desired result with as little disruption as possible, and without affecting accrued rights and existing status any more than was necessary."[228]

It is true that what is said in the judgments in *Delgamuukw* is against a background of treaty making. Nevertheless the passage in the judgment of

Macfarlane JA is particularly apposite here. In the course of his judgment Lambert JA (who was in dissent as to the outcome of the appeal) distinguished express (or explicit) extinguishment and implicit extinguishment. As to the latter he said[229]:

" *Implicit extinguishment* is extinguishment brought about by the sovereign power acting legislatively in an enactment which does not provide in its terms for extinguishment but which brings into operation a legislative scheme which is not only inconsistent with aboriginal title or aboriginal rights but which makes it clear and plain by necessary implication that, to the extent governed by the existence of the inconsistency, the legislative scheme was to prevail and the aboriginal title and aboriginal rights were to be extinguished."

What emerges from the judgments in *Delgamuukw* is the emphasis on inconsistency between native title rights and rights created by legislation or by some administrative scheme authorised by legislation, that is, the inability of the two to co-exist. It is that inconsistency that renders the native title rights unenforceable at law and, in that sense, extinguished. If the two can co-exist, no question of implicit extinguishment arises and it is implicit extinguishment with which these appeals are concerned.

While the appellants accepted, as they were bound to do in light of *Mabo [No 2]*[230] and the *Native Title Act Case*[231], that native title may be extinguished, there is something curious in the notion that native title can somehow suddenly cease to exist, not by reason of a legislative declaration to that effect but because of some limited dealing by the Crown with Crown land. To say this is in no way to impugn the power of the Crown to deal with its land. It is simply to ask what exactly is meant when it is said that native title to an area of land has been extinguished.

Inconsistency can only be determined, in the present context, by identifying what native title rights in the system of rights and interests upon which the appellants rely are asserted in relation to the land contained in the pastoral leases. This cannot be done by some general statement; it must "focus specifically on the traditions, customs and practices of the particular aboriginal group claiming the right"[232]. Those rights are then measured against the rights conferred on the grantees of the pastoral leases; to the extent of any inconsistency the latter prevail. It is apparent that at one end of the spectrum native title rights may "approach the rights flowing from full ownership at common law"[233]. On the other hand they may be an entitlement "to come on to land for ceremonial purposes, all other rights in the land belonging to another group"[234]. Clearly there are activities authorised, indeed in some cases required, by the grant of a pastoral lease which are inconsistent with native title rights that answer the description in the

penultimate sentence. They may or may not be inconsistent with some more limited right.

Thus the questions asked of the Federal Court, which assume the existence of native title rights but say nothing as to their content, produce an artificial situation.

Radical title

Because of the course taken by the argument before the Court in the present appeals, it is necessary to say something about radical title, though this matter was considered by the Court in *Mabo [No 2]*[235]. As is clear from the judgments in that case, a consequence of sovereignty is the attribution of radical title to the Crown. But radical title does not of itself carry beneficial ownership. Brennan J described it in these terms[236]:

"The radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty."

In *Amodu Tijani v Secretary, Southern Nigeria* the Privy Council, in a judgment delivered by Viscount Haldane[237], spoke of the title of the Sovereign as "a pure legal estate, to which beneficial rights may or may not be attached".

From the distinction thus made, it is apparent that the grant of an estate in land does not require the Crown to assume beneficial ownership of the land. Nor does the relevant legislation so dictate. As Brennan J observed in *Mabo [No 2]*[238]:

"It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty."

Later his Honour said[239]:

"If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium."

That the radical title lies with the Crown immediately before the grant of a pastoral lease is clear. But how relevant is it to speak of the Crown acquiring the "reversion" in such a case and of the Crown's title becoming a plenum dominium? It has been said[240]: "A reversion is the interest which remains in a grantor who creates *out of his own estate* a lesser estate" (emphasis

added). In support of the foregoing statement, the author quotes from Blackstone[241]:

"An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. ... For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him."

The doctrine of estates is a feudal concept in order to explain the interests of those who held from the Crown, not the "title" of the Crown itself. The discussion of reversion in the standard texts invariably focuses on the holder of an estate in fee simple who grants some lesser estate, usually a life estate or lease. But that is not the case here. The matter was explained by Brennan J in *Mabo [No 2]* when he said[242]:

"Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory)."

To speak, in relation to the Crown, of a reversion expectant on the expiry of the term of a lease as expanding the Crown's radical title to a plenum dominium is, in my respectful view, to apply the concept of reversion to an unintended end. To say this in no way detracts from the doctrine of sovereignty; the Crown may thereafter deal with the land as is authorised by statute, disposing of it in some way or appropriating it to its own use[243]. Indeed it may deal with the land during the term to the extent that it is authorised by statute or by the terms of the grant to do so. In the present case, once a pastoral lease came to an end, the land answered the description of "Crown land" and might be dealt with accordingly[244]. The invocation of reversion and plenum dominium, as those expressions are usually understood, does not lie easily with the position of the Crown under the relevant statutes.

The proposition that it is the radical title of the Crown with which we are concerned and that, on the expiration or other termination of a pastoral lease, it is still the radical title that must be considered in relation to native title rights, does not minimise the sovereignty of the Crown. Nor does it undermine the principle that native title rights depend on their recognition by the common law. That recognition carries with it the power to extinguish those rights. But it requires a very clear act to do so. To contend that there is a beneficial reversionary interest in the Crown which ensures that there is no

room for the recognition of native title rights, is in my view, to read too much into the Crown's title. Furthermore, if it is the reversion which carries with it beneficial title, why is that title not there in the first place? And if it is the existence of that beneficial title which extinguishes native title rights, why were those rights not extinguished before the grant of a pastoral lease? There is a curious paradox involved in the proposition.

While nothing in the judgments of the Court, in particular those in *Mabo [No 2]*, point with any certainty to the answers demanded of the Court in the present proceedings, that decision is a valuable starting point because it explores the relationship between the common law and the "law" which evidences native title rights. So far as the scope of *Mabo [No 2]* is concerned, it should be noted that in their joint judgment Mason CJ and McHugh J, with the authority of the other members of the Court constituting the majority, said[245]:

"The formal order to be made by the Court ... is cast in a form which will not give rise to any possible implication affecting the status of land which is not the subject of the declaration in ... the formal order."

This simply reinforces the proposition that while the judgments in *Mabo [No 2]* are significant for an understanding of the issues in the present appeals, they do not determine their outcome.

Non-entry into possession

The lessees of the Mitchellton leases did not go into possession. Council for the Thayorre People relied upon this point of distinction with the Holroyd lease to argue that the Mitchellton leases vested in interest but never in possession.

The argument was in part that if the concept of feudal tenures applied to pastoral leases, the Crown did not acquire a reversion expectant necessary for the plenum dominium required to extinguish native title rights. The feudal principle was expressed in *Coke on Littleton* in the following manner[246]:

"For before entry the lessee hath but *interesse termini*, an interest of a terme, and no possession, and therefore a release which enures by way of enlarging of an estate cannot worke without a possession, for before possession there is no reversion".

Although the rule has been abolished in all States of Australia, including Queensland[247], it occasionally rears its head[248]. However the earlier existence of the rule does not advance the argument of the Thayorre People. Section 6(2) of the *Land Act* 1910, under which the Mitchellton leases were

granted, declares the leases to be "valid and effectual to convey to and vest in the person therein named the land therein described for the estate or interest therein stated". It follows that execution of the leases in question was sufficient to vest in the lessees a grant in accordance with the statute.

Extinguishment revisited

Undue emphasis on the term extinguishment tends to obscure what is at the heart of this issue. It is too simplistic to regard the grant by the Crown of a limited interest in land as necessarily extinguishing native title rights. It is a large step indeed to conclude that, because there has been a grant of a "lease" of many square miles for pastoral purposes, all rights and interests of indigenous people in regard to the land were intended thereby to be brought to an end. Where is the necessary implication of a clear and plain intention? The impact of such a conclusion was addressed by Lee J in *North Ganalanja* when he said[249]:

"It may be thought to be a bold proposition that the grant of a statutory right to take possession of a vast area of leasehold land to depasture stock, being an area which included land to which an organised social group of indigenous inhabitants resorted as of right for usufructuary or cultural purposes, demonstrated a clear and plain intention by the Crown to extinguish those rights when the interest granted to the pastoral tenant by the Crown was subject to various derogations including the right of the Crown to recover the demised property by resumption or reservation, and rights of access and possession vested by the Crown in third parties, the exercise of which, in most cases, was likely to cause as much disturbance to the pastoral tenant's enjoyment of possession as the use of native title rights by indigenous inhabitants."

Because I have concluded that none of the grants necessarily extinguished "all incidents of Aboriginal title", no further question arises in these appeals as to any concept of the suspension of native title rights during the currency of the grants. I express no view on that matter.

The claims against Queensland, Comalco

and Aluminium Pechiney

These claims, mentioned at the outset of these reasons, are the subject of Questions 4 and 5. They raise discrete issues from the earlier questions.

I would answer each of those questions "No", for the reasons given by Kirby J which I gladly adopt.

Answering the questions

As I said early in these reasons, the Court made it clear that it proposed to deal only with the particular questions asked.

Questions 1A and 1B are not happily framed, with their emphasis on whether the grant of each pastoral lease "necessarily" extinguished "all incidents of Aboriginal title" of the **Wik** Peoples and the Thayorre People, an aspect that only arises if in each case the pastoral lease conferred "rights to exclusive possession on the grantee". The questions reduce to straightforward propositions what are in truth complex issues of law and of fact. They 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. It is apparent from these reasons that I am of the opinion that none of the grants the subject of the appeals "necessarily" extinguished all incidents of aboriginal title. However, Questions 1B and 1C cannot be answered in the form asked because I am also of the opinion that the pastoral leases did not confer exclusive possession on the grantees especially in the sense of excluding all holders of native title rights, the existence and nature of which have not even been canvassed. Indeed, the questions framed by reference to "exclusive possession" tend to obscure what is the critical question, that of extinguishment. Nevertheless, the questions should be answered as best they can.

As to Question 1B(a), the **Wik** Peoples did not press a challenge to Drummond J's answer. While the Thayorre People did not abandon their challenge to Drummond J's answer to Question 1C(a), they made no submissions in support of that challenge. I am content to adopt Gaudron J's reasons for dismissing the appeal on this point.

In the light of these reasons for judgment, I would answer the questions as follows:

Question 1B

(b) No.

(c) Does not arise.

(d) Strictly does not arise but, in the light of these reasons, is properly answered No.

Question 1C

(a) No.

(b) No.

(c) Does not arise.

(d) Strictly does not arise but, in the light of these reasons, is properly answered No.

Question 4

No.

Question 5

No.

It follows that each appeal succeeds in part. The answers given by Drummond J to Questions 1B(b), (c) and (d) and 1C(b), (c) and (d) should be set aside and the questions answered in accordance with these reasons. The **Wik** Peoples should have their costs of the appeal relating to Question 1B(b), (c) and (d), to be paid by the respondents who opposed the orders sought in relation to that question. The **Wik** Peoples should pay the respondents' costs relating to Questions 4 and 5. The **Wik** Peoples and the Thayorre People should have their costs of the appeal relating to Question 1C(b), (c) and (d), to be paid by the respondents who opposed the orders sought in relation to that question. The Thayorre People should pay the respondents' costs relating to Question 1C(a). The matter should be remitted to Drummond J with respect to the costs of the proceedings below and generally.

Postscript

Before leaving this judgment, it is important that the significance of the answers proposed should be properly understood. What now follows is said with the concurrence of Gaudron, Gummow and Kirby JJ who each answers the questions in similar terms. The order the Court makes will therefore reflect those answers.

In these appeals the Court has been called upon to answer questions which, no doubt, it was hoped would resolve all important issues between the parties. Having regard to the form of the questions framed for the purpose of the proceedings in the Federal Court, that has not proved possible.

To say that the pastoral leases in question did not confer rights to exclusive possession on the grantees is in no way destructive of the title of those grantees. It is to recognise that the rights and obligations of each grantee depend upon the terms of the grant of the pastoral lease and upon the statute which authorised it.

So far as the extinguishment of native title rights is concerned, the answer given is that there was no necessary extinguishment of those rights by reason of the grant of pastoral leases under the Acts in question. 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. Once the conclusion is reached that there is no necessary extinguishment by reason of the grants, the possibility of the existence of concurrent rights precludes any further question arising in the appeals as to the suspension of any native title rights during the currency of the grants.

GAUDRON J.

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In June 1993, the **Wik** Peoples commenced proceedings in the Federal Court of Australia against the State of Queensland, the Commonwealth of Australia and other respondents, including Comalco Aluminium Limited ("Comalco") and Aluminium Pechiney Holdings Pty Ltd ("Pechiney"). They, the **Wik** Peoples, claimed native title and possessory title rights over an area of land, including tidal land, in far north Queensland and over the adjoining sea. In the alternative, they claimed damages and sought various forms of equitable relief. Other persons and bodies, including pastoralists, the Aboriginal and Torres Strait Islander Commission and the Thayorre People, were later joined as additional respondents.

The Thayorre People claim native title over part of the land the subject of the **Wik** claim. When joined to the proceedings instituted by the **Wik** Peoples, the Thayorre People cross-claimed against the State of Queensland and others, including the Pormpuraaw Aboriginal Council which, as trustee, holds part of the land which they, the Thayorre, claim.

The *Native Title Act* 1993 (Cth) came into force on 1 January 1994. The **Wik** Peoples then made a claim under that Act but procedural rulings were made by Drummond J for the hearing and determination of certain issues in the Federal Court proceedings which, it was thought, might resolve the major, if not all, issues in the Federal Court proceedings as well as those in the claim under the *Native Title Act*. In the result, five questions were raised for determination as preliminary questions of law, the first question containing three sub-questions, 1A, 1B and 1C.

It will later be necessary to refer in some detail to some of the questions raised for determination as preliminary issues. For the moment it is sufficient to note

that, at first instance, Drummond J declined to answer one of those questions, Q 2, but answered the others in a manner adverse to the interests of the **Wik** and the Thayorre Peoples[250]. The **Wik** and Thayorre Peoples (together referred to as "the appellants") were each granted leave to appeal to the Full Federal Court and, in due course, their appeals were removed into this Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth).

The issues in the Appeal

The notice of appeal filed on behalf of the **Wik** Peoples was amended in various respects and, as a result, there is no longer any challenge to the answers given by Drummond J to questions 1A and 3. Question 1A was designed to determine whether, as a matter of State constitutional law, the legislative power of the Queensland Parliament is limited in such a way that it does not extend to laws extinguishing or impairing native title rights. Question 3 was designed to determine whether, assuming their previous existence, native title rights to minerals and petroleum were extinguished by the enactment of general legislation reserving or vesting minerals and petroleum in the Crown.

The result of the amendments to the notice of appeal filed on behalf of the **Wik** Peoples is that they challenge the correctness of the answers given by Drummond J to parts of questions 1B and 1C and, also, to questions 4 and 5. The Thayorre People only challenge the answer to question 1C; and they alone challenge the answer to question 1C(a). That sub-question is directed to ascertaining whether native title rights are constitutionally protected by reason of undertakings given by colonial authorities in the mid-nineteenth century. No argument was addressed to that question in this Court.

The major issue in the appeal arises by reference to questions 1B(b), (c) and (d) and 1C(b), (c) and (d). Those sub-questions are directed to ascertaining whether, as contended by the State of Queensland and the other respondents who adopted the same position in this Court[251] (together referred to as "the respondents"), the grant of pastoral leases pursuant to the *Land Act* 1910 (Q)[252] ("the 1910 Act") and the *Land Act* 1962 (Q) ("the 1962 Act") automatically extinguished native title rights. The sub-questions proceed by reference to two leases granted under the 1910 Act ("the Mitchellton Pastoral Leases") and one granted under the 1962 Act ("the Holroyd Pastoral Lease").

Questions 4 and 5 give rise to a separate and distinct issue, namely, whether, as contended by the **Wik** Peoples, native title survived separate agreements between the State of Queensland and Comalco and Pechiney and the grant of bauxite mining leases to those companies in accordance with those agreements.

The claims by the **Wik** Peoples with respect to bauxite mining leases granted to Comalco and Pechiney (Questions 4 and 5)

It is convenient to state at the outset that I agree with Kirby J, for the reasons that his Honour gives, that Drummond J correctly answered questions 4 and 5 against the interests of the **Wik** Peoples. Accordingly, to that extent their appeal must be dismissed.

The arguments with respect to Pastoral Leases

As already mentioned, no argument was directed to question 1C(a). As to questions 1B(b), (c) and (d) and 1C(b), (c) and (d), it was argued for the respondents in this Court and by the interveners who appeared in the same interest[253] that pastoral leases granted under the 1910 and 1962 Acts were true leases in the traditional common law sense and, thus, conferred rights of exclusive possession. Those rights, according to the argument, are inconsistent with the continued existence of native title rights and, thus, necessarily extinguished them. On the other hand, the appellants and the interveners and respondents appearing in the same interest[254] argued that pastoral leases granted under those Acts were not true leases and did not confer rights of exclusive possession, but merely rights to use land for pastoral purposes.

By way of alternative, the appellants argued that, if pastoral leases did confer rights of exclusive possession, native title rights were not extinguished because those rights were not exercised either pursuant to the Mitchellton Pastoral Leases or the Holroyd Pastoral Lease. The respondents and supporting interveners replied to this contention by asserting that it was the grant, not the exercise, of a right of exclusive possession which operated to extinguish native title rights. In this they were undoubtedly correct. As Deane J and I pointed out in *Mabo v Queensland [No 2]*[255], 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" or other inconsistent dealings with the land by the Crown.

The appellants also contended, by way of further alternative, that native title rights revived on expiry, surrender or forfeiture. The respondents and interveners resisted this submission, arguing that, with the grant of a pastoral lease, the Crown acquired the interest in the reversion and its radical title was thereby converted to full beneficial ownership. The appellants, in turn, argued that there was no reversion, in the sense for which the respondents and supporting interveners contended.

Finally, the appellants argued that, if the Crown acquired the reversion and, thus, full beneficial ownership by the grant of a pastoral lease, the Crown

owed a fiduciary duty to, and, thus, held the reversion on trust for previous native title holders.

Leaving aside the question of trust, the arguments direct attention, in the main, to the terms of the Mitchellton and Holroyd Pastoral Leases and to the terms of the 1910 and 1962 Acts.

The Mitchellton land

As the Mitchellton Pastoral Leases were granted before the Holroyd Pastoral Lease, it is convenient to deal with them first. They were granted under the 1910 Act and are the subject of separate claims by the **Wik** Peoples and the Thayorre People. The land the subject of these Pastoral Leases ("the Mitchellton land") is located north of Normanton, in far north Queensland. It covers an area of 535 square miles, extending from the Mitchell River to the Edward River in the north and west to the Gulf of Carpentaria. It is in the District of Cook which was opened up for occupation in 1866[256].

Dealings with the Mitchellton land

There were no dealings with the Mitchellton land by government authorities until 1912. In that year, on 23 May, an occupation license[257] was granted to William Hutson for an area of "about 100 square miles". The license was expressed to extend "until 31 December [1912], and thereafter from year to year, so long as the rent fixed from time to time in terms of the [1910] Act [should] be punctually paid". The license was determinable in a number of specified events, including in the event that the land was selected, leased, reserved or sold under that Act. The license was subsequently forfeited.

On 28 January 1915, an area of 535 square miles which included the land the subject of the occupation license forfeited by William Hutson was notified as open for pastoral lease "in terms of section 40" of the 1910 Act[258]. It was granted to Alfred Joseph Smith, Thomas Alexander Simpson and Marshall Stanley Woodhouse for a term of 30 years from 1 April of that year ("the first Mitchellton lease")[259]. The lease was forfeited in 1918 for failure to pay rent[260]. It was accepted by Drummond J at first instance that the lessees never entered into possession[261].

The Mitchellton land was again notified as open for lease on 23 August 1918[262]. On 14 February 1919, it was granted to Walter Sydney Hood for a term of 30 years from 1 January 1919 ("the second Mitchellton lease"). That same year, on 9 September, he transferred his interest to Byrimine Pastoral Properties Limited ("the company"). The company surrendered the lease pursuant to s 122 of the 1910 Act on 12 October 1921. Again it was accepted

by Drummond J that neither Mr Hood nor the company entered into possession[263].

Shortly before the surrender of the second Mitchellton Lease, the Chief Protector of Aboriginals wrote to the Under Secretary, Home Secretary's Department, informing him that there were "about 300 natives roaming on [the] country" and complaining that there had been no consultation with his Department with respect to the lease. He also noted that there was "a suggestion that the [c]ompany [might] allow the lease to lapse" and urged that, if it did, his Department should be consulted before anyone else was allowed to obtain possession. Whether in consequence of this letter or otherwise, the Mitchellton land was temporarily reserved for the use of Aborigines on 12 January 1922[264] and permanently reserved for that purpose on 7 May 1930[265]. Although its precise status has changed from time to time, it has apparently been held for and on behalf of Aboriginal people ever since. And at least some of it is now part of the land held in trust by the Pormpuraaw Aboriginal Council.

The question asked concerning the Mitchellton Pastoral Leases (Q 1C)

The question which Drummond J asked concerning the Mitchellton Pastoral Leases (Q 1C) is as follows[266]:

"If at any material time Aboriginal title or possessory title existed in respect of the land demised under the pastoral leases in respect of the Mitchellton Pastoral Holding No 2464 and the Mitchellton Pastoral Holding No 2540 ... (Mitchellton Pastoral Leases):

(a) was either of the Mitchellton Pastoral Leases subject to a reservation in favour of the Thayorre People and their predecessors in title of any rights or interests which might comprise such Aboriginal title or possessory title which existed before the *New South Wales Constitution Act* 1855 (Imp) took effect in the Colony of New South Wales?

(b) did either of the Mitchellton Pastoral Leases confer rights to exclusive possession on the grantee?

If the answer to (a) is "no" and the answer to (b) is "yes":

(c) does the creation of the Mitchellton Pastoral Leases that had these two characteristics confer on the grantee rights wholly inconsistent with the concurrent and continuing exercise of any rights or interests which might comprise such Aboriginal title or possessory title of the Thayorre People and their predecessors in title which existed before the *New South*

Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?

(d) did the grant of either of the Mitchellton Pastoral Leases necessarily extinguish all incidents of Aboriginal title or possessory title of the Thayorre People in respect of the land demised under either of the Mitchellton Pastoral Leases?"

Drummond J answered that question[267]:

"as to question 1C(a): No;

as to question 1C(b): Yes - both did;

as to question 1C(c): Yes;

as to question 1C(d): Yes - the grant of the first of these leases extinguished Aboriginal title."

It is common ground that, in the proceedings before Drummond J, no argument was directed to the question whether possessory title was necessarily extinguished by the grant of the Mitchellton Pastoral Leases and that the answer to Q 1C(d) does not cover that issue[268].

The terms of the Mitchellton Pastoral Leases

Each of the first and second Mitchellton Leases was expressed to operate as a "Demise and Lease". The persons to whom they were granted were described as entitled to a lease "in pursuance of Part III, Division I of the [1910] Act" and together with their successors were designated as "the Lessee". In each case, the "Demise and Lease" was expressed to be made in consideration of a specified sum "paid for a full year's rent and of the rent [t]hereby reserved". In each case it was granted for "pastoral purposes only". And in each case, the grant was expressed to be "subject to the conditions and provisoes in Part III, Division I of the [1910] Act", all other rights, conditions and restrictions contained in that Act and, also, the *Mining on Private Land Act* 1909 (Q). The second Mitchellton Lease was also made subject to *The Petroleum Act* 1915 (Q).

There were two express reservations of access in the Mitchellton Pastoral Leases. The first was a reservation of access for the purpose of searching for or working gold and minerals and, in the case of the second Mitchellton Lease, petroleum. The second, which was in identical terms in both leases, was a reservation of "the right of any person duly authorised in that behalf by the Governor of Our said State in Council 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".

Early Queensland land law

It is convenient, before turning to the provisions of the 1910 Act, to note some aspects of the early development of Queensland land law. That account must begin with the early law of the Colony of New South Wales which, at first, included the area that is now Queensland.

On settlement, there was introduced to the Colony of New South Wales, "by the silent operation of constitutional principles"[269], that English law "applicable to the condition of an infant Colony", but not "artificial requirements and distinctions ... [which were] neither necessary nor convenient"[270]. And perhaps, "as the population, wealth, and commerce of the Colony increase[d], many rules and principles of English law, which were unsuitable in its infancy, [were] gradually ... attracted"[271].

It was held by the Privy Council, in *Cooper v Stuart*[272], in application of the principles to which reference has just been made, that "[t]here was no land law or tenure existing in the Colony [of New South Wales] at the time of its annexation to the Crown; and, in that condition of matters ... as colonial land became the subject of settlement and commerce, all transactions in relation to it were governed by English law, in so far as that law could be justly and conveniently applied to them."[273]

As pointed out by Drummond J at first instance, land in the Colony of New South Wales was initially disposed of by the Governor in the exercise of prerogative power[274]. Thus, for example, the commission of 2 April 1787 issued to Governor Phillip conferred "full power and authority to agree for such lands tenements and hereditaments as shall be in Our power to dispose of and grant to any person or persons upon such terms and under such moderate quit rents services and acknowledgments to be thereupon reserved unto Us according to such instructions as shall be given to you under Our Sign Manual"[275].

The prerogative power to dispose of land gave way to a power conferred by statute with the passage of the *Sale of Waste Lands Act* 1842 (Imp)[276]. Section 2 of that Act provided that the waste lands of the Crown in the Australian colonies were not to be alienated by the Crown either in fee simple or for any less estate or interest otherwise than by sale conducted in accordance with the regulations made under the Act. That Act was amended by the *Sale of Waste Lands Act Amendment Act* 1846 (Imp)[277] which provided, amongst other things, for the making of rules and regulations by Orders-in-Council[278].

Prior to 1847, most land was alienated by the grant of an estate in fee simple[279]. Following the enactment of the *Sale of Waste Lands Act Amendment Act*1846 (Imp), there issued an Order-in-Council of 9 March 1847 making distinct provision with respect to pastoral leases[280]. The Order-in-Council classified lands in the Colony as "Settled Districts"[281], "Intermediate Districts"[282] or "Unsettled Districts"[283] and, within those areas, pastoral leases might be granted for one year, eight years or fourteen years respectively[284].

Apart from the use of the word "lease", there was nothing in the Order-in-Council of 9 March 1847 to indicate the estate or interest intended to be conferred by the grant of a pastoral lease. However, some indication appears from correspondence between the Secretary of State, Earl Grey and the Governor of New South Wales, Sir Charles A FitzRoy, discussing the concern that pastoral lessees might abuse their position with respect to Aborigines who had traditionally used the land[285]. That correspondence culminated in a despatch accompanying an Order-in-Council of 18 July 1849[286] permitting the insertion in pastoral leases of conditions appropriate for "securing the peaceable and effectual occupation of the lands comprised in such leases, and for preventing the abuses and inconveniences incident thereto". In that despatch Earl Grey wrote[287]:

"Comparing the terms of the [*Sale of Waste Lands Act Amendment Act* 1846 (Imp)] Sections 1 and 6, with those of the Order in Council of 9th March 1847, there can, I apprehend, be little doubt that the intention of Government was, as I pointed out in my Despatch of 11th February last, to give only the exclusive right of pasturage in the runs, not the exclusive occup[a]tion of the Land, as against Natives using it for the ordinary purposes: nor was it meant that the Public should be prevented from the exercise, in those Lands, of such rights as it is important for the general welfare to preserve, and which can be exercised without interference with the substantial enjoyment by the lessee of that which his lease was really intended to convey."

There is also a minute to the same effect on an earlier despatch of 11 October 1848[288] in which it is recorded:

"But it must also be considered what ought to be done in order to secure what is due to the natives as regards lands already leased for 14 years [under the *Sale of Waste Lands Act Amendment Act* 1846 (Imp)]. The introduct[io]n of a condit[io]n into these leases is now impracticable, but I apprehend that it may fairly be assumed that HM did not intend and [gave] no power by these leases to exclude the natives from the [use] they had been accustomed to make of these unimproved [lan]ds and the quest[io]n arises whether some declarat[io]n to that [effect] sh[oul]d not be introduced into the [O in C]?"

No declaration of that kind found its way into the Order-in-Council which eventually issued.

The position with respect to the sale and disposal of land changed significantly with the conferral of self government on the Colony of New South Wales, it being provided in s 2 of the *New South Wales Constitution Act* 1855 (Imp)[289] that "the entire Management and Control of the Waste Lands belonging to the Crown in the said Colony ... shall be vested in the legislature of the said Colony". That constitutional provision was subject to a number of provisoes, only the second of which is presently relevant. By that proviso, "nothing [t]herein contained [was to] affect or be construed to affect any Contract or to prevent the Fulfilment of any Promise or Engagement made by or on behalf of Her Majesty, with respect to any Lands situate in the ... Colony". It is that proviso which lies at the heart of question 1C(a).

The *New South Wales Constitution Act* 1855 (Imp) also provided, in s 7, for the establishment of a separate colony or colonies by the alteration of the Colony's northern border[290]. Letters Patent were issued pursuant to that section establishing Queensland as a separate colony in 1859[291]. The Letters Patent conferred on the Governor of Queensland, in cl 5, "full power and authority, by and with the advice of the ... Executive Council, to grant ... any waste or unsettled lands in ... [the] colony ... provided ... that in granting and disposing of such lands [he] ... conform[ed] to and observe[d] the provisions in that behalf contained in any law ... in force within ... [the] colony". There were various statutes, including the *Pastoral Leases Act* 1863 (Q) which, from time to time, governed the exercise of that power[292]. Again, apart from the use of the word "lease", neither that latter Act nor any other Acts making provision with respect to pastoral leases indicated the estate or interest intended to be granted by a lease of that kind.

With the enactment of the *Queensland Constitution Act* 1867 (Imp)[293], the position with respect to waste lands in that Colony was brought into line with that provided for in New South Wales by the *New South Wales Constitution Act* 1855 (Imp). Thus, it was provided by s 40 of the *Queensland Constitution Act*1867 (Imp) that, subject to certain provisoes, "[t]he entire management and control of the waste lands belonging to the Crown ... [should] be vested in the Legislature of the ... colony". Again, it is necessary to mention only one proviso, namely, a proviso in the same terms as that in the *New South WalesConstitution Act* 1855 (Imp) relating to previous contracts, promises and engagements. That proviso supplanted the proviso to the same effect in the *New South Wales Constitution Act* 1855 (Imp) which, until then, had been part of the law of Queensland[294].

The power conferred by s 40 of the *Queensland Constitution Act* 1867 (Imp) was exercised with the enactment of the *Crown Lands Alienation Act* 1868 (Q) which provided, amongst other things, for the selection of first and second class pastoral lands and the grant of pastoral leases[295]. Shortly afterwards there was enacted the *Pastoral Leases Act* 1869 (Q)[296] which was concerned with land in unsettled districts. There followed a number of other legislative measures prior to the enactment of the 1910 Act[297]. Again, apart from the use of the word "lease", none of these measures provides any indication as to the nature of the estate or interest created by the grant of a pastoral lease.

Reservation in favour of Native Title Rights (Q 1C(a))

As already mentioned, no argument was put in this Court with respect to the answer to question 1C(a). However, the notice of appeal filed on behalf of the Thayorre People challenges the answer given by Drummond J. Accordingly, the issue raised by that sub-question must be considered.

At first instance, the contention with respect to the issue raised by question 1C(a) was that the despatches between Earl Grey and Sir Charles FitzRoy with respect to Orders-in-Council made following the *Sale of Waste Lands Act Amendment Act* 1846 (Imp), to which reference has already been made, contained promises or engagements for the preservation of native title rights[298]. According to the argument, they constituted promises or engagements for the purposes of the second proviso to s 2 of the *New South Wales Constitution Act* 1855 (Imp) which vested the management and control of waste lands in the legislature of New South Wales. And, as earlier noted, that proviso continued in effect in Queensland until supplanted by a proviso in the same terms in the *QueenslandConstitution Act* 1867 (Imp).

Drummond J rejected the contention with respect to the proviso to s 2 of the *New South Wales Constitution Act* 1855 (Imp), holding that it did "not encompass undertakings to preserve native title rights ... but only undertakings to grant interests in Crown lands made before the [*Sale of Waste Lands Act*1842] came into force, which undertakings had not been carried into effect or completed by issue of a formal deed of grant when the [*New South WalesConstitution Act* 1855 (Imp)] came into effect"[299].

It is unnecessary to consider the detailed history by which Drummond J came to the conclusion that the proviso was confined to undertakings made before the*Sale of Waste Lands Act* 1842 came into force. It is sufficient to observe that it operated in a legislative context concerned with the management and control of the waste lands of the Crown. In that context, the proviso is properly to be seen as directed to undertakings with respect to the disposal of waste lands, and, perhaps, their reservation for public purposes, both of which

fell within the contemplation of the enacted legislation, not undertakings with respect to the preservation of native title rights which fell outside the operation of any legislation then existing. It follows that, to the extent that it challenges the correctness of the answer to question 1C(a), the appeal of the Thayorre People must be dismissed.

General provisions of the 1910 Act bearing on Pastoral Leases

The 1910 Act was in force when each of the Mitchellton leases was granted and remained in force until after the second Mitchellton lease was forfeited in 1921. It was amended in 1916[300], 1917[301], 1918[302] and 1920[303]. These amendments are not directly relevant to the nature of the interest taken under the Mitchellton Pastoral Leases and it is thus convenient to refer to the 1910 Act in its unamended form. However, it should be noted that the 1916 amendments introduced a different kind of pastoral lease, namely, a preferential pastoral lease which was subject to a condition of personal residence during the first seven years of its term[304].

Sub-section (1) of s 6 of the 1910 Act provided, subject to that Act, for the Governor to "grant in fee-simple, or demise for a term of years, any Crown land within Queensland". "Crown land" was defined in s 4 of the Act as:

" All land in Queensland, except land which is, for the time being -

(a) Lawfully granted or contracted to be granted in fee-simple by the Crown; or

(b) Reserved for or dedicated to public purposes; or

(c) Subject to any lease or license lawfully granted by the Crown: Provided that land held under an occupation license shall be deemed to be Crown land".

"Occupation license" was also defined[305]. In essence, an "occupation license" was a license to occupy land for pastoral purposes, expiring on 31 December of each year[306]. There was no definition of "demise", "lease" or "license". "Lessee" was defined merely as "[t]he holder of a lease under [the] Act"[307].

By s 6(2) of the Act, it was provided that:

"The grant or lease [of Crown land within Queensland] shall be made subject to such reservations and conditions as are authorised or prescribed by this Act or any other Act, and shall be made in the prescribed form, and being so made shall be valid and effectual to convey to and vest in the person therein named the land therein described for the estate or interest therein stated."

The Mitchellton Pastoral Leases were both in the prescribed form, which form provided for reservations in the terms incorporated in those Leases[308].

The Act provided for the grant of pastoral leases and for the grant of leases of various agricultural selections, including "Perpetual Lease Selection[s]", the latter of which were, by s 104(1), described as "lease[s] in perpetuity". It also provided for licenses to occupy pastoral land[309] and licenses to occupy selections[310], the latter being licenses which operated pending the grant of a lease. As well, the Act provided for the surrender of any holding on one year's notice in writing or on payment of one year's rent in advance and other moneys due in respect of the holding[311]. It also provided for forfeiture, including for non-payment of rent[312]. It will later be necessary to refer to some of these provisions in greater detail. For the moment, their only significance is to permit an understanding of s 135 which provided:

" If the license or lease of any land is determined by forfeiture or other cause before the expiration of the period or term for which it was granted, then, unless in any particular case other provision is made in that behalf by this Act, the land shall revert to His Majesty and become Crown land, and may be dealt with under this Act accordingly."

There was no equivalent provision as to the situation obtaining on the expiry of a pastoral lease. And prima facie, at least, s 135 appears to have provided exhaustively as to the situation obtaining on forfeiture or early determination.

Two other general provisions should be noted. Section 203 of the Act created an offence of trespass on reserves and on Crown land (which, by force of the definition of "Crown land" in s 4, included pastoral land the subject of an occupation license, but not land which, in terms of s 6, had been "granted" or "demised"). Section 203 was in these terms:

" Any person, not lawfully claiming under a subsisting lease or license or otherwise under any Act relating to the occupation of Crown land, who is found occupying any Crown land or any reserve, or is found residing or erecting any hut or building or depasturing stock thereon, or clearing, digging up, enclosing, or cultivating any part thereof, shall be liable to a penalty not exceeding twenty pounds."

A procedure was laid down by s 204 for the issue of warrants for the removal of "any person [who was] in unlawful occupation of any Crown land or any reserve, or [was] in possession of any Crown land under colour of any lease or license that [had] become forfeited". And it was provided in the last paragraph of that section that:

" A lessee or his manager or a licensee of any land from the Crown may in like manner make a complaint against any person in unlawful occupation of any part of the land comprised in the lease or license, and the like proceedings shall thereupon be had."

A provision in similar terms to s 203, namely, s 91 of the *Crown Lands Alienation Act* 1876 (Q), was considered by Brennan J in *Mabo v Queensland [No 2]*[313]. It was held in that case that general words in a statute are not to be construed as extinguishing native title rights unless that intention is manifest, as evidenced by the use of clear and unambiguous words to that effect[314]. In application of that principle, Brennan J said in a passage which, in my view, is clearly correct, that s 91 and similar provisions were "not directed to indigenous inhabitants who were or are in occupation of land by right of their unextinguished native title"[315]. That statement is equally true of s 203.

Once it is accepted that s 203 did not render Aboriginal people trespassers on their own land, it follows that s 204 did not, of itself, render them trespassers on land the subject of a pastoral lease. Rather, the question whether their presence constituted or, perhaps, was capable of constituting "unlawful occupation", has to be determined by ascertaining the nature of the rights conferred by the lease in question.

Particular provisions of the 1910 Act relating to Pastoral Leases

Provision was made in the Act for procedures to be adopted for the grant of pastoral and other land. It was provided in Pt III, which was headed "Pastoral Tenures", for the Minister to notify that land was "open for pastoral lease"[316] or "open for occupation under occupation license"[317]. The nature of the land which might be the subject of a pastoral lease or of an occupation license was neither defined nor described. However, some indication that the land was generally remote from settled areas appears by contrasting the provisions of Pt III with those of Pt IV, which was headed "Selections". The latter provisions allowed for the Minister to notify that "country land [was] open for selection either as surveyed land or as designed land"[318], although an application for designed land could not be approved until it was surveyed[319]. "Surveyed land" was land which was surveyed with roads and reserves, whereas "designed land" was land which was divided into portions merely by markings on maps or plans[320]. Further contrast may be made with the provisions of Pt V, headed "Sales by Auction", which provided for the Minister to notify that town, suburban and country land was available for sale as lots[321].

Moreover, it is clear from s 43, which required the calculation of rent according to the number of square miles, that pastoral leases might be granted

for vast areas, many times exceeding that available for agricultural selections. There were statutory limits as to the areas of the different selections for which the Act provided[322]. However, they were expressed in acres, not square miles[323].

Section 41 provided for the processing of applications for pastoral leases, directing in sub-s (4) that "[t]he lease [should] be issued to the successful applicant and [should] commence on the quarter day next ensuing after the date of acceptance of his application". There was no provision dealing with occupation or possession of pastoral land, the rights in that regard being left to inference from the word "lease", the expression "occupation license" and the terms of s 204 which, as already mentioned, allowed that a lessee or licensee might take action for the removal of persons in "unlawful occupation". By contrast, it was expressly provided by s 75 that, on the approval of a settlement application and on payment of the sum required by the Act, the applicant was entitled "to receive ... a license to occupy the land" and, by s 76(1), that "[f]rom and after the date of his license to occupy, the selector may enter upon the land and take possession thereof".

As appears from the terms of the Mitchellton Pastoral Leases, there were certain conditions applicable to pastoral leases by virtue of the provisions of Pt III of the Act. By s 40, the Minister might declare in the opening notification that land was open subject to one or both of the conditions specified in that section, namely, a condition that the land should be enclosed and kept enclosed with a rabbit-proof fence or a condition for the destruction of noxious plants. Neither of the Mitchellton leases was subject to either condition.

There was one other condition imposed by Pt III Div 1, namely, a condition with respect to the payment of an annual rent at the rate for the time being prescribed[324]. And as earlier indicated, the rent was to be calculated according to the number of square miles comprised in the lease. The word "rent" was not used in a way that gives any clear indication of the nature of the interest effected by leases authorised by the Act for the Act also required the payment of rent pursuant to licenses to occupy pastoral land[325] and pursuant to occupation licenses granted following approval of settlement applications[326].

Again, as the terms of the Mitchellton Pastoral Leases indicate, the Act provided with respect to "other rights ... conditions ... [and] restrictions" applicable to pastoral leases. Some were also applicable to other holdings. There was a prohibition in s 198 on ringbarking, cutting and destruction of trees. This condition applied to lessees of pastoral holdings, to holders of occupation licenses, and, also, to selectors of Agricultural, Prickly-pear and

Unconditional Selections. However, in the case of selections, it applied only during the first five years[327].

Another restriction was to be found in ss 199 and 200. Section 199(1) provided for the issue of licenses to persons "to enter upon any Crown land, or any pastoral holding, or any Grazing Selection, or any road or reserve, and to cut, get, and remove timber, stone, gravel, clay, guano, or other material, but not, unless with the consent of the lessee, within two miles of the head station of any pastoral holding". The licenses were given further effect by s 200 which provided that, except to the extent that the Act permitted otherwise, "a lessee of a pastoral holding or the holder of a Grazing Selection [should] not have power to restrict persons duly authorised by law from cutting or removing timber or material within his holding".

Section 205 was another provision of some importance. It allowed for a drover or traveller riding or driving stock on a stock route or road passing through a pastoral holding or through land the subject of an occupation license to depasture the stock on "any part of the land which [was] within a distance of half a mile from the road and [was] not part of an enclosed garden or paddock under cultivation, and which [was] not within a distance of one mile from the principal homestead or head station".

The interest conferred by the Mitchellton Pastoral Leases

It is clear that pastoral leases are not the creations of the common law. Rather, they derive from specific provision in the Order-in-Council of 9 March 1847 issued pursuant to the *Sale of Waste Lands Act Amendment Act* 1846 (Imp) and, so far as is presently relevant, later became the subject of legislation in New South Wales and Queensland[328]. That they are now and have for very many years been entirely anchored in statute law appears from the cases which have considered the legal character of holdings under legislation of the Australian States and, earlier, the Australian Colonies authorising the alienation of Crown Lands. Thus, for example, it was said of such holdings in *O'Keefe v Williams*[329] that "[t]he mutual rights and obligations of the Crown and the subject depend, of course, upon the terms of the Statute under which they arise".

O'Keefe v Williams is of particular interest because it was argued in that case that occupation licenses under the *Crown Lands Act* 1884 (NSW) and the*Crown Lands Act* 1895 (NSW) conferred "an absolute right to possession as against all the world" with the consequence that there was no necessity to imply a right of quiet enjoyment[330]. The argument was disposed of on the basis that, "if sound", it would negative an implied covenant for quiet enjoyment in leases between subject and subject[331]. However, that case does contain statements suggesting that the occupation licenses in question

conferred an exclusive right of occupation[332], a suggestion also made in *O'Keefe v Malone*[333], an earlier case involving the same licenses, and in *Macdonald v Tully*[334], a case arising under the *Tenders for Crown Lands Act* 1860 (Q).

It may be that in *O'Keefe v Williams* Griffiths CJ and Isaacs J both used the expression, "exclusive right to occupy" as synonymous with the expression "exclusive right of possession"[335]. However, that is of little or no significance not only because the case was concerned with different legislation but because their Honours proceeded on the view that the Privy Council had held in *O'Keefe v Malone* that the occupation licenses in question were leases[336]. In truth, their Lordships held only that a power to relieve against "the lapse or voidance of [a] contract ... for the purchase or leasing of Crown lands" extended to relieve against forfeiture of the occupation licenses. And, perhaps, of some relevance to this case, their Lordships reached that conclusion because "the words `leased,' `lease,' and `lessee,' [were] frequently used [in the relevant legislation] as words of a generic import, including lands held under occupation licence, or the licence or the holder thereof"[337].

Whatever may have been said in the decided cases as to holdings under other legislation, it is clear that the Mitchellton Pastoral Leases derive entirely from the 1910 Act and that they conferred, and only conferred, the estate or interest which that Act authorised. As there has been no case which decides what that estate or interest was and as the Act, itself, contained no express provision in that regard, the estate or interest must be ascertained by application of those principles of statutory construction which have been devised to determine what it was that the legislature intended but failed to say in plain words.

There are two features which point in favour of the view that the Mitchellton Pastoral Leases were true leases in the traditional common law sense and, thus, conferred rights of exclusive possession. The first is the language of the Act and of the Leases. In this regard, the use of the words "demise", "lease" and derivatives of the word "lease" in the statutory provisions concerned with pastoral leases and in the Leases themselves, are to be noted. Similarly, it is to be observed that s 6(1) of the Act speaks of a "demise for a term of years", "demise" being a word traditionally used to create a leasehold estate[338]. Moreover, the word "lease" and the expression "demise for a terms of years" are used not only in relation to pastoral leases, but also in connection with agricultural holdings. However, it will later appear that there is no sound basis for assuming that they necessarily have the same meaning when used in relation to the various different holdings permitted by the Act.

The second feature which points in favour of the view that pastoral leases under the 1910 Act were true leases is that the 1910 Act clearly distinguished between leases and licenses, thereby suggesting that it was maintaining the

traditional common law distinction between a lease, which confers a right of exclusive possession, and a license, which does not.

Ordinarily, words which have an established meaning at common law are construed as having the same meaning in a statute unless there is something in the words or the subject-matter of the statute to indicate otherwise. This is but an instance of the general rule that statutes are not to be construed as altering common law principles unless that is clearly intended. Thus, in *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd*[339], where the question arose whether the 1962 Act precluded the right of a sub-lessee to transfer or mortgage its interest in a lease of an area reserved under Pt XI of that Act[340], Mason J observed[341]:

" The general rule is that the courts will construe a statute in conformity with the common law and will not attribute to it an intention to alter common law principles unless such an intention is manifested according to the true construction of the statute ... This rule certainly applies to the principles of the common law governing the creation and disposition of rights of property. Indeed, there is some ground for thinking that the general rule has added force in its application to common law principles respecting property rights."

However, there are difficulties in applying that principle to the word "lease" and the expression "demise for a term of years" in the 1910 Act, even in a context where a distinction is drawn between a lease and a license.

It is well settled that the question whether an instrument creates a lease or a license is a question of substance not one of language[342]. It is also well settled that it is a question to be answered, at least in the first instance, by asking whether the instrument in question confers a right of exclusive possession[343]. These principles of interpretation are equally applicable in the construction of a statute concerned with a particular type of holding not known, as such, to the common law, but devised to suit the peculiar conditions of the Australian colonies. Thus, the word "lease" and the expression "demise for a term of years" cannot, of themselves, provide a basis for holding that a pastoral lease under the 1910 Act conferred a leasehold estate, as understood by the common law and, thus, conferred a right of exclusive possession. Rather, the search must be for indications within the Act that it was intended that pastoral leases should confer that right.

Because it is necessary to look for indications within the Act to ascertain the estate or interest intended to be conferred by a pastoral lease and, indeed, by a lease of any of the holdings permitted by the 1910 Act, there is no basis for assuming that "lease" and "demise for a term of years" bear precisely the same meaning when used in relation to each of those different holdings. And for that reason, also, it would be wrong to place over-much reliance on the 1910

Act's apparent distinction between a lease and a license. Particularly is that so in a statutory context in which an occupation license with respect to pastoral land may be readily distinguishable from a pastoral lease by reason of the short term nature of the license[344].

Another difficulty with approaching the word "lease" and the expression "demise for a term of years" in the 1910 Act as if they bore their common law meaning is that, whatever may be the position in other areas of the law, there is no very secure basis for thinking that pastoral leases owe anything to common law concepts. As already indicated, pastoral leases are statutory devices designed to suit the peculiar conditions of the Australian colonies, deriving from the Order-in-Council of 9 March 1847. And as has been seen, the common law was only applicable in the early days of the Colonies to the extent that that was necessary or convenient.

In 1847, when pastoral leases were devised, the Colony of New South Wales had been established for nearly sixty years. However, there were vast areas which had not then been opened up for settlement, including the land in issue in this case. Even if pastoral leases were devised with common law concepts in mind, they were a novel concept and there is nothing to suggest that it was necessary or convenient for them to conform precisely to the common law. More to the point, perhaps, there is nothing to suggest that a right of exclusive possession was either a necessary or convenient feature of pastoral leases in the conditions of the Colony of New South Wales in 1847. And there is nothing to suggest that subsequent statutory measures culminating in the 1910 Act effected any significant change with respect to the estate or interest which they conferred.

A third difficulty with attributing the features of common law leases to the holdings described as "pastoral leases" in the 1910 Act is that, at least in one significant respect, the Act prescribes a quite different feature. As the common law stood in Queensland until 1975, a leasehold estate vested only on entry into possession[345]. In contrast, s 6(2) of the Act provided that it was the making of a grant in the prescribed form which operated to convey and vest the interest thereby granted.

Finally, there is the difficulty of construing "lease" in the 1910 Act as the equivalent of a lease at common law in a context in which the Act clearly used the word "lease" to refer to something quite foreign to the common law conception of a lease. At common law, a lease is normally a demise for a term of years. However the 1910 Act authorised the grant of perpetual leases which, as already indicated, were expressed to be "leases in perpetuity", an expression which is unknown to the common law and which cannot possibly take its meaning from it[346].

Quite apart from the difficulties involved in approaching the provisions of the 1910 Act on the basis that the word "lease" and the expression "demise for a term of years", of themselves, indicate that pastoral leases were true leases in the traditional common law sense, there were provisions in the Act indicating that they were not. Certainly, there were indications that they did not confer a right of exclusive possession which, as already mentioned, is an essential feature of a lease at common law.

The strongest indication that a pastoral lease granted under the 1910 Act did not confer a right of exclusive possession is to be found in those provisions of the Act conferring rights on persons authorised in that behalf to enter upon land the subject of a pastoral lease to remove timber, stone, gravel, clay, guano or other material[347], denying the lessee the right to ringbark, cut or destroy trees[348] and also denying the lessee power to restrict authorised persons from cutting or removing timber or material within the holding[349]. There is a similar indication in the provision permitting others to depasture stock if a stock route or road passed through the holding[350]. And, of course, there were the reservations in the Leases as required by the prescribed form of lease. In particular, there were the identical reservations in both Leases of "the right of any person duly authorised in that behalf ... 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" (emphasis added).

There is another indication that a pastoral lease granted under the 1910 Act did not confer a right of exclusive possession. In contradistinction to the express provision contained in s 76(1) of the 1910 Act with respect to persons whose applications for agricultural holdings had been approved, there was no provision in the Act authorising a pastoral lessee to take possession of the land the subject of a lease. Rather, the only right expressly conferred on pastoral lessees in that regard was that conferred by s 204 of the Act, namely, to take action for the removal of persons in "unlawful occupation". And, as already explained, that provision did not, of itself, confer a right of exclusive possession.

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".

Given that the words "lease" and the expression "demise for a term of years" do not, of themselves, indicate that pastoral leases granted pursuant to the 1910 Act conferred a right of exclusive possession and given, also, the

indications in the Act to the contrary, the question whether they conferred such a right is concluded in favour of the continued existence of native title rights by application of the rule of construction identified in *Mabo [No 2]* to which some reference has already been made[351]. That rule is that general legislation with respect to waste lands or Crown land "is not to be construed, in the absence of clear and unambiguous words, as intended to apply in a way which will extinguish or diminish rights under common law native title"[352].

As Deane J and I explained in *Mabo [No 2]* the rule to which reference has just been made is not a special rule with respect to native title; it is simply a manifestation of the general and well settled rule of statutory construction which requires that "clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation"[353]. Whether the rule be stated generally or by reference to native title rights, it dictates the conclusion that, whilst the grant of a pastoral lease under the 1910 Act certainly conferred the right to occupy land for pastoral purposes and s 204 conferred the right to bring action for the removal of persons in unlawful occupation, a pastoral lease did not operate to extinguish or expropriate native title rights, as would have been the case, had it conferred a right of exclusive possession.

The Mitchellton Pastoral Leases: the Crown's "reversionary interest"

It follows from the conclusion that the grant of a pastoral lease under the 1910 Act did not confer a right to exclude native title holders and, thus, did not confer a right of exclusive possession that the Mitchellton Leases were not true leases in the traditional common law sense, and, thus, did not operate to vest a leasehold estate. As a reversionary interest only arises on the vesting of a leasehold estate[354], there is no basis for the contention that, on the grant of the Mitchellton Leases, or, more accurately, on the grant of the first Mitchellton Lease, the Crown acquired a reversionary interest, as that notion is understood by the common law, and its radical title was thereby expanded to full beneficial ownership.

Moreover, the provisions of the 1910 Act run counter to the notion that the Crown acquired a reversionary interest of the kind for which the respondents contended. As already indicated, a reversionary interest arises on the vesting of a leasehold estate, which, prior to 1975 in Queensland, occurred on entry into possession. However, s 6(2) of the 1910 Act operated to vest the estate or interest conferred by a grant under the Act, not on entry into possession, but on the making of a grant in the prescribed form.

Furthermore, s 135 made provision for what may be called a statutory reversion in the event of "determinat[ion] by forfeiture or other cause before

the expiration of the period or term for which it was granted", specifying that in that event it should "revert to His Majesty and become Crown land", able to be "dealt with under [the] Act accordingly". In the event of forfeiture or early determination, the clear effect of s 135 was to assimilate the land involved to land which had not been alienated, reserved or dedicated for public purposes and which, therefore, was "Crown land" as defined in s 4 of the Act. In other words, the effect of s 135 was, in that event, to assimilate the previously alienated land to land in respect of which the Crown had radical title, and not to land in respect of which it had beneficial ownership.

The fact that in these two respects the 1910 Act proceeded on a basis which was at odds with the common law principles with respect to reversionary interests tends to confirm the conclusion otherwise reached in the application of ordinary principles of statutory construction, namely, that the grant of a pastoral lease under the 1910 Act did not confer a right of exclusive possession.

Conclusion with respect to the Mitchellton Pastoral Leases: answer to question 1C

The conclusion I have reached by application of ordinary principles of statutory construction renders it unnecessary for me to consider the appellants' alternative arguments with respect to fiduciary duties. And it follows from that conclusion that Drummond J was in error in answering question 1C(b) as he did. Instead it should have been answered "No". So answered, sub-questions 1C(c) and (d) do not arise. However, in the light of these reasons, I would answer sub-question 1C(d) "No".

The Holroyd land

The land the subject of the Holroyd Pastoral Lease ("the Holroyd land") is also in the District of Cook. It is further north and to the east of the Mitchellton land and about 24 miles west of Coen. It covers an area of approximately 1,120 square miles[355] or 2,830 square kilometres and extends north and east from the Holroyd River.

Dealings with the Holroyd land

The Holroyd land was declared open for pastoral lease on 8 June 1944[356]. On 8 February 1945, Marie Stuart Perkins was granted a "Lease of Pastoral Holding under Part III, Division I, of the Land Acts, 1910 to 1943" for a term of 30 years from 1 October 1944 ("the first Holroyd Lease"). It was the subject of a number of transfers. During the term of that lease, the 1910 Act was repealed and the 1962 Act enacted.

In 1972, the then lessees of the first Holroyd lease applied under s 155 of the 1962 Act for a new lease of the Holroyd land. The application was approved, subject to the incorporation of certain conditions in the new lease. On 31 December 1973, the first Holroyd lease was surrendered and a second lease, the Holroyd Pastoral Lease, was granted over the same land for a term of thirty years from 1 January 1974. The 1962 Act was amended by the *Land Act Amendment Act* 1986 (Q) and, pursuant to s 5 of that latter Act, the term of the lease was extended by 20 years. In 1989 the lease was transferred to the present owners, members of the Shepherdson family.

The question asked concerning the Holroyd Pastoral Lease (Q 1B)

Save that it refers to the Holroyd Pastoral Lease, the question asked of the Holroyd land, question 1B, is the same as question 1C, the question asked of the Mitchellton Pastoral Leases. And save that his Honour was dealing with one lease, not two, Drummond J answered question 1B in the same manner as he answered question 1C[357].

Three matters should be noted with respect to the answers given by Drummond J to question 1B. The first is that there is no longer any challenge to his Honour's answer to question 1B(a). The second is that it is common ground that, as with the answer to question 1C(d), the answer to question 1B(d) does not extend to possessory title. The third matter and the one that lies at the heart of these proceedings, as they affect the Holroyd land, is that, in answering question 1B(b), his Honour held that the Holroyd Pastoral Lease conferred a right of exclusive possession. To determine whether that is so it is necessary to analyse the terms of the Lease and, also, the provisions of the 1962 Act which, like the 1910 Act, contained no express provision as to the estate or interest conferred by a pastoral lease.

The terms of the Holroyd Pastoral Lease

The Holroyd Pastoral Lease is expressed to be a "Lease of Pastoral Holding under Part VI, Division I, of the Land Act 1962-1974". It is in a form similar to that of the Mitchellton Pastoral Leases. It recites that the grantees were entitled to a lease of the Holroyd land pursuant to Pt VI, Div I of the 1962 Act[358]. It is expressed to operate as a "Demise and Lease" made in consideration of an amount "paid for a full year's rent, and of the rent [t]hereby reserved". It is not expressed to be granted solely for pastoral purposes.

The Lease is expressly made subject to the conditions and provisoes in Pt III, Div I of the 1962 Act and subject also to the *Mining Act* 1968-1974 (Q) and the *Petroleum Acts* 1923 *to* 1967 (Q) and regulations made under those three Acts. It contains reservations in similar terms to those in the Mitchellton

Pastoral Leases, including a reservation of "the right of any person duly authorised in that behalf by the Governor of Our said State in Council 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".

The Holroyd Pastoral Lease also contains the following special conditions:

" The Lessees shall within five (5) years from the date of the commencement of the lease and to the satisfaction of the Minister:

(a) Construct Manager's residence, quarters for five (5) men and a shed (machinery shed, store, workshop, etc);

(b) Construct an airstrip to Department of Civil Aviation standard for mail service and flying doctor service;

(c) Erect ninety (90) miles of internal fencing;

(d) Erect 1 set of main yards and dip;

(e) Construct in the melonhole country three (3) earth dams of not less than 3,060 cubic metres (4,000 cubic yards) capacity each;

(f) Sow at least 40.5 hectares (100 acres) to Townsville Style as a seed production area; and

(g) Enclose the holding with a good and substantial fence."

There is a further condition requiring that all improvements be maintained in good repair during the term of the lease. These requirements reflect the conditions attached to the approval of the application for a new lease under s 155 of the 1962 Act.

Special conditions of the Holroyd Pastoral Lease

Some but not all of the special conditions of the Holroyd Pastoral Lease have been satisfied. It is not clear whether, as permitted by s 64(3) of the 1962 Act, the Minister formally exempted the lessees from compliance with the condition as to boundary fencing. However, it seems that, at the very least, a decision has been made not to enforce it. Some seed has been sown, and some internal fencing, dams and mustering yards constructed, but, the mustering yards are no longer usable and main yards and dip have not been built. An airstrip, machinery shed and toilet block have been constructed but, by November 1988, work had not commenced either on the manager's residence or on the workmen's quarters. It was reported in that year that a house was to

be built within the next 12 months but the materials provided by the parties do not disclose what, if anything, has happened since.

General provisions of the 1962 Act bearing on Pastoral Leases

The 1962 Act was amended from time to time and repealed in 1995[359]. The amendments do not bear on the question whether the Holroyd Pastoral Lease conferred a right of exclusive possession. It is therefore convenient to approach that question by reference to the 1962 Act in its unamended form. The long title of that Act was "An Act to Consolidate and Amend the Law relating to the Alienation, Leasing and Occupation of Crown Land" and it is not surprising, therefore, that several of its provisions are or are substantially to the same effect as those of the 1910 Act.

In terms only slightly different from those in the 1910 Act, s 6(1) of the 1962 Act authorised the Governor-in-Council, subject to that latter Act, to "grant in fee-simple, or demise for a term of years or in perpetuity, or deal otherwise with any Crown land within Queensland". "Crown land" was defined in terms which were identical to those found in the 1910 Act[360]. By s 6(2) of the 1962 Act it was necessary that a grant or lease be subject to the reservations and conditions authorised or prescribed by that or any other Act and that it be made in the prescribed form. It was also provided in s 6(2) that, when so made, the grant or lease was "valid and effectual to convey to and vest in the person therein named the land therein described for the estate or interest therein stated". The Holroyd Pastoral Lease is in the form prescribed as at the date of its grant, which form provided for reservations in the terms incorporated in the Lease[361].

The Act provided for the grant of "occupation licenses" over pastoral land[362], pastoral leases[363], leases of stud holdings[364] and the sale and lease of various agricultural holdings[365]. No relevant distinction is to be drawn between occupation licenses granted under the 1910 Act and those granted pursuant to the 1962 Act. However, the provisions of the 1962 Act with respect to pastoral leases differ from those of the 1910 Act as it stood when the Mitchellton Pastoral Leases were granted for the reason, among others, that provision was made for the grant of pastoral leases under three different forms of tenure, namely, pastoral holding, pastoral development holding and preferential pastoral holding[366]. As appears from its terms, the Holroyd Pastoral Lease is a lease of a pastoral holding.

The chief difference between the lease of a pastoral holding and other pastoral holdings under the 1962 Act is that additional conditions attached to leases of pastoral development holdings and preferential pastoral holdings. A lease of a pastoral development holding could only be granted if "the cost of developing the land [would be] abnormally high, and [if] developmental conditions

[were] imposed calculated to improve the carrying capacity and productivity of the land and to develop the public estate"[367]. A preferential pastoral holding, like its counterpart under the 1910 Act, was subject to a requirement of personal residence[368]. Similarly, on the conversion of a pastoral holding to a stud holding, as permitted by s 66(1) of the 1962 Act[369], the lessee came under an additional obligation to provide the Minister with information with respect to the stud[370] and to satisfy conditions associated with its running[371].

The 1962 Act also effected a number of changes with respect to agricultural holdings. It allowed for only four agricultural holdings, namely, agricultural farm holdings, perpetual leases, settlement farm and grazing selections, with the latter having two sub-categories, namely, grazing homestead selections and grazing farm selections[372]. As with perpetual leases under the 1910 Act, a perpetual lease under the 1962 Act was described in s 127(1) of that latter Act as "a lease in perpetuity".

The 1962 Act provided for the automatic conversion of some holdings under earlier Acts to holdings under that Act[373]. As well, provision was made for lessees of some agricultural holdings under earlier Acts to apply for their conversion to holdings under the later Act[374]. The 1962 Act also contained specific provisions for the continuation of some unconverted holdings[375]. However and leaving aside s 66(1) which permitted certain holdings, including pastoral holdings, to be converted to stud holdings[376], pastoral leases granted under earlier Acts were not converted, but continued by s 4(2) of the Act and, by that sub-section, deemed to have been granted under the 1962 Act. Subject to provisoes which are not presently relevant, s 4(2) provided for their continuation in these terms:

"All leases of land ... granted ... under the repealed Acts, and subsisting at the commencement of this Act, shall be deemed to have been granted or issued under the provisions of this Act relating to the tenure or class or mode of a class of tenure hereunder which is analogous thereto and shall in all respects continue in force and be held under and subject to this Act".

The 1910 Act was one of the repealed Acts[377].

The effect of s 4(2) was reflected in the definition of "pastoral lease" in s 5 of the 1962 Act. That definition was as follows:

"A lease of land under and subject to Divisions I and II of Part III: the term includes a pastoral holding, preferential pastoral holding or pastoral development holding, the lease whereof was issued otherwise than pursuant to Part III."

The definition also reflected the provisions of Div I of Pt VI of the Act which, as already mentioned, allowed for the renewal of certain leases, including pastoral leases, prior to their expiry.

It should also be noted that the terms of the definition of "pastoral lease" in s 5 of the 1962 Act emphasise that, as with pastoral leases under the 1910 Act, pastoral leases granted under the later Act conferred only the estate or interest which that Act authorised.

Unlike the 1910 Act, the 1962 Act provided for the renewal of certain leases prior to their expiry[378]. Application for early renewal had to be considered by the Land Administration Commission, which, pursuant to s 156(1), was required to investigate, amongst other things:

" ...

(b) the public interests, the interest of the lessee concerned, and how best the land [might] be brought to its maximum production, increased population [might] be sustained, and the public estate [might] be developed;

...

(d) such other factors and circumstances as the Commission deem[ed] fit and proper".

By s 157(1) of the Act, the Minister was given "absolute discretion" to refuse or approve an application for early renewal and to approve renewal "either unconditionally or subject to such conditions as, in his opinion, [were] calculated to develop the public estate"[379]. It was pursuant to these provisions that the Holroyd Pastoral Lease was granted and made subject to the special conditions earlier mentioned.

Another point of distinction between the 1910 Act and the 1962 Act is that the 1962 Act made express provision for entry into occupation and possession of all holdings under the Act. If there were improvements on the land, the Act provided that all selectors, lessees (which, of course, included pastoral lessees) and purchasers were "entitled to occupy, and [might] enter into possession" upon payment of the prescribed or provisional value of the improvements or sooner with the written permission of the Minister[380]. If there were no improvements, the grantee of a pastoral lease was "entitled to occupy and [might] enter into possession ... on and from the date of acceptance of his application"[381].

The 1962 Act provided for the early surrender of leases[382] and for forfeiture for various causes, including non payment of rent[383] and "breach of any

condition to which [the lease was] or [was] deemed to be subject"[384]. Sub-section (1) of s 299 provided that, in the event of forfeiture or early determination, "unless in any particular case other provision [was] made in that behalf by [the 1962] Act, the land [should] revert to Her Majesty and become Crown land, and [might] be dealt with under [the] Act accordingly". In that respect, the 1962 Act corresponded with the 1910 Act. However, s 299(2) provided:

"Forthwith upon the determination of the lease the person in occupation of the land concerned shall give peaceful possession thereof and of all improvements thereon to the [Land Commissioner for the relevant district] or a person thereunto named by the [Land] Commissioner, otherwise such person shall be a trespasser upon Crown land and the provisions of [the] Act relating to such trespassers shall apply accordingly".

Provision was made in s 372 of the 1962 Act with respect to trespassers on reserves and Crown land in terms to much the same effect as s 203 of the 1910 Act. A similar procedure to that specified in s 204 of the 1910 Act for the removal of persons in unlawful occupation of reserves and Crown land was laid down by s 373. And, as with its counterpart under the 1910 Act, the concluding paragraph of s 373 provided for the same procedure to be invoked by "[a] lessee or his manager or a licensee of any land held from the Crown, or a person ... purchasing any land from the Crown" against "any person in unlawful occupation" of the land concerned.

Statutory conditions with respect to Pastoral Leases

As well as the special conditions to which reference has been made, the Holroyd Pastoral Lease is expressed to be subject to the conditions and provisoes specified in Pt III, Div I of the 1962 Act. By s 50(2) in that Part, the Minister might specify conditions in the notification that land was open for lease as a pastoral holding, including conditions with respect to boundary fencing, improvements, developmental works and the eradication of noxious plants. Additional conditions might be specified in the opening notification for pastoral development holdings and preferential pastoral holdings[385]. The Holroyd Pastoral Lease was granted in consequence of an application for renewal under s 155 of the 1962 Act, not pursuant to an opening notification. Thus, it is not subject to conditions which might otherwise have attached by operation of s 50[386].

One other provision of Pt III, Div I of the 1962 Act, namely s 61, specified conditions applicable to leases of pastoral holdings. It provided as to their maximum permissible term, their commencement, and specified, in s 61(d), that "rent [should] be computed according to the number of square miles in the lease".

In addition to the conditions attaching to leases of pastoral holdings pursuant to the provisions of Pt III, Div I of the 1962 Act, ss 251 and 261, respectively, subjected all holdings to conditions for the destruction of noxious weeds and Harrisia cactus. However, the Minister was empowered by s 266 to grant exemptions from each of those conditions if satisfied that performance would be uneconomic.

Provisions of the 1962 Act allowing for exemption from conditions

In addition to s 266 which empowered the Minister to grant exemptions with respect to the destruction of noxious weeds and Harrisia cactus, there were two other provisions of the 1962 Act relevant to the performance of conditions attaching to pastoral leases. First, s 14(2)(a) allowed that "[t]he Minister, with the approval of the Governor in Council and the consent of the lessee, [might] delete or vary or amend any developmental or improvement condition (including the condition of fencing or other improvement) of a lease". That power was subject to the qualification contained in sub-section (c), the effect of which was that the Minister could extend but not reduce the time for performance.

The second relieving or exempting provision was that contained in s 64(3), to which some reference has already been made. By that sub-section, "[t]he Minister, in his discretion, [might] exempt a lessee from performing any condition of fencing imposed upon the lease of a pastoral lease and [might] alter or cancel such exemption". The combined effect of the concluding paragraph of that sub-section and of s 111 of the Act[387] was that the exemption might be limited as to time and circumstances and that, once granted, it could only be cancelled or altered by the giving of six months' notice to that effect.

Specific provision was also made for relief against forfeiture, including forfeiture of pastoral leases. Although provision was made in s 297 for proceedings to determine whether a lease was liable to be forfeited, an overriding discretion was reserved to the Minister in these terms[388]:

"If upon the final decision of the matter any such liability to forfeiture is established the Minister may in his discretion-

(a) recommend to the Governor in Council that the lease be forfeited; or

(b) waive the liability to forfeiture subject to such terms and conditions as he thinks fit to impose upon the lessee."

Other provisions of the 1962 Act relevant to the estate or interest

conferred by Pastoral Leases

As with the 1910 Act, the 1962 Act made provision denying the lessees of various holdings, including the lessee of a pastoral holding, the right, without prior written permission, to destroy any tree on the land the subject of the lease[389]. There was no provision in the 1962 Act akin to ss 199 and 200 of the 1910 Act which allowed for others to be licensed to take timber from land held under a pastoral lease. At all relevant times, however, the *Forestry Act* 1959 (Q) provided for the issue of licenses to get forest products from various holdings, including pastoral holdings, and conferred full power of entry upon persons so licensed[390].

Finally, it should be noted that persons travelling stock on a stock route passing through a pastoral lease were entitled to depasture the stock on the land on the same terms and conditions as those applicable under the 1910 Act[391].

The interest conferred by the Holroyd Pastoral Lease

The differences between the Mitchellton Pastoral Leases and the Holroyd Pastoral Lease and between the 1910 and the 1962 Acts provide some support for the view that the Holroyd Pastoral Lease is a true lease, the grant of which conferred a right of exclusive possession on the lessees. Perhaps the most significant difference is to be seen in the Holroyd Pastoral Lease, itself, which, as already mentioned, is in the prescribed form and, in accordance with that form, is not expressed to be granted solely for pastoral purposes.

There is also the consideration that the 1962 Act, unlike the 1910 Act, provided for lessees of pastoral holdings, along with selectors, the lessees of other holdings and purchasers of land under the Act to "occupy and ... take possession" of land. This does not establish that a pastoral lease conferred a right of exclusive possession; on the other hand, the contrary proposition draws no support from the absence of any provision authorising occupation or possession, as is the case with the 1910 Act.

Another difference between the 1910 and the 1962 Acts which provides a measure of support for the view that the lease of a pastoral holding under that latter Act confers a right of exclusive possession is that, as with other holdings under the 1962 Act, the lessee of a pastoral holding was required, on forfeiture or early termination, to give possession to the Crown. Notwithstanding the terms of s 299(1) which, in the event of forfeiture or early termination of a lease, assimilate the land involved to what, for convenience, may be referred to as unalienated Crown land, the terms of s 299(2), requiring that possession be given to the Crown, point in favour of a statutory interest on forfeiture or early termination extending beyond radical title. Again, if that is the effect of s

299(2), it does not establish that a pastoral lease conferred a right of exclusive possession and accordingly does not establish the existence of a traditional leasehold estate[392]; neither, however, does it provide support for the contrary view, as did the absence of a reversionary interest extending beyond radical title in the case of the Mitchellton Pastoral Leases.

Other provisions which are capable of giving some support to the view that a lease of pastoral holding under the 1962 Act conferred a right of exclusive possession are those allowing for a grant to be made subject to conditions for the erection of boundary fences and the carrying out of improvements and developmental works. As earlier indicated, such conditions might be imposed pursuant to a requirement to that effect in the opening notification[393], or, as here, pursuant to conditions imposed by the Minister on renewal prior to expiry. And, of course, the question of early renewal in the case of pastoral and other renewable leases, was dependent on a consideration, amongst other things, of "how best the land [might] be brought to its maximum production, increased population [might] be sustained, and the public estate ... developed"[394]. Consideration of those matters might well result in conditions suggestive of a right of exclusive possession.

Certainly, improvement and developmental conditions for the construction of buildings and improvements such as the manager's residence and airstrip required by the Holroyd Pastoral Lease might suggest a right of exclusive possession. And as there is no basis for distinguishing as to the estate or interest granted with respect to that part of the land to be improved and that to be left unimproved, conditions of that kind might suggest a right of exclusive possession over the whole land. Similarly, as there is no statutory basis for distinguishing between pastoral holdings made subject to improvement or developmental conditions and those not subject to conditions of that kind, the possibility that such conditions might be imposed is capable of suggesting that all pastoral leases conferred a right of exclusive possession.

However, it would be wrong, in my view, to place great weight on the provisions of the 1962 Act authorising the imposition of improvement and developmental conditions. After all, other provisions of the Act conferred discretionary powers on the Minister to delete, vary or amend those conditions, to exempt lessees from performance of fencing conditions and ultimately, to relieve against forfeiture. Moreover, it cannot be said that the conditions which might be imposed were of such a nature that they necessitated a right of exclusive possession. After all, the ordinary criminal and civil laws were and are available to protect against wilful and negligent damage to property. And to the extent that there is any inconsistency between the satisfaction of conditions and the exercise of native title rights, it may be that satisfaction of the conditions would, as a matter of fact, but not as a

matter of legal necessity, impair or prevent the exercise of native title rights and, to that extent, result in their extinguishment.

In the light of the principle of construction identified and explained in *Mabo [No 2]* and in light of the long statutory history of pastoral leases, clear words are plainly required before the provisions of the 1962 Act dealing with pastoral tenures can be construed as changing the essential nature of pastoral leases by the introduction, under the same name, of a different tenure conferring a right of exclusive possession. The matters to which reference has been made fall short of a clear indication of an intention to that effect. Rather, s 4(2) of the 1962 Act makes it plain that the pastoral tenures permitted by that Act were, and were intended to be, "analogous" with those permitted by earlier Acts, including the 1910 Act. Given these considerations, the provisions of the 1962 Act concerned with leases of pastoral holdings are not to be construed as creating leases which conferred a right of exclusive possession and, thus, a right to exclude native title holders from their traditional lands.

It follows that the Holroyd Pastoral Lease did not confer a right of exclusive possession. The questions whether performance of the conditions attached to the Holroyd Pastoral Lease effected any impairment or extinguishment of native title rights and, if so, to what extent are questions of fact and are to be determined in the light of the evidence led on the further hearing of this matter in the Federal Court.

Conclusion with respect to the Holroyd Pastoral Lease: answer to question 1B

Again, the conclusion that, as a matter of statutory construction, a pastoral lease under the 1962 Act did not confer a right of exclusive possession makes it unnecessary to consider the arguments with respect to fiduciary duties. And that conclusion also has the consequence that Drummond J was in error in answering question 1B(b) as he did. Instead, it should have been answered "No". As with questions 1C(c) and (d), questions 1B(c) and (d) do not arise. However, in the light of these reasons, I would answer sub-question 1B(d) "No".

Orders

I agree with the orders proposed by Toohey J.

McHUGH J. I agree with the judgment of Brennan CJ in these matters and with the orders which he proposes.

GUMMOW J.

Introduction

On 30 June 1993, that is to say before the enactment of the *Native Title Act* 1993 (Cth) ("the Native Title Act")[395], the **Wik** Peoples instituted in the Federal Court of Australia a proceeding in which they sought to establish the existence of certain native title rights over an area of land in North Queensland. The State of Queensland was first respondent and the Commonwealth of Australia second respondent. The Thayorre People were later joined as respondents. They cross-claimed, seeking similar relief in respect of lands that, in part, overlapped those the subject of the claim of the **Wik** Peoples.

The litigation stands outside the system for the determination of native title claims established by the Native Title Act. However, it raises issues which may have importance for the operation of that statute. The expressions "native title" and "native title rights and interests" are defined in s 223(1) thereof as meaning communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters where, among other things, "the rights and interests are recognised by the common law of Australia". If acts done before the commencement on 31 October 1975 of the *Racial Discrimination Act* 1975 (Cth) ("the Racial Discrimination Act") were effective to extinguish or impair native title, the Native Title Act does not undo that result. In the joint judgment of six members of this Court in *Western Australia v The Commonwealth* (*Native Title Act Case*)[396], it was said:

"An act which was wholly valid when it was done and which was effective then to extinguish or impair native title is unaffected by the *Native Title Act*. Such an act neither needs nor is given force and effect by the Act."

The present litigation is not concerned solely with steps taken under the prerogative. Prerogative powers were supplanted in Queensland by statute as a result of constitutional development in the second half of the nineteenth century. As will appear in the course of these reasons, the issues on these appeals turn upon the proper construction of *The Land Act* 1910 (Q) ("the 1910 Act") and *The Land Act* 1962 (Q) ("the 1962 Act"), and upon the terms of the grants of pastoral leases thereunder. The 1962 Act repealed the 1910 Act. The 1962 Act has now been repealed by the *Land Act* 1994 (Q).

I approach these issues of construction upon the assumption, adverse to the **Wik** Peoples and the Thayorre People, that there does not exist and did not exist when the 1910 Act and the 1962 Act were enacted, any fiduciary relationship between them and the State of Queensland. The **Wik** Peoples and the Thayorre People submitted that such relationships existed

and the duties arising thereunder militated against there being any legislative intention to extinguish native title. I put fiduciary duty issues to one side.

Rather, I begin with the proposition that for a statute such as the 1910 Act or the 1962 Act to impair or extinguish existing native title or to authorise the taking of steps which have that effect, it is necessary to show, at least, the intention, "manifested clearly and plainly", to achieve that result. That is how the point was expressed in the joint judgment of six members of the Court in the *Native Title Act Case*[397].

In this context, "intention" does not refer to any particular state of mind of the legislators, who may not have adverted to the rights and interests of the indigenous inhabitants[398]. Moreover, statute law may be the result of a compromise between contending factions and interest groups and of accommodations between and within political organisations which are not made public and cannot readily be made apparent to a court[399]. To speak here of "intention" will seldom assist and may impede the understanding of the effect of the legislation in question, unless it be kept in mind that what is involved is the "intention" manifested by the legislation[400]. As Holmes put it, "[w]e do not inquire what the legislature meant; we ask only what the statute means"[401]. It will be necessary later in these reasons to consider the particular criteria by which the manifestation of legislative intention is to be assessed in this case.

The Federal Court proceedings

The content of native title, its nature and incidents, will vary from one case to another. It may comprise what are classified as personal or communal usufructuary rights involving access to the area of land in question to hunt for or gather food, or to perform traditional ceremonies. This may leave room for others to use the land either concurrently or from time to time[402]. At the opposite extreme, the degree of attachment to the land may be such as to approximate that which would flow from a legal or equitable estate therein[403]. In all these instances, a conclusion as to the content of native title is to be reached by determination of matters of fact, ascertained by evidence[404].

It is at this threshold that these appeals present a significant consideration. There has been no trial of issues going to the establishment of native title and the ascertainment of its content. Yet the effect of the decision at first instance was to foreclose the occasion for such a trial and to rule against the claims of the **Wik** Peoples and the Thayorre People. This state of affairs has come about as follows.

A judge of the Federal Court (Drummond J) ordered[405] a number of questions for separate decision[406]. Questions 1B, 1C, 4 and 5 and the answers given by Drummond J are set out in the judgment of Brennan CJ. The Thayorre People were granted leave to appeal to the Full Court of the Federal Court against the determination of Question 1C. This related to two instruments for a grant of pastoral leases (the "Mitchellton Pastoral Leases") dated respectively 25 May 1915 and 14 February 1919 and issued pursuant to the 1910 Act[407]. Each pastoral lease was for a term of 30 years. However, the first was forfeited in 1918 for non-payment of rent and the second was surrendered in 1921. There was no entry into occupation by the grantees of either of these pastoral leases. They were for an area of 535 square miles, bounded partly by the Gulf of Carpentaria, the Mitchell River and the Edward River. In 1921 the Chief Protector of Aboriginals reported that "there are about 300 natives roaming this country". In that year, by Order in Council made under the power conferred by s 180 of the 1910 Act, the land in question was reserved and set apart for use of the Aboriginal inhabitants of the State. The creation of such a reserve did not extinguish any native title which then still subsisted[408].

The **Wik** Peoples obtained leave to appeal to the Full Federal Court, not only in respect of the answer to Question 1C but in respect of Question 1B. This concerned a lease of an area of 2,830 square kilometres (partly bounded by the Holroyd River) as a pastoral holding under the 1962 Act ("the Holroyd River Pastoral Lease"). The carrying capacity in fair seasons was one beast per 60 acres. The pastoral lease was granted, with effect for 30 years from 1 January 1974, by instrument dated 27 March 1975 (some seven months before the commencement of the Racial Discrimination Act) and is still current[409].

Leave also was granted to the **Wik** Peoples to appeal to the Full Court in respect of the answers to Questions 4 and 5. These concerned certain claims against the State of Queensland, the first respondent; Comalco Aluminium Ltd ("Comalco"), the fourth respondent; and Aluminium Pechiney Holdings Pty Ltd ("Pechiney"), the fifth respondent. That branch of the litigation involves discrete issues. I agree it should be dealt with as proposed by Kirby J and for the reasons given by his Honour.

The Questions concerning the Holroyd River Pastoral Lease and the Mitchellton Pastoral Leases were so framed as to ask whether, if at any material time any native title existed in respect of the land the subject of those pastoral leases, *the grant* of those pastoral leases *necessarily* extinguished all incidents thereof. The form in which the issue is presented, namely necessary extinguishment by grant, is significant. The primary judge answered the questions in the affirmative as to the Holroyd River Pastoral Lease and the first of the Mitchellton Pastoral Leases. However, as I have indicated, this was

without any prior determination as to whether, in fact, any native title was in existence at the respective times of grant of those pastoral leases.

By orders of this Court made under s 40 of the *Judiciary Act* 1903 (Cth), each of the pending appeals to the Full Federal Court by the **Wik** Peoples and the Thayorre People was removed into this Court.

My conclusion is that the primary judge erred in determining that the grants of pastoral lease under the 1910 Act and the 1962 Act necessarily had the effect of extinguishing all incidents of any native title which might have then subsisted in the **Wik** Peoples or the Thayorre People. Rather, his Honour should have determined that none of these grants clearly, plainly and distinctly authorised activities and other enjoyment of the land which necessarily were inconsistent with the continued existence of any of the incidents of native title which could have been subsisting at the time of these grants. This would leave for future determination at trial the questions whether such native title subsisted at material times and still subsists and, if so, the incidents of such native title.

The legal framework

In asking "what the statute means"[410] of any provision of the 1910 Act or the 1962 Act, regard is to be had not only to the other provisions of the same statute but also to such matters as other statutes *in pari materia* and the existing state of the law[411]. The phrase "the existing state of the law" embraces the then understanding of the common law. In this way there is discerned the state of affairs for the remedy or establishment of which the statute was designed[412].

At the enactment of the 1910 Act as at that of the 1962 Act, a basic principle of land titles in Australia was that identified, with some reference to New South Wales colonial history before the establishment of self-government, by Windeyer J in *Randwick Corporation v Rutledge*. His Honour said[413]:

"On the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became in law vested in the Crown. The early Governors had express powers under their commissions to make grants of land. The principles of English real property law, with socage tenure as the basis, were introduced into the colony from the beginning - all lands of the territory lying in the grant of the Crown, and until granted forming a royal demesne. The colonial Act, 6 Wm IV No 16 (1836), recited in its preamble that the Governors by their commissions under the Great Seal had authority 'to grant and dispose of the waste lands' - the purpose of the Act being simply to validate grants which had been made in the names of the Governors instead of in the name of the Sovereign. And when in 1847 a bold

argument, which then had a political flavour, challenged the right of the Crown, that was to say of the Home Government, to dispose of land in the colony, it was as a legal proposition firmly and finally disposed of by Sir *Alfred Stephen* CJ: *The Attorney-General v Brown*[414]."

Stephen CJ had emphasised in *Brown* that, at the time of making a grant of land to a subject, the Crown must be presumed to have a title to that land and that this original title provides the foundation and source of all other titles. Estates in land in the colony were held in free and common socage. They were not allodial, that is to say, they were not a species of estate which existed outside the feudal system and were held independently and not of any superior. All interests in land in New South Wales had been granted directly by the Crown. In contrast to the tenurial system as it had been applied in England, in the colony estates were not held by any intermediate or mesne lord.

Attorney-General v Brown concerned a grant made in 1840. Until as late as 1842 there was no statutory restriction upon the alienation by the Crown of lands in the Australian colonies. The phrase "waste lands" had as its primary meaning lands which were uncultivated rather than profitless[415]. The management and control of colonial waste lands (ie, lands not yet granted from the Crown in fee simple, or for an estate in freehold, or for a term of years, and not dedicated and set apart for some public use[416]) was by executive fiat[417].

Until the mid-nineteenth century Imperial policy with respect to Australia was opposed to Colonial control in such matters. There was no invariable rule that a colony enjoyed its own land revenue[418]. To the contrary, the Imperial authorities saw "unsettled" land as the source of revenue to recoup the outlays in the operation of the colonial administrations and to provide for further emigration from the United Kingdom and other development. After 1840, the Colonial Secretary was advised by the Colonial Lands and Emigration Commissioners. In 1842 this body received by statute[419] powers with respect to the administration of the proceeds of sale of waste lands. Gross proceeds of such sales were to be applied to the "public Service" of the colony in which the land was situated and one-half was to be appropriated to the purposes of emigration[420]. An element of representative government was provided by the *Australian Constitutions Act* 1842 (Imp)[421], but s 29 excluded from the competence of the New South Wales Legislative Council any law which interfered in any manner with the sale of Crown lands in the colony or with the revenue arising therefrom[422].

The *Australian Constitutions Act* did not provide a constitutional settlement of any duration. Queensland was separated from New South Wales in 1859 and with the arrival of representative government the Imperial authorities

relinquished control over Crown lands in these colonies. Imperial statute, s 2 of the *New South Wales Constitution Act* 1855[423], vested in the New South Wales legislature the entire management and control of the waste lands belonging to the Crown in New South Wales and the power of appropriation of the gross proceeds of the sales of any such lands[424]. Then s 30 of the *Constitution Act* 1867 (Q) ("the 1867 Act")[425] provided that it was to be lawful for the legislature of that colony to make laws for regulating the sale, letting, disposal and occupation of waste lands of the Crown within Queensland. With exceptions not presently material, s 40 stated:

"The entire management and control of the waste lands belonging to the Crown in the said Colony of Queensland and also the appropriation of the gross proceeds of the sales of such lands and of all other proceeds and revenues of the same from whatever source arising within the said colony including all royalties mines and minerals shall be vested in the Legislature of the said colony.

..."

The result was to withdraw from the Crown, whether represented by the Imperial authorities or by the Executive Government of Queensland, significant elements of the prerogative. The management and control of waste lands in Queensland was vested in the legislature and any authority of the Crown in that respect had to be derived from statute[426].

There followed the enactment in Queensland and elsewhere of statutes designed to provide for conditions unknown in England and to meet local wants in a fashion unprovided for in England. First, there was the growth of a statutory system of title by registration, identified by the phrase "the Torrens system", whereby statute makes the certificate of title conclusive evidence of its particulars and protects the registered proprietor from actions to recover the land, except in specifically described cases[427].

Then there was the creation by statute of what Griffith CJ called "new forms of tenure"[428]. This legislative activity illustrated the general propositions that statute may create interests in property which are unknown to the common law[429] and that "there is nothing higher among legal rights than a right created by statute"[430]. To these new forms of tenure the terms "lease" and "licence" applied in a new and generic sense[431]. The legislation teemed with "proverbial incongruities"[432] and Higgins J used the term "*quasi*-Crown lands"[433] to identify those areas as to which there had been conferred a tenure short of a fee simple. Of the operation of that system in New South Wales in 1905, that is to say shortly before the enactment of the 1910 statute in Queensland, A C Millard and G W Millard wrote[434]:

"The whole of the numerous and elaborate provisions of the Acts for the alienation and occupation of Crown lands are examples of the legislation which has been necessary to meet the peculiar conditions and wants of the colony. Nothing corresponding to the body of laws thereby created is found in English law, there being nothing in England analogous to the vast area of unoccupied lands in this colony, of which the Crown is the nominal, and the public the real owner, the settlement of which is necessary to the welfare and progress of the country."

The comparable situation in Queensland later was described as follows[435]:

"The Crown leasehold principle, introduced during the imperial period as a device in favour of the squatters, was developed in (literally) scores of Queensland statutes after the Separation in 1859. The undoubted constitutional right of the Queensland Parliament to create whatever tenures it thinks fit and to attach to them whatever incidents it thinks fit, has been exercised actively. In Queensland, as Millard has correctly stated in respect of New South Wales, the result is 'a bewildering multiplicity of tenures - many of them exhibit only trifling differences in detail'[436].

Gone is the simplicity of the law concerning modern English tenures; gone is the senile impotence of the emasculated tenurial incidents of modern English Land Law. In Queensland, as in the rest of Australia, we are in the middle of a period in which the complexity and multiplicity of the law of Crown tenures beggars comparison unless we go back to the early mediaeval period of English Land Law."

Throughout this period it was assumed that the powers of the colonial and then of the State legislatures to create whatever tenures they thought fit, and with the attachment of such incidents as statute provided, were exercised in an environment where the local common law recognised no allodial species of estate which was held independently of any grant by the Executive Government or of any grant by or pursuant to statute. That this was a false assumption was demonstrated in 1992 by the decision of this Court in *Mabo [No 2]*[437].

That decision confirmed native title rights to certain lands in two Torres Strait islands which had been annexed to the colony of Queensland in 1879[438]. On remitter to the Supreme Court of Queensland, findings of fact were made concerning the occupation of the Murray Islands by the Meriam People, Melanesians who probably came to settle the islands from Papua New Guinea[439]. This Court granted declaratory relief as to the subsistence of the native title of the Meriam people[440]. Nevertheless, *Mabo [No 2]* must be taken, particularly since the further decisions with respect to Western Australia in the *Native Title Act Case*[441], to establish and entrench in the

common law of Australia broader and more fundamental propositions. They include the holding that:

"the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands".

This is the formulation in the Preamble to the Native Title Act, and thus supplies a foundation upon which the Parliament enacted the Native Title Act. The Preamble also recites the holding in *Mabo [No 2]* 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".

The extinguishment of existing native title readily is seen as a consequence of a grant in fee simple. That is because the fee simple, as the largest estate known to the common law, confers the widest powers of enjoyment in respect of all the advantages to be derived from the land itself and from anything found upon it. No different result may follow where what is asserted against native title is a lease for a term. In particular, subject to the constraints imposed by the law of waste, at common law the lessee ordinarily has powers of use and enjoyment with respect to certain profits or produce derived from the land. Under the common law as developed in England, this included game and other *ferae naturae* captured within the limits of the land[442] and a general property in underwood and trees[443].

In these appeals, the fundamental issue does not concern the extinguishment of native title by grant of a fee simple or of a leasehold interest as known to the common law. Rather, it concerns the impact upon native title of statute and of *sui generis* interests created thereunder. The dispute is whether the grants of the Mitchellton Pastoral Leases, pursuant to the 1910 Act, and of the Holroyd River Pastoral Lease, pursuant to the 1962 Act, were, in the sense of the Preamble to the Native Title Act, valid government acts inconsistent with the continued existence of any native title rights and interests which subsisted when the grants were made. Those statutory grants were not of any freehold estate, being, indeed, grants of interests that were *sui generis*.

English land law

Traditional concepts of English land law, although radically affected in their country of origin by the *Law of Property Act* 1925 (UK), may still exert in this country a fascination beyond their utility in instruction for the task at hand. So much became apparent as submissions were developed on the hearing of these appeals. The task at hand involves an appreciation of the significance of the

unique developments, not only in the common law, but also in statute, which mark the law of real property in Australia, with particular reference to Queensland. I have referred above to some of these developments. There also is the need to adjust ingrained habits of thought and understanding to what, since 1992, must be accepted as the common law of Australia.

Further, those habits of thought and understanding may have lacked a broad appreciation of English common law itself. For example, there is no particular reason to be drawn from English land law which renders it anomalous to accommodate in Australian land law notions of communal title which confer usufructuary rights. There are recognised in England rights of common which depend for their establishment upon prescription and custom. An example is the common of pasture in gross enforceable by action by one commoner on behalf of that commoner and the other commoners[444]. Moreover, the extinguishment of the rights of commoners may be effected by statute. In the century before the enactment in England of the *Inclosure Act* 1845 (UK)[445], nearly 4,000 private inclosure Acts had been passed[446].

Nor, in a system where, subject to statute, land ownership depends upon principles derived from the English common law is there any necessary conceptual difficulty in accommodating allodial to tenurial titles. The point was made as follows by Brennan J in *Mabo [No 2]*[447]:

"Nor is it necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the indigenous inhabitants. The doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant. The English legal system accommodated the recognition of rights and interests derived from occupation of land in a territory over which sovereignty was acquired by conquest without the necessity of a Crown grant."

Blackstone contrasted as follows the term "allodial" with the term "fee"[448]:

"The true meaning of the word fee (*feodum*) is the same with that of feud or fief, and in its original sense it is taken in contradistinction to *allodium*; which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely *in dominico suo*, in his own demesne. But *feodum*, or fee, is that which is held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides."

In Blackstone's time, it was accepted that allodial titles preceded the development of the feudal system after the Norman Conquest.

In the same period in which the existence of allodial title was denied to the colony of New South Wales by the decision in *Brown*, it was re-emerging elsewhere in the common law world. Quite apart from the treatment in the United States of native title, the American Revolution was followed in several of the States by legislative repudiation of the tenurial system as the ultimate root of real property title. For example, in New York the legislature abolished all feudal tenures of every description, with all their incidents, and declared that all lands within that State were allodial[449]. Of the developments in the United States, Chancellor Kent wrote in 1828[450]:

"Thus, by one of those singular revolutions incident to human affairs, allodial estates, once universal in Europe, and then almost universally exchanged for feudal tenures, have now, after the lapse of many centuries, regained their primitive estimation in the minds of freemen."

The significance of *Mabo [No 2]*

In this decision, the Court declared the content of the common law upon a particular view which now was taken of past historical events. The significance this has for common law techniques of adjudication may be seen in the form taken by the submissions on the present appeals. The first matter of significance concerns what is sometimes identified as the declaratory theory of the common law. The second is related to the first. It concerns the meaning to be given, when interpreting statutes such as the 1910 Act and the 1962 Act, to the phrase, referred to earlier in these reasons, "the existing state of the law".

There have been few adherents in recent times to a declaratory theory in an absolute form. For one thing, the principles and doctrines of equity were never "like the rules of the Common Law, supposed to have been established from time immemorial"; rather, they were "established from time to time - altered, improved, and refined from time to time"[451]. For another, to use the words of Windeyer J, "[l]aw is to be accommodated to changing facts"[452]. Perhaps the general understanding (with its emphasis upon the evolutionary and the functional[453]) was expressed by Lord Radcliffe in 1956 in his speech in *Lister v Romford Ice and Cold Storage Co Ltd*[454]:

"No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movement may not be perceptible at any distinct point of time, nor can we always say how it gets from one point to another; but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place."

Here is a broad vision of gradual change by judicial decision, expressive of improvement by consensus, and of continuity rather than rupture. Yet much of the common law is subjected to statutory modification, often drastic. The task of the courts then is to construe that statutory change to the common law, employing common law methods and techniques of interpretation and adjudication[455].

Movement also may plainly be perceptible, and there may be an explicit change of direction, where, in the perception of appellate courts, a previously understood principle of the common law has become ill adapted to modern circumstances. The point was made as follows by Mason J in *State Government Insurance Commission v Trigwell*[456]:

"If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency."[457]

Again, it may emerge that the rationale of a particular cause of action is the product of a procedural fiction (eg, an implied promise to pay) which should no longer be supported after the demise of the old forms of action[458]. In those cases, the perceived reason for change stems from alterations in the legal system itself. The procedural operation of the Judicature system may produce similar results[459]. More simply, upon analysis it may appear that a particular principle (eg, as to the irrecoverability of payments made under a mistake of law) rests upon a dubious foundation in the case law which has not been accepted in this Court[460].

Mabo [No 2] was not such a decision. Nor did it rest upon the rejection of a particular common law rule by reason of its basis in particular conditions or circumstances which, whilst once compelling, since have become ill adapted to modern circumstances. Rather, the gist of *Mabo [No 2]* lay in the holding that the long understood refusal in Australia to accommodate within the common law concepts of native title rested upon past assumptions of historical fact, now shown then to have been false.

Those assumptions had been made within a particular legal framework which had been developed over a long period. The effect of the *British Settlements Act*1887 (Imp) was to empower the Crown to make laws and establish courts not only for possessions acquired by cession or conquest and which lacked a legislature, but also for possessions which had been settled and which lacked a legislature. Previously, settlers had seen their interests as better protected by

the classification of a settled colony because that took the local legal structure outside prerogative control[461]. Settled colonies had been identified by the Privy Council in 1722 as those which had been found "uninhabited"[462]. This classification was extended to include inhabited territory and in 1828 it was decided that the applicability of the law of those inhabitants to settlers depended upon "the existence of a *lex loci*, by which the British settlers might, without inconvenience, for a time, be governed"[463].

That left various questions as to the legal position of the original inhabitants[464]. These included the operation of the criminal law[465]. After the adoption in*Attorney-General v Brown*[466] of the doctrine that the original title of the Crown provided the foundation and source of all other land titles, there remained in Australia the question of the extent to which the common law denied all continuity to customary law of Aboriginal peoples with respect to land. No question of native title arose for express decision in *Brown*.

In 1889 the Judicial Committee decided *Cooper v Stuart*[467]. No question of native title was in issue in that case. However, the reasoning of their Lordships was adverse to any theory of continued native title. The appellant unsuccessfully sought to show that the rule against perpetuities, in so far as it affected the Crown, was operative in New South Wales at the time of an executive grant made by Governor Brisbane in 1823. The Privy Council held that there was no land law or tenure existing at the time of annexation to the Crown. Nevertheless, as an exception to the general and immediate application in New South Wales of English law, the law against perpetuities could not justly and conveniently be applied in New South Wales against the Crown.

As a step in their reasoning, their Lordships declared that the colony of New South Wales had peacefully been annexed to the Crown, being territory "practically unoccupied, without settled inhabitants or settled law"[468]. Of that proposition it was said in *Mabo [No 2]*[469]:

"The facts as we know them today do not fit the 'absence of law' or 'barbarian' theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory. It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands."

Thus, it was appropriate to declare in 1992 the common law upon a particular view of past historical events. That view differed from assumptions, as to extent of the reception of English land law, upon which basic propositions of Australian land law had been formulated in the colonies before federation. To

the extent that the common law is to be understood as the ultimate constitutional foundation in Australia, there was a perceptible shift in that foundation, away from what had been understood at federation.

In Canada, the basic legal framework had developed quite differently. In *R v Van der Peet*[470] McLachlin J identified two fundamental principles upon which dealings with the aboriginal peoples were predicated by the common law and those who regulated British (and *semble* French[471]) settlement of Canada. These were, first, "the general principle that the Crown took subject to existing aboriginal interests in the lands they traditionally occupied and their adjacent waters, even though those interests might not be of a type recognized by British law" and, secondly, these interests "were to be removed only by solemn treaty with due compensation"[472].

There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms. Rather, lawyers have "been bemused by the apparent continuity of their heritage into a way of thinking which inhibits historical understanding"[473]. Even if any such taxonomy were to be devised, it might then be said of it that it was but a rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflicts.

At what level of primary fact does one perceive the disappearance of the foundation for native title by reason of the washing away by "the tide of history" of any real acknowledgment of traditional law and real observance of traditional customs?[474] Again, for example, one might speculate on the significance their Lordships in *Cooper v Stuart* might have attached to the observations of Governor Hutt in 1841 had they been dealing with the position in Western Australia. The Governor wrote from Perth to the Colonial Secretary, Lord John Russell, in accordance with his directions, a report "exhibiting the state of the [A]borigines in Western Australia, and showing what has been done for them in the course of the year preceding". In so doing, the Governor said[475]:

"They have no particular spots which can be regarded as their haunts, or where they habitually dwell; and though every family has its particular locality or tract of land which it considers its own, yet this seems to be open to the use of all the relations of the family, and from their intermarriages, and consequent wide-spread connexions, except there should be a blood fued [sic] between him and the inhabitants of a particular district, a man may have the privilege of hunting or of ranging for roots over very many miles of country; even the land which an individual may call his own he has no tenacious longing after when usurped by us, except so far as it may afford him the means of subsistence; the moment we clear it for the purposes of agriculture

or gardening, it loses its chief value in his eyes; so that an Australian's idea of property in land is limited, it may be said, to its usufructuary value."

The development of an appropriate historical method to some extent has been constricted by habits of thought engendered by the adversarial processes of common law trial. In *Air Canada v Secretary of State for Trade*[476], Lord Wilberforce emphasised that those processes may, from the imperfections or absence of evidence, produce an adjudication which is not, and is known not to be, the whole truth of the matter. His Lordship observed[477]:

"[T]he task of the court is to do, and be seen to be doing, justice between the parties ... There is no higher or additional duty to ascertain some independent truth."

From such a foundation, the further elucidation of common law principles of native title, by extrapolation to an assumed generality of Australian conditions and history from the particular circumstances of the instant case, is pregnant with the possibility of injustice to the many, varied and complex interests involved across Australia as a whole. The better guide must be "the time-honoured methodology of the common law"[478] whereby principle is developed from the issues in one case to those which arise in the next. On the present appeals, this requires close attention to the terms of the 1910 Act and the 1962 Act.

Statutory interpretation

The particular application in *Mabo [No 2]* of the declaratory theory of the common law has consequences for these appeals. The Court is called upon to construe statutes enacted at times when the existing state of the law was perceived to be the opposite of that which it since has been held then to have been. Moreover, there is an incongruity in the application to the 1910 Act and the 1962 Act of the now established common law doctrine that, in certain circumstances, regard may be had to what is said by the responsible Minister in the course of the passage through the legislature of the Bill for the particular Act in question[479]. The legislature would have proceeded in such a situation upon a false understanding of the existing law.

The same is true of the "purposive" approach to construction, enshrined in s 14A of the *Acts Interpretation Act* 1954 (Q). The goal there is the promotion of the general legislative purpose underlying the provision in question by the adoption of a construction which would have that result over one which would not. Moreover, in 1910 and 1962 the legislature would not have been equipped fully to discern any mischief or defect for the remedy of which the statutory provision was appropriate. Finally, the false footing on which the legislature is now seen to have acted inhibits the perception of "the equity of

the statute" with consequent significance for the doctrines of illegality founded upon the scope and purpose of the legislation[480].

Of course, a statute may operate adversely upon existing legal or equitable rights which, at the time of the enactment, were unknown to the legislature or even could not be known to it. An example is *Plimmer v Mayor, &c, of Wellington*[481]. There, the Judicial Committee held that, upon the view it took of the facts (which commenced in 1848), the appellant by 1856 had acquired, by a species of estoppel, an equitable proprietary interest in certain land. That interest gave a statutory right to compensation upon resumption of the land in question in 1880.

It was in this period that Fry J determined *Corporation of Yarmouth v Simmons*[482]. The case concerned a pier, constructed under statutory authority, which obstructed what was said to have been a previously existing public right of way. Fry J rejected the submission that a public right of way could only have been abrogated by express words in the legislation. His Lordship put the matter as follows[483]:

"I think that, when the Legislature clearly and distinctly authorize the doing of a thing which is physically inconsistent with the continuance of an existing right, the right is gone, because the thing cannot be done without abrogating the right."

The expression "clearly and distinctly" emphasises the burden borne by a party seeking to establish the extinguishment of subsisting rights not by express legislative provision but by necessary implication from the provisions of a statute. The phrase "physically inconsistent" does not suggest the question of inconsistency between rights is answered by regard, as a matter of fact in a particular case, to activities which are or might be conducted on the land. Rather, it requires a comparison between the legal nature and incidents of the existing right and of the statutory right. The question is whether the respective incidents thereof are such that the existing right cannot be exercised without abrogating the statutory right. If it cannot, then by necessary implication, the statute extinguishes the existing right.

This notion of inconsistency includes the effect of a statutory prohibition of the activity in question. It supplies the means for resolution of the issues which arise on these appeals. The decision of Fry J was applied in this Court by McTiernan J in *Aisbett v City of Camberwell*[484] and earlier by Isaacs J in *Goodwin v Phillips*[485] and O'Connor J in *Chief Commissioner for Railways and Tramways (NSW) v Attorney-General for New South Wales*. O'Connor J said[486]:

"[E]xpress words are not necessary for the statutory extinction of a public right of way. That is illustrated by Mr Justice *Fry's* judgment in *Corporation of Yarmouth v Simmons*[487], where a public right of way was held to be extinguished by necessary implication from the provisions of a Statute. The continued use of the land as a public road would render the exercise of the powers expressly conferred on the Constructing Authority impossible. It follows, therefore, that by necessary implication the rights of public way must be taken to have been extinguished by the resumption."

The authorisation by the 1910 Act and the 1962 Act of activities amounting to physical inconsistency (in the sense indicated above) with the continued exercise of what now are accepted as existing rights of native title would manifest, as a matter of necessary implication, the legislative intention to impair or extinguish those rights. I have referred to legislative intention with the particular meaning of "intention" indicated in the *Native Title Act Case*[488] and discussed earlier in these reasons. Impairment or extinguishment would also follow if the 1910 Act or the 1962 Act prohibited acts which would be committed in the exercise of what now would be accepted to be native title. I approach the analysis of the 1910 Act and the 1962 Act upon that footing and what follows should be read accordingly.

Expansion of radical title

Radical title is that acquired upon the assumption of sovereignty (as understood in the law of nations) or, rather, upon settlement[489] (as understood in that part of British constitutional law concerned with Imperial expansion). Radical title links international and constitutional law notions with those which support the private law of proprietary rights and interests in land. Thus, radical title was "a postulate to support the exercise of sovereign power within the familiar feudal framework of the common law"[490]. The framework included the doctrine of tenures. Absolute and beneficial Crown ownership, a *plenum dominium*, was established not by the acquisition of radical title but by subsequent exercise of the authority of the Crown.

The mediaeval notion of tenure was expressed by the proposition that all land was held directly or indirectly of the Crown. This involved relationships of reciprocal obligation between the respective parties at each level of the feudal structure, at the peak of which stood the sovereign. In an understanding of these relationships, including those between intermediate or mesne lord and tenant, "proprietary language is out of place" and the *dominium* of any particular *dominus*"was always a relative thing"[491]. The concept of *ownership* by the Crown of all land is a modern one, and its adoption in legal theory may have been related to Imperial expansion in the seventeenth and eighteenth centuries, well after the decline of feudalism[492]. Writing in 1896, Professor Jenks said[493]:

"[T]he theory had almost died a natural death when it sprang to life again in the most unexpected manner with the acquisition of the great English colonies. For if, as was the case, no subject could show a recognized title to any of the countless acres of America and Australia, at a time when those countries were first opened up by white men, it followed that, according to this relic of feudal theory, these acres belonged to the Crown. It may seem almost incredible that a question of such magnitude should be settled by the revival of a purely technical and antiquarian fiction."

In the law, fictions usually are acknowledged or created for some special purpose, and that purpose should be taken to mark their extent[494].

The State of Queensland relies strongly upon a passage in the judgment of Brennan J in *Mabo [No 2]*. In the course of discussing the extinguishment of native title upon the vesting by Crown grant of an interest in land inconsistent with continued enjoyment of a native title in respect to the same land, his Honour said[495]:

"If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium."

Queensland submits that the grant by the Crown of a lease necessarily involves the acquisition by the Crown of the reversion which is expectant upon the expiry of the term. Accordingly, in granting the lease, the Crown exercises sovereign power in such a fashion as to assert absolute and beneficial ownership out of which the lease is carved. That absolute and beneficial ownership is, as a matter of law, inconsistent with the continued right to enjoy native title in respect of the same land.

It is necessary for the State to make good these propositions by their adaptation to the statutory systems for the disposition of Crown lands established by the 1910 Act and the 1962 Act. It is here, in my view, that the case for the State breaks down.

I have referred to the significant constitutional developments embodied in mid-nineteenth century legislation, culminating in Queensland with the 1867 Act, whereby settlement was achieved, in favour of the colonial legislatures, of the conflicting fiscal and political interests of the Imperial and local authorities and of the executive and the colonial legislatures in the disposition of the waste lands of the Crown.

That settlement, embodied in ss 30 and 40 of the 1867 Act, was implemented in successive statutes. These provisions include sub-ss (1) and (2) of s 6 of the 1910 Act, which state[496]:

"(1) Subject to this Act, the Governor in Council may, in the name of His Majesty, grant in fee-simple, or demise for a term of years, any Crown land within Queensland.

(2) The grant or lease shall be made subject to such reservations and conditions as are authorised or prescribed by this Act or any other Act, and shall be made in the prescribed form, and being so made shall be valid and effectual to convey to and vest in the person therein named the land therein described for the estate or interest therein stated."

Section 209(1)(ii) of the 1910 Act empowers the Governor in Council to make regulations which prescribe forms and "the conditions, stipulations, reservations, and exceptions that shall be inserted ... in grants, leases, licenses, and other instruments".

The term "Crown Land" was defined in s 4 as follows[497]:

"All land in Queensland, except land which is, for the time being -

(a) Lawfully granted or contracted to be granted in fee-simple by the Crown; or

(b) Reserved for or dedicated to public purposes; or

(c) Subject to any lease or license lawfully granted by the Crown: Provided that land held under an occupation license shall be deemed to be Crown land".

The phrase "[a]ll land in Queensland" was apt to include land in respect of which the Crown held radical title. By that radical title, as a postulate of the doctrine of tenures and a concomitant of sovereignty, the common law enabled the Crown to grant interests in land to be held of the Crown and to become absolute beneficial owner of unalienated land required for the purposes of the Crown[498]. However, by the constitutional settlement of the mid-nineteenth century, these prerogatives of the Crown, part of the common law, were displaced. Thereafter, all land in Queensland was to be dealt with pursuant to statute. It was by legislation that interests in the land were to be granted by the Crown and land was to be reserved or dedicated to "public purposes"[499].

Section 6(1) of the 1910 Act conferred upon the Governor in Council power to grant in fee simple or as a demise for a term of years any land in Queensland, save that land for the time being in fee simple, reserved for or

dedicated to public purposes or subject to lease or licence lawfully granted by the Crown[500]. The statute maintained a legal regime where, in respect of what it identified as leases, there was no need for the creation in the Crown of a reversionary estate out of which lesser estates might then be granted. Rather, land which for the time being had been subject to any such "lease" lawfully granted under s 6, was, upon ceasing to be so and, by reason of it now answering the definition of "Crown Land" in s 4, liable further to be dealt with by the Crown under s 6. Moreover, as will appear later in these reasons, whilst entry by the lessee was essential, at common law, to the creation of the reversion, s 6(2) operated effectually to vest interests granted under the statute in advance of and without dependence upon entry.

In addition, special provision was made by s 135 for consequences of forfeiture or other premature determination of any lease or licence. Section 135 provided:

"If the license or lease of any land is determined by forfeiture or other cause before the expiration of the period or term for which it was granted, then, unless in any particular case other provision is made in that behalf by this Act, the land shall revert to His Majesty and become Crown land, and may be dealt with under this Act accordingly."

It is apparent that the term "revert" is used in the particular sense of the reassumption of the character of "Crown land" liable to further disposition under s 6. Further, as I seek to explain later in these reasons, whilst entry was necessary to create the common law reversion, compliance with s 6(2) effectually vested without the need for prior entry, the interest granted. Upon that state of affairs, s 135 would operate in the above manner.

The 1962 Act contains similar provisions to ss 4, 6 and 135 of the 1910 Act[501].

Accordingly, I would reject the submission for the State that the scheme of the 1910 Act and the 1962 Act is such that, with respect to the grant of limited interests thereunder by the Crown, the necessary consequence is the acquisition by the Crown of a reversion expectant on the cesser of that interest, thereby generating for the Crown that full and beneficial ownership which is necessarily inconsistent with subsisting native title. Whatever be the interests or other rights created under s 6 of the 1910 Act and the 1962 Act, they "owe their origin and existence to the provisions of the statute"[502].

Extinguishment by the general provisions of the Act

Putting to one side particular submissions concerning the pastoral lease provisions, it is convenient first to consider whether the general operation of

the 1910 statute necessarily involved the extinguishment of any native title in relation to an area of Crown land (as defined in s 4) which subsisted at the commencement of the 1910 Act on 1 January 1911[503]. Particular attention is required to two provisions. The first is s 203[504]. This states:

"Any person, not lawfully claiming under a subsisting lease or license or otherwise under any Act relating to the occupation of Crown land, who is found occupying any Crown land or any reserve, or is found residing or erecting any hut or building or depasturing stock thereon, or clearing, digging up, enclosing, or cultivating any part thereof, shall be liable to a penalty not exceeding twenty pounds."[505]

Section 203 is concerned with the protection of the interests of the Crown in land which, for the time being, has not been granted in fee, is not reserved for or dedicated to public purposes, and is not subject to any lease or licence granted by the Crown, other than an occupation licence. This follows from the definition of "Crown land" in s 4. On its face, s 203 would have rendered a trespasser any person who, in exercise of what now are to be characterised as having been native title rights, occupied any of the very large area of Queensland falling within the definition of "Crown land" or conducted there any of the activities referred to in s 203. Were that so, the ground would be provided for a submission as to the general extinction of native title in respect of any land from time to time falling within the definition of "Crown land".

However, the progenitors of s 203 included s 91 of the *Crown Lands Alienation Act* 1876 (Q). Section 91 stated:

"*Any person* unless lawfully claiming under a subsisting lease or license or otherwise under this Act who shall be found occupying any Crown lands or land granted reserved or dedicated for public purposes either by residing or by erecting any hut or building thereon or by clearing digging up enclosing or cultivating any part thereof or cutting or removing timber otherwise than firewood not for sale thereon shall be liable on conviction to a penalty not exceeding five pounds for the first offence and not exceeding ten pounds for the second offence and not exceeding twenty pounds for the third or any subsequent offence. Provided that no information shall be laid for any second or subsequent offence until thirty clear days shall have elapsed from the date of the previous conviction." (emphasis added)

In *Mabo [No 2]*, s 91 was construed by Brennan J[506] (with whose judgment Mason CJ and McHugh J agreed) and by Deane and Gaudron JJ[507], as being directed to those who were in occupation under colour of a Crown grant or without any colour of right and as not directed to indigenous inhabitants in occupation of land by right of what is now to be seen as their unextinguished native title. Those indigenous inhabitants were not by s 91 rendered

trespassers, liable to expulsion from Crown lands. They were not included in the class or description of persons to whom s 91 was directed. That was because an indigenous inhabitant as identified above would not be "any person". This construction of s 91 was an important step in the reasoning which led to the conclusion that the native title of the Meriam people had not been extinguished.

The 1910 Act and its predecessors were enacted at a time when there was doubt whether at common law the Crown was obliged to proceed by way of information for intrusion because it could not maintain an action for ejectment. These doubts since have been dispelled[508]. However, they assist in perceiving the purpose of the first paragraph of s 204 in conferring a specific remedy for the removal of trespassers from Crown land.

Section 204 states[509]:

"Any Commissioner[510] or officer authorised in that behalf by the Minister who has reason to believe that *any person* is in *unlawful occupation* of any Crown land or any reserve, or is in possession of any Crown land under colour of any lease or license that has become forfeited, may make complaint before justices, who shall hear and determine the matter in a summary way, and, on being satisfied of the truth of the complaint, shall issue their warrant, addressed to the Commissioner or to such authorised officer or to any police constable, requiring him forthwith to remove such person from such land, and to take possession of the same on behalf of the Crown; and the person to whom the warrant is addressed shall forthwith carry the same into execution.

A lessee or his manager or a licensee of any land from the Crown may in like manner make a complaint against *any person* in *unlawful occupation* of any part of the land comprised in the lease or license, and the like proceedings shall thereupon be had." (emphasis added)

The first paragraph of s 204 is concerned with the recovery of possession on behalf of the Crown of land which is "Crown land" within the definition of that term in s 4. The second paragraph assists those holding from the Crown under any lease or licence land which, in the above sense, for the time being is not Crown land.

In that regard it is convenient at this point to consider the decision in *Macdonald v Tully*[511]. There, in delivering the judgment of the Court, Cockle CJ said of a plaintiff who was a lessee within the meaning of s 5 of *The Tenders for Crown Lands Act* 1860 (Q) that[512]:

"This right of the plaintiff to occupy was ... capable of being maintained against any disturber, whether assuming to disturb in virtue of an alleged lease or otherwise."

The Full Court granted a motion for arrest of a judgment recovered in an action against a nominal defendant representing the Crown. The plaintiff's complaint had been that the Crown had wrongly granted to a third party a lease of the land in question and that, in response to threats of trespass made by that third party, the plaintiff had withdrawn from occupation of the land. The judgment was arrested on the footing that the plaintiff's case failed because, rather than maintaining his own right, he had acquiesced in the claim of right made by the third party and had withdrawn from the runs without notice to or knowledge on the part of the Crown. This case illustrates that an end sought to be achieved by legislation such as s 203 and s 204 of the 1910 Act was the imposition of legal order upon the confusion which developed with the expansion of European settlement. In particular, the second paragraph of s 204 conferred some security of tenure against third parties, including settlers with competing claims.

In each paragraph of s 204, the term "any person" was used to identify those whose occupation of the Crown land was "unlawful". Section 203 achieved the same result by the phrase "not lawfully claiming". As indicated above, the term "any person" is not apt to include those claiming under native title. The use of "unlawful" does not require a different construction. Rather, it supports the above construction.

The word "unlawful" may be used in various senses. Two of these were discussed by Griffith CJ in *Lyons v Smart*[513]. His Honour spoke as follows with reference to the unlawful importation and unlawful possession provisions of the *Customs Act* 1901 (Cth) as they then stood[514]:

"Now, the word 'unlawfully' is a word commonly used in Statutes creating crimes, misdemeanours and minor offences, and in such Acts it is used in two shades of meaning, one when referring to an act which is wrong or wicked in itself - recognized by everybody as wicked - as, for instance, when it is used with reference to certain sexual offences, or with reference to acts which are absolutely prohibited under all circumstances; the other when referring to some prohibition of positive law. The *Customs Act* 1901 has nothing to do with what is right or wrong or virtuous. It contains certain arbitrary rules which the legislature lays down. What is wrong is wrong because the Act says so, and for no other reason. The word 'unlawfully' must, therefore, there being no other relevant law, be read in that context as meaning 'in contravention of the provisions of this Act.'"

The situation with which these appeals are concerned, the exercise of rights attached to native title, would not, without more, be in contravention of the provisions of the 1910 Act, in the above sense of "unlawful" used by the Chief Justice. Indeed, the question at issue is whether, upon its true construction, the 1910 Act contained clear and plain provisions necessarily inconsistent with the continuation of native title. The answer to that question is not to be found by passing through a gateway erected by a particular construction of "unlawful" in s 204.

In *Lyons v Smart*[515], Barton J and O'Connor J treated the ordinary meaning of an unlawful act as one "forbidden by some definite law", whether statute law or common law. Upon the present hypothesis, there is no statute forbidding the exercise of rights of native title and that title is recognised by the common law of Australia. Finally, in his dissenting judgment in *Lyons v Smart*, Isaacs J referred to that construction of "unlawfully" as meaning without any bona fide claim of right or colour of justification[516]. If s 204 be interpreted in this way, a bona fide assertion of a claim to rights conferred by native title would not render occupation unlawful.

In the result, whichever shade of meaning is given to that term 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 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[517].

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.

On the other hand, at common law the term "exclusive possession" is used as a touchstone for the differentiation between the interest of a lessee and that of a licensee, who has no interest in the premises. "Exclusive possession" serves to identify the nature of the interest conferred upon the lessee as one authorising the exclusion from the demised premises (by ejectment and, after entry by the lessee, by trespass) not only of strangers but also, subject to the reservation of any limited right of entry, of the landlord[518]. As Windeyer J put it, a tenant cannot be deprived of the rights of a tenant by being called a licensee[519].

Accordingly, s 204 points towards a construction of the 1910 Act which does not treat as coincident with the characteristics of "leases" and "licenses" as understood at common law, those of the tenures created by the statute and identified therein by terms which include one or other of those words.

Provision corresponding to s 203 and s 204 is made in s 372(1) and s 373(1) respectively of the 1962 Act. The conclusions reached with respect to the earlier provisions apply to their later counterparts.

Pastoral leases

It is appropriate to turn to consider more closely the particular provisions of the legislation with respect to pastoral leases. The question is whether it follows upon a proper construction thereof and by reason of the steps taken thereunder by the issue of the Mitchellton Pastoral Leases and the Holroyd River Pastoral Lease, the necessary extinguishment of any subsisting native title.

Attention is to be focused upon the terms of the legislation and of the instruments themselves. In that examination, the term "exclusive possession" is of limited utility. As has been indicated, by s 204 the 1910 Act created its own remedy in the nature of ejectment and made it available not only to lessees but also to licensees of any land from the Crown.

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.

The term "lease" may be used in a statute in a limited sense only. Thus, a lease enforceable in equity under the doctrine in *Walsh v Lonsdale*[520] may not answer the description of "lease" in a particular statute[521]. Statute, such as the *Landlord and Tenant (Amendment) Act* 1948 (NSW), may create between parties who were landlord and tenant a relationship for the identification of which "no new terminology ... has come into existence"[522]. The phrase "statutory tenant" then may be used to identify these rights and obligations which subsist only by virtue of the legislation and are unknown at common law[523].

In the present dispute, the necessary analysis discloses an operation of the legislation comparable to that identified by Isaacs J in respect to conditional purchases under the *Crown Lands Consolidation Act* 1913 (NSW). In *Davies v Littlejohn*[524], his Honour said of tenures created by such legislation:

"It creates them, shapes them, states their characteristics, fixes the mutual obligation of the Crown and the [grantee], and provides for the mode in which they shall cease to exist".

More recently, in *R v Toohey; Ex parte Meneling Station Pty Ltd*[525], Mason J spoke to similar effect. The question there was whether a grazing licence granted pursuant to the *Crown Lands Act* 1931 (NT) to permit the grazing of stock on Crown land conferred an "estate or interest" in the subject land within the meaning of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), so as to take the grazing licence beyond the reach of its provisions as to grants to Aboriginal Land Trusts[526]. In deciding that a grazing licence conferred no such "estate or interest", Mason J determined that the rights of the holder of such a licence fell short in two respects of the concept of property or proprietary rights expressed in the well-known analysis by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*[527]. First, although a licence might be granted for up to one year, it was liable to cancellation by the Minister on three months' notice in writing and without any default by the licensee. Secondly, the licence was not assignable, thereby emphasising the personal nature of the rights conferred by it. In the course of this analysis, Mason J said[528]:

"The grazing licence is the creature of statute forming part of a special statutory regime governing Crown land. It has to be characterized in the light of the relevant statutory provisions without attaching too much significance to similarities which it may have with the creation of particular interests by the common law owner of land."

Two further points should be made here. The first is that land law is but one area in which, whilst statute may appear to have adopted general law principles and institutions as elements in a new regime, in truth the legislature

has done so only on particular terms. A statutory body in which a fund is vested may be styled as a "Trust", or may be given by its constituent statute the investment powers of trustees. In neither case may contributors to the fund have the beneficial interest of an ordinary *cestui que* trust[529]. On the other hand, from an express statement that a statutory body is not bound by the law relating to the administration of trust funds by trustees, it does not necessarily follow that in other respects this body is a trustee in the ordinary sense of moneys held by it[530]. In such ways the legislature may create entities which have some but not all of the characteristics of a trust. In each case the true construction of the law determines the degree of the analogy. Accordingly, there is nothing remarkable in the use of a term such as "lease" or "licence" to identify new institutions not fully to be identified with either term as understood at common law.

The second point is that it is unhelpful to approach the issues of construction which arise on these appeals by asking whether the 1910 Act and the 1962 Act each is a "code" and, after giving a negative answer, to conclude that a pastoral lease for a particular period has the same incidents of a lease for such a term under the general law. Like native title itself[531], the interests created by the 1910 Act and the 1962 Act take their place in the general legal order. As such (and subject to the operation of doctrines of illegality[532]), those interests may be the object of rights and obligations created *inter partes* and supported by the law of contract. In *O'Keefe v Williams*[533], this Court held that there was an implied covenant by the Crown not to derogate from the rights of a plaintiff under an "occupation licence" granted under the New South Wales Crown lands legislation. For breach of a contractual obligation to deal in a statutory interest in or with respect to land, a remedy in the nature of specific performance may be appropriate[534]. In the circumstances of the particular case and depending upon the particular incidents attached by statute to the interest in question, there may be an equity to relief against forfeiture of that interest[535]. The exercise of statutory powers with respect to the granting of interests thereunder which are conferred upon the executive may be attended by obligations to afford procedural fairness, and equity may, by injunction, restrain eviction of the plaintiff pending the determination of an application for a further grant[536].

In such ways, the legal system may operate upon pastoral leases and other interests created under the 1910 Act and the 1962 Act. However, in so doing, the legal system takes those interests as they are found in the statute. It does not first so classify those interests that they fit within one or other category of estate or interest already known to the general law.

It is true that s 6(1) of the 1910 Act speaks of a "demise for a term of years", as well as the grant in fee simple. However, in s 6(2) the same formalities are prescribed for both a "grant" and a "lease". Moreover, under this provision the

lease is to be made in the prescribed form and, being so made, is stated as being "valid and effectual" both to convey to and to vest "in the person therein named the land therein described for the estate or interest therein stated". Section 6(2) is not merely a procedural provision. By stating that compliance with this requirement was effectual to vest the interest in question, it marks off, to a significant degree, pastoral leases from leases granted under the common law.

If the Mitchellton Pastoral Leases were treated as attended in their creation by the same requirement as those attending the creation of leases under the common law, neither of those instruments would have vested the term in the lessees. At common law, the term would have vested only upon entry and there was no such entry. Before entry, the lessees would have had merely an interest in the term, or *interesse termini*. With effect from 1 December 1975[537], the doctrine of*interesse termini* was abolished by s 102 of the *Property Law Act* 1974 (Q) and s 12 of the *Residential Tenancies Act* 1975 (Q)[538]. This was after the grant of the Holroyd River Pastoral Lease. The *interesse termini* gave not an estate but a right of entry[539]. This reflected the origin in covenant of the rights of the lessee against the lessor, so that, if the lessor failed to deliver possession, the lessee could not bring a real action. The remedy was one for breach of covenant[540]. Entry was essential to create the estate in reversion[541]. However, as indicated earlier in these reasons, the 1910 Act operated without the creation in favour of the Crown of what at common law would be regarded as a reversionary estate.

Part III of the 1910 Act was headed "PASTORAL TENURES". Division I thereof (ss 40-44) was headed "*Pastoral Leases*", and Div II (ss 45-47) was headed "*Occupation Licenses*". Occupation licences were granted by the Minister (s 46) and pastoral leases by the Governor in Council (s 6). Occupation licences, unless renewed for the next year, expired on 31 December of the year of grant (s 47(1)). The term of any pastoral lease was not to exceed 30 years (s 40(2)). Pastoral leases might be mortgaged (ss 156, 158, 159)[542] and surrendered (s 122).

The pastoral leases and occupation licences, as the two species of pastoral tenure, were treated without distinction in various provisions of the 1910 Act outside Pt III. Reference already has been made to s 204. Pastoral leases and occupation licences might be transferred to qualified persons with the permission of the Minister (s 166). In respect of both species of interest, the same provision (s 129) conferred a power of forfeiture for default in payment of rent and acceptance by the Crown of any rent or other payment did not operate as a waiver of such forfeiture (s 131(2)). The expression "the land shall revert to His Majesty and become Crown land, and may be dealt with under this Act accordingly" is used in s 135 in respect of determination of either pastoral lease or licence before the expiration of the period or term of

grant; under the common law, determination of a licence would not ordinarily be described as bringing about a reversion of the land to the licensor. Finally, in Pt III itself, s 43(1) requires of every pastoral lease that it be subject to a condition as to payment of "rent", and s 47(2) stipulates the "rent" for an occupation licence.

A condition might be imposed upon a pastoral lease that the land be enclosed and kept enclosed with a rabbit-proof fence (s 40(1)). No such condition was imposed in the Mitchellton Pastoral Leases. At the time of the grant of the second of the Mitchellton Pastoral Leases in 1919, s 43(iii)[543] provided, in certain circumstances, for the inclusion of a condition of personal residence during the first seven years of the term. No such condition was imposed in the second of the Mitchellton Pastoral Leases. On the other hand, in Pt IV (ss 48-114), headed "SELECTIONS", there were obligations of fencing (ss 78-83) and detailed provision as to conditions of personal residence and occupation (ss 86-93).

Each of the Mitchellton Pastoral Leases was expressed to "demise and lease" the land "for pastoral purposes only" and to be subject to the conditions and provisos in Pt III Div I of the 1910 Act and to the other provisions of that statute and to *The Mining of Private Land Act* 1909 (Q), and to any Regulations made or thereafter to be made under that Act or the 1910 Act. The Court was furnished with the relevant General Regulations under s 209 of the 1910 Act[544]. These indicate that both the Mitchellton Pastoral Leases were in Form 3 prescribed by reg 4 and that the expression "for pastoral purposes only" appeared in Form 3. The Form, like the two Mitchellton Pastoral Leases, contained what was styled a "reservation" in favour of the Crown of a right of access to search for or work gold and minerals and there was a further "reservation" of a right of access in favour of any person authorised in that behalf by the Governor in Council to go upon the land "for any purpose whatsoever, or to make any survey, inspection, or examination of the same".

Section 209(1)(ii) of the 1910 Act empowered the Governor in Council to make the General Regulations prescribing Form 3 and this fell within the terms of the central provision in s 6(2). This stated that a grant or lease "shall be made subject to such reservations and conditions as are authorised or prescribed by this Act or any other Act, and shall be made in the prescribed form ...". The term "reservation" in strict usage identifies something newly created out of the land or tenement demised and is inappropriate to identify an exception or keeping back from that which is the subject of the grant[545]. However, in accordance with the Australian usage referred to by Windeyer J in *Wade v New South Wales Rutile Mining Co Pty Ltd*[546], "reservation" was apt in Form 3 to identify that which was withheld or kept back by the grants made by the Governor in Council under the 1910 Act. The adoption of Form 3

with this text does not necessarily support a proposition that without these "reservations" the holder of the pastoral lease would have had the entitlement to refuse entry or re-entry to all persons whatsoever.

The ordinary meaning of the phrase "for the purpose of pasture" is the feeding of cattle or other livestock upon the land in question[547]. The phrase "for pastoral purposes" would include the feeding of cattle or other livestock upon the land but it may well be broader, and encompass activities pursued in the occupation of cattle or other livestock farming. Even upon this broader interpretation, it cannot be said that there have been clearly, plainly and distinctly authorised activities and other enjoyment of the land necessarily inconsistent with the continued existence of any of the incidents of native title which could have been subsisting at the time of these grants of the pastoral leases.

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[548]. 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 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.

I turn to the Holroyd River Pastoral Lease. Part III (ss 49-80) of the 1962 Act is headed "PASTORAL TENURES", and Div I (ss 49-65) is headed "*Pastoral Leases*". There are two pastoral tenures in addition to pastoral leases, stud holdings (ss 66-74) and occupation licences (ss 75-80). The term "rent" is used in respect of occupation licences (s 79) as well as pastoral leases (s 61). There was a statutory maximum of 30 years as the term of a pastoral lease (s 53(1)). The prescribed form for pastoral leases differed from that under the 1910 Act in not expressing the grant as "for pastoral purposes only". Other differences between the two regimes are identified by Gaudron J in her reasons for judgment.

As indicated earlier in these reasons, the land carried approximately one beast to 60 acres. The cattle were run under open range conditions. At the time of the relevant grant in 1974, there appear to have been six sets of roughly constructed mustering yards but no other improvements upon the land. Section 14 of the 1962 Act obliged the grantees to perform conditions

imposed upon them by the statute or the grant[549]. The instrument contained conditions requiring, within five years, the sowing of at least 40.5 hectares as a "seed production area" and the construction of an airstrip, 90 miles of internal fencing, one set of main yards and dip, three earth dams and a manager's residence, with quarters for five men and a shed. There was a further condition requiring, within that period, the enclosure of the holding with a good and substantial fence. This was unwelcome to the grantees. It was not common practice on Cape York to boundary fence. Apparently as the result of an exercise of the discretion conferred upon the Minister by s 64(3) of the 1962 Act, the grantees later were relieved from compliance with this condition[550]. The airstrip was constructed and the Minister appears to have accepted that there was compliance with the requirement for dam construction. The other conditions were not complied with by the grantees. Failure to comply with conditions required by the Holroyd River Pastoral Lease rendered it liable to determination by forfeiture (ss 14(1) and 295 of the 1962 Act). Upon such determination, the land reverted to the Crown and became Crown land available for re-grant (ss 299(1), 6(1)). The person in occupation would be obliged by s 299(2) to give to the Land Commissioner peaceful possession of the land and of all improvements thereon. Liability to forfeiture might be waived by the Minister (s 297(2)).

Despite some differences between the two statutory regimes and subject to one qualification, the same conclusions apply to the Holroyd River Pastoral Lease as those reached with respect to the Mitchellton Pastoral Lease. In none of these instances was there clear, plain and distinct authorisation by the relevant grant of acts necessarily inconsistent with all species of native title which might have existed. It does not appear that the statutory interests could be enjoyed only with the full abrogation of any such native title.

The qualification is that the later but not the earlier grants were subject to conditions requiring improvements to the land. It may be that the enjoyment of some or all native title rights with respect to particular portions of the 2,830 square kilometres of the Holroyd River Pastoral Lease would be excluded by construction of the airstrip and dams and by compliance with other conditions. But that would present particular issues of fact for decision. The performance of the conditions, rather than their imposition by the grant, would have brought about the relevant abrogation of native title.

It remains to consider two authorities of this Court which were cited in opposition to the submissions presented by the **Wik** Peoples and the Thayorre People. In *American Dairy Queen (Q'ld) Pty Ltd v Blue Rio Pty Ltd*[551], this Court was concerned with the construction of Pt XI (ss 334-361) of the 1962 Act. Division I is headed "*Deeds of Grant in Trust and Reserves*" and Pt XI deals generally with grants, reserves and reservations for public purposes. As was indicated in argument in that case[552], the

provisions of Pt XI, in particular s 343 dealing with leases by a Trustee and s 347 dealing with the transfer, mortgage and subletting of leases, are to be contrasted with the detailed provisions in Div VIII (ss 273-293) of Pt X. These deal with subleases, mortgages, transfers and other dealings with certain holdings, including pastoral leases created under earlier Parts of the Act. Section 343 and the sections following expressly mentioned only one interest, identified as a lease. It was held that by adopting the terminology of leasehold interests the legislature must be taken to have intended the operation of the incidents of corresponding interests at common law as modified by the statute[553]. The immediate issue concerned the power of a sublessee to deal with its interest, the subject premises being a reserve having upon it a kiosk and other buildings adjacent to a swimming area at Southport. I would not treat that decision as authority going beyond the particular operation of Pt XI of the 1962 Act. The decision is further discussed by Toohey J in his judgment in the present case. I respectfully agree with what is said there by his Honour.

The second authority is *O'Keefe v Williams*[554]. I agree with the analysis of this case by Gaudron J in her Honour's reasons for judgment.

Conclusions

Of the questions separately determined by Drummond J, Questions 4 and 5 arise in this Court only upon the appeal by the **Wik** Peoples. These Questions concerned the claims against Comalco and Pechiney. The appeal by the **Wik** Peoples in respect of the answers to those Questions should be dismissed.

The **Wik** Peoples also appeal in respect to the answer to Questions 1B and 1C. The Thayorre People appeal with respect to the answer to Question 1C. Drummond J answered in the affirmative that element in Question 1B which asked whether the grant of the Holroyd River Pastoral Lease necessarily extinguished all incidents of Aboriginal title or possessory title of the **Wik** Peoples in respect to the land demised thereunder. His Honour also answered that element of Question 1C which asked whether the grant of either of the Mitchellton Pastoral Leases necessarily extinguished all incidents of Aboriginal title or possessory title of the Thayorre People in respect to the land demised thereunder by stating that the grant of the first Mitchellton Pastoral Lease extinguished Aboriginal title.

My conclusion is that none of these grants necessarily extinguished all incidents of native title which then were subsisting. Accordingly, on these appeals no further question remains as to the existence of any doctrine as to suspension of native title and the revival thereof upon expiration of these grants. I say nothing upon that subject. There should be no further delay in

preparing for trial. The particular elements of Questions 1B and 1C to which I have referred are contained in each case in par (d). This asks whether *the grant* of the pastoral lease in question *necessarily* extinguished *all incidents* of native title. The form of par (d) thus is important. However, both Question 1B and Question 1C were so drawn that consideration of par (d) only arose upon an affirmative answer to the question posed in par (b). This asked whether the respective pastoral leases conferred "rights to exclusive possession on the grantee". In my view, as indicated earlier in these reasons, the posing of a question in those terms may have distorted the essential issues and par (d) should have stood independently for decision. On the other hand, there was no challenge at the hearing before this Court with respect to questions and answers to par (a) in Questions 1B and 1C[555].

I would deal with this situation in respect of both Question 1B and Question 1C by answering par (b) "No", par (c) "Does not arise", and par (d) "Strictly does not arise, but is properly answered no".

Each appeal should be allowed in part. In the appeal by the **Wik** Peoples, the answers given by Drummond J to Question 1B and Question 1C should be set aside and replaced by answers reflecting the above conclusions. On the appeal by the Thayorre People, this is required only in respect of Question 1C. Costs in this Court should be ordered as proposed by Toohey J. The costs of the proceedings below should be remitted for further consideration by the Federal Court.

KIRBY J.

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These proceedings, removed into this Court from the Federal Court of Australia, concern a claim by Aboriginal Australians to "native title"[556] in respect of certain land in Northern Queensland. They raise the issue of the effect on such title of pastoral leases granted under Queensland legislation. Also raised is a challenge to the effectiveness of two agreements with mining consortia which, by statute, are given the force of law as if they were enacted by the Queensland Parliament.

INTRODUCTION

The *Mabo* decision and its aftermath

Before the decision of this Court in *Mabo v Queensland [No 2]*[557] ("*Mabo [No 2]*"), the foundation of land law in Australia was as simple as it was clear. From the moment that the lands of Australia were successively annexed to the Crown, they became "in law the *property* of the King of England"[558]. It was so in respect of Eastern Australia when Governor Phillip received his first commission from King George III on 12 October 1786. It was so after the first settlement of the English penal colony was established in Sydney in 1788[559]. No act of appropriation, reservation or setting apart was necessary to vest the title in the land in the Crown. All land, including all waste lands of the colony, were "without office found, in the Sovereign's possession ... as his or her property"[560]. Land interests were thereafter enjoyed only as, or

under, grants made by the Crown. This doctrine, providing the ultimate source of all interests in land in Australia, was upheld by early decisions of the courts of the Australian colonies. But it was also accepted[561], affirmed[562] and reaffirmed[563] by this Court. Although the indigenous inhabitants of Australia (Aboriginals and Torres Strait Islanders) "had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest"[564], their legal interests in, and in relation to, the annexed land were considered to be extinguished. If they were to enjoy any such interests thereafter, they could do so only by, or under, a grant from the Crown: the universal repository of the ultimate or "radical" title[565].

This apparently unjust and uncompensated deprivation of pre-existing rights distinguished the treatment by the Crown of the indigenous peoples in Australia when compared to other settlements established under the Crown in the American colonies[566], Canada[567], New Zealand[568] and elsewhere. The principle was criticised[569]. However, from the point of view of the settlers, their descendants and successors, it was part of Australia's historical reality. From the point of view of legal theory, it had a unifying simplicity to commend it: No legally enforceable rights to land pre-existing annexation and settlement. No title to land except by or under a Crown grant made out of the royal prerogative of the Sovereign in the earliest days and thereafter pursuant to enabling legislation.

Into this settled and certain world of legal theory and practicality, the decision in *Mabo [No 2]*[570] intruded. By that decision, this Court unanimously affirmed that the Crown's acquisition of sovereignty over the territories which now comprise Australia might not be challenged in an Australian court. Upon the acquisition of such sovereignty, the Crown acquired a radical title to the land. But, by majority[571], the Court held that what it called "native title" survived the Crown's acquisition of sovereignty and of the radical title. However, such title was subject to extinguishment where it was shown that the sovereign power, acquired by annexation, had been exercised in respect of land in a way inconsistent with the continuance of the native title[572].

The decision in *Mabo [No 2]* called forth a great deal of legal commentary[573]. It resulted in the passage of the *Native Title Act* 1993 (Cth). Various State Acts were also enacted, including the *Native Title (Queensland) Act* 1993 (Q). In *Western Australia v The Commonwealth (Native Title Act Case)*[574], this Court upheld the general validity of the federal Act as resting upon s 51(xxvi) of the Constitution. That paragraph empowers the Federal Parliament to make laws with respect to the "people of any race for whom it is deemed necessary to make special laws". It was held that the Act was "special" in that it conferred on the holders of native title benefits protective of that title, otherwise vulnerable to extinction in accordance with the holding in *Mabo [No 2]*[575].

The *Native Title Act* 1993 (Cth) did not purport to provide for the consequences for native title of the grant of pastoral leases such as are in question in this appeal. In the Preamble to the Act, the Parliament expressed its understanding of the decision of this Court in *Mabo [No 2]* to include a holding that[576]:

"... 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."

The Act provided for the recognition and protection of native title[577]. This Court has had occasion to emphasise the beneficial character of the procedures established by the Act, in *North Ganalanja Aboriginal Corporation v State of Queensland* ("the *Waanyi Case*")[578]. That was an appeal from the Full Court of the Federal Court of Australia[579]. Although the holding of the Federal Court in the *Waanyi Case* included a holding about the effect, in law, of the grant of a pastoral lease in Queensland, this Court, by majority[580], considered that it was then premature to determine the correctness of the Federal Court's opinion on the "pastoral lease question". The application on behalf of the Waanyi people was returned to the National Native Title Tribunal established by the *Native Title Act* 1993 (Cth) so that the procedures of that tribunal might be correctly followed.

It did not take long for an opportunity to present itself again whereby this Court would be asked to consider the effect of pastoral leases upon the native title found, in *Mabo [No 2]*[581], to have survived the annexation by the Crown of the Australian lands.

In *The* ⇦ ***Wik*** ⇨ *Peoples v State of Queensland*[582], a single judge of the Federal Court of Australia (Drummond J) answered a number of questions of law raised by the claims of the ⇦ **Wik** ⇨ Peoples ("the ⇦ **Wik** ⇨"- the present appellants) and also the Thayorre People ("the Thayorre"- the 19th respondents) to an area of land in Northern Queensland affected by earlier grants of pastoral leases under Queensland law. The several questions isolated for consideration by Drummond J, and answered by him, concerned:

1. Whether the power of the Queensland Parliament to enact laws providing for pastoral leases without preserving native title rights was limited in law. (The State constitution question).

2. Whether a grant of a pastoral lease in Queensland, without express reservation of native title rights, necessarily extinguished native title, including that of the ⇦ **Wik** ⇨ and the Thayorre. (The pastoral leases question).

3. Whether the passage of the *Mining on Private Land Act* 1909 (Q) and/or the *Petroleum Act* 1915 (Q) had extinguished any native title rights which the applicants may have had in minerals and petroleum beneath the subject land. (The mineral rights question).

4. Whether the applicants could claim relief against the State of Queensland and Comalco Aluminium Ltd if a grant by the State of Queensland to that company of rights in land, including mining rights, extinguished any native title rights which the applicants may have had in the land, having regard to the *Commonwealth Aluminium Corporation Pty Limited Agreement Act* 1957 (Q) and the agreement entered into pursuant to that Act. (The Comalco Agreement question).

5. A similar question to the Comalco Agreement question in relation to the entitlement of the **Wik** and the Thayorre to maintain claims against the State of Queensland or Aluminium Pechiney Holdings Pty Ltd (the 5th respondent) having regard to the *Aurukun Associates Agreement Act* 1975 (Q) and the Aurukun Associates Agreement purportedly made under that Act. (The Aurukun Agreement question).

When Drummond J answered each of the foregoing questions adversely to the **Wik** (and consequentially to the interests of the Thayorre) an appeal was immediately taken to the Full Court of the Federal Court of Australia. An application for removal of that appeal into this Court was heard and granted on 22 March 1996. However, the issues for decision in the appeal were narrowed. The State constitution question and the mineral rights question were not pressed. This left as the active issues in the appeal the pastoral leases question and the Comalco and Aurukun Agreement questions. I shall group the latter together to be dealt with in due course as the "Statutory Agreements question".

The ultimate questions for decision in this Court are relatively simple and confined. Did the pastoral leases granted in the lands claimed by the **Wik** and the Thayorre, either by the fact of grant or the terms thereof, extinguish the native title rights of the **Wik** and the Thayorre? Could the claim brought by the **Wik** against the State of Queensland and the companies mentioned in the Statutory Agreements be maintained in law, notwithstanding the steps purportedly taken under the legislation authorising the making of those agreements to give them the force of statute?

It might be thought that such relatively straightforward questions would yield simple answers. Whilst I regard the Statutory Agreements question as being relatively simple to answer, the pastoral leases question is not. Most of the oral hearing before this Court was devoted to its complexities, as were the written submissions and documentation filed by the parties, numbering many

thousands of pages. These have taken the Court into the history and incidents of feudal land tenures in England; the reception of land law into the Australian colonies, and specifically into Queensland; the history of the special legislative measures enacted in colonial and post-colonial Queensland to provide for pastoral leases; and the decisions of many courts on the meaning and effect of the statutory provisions in question.

For the purposes of comparison, the Court was also taken to colonial practice and legislation as well the modern statutes affecting pastoral leases in the States of Australia and in the Northern Territory. The State of Queensland was the first respondent to the appeal. All of the other States (except New South Wales and Tasmania) and the Northern Territory intervened. The Court received detailed submissions on behalf of the Commonwealth (second respondent) and contradictory submissions for the Aboriginal and Torres Strait Islander Commission (13th respondent). It received submissions from a number of Aboriginal Councils concerned about the possible implications of the resolution of the pastoral leases question for jurisdictions other than Queensland. It also heard submissions from various interests representing pastoralists who might be affected were the **Wik** to succeed. Some of these submissions drew upon decisions of courts of other common law countries upon problems described as analogous, being the resolution of conflicts about legal claims upon land made on behalf of indigenous peoples[583] and the claims of pastoralists and their suggested foreign counterparts[584].

Procedural context

At the outset it is appropriate to say something about the procedural context in which the issues before the Court arise.

In June 1993, following *Mabo [No 2]*, proceedings were commenced in the Federal Court on behalf of the **Wik**. By those proceedings, the **Wik**, an Aboriginal clan or group, sought a declaration as to their native title rights in relation to a large area of land in Northern Queensland. The **Wik** also claimed damages and further relief in the event that it was found that such rights had been extinguished. One of the respondents to the claim was the Thayorre, another Aboriginal clan or group. The Thayorre cross-claimed for similar declarations in respect of lands which overlapped, in part, those the subject of the claim of the **Wik**.

Subsequently, in January 1994, the *Native Title Act* 1993 (Cth) commenced operation. The **Wik** made an application to the Federal Court for the adjournment of its proceedings under the general law so that they could apply to the Tribunal established under the new Act for a determination that they enjoyed "native title" as, in effect, they were claiming in the Federal Court

action. The application for adjournment, and subsequent procedural issues, were all dealt with in the Federal Court by Drummond J[585]. Some of the respondents supported the application or did not oppose it. Others opposed it on the ground of the fragmentation of the litigation. On 11 March 1994, Drummond J ruled that the **Wik** could divide the proceedings. But to avoid vexation of the resisting respondents, the **Wik** were required to file and serve an undertaking not to prosecute further their original claim for native (called "Aboriginal") or possessory title. That application was adjourned but with liberty to any party to restore it depending on the prosecution and outcome of the claim under the Act[586].

The **Wik** brought proceedings under the Act for the determination of their claim to native title. On 18 April 1994, Drummond J heard argument as to whether some of the issues raised should not be disposed of as preliminary questions. Much the same course was followed as in the Waanyi claim, ie it was ordered that a number of issues arising from the proceedings be dealt with as preliminary questions[587]. This course was followed before the clarification by this Court, of the procedural entitlement of claimants, such as the **Wik**, as explained in the *Waanyi Case*[588]. No party has taken any point on this procedural irregularity.

The **Wik** accepted that some issues in their claim were appropriate for preliminary determination. However, they submitted that it was first necessary for evidence to be taken. A difference arose as to whether that evidence should be more than formal and documentary evidence. The **Wik** sought to be released, in part, from their undertaking to the Federal Court so that they could pursue part of their claim under the general law, outside the Act. This application was refused on 26 May 1994. Instead, Drummond J, with the assistance of the parties, formulated questions on the five issues identified above. Drummond J's rulings were challenged before the Full Court of the Federal Court. Whilst expressing no opinions on the substantive issues, the Full Court declined to disturb the interlocutory orders which Drummond J had made[589]. Some of the submissions of the **Wik** before the Full Court appear similar to those subsequently upheld by this Court in the *Waanyi Case*[590]. However, the Full Court was of the view that the legal questions were important and that it was in the interests of all parties that they be determined as quickly as possible[591].

It was against this background that Drummond J came to the determination of the questions presenting the issues which he had separated for resolution[592]. Those questions, so far as still relevant to the proceedings removed into this Court, are set out in the reasons of Brennan CJ. I do not repeat them. As I have stated, all of them were answered by Drummond J adversely to the interests of the **Wik**[593] and some only of them are now contested.

The point of explaining this protracted procedural saga is now reached. The notice of appeal filed by the **Wik** (as amended) sets out those grounds of appeal which are still in contest. Certain of the grounds challenge the correctness of Drummond J's procedural approach. They assert that his Honour erred "in treating the question [of the effect of the pastoral leases] as a question only of law and not a question of fact or a mixed question of fact and law". They dispute that the questions were "capable of determination in the absence of a determination of facts as to the nature and extent of native title rights and interests". As argued, I did not take these grounds of appeal to seek to reagitate the discretionary procedural decision of Drummond J, as such. Whilst appellate courts retain their supervision to correct error in such orders, they are most hesitant to disturb them, even where, in effect, those orders have the consequences of striking out or otherwise terminating the entire proceeding[594]. Instead, I took the **Wik** to be raising a point of substance. This was that, upon one view of the law, pastoral leases of the kind here in question do not, merely by grant, extinguish the native title of the **Wik**. Such extinguishment depends upon the elucidation, by evidence, of complex facts. Relevant facts might include, for example, whether the lessee entered into possession. Alternatively, they might include a painstaking examination of the conduct of successive lessees and successive generations of the **Wik** to see whether *in fact* there was such an inconsistency between the title under the pastoral lease and native title as to extinguish the latter.

It will be necessary to return to this point of substance. I depart the procedural complaint by the **Wik** over the course followed in the Federal Court by endorsing the remarks of Sir Thomas Bingham MR in *E (A Minor) v Dorset County Council*[595]. An order to strike out an action or to separate and answer adversely to the plaintiff preliminary questions having the same effect, may not be an appropriate course where the source of doubt as to the "legal viability of a cause of action" is that "the law is in a state of transition". In such a case it may be desirable to reach conclusions on the law after conclusions have been reached on the facts. Evidence may sometimes add substance and understanding to the legal claim, depending on what it is.

Against this background, the **Wik** made it clear to this Court that the sole relief they sought was that the appeal be allowed and new answers given to the questions formulated by Drummond J (so far as they were still in issue and it was appropriate to answer them). The proceedings could then be returned for trial. They did not seek to formulate declaratory or other relief in this Court. This was because it is of the essence of their contentions that the proper elucidation of their entitlements to native title would be found after evidence is adduced, and factual findings made, concerning the incidents of the title enjoyed under the pastoral leases when compared with the proved characteristics of the native title of the **Wik**.

The **Wik** could only have stood to lose from the procedure adopted by Drummond J. That is why it was, in effect, a strike out application or demurrer to their claim. If any of the questions remaining in contest are answered favourably to the **Wik**, it was enough for them that the proceedings should be returned for trial. Any future elucidation or elaboration of such complex questions as the relationship in this case between pastoral leases and native title could be better attempted against a thorough understanding of the facts, including the variations in place and time both of the incidents of the pastoral lease in question and the native title claim. If the threshold could be passed, the **Wik** would then be in a position to take their claim to trial.

PASTORAL LEASES

Common ground

Despite the strenuous contest over matters of great importance which this litigation has presented, many points relevant to its determination were either agreed or not seriously in contest amongst the parties:

1. There was no challenge to the principle established by *Mabo [No 2]* that the duty of this Court (as of every Australian court) is to apply the common law and relevant statutes although this could lead to the extinguishment or impairment of native title. This Court, established by the Constitution, operates within the Australian legal system. It draws its legitimacy from that system. Self-evidently, it is not an institution of Aboriginal customary law. To the extent that native title is recognised and enforced in Australia by Australian law, this occurs because, although not of the common law, native title is recognised by the common law as not inconsistent with its precepts[596]. This does not mean that, within its own world, native title (or any other incidents of the customary laws of Australia's indigenous peoples) depends upon the common law for its legitimacy or content. To the extent that the tide of history has not washed away traditional laws and real observance of traditional customs, their legitimacy and content rest upon the activities and will of the indigenous people themselves[597]. Two centuries of interaction between Australian law and such traditional laws and customs have doubtless affected the latter, often to their detriment. Now, the decision in *Mabo [No 2]*, the enactment of the *Native Title Act* 1993 (Cth) and other legislation have begun a process which may protect and reinforce some aspects of traditional laws and customs. But no dual system of law, as such, is created by *Mabo [No 2]*. The source of the enforceability of native title in this or in any other Australian court is, and is only, as an applicable law or statute provides. Different considerations may arise in different societies where indigenous peoples have been recognised, in effect, as nations with inherent powers of a limited sovereignty that have never been extinguished[598]. This is not the

relationship which the indigenous people of Australia enjoy with the legal system of Australia. For Aboriginal legal rights, including to native title, to be enforceable in an Australian court, a foundation must be found within the Australian legal system[599]. These truisms do not resolve all of the issues concerning the relationship between the Australian legal system and Aboriginal law and custom, including as to native title. It will be necessary to return to some of the differences which have emerged.

2. No party challenged the decision in *Mabo [No 2]*. No party sought leave to reargue the correctness of *Mabo [No 2]* or the fundamental principle which it establishes, contrary to the previous understanding of the law, that native title to land survived the Crown's acquisition of sovereignty in Australia. The respondents did not contest the importance of the Court's decision in *Mabo [No 2]* or the necessity which that decision imposed to accommodate the new understanding of native title rights within a legal system which, for two hundred years, had developed in great detail on the basis of a completely contradictory assumption. The position of the parties contesting the submissions of the **Wik** and the Thayorre was, not that *Mabo [No 2]* was wrongly decided, but that, contained within its holdings, or implicit in a logical development of its reasoning, were conclusions sustaining the answers given in the Federal Court to the questions isolated in this case.

3. No party contested the determination in *Mabo [No 2]* that upon annexation of the Australian territory, sovereignty over every part of Australia passed to the Crown which thereupon acquired a radical title in respect of all such land. There was no contest that the Crown, as Sovereign, had the power, in accordance with law, to deal with land in every part of Australia. To the extent that it did so in a way inconsistent with Aboriginal law and custom or native title, the latter would, to that extent, be liable to extinguishment or impairment.

4. There was some discussion during argument about Aboriginal traditions and customs other than in relation to possession of land. However, as pleaded, this case is not concerned with claims of a sentimental or ceremonial kind. It is not concerned, as such, with rights of a spiritual or religious character. It is concerned with interests in land. It presents the question whether the grants of the pastoral leases proved constituted such an exercise of the acquired sovereignty over Australia as to extinguish the vulnerable native title which, until then, had survived such acquisition of sovereignty.

5. Although there was also some discussion during argument about the precise character and qualities of the Crown's radical title[600] and about the character and qualities of native title, these questions do not have to be exhaustively determined. It was suggested that native title was allodial in character, ie that land in which the relevant Aboriginal clan or group held

native title would be held as their absolute property and not as an estate from a Lord or superior. By conventional doctrine, no land in England, at least after the Conquest, was held allodially[601]. The highest estate known to the common law was one in fee simple. In a context in which this fiction of English land law, derived from feudal times, has long been criticised as inappropriate to Australian land law[602], it scarcely seems helpful to attempt to categorise the laws and customs of Australian Aboriginals as allodial in terms of the *Lex Salica* of Roman law. It seems safer to agree with Macfarlane JA in *Delgamuukw v The Queen in Right of British Columbia*[603] that Aboriginal rights are sui generis, difficult if not impossible to describe in the terminology of traditional property law, being communal, personal and usufructuary[604]. Interesting although these issues may be, they do not have to be resolved at this stage of the present litigation.

6. No one disputed that, as a matter of fact, members of the **Wik** and the Thayorre had remained upon, travelled in and out of, and utilised the land the subject of the pastoral leases in question in these proceedings. There was no agreement about the intensity of such usage. Hansard records of debates in the Parliament of Queensland and evidence before Committees of that Parliament suggest that the accepted policy in respect of "blacks" in Northern Queensland at the end of the 19th century was opposed to the establishment there of Aboriginal reserves[605]. The Home Secretary explained that "the aboriginals are by nature hunters, they would feel as if they were imprisoned. I do not propose to deal with them in that way"[606]. This policy was also adopted by the Northern Protector of Aboriginals (Dr Walter Roth). In answer to questions asked of him in Committee he said[607]:

"[Q:] Do they come under your control to round them up into camps? I do not see any clause in the Bill which says I am to put blacks into camps.

[Q:] In certain cases you may require every aboriginal to be drafted away into some camp or reserve? In cases it may be necessary; but I have no idea, and no one else has, of shifting the blacks from their hunting-grounds on to reserves unless it is absolutely necessary to do so.

[Q:] Then you would not have a provision of that kind in the Bill? I have not asked for any.

[Q:] And you would not approve of it? No. ...

[Q:] You do not think it advisable to abolish ... camps and force all the blacks to go on to reserves? Very far from that. How can we keep 18,000 or 20,000 blacks on reserves?"

The Northern Protector of Aboriginals had responsibility for Aboriginals in the districts of Queensland included in the areas claimed by the **Wik** and the Thayorre[608]. Complaints were later recorded from pastoralists that Aboriginals, roaming and hunting over their traditional lands, sometimes frightened cattle or camped at waterholes. But the Northern Protector of Aboriginals for 1903, in his report to the Queensland Parliament, asserted[609]:

"[T]he principle must be rigidly instilled that the aboriginals have as much a right to exist as the Europeans, and certainly a greater right, not only to collect the native fruits, but also to hunt and dispose of the game upon which they have been vitally dependent from time immemorial. Were the assumption just mentioned to be carried to its logical conclusion, and all available country leased or licensed, we should have a condition of affairs represented by a general starvation of all the aboriginals and their concurrent expulsion from the State".

In an earlier report, the Northern Protector had stated[610]:

"It would be as well, I think, to point out to certain of these Northern cattle-men (at all events those few amongst them who regard the natives as nothing more than vermin, worthy only of being trampled on) that their legal status on the lands they thus rent amounts only to this: There is nothing illegal in either blacks (or Europeans) travelling through unfenced leasehold runs. These runs are held only on grazing rights - the right to the grass - and can only be upheld as against people taking stock, &c., through them. It certainly is illegal for station-managers, &c., to use physical force and threats to turn blacks (or Europeans) so travelling off such lands. Carrying the present practice (might against right) to a logical conclusion, it would simply mean that, were all the land in the north to be thus leased, all the blacks would be hunted into the sea."

Because the **Wik** and the Thayorre were not banished from the lands in question, still less hunted into the sea, the issue presented by this aspect of these proceedings was not whether in *fact* the **Wik** and the Thayorre had physically remained on their traditional lands. It was simply whether in *law* they did so in pursuance of the native title rights which the common law recognised and which the common law and the *Native Title Act* 1993 (Cth) would now protect. Or whether such rights had been extinguished by the Crown's action in granting pastoral leases under legislation, which action was said to be inconsistent with the continuance of native title rights.

7. Several of the respondents appealed to the Court to confine any holding in this case to the peculiarities of pastoral leases in Queensland and the

suggested additional peculiarities, as between each other, of the pastoral leases granted in respect of the Holroyd River Holding and the Mitchellton Pastoral Holdings No 2464 and 2540 affecting the traditional lands of the **Wik** and the Thayorre. The Holroyd River Holding is the pastoral lease referred to in question 1B in this case. The leases in respect of the Mitchellton Pastoral Holding are the subject of question 1C. The **Wik** are concerned principally with the Holroyd River Holding. The Mitchelleton Pastoral Holding is principally the concern of the Thayorre. The Thayorre's claim to native title around the Edward River in Northern Queensland includes areas within the Mitchellton Holding. Because part of this land is within the southern portion of the **Wik**'s claim, the Thayorre were joined in these proceedings. To a large extent the Thayorre made principal cause with the **Wik** on the common issue of the effect of pastoral leases generally upon native title. But the history of each pastoral lease was different. The point was fairly made that not all pastoral leases, including not all of them in Queensland, would reflect the same history and depend on the same statutes and instruments of pastoral lease as did the Holroyd and Mitchellton Holdings. As will be shown, these holdings evidence minimal, if any, activity on the part of the pastoral lessees in exercise of their leasehold rights. Such would not necessarily be the case in other pastoral leases. Therefore, a decision should not be made in the present case on an assumption that the leaseholds in question here were necessarily typical or representative of Queensland pastoral leases generally. To the extent that native title was not extinguished, as a matter of law, by the fact or necessary concomitants of the grant of a leasehold interest, each such interest would have to be considered individually. A fortiori, because of the different colonial history, legislation, regulation and practices in the several States of Australia and in the Northern Territory, care would need to be observed in expressing any general rule concerning the legal consequences of the grant of pastoral leases upon native title in those jurisdictions. In particular, the legal consequences of express reservations in the grant of a leasehold interest, to protect the rights of Aboriginals (or arguably the reservation of lands for purposes consistent with the enjoyment of those rights, as in national parks[611]) needed to be separately considered. The different contractual and legislative formulae which exist in this regard in the several States and in the Northern Territory were explained. If the fact, or necessary incidents, of the grant of a pastoral lease did not, without more, extinguish any surviving native title, it was common ground that this Court should confine its attention to the particular leases in question in this case. It should avoid the expression of unnecessary generalisations which might cause problems in future native title claims in Queensland and, in significantly different legal settings, elsewhere in Australia.

8. There is also a point concerning the role of the courts which should be mentioned for it was referred to in submissions. Various submissions

acknowledged the injustices suffered by Australia's indigenous peoples as a consequence of the substantial extinguishment, after 1788, of their traditional laws and customs, including native title. Thus, the Commonwealth admitted that acceptance of its submissions, upholding the determination of Drummond J on the effect of pastoral leases, could be regarded as "the hard view", the "tough view" and one which "the Commonwealth will completely admit is an unsatisfactory result so far as the present position of Aboriginals, or of those claiming native title, may be concerned"[612]. Nevertheless, the Court was repeatedly reminded of the limits of the proper function of the courts in resolving the present claim according to law. Effectively to take away the property rights conventionally assumed to have been granted and previously enjoyed by those holding land by or under pastoral leases is an equally serious matter given the law's respect for, and protection of, property rights[613]. The radical rewriting of the property rights of Aboriginals, pastoralists and those taking under them is a matter for legislation; not a court decision. So much may be accepted. No one doubts the limits of this Court's functions in stating what the law is. But just as in *Mabo [No 2]*, there is room for difference as to where the boundary lies. The Court cannot disclaim the responsibility of determining the legal claims advanced for the **Wik** and the Thayorre. Those claims are before the Court to be decided according to law. A new ingredient has been injected into the previously settled land law of Australia by the decision in *Mabo [No 2]*. Settled principles and assumptions must be re-examined to accord with the decision of the Court in that case. Where there is no precise holding on the point (and no valid legislation resolving any doubt) the Court must reach its decision upon the competing legal contentions of the parties: finding the applicable rule by the use of the normal techniques of judicial decision-making, viz reasoning by analogy from established legal authority illuminated by relevant legal history and informed by applicable considerations of legal principle and legal policy[614].

9. No one doubted the significance of the issue tendered to the Court. Various estimates were given of the area of land in Australia covered by pastoral leases. For the Commonwealth it was put at 42% in aggregate. In various States, estimates of 70 to 80% of the land surface were mentioned. The systems of Crown leases introduced into New South Wales and Queensland were particularly "complex and diversified[615]":

"[The law] ... introduced a system of Crown leasehold tenures which led to the whole of Australia being transformed in subsequent decades into a patchwork quilt of freeholdings, Crown leaseholdings, and Crown 'reserves' ...

The result in each State, as Millard has said of New South Wales, is 'a bewildering multiplicity of tenures[616].' Gone is the simplicity of the modern English law as to tenures. Gone is the senile impotence of the emasculated tenurial incidents of modern English law. New South Wales and Queensland

are in the middle of an historical period in which the complexity and multifarious nature of the laws relating to Crown tenures beggars comparison unless we go back to the mediaeval period of English land law. ... [I]n no Australian State or dependant Territory are these laws nearly as simple as is the modern English law as to tenures. ...

Of all Australian States, Queensland is that in which the largest fraction of total area is held by Crown tenants on various kinds of non-perpetual Crown leasehold tenures[617], and in which there exists a remarkable multiplicity of Crown leasehold tenures.

There are approximately seventy different kinds of Crown leasehold and Crown perpetual leasehold tenures in Queensland.[618]"

The issues at stake in these proceedings are therefore important. If the primary argument of the contesting respondents is accepted, this Court's holding in *Mabo [No 2]*, that native title survived the annexation of Australia to the Crown and the acquisition of the Crown's radical title, is revealed as having little practical significance for Australia's indigenous people over much of the land surface of the nation. The vulnerability of native title to extinguishment by the fact or necessary incidents of a grant of a pastoral lease over the land is revealed in sharp relief. The effective operation of the *Native Title Act* 1993 (Cth) and like legislation, as well as claims under the general law, recede to apply only to the balance of Australia's land surface after the grants of estates, including freehold[619] and pastoral leaseholds (without relevant reservations), are deducted. This is all the more significant to indigenous peoples as the parts of Australia where their laws and traditions (important to sustain native title) are most likely to have survived include those where pastoral leases are likely to exist. On the other hand, the issues are equally important for lessees under pastoral leases, those taking under them, potentially those holding other title to land, governments, mining interests and the population generally.

10. Finally, there is a further consideration of a practical kind. If the threshold objection to the claim of the **Wik** and the Thayorre, upheld by Drummond J, is set aside, these proceedings would be returned for trial. The position of the parties would then be uncertain. The rights of Aboriginal and non-Aboriginal Australians in respect of land affected by pastoral leases would be left unclear: awaiting elucidation in this and many other cases unless earlier resolved by valid legislation. This would be so in an area of the law's operation where certainty and predictability have conventionally been accorded high importance. Conformably with the legal rights of those involved, the avoidance of unnecessary doubt and confusion is a proper objective of land law.

Mabo [No 2] does not resolve the claims

In judging what *Mabo [No 2]* decides, it is helpful to consider the three possible doctrinal solutions in respect of grants of pastoral leases which compete for acceptance:

(1) *The exercise of sovereignty test*: That once the Crown proceeded in any way to convert its ultimate or radical title into some other estate or interest in land, it exercised its sovereignty. In doing so, necessarily and without anything more, it extinguished any fragile native title interests in the land affected.

(2) *The inconsistency of incidence test*: That once the Crown's ultimate or radical title was converted, by the exercise of sovereignty into an estate or interest in land, the question became whether that estate or interest, of its legal character, was inconsistent with the continuance of native title in the land. The question was not whether the estate or interest had been exercised, in fact, in a way that was incompatible with the exercise of native title rights, but whether it was legally capable of being so exercised. The issue was one of legal theory, not detailed evidence.

(3) *The factual conflict test*: That the issue is in every case one of actual or practical inconsistency between the estate or interest conferred in the land (in this case the pastoral lease executed pursuant to statute) and the actual exercise of surviving native title rights. If, in actuality, the two may be reconciled, the native title rights are not extinguished. They survive as a continuing burden on the Crown's radical title.

Much of the argument in the Federal Court, and in this Court, concerned a suggestion that the decision in *Mabo [No 2]*, either in the language of the majority reasons or by logical inference from what was there held, required the result to which Drummond J gave effect. This was that the grant of pastoral leases under the relevant Queensland legislation, without more[620], extinguished any native title right which the **Wik** or the Thayorre had previously enjoyed in respect of the Crown land the subject of the leases. In so deciding, Drummond J held that he was bound by the majority decision of the Full Federal Court in the *Waanyi Case*[621]. There was no basis for holding that any of the leases involved in the **Wik** or Thayorre claims were distinguishable from the pastoral lease considered in the *Waanyi Case*. Because all of the leases granted exclusive possession of the areas specified in them it necessarily followed that the grant of such interests extinguished the native title rights of the **Wik** and the Thayorre.

In the *Waanyi Case* Hill J[622], with whom Jenkinson J agreed on this point[623] concluded that the issue was resolved by the reasoning of this

Court in *Mabo [No 2]*. As this is also the ultimate foundation of Drummond J's conclusion in this case, it is appropriate to note the reasoning[624]:

"There was agreement by the majority of the court that the grant of a freehold title necessarily operated to extinguish native title. Once it was extinguished it could not be revived. The matter depended not on subjective intention but, as Brennan J observed[625] on 'the effect which the grant has on the right to enjoy the native title'. At that page his Honour said:

'If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium'.

Later his Honour referred to the grant of interests in land inconsistent with the right to continued enjoyment of native title ...

The exposition given by Deane and Gaudron JJ is slightly different from that of Brennan J. ...

However, it is clear that [they] were of the view that a lease would operate to extinguish native title. Thus their Honours said[626]:

'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. They can also be terminated by other inconsistent dealings with the land by the Crown ...'."

Whilst acknowledging that the opinions extracted "may strictly be dicta", Hill J regarded them as "of the highest authority" and adopted them[627].

Convenient as it would be if it were otherwise, I cannot accept that the cited passages relied on from *Mabo [No 2]*, other passages referred to, or the conclusions inherent in the majority reasoning require the conclusion that the grant by the Crown of any leasehold interest in Crown land necessarily extinguishes native title in that land.

There were two leases involved in the decision in *Mabo [No 2]*[628]. The first was one of two acres of land on Mer Island in the Murray Island group. This had been granted by the Crown to the London Missionary Society in 1882. It was for a term of years. The second lease by the Crown was granted to two non-Islanders over the whole of the islands of Dauar and Waier, for a term of 20 years for the purpose of establishing a sardine factory. The latter lease contained a condition that the lessees should not obstruct, or interfere with, the

use by Meriam people of the islands for gardens and the surrounding waters for fishing.

In *Mabo [No 2]*, the consequences of the Crown's grants of the two leases constituted an issue subordinate to the main questions which this Court had to determine. It is unsurprising, therefore, that the Court withheld conclusive answers on the effect of leases on the survival of native title. Given the great number and variety of Crown leasehold interests in Queensland law[629], the decision in *Mabo [No 2]* would not, in any case, have provided a conclusive answer to the effect of a pastoral lease on native title, unless the first of the doctrines stated above had been clearly embraced. If the leases described in *Mabo [No 2]* were sufficient to evidence the exercise of sovereignty and, without more, to expel any residual native title, the same logic would apply to every leasehold interest, including pastoral leases. The reasoning offered by the Court in *Mabo [No 2]* does not uniformly sustain this thesis. The orders of the Court are inconsistent with it.

The passage from the reasons of Brennan J at page 68 of *Mabo [No 2]*, partly extracted above by Hill J in the *Waanyi Case*[630], deserves to be cited in full because it was the linchpin of much of the argument of the contesting respondents:

"A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title. The extinguishing of native title does not depend on the actual intention of the Governor in Council (who may not have adverted to the rights and interests of the indigenous inhabitants or their descendants), but on the effect which the grant has on the right to enjoy the native title. If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium. 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 and dedicated land inconsistently with the right to continued enjoyment of native title by the indigenous inhabitants, native title survives and is legally enforceable".

As I read this passage, it contains the seeds of each of the three theories stated above. However, it cannot be reconciled with the first theory because, by that theory, any exercise by the Crown of sovereignty in respect of the land, however slight, would necessarily be inconsistent with native title rights and would extinguish them. This would certainly have been so in respect of the leases discussed in *Mabo [No 2]*. It would even have been so in respect of the conversion of the Crown's radical title to the creation of a reservation for public purposes over the land.

The passage relating to the expansion of the Crown's radical title into a plenum dominium, such that there is inherent in any leasehold the creation of a reversion expectant, comes closest to the second theory. Yet, by the application of that doctrine, the expansion of the Crown's radical title for the purpose of granting the two leases in question would *ipso facto* have extinguished native title in the lands affected by the leases simply because that was an incident of the legal character of a common law lease.

The reasons of Mason CJ and McHugh J in *Mabo [No 2]*[631] included a qualification that the formal order of the Court should be "cast in a form which will not give rise to any possible implication affecting the status of land which is not the subject of the declaration ...". The actual declaratory order made by the Court[632] therefore excluded the lands the subject of the two leases. That order defines what it is that this Court held. Clearly, therefore, in the reasoning of individual Justices, the effect of the grant of leasehold interests upon native title rights is not authoritatively decided. There are dicta in the reasons of Deane and Gaudron JJ[633] to the effect that an unqualified grant of an inconsistent estate, whether in fee or by a lease conferring a right to exclusive possession, could extinguish native title. But their Honours clearly rejected the first theory propounded by observing that the lease of two of the islands for a term of 20 years for the purpose of establishing a sardine factory did not of itself extinguish native title rights. Nor did it have any continuing adverse effect upon native title[634]. Toohey J agreed that the issue of the effect of the leases did not have to be determined in *Mabo [No 2]*[635].

Returning, then, to the passage in the reasons of Brennan J, extracted above, in so far as it concerns the effect of a lease on native title, it is not part of the binding rule established by *Mabo [No 2]*. The reasoning of all Justices in the majority appears to be inconsistent with the first theory which I have indicated. Moreover, as Lee J pointed out, in dissent, in the *Waanyi Case*[636] when it was before the Full Federal Court:

"If the act of reservation by the Crown of a discrete area of Crown land for the express purpose of dedicating it for use as a school, courthouse or public office, or the appropriation and use of Crown land if that use is consistent with the continuing current enjoyment of native title does not extinguish native title[637], there must be ample scope for the argument that the grant of a statutory leasehold interest by the Crown, in the form of a pastoral lease over waste land, is not intended to exclude concurrent enjoyment of native title and to extinguish that title."

Once one has descended to the particularity of the facts as to whether a school, courthouse or other public building has been erected on the land or not, attention has shifted from consideration of pure legal theory to a consideration of factual inconsistency and the state of the evidence.

Although the discussion of the effect of the leases in *Mabo [No 2]* is helpful as identifying some of the problems which are presented by the rather different leases in question in the present claims, *Mabo [No 2]* does not provide the solutions. It was understandable that Hill J (with the concurrence of Jenkinson J) in the*Waanyi Case*[638] should have turned to the dicta of Brennan J about the leases in *Mabo [No 2]* to seek analogies for the pastoral leases competing with the Waanyi claim. However, I prefer the analysis of Lee J in that case[639]. *Mabo [No 2]* failed to resolve the basic questions. That is why some of them remain to be decided in these proceedings.

Pastoral leases

It is useful to record, briefly, something of the history of the emergence of pastoral leases in Queensland. As a result of the different patterns of availability and utilisation of land in England, such leases were unknown in that country. They are creatures of Australian statutes[640].

Moves to depasture stock outside the concentrated settlements in New South Wales first began without official sanction in the late 1820s. They continued in the following two decades. So-called "squatters" simply moved onto land unoccupied by other squatters and took possession of that land without any right or title to it[641]. Faced with this fait accompli, the New South Wales legislature enacted the "Squatting Acts", instituting a system of pastoral licences[642]. For a fixed annual licence fee holders of such licences were permitted to occupy land outside the settled districts for pastoral purposes. The squatters objected to the intrusion into their *de facto* activities. The Government was concerned about uncontrolled activities on Crown land, particularly where the land was acquired without payment, unsurveyed and beyond legal and administrative control[643]. Hence the *Crown Lands Unauthorized Occupation Act* 1839 (NSW) established a border police force "for the mutual protection and security of all persons lawfully occupying or

being upon the Crown lands beyond the limits allotted for location ...". That Act clearly contemplated Aboriginals "being upon" Crown lands, including those lawfully occupied by the holders of licences[644]. Regulations made in 1839 provided that such licences could be cancelled if the licencee were convicted "of any malicious injury committed upon or against any aboriginal native or other person ..."[645].

By the *Sale of Waste Lands Act* 1842 (Imp) (5 & 6 Vict c 36), the Imperial Parliament brought all grants of Crown land under legislative supervision. In 1846, the Imperial Parliament enacted the *Sale of Waste Lands Act Amendment Act* 1846 (Imp) (9 & 10 Vict c 104). By s 1, it was made lawful for Her Majesty to "demise for any Term of Years not exceeding Fourteen, to any Person or Persons, any Waste Lands of the Crown in the Colonies ...". This Act was implemented in New South Wales by Order in Council of 9 March 1847[646]. By Chapter II s 1 of the Order in Council, the Governor was empowered to grant leases of land in the unsettled districts for any term not exceeding fourteen years for pastoral purposes. There was nothing at all in any of the foregoing legislation, unless it was that the interests granted were called "leases" and "licences" which evidenced an intention of the Crown to grant possession over the lands in question to the exclusion of the Aboriginal subjects of the Crown. Contemporary documents, including communications by Earl Grey, Secretary of State for the Colonies, to the Governor of New South Wales, Sir Charles FitzRoy, indicate that this was not intended, at least by the Imperial authorities[647]:

"[I]t should be generally understood that Leases granted for this purpose give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such Land as they may require within the large limits thus assigned to them, but that these Leases are not intended to deprive the Natives of their former right to hunt over these Districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil except over land actually cultivated or fenced in for that purpose[648]."

A further Order in Council of 18 July 1849[649] was declaratory of existing rights under the *Sale of Waste Lands Act Amendment Act* 1846 and the Order in Council of 9 March 1847. Thereafter, pastoralists outside the settled districts of the colony held their lands on leases of 8 or 14 years duration, for low annual rents. A right of resumption was retained by the Crown and a right of pre-emption of the fee simple of the land, or part thereof, was granted to the Crown's leasehold tenants.

These developments provide the common starting point for the evolution of Crown leasehold tenure, including pastoral leases, in what are now the States of New South Wales, Queensland, Victoria and Tasmania[650].

In February 1842, land in the Moreton Bay District was first opened for free settlement[651]. The laws applicable were those of the colony of New South Wales of which it was then part. In May 1842 a Commissioner for Crown Lands for the Moreton Bay District was appointed pursuant to the *Crown Lands Unauthorized Occupation Acts* of 1839-1841[652]. As the new settlement expanded, pressure grew for other districts to be opened up for the use of land within them for pastoral purposes. The occupation of waste lands of the Crown for such purposes initially mirrored the unauthorised expansion which had taken place elsewhere in the colony.

Self-government was granted to New South Wales in 1855. In June 1859 Queensland separated from New South Wales[653]. However, the laws of New South Wales, including those regulating the "sale, letting, disposal and occupation" of wastelands of the Crown, remained in force until repealed or varied by the legislature of the new colony[654]. That legislature had the power to make laws with respect to land use. Thereafter, the Queensland Parliament adopted and elaborated the form of pastoral lease which had earlier evolved in New South Wales. There followed, up to recent times, a large number of statutes with provisions for, or affecting, pastoral leases[655]. The point of referring to them is to demonstrate the extent to which the Queensland Parliament regulated the incidents of pastoral leases in the colony. Most of the statutes contained express provisions conferring rights on third parties over a pastoral lease, inconsistent with the submission that the lease conferred rights of exclusive possession upon the lessee.

By the successive Queensland Acts, rights to possession were subject to various exceptions. Thus, the *Land Act* 1910 (Q), pursuant to which the instrument of lease of the Mitchellton Pastoral Holding was granted, provided for reservations of a right of access for the purpose of the search for, or working of, any mines of gold or minerals (s 6(3)); the right of a land ranger to enter a holding to "view the same and observe the manner of residence or occupation" (s 14(3)); a right of entry to a person authorised by a Minister to survey, inspect or examine land the subject of a lease (s 14(4)); a power of the Commissioner appointed under the Act to cause inspections of all land within the District of the lease (s 139); a provision to grant a licence to cut timber on leasehold land or to remove stone, gravel, clay, guano or other material (s 199(1)); a right of a licensee to use animals and vehicles to remove timber or materials and to depasture such animals (s 199(1)); a right in a person duly authorised by law to cut or remove timber or material without restriction by the pastoral lessee (s 200); and a right of pasturage for travelling stock (s 205). Such rights enjoyed by third parties, are not confined to the *Land Act* 1910 (Q). Many of the statutes referred to above contain similar provisions. Their existence gave rise to competing submissions in this appeal. For the **Wik** and the Thayorre, they showed that the Queensland Parliament had never intended, by calling a pastoral lease a "lease", and using other

terminology apt to describe a lease at common law, to assimilate the special kind of statutory lease created, to a lease at common law. The fundamental element explained in *Landale v Menzies*[656] was missing, viz a "contract for the exclusive occupation of land for a determinate period, however short ...". For the contesting respondents, however, the very need, in the statutes, expressly to reserve rights of entry and inspection demonstrated an acceptance that, in the absence of such reservations, the pastoral lease would, in law, permit exclusion of anyone on the ground that that was the character of a lease. The latter view enjoyed the support of early Queensland Supreme Court decisions[657] written, of course, without any need to address the problem presented by the subsequent decision in *Mabo [No 2]*.

None of the foregoing Queensland legislation expressly abolished Aboriginal native title. This is scarcely surprising, having regard to the then understanding of the law, that such title had not survived annexation of Australia to the Crown. Nor did the legislation expressly provide for the curtailment or limitation of Aboriginal rights, or any manner of dealing with the land from which could be inferred the purpose of abolishing Aboriginal native title. Again, this is unsurprising, in light of the understanding of Aboriginal legal rights at the time, the provisions in limited legislation about particular aspects of Aboriginal policy and the then prevailing policy of ignoring Aboriginals, leaving them as far as possible untouched by Australian law in the expectation, and hope, that they would become "civilised", assimilated or otherwise disappear as a "problem"[658].

It now falls to legislatures and courts to work out the consequences of the failure of this earlier social and legal strategy. There is an inescapable element of artificiality, in looking back over Australian legal history, which developed upon a particular hypothesis about Aboriginal legal rights, and endeavouring to reinterpret that history with the knowledge afforded by *Mabo [No 2]*. But it is important to understand that the decision in *Mabo [No 2]* was not a legislative but a judicial act. It did not declare that thenceforth native title would be recognised. It held that native title had always existed[659]. It had survived the advent of the sovereignty of the Crown in Australia. It was recognised by the common law. It would be enforced unless clearly extinguished. Thus the search must now be conducted to find indications of extinguishment. It is a search conducted at a disadvantage because it relies upon legal materials written in a completely different legal environment of contrary understandings and beliefs. One of the founders of the Australian Constitution, Alfred Deakin, stated that the judicial method enabled "the past to join the future, without undue collision and strife in the present"[660]. In this case the present must revisit the past to produce a result, wholly unexpected at the time, which will not cause undue collision and strife in future.

The pastoral leases in this case

The Holroyd River Holding covers an area of 2,830 square kilometres. The Mitchellton Holding, expressed in the old measurements, is said to cover an area of 535 square miles (approximately 1385 square kilometres).

The first Mitchellton lease was issued under the *Land Act* 1910 (Q) ("the 1910 Act") on 1 April 1915. However, it was forfeited for non-payment of rent in 1918. The second Mitchellton lease was also issued under that Act in 1919. It was surrendered in 1921. Possession was never taken by the lessee under either of these two leases. Since 12 January 1922, the land, formerly the subject of the Mitchellton leases, has been reserved for the benefit of Aboriginals, held for and on their behalf. The Holroyd River Holding lease was originally issued under the 1910 Act in 1945. That lease was surrendered in 1973. A new lease was issued on 27 March 1975 under the *Land Act* 1962 (Q) ("the 1962 Act"). The lease was issued to the same persons for a term of 30 years with a commencing date of 1 January 1974.

The lease documents for the Holroyd River Holding are instructive. They show that there was no irrigation on the property. It was served by natural waters only. It was said not to be fit for fattening cattle. It was purely suitable for breeding cattle. Its carrying capacity in fair seasons was approximately 1 beast to 60 hectares. This could be increased by fencing and the supply of additional waters but the cost of doing that was unknown and the lessees were recorded as displaying no intention of doing so. The cattle carried on the holding were running under open range conditions. The lessees disclosed that there were no improvements whatsoever on the property. In answer to a question concerning the nature and estimated cost of any improvements proposed to be made they stated "Nil at present". As to land "cultivable or suitable for the introduction of pasture", the lessees stated that there was "Nil". There was no accommodation or amenities for employees on the property at the time of the first return.

When the new lease was issued under the 1962 Act in 1975, certain conditions were imposed. Within five years of the commencement of the new lease the lessees were obliged to construct a manager's residence with quarters for five men and a shed for machinery. They were also to build an airstrip and to erect 90 miles of internal fencing with some yards, a dip and some dams. From a report in 1984 from the relevant government officer who inspected the property, it is clear that there had been little change. The number of stock depastured upon the land was estimated at 1,000 head. The property had been partly destocked to restrain an outbreak of tuberculosis. Its carrying capacity at the time of the inspection was reduced to 1 beast to 55 hectares. The holding was characterised as "Not permanently occupied". As to employees, it was stated that "No one employed at the time of inspection though usually

about 12 stockmen are mustering the block in the dry season". None of the buildings required by the above conditions had been built, although an airstrip had been constructed. No seed production area had been established nor was any planned. No boundary fencing had been erected and the lessee did not intend to erect any.

By 1988, a similar inspection report disclosed that the only cattle on the land were feral cattle. There were no branded cattle and only about 100 unbranded. The only occupants of the land, so far as the lessee was concerned, were two sleeper cutter gangs of six men and the contract musterers in the dry season. A machinery shed had been built. But no residential quarters for employees had been constructed. Timber cutters, using their own money, had erected a toilet and shower system. They were recorded as intending to build a house on the holding for their own use. The introduction of helicopter mustering had, in the opinion of the inspector, reduced the necessity to insist on permanent mustering yards. The openness of the country afforded the cattle little means of escape or hiding.

The picture painted of the two pastoral leasehold properties in question in the present case is, therefore, somewhat bleak. Each of them, in remote parts of Northern Queensland, offered to the lessee rudimentary and apparently unpromising conditions for depasturing cattle and conducting associated activities. So unpromising was the first Mitchellton lease that it endured for only three years and was forfeited for non-payment of rent. The second lease lasted for an even shorter period before it was surrendered. On 14 January 1922, by Order in Council of two days earlier, the Mitchellton Holding was reserved for the use of Aboriginal inhabitants of Queensland. According to the evidence, neither of the Mitchellton lessees entered into possession. The Thayorre assert that they never left their ancestral lands. Members of the Thayorre continued living on the land in their traditional way. They would have had no reason (there having been no entry) even to be aware of the grant of any pastoral lease over the land. Soon after the surrender of the lease in October 1921, a reserve was created for them. Given that it is now established that their native title survived the annexation of all Australian land to the Crown, it would require a very strong legal doctrine to deprive them of their native title. Especially because, so far as they were concerned, nothing of relevance had occurred to their land, save for (as it was put in argument) "the signing of documents by people in Brisbane".

The position of the Holroyd River Holding is not so extreme a case. But from the conditions which are described in the pastoral lease documents and from the successive inspectors' reports, it seems a reasonable inference that traditional Aboriginal life would have been little disturbed by the grant of the pastoral lease in that instance. The number of persons entering the land was small and mostly seasonal. The physical improvements were virtually non-

existent. In such a large remote terrain, for most of the year, the **Wik** could go about their lives with virtually no contact with the lessee or the tiny number of stockmen, wood gatherers and occasional inspectors who entered their domain or, more recently, in the case of helicopter pilots engaged in mustering, who flew over it.

To the contesting respondents, these facts were irrelevant. They were not necessarily typical of all pastoral leases in Queensland, still less elsewhere in Australia. The issue to be resolved was one of legal theory. It was the resolution of a conflict of legal titles which was to be decided on legal principles determining legal rights: not factual evidence regarding land use. I have nevertheless described the evidence as to the use of the land in the pastoral leases in this case because the emerging facts illustrate vividly the kind of practical physical conditions for which pastoral leases were created by the Queensland Parliament. Those facts also demonstrate the very limited occupation of the land which was expected and regarded as normal under pastoral leases. They show how Aboriginal law and tradition could readily survive in such an environment because of the very limited contact which was inherent in these pastoral leases, between Aboriginals and those connected with the lessee. The understanding of these facts helps to provide the context against which the application of legal theory must be tested in this case. It also helps to illustrate, and describe, the nature of the pastoral leases which the successive enactments on pastoral leases were designed to permit. They are a far cry from the situation in settled and occupied areas of Australia where the extinguishment of native title has a practical and necessary quality sustaining a legal determination of extinguishment by reference to the legal characteristics of common law or residential leases. In pastoral leases of the kind described in the evidence in this case, talk of "exclusive possession" or "exclusive occupation" has an unreal quality. It may be what the law imputes to the lease at common law. But it would require very clear law to drive me to such an apparently unrealistic conclusion. The common law tends to abhor unreality, even when it is presented as legal doctrine.

Mere exercise of sovereignty doctrine rejected

I now return to the three theories which were suggested as potentially providing the solution to a conflict between the grant of an estate or interest in land under Australian law and native title as a burden on the Crown's ultimate or radical title.

The first theory was one which postulates the extreme fragility and vulnerability of native title. Under this theory, any action, now necessarily by legislation, whereby the Crown's radical title is expanded into an exercise of dominium in respect of the land, necessarily expels native title. This is so,

whatever the estate or interest granted. It does not depend upon the precise legal features of that estate or interest.

This theory rests upon the political notion that in the one nation there cannot be two sovereigns. Specifically, there cannot be two sources of title to land. All land is held of the Crown, otherwise the Crown's claim to sovereignty is put in doubt. Even native title is, upon this view, held of the Crown, to the extent that the common law recognises and enforces it. Thus where, in effect by legislation, the Crown grants any estate or interest in land (however limited in rights and time), by the very act of doing so it has exercised its sovereignty in a way that is inconsistent with the common law's recognition of native title, derived from a different source, in respect of the same land. A legal metamorphosis takes place the instant that the paramount or radical title is changed to a dealing in the land. When that occurs the Crown's undoubted sovereignty has been exerted in a way that does not permit the survival of a legal right originating outside the ordinary legal system. To the complaint that it would be extraordinary that the rights of Aboriginal peoples in Northern Queensland, possibly enjoyed for millennia, could be extinguished by the actions of officials in Brisbane of which they were completely unaware, the answer is given: that is the way that sovereign powers of a modern state are exercised. Radical title is not a real title for property purposes. It is more in the nature of a political notion and in that sense a legal fiction[661]. But property rights of any kind are not fictional. They concern the interests of individuals. Where they involve estates or interests in land, their recognition and protection by the legal system is important to the social and economic stability and peace which it is the function of the sovereign to protect and enforce. Thus, where radical title expands through the exertion of sovereignty, to the extent of granting a legal estate or interest in land, that fact alone is sufficient to expel forever native title in such land. Thereafter, such title as exists must be derived from any further exercise of the powers of the new sovereign which has asserted its rights of sovereignty over the land. On this theory, the grant of a pastoral lease in respect of any land, being an exercise of the sovereign's powers in relation to that land, necessarily extinguishes rights deriving from a competing legal system unless, possibly, those other rights were expressly reserved or exempted and that is not suggested here.

This theory was supported in argument by what was said to be the logic of the explanation in *Mabo [No 2]* of the way in which, upon the grant of a lease, the "Crown's title is ... expanded from the mere radical title and, on expiry of the term, becomes a plenum dominium"[662]. However, it is not consistent with the analysis of the reasoning of any of the Justices in *Mabo [No 2];* nor with the Court's holding in that case. Nor is it consistent with earlier analyses of the Privy Council[663].

In the critical passage in the reasoning of Brennan J in *Mabo [No 2]*[664], his Honour implies that it is not the grant of the lease, as such, which has the effect of expanding the Crown's title "from the mere radical title" to a "plenum dominium" but the acquisition of the reversion expectant on the expiry of the leasehold term. This required legal analysis of the consequences of the exercise of sovereign rights in respect of each dealing in the land. So much is implied by the passage which followed, discussing the case where the Crown grants land in trust or reserves or dedicates land for public purposes. This would also be an exercise by the Crown of its rights as sovereign. But clearly it was not regarded by Brennan J as sufficient (without more) to extinguish native title. That title remained a burden on the Crown's radical title despite such exercise of sovereignty.

The first theory is not compatible with the authority of the Court in *Mabo [No 2]*. The decision of the Court in that case introduced a new and radical notion. It disturbed the previous attempts of the Australian legal system to explain all estates and interests in land in this country by reference to the English legal doctrine of tenure derived ultimately from the sovereign as Paramount Lord of the colonies as he or she had been in England after the Conquest[665]. Now a different source of title must be accommodated by the recognition of the continuance of native title as a burden on the Crown's radical title. Something more is needed to remove that burden, and to extinguish the native title, than a mere exercise by the Crown of rights of dominium in respect of the land. Native title might be subject to extinguishment. However, it is not as fragile as the first theory propounded.

Factual inconsistency doctrine rejected

It is convenient to deal next with the third theory, viz that in order to see whether native title, as recognised in *Mabo [No 2]*, had been extinguished by a grant of an estate or interest in land said to be inconsistent, it is necessary to examine the facts relating to the exercise of rights under such estate or interest. I took this theory to be inherent in the submissions for the Thayorre. Some support for the proposition was derived from passages in the judgments of the Court in *Mabo [No 2]*. For example, Brennan J, discussing the nature and incidents of native title said[666]:

"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 ... It is a problem that did not arise in the case of a settled colony so long as the fictions were maintained that customary rights could not be reconciled 'with the institutions or the legal ideas of civilised society'[667], that there was no law

before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown. These fictions denied the possibility of a native title recognised by our laws. But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert than it was 'desert uninhabited' in fact, it is necessary to ascertain by evidence the nature and incidents of native title."

By parity of reasoning, it was argued, the survival, persistence and revival of native title under the Australian legal system, notwithstanding a superimposed title from the Crown, was in every case a question of fact. The Crown (acting under legislation) might have the power to extinguish native title. Whether it had done so in the particular case would depend, not upon theoretical possibilities discovered by an examination of the nature of legal instruments, but by evidence concerning the possible reconciliation or inconsistency of the two legal regimes and the concurrent enjoyment of rights deriving from them, as a matter of fact. It was the essence of the Thayorre's primary submission that native title was title outside the common law. In its nature, it had nothing whatever to do with the feudal system of tenures. Because it had its own sources and integrity, it could not be destroyed by a legal theory outside its own regime[668]. It could expire by factual circumstances: dispossession, acquisition, surrender or abandonment. But even then it might later revive. The Australian legal system might determine whether, and if so when, it would grant recognition and enforcement to native title. But the title itself, being derived from an entirely different legal source, would continue to exist whatever the Australian legal system said, until it was acquired from, or surrendered or abandoned by, the indigenous people themselves.

It was suggested that this theory would apply equally to native title in respect of land granted in fee simple as to land demised by lease, including a pastoral lease. Dicta in *Mabo [No 2]* suggest that the grant by the Crown of title in fee simple necessarily extinguishes native title[669]. That conclusion is compatible with earlier Privy Council decisions explaining how native title could be lost "[b]y the will of the Crown and in exercise of its rights"[670]. The Thayorre did not resile from their argument. Whether, in a particular case, native title would be recognised by the common law was, for the Thayorre, a question of fact to be answered by examining the current state of the native title in order to see whether it could be reconciled with the exercise of the competing title granted under Australian law. If it could not, the latter would prevail, simply because of the ascendancy and power of the Australian legal system. The native title would continue to exist. It would simply not be enforceable in an Australian court.

Whilst this submission has certain attractions, it is supported neither by legal authority applicable to this country nor by legal principle or policy. It may be

conceded that some of the passages in the reasoning of *Mabo [No 2]* can be read to suggest that, in a particular case, where native title is claimed and extinguishment is asserted, the task is to find the factual, as distinct from the legal, content of a supervening title from the Crown. The contemplation that native title could survive the expansion of the Crown's radical title into a grant of land on trust or for reserves[671] or is lost only when a school, a courthouse or a public building is erected on such land[672], may be interpreted as suggesting that the search in each case is for evidence about the factual use of the land. However, this is not the legal principle which I take *Mabo [No 2]* to establish. What is in issue is *title* in respect of land. It is therefore a question about the existence or otherwise of rights of a legal character in respect of the land. As such, it is not a question about the intention or actions of the Aboriginal parties, any more than of the Crown or governmental officials. The question is not whether indigenous people have *in fact* been expelled from traditional lands but whether those making claim to such lands have the *legal right* to exclude them. The parties have come to the Court for the elucidation of their legal rights. I read the passages in *Mabo [No 2]* as saying no more than that facts will generally have to be explored in order to decide whether claims to native and other title can be established[673]. The proof of native title by detailed evidence is necessary because such title, unlike Australian title from the Crown and other title under Australian law, is not inscribed in official records.

The theory accepted by this Court in *Mabo [No 2]* was not that the native title of indigenous Australians was enforceable of its own power or by legal techniques akin to the recognition of foreign law. It was that such title was enforceable in Australian courts because the common law in Australia said so[674].

To suggest that the actual conduct of a pastoralist, under a pastoral lease, could alter the rights which the pastoralist and others enjoyed under the lease, would be tantamount to conferring on the pastoralist a kind of unenacted delegated power to alter rights granted under the *Land Acts*. This cannot be. It would introduce a dangerous uncertainty in the entitlements to land of all people in Australia to adopt such a principle. The search must therefore be one which is first directed at the legal rights which are conferred on a landholder by the Australian legal system. This is because legal title and its incidents should be ascertainable before the rights conferred are actually exercised and indeed whether they are exercised or not. In some cases the grant of such legal rights will have the inevitable consequence of excluding any competing legal rights, such as to native title. But in other cases, although the native title may be impaired, it may not be extinguished. The answer is to be found in the character of the legal rights, not in the manner of their exercise[675].

Arguments for extinguishment of native title

I therefore return to the second theory about the extinguishment and impairment of native title rights, which is the one that I take *Mabo [No 2]* to have established and which I would apply in this case. The question is whether the legal character of the pastoral leases in the present case, discernible from their terms and the rights afforded under them, had the necessary legal effect of extinguishing the native title claimed by the **Wik** and Thayorre.

Several strong arguments were marshalled to support extinguishment:

1. As a matter of authority, the opponents to the claims of the **Wik** and the Thayorre relied heavily on the passage in the reasons of Brennan J in *Mabo [No 2]* already cited[676]. Even if this were not part of the holding in the case, binding until reversed or qualified, it represented the only consideration by this Court of the effect of the grant of a lease on native title[677]. In the application and development of this body of law, it is highly desirable that consistency and predictability should be maintained. Moreover, it is undesirable that the basic tenets of Australian land law should be disturbed, more than is absolutely necessary, by the belated recognition of native title.

2. It was argued that the absence of express abolition of native title by the *Land Acts* under which the pastoral leases in question were granted was not important for several reasons:

(a) Both the *Land Acts* in question and the instruments granting the relevant interests are expressed in terms of a "lease". A lease is a legal interest well known to the common law. Where a word such as "lease" is used in the Acts of Parliament, it should be presumed that it was the purpose of the legislators to use the word in its ordinary meaning. That meaning includes the concept that it is the intention of the parties that the grantee will be entitled to exclusive possession of the property, the subject of the lease. Where it is otherwise, what is granted is a licence and not a lease[678]. Conceding that the word "lease" is sometimes used where "licence" is meant[679], it should nonetheless be assumed, in the technical area of land law, the subject of successive and detailed enactments of the Queensland Parliament, that the drafters knew what a "lease" was in law and intended to use the word in the technically accurate sense[680]. Any doubts or confusion which they may have had at an earlier historical time would have been removed by decisions of the Queensland Supreme Court before the 1910 and 1962 *Land Acts* were enacted and before the grant of any of the pastoral leases in issue here[681]. It is of the essence of a "lease" in the ordinary meaning of that term, that it must be for an estate or term less than the lessor has in the property. Otherwise, an instrument which passes the entire interest of the grantor is a conveyance or assignment and not a lease. It was this attribute of a lease which was critical to

the respondent's argument resting on the reversion expectant[682]. According to this notion, it was inherent in the *Land Acts* (although not expressed in them) that, in order that it might grant a lease to the lessee, the fundamental legal character of the Crown's interest in the subject land must have changed. Its title had "expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium"[683]. Such a metamorphosis was implicit in, and necessary to, the Crown's capacity to found a grant of a leasehold interest, including a pastoral leasehold under statute. Not only was this an essential postulate to sustain the grant of a legal right called a "lease". It was equally necessary to explain the Crown's interests, elsewhere reflected in the *Land Acts*, to protect the land and to receive the reversion on expiry, forfeiture or surrender of the lease[684]. The successive *Land Acts*, by expanding the Crown's dominium in order to sustain the grant of interests called "leases" had necessarily moved from the "logical postulate" of a radical title to the holding of an interest in the particular parcel of land which was sufficient to expel any residual native title.

(b) Alternatively, or additionally, the lessee's entitlement to exclusive possession which was itself sufficient to extinguish native title in the land was supported by both general and specific references to the instruments creating the pastoral leases and the *Land Acts* under which they were issued. The instrument of lease under the 1910 Act is titled "Lease of Pastoral Holding ...". The recital refers to the entitlement of the lessee to "a Lease" for a specified "term" and at a yearly payment called "rent". The operative words of the instrument are expressed in the name of the sovereign to "Demise and Lease [the specified lands] unto the said [lessee] and [its] lawful assigns". This is the normal language of a lease. The provisions under the 1962 Act were almost identical. They tend to reinforce the suggestion that the interest being granted was intended to be an ordinary leasehold interest, although for a specific objective, namely "for pastoral purposes only". To the language of the instrument must be added the language of the Act itself. Thus s 6 of the 1910 Act provides for the Governor in Council, in the name of the sovereign to "grant in fee-simple, or demise for a term of years, any Crown land within Queensland". Section 6(2) should be noted. It provides:

"The grant or lease shall be made subject to such reservations and conditions as are authorised or prescribed by this Act or any other Act, and shall be made in the prescribed form, and being so made shall be valid and effectual to convey to and vest in the person therein named the land therein described for the estate or interest therein stated."

(c) Far from being an indication that the interest granted by a pastoral lease under the *Land Acts* was of a different character from a lease at common law, the several exceptions envisaged by the *Land Acts* were called in aid to reinforce the argument that the *Land Acts* were thereby contemplating that,

with the "lease", came the ordinary common law entitlement to exclusive possession from which derogations had to be specifically authorised[685].

In these different ways, the arguments of extinguishment were advanced. At the highest level of abstraction, by the assertion of plenum dominium converting the Crown's radical title to a reversion expectant incompatible with the survival of native title. At a lower level of abstraction, by the language of the *Land Acts* and the relevant pastoral leases, affording legal rights of exclusive possession to the entirety of the land referred to in the leases. At the lowest level of abstraction, by reference to the detailed provisions of the *Land Acts*, it was argued that the rights conferred by the pastoral leases were incompatible with the continuance of native title. Such title was therefore extinguished[686].

Significance of non-entry

It will be remembered that unlike the Holroyd River Holding, the successive lessees of the Mitchellton Holding never went into possession. This fact, which was undisputed, led to a submission for the Thayorre which is particular to their case and does not affect the case for the **Wik**. For the Thayorre, it was put that, until a lessee goes into possession, it does not have an estate in possession but a mere *interesse termini*. Therefore, it was submitted, the estates of the Mitchellton Holding lessees vested in interest but never in possession. As a consequence, assuming (contrary to the Thayorre's primary submission) the principles of tenure were attracted to the pastoral leases executed in respect of the Mitchellton Holding, the Crown never acquired a reversion expectant which was the postulate for the expansion of the Crown's radical title to the plenum dominium that was said to extinguish the residual native title in the land.

To support this argument, the Thayorre relied on what was advanced as a basic principle of the common law of leases, as expressed in *Coke Upon Littleton*[687]:

"For before entry the lessee hath but *interesse termini*, an interest of a terme, and no possession, and therefore a release which enures by way of enlarging of an estate cannot worke without a possession, for before possession there is no reversion ..."

This rule was referred to, without disapproval in *Mann, Crossman & Paulin Ltd v The Registrar of the Land Registry*[688]. It has now been abolished by statute in Queensland, but such abolition did not occur until 1975[689].

Attractive though it might be to find a rule of the common law of leases that would forestall the legal operation of the grant of the pastoral leases over the

Mitchellton lands, considering that they were never taken up and no entry was ever made under them, I do not believe that this argument can prevail in the face of the operation of s 6(2) of the 1910 Act. It was under that Act that both of the Mitchellton leases were granted. By that sub-section (set out in its entirety above) the lease itself is, by force of Statute, declared:

"... valid and effectual to convey to and vest in the person therein named the land therein described for the estate or interest therein stated."

Any residual common law principle which required physical entry to give rise to the effectiveness of a lease and the reversion expectant, is swept aside in the case of a pastoral lease granted under the 1910 Act by the provisions of the legislation. Under the 1910 Act, execution of the lease, alone, is sufficient. Drummond J was right to so determine. The submission for the Thayorre, that s 6(2) of the 1910 Act was merely providing for matters of form, must be rejected.

Native title was not necessarily extinguished

This conclusion takes me, therefore, to the basic argument, advanced for the **Wik** and the Thayorre, to sustain the suggested survival of their native title notwithstanding the pastoral leases granted in this case. Their argument was simple and correct. Pastoral leases give rise to statutory interests in land which are sui generis. Being creatures of Australian statutes, their character and incidents must be derived from the statute. Neither of the Acts in question here expressly extinguishes native title. To do so very clear statutory language would, by conventional theory, be required. When the Acts are examined, clear language of extinguishment is simply missing. On the contrary, there are several indications which support the contention of the **Wik** and the Thayorre that the interest in land which was granted to the pastoralist was a limited one: for "grazing purposes only", as the leases stated. Such an interest could, in law, be exercised and enjoyed to the full without necessarily extinguishing native title interests. The extent to which the two interests could operate together is a matter for further evidence and legal analysis. Only if there is inconsistency between the legal interests of the lessee (as defined by the instrument of lease and the legislation under which it was granted) and the native title (as established by evidence), will such native title, to the extent of the inconsistency, be extinguished.

The foregoing conclusions are supported by the following considerations:

1. Australia's peculiar colonial needs and environmental opportunities called forth legislation on land use which was increasingly particular and special to this country. The prerogative power of the sovereign to dispose of waste lands of the Crown in New South Wales (then including the present Queensland)

was removed by the *Sale of Waste Lands Act* 1842 (Imp)[690]. Thereafter, the grants of interest in land were made under legislation, eventually enacted exclusively by local legislators. The Queensland legislation on pastoral leases, commencing with the *Pastoral Leases Act* 1869 (Q) was, as I have noted, multifarious, detailed and peculiarly local. Whereas in England, most of the instruments by which land was first granted had been lost (resulting in a reliance on fictions, the general rules of the common law and evidence of practice), in Australia, and specifically in Queensland, it is virtually always possible to trace the grant to an instrument and to the legislation by which the instrument was authorised[691]. Dr Fry commented:

"The Crown tenures of mediaeval England were as difficult to classify, and the incidents of such tenures were as multitudinous and multifarious, as are the Crown tenures and tenurial incidents of modern Australian land law, especially in Queensland and New South Wales. Tenurial incidents in mediaeval England were, however, peculiarly appropriate to the feudal period, and those in modern Australia are of a different nature."[692]

It is a mistake to import into the peculiar Australian statutory creation, the pastoral lease, all of the features of leases in English leasehold tenures dating back to medieval times. Unless such importation is necessary, either for reasons of the language or imputed purpose of the statute, it is much more appropriate to give content to the statutory pastoral lease by reference to the statute, unencumbered. Doing so represents a more orthodox approach to the construction of an Australian statute, made for peculiar, and in some ways unique, local land conditions. Tenure is already, to some extent, a fiction in England. It is a fiction increasingly questioned[693]. Why, in such circumstances, it should be imputed to the Queensland Parliament in 1910 and 1962 that it had imported all of the incidents of the English common law of leases is not immediately plain. Pastoral leases covered huge areas as extensive as many a county in England and bigger than some nations. In these circumstances, it seems distinctly unlikely that there can be attributed to the Queensland Parliament an implied purpose of granting a legal right of exclusive possession to the pastoralist (including as against Aboriginals known to exist on the land and unmolested in their continuing use of it) where that Parliament held back from expressly so providing.

2. The *Land Acts* regulate the grant of leases. They do not expressly confer on the Crown the estate necessary to grant a lease. The historical reason for this is clear enough. At the time of the enactments, it was assumed that the Crown exclusively enjoyed the power to grant leasehold and other interests simply as an attribute of its sovereignty. Only now, following *Mabo [No 2]*, has it become clear that, contrary to the earlier understanding, with sovereignty came no more than a radical or paramount title and this was burdened with native title which the common law would, in some circumstances, uphold. To

invent the notion, not sustained by the actual language of the *Land Acts*, that the power conferred on the Crown to grant a pastoral leasehold interest was an indirect way of conferring on the Crown "ownership" of the land by means of the reversion expectant involves a highly artificial importation of feudal notions into Australian legislation. It would require much plainer statutory provisions to convince me that this was what the Queensland Parliament did in 1910 and 1962 when the *Land Acts* were enacted. That legislation is silent on the point precisely because the notion that the legislators (and drafters) were obliged to confer such a power on the Crown would have been furthermost from their minds. What is therefore suggested, upon analysis, is that, by a new legal fiction, such a purpose should be invented, retrospectively attributed to the Queensland Parliament and read into the *Land Acts* in order to afford the estate out of which the Crown might grant a pastoral lease. But if the Crown's power to make such a grant, properly analysed, exists simply because Parliament has said that it does, that is sufficient. Importing into the *Land Acts* notions of the common law apt for tenurial holdings under the Crown in medieval England, and attributing them to the Crown itself, piles fiction upon fiction. As it is not expressed in the legislation, I would not introduced it.

3. As to the argument that the very word "lease" and the other words familiar to leasehold interests ("demise", "rent", "assigns") are used in the *Land Acts*, I am quite unconvinced that they are sufficient to import all of the features of a common law lease. The case books are full of warnings against such a process of reasoning, both generally[694] and particularly in the context of the use of words such as "lease" and "licence"[695]. In *R v Toohey; Ex parte Meneling Station Pty Ltd*[696], this Court was obliged to consider a statutory "grazing licence" as either proprietary or non-proprietary in nature. Mason J observed that the licence[697]:

"has to be characterised in the light of the relevant statutory provisions without attaching too much significance to similarities which it may have with the creation of particular interests by the common law owner of land".

The same point has been made many times by this Court and by other courts of high authority. Long ago, in *O'Keefe v Malone*[698], the Privy Council, in a case involving a statutory licence, emphasised that the correct approach for a court to take was to examine the rights actually conferred on the grantee by the instrument rather than implying from the mere use of the word "licence" or "lease" all of the incidents common to those expressions in a private contract. This is not to say that some features of an ordinary "lease" may not be imported into the terms where used in a statute. For example, the lessee would be entitled (exceptions and reservations aside) to enforce as against the Crown an entitlement to be given quiet enjoyment. The lessee would be entitled to seek relief in equity in certain circumstances as under a private

lease[699]. The lessee would have the statutory right to invoke the assistance of the Crown to expel trespassers who had no right or title to be upon the land[700]. However, these conclusions fall a long way short of requiring that the title conferred by a pastoral lease upon the lessee to use the land "for pastoral purposes only" be extended to exclude Aboriginals using the land in the traditional way. This is particularly so where they are on the land, as *Mabo [No 2]* now makes clear, in pursuit of a native title which the common law will recognise and enforce so far as it is not inconsistent with the pastoralist's right to use the land "for pastoral purposes only". The context in which the legislation on pastoral leases was enacted in Queensland also makes it highly unlikely that this was the intention of Parliament. As the historical materials demonstrate, it was known that there were substantial numbers of Aboriginals using the land, comprised in the pastoral leases, according to their traditional ways. It was not government policy to drive them 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. In such huge, remote and generally unvisited areas as ordinarily comprise pastoral leases, it may be assumed that Parliament, had it been questioned about the position of Aboriginals, would have responded as the Northern Protector of Aboriginals did at the turn of the century.

4. There are several provisions in the *Land Acts* which reinforce the foregoing conclusions. The *Land Act* 1897 (Q) contained, in s 235, a provision for the removal of trespassers. This provision became common in the Queensland legislation. By regulations made under that Act, the form of warrant for the removal of trespassers read:

"[t]hat our Sovereign Lady the Queen is entitled to possession of the said land; These are therefore to command you forthwith to enter into and upon the said land, and to dispossess and remove the said [trespassers] ... and to take possession of the same on behalf of our said lady the Queen."

The equivalent provision in the 1910 Act was s 204. In the 1962 Act it was s 373(1). These sections uniformly provide for the removal of trespassers by the taking of possession "on behalf of the Crown". This is one of a number of indications in the *Land Acts* that, by their terms, exclusive possession did not repose in the lessee. A residue of actual possessory right was retained to the Crown, not a mere reversion expectant. Both the 1910 and 1962 Acts contained provisions that pastoral leases should be subject to reservations and conditions authorised or prescribed by the Acts[701]. 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. It is an interest peculiar to, and apt for, the conditions of the countryside described. It was not one conferring on the lessee a general right of exclusive possession simply because what was granted was called a "lease".

5. Confining the rights granted to the lessee to those apt for the circumstances of a pastoral lease involves no distortion of the language of the *Land Acts*. On the contrary, it simply applies to the *Land Acts* the ordinary rule of statutory construction that the powers conferred by the legislative language on a donee of such powers are, and are only, those stated or necessary for the achievement of the stated objects[702]. In the context of a pastoral lease, the interests acquired by the lessees to achieve the objects of the *Land Acts* are not dissimilar to those which, at common law, were known as profits à prendre[703]. However, because of my view that the rights conferred on the lessee under a pastoral lease in Queensland are sui generis and to be discovered from the legislation creating those rights, I see no reason to pursue any analogy to profits à prendre or other property interests developed in other contexts[704].

6. There are further reasons of legal principle which reinforce this approach to the *Land Acts* under which the pastoral leases here were granted. There is a strong presumption that a statute is not intended to extinguish native title[705]. The intention to extinguish native title must be clear and plain, either by the express provision of the statute or by necessary implication[706]. General provisions of an Act are not construed as extinguishing native title if they are susceptible to some other construction[707]. Whether by necessary implication a statute extinguishes native title depends upon the language, character and purpose which the statute was designed to achieve. This is species of a general proposition applied by courts in the construction of legislation. It is applied out of deference to the presumption that Parliament would not normally take away the rights of individuals or groups, without clearly stating such a purpose[708]. It may be said that the*Land Acts* under which the present pastoral leases were granted, were made by the Queensland Parliament before the survival of native title was made clear by this Court in *Mabo [No 2]*. That is true. It is equally true that a court, in giving meaning to the language of an Act, will ordinarily take into account the circumstances and conditions contemporaneous to its enactment[709]. However, the principle protective of the rights of Aboriginal people is not new to the common law. It existed in Australia in colonial times. Often it was explained in terms of the duty which the Crown owed, in honour, to native people who were under the Crown's protection[710]. Although the legislators in 1910 and 1962 did not know of the existence of native title, it should be presumed that, had they known, Parliament would have acted to protect such rights against uncompensated expropriation[711]. Especially would it have done so in

circumstances where the expropriation asserted was alleged to have occurred by a legal fiction, viz the grant of a leasehold interest but one whose peculiarities would leave traditional Aboriginal life totally, or largely, undisturbed. In Canada, the principle has been approved that courts should attribute to Parliament the objective of achieving desired results with as little disruption as possible of the rights and interests of indigenous peoples and affecting their rights and status no more than is necessary[712]. Moreover, the principles of statutory construction to which I have referred are by no means new principles. There were many cases before and at the time of the enactment of the early pastoral leases legislation which adopted analogous principles[713]. Existing proprietary rights might be affected by Parliament acting within, and in accordance with, its constitutional powers[714]. However, to deprive a person of pre-existing proprietary interests, the legislation enacted by Parliament must clearly do so, either by express enactment[715] or by necessary implication[716]. The problem of interference with proprietary rights over land (frequently rights of way) by or under railway construction legislation was a question commonly before the courts in the 19th and early 20th centuries. Where Parliament had not expressly abolished proprietary rights, the court typically asked itself whether "[t]he continued use of the land ... would render the exercise of the powers expressly conferred on the Constructing Authority impossible"[717]. If such a question is posed in relation to native title rights and the rights conferred on lessees of pastoral leases under the successive *Land Acts* of Queensland, the answer must be in the negative. The exercise of the leasehold interests to their full extent would involve the use of the land for grazing purposes. This was of such a character and limited intensity as to make it far from impossible for the Aboriginals to continue to utilize the land in accordance with their native title, as they did. In that sense, the nature of the interests conferred by a pastoral lease granted under the successive *Land Acts*, was not, of its legal character, inconsistent with native title rights. Whether, in particular cases, and in particular places, native title rights, in their operation, were inconsistent with the rights enjoyable under the pastoral lease is a matter for evidence. Because the interests under native title will not be uniform, the ascertainment of such interests, by evidence, is necessary in order to judge whether such inconsistency exists as will extinguish the particular native title proved. If inconsistency is demonstrated in the particular case, the rights under the pastoral lease will prevail over native title[718]. If not, the native title recognised by our law will survive.

7. Is there any legal principle or legal policy which would cast doubt on the foregoing conclusion and require that such outcome be reconsidered? I think not. No new doctrine is adopted which alters the course set by the decision of this Court in *Mabo [No 2]*. There is no radical departure from the fundamental principles of Australian law, including Australian land law[719]. It is true that some remarks in *Mabo [No 2]*, not necessary to the actual decision in that

case, have been reconsidered. The suggestion that it was necessary and inherent in the special Queensland legislation creating the uniquely Australian property interest of a pastoral lease to import the paraphernalia of English feudal leasehold notions has been rejected. It is not what the Queensland legislature said in its enactments. It is not necessary in order to make the legislation effective. It is unhistorical and artificial in the concept which it would import into the function of the Crown in Australia as the paramount grantor of interests in land. The fundamental rule in *Mabo [No 2]* is unaffected.

When, therefore, the legal interests granted by the pastoral leases here are analysed and considered with our present knowledge that native title survived annexation of the Australian lands to the Crown, the nature of such legal interests is such that they do not necessarily extinguish native title. This conclusion can more comfortably be reached with the assistance of the presumption that, without express words or necessary implication, Australian legislation will not be construed to take away proprietary rights, particularly without compensation. The holders of pastoral leases are left with precisely the legal rights which they enjoyed pursuant to the leases granted under the *Land Acts* "for pastoral purposes only". Those rights will prevail, to the extent of any inconsistency with native title. This judgment is concerned only with the legal interests of the lessees under the Queensland legislation examined in this case. It is the peculiarity of the legal rights conferred by such statutory leases, in the factual setting in which they were intended to operate, which permits the possibility of coexistence of the rights under the pastoral lease and native title. Such would not be the case where an estate or interest in fee simple had been granted by the Crown. Such an interest, being the local equivalent of full ownership, necessarily expels any residual native title in respect of such land. The position of the countless other leasehold interests in Queensland, described by Dr Fry[720] and of the pastoral and other leasehold interests elsewhere in Australia must remain to be elucidated in later cases. It is true that this result introduces an element of uncertainty into land title in Australia, other than fee-simple. However, this is no more than the result of the working out of the rules adopted in *Mabo [No 2]*.

There were many reasons of legal authority, principle and policy for adhering to the understanding of the law which existed prior to *Mabo [No 2]*[721]. But no party before this Court sought to reargue the correctness of that decision. So it falls to the Court to determine one of its logical consequences. I forbear, of my own motion, to reagitate the wisdom of the step taken by the Court in *Mabo [No 2]*. Once that step was taken, ordinary common law principles for the protection of a proprietary right, found to have survived British settlement, extended to the protection of the indigenous peoples of Australia, in exactly the same way as the law would protect other Australians. Because pastoral leases in Queensland are not necessarily, in law,

incompatible with the survival of native title rights, the latter survived unless shown, by particular evidence, on the particular facts, to be inconsistent and thus extinguished.

A large number of other submissions were received by the Court on the pastoral leases question. Determination of them, in these already extended reasons, is not necessary. What has been stated is sufficient to bring me to my conclusions and to the orders which I would propose on this point.

The appeal on this question must be upheld. The answers given by Drummond J in the Federal Court to the questions separated for determination must be amended accordingly. For the reasons explained above, no declaration or other relief in this Court is sought or is appropriate. With the answers to the questions given by the Court in those matters still in issue, the proceedings should be returned to the Federal Court for trial. At such trial, evidence will be required to give content to the survival and requirements of the native title alleged by the **Wik** and the Thayorre which, for the purpose of these proceedings, it has been assumed that they can prove.

STATUTORY AGREEMENTS

Agreement with Comalco authorised by statute

Questions 4 and 5 concern only certain claims by the **Wik** propounded in their further amended statement of claim. So far as question 4 is concerned, the claims are maintained against the State of Queensland ("Queensland') and the Commonwealth Aluminium Corporation Pty Limited ("Comalco"). There was no dispute as to the facts, so far as the preliminary determination of the question of law was concerned. For that purpose, Queensland and Comalco assumed that the **Wik** would make out the various defaults alleged (including breach of the requirements of procedural fairness and breach of fiduciary duty) whilst strenuously denying that such defaults had occurred.

In 1957, the Government of Queensland procured the passage through the Parliament of Queensland of the *Commonwealth Aluminium Corporation Pty Limited Agreement Act* 1957 (Q) ("the Comalco Act"). The Act was given the Royal Assent on 12 December 1957. As originally enacted, its relevant provisions were:

"**2.** The Premier and Chief Secretary is hereby authorised to make, for and on behalf of the State of Queensland, with Commonwealth Aluminium Corporation Pty Limited ... the Agreement a copy of which is set out in the Schedule to this Act ...

3. Upon the making of the Agreement the provisions thereof shall have the force of law as though the Agreement were an enactment of this Act.

The Governor in Council shall by Proclamation notify the date of the making of the Agreement.

4. The Agreement may be varied pursuant to agreement between the Minister for the time being administering this Act and the Company with the approval of the Governor in Council by Order in Council and no provision of the Agreement shall be varied nor the powers and rights of the Company under the Agreement be derogated from except in such manner.

Any purported alteration of the Agreement not made and approved in such manner shall be void and of no legal effect whatsoever.

Unless and until the Legislative Assembly, pursuant to subsection four of section five of this Act, disallows by resolution an Order in Council approving a variation of the Agreement made in such manner, the provisions of the Agreement making such variation shall have the force of law as though such lastmentioned Agreement were an enactment of this Act.

5 (1.) Any Proclamation or Order in Council provided for in this Act or in the Agreement may be made by the Governor in Council ...

(2.) ...

(3.) Every such Proclamation or Order in Council shall be published in the Gazette and such publication shall be conclusive evidence of the matters contained therein and shall be judicially noticed.

(4.) Every such Proclamation or Order in Council shall be laid before the Legislative Assembly within fourteen days after such publication if Parliament is sitting for the despatch of business; or, if not, then within fourteen days after Parliament next commences to so sit.

If the Legislative Assembly passes a resolution disallowing any such Proclamation or Order in Council, ... such Proclamation or Order in Council shall thereupon cease to have effect, but without prejudice to the validity of anything done in the meantime."

The agreement authorised by the Comalco Act ("the Comalco Agreement") was executed by the Premier and Chief Secretary of Queensland in apparent compliance with s 2 of the Act and purportedly "for and on behalf of the State [of Queensland]", and also by Comalco, on 16 December 1957. On 22 March 1958, the Proclamation notifying the date of the making of the Comalco Agreement was published in the *Queensland Government Gazette*. The

conditions in the Comalco Agreement being satisfied, Comalco became entitled, pursuant to cl 8, to the grant of a "Special Bauxite Mining Lease for the western bauxite field for an initial term of eighty-four (84) years commencing on the first day of January, 1958". Pursuant to cl 11(c) of the Comalco Agreement, Comalco also became entitled to occupy the area to be leased and to exercise all the rights and powers intended to be granted under the lease, pending the issue of the instrument of lease. The Special Bauxite Mining Lease (identified as ML 7024) was issued on 3 June 1965. It was in the form set out in the Third Schedule to the Comalco Agreement, in conformity with cl 11(a) of that Agreement. The lease was thereafter varied on a number of occasions in the manner provided for by s 4of the Comalco Act.

The primary submission of the **Wik** in their Statement of Claim was that the enactment of the Comalco Act, the making of the Comalco Agreement and the granting of the lease did not extinguish native title in the areas the subject of Comalco's entitlements under the foregoing provisions. However, against the possibility that this primary submission might fail and that the Comalco Act, the Comalco Agreement and the lease referred to, singly or in combination, might be so inconsistent with the **Wik**'s native title rights as to extinguish them, the **Wik** sought to advance the claims against Queensland and Comalco which are the subject of question 4. Those claims were:

(a) That the Comalco Agreement and the lease were invalid and of no effect, being made in breach of the requirements of procedural fairness to which the **Wik** were entitled (basically notification that their interests might be adversely affected by the decision to enter into the Comalco Agreement or otherwise over-ridden to the advantage of the private rights and interests of third parties)[722].

(b) That the Comalco Agreement and the lease were invalid and of no effect on the ground that they were negotiated and executed in breach of trust or fiduciary duty on the part of Queensland, in which breach Comalco knowingly participated[723].

(c) That Comalco was obliged to account to the **Wik** for profits made by Comalco in consequence of the breach of fiduciary duty by Queensland and that there should be a declaration that Comalco held the lease as constructive trustee for the **Wik**[724].

(d) That Comalco had been unjustly enriched by the benefits which it received from the making of the Comalco Agreement, the grant of the lease and the operations conducted pursuant thereto, and was thereby obliged to account to the **Wik** for such benefits[725].

(e) That Comalco should be enjoined from continuing its operations pursuant to the Comalco Agreement and lease because it had no lawful right to conduct the operations once the Comalco Agreement and the lease were found invalid[726].

The **Wik** did not contend that the Comalco Act was invalid. Queensland and Comalco successfully argued in the Federal Court that the Comalco Act, the Comalco Agreement it authorised and the lease which it envisaged together, expressly or by necessary implication, denied the **Wik** any remedy for the wrongs alleged, assuming they could prove them. The **Wik** denied that this was the effect of the Comalco Act or of the Comalco Agreement and lease made under it.

Decision of the Federal Court

In approaching the operation of the Comalco Act, Drummond J had the benefit of the decision upon that issue of the Full Court of the Supreme Court of Queensland in *Commonwealth Aluminium Corporation Ltd v Attorney-General*[727]. In issue in that litigation was whether an amendment to the rate of royalties payable under the Comalco Agreement, effected not by means of the variation provisions in s 4 of the Comalco Act but by a subsequent Act[728], was inapplicable to vary the Comalco Act. The Court held that, notwithstanding the Comalco Act, the Queensland Parliament retained full legislative power to amend the Comalco Act and, by later legislation, to affect the Comalco Agreement executed under that Act. In response to the complaint that the formula in s 4 of theComalco Act had the effect of elevating executive action to the status of legislation, and so abrogating the legislative authority of the Parliament of Queensland, Wanstall SPJ pointed out that the Queensland Parliament retained its entire legislative powers[729]. His Honour rejected the attack on the validity of theComalco Act and relied upon the reasoning of the Privy Council in *Cobb & Co Ltd v Kropp*[730].

In this Court the **Wik** shifted their attack. Many of the arguments which were rejected in the Federal Court were abandoned. The three arguments which were advanced were:

(a) That the Federal Court had erred in reading the Comalco Act so widely as to excuse Queensland and Comalco from any enforceable liability which they respectively owed to the **Wik**.

(b) That so far as the Comalco Agreement was concerned, the most that the Act did was to "authorise" the Premier to execute the Comalco Agreement. This should be read as falling short of imposing upon the Premier the obligation to execute the Comalco Agreement. It permitted him to do so if he so decided, after satisfying himself that all relevant matters and interests had

been taken into account (including the entitlements of the **Wik**). It thereby implicitly preserved the obligation to adhere to procedural fairness and to respect the **Wik**'s fiduciary rights.

(c) That the lease was separate from the Comalco Agreement and did not form part of it. Hence the lease did not have the force of statute even though the Comalco Agreement was given such status by the Comalco Act.

In the Federal Court, Drummond J rejected each of these submissions. In my opinion his Honour was right to do so.

Attack on the Agreement: Implications of the *Comalco Act*

The **Wik** urged that the proper construction of the Comalco Act was that it was limited to its basic purpose of removing the need, under the *Mining Acts*of Queensland, to follow for the granting of mining leases, what the Privy Council described as a "chain of necessary steps to be taken, of satisfaction to be achieved, of decisions to be made, of discretions to be exercised"[731]. In this regard, reference was made to the reasoning of the Full Court in the earlier litigation concerning the Comalco Act[732]. There seems little doubt that had the Comalco Act merely authorised the execution of the Comalco Agreement, without the additional element provided by s 3 which gave that agreement statutory force, it would not have sanctioned the provisions in the Comalco Agreement which otherwise conflicted with the *Mining Act*[733]. There is no doubt that this was one of the purposes of the Comalco Act. The **Wik** argued that the Act should be given a construction which avoided attributing to Parliament any intention to validate what would otherwise be a wrong done to a third party. They submitted that it would require clear language to authorise not merely the bringing into force of the Comalco Agreement but also doing so in breach of the duty of procedural fairness and of fiduciary duty, as posited. Compliance with those duties was assumed by Parliament. Breach was not prospectively authorised or subsequently ratified or validated by the statutory and contractual arrangements which followed. The **Wik** acknowledged that a passage in the judgment of the Privy Council in *The Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna*[734] was authority against their proposition. They urged that this Court should not follow the opinion there expressed.

There are a number of answers to these arguments. Essentially, the function of the Court is to give effect to the purpose of the Queensland Parliament in adopting the exceptional course found in the Comalco Act. In *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*[735], the Privy Council referred to its earlier decision in *Labrador Company v The Queen*[736] and said:

"It is not open to the court to go behind what has been enacted by the legislature, and to inquire how the enactment came to be made, whether it arose out of incorrect information or, indeed, on actual deception by someone on whom reliance was placed by it."

Those remarks were repeated in the House of Lords in *British Railways Board v Pickin*[737], where it was further decided that a litigant could not establish a claim in equity that the other party, by fraudulently misleading the legislature in successfully promoting a Bill, had inflicted damage on the plaintiff. The **Wik**'s argument concerning the invalidity of the Comalco Agreement, at least on the basis of their attacks on that Agreement, conflicts with one of the obvious purposes of adopting the procedure evidenced in the Comalco Act. That procedure was designed to confer a statutory status on the Comalco Agreement. To permit a party to attack the validity of the Comalco Agreement on the basis of alleged default or impropriety in the steps leading to its execution would undermine and frustrate the clear purpose of the legislation. Similarly, once the Comalco Agreement was executed, the rights conferred by it were of the same status as if they had been conferred by legislation. The fact that other persons (such as the **Wik**) may thereby have lost rights previously belonging to them is simply the result of the operation of legislation, the constitutional validity of which is not impugned. Subject to what follows, the Comalco Act had the purpose and effect of giving legislative force to the Comalco Agreement. To permit the **Wik** now to question the validity of the Comalco Agreement is contrary to the plainly intended effect of the Comalco Act. Inherent in this conclusion is the further one that damages and other relief cannot be obtained for alleged breaches of duty resulting in, or constituted by, the making of the Comalco Act or in respect of the benefits flowing from the Comalco Agreement. This is so because, once executed as Parliament provided, the Comalco Agreement itself took on the force of legislation[738]. This was not the usurpation of legislative power. It was the exercise of it. The suggested injustice of the Comalco Agreement and of its consequences for the **Wik** is not then a matter for legal[739] but only for political redress.

It is not necessary in this case to consider what might be the consequences where a procedural requirement of Parliament, or of the particular Act, is not complied with[740]. The **Wik** raised the case where the authorised signatory to a statutory contract was substituted by an imposter. There is no suggestion of any such default in the Parliamentary procedures or the legislative requirements applicable in this instance. I do not regard the suggested analogy as a valid one. Parliament is to be taken to expect that its own procedures and its essential legislative conditions would be fulfilled. But the major purpose of the legislative endorsement of the Comalco Agreement, adopted in the Comalco Act, was to avoid claims of invalidity of

the Agreement of the kind which the **Wik**, by the applicable paragraphs of their statement of claim, wish to ventilate.

Statutory authorisation and its effect

In a fall-back argument, the **Wik** asserted that, upon its true construction, the provision in s 2 of the Comalco Act which "authorised" the Premier to make the Comalco Agreement did not require him to do so. It merely permitted that course. The actual power to make the Comalco Agreement had to be found elsewhere either under different legislation or under the residue of the Royal prerogative. In either such case, so it was argued, to move from the authorisation to the execution of the Comalco Agreement, the Premier would be obliged by law to do so in conformity with the general law requiring compliance with duties of procedural fairness owed to persons affected and fiduciary duties applicable to the case.

As was pointed out by Jordan CJ in *Ex parte Johnson; Re MacMillan*[741], the word "`authorise', according to its natural meaning, [ordinarily] signifies the conferring upon a person of a right to do something which, apart from the authorisation, he does not possess". But Jordan CJ pointed out that the word, like any other word, takes its meaning from the context in which it appears. In that particular case he found that "authorise" had to be read as including "requiring"[742].

There is not much point in offering, as the **Wik** did, numerous cases where "authorise" has been held to mean no more than to "sanction, approve, and countenance"[743] or "permit"[744]. Just as many cases could be found where the word included the notion that the "authorised" course was required[745].

In the present context, the employment of the term "authorised" was appropriate to the relationship between the Parliament of Queensland and the Executive Government of the State. The detail and specificity of the Comalco Act and the departure which it represents from the ordinary law governing the multitude of contracts made for and on behalf of the Crown in a State[746] all suggest that this was an agreement which the Queensland Parliament expected to be made. Once made, pursuant to Parliament's authority, the Comalco Agreement, exceptionally, had the force of law as though itself part of the enactment.

In such a context, the suggestion that the Comalco Agreement needed a different and additional foundation (which would permit an attack on the suggested defaults) is not persuasive. For this special agreement, a particular regime of legislative authorisation was laid down. It was sufficient, without

more, to support the making of the Comalco Agreement. In this case, no other source of power was required.

The lease was valid

The final challenge by the **Wik** to the rights of Comalco involved an attack on the validity of the lease, ML 7024. Comalco conceded in the Federal Court that it could not contend that the mining lease itself had statutory status[747].

The **Wik** argued that the lease, having no special statutory status, did not preclude the maintenance of the claims set out in the amended statement of claim. They should therefore be entitled to a trial of their assertion that the Executive Government, before obeying the legislative command to grant the lease scheduled to the Comalco Agreement, was required to accord procedural fairness and to avoid any breach of fiduciary duty to persons in the position of the **Wik**.

It is a serious step to terminate a party's claim in advance of a trial on the merits. As I have already said, where the law is uncertain, or in a state of development, it is usually preferable to allow the claim to go to trial[748]. On the other hand, if a claim is clearly hopeless in law, it is an unjust vexation of the defendant to oblige it to defend the claim. Long ago in the *Mersey Docks and Harbour Board Trustees v Gibbs*[749] it was said:

"If the legislature directs or authorises the doing of a particular thing, the doing of it cannot be wrongful;"

As the Comalco Agreement, with the force of an Act of Parliament, obliged Queensland to grant to Comalco the lease ML 7024, the action of Queensland in granting that lease pursuant to the express statutory authority cannot, in my view, give rise to actions of the kind which the **Wik** wish to bring. This conclusion is what the correct construction of the Comalco Act requires. Cases involving other Acts and other factual circumstances[750] are not in point. The question here is the purpose and operation of a special public statute of the Queensland Parliament adopting the particular device of a statutory agreement, an essential purpose of which was to grant just such a lease as ML 7024. Within the scheme established by the Comalco Act, obligations of the kind which the **Wik** now wish to litigate were excluded. This conclusion relieves me of the need to consider the additional defensive arguments advanced by Queensland and Comalco.

Pechiney and the "Access Agreement"

Question 5 concerns similar questions which arise in respect of a number of paragraphs of the **Wik**'s amended statement of claim. By those paragraphs the **Wik** seek to maintain against Queensland and Aluminium Pechiney Holdings Pty Limited ("Pechiney"), actions similar to those identified in the case of Comalco. In this case, the statute in question is the *Aurukun Associates Agreement Act* 1975 (Q) ("the Aurukun Act"). It gave like authorisation for the making of the Aurukun Associates Agreement ("the Franchise Agreement")[751]. In a like way, that agreement gave rise to the proclamation of the making of the Franchise Agreement pursuant to the Aurukun Act with the grant of Special Bauxite Mining Lease, number 9.

The Aurukun Act was given the Royal Assent on 12 December 1975. As in the case of the Comalco Act, its validity was not in contest in this Court. By Proclamation dated 27 December 1975, the Governor of Queensland in Council notified that the date of the execution of the Franchise Agreement was 22 December 1975. That was the agreement, the making of which was authorised by s 2 of the Aurukun Act. The Third Schedule to the Franchise Agreement was the "Access Agreement". This was an agreement between the Director of Aboriginal and Islanders Advancement of Queensland ("the Director") and, amongst other parties, Pechiney. The Aurukun Act was in all material terms similar to the Comalco Act. Accordingly, for the reasons already given, the Franchise Agreement is to be treated as if it were an enactment of the Queensland Parliament. No objection may be taken to the validity of the Franchise Agreement. Such validity may not be impugned on the grounds of breach of fiduciary duty or breach of the rules of procedural fairness because to do so would be to contradict the clear purpose of the Queensland Parliament in adopting the exceptional course of authorising the making of the Franchise Agreement and, once made, affording it the force of statute.

It is clear both from the Aurukun Act itself and from the Parliamentary Debates on the Bill which became the Act, that it was "the culmination of detailed negotiations between the Queensland Government and the Aurukun Associates"[752]. The "Access Agreement" was part of the background to those negotiations. It was, in fact, the very agreement which was considered in the *Peinkinna Case*[753]. It bears the date 4 December 1975. It thus preceded both the Aurukun Act and the Franchise Agreement which that Act authorised. It is not expressly referred to in the body of the Aurukun Act. However, as contemplated in the form of the Franchise Agreement as set out in the Act, it was scheduled to that agreement when it was made.

The submission of the **Wik** in relation to the Access Agreement was similar to the submission made with respect to the lease granted to Comalco: it did not itself have the force of statute. Its execution was an administrative

act liable to be tested by reference to the obligations of procedural fairness and fiduciary duty.

For reasons similar to those given in dealing with the Comalco lease, I am of the opinion that the scheme of the Aurukun Act excludes prosecution of the **Wik**'s claims against Queensland and Pechiney in respect of the Access Agreement. The Franchise Agreement has statutory force. One of its provisions[754]imposes on the Aurukun companies an obligation to "carry out their responsibilities and obligations as defined in the [Access Agreement]". The obligations under the Access Agreement are therefore as effective as if they were expressly stated in, and part of, the Aurukun Act. The clear intention of the Queensland Parliament was that the Access Agreement should take effect as part of the scheme which was to include the Franchise Agreement made with the force of statute. This interpretation, which I would reach independently, is confirmed by the explanations given to the Queensland Parliament in support of the complex arrangements between the parties and for which the approval of Parliament was sought[755]. Placed as it was as an integral part of the arrangements carried into law in the Franchise Agreement, it must be taken that, for the successful operation of the Franchise Agreement sanctioned by Parliament, the latter supplied any deficiency in the authority or power of the Director to enter into the Access Agreement. It would be destructive of the obvious purposes of the Aurukun Act now to open to complaint the claims advanced by the **Wik** in objection to the Access Agreement.

I therefore consider that Drummond J was right to answer question 5, like question 4, in the negative.

ORDERS

For the foregoing reasons I agree in the answers to the questions proposed, and in the orders stated, in the reasons of Toohey J.

[1] Now repealed: see the *Land Act* 1994 (Q).

[2] Tried pursuant to O 29 r 2(a) of the Federal Court Rules.

[3] ***Wik*** *Peoples v Queensland* (1996) 134 ALR 637 at 706-707.

[4] The Parliament of Queensland was empowered to make laws for regulating the letting of Crown land in Queensland by s 30 of the *Constitution Act* 1867: see also s 40 of that Act.

[5] pursuant to s 14(4).

[6] s 40(2).

[7] s 41(4).

[8] ss 42 and 43.

[9] s 43(i).

[10] [1992] HCA 23; (1992) 175 CLR 1 at 66.

[11] Section 91 of *The Crown Lands Alienation Act* 1876 (Q). Section 203 of the 1910 Act was drawn in similar terms.

[12] [1992] HCA 23; (1992) 175 CLR 1 at 69.

[13] Note the summary procedure for removal of persons in wrongful occupation prescribed by s 204 discussed below.

[14] This was the course taken in *McGavin v McMaster* (1869) 2 QSCR 23 when the *Pastoral Leases Act* 1863 (Q) provided the summary remedy on an application by or on behalf of the Crown but contained no provision authorising an application by or on behalf of lessees or the other categories of persons mentioned in the last paragraph of s 204.

[15] Section 71 of the *Pastoral Leases Act* 1869.

[16] ss 6(3), 14(3) and (4), 139, 199(1) and (2), 200, 205.

[17] See *Radaich v Smith* [1959] HCA 45; (1959) 101 CLR 209 at 222 per Windeyer J.

[18] [1973] HCA 7; (1973) 128 CLR 199.

[19] [1973] HCA 7; (1973) 128 CLR 199 at 213.

[20] [1904] AC 405 at 408.

[21] See *Yandama Pastoral Co v Mundi Mundi Pastoral Co Ltd* [1925] HCA 38; (1925) 36 CLR 340 where the issue was whether a provision of the*Pastoral Act* 1904 (SA) conferred a right to travel stock across a pastoral lease or whether it merely conditioned the exercise of an existing right so to do. Both the majority and minority accepted that, in the absence of some right arising aliunde, the travelling of stock would have infringed the pastoral lessee's possession: see at 365, 376.

[22] The definition of "private land" in s 3 of *The Petroleum Act* means all land *other than* Crown land. Crown land does not include land "subject to any lease or licence lawfully granted by the Crown".

[23] The problems of mining leases over privately owned land need not be explored here. See, for example, *Croudace v Zobel* [1899] AC 258; *Ebbels v Rewell* [1908] VicLawRp 39; [1908] VLR 261 at 264; *Frazers Creek Mining v Schieb* [1971] 1 NSWLR 953 at 959; *Wade v New South Wales Rutile Mining Co Pty Ltd* [1969] HCA 28; (1969) 121 CLR 177.

[24] [1904] AC 405 at 408.

[25] [1903] AC 365 at 377; followed in *O'Keefe v Williams* [1910] HCA 40; (1910) 11 CLR 171 at 208.

[26] *Street v Mountford [1985] UKHL 4;* [1985] AC 809 at 816, 818. As to the difference between an exception and a reservation in conveyancing law, see*Wade v New South Wales Rutile Mining Co Pty Ltd* [1969] HCA 28; (1969) 121 CLR 177 at 194 and *Hill and Redmond's Law of Landlord and Tenant*, 18th ed, par A686.

[27] [1959] HCA 45; (1959) 101 CLR 209 at 222.

[28] *Attorney-General for NSW v Brewery Employes Union of NSW* [1908] HCA 94; (1908) 6 CLR 469 at 531; *Barker v The Queen* [1983] HCA 18; (1983) 153 CLR 338 at 341, 355-356; *R v Slator* (1881) 8 QBD 267 at 272, 274.

[29] s 6(1).

[30] s 6(2).

[31] s 40(2).

[32] s 41(4).

[33] s 40(2).

[34] s 43.

[35] s 122: and see *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* [1966] HCA 15; (1966) 115 CLR 1 at 6. ii Co Litt, 19th ed (1832) at 337b, refers to "surrender" as "a yielding up [of] an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them".

[36] Section 130(2) of the 1910 Act; ss 14(1), 249, 295 of the 1962 Act. Section 14(1) of the 1962 Act, unlike s 130(2) of the 1910 Act, distinguished between a lease which is "forfeited" and a licence which is "determined".

[37] s 135; see *Minister for Lands v Priestley* [1911] HCA 68; (1911) 13 CLR 537.

[38] [1981] HCA 65; (1981) 147 CLR 677 at 686 and per Mason J at 682-683; see also *ICI Alkali v Federal Commissioner of Taxation* [1916] HCA 67; (1978) 22 ALR 465 at 470 where the High Court accepted that a Crown lease under the *Mining Act* 1930 (SA) was in truth a lease, not a licence.

[39] (1875) LR 6 PC 354 at 370.

[40] *de Britt v Carr* [1911] HCA 32; (1911) 13 CLR 114 at 122 per Griffith CJ.

[41] [1975] AC 520 at 533.

[42] [1910] HCA 40; (1910) 11 CLR 171 at 207.

[43] In *O'Keefe v Williams* [1907] HCA 64; (1907) 5 CLR 217 at 230.

[44] *O'Keefe v Williams* [1910] HCA 40; (1910) 11 CLR 171 at 191, 193, 200, 209 and see *American Dairy Queen (Q'ld) Pty Ltd v Blue Rio Pty Ltd*[1981] HCA 65; (1981) 147 CLR 677 at 683.

[45] [1973] HCA 7; (1973) 128 CLR 199 at 213.

[46] [1923] HCA 64; (1923) 34 CLR 174 at 187-188.

[47] [1947] VicLawRp 50; [1947] VLR 347.

[48] [1923] HCA 64; (1923) 34 CLR 174 at 190.

[49] (1875) LR 6 PC 354 at 372.

[50] [1907] HCA 64; (1907) 5 CLR 217 at 229.

[51] (1991) 22 NSWLR 687.

[52] (1991) 22 NSWLR 687 at 712.

[53] (1991) 22 NSWLR 678 at 696.

[54] *O'Keefe v Williams* [1907] HCA 64; (1907) 5 CLR 217 at 229; [1910] HCA 40; (1910) 11 CLR 171 at 207.

[55] s 6(2).

[56] [1985] UKHL 4; [1985] AC 809 at 816.

[57] Letter from the Colonial Land and Emigration Office to Herman Merivale dated 17 April 1849.

[58] *Wildash v Brosnan* (1870) QCLLR 17 at 18 and see *Macdonald v Tully* (1870) 2 QSCR 99 at 106 where a pastoral lessee's right to occupy while awaiting the issue of a formal lease was "capable of being maintained against any disturber".

[59] *R v Tomkins* (1919) St R Qd 173 at 190, 194-195, 198; see also *Attorney-General of Victoria v Ettershank* (1875) LR 6 PC 354 at 368, 370;*O'Keefe v Williams* [1910] HCA 40; (1910) 11 CLR 171 at 190-191, 196, 200, 208; *Yandama Pastoral Co v Mundi Mundi Pastoral Co Ltd* [1925] HCA 38; (1925) 36 CLR 340; *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 696, 710; cf *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; (1982) 158 CLR 327.

[60] 18 & 19 Vict c 56.

[61] [1907] HCA 56; (1907) 5 CLR 326 at 336.

[62] See the use of the term "estate" by O'Connor J in *Minister for Lands v Priestley* [1911] HCA 68; (1911) 13 CLR 537 at 550.

[63] (1863) 2 Moo (NS) 267 at 273 [1863] EngR 782; [15 ER 902 at 904].

[64] (1863) 2 Moo (NS) 267 at 273 [1863] EngR 782; [15 ER 902 at 904].

[65] (1863) 2 Moo (NS) 267 at 273 [1863] EngR 782; [15 ER 902 at 905].

[66] Also the submission of some interveners.

[67] *Coe v The Commonwealth* [1993] HCA 42; (1993) 68 ALJR 110 at 118.

[68] *Gillard v Cheshire Lines Committee* (1884) 32 WR 943.

[69] *Parsley v Day* (1842) 2 QB 147 at 155-156 [1842] EngR 820; [114 ER 58 at 62].

[70] *Ryan v Clark* (1849) 14 QB 65 at 73 [1849] EngR 5; [117 ER 26 at 29].

[71] *Copeland v Stephens* (1818) 1 B & Ald 593 at 606-607 [106 ER 218 at 223]; *Williams v Bosanquet* [1819] EngR 467; (1819) 1 Brod & B 238 [129 ER 714]; ii Co Litt, 19th ed (1832) at 270a.

[72] One effect of s 6(2) would have been the elimination of any requirement that, to be effective, the Crown grant be a matter of record: see Enid Campbell, "Crown Land Grants: Form and Validity", (1966) 40 *Australian Law Journal* 35 at 38.

[73] 1910 Act, ss 40 and 41.

[74] [1992] HCA 23; (1992) 175 CLR 1 at 58. See also at 110 per Deane and Gaudron JJ; at 195 per Toohey J.

[75] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 59, 69; *Western Australia v The Commonwealth. Native Title Act Case* [1995] HCA 47; (1995) 183 CLR 373 at 422.

[76] [1992] HCA 23; (1992) 175 CLR 1 at 63-64 per Brennan J; at 110-111 per Deane and Gaudron JJ; at 195-196 per Toohey J.

[77] [1992] HCA 23; (1992) 175 CLR 1 at 64 per Brennan J; at 111 per Deane and Gaudron JJ; at 196 per Toohey J.

[78] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 68; *Western Australia v The Commonwealth. Native Title Act Case* [1995] HCA 47; (1995) 183 CLR 373 at 422.

[79] [1992] HCA 23; (1992) 175 CLR 1 at 68; see also 94, 197.

[80] *Mabo v Queensland* (*Mabo [No 1])* (1988) 166 CLR 186 at 218-219, 231-232 and see *Western Australia v The Commonwealth. Native Title ActCase* [1995] HCA 47; (1995) 183 CLR 373 at 438-439.

[81] See *Williams v Attorney-General for New South Wales* (the Government House Case) [1913] HCA 33; (1913) 16 CLR 404 (HC); [1915] UKPCHCA 1; (1915) 19 CLR 343 (PC) and *Randwick Corporation v Rutledge* [1959] HCA 63; (1959) 102 CLR 54. *Mabo [No 2]* rejected the dicta in these cases which treated the Crown as the beneficial owner of all land in the Colony of New South Wales upon settlement of the Colony, but their authority in other respects was left unimpaired.

[82] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 68 per Brennan J; at 110 per Deane and Gaudron JJ.

[83] (1979) 107 DLR (3d) 513 at 549.

[84] *Corporation of Yarmouth v Simmons* (1878) 10 Ch D 518 at 527 cited by McTiernan J in *Aisbett v City of Camberwell* [1933] HCA 36; (1933) 50 CLR 154 at 178-179.

[85] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 68.

[86] *Re Waanyi People's Application* (1995) 129 ALR 118 at 166.

[87] [1992] HCA 23; (1992) 175 CLR 1 at 68; see also at 72-73.

[88] Or, perhaps, on expiry of the term to which the lessee becomes entitled by exercise of a right of renewal.

[89] The Thayorre submission contends, in the alternative, for a recognition anew of the native title that was extinguished by the lease.

[90] See A W B Simpson, *A History of the Land Law*, 2nd ed (1986) at 47.

[91] [1992] HCA 23; (1992) 175 CLR 1 at 81.

[92] See, for example, *Delohery v Permanent Trustee Co of NSW* [1904] HCA 10; (1904) 1 CLR 283 at 299-300; *Williams v Attorney-General (NSW)*[1913] HCA 33; (1913) 16 CLR 404.

[93] Megarry and Wade, *The Law of Real Property*, 5th ed (1984) at 14.

[94] As Pollock and Maitland, *The History of English Law*, 2nd ed (1898: reprint 1952), vol 2 at 10 observe: "Proprietary rights in land are, as we may say, projected upon the plane of time. The category of quantity, of duration, is applied to them."

[] **95**[ ]*Williams and Eastwood on Real Property*[, 24th ed (1933) at 34-35; Pollock and Maitland,]*The History of English Law*[, 2nd ed (1898: reprint 1952), vol 1 at 351ff.

96] See the note on "Land Without An Owner", (1954) 70 *Law Quarterly Review* 25.

[97] (1880) 14 Ch D 287 at 295 and see per Jenkins J in *In re Strathblaine Estates, Ld* [1948] Ch 228 at 231.

[98] The distinction is explained by Pollock and Maitland, *The History of English Law*, 2nd ed (1898: reprint 1952), vol 2 at 22-23.

[99] That is, the leasehold estate is held of the Crown. It is a "tenure" in the strict common law sense of the term, not merely in the sense in which "tenure" is used, often loosely, in Crown lands legislation.

[100] *Cudgen Rutile (No 2) Ltd v Chalk* [1975] AC 520 at 533.

[101] In this context, where ownership of minerals is reserved from a grant, the reservation is truly an exception, that is, the minerals do not form part of the parcel of land that is the subject of the grant of the leasehold estate.

[102] *Lyttleton's Tenures* (1841), pars 328-330 at 374-376.

[103] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 48-49.

[104] [1995] HCA 47; (1995) 183 CLR 373 at 452.

[105] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[106] See the cases cited in *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 26-28.

[107] s 127(3).

[108] s 122.

[109] s 132.

[110] s 135.

[111] s 124.

[112] s 177.

[113] Section 5 of *The Escheat (Procedure and Amendment) Act* 1891 ("the *Escheat Act*").

[114] Section 4 of the *Escheat Act*.

[115] s 72.

[116] ss 48 and 50.

[117] ss 100, 106, 108, 110, 114.

[118] s 104.

[119] *Metropolitan Borough and Town Clerk of Lewisham v Roberts* [1949] 2 KB 608 at 622.

[120] *Woodfall's Landlord and Tenant*, (1993) vol 1 par 1.005.

[121] *Javad v Mohammed Aqil [1990] EWCA Civ 1;* [1991] 1 WLR 1007 at 1012; [1990] EWCA Civ 1; [1991] 1 All ER 243 at 247.

[122] *Hall v Ewin* (1887) 37 Ch D 74.

[123] Pollock and Maitland, *The History of English Law*, 2nd ed (1898: reprint 1952), vol 1 at 351; *Williams and Eastwood on Real Property*, 24th ed (1933) at 34-35.

[124] s 72.

[125] s 124.

[126] See the 1962 Act, Pt VI Divs I and II, especially s 166.

[127] *Breen v Williams* (1996) 70 ALJR 772 at 776; 138 ALR 259 at 265.

[128] *Henderson v Merrett Syndicates Ltd [1994] UKHL 5;* [1995] 2 AC 145 at 205.

[129] *Chan v Zacharia* [1984] HCA 36; (1984) 154 CLR 178; *United Dominions Corporation Ltd v Brian Pty Ltd* [1985] HCA 49; (1985) 157 CLR 1.

[130] *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41.

[131] See *United States v Mitchell* [1983] USSC 154; (1983) 463 US 206 at 224.

[132] (1984) 13 DLR (4th) 321; see also *Blueberry River Indian Band v Canada* (1995) 130 DLR (4th) 193 at 203, 209.

[133] (1984) 13 DLR (4th) 321 at 334, 340.

[134] (1984) 13 DLR (4th) 321 at 347.

[135] (1984) 13 DLR (4th) 321 at 356, 357.

[136] 25 USC SS177.

[137] *Joint Tribal Council of Passamaquoddy Tribe v Morton* [1975] USCA1 273; (1975) 528 F 2d 370 at 379.

[138] *United States v University of New Mexico* [1984] USCA10 123; (1984) 731 F 2d 703 at 706 citing *Passamaquoddy Tribe v Morton* [1975] USCA1 273; (1975) 528 F 2d 370 at 379.

[139] [1985] HCA 78; (1985) 160 CLR 583 at 614.

[140] [1985] HCA 78; (1985) 160 CLR 583 at 615.

[141] cl 8 par (a).

[142] By the Third Schedule to the Agreement.

[143] [1976] Qd R 231 at 260.

[144] *The Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna* (1978) 52 ALJR 286; 17 ALR 129.

[145] cl 2 of Pt III.

[146] cl 3 of Pt III.

[147] cl 5 of Pt III.

[148] (1978) 52 ALJR 286; 17 ALR 129.

[149] *Western Australia v The Commonwealth* [1995] HCA 47; (1995) 183 CLR 373.

[150] (1988) 166 CLR 186.

[151] [1992] HCA 23; (1992) 175 CLR 1.

152 [1992] HCA 23; (1992) 175 CLR 1.

[153] ***Wik*** *Peoples v Queensland* (1996) 134 ALR 637 at 641; 63 FCR 450 at 454.

[154] The expressions "native title" and "native title rights" are now part of the vocabulary of the law. However, I still confess a preference for "traditional title". See *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 188.

[155] ***Wik*** *Peoples v Queensland* (1996) 134 ALR 637; 63 FCR 450.

[156] The relevant questions and the answers given by Drummond J are set out in full in the judgment of Brennan CJ.

[157] Those entities are respectively the first, fourth and fifth respondents to the appeals.

158 (1995) 132 ALR 565; 61 FCR 1.

[159] (1996) 134 ALR 637 at 666; 63 FCR 450 at 480.

[160] (1996) 134 ALR 637 at 666; 63 FCR 450 at 480.

[161] (1996) 134 ALR 637 at 666; 63 FCR 450 at 481.

[162] Section 4(1) of the *Land Act* of 1962 repealed the 1910 Act. Section 4(2) provided that leases granted under the earlier legislation "shall be deemed to have been granted" under the new Act.

[163] A reference to *The Land Acts*.

[164] (1996) 134 ALR 637 at 664-665; 63 FCR 450 at 479.

[165] A reference to Question 1B.

[166] (1996) 134 ALR 637 at 668-669; 63 FCR 450 at 483.

[167] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 66-67.

[168] (1996) 134 ALR 637 at 674; 63 FCR 450 at 489.

[169] (1996) 134 ALR 637 at 674; 63 FCR 450 at 489.

[170] In this discussion I am indebted to Dr Fry's writings. His major work in this respect is *Freehold and Leasehold Tenancies of Queensland Land*. There is a more summary account in "Land Tenures in Australian Law" in *Res Judicatae*, (1946-1947) 3 at 158. I am also indebted to the monograph by Professor Reynolds and Mr Dalziel, *Aborigines, Pastoral Leases and Promises By The Crown - Imperial and Colonial Policy 1826-1855*, now published as "Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855", (1996) 19(2) *UNSW Law Journal* 315.

[171] See Campbell, "Crown Land Grants: Form and Validity", (1966) 40 *Australian Law Journal* 35.

[172] [1959] HCA 63; (1959) 102 CLR 54 at 71.

[173] (1847) 1 Legge Rep 312.

[174] s 25.

[175] 5 & 6 Vict c 36.

[176] Fry, "Land Tenures in Australian Law", (1946-1947) 3 *Res Judicatae*, 158 at 160.

[177] 9 & 10 Vict c 104.

[178] Fry, "Land Tenures in Australian Law", (1946-1947) 3 *Res Judicatae*, 158 at 160-161.

[179] Published in the New South Wales Government Gazette, 15 February 1842 at 267.

[180] *Stewart v Williams* [1914] HCA 43; (1914) 18 CLR 381 at 390.

[181] Millard and Millard, *The Law of Real Property in New South Wales*, (1905), quoted in Edgeworth, "Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*", (1994) 23 *Anglo-American Law Review* 397 at 397.

[182] (1946-1947) 3 *Res Judicatae*, 158 at 159.

[183] (1946-1947) 3 *Res Judicatae*, 158 at 158.

[184] [1982] HCA 69; (1982) 158 CLR 327 at 344.

[185] s 4. The definition of "Crown land" in s 5 of the 1962 Act is the same.

[186] In the interests of consistency I have used the spelling "license" for the noun in contexts where the Queensland statute uses that spelling.

[187] s 42.

[188] s 47.

[189] That is, the first Holroyd lease and both Mitchellton leases.

[190] s 62(1).

[191] s 53(1).

[192] s 299(2).

[193] [1959] HCA 45; (1959) 101 CLR 209.

[194] See *Lewis v Bell* [1985] 1 NSWLR 731.

[195] [1959] HCA 45; (1959) 101 CLR 209 at 222.

[196] [1985] UKHL 4; [1985] AC 809 at 827.

[197] [1903] AC 365 at 377.

198 [1969] HCA 28; (1969) 121 CLR 177 at 192.

[199] See also *Gowan v Christie* (1873) LR 2 Sc & Div 273 at 284; *In re Adam's Settled Estate* [1902] 2 Ch 46 at 56.

200 [1973] HCA 7; (1973) 128 CLR 199.

[201] [1904] AC 405 at 408.

[202] [1981] HCA 65; (1981) 147 CLR 677 at 686.

[203] [1981] HCA 65; (1981) 147 CLR 677 at 682-683.

[204] Despatch No 65, Sir George Gipps to Lord Glenelg, 6 April 1839, CO 201/285.

[205] Despatch No 24 Earl Grey to the Governor Sir Charles FitzRoy, 11 February 1848; Despatch No 134 Earl Grey to Sir Charles FitzRoy, 6 August 1849.

[206] Annual Report of the Northern Protector of Aboriginals for 1900, Queensland, Votes and Proceedings, 1901, vol 4, 1329-1337.

[207] Annual Report of the Northern Protector of Aboriginals for 1903, Queensland Parliamentary Papers, 1904, 847-873.

[208] *Western Australia v The Commonwealth* (*Native Title Act Case*) [1995] HCA 47; (1995) 183 CLR 373 at 421-423.

[209] [1870] 2 QSCR 99 at 106.

[210] [1870] 1 QCLLR 17 at 18.

[211] [1992] HCA 23; (1992) 175 CLR 1 at 66.

[212] [1925] HCA 38; (1925) 36 CLR 340.

[213] [1925] HCA 38; (1925) 36 CLR 340 at 349-350.

[214] [1925] HCA 38; (1925) 36 CLR 340 at 353.

[215] [1992] HCA 23; (1992) 175 CLR 1 at 63.

216 [1975] USCA1 273; (1975) 528 F 2d 370 at 376, n 6.

[217] *Johnson v McIntosh* (1823) 21 US 240 at 259; *United States v Santa Fe Pacific Railroad Co* [1942] USSC 12; (1941) 314 US 339; *St Catherine's Milling & Lumber Co v The Queen* [1888] 14 AC 46; *Tee-Hit-Ton Indians v United States* [1955] USSC 24; (1955) 348 US 272 at 279; *Hamlet of Baker Lake v Minister of Indian Affairs* (1979) 107 DLR (3d) 513 at 549; [1980] 1 FC 518 at 566-567. In *Mabo v Queensland* (1988) 166 CLR 186 at 195, 201, 213-214, the power to extinguish by legislation consisting of "clear and plain" language was assumed.

[218] [1992] HCA 23; (1992) 175 CLR 1 at 110-111.

[219] [1992] HCA 23; (1992) 175 CLR 1 at 193.

[220] [1992] HCA 23; (1992) 175 CLR 1 at 195.

[221] [1992] HCA 23; (1992) 175 CLR 1 at 64.

[222] [1992] HCA 23; (1992) 175 CLR 1 at 110-111 per Deane and Gaudron JJ, 136 per Dawson J, 193-196 per Toohey J. See also *Western Australia v The Commonwealth* (*Native Title Act Case*) [1995] HCA 47; (1995) 183 CLR 373 at 422: "the presumption in the case of the Crown is that no extinguishment is intended". See also *R v Van der Peet* (1996) 137 DLR (4th) 289 at 337, 385.

[223] [1995] HCA 47; (1995) 183 CLR 373 at 422.

[224] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[225] [1992] HCA 23; (1992) 175 CLR 1 at 110.

[226] See [1992] HCA 23; (1992) 175 CLR 1 at 197.

[227] (1993) 104 DLR (4th) 470 at 525.

[228] (1993) 104 DLR (4th) 470 at 529.

[229] (1993) 104 DLR (4th) 470 at 668.

[230] [1992] HCA 23; (1992) 175 CLR 1.

[231] [1995] HCA 47; (1995) 183 CLR 373.

[232] *R v Van der Peet* (1996) 137 DLR (4th) 289 at 318 per Lamer CJC.

[233] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 89.

[234] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 190.

[235] See generally, Rogers, "The Emerging Concept of 'Radical Title' in Australia: Implications for Environmental Management", (1995) 12 *Environmental and Planning Law Journal* 183.

[236] [1992] HCA 23; (1992) 175 CLR 1 at 48.

[237] [1921] 2 AC 399 at 403.

[238] [1992] HCA 23; (1992) 175 CLR 1 at 51.

[239] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[240] Helmore, *The Law of Real Property*, 2nd ed (1966) at 227.

[241] *Commentaries*, Book II, Ch 11 at 175.

[242] [1992] HCA 23; (1992) 175 CLR 1 at 50.

[243] These appeals are not concerned with the operation of the *Racial Discrimination Act* 1975 (Cth).

[244] See s 135 of the 1910 Act.

[245] [1992] HCA 23; (1992) 175 CLR 1 at 16.

[246] 2 Co Litt 270a.

[247] *Property Law Act* 1974 (Q), s 102.

[248] See 70 *Australian Law Journal* 524.

[249] (1995) 132 ALR 565 at 586; 61 FCR 1 at 23.

[250] ***Wik*** *Peoples v Queensland* (1996) 134 ALR 637; 63 FCR 450.

[251] The 2nd-4th, 9th-12th and 14th-18th respondents in both appeals. The 5th respondent made submissions only with respect to question 5. The 6th respondent did not appear before this Court. The 7th and 8th respondents did not make any submissions contrary to those of the appellants and the 13th respondent supported the **Wik** Peoples' submissions.

[252] 1 Geo V No 15.

[253] The Attorneys-General for Victoria, South Australia, Western Australia and the Northern Territory.

[254] While the Napranum Aboriginal Council (7th respondent) and Pormpuraaw Aboriginal Council (8th respondent) made no submissions contrary to those of the appellants, ATSIC (13th respondent) supported the submissions of the **Wik** Peoples. The Kimberley Land Council, Nanga-Ngoona Moora-Joonga Association Aboriginal Corporation, Western Desert Punturkurnuparna Aboriginal Corporation, Ngaanyatjarra Land Council, Northern Land Council, Central Land Council and Ben Ward and others on behalf of the Miriuwung and Gajerrong Peoples intervened in the same interest as the appellants.

[255] [1992] HCA 23; (1992) 175 CLR 1 at 110; see also at 68 per Brennan J and at 195-196 per Toohey J.

[256] By Proclamation dated 27.12.1865 published in the *Queensland Government Gazette* on 6.1.1866.

[257] Note that both the 1910 Act and the 1962 Act refer to licenses and accordingly that word will be so used in this judgment.

[258] Published in the *Queensland Government Gazette* on 30.1.1915.

[259] The grant was made on 25 May 1915.

[260] Declaration of forfeiture published in the *Queensland Government Gazette* on 20.7.1918.

[261] (1996) 134 ALR 637 at 673; 63 FCR 450 at 488.

[262] Published in the *Queensland Government Gazette* on 24.8.1918.

[263] (1996) 134 ALR 637 at 673; 63 FCR 450 at 488.

[264] Published in the *Queensland Government Gazette* on 14.1.1921.

[265] By Order-in-Council published in the *Queensland Government Gazette* on 10.5.1930.

[266] See (1996) 134 ALR 637 at 672-673; 63 FCR 450 at 487.

[267] (1996) 134 ALR 637 at 675; 63 FCR 450 at 490.

[268] (1996) 134 ALR 637 at 643; 63 FCR 450 at 455.

[269] *Cooper v Stuart* (1889) 14 AC 286 at 293.

[270] Blackstone, *Commentaries*, 1 Comm 107, approved by the Privy Council in *Cooper v Stuart* (1889) 14 AC 286 at 291.

[271] *Cooper v Stuart* (1889) 14 AC 286 at 292.

[272] (1889) 14 AC 286.

[273] (1889) 14 AC 286 at 292.

[274] (1996) 134 ALR 637 at 645; 63 FCR 450 at 458.

[275] Cited by Drummond J in ***Wik*** *Peoples v Queensland* (1996) 134 ALR 637 at 645; 63 FCR 450 at 458 and by Barton ACJ in *Williams v Attorney-General for New South Wales* [1913] HCA 33; (1913) 16 CLR 404 at 416-417.

[276] 5 & 6 Vict, c 36.

[277] 9 & 10 Vict, c 104.

[278] Section VI of the *Sale of Waste Lands Act Amendment Act* 1846 (Imp).

[279] Fry, *Freehold and Leasehold Tenancies of Queensland Land*, (1946) at 20.

[280] Published in the *Supplement to the New South Wales Government Gazette* on 7.10.1847.

[281] Settled Districts comprised land in certain established counties, lands within a specified radius of particular towns, lands within 3 miles of the sea, and lands within 2 miles of the banks of certain rivers in the Colony - Ch I, s 2 of the rules and regulations.

[282] Intermediate Districts comprised land within certain specified counties and any other county whose boundaries were fixed and proclaimed on or before 31.12.1848 other than land within those counties designated as Settled Districts - Ch I, s 3 of the rules and regulations.

[283] Unsettled Districts comprised all land in the colony of New South Wales which was not otherwise designated as a "Settled District" or "Intermediate District" - Ch I, s 4 of the rules and regulations.

[284] See Ch IV, s 1, Ch III, s 1 and Ch II, s 1 of the rules and regulations.

[285] See especially Despatch No 24, Earl Grey to Sir Charles FitzRoy, 11 February 1848, *Historical Records of Australia*, Series I, Vol 26 at 223 (CO 201/382). See also Despatch No 107, Sir Charles FitzRoy to Earl Grey, 17 May 1847, enclosing Report, GA Robinson (Chief Protector of Aborigines at Port Phillip-Loddon District) to the Colonial Office and other documents (CO 201/382); Despatch No 221, Sir Charles FitzRoy to Earl Grey, 11 October 1848, (CO 201/400).

[286] By Proclamation published in the *New South Wales Government Gazette* on 26.4.1850.

[287] Despatch No 134, Earl Grey to Sir Charles A FitzRoy, 6 August 1849, Despatches to the Governor, Mitchell Library, MSA 1308.

[288] Minute from the Secretary of State for War and Colonies, 26 March 1849, Despatch No 221, Sir Charles FitzRoy to Earl Grey (CO 201/400).

[289] 18 & 19 Vict, c 54.

[290] Earlier provisions to the same effect are to be found in s 51 of the *New South Wales and Van Diemen's Land Act* 1842 (Imp) (5 & 6 Vict, c 76) and s 34 of the *Australian Colonies Act* 1850 (Imp) (13 & 14 Vict, c 59).

[291] Published in the *Queensland Government Gazette*, 10.12.1859.

[292] See, for example, *Unoccupied Crown Lands Occupation Act* 1860 (Q) (24 Vict No 11); *Tenders for Crown Lands Act* 1860 (Q) (24 Vict No 12);*Alienation of Crown Lands Act* 1860 (Q) (24 Vict No 15); *Occupied Crown Lands Leasing Act* 1860 (Q) (24 Vict No 16); *Pastoral Occupation Act*1862 (Q) (26 Vict No 8). Except for the *Alienation of Crown Lands Act* 1860, all of these Acts were repealed by the *Pastoral Leases Act* 1863 (Q) (27 Vict No 17).

[293] 31 Vict No 38.

[294] By cl 5 of the Letters Patent of 1859, the Governor of Queensland was vested with full power to dispose of waste lands subject to any other law in force in Queensland regulating such disposal. Clause 20 of an Order-in-Council dated 6 June 1859 (published in the *Queensland Government Gazette* on 24.12.1859) provided that the laws of New South Wales operated until repealed or varied by the Queensland legislature. Clause 17 of that Order-in-Council provided that it was lawful for the Queensland legislature to make laws regulating the disposal of waste lands subject to the provisions in the *New South WalesConstitution Act* 1855 (Imp) and the *Australian Waste Lands Act* 1855 (Imp) "which concern the maintenance of existing contracts",

however cl 22 permitted the legislature to repeal any provision in the Order-in-Council. The Order-in-Council was repealed by s 3 of *The Repealing Act* 1867 (Q) (31 Vict No 39) which was enacted concurrently with the *Queensland Constitution Act* 1867 (Imp). Accordingly s 40 of the *Queensland Constitution Act* 1867 (Imp) replaced s 2 of the *New South Wales Constitution Act* 1855 (Imp).

[295] 31 Vict No 46.

[296] 33 Vict No 10.

[297] See, for example, *The Crown Lands Act* 1884 (Q) (48 Vict No 28); *The Crown Lands Act Amendment Act* 1889 (Q) (53 Vict No 14); *The Pastoral Leases Extension Act* 1890 (Q) (54 Vict No 14); *The Crown Lands Act* 1894 (Q) (58 Vict No 25); *The Land Act* 1897 (Q) (61 Vict No 25); *The Pastoral Leases Act* 1900 (Q) (64 Vict No 14); *The Pastoral Holdings New Leases Act* 1901 (Q) (1 Edw VII No 25) and *The Land Act* 1902 (Q) (2 Edw VII No 18).

[298] See ***Wik*** *Peoples v Queensland* (1996) 134 ALR 637 at 653; 63 FCR 450 at 466.

[299] (1996) 134 ALR 637 at 663; 63 FCR 450 at 477.

[300] *Land Act Amendment Act* 1916 (Q) (7 Geo V No 19).

[301] *Land Act Amendment Act* 1917 (Q) (8 Geo V No 21).

[302] *Land Acts Amendment Act* 1918 (Q) (9 Geo V No 8).

[303] *Land Act Amendment Act* 1920 (Q) (10 Geo V No 30); *Land Acts Amendment Act* 1920, *No* 2 (Q) (10 Geo V No 24).

[304] See *Land Act Amendment Act* 1916 (Q), s 5(d).

[305] Section 4.

[306] Section 47(1). The license was renewable from year to year (s 47(3)), however it could be determined either by the Minister on 3 months notice (s 47(5)), or upon selection, reservation, lease or sale of the subject land (s 47(6)-(7)).

[307] Section 4.

[308] The Land Regulations of 1912, Form 3 (published in the *Queensland Government Gazette* on 28.6.1912).

[309] Sections 45-47.

[310] Sections 75-77.

[311] Section 122.

[312] Sections 129, 131.

[313] [1992] HCA 23; (1992) 175 CLR 1.

[314] [1992] HCA 23; (1992) 175 CLR 1 at 64 per Brennan J, 111 per Deane and Gaudron JJ, 195 per Toohey J. See also *Mabo v Queensland [No 1]*(1988) 166 CLR 186 at 213; *Western Australia v Commonwealth* (*Native Title Act Case*) [1995] HCA 47; (1995) 183 CLR 373 at 423.

[315] [1992] HCA 23; (1995) 175 CLR 1 at 66.

[316] Section 40.

[317] Section 45.

[318] Section 48.

[319] Section 49(2)(a).

[320] Section 49.

[321] Section 115.

[322] Section 56.

[323] One acre equals 0.405 hectare (4,050 square metres); one square mile equals 2.59 square kilometres (2,590,000 square metres).

[324] Section 43.

[325] Section 46.

[326] Section 75.

[327] Section 198(1).

[328] See also, for example, Victoria: *Land Act* 1869 (Vic), *Land Act* 1884 (Vic), *Land Act* 1890 (Vic), *Land Act* 1898 (Vic), *Land Act* 1901 (Vic), *Land Act* 1915 (Vic); Western Australia: Land Regulations 1850 (WA), Additional Land Regulations 1851 (WA), Regulations for the Sale, Letting, Disposal and

Occupation of Waste Lands 1864 (WA), *Land Act* 1898 (WA); Northern Territory: *Northern Territory Act* 1863 (NT), *The Northern Territory Land Act*1872 (NT), *The Northern Territory Crown Lands Consolidation Act* 1882 (NT), *The Northern Territory Crown Lands Act* 1890 (NT), *The Northern Territory Land Act* 1899 (NT), *Crown Lands Ordinance* 1912 (NT).

[329] [1910] HCA 40; (1910) 11 CLR 171 at 190 per Griffith CJ; see also at 207 per Isaacs J. See further *Davies v Littlejohn* [1923] HCA 64; (1923) 34 CLR 174 at 187-188; *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; (1982) 158 CLR 327 at 344; *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 696.

[330] [1910] HCA 40; (1910) 11 CLR 171 at 191-192.

[331] [1910] HCA 40; (1910) 11 CLR 171 at 192.

[332] [1910] HCA 40; (1910) 11 CLR 171 at 191.

[333] [1903] AC 365.

[334] (1870) 2 QSCR 99 at 105, 106, 108. See also *Wildash v Brosnan* (1870) 1 QCLLR 17 at 18 where there was reference to a lessee's "exclusive right to the land" under a pastoral lease granted pursuant to *The Crown Lands Alienation Act* 1868 (Q).

[335] [1910] HCA 40; (1910) 11 CLR 171 at 191-193 per Griffiths CJ, 212 per Isaacs J; see also at 200-201 per Barton J.

[336] [1910] HCA 40; (1910) 11 CLR 171 at 191 per Griffiths CJ, 208 per Isaacs J; see also at 196 per Barton J.

[337] [1903] AC 365 at 377.

[338] Coke, *Commentary upon Littleton*, "Of Tenant for yeares" L1 c7 Sect 58 [45b]: "Words to make a lease be, demise, grant, to fearme let, betake; and whatsoever word amounteth to a grant may serve to make a lease".

[339] [1981] HCA 65; (1981) 147 CLR 677.

[340] Part XI of the 1962 Act deals with "Grants, Reserves and Reservations for Public Purposes".

[341] [1981] HCA 65; (1981) 147 CLR 677 at 682-683. See also *Wade v New South Wales Rutile Mining Co Pty Ltd* [1969] HCA 28; (1969) 121 CLR 177 at 185 per Windeyer J and the cases there cited.

[342] *Radaich v Smith* [1959] HCA 45; (1959) 101 CLR 209. See also *Claude Neon Ltd v Melbourne and Metropolitan Board of Works* (1969) 43 ALJR 69 at 71; *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* [1973] HCA 7; (1973) 128 CLR 199 at 212.

[343] *Radaich v Smith* [1959] HCA 45; (1959) 101 CLR 209 at 214, 217, 219-220, 222. See also *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* [1966] HCA 15; (1966) 115 CLR 1 at 7; *Claude Neon Ltd v Melbourne and Metropolitan Board of Works* (1969) 43 ALJR 69 at 71;*Goldsworthy Mining Ltd v Federal Commissioner of Taxation* [1973] HCA 7; (1973) 128 CLR 199 at 212.

[344] Whereas an occupation license expired on 31 December each year and was determinable at any other time on 3 months notice or on selection, reservation or lease of the land (s 47), a pastoral lease could be granted for a term of up to 30 years (s 40(2)).

[345] A lease without entry conferred an interest in the term (*interesse termini*) but no estate: Coke, *Commentary upon Littleton*, "Of Tenant for yeares" L1 c7 Sect 58 [46b]; Blackstone, *Commentaries*, Book II at 144; *Joyner v Weeks* [1891] 2 QB 31 at 47. The doctrine of *interesse termini* was abolished by s 102 of the *Property Law Act* 1974 (Q) as from 1 December 1975.

[346] *Sevenoaks, Maidstone, and Tunbridge Railway Co v London, Chatham, and Dover Railway Co* (1879) 11 ChD 625 at 635: "Now we have not by law any such thing as a lease in perpetuity. We have a fee simple subject to a rent-charge, and we have a lease for years, but we have no such thing as a lease in perpetuity"; Fry "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158 at 167.

[347] Section 199.

[348] Section 198.

[349] Section 200.

[350] Section 205.

[351] See note 314.

[352] *Mabo v Queensland [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 111.

[353] [1992] HCA 23; (1992) 175 CLR 1 at 111. See also the cases there cited, namely, *The Commonwealth v Hazeldell Ltd* [1918] HCA 75; (1918) 25 CLR 552 at 563; *Central Control Board (Liquor Traffic) v Cannon Brewery*

Co Ltd [1919] AC 744 at 752; *Clissold v Perry* [1904] HCA 12; (1904) 1 CLR 363 at 373-374 (affirmed in [1907] AC 73), a case dealing with possessory title.

[354] Coke, *Commentary upon Littleton*, "Of Fee taile" L1 c2 Sect 19 [22b]; Blackstone, *Commentaries*, Book II at 175.

[355] The original grant was for an area of 1,120 square miles but one square mile was resumed for the purposes of a road in 1953.

[356] Published in the *Queensland Government Gazette* on 10.6.1944.

[357] See (1996) 134 ALR 637 at 672; 63 FCR 450 at 487.

[358] Part VI, Div I is entitled "Renewal of Leases before Expiry" and includes s 155.

[359] *Land Act* 1994 (Q), s 524. Note that certain provisions of the 1962 Act are still in force, none of which are presently relevant.

[360] Section 5 of the 1962 Act, s 4 of the 1910 Act.

[361] Form 5 of the Regulations under the 1962 Act published in the *Queensland Government Gazette* on 5.2.1963. Note however that the lease was granted pursuant to Pt VI, Div I of the 1962 Act rather than Pt III, Div I as on the prescribed form.

[362] Division III of Pt III.

[363] Division I of Pt III.

[364] Division II of Pt III.

[365] Part IV.

[366] See s 49.

[367] Section 49(1).

[368] By s 62, the lessee of a preferential pastoral holding was required to reside on the holding during the first seven years of the lease or longer if a condition to that effect was imposed by the opening notification.

[369] By s 66(1), the holder of any lease or selection under the 1962 Act could apply to have the tenure converted to a stud holding when the subject land was used to breed stud merino sheep or beef cattle.

[370] See s 67.

[371] See s 73(3).

[372] See ss 83 and 84.

[373] See, for example, s 4(2) (savings provision); s 129 (perpetual lease Prickly-pear and perpetual lease Prickly-pear development selections converted into perpetual lease selections); s 132 (development grazing homesteads and Prickly-pear development grazing homesteads converted into grazing homesteads).

[374] See, for example, s 124(5) (conversion of a perpetual lease selection to an agricultural farm).

[375] See, for example, s 124(1), (3), (4) (agricultural farms); s 130(5) (certain settlement farm leases); s 133 (grazing selections).

[376] See note 369.

[377] See s 4(1) and the Schedule to the 1962 Act.

[378] Sections 154 and 155 of the 1962 Act, which applied to settlement farm leases, grazing selections, brigalow leases, pastoral holdings, preferential pastoral holdings and pastoral development holdings allowed for leases to be renewed if they had not more than ten years to run. Note that while the 1910 Act did not provide for renewal as at the time of the Mitchellton Pastoral Leases, the *Land Acts Amendment Act* 1952 (Q) (Pt III, ss 13-19) and the *Land Acts and Other Acts Amendment Act* 1959 (Q) (Pt VIII ss 40-47) provided for renewal of pastoral leases prior to expiry.

[379] See also s 162.

[380] Section 231(1).

[381] Section 231(2)(b).

[382] Section 333.

[383] Section 305.

[384] Section 295(a).

[385] See s 50(1)(e)-(f). See also ss 51 and 52.

[386] Note that in any case the opening notification pursuant to which the first Holroyd lease was granted required only that there be payment for any improvements already on the land.

[387] Section 64(3) provided that s 111 applied to that section.

[388] Section 297(2).

[389] Section 250. In general terms, that section operated with respect to agricultural selections and perpetual country leases, during their first two years, and pastoral leases, brigalow leases, grazing selections, settlement farm leases and certain licenses for their entire term.

[390] See ss 55 and 57 of the *Forestry Act* 1959 (Q). Note that s 44 of the *Forestry Act* 1959 (Q) specifically provided that the lease of any Crown holding, which included a holding granted under the 1962 Act, was subject to the provisions of Pt VI of the *Forestry Act* (ss 44-61).

[391] Section 375(1) of the 1962 Act, s 205 of the 1910 Act.

[392] As explained with respect to the Mitchellton leases, no reversion can arise at common law unless a leasehold estate exists.

[393] Section 50(2)(c)(i) and (iii).

[394] Section 156(1)(b).

[395] The substantive provisions of the Native Title Act commenced on 1 January 1994.

396 [1995] HCA 47; (1995) 183 CLR 373 at 454.

[397] *Native Title Act Case* [1995] HCA 47; (1995) 183 CLR 373 at 422-423, 452-453. See also *Mabo v Queensland* (1988) 166 CLR 186 at 213-214, and, in Canada, *R v Sparrow* [1990] 1 SCR 1075 at 1097 - 1099; *R v Van der Peet* (1996) 137 DLR (4th) 289 at 302-303, 337, 385.

[398] *Mabo v Queensland [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 68; *Native Title Act Case* (1995) 183 CLR 373 at 422.

[399] Posner, *The Problems of Jurisprudence*, (1990) at 276-277.

[400] *Native Title Act Case* [1995] HCA 47; (1995) 183 CLR 373 at 423.

[401] Holmes, "The Theory of Legal Interpretation", (1899) 12 *Harvard Law Review* 417 at 419. See also *Re Bolton; Ex parte Beane* [1987] HCA 12;

(1987) 162 CLR 514 at 518, 532; *Brennan v Comcare* [1994] FCA 1147; (1994) 50 FCR 555 at 572-575.

[402] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 66-67.

[403] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 89.

[404] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 58.

[405] Pursuant to O 29 r 2(a) of the Federal Court Rules (Cth).

[406] ***Wik*** *Peoples v State of Queensland* (1996) 63 FCR 450; 134 ALR 637.

[407] The first of these pastoral leases was issued under the 1910 Act as amended by *The Land Act Amendment Act* 1913 (Q) and *The Land Act Amendment Act* 1914 (Q). The second was issued under the 1910 Act as further amended by *The Land Act Amendment Act* 1916 (Q), *The Land Act Amendment Act* 1917 (Q), and *The Land Acts Amendment Act* 1918 (Q). The 1910 Act will be considered in these reasons in the form it took at the respective times for the Mitchellton Pastoral Leases.

[408] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 66-67.

[409] An earlier lease for a term expiring 1 October 1974 had been granted in 1945 under the 1910 Act. The effect of the 1962 Act (s 4(2)) was to deem the earlier lease to have been granted as a pastoral lease under Pt III Div 1 of the new legislation, this being "the tenure or class or mode of a class of tenure" which was "analogous" to that under the 1910 Act. Part VI Div 1 of the 1962 Act provided for "renewal" of such leases by the issue of a new lease and surrender of the subsisting lease (s 160).

[410] Holmes, "The Theory of Legal Interpretation", (1899) 12 *Harvard Law Review* 417 at 419.

[411] *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461, cited in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; (1985) 157 CLR 309 at 312, 315.

[412] *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461. See also the *Native Title Act Case* [1995] HCA 47; (1995) 183 CLR 373 at 452.

[413] [1959] HCA 63; (1959) 102 CLR 54 at 71.

[414] (1847) 2 SCR (NSW) App 30.

[415] *Wildash v Brosnan* (1870) 1 QCLLR 17 at 18.

[416] From the definition of "waste lands of the [C]rown" in s 23 of the *Australian Colonies, Waste Lands Act* 1842 (Imp) (5 & 6 Vict c 36).

[417] Campbell, "Crown Land Grants: Form and Validity", (1966) 40 *Australian Law Journal* 35.

[418] cf *In re Natural Resources (Saskatchewan)* [1932] AC 28 at 38.

[419] *Australian Colonies, Waste Lands Act* 1842 (Imp) (5 & 6 Vict c 36), s 16.

[420] *Australian Colonies, Waste Lands Act* 1842 (Imp) (5 & 6 Vict c 36), s 19.

[421] 5 & 6 Vict c 76.

[422] In England, the prerogative to alienate lands of the Crown had been restricted to the granting of certain leases by the *Crown Lands Act* 1702 (Eng) (1 Anne c 1). The *Crown Lands Act* 1829 inaugurated the modern system whereby the Crown Estate Commissioners lease Crown lands in accordance with statute: *Halsbury's Laws of England*, 4th ed, vol 8, pars 1451-1475.

[423] 18 & 19 Vict c 54.

[424] *Blackwood v London Chartered Bank of Australia* (1874) LR 5 PC 92 at 112-113.

[425] The sources of the power of the Queensland legislature to pass this statute were identified in *Cooper v Commissioner of Income Tax for the State of Queensland* [1907] HCA 27; (1907) 4 CLR 1304 at 1311-1313, 1326-1329.

[426] *Australian Alliance Assurance Co Ltd v John Goodwyn, the Insurance Commissioner* [1916] St R Qd 225 at 253-254; *Cudgen Rutile (No 2) Ltd v Chalk* [1975] AC 520 at 533; *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 63-64.

[427] *Breskvar v Wall* (1971) 126 CLR 376 at 384, where this description was applied by Barwick CJ to the *Real Property Acts* 1861 to 1963 (Q).

[428] *Stewart v Williams* [1914] HCA 43; (1914) 18 CLR 381 at 390.

[429] *Sevenoaks Maidstone and Tunbridge Railway Co v London Chatham and Dover Railway Co* (1879) 11 Ch D 625 at 635; *Duncan v State of Queensland* [1916] HCA 67; (1916) 22 CLR 556 at 578.

[430] *Blackwood v London Chartered Bank of Australia* (1874) LR 5 PC 92 at 110.

[431] *O'Keefe v Malone* [1903] AC 365 at 377.

[432] *Stewart v Williams* [1914] HCA 43; (1914) 18 CLR 381 at 406 per Isaacs J, speaking of the New South Wales legislation.

[433] *Hegarty v Ellis* [1908] HCA 38; (1908) 6 CLR 264 at 281, speaking of the legislation in Victoria.

[434] *The Law of Real Property in New South Wales*, (1905) at 5-6. Comparable legislative ingenuity occurred with mining law: *Wade v New South Wales Rutile Mining Co Pty Ltd* [1969] HCA 28; (1969) 121 CLR 177 at 186-195. In 1891, it was said that "the whole of our mining law is founded on statutes for which no precedent existed in any other country": Armstrong, "A Treatise on the Law of Gold-Mining in Australia and New Zealand", 2nd ed (1901), at vi, from the Preface to the 1st ed (1891).

[435] Fry, *Freehold and Leasehold Tenancies of Queensland Land*, (1946) at 29.

[436] *Millard on Real Property (NSW)*, 4th ed (1930) at 474.

[437] [1992] HCA 23; (1992) 175 CLR 1.

[438] See *Wacando v The Commonwealth* [1981] HCA 60; (1981) 148 CLR 1 at 11.

[439] [1992] HCA 23; (1992) 175 CLR 1 at 17-25.

[440] [1992] HCA 23; (1992) 175 CLR 1 at 217.

[441] [1995] HCA 47; (1995) 183 CLR 373.

[442] *Falkland Islands Co v The Queen* (1863) 2 Moore NS 266 at 274 [1863] EngR 782; [15 ER 902 at 905]; *Halsbury's Laws of England*, 4th ed, vol 27(1) Reissue, par 137. A provision in a lease expressed to reserve such rights to the landlord operated not as a true reservation but as a regrant by the lessee to the lessor: *Wickham v Hawker* (1840) 7 M & W 63 at 76 [1840] EngR 285; [151 ER 679 at 685]; *Mason v Clarke* [1955] AC 778 at 786.

[443] But excluding what the common law regarded as "timber": *Halsbury's Laws of England*, 4th ed, vol 27(1) Reissue, pars 157-160.

[444] *Halsbury's Laws of England*, 1st ed, vol 4, "Commons and Rights of Common", par 1104. See also *Halsbury's Laws of England*, 4th ed, vol 6 Reissue, "Commons", par 564; Holmes, *Notes to Kent's Commentaries*, reprinted in Novick, *The Collected Works of Justice Holmes*, (1995), vol 2 at 410-415; Simpson, *A History of the Land Law*, 2nd ed (1986) at 107-108.

[445] 8 & 9 Vict c 118. See Simpson, *A History of the Land Law*, 2nd ed (1986) at 261-262; Cornish and Clark, *Law and Society in England 1750-1950*, (1989) at 137-141.

[446] *Halsbury's Laws of England*, 1st ed, vol 4, "Commons and Rights of Common", par 1146.

[447] [1992] HCA 23; (1992) 175 CLR 1 at 48-49.

[448] Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), vol 2 at 104.

[449] *Kavanaugh v Cohoes Power & Light Corp* (1921) 187 NYS 216 at 236-237; Gray, *The Rule Against Perpetuities*, 4th ed (1942), SS23.

[450] Kent, *Commentaries on American Law* (1828), vol 3 at 412. For the views of Jefferson and John Adams and their influence upon constitutional theory in the United States see Edgeworth, "Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*", (1994) 23 *Anglo-American Law Review* 397 at 399-403.

[451] *In re Hallett's Estate* (1880) 13 Ch D 696 at 710 per Jessel MR.

[452] *Ex parte Professional Engineers' Association* [1959] HCA 47; (1959) 107 CLR 208 at 267.

[453] cf Gordon, "Critical Legal Histories", (1984) 36 *Stanford Law Review* 57 at 63-65.

[454] [1956] UKHL 6; [1957] AC 555 at 591-592.

[455] An example is the consideration of the abolition of the rule in *Brinsmead v Harrison* (1871) LR 7 CP 547, by s 5(1) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW), in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* [1985] HCA 12; (1985) 155 CLR 448. See also, in this respect, *Thompson v Australian Capital Television Pty Ltd*, unreported, High Court of Australia, 10 December 1996.

[456] [1979] HCA 40; (1979) 142 CLR 617 at 633.

[457] See also the discussion by McHugh J of this passage in *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13; (1994) 179 CLR 520 at 592-593.

[458] *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221 at 253-255.

[459] *Chan v Cresdon Pty Ltd* [1989] HCA 63; (1989) 168 CLR 242 at 254-256.

[460] *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353 at 370-376.

[461] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 37.

[462] *Anonymous* [1722] EngR 1; (1722) 2 P Wms 75 [24 ER 646].

[463] *Freeman v Fairlie* (1828) 1 Moore Ind App 305 at 325 [1828] EngR 63; [18 ER 117 at 128].

[464] Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v British Columbia*", (1992) 17 *Queen's Law Journal*350 at 365-373, 385-386.

[465] Taken in Australia to have been settled by *R v Jack Congo Murrell* (1836) 1 Legge 72; see also, with respect to *Bonjon's Case*, the despatch from Governor Gipps to Lord Stanley of 24 January 1842 and the reply of Lord Stanley of 2 July 1842 reprinted in British Parliamentary Papers, *Papers Relating to Emigration, the Aboriginal Population and Other Affairs in Australia 1844*, (1969) vol 8, *Colonies Australia*, at 143-156.

[466] (1847) 2 SCR (NSW) App 30.

[467] (1889) 14 App Cas 286.

[468] (1889) 14 App Cas 286 at 291.

[469] [1992] HCA 23; (1992) 175 CLR 1 at 39.

[470] (1996) 137 DLR (4th) 289 at 382.

[471] *R v Cote*, unreported, Supreme Court of Canada, 3 October 1996, pars 42-54 of the judgment of Lamer CJ, with whom Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ agreed.

[472] The present legal regime in Canada is supported by s 35 of the *Constitution Act* 1982 which enshrines "existing aboriginal and treaty rights". Aboriginal rights encompass more than what in Canada is regarded as aboriginal title: *R v Adams*, unreported, Supreme Court of Canada, 3 October 1996, pars 26, 27 of the judgment of Lamer CJ, with whom La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ agreed. The text of s 35 is as follows:

"(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

[473] Baker, *The Legal Profession and the Common Law - Historical Essays*, (1986) at 436.

[474] cf *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 60; *R v Van der Peet* (1996) 137 DLR (4th) 289 at 315-316, 317-318, 332.

[475] British Parliamentary Papers, *Papers Relating to Emigration, the Aboriginal Population and Other Affairs in Australia 1844*, (1969) vol 8, *Colonies Australia*, at 380. John Hutt was the second Governor of Western Australia, holding office between 1839 and 1846.

[476] [1983] 2 AC 394 at 438.

[477] [1983] 2 AC 394 at 438.

[478] *R v Van der Peet* (1996) 137 DLR (4th) 289 at 377 per McLachlin J.

[479] *Pepper v Hart [1992] UKHL 3;* [1993] AC 593. Statute in Queensland provides to similar effect: *Acts Interpretation Act* 1954 (Q), s 14B.

[480] *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538 at 552-555; *Orr v Ford* [1989] HCA 4; (1989) 167 CLR 316 at 326-327, 333-334.

[481] (1884) 9 App Cas 699.

[482] (1878) 10 Ch D 518.

[483] (1878) 10 Ch D 518 at 527.

[484] [1933] HCA 36; (1933) 50 CLR 154 at 178-179.

[485] [1908] HCA 55; (1908) 7 CLR 1 at 16.

[486] [1909] HCA 75; (1909) 9 CLR 547 at 560.

[487] (1878) 10 Ch D 518.

[488] [1995] HCA 47; (1995) 183 CLR 373 at 423.

[489] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 86-87.

[490] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 54.

[491] Milsom, *The Legal Framework of English Feudalism*, (1976) at 39.

[492] Simpson, *A History of the Land Law*, 2nd ed (1986) at 1, 47-48; Edgeworth, "Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*" (1994) 23 *Anglo-American Law Review* 397 at 428-432.

[493] Jenks, *A History of the Australasian Colonies*, (1896) at 59.

[494] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 212; *Morris v Pugh* [1761] EngR 68; (1761) 3 Burr 1241 at 1243 [97 ER 811 at 811]; Fuller,*Legal Fictions*, (1967) at 56-71.

[495] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[496] Section 8 of *The Crown Lands Act* 1884 (Q), s 12 of *The Land Act* 1897 (Q) and s 6(1) and (2) of the 1962 Act were all in similar terms.

[497] Section 4 of the 1910 Act followed, in this respect, the terms of earlier legislation including *The Pastoral Leases Act* 1869 (Q) (s 3), *The Crown Lands Act* 1884 (Q) (s 4) and *The Land Act* 1897 (Q) (s 4) and the pattern is continued in the definition of "Crown Land" in s 5 of the 1962 Act.

[498] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 48.

[499] The term "Public Purposes", as it appeared in the definition of "Crown Land" in the 1910 Act, itself was defined in s 4 by reference to a lengthy list of objects or purposes, including "Aboriginal reserves".

[500] The effect of the proviso to par (c) of the definition of "Crown Land" was to classify as Crown land susceptible of grant or demise under s 6 land held merely under an occupation licence issued under Pt III (ss 40-47) of the 1910 Act.

[501] The 1962 Act, s 5 (definitions of "Crown land" and "Public purposes"), s 6, s 299 (forfeiture).

[502] cf *Davies v Littlejohn* [1923] HCA 64; (1923) 34 CLR 174 at 187-188.

[503] Section 2 of the 1910 Act provided for this commencement date.

[504] Section 203 of the 1910 Act largely, but not fully, followed the terms of s 29 of the *Unoccupied Crown Lands Occupation Act* 1860 (Q), s 72 of *The Pastoral Leases Act* 1869 (Q), s 91 of *The Crown Lands Alienation Act* 1876 (Q), s 124 of *The Crown Lands Act* 1884 (Q), and s 236 of *The Land Act*1897 (Q).

[505] This is a summary offence (s 206).

[506] [1992] HCA 23; (1992) 175 CLR 1 at 66.

[507] [1992] HCA 23; (1992) 175 CLR 1 at 114.

[508] *The Commonwealth v Anderson* [1960] HCA 85; (1960) 105 CLR 303 at 318.

[509] Section 204 was predated (as to the first paragraph of s 204) by s 28 of the *Unoccupied Crown Lands Occupation Act* 1860 (Q), and more fully by s 71 of *The Pastoral Leases Act* 1869 (Q), s 90 of *The Crown Lands Alienation Act* 1876 (Q), s 123 of *The Crown Lands Act* 1884 (Q), and s 235 of *The Land Act* 1897 (Q).

[510] Being The Land Commissioner for the district in which the land in question is situated, or a Deputy Land Commissioner: see the definition in s 4.

[511] (1870) 2 QSCR 99.

[512] (1870) 2 QSCR 99 at 106.

[513] [1908] HCA 34; (1908) 6 CLR 143.

[514] [1908] HCA 34; (1908) 6 CLR 143 at 147-148. See also *Owens v Collector of Customs for the State of New South Wales* (1940) 40 SR (NSW) 605 at 609.

[515] [1908] HCA 34; (1908) 6 CLR 143 at 155 per Barton J, 160 per O'Connor J.

[516] [1908] HCA 34; (1908) 6 CLR 143 at 164. See also *Cotterill v Penn* [1936] 1 KB 53 at 61.

[517] cf *McGraw-Hinds (Aust) Pty Ltd v Smith* [1979] HCA 19; (1979) 144 CLR 633 at 643; *Clyne v Deputy Commissioner of Taxation* [1981] HCA 40; (1981) 150 CLR 1 at 10, 15-16; *Murphy v Farmer* [1988] HCA 31; (1988) 165 CLR 19 at 26-27.

[518] *Radaich v Smith* [1959] HCA 45; (1959) 101 CLR 209 at 222; *Street v Mountford* *[1985] UKHL 4;* [1985] AC 809 at 827.

[519] *Voli v Inglewood Shire Council* [1963] HCA 15; (1963) 110 CLR 74 at 90.

[520] (1882) 21 Ch D 9.

[521] *Chan v Cresdon Pty Ltd* [1989] HCA 63; (1989) 168 CLR 242 at 264.

[522] *Arnold v Mann* [1957] HCA 64; (1957) 99 CLR 462 at 475.

[523] *Andrews v Hogan* [1952] HCA 37; (1952) 86 CLR 223 at 250; *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* [1966] HCA 15; (1966) 115 CLR 1 at 6.

[524] [1923] HCA 64; (1923) 34 CLR 174 at 187.

[525] [1982] HCA 69; (1982) 158 CLR 327 at 344.

[526] cf *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* [1973] HCA 7; (1973) 128 CLR 199, affd [1975] HCA 3; (1975) 132 CLR 463; there the issue was whether a dredging lease granted by the State of Western Australia pursuant to the *Iron Ore (Mount Goldsworthy) Agreement Amendment Act* 1964 (WA) rendered the taxpayer a lessee for the purposes of s 88(2) of the *Income Tax Assessment Act* 1936 (Cth).

[527] [1965] UKHL 1; [1965] AC 1175 at 1247-1248.

[528] [1982] HCA 69; (1982) 158 CLR 327 at 344.

[529] *Fouche v The Superannuation Fund Board* [1952] HCA 1; (1952) 88 CLR 609 at 640; *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* [1979] HCA 34; (1979) 145 CLR 330 at 353-354, 362-364.

[530] *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* [1993] HCA 1; (1993) 178 CLR 145 at 161-168.

[531] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 61.

[532] As considered, for example, in *Chalmers v Pardoe* [1963] 1 WLR 677; [1963] 3 All ER 552; *Maharaj v Chand* [1986] AC 898; *Orr v Ford* [1989] HCA 4; (1989) 167 CLR 316.

[533] [1910] HCA 40; (1910) 11 CLR 171. It will be necessary to make further reference to this case later in these reasons.

[534] *Butts v O'Dwyer* [1952] HCA 74; (1952) 87 CLR 267 at 286; *McWilliam v McWilliams Wines Pty Ltd* [1964] HCA 6; (1964) 114 CLR 656 at 660-661; *Brown v Heffer* [1967] HCA 40; (1967) 116 CLR 344 at 349-350.

[535] *Attorney-General of Victoria v Ettershank* (1875) LR 6 PC 354 at 370; *McPherson v Minister for Natural Resources* (1990) 22 NSWLR 671 at 682-683 per Kearney J, affd *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 697-703, 713-715; cf *Davies v Littlejohn* [1923] HCA 64; (1923) 34 CLR 174 at 184, 190-191, 196 - it was held in this case that, in respect of conditional purchases under the *Crown Lands Consolidation Act* 1913 (NSW), the Crown did not have a vendor's lien for the instalments of purchase money not yet due.

[536] *State of Queensland v Litz* [1993] 1 Qd R 343 at 349-351.

[537] *Property Law Act* 1974 (Q), s 1(2); *Residential Tenancies Act* 1975 (Q), s 2. The latter statute was repealed with effect 3 April 1995 by s 342 of the*Residential Tenancies Act* 1994 (Q).

[538] Section 102(2) of the *Property Law Act* 1974 (Q) provided that, from the date of commencement of the Act, all terms of years absolute, were to be capable of taking effect from the date fixed for commencement of the term, without actual entry.

[539] *Lord Llangattock v Watney Combe Reid & Co Ltd* [1910] 1 KB 236 at 246, affd [1910] AC 394.

[540] Note, "Is *Interesse Termini* Necessary?", (1918) 18 *Columbia Law Review* 595. If the lease were made by way of bargain and sale for a term, the term would vest by operation of the Statute of Uses and without actual entry: *Lutwich v Mitton* (1620) Cro Jac 604 [79 ER 516].

[541] *Mann Crossman & Paulin v Land Registry (Registrar)* [1918] 1 Ch 202 at 206-207.

[542] Detailed provision for the mortgaging of interests, including pastoral leases, under the 1962 Act is made by ss 275-281 of that statute.

[543] Inserted by s 8 of the *Land Act Amendment Act* 1916 (Q).

[544] "General Regulations Under 'The Land Act of 1910'", published *Queensland Government Gazette*, vol XCVIII, No 167, 28 June 1912. The Regulations were amended and supplemented from time to time in the period before the grant of the second Mitchellton Pastoral Lease, but nothing turns upon these further Regulations.

[545] *Norton on Deeds*, 2nd ed (1928) at 268-272.

[546] [1969] HCA 28; (1969) 121 CLR 177 at 194.

[547] *Westropp v Elligott* (1884) 9 App Cas 815 at 819-820.

[548] It should also be noted that s 104, contained in Pt IV of the 1910 Act, and s 127, contained in Pt IV, of the 1962 Act, provide for a "Perpetual Lease Selection". This is identified as "a lease in perpetuity", something unknown to the common law, there being no limitation of time to fix the boundary of the term: see *Landale v Menzies* [1909] HCA 48; (1909) 9 CLR 89 at 125; *Prudential Assurance Co Ltd v London Residuary Body [1991] UKHL 10;* [1992] 2 AC 386 at 390, 396-397. The result is the creation of a statutory title which is *sui generis*; see *Nolan v Willimbong Shire Council* (1939) 14 LGR (NSW) 89 at 90; Ryall, "Perpetual Leaseholds in New South Wales", (1937) 11 *Australian Law Journal* 223; Fry, "Land Tenures in Australian Law", (1946-1947) 3 *Res Judicatae* 158 at 167-169.

[549] Section 14(1) states:

"Subject to this Act the lessee of a holding or holder of a license under this Act shall perform all of the conditions of the lease or license which by this Act or by the lease or license are required to be performed by him and for any failure so to do shall be liable to the prescribed penalty (if any) and the lease shall be liable to be forfeited or the license to be determined as prescribed."

[550] Section 64(3) states:

"The Minister, in his discretion, may exempt a lessee from performing any condition of fencing imposed upon the lease of a pastoral lease and may alter or cancel such exemption."

A power of deletion, variation and amendment of developmental and improvement conditions, with approval of the Governor in Council and consent of the lessee, was conferred by s 14(2).

[551] [1981] HCA 65; (1981) 147 CLR 677.

[552] [1981] HCA 65; (1981) 147 CLR 677 at 679.

[553] [1981] HCA 65; (1981) 147 CLR 677 at 683, 686.

[554] [1910] HCA 40; (1910) 11 CLR 171.

[555] In their Notice of Appeal, the Thayorre People challenge answer "No" given by Drummond J to the question in par (a) of Question 1C. However, the statement of the grounds of appeal does not further refer to the matter, and it was not the subject of submissions. Accordingly, there is no reason to doubt the correctness of the judgment of Drummond J on the point. I adopt the reasons of Gaudron J for affirming the answer given by Drummond J to Question 1C(a).

[556] A preferable description is "traditional title"; cf *Mabo v State of Queensland [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 176 per Toohey J. The words "aboriginal natives" appeared in the Constitution s 127 (now repealed) and in colonial legislation. In the statement of claim and notice of appeal the appellants refer to "Aboriginal title". However, such title rights are not confined to Aboriginals. They extend to other indigenous peoples. The term "native title" has been used repeatedly in decisions of this Court and other Australian courts. It is now used in Federal and State legislation. It is therefore used throughout these reasons.

[557] [1992] HCA 23; (1992) 175 CLR 1.

[558] *Williams v Attorney-General for New South Wales* [1913] HCA 33; (1913) 16 CLR 404 at 439 per Isaacs J. See also Fry, "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158.

[559] *Attorney General v Brown* (1847) 1 Legge 312.

[560] *Attorney General v Brown* (1847) 1 Legge 312.

[561] *Williams v Attorney-General for New South Wales* [1913] HCA 33; (1913) 16 CLR 404 at 439.

[562] *Randwick Corporation v Rutledge* [1959] HCA 63; (1959) 102 CLR 54 at 71.

[563] *New South Wales v The Commonwealth* (The "*Seas and Submerged Lands Case*") [1975] HCA 58; (1975) 135 CLR 337 at 438.

[564] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 29 per Brennan J.

[565] See also Fry, "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158 at 158 citing *Williams v Attorney-General for New South Wales*[1913] HCA 33; (1913) 16 CLR 404 at 439 per Isaacs J.

[566] *Cherokee Nation v State of Georgia* [1831] USSC 6; (1831) 30 US 1; *Worcester v State of Georgia* [1832] USSC 39; (1832) 31 US 515;*Menominee Tribe of Indians v United States* (1968 [1968] USSC 108; 391 US 404; *Joint Tribal Council of the Passamaquoddy Tribe v Morton* [1975] USCA1 273; (1975) 528 F 2d 370; cf *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 135-136.

[567] *Guerin v The Queen* [1984] 2 SCR 335; *Sparrow v The Queen* [1990] 1 SCR 1075; *Delgamuukw v The Queen in Right of British Columbia*(1993) 104 DLR (4th) 470; affirmed sub nom *R v Van der Peet* (1996) 137 DLR (4th) 289; *Apsassin v The Queen* [1995] 4 SCR 344; cf *Mabo [No 2]*[1992] HCA 23; (1992) 175 CLR 1 at 131-135.

[568] *In re the Ninety-Mile Beach* [1963] NZLR 461 at 468; cf *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 137.

[569] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 256.

[570] [1992] HCA 23; (1992) 175 CLR 1.

[571] Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; Dawson J dissenting.

[572] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[573] eg Bartlett, "Political and Legislative Responses to Mabo" (1993) 23 *University of Western Australia Law Review* 352; McIntyre, "Aboriginal Title: Equal Rights and Racial Discrimination" (1993) 16 *University of New South Wales Law Journal* 57; Reynolds, "The *Mabo* Judgment in the Light of Imperial Land Policy" (1993) 16 *University of New South Wales Law Journal* 27; Lumb, "Native Title to Land in Australia: Recent High Court Decisions" (1993) 42*International and Comparative Law Quarterly* 84; Stephenson and Ratnapala (eds), *Mabo: a Judicial Revolution. The Aboriginal Lands Rights Decision and its Impact on Australian Law* (1993); Nettheim, "Judicial Revolution or Cautious Correction? *Mabo v Queensland*" (1993) 16 *University of New South Wales Law Journal* 1; Hanks, "A National Aboriginal Policy" (1993) 16 *University of New South Wales Law Journal* 45;

Phillips (ed), *Essays on the Mabo Decision* (1993); Butt and Eagleson, *Mabo: What the High Court said and what the Government did* (1996); Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*" [1995] SydLawRw 1; (1995) 17 *Sydney Law Review* 5.

[574] [1995] HCA 47; (1995) 183 CLR 373. Section 12 of the federal Act was found to be invalid.

[575] [1995] HCA 47; (1995) 183 CLR 373 at 460-462.

[576] *Native Title Act* 1993 (Cth), Preamble at par 7 sub-par (c).

[577] *Native Title Act* 1993 (Cth), s 3(a).

[578] [1996] HCA 2; (1996) 135 ALR 225; 70 ALJR 344.

[579] *North Ganalanja Aboriginal Corporation v State of Queensland* (1995) 61 FCR 1; 132 ALR 565.

[580] [1996] HCA 2; (1996) 70 ALJR 344; 135 ALR 225 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ; myself contra.

[581] [1992] HCA 23; (1992) 175 CLR 1.

[582] (1996) 63 FCR 450; 134 ALR 637.

[583] For example *Delgamuukw v The Queen in Right of British Columbia* (1993) 104 DLR (4th) 470; affirmed sub nom *R v Van der Peet* (1996) 137 DLR (4th) 1.

[584] For example *United States v Dann* [1983] USCA9 822; (1983) 706 F 2d 919; *United States v Dann* [1985] USSC 33; (1985) 470 US 39; *United States v Dann* [1989] USCA9 338; (1989) 873 F 2d 1189.

[585] *The* ***Wik*** *Peoples v State of Queensland* [1994] FCA 967; (1994) 49 FCR 1; 120 ALR 465.

[586] *The* ***Wik*** *Peoples v State of Queensland* [1994] FCA 967; (1994) 49 FCR 1; 120 ALR 465.

[587] *North Ganalanja Aboriginal Corporation v State of Queensland* (1995) 61 FCR 1; 132 ALR 565.

[588] [1996] HCA 2; (1996) 70 ALJR 344; 135 ALR 225.

[589] *The* ***Wik*** *Peoples v State of Queensland*, unreported, 6 September 1994.

[590] [1996] HCA 2; (1996) 70 ALJR 344; 135 ALR 225. The submissions concerned the statutory right to mediation.

[591] cf [1996] HCA 2; (1996) 70 ALJR 344 at 384; [1996] HCA 2; 135 ALR 225 at 278.

[592] Pursuant to O 29 r 2(a) Federal Court Rules.

[593] (1996) 63 FCR 450 at 450-452; 134 ALR 637 at 705-708.

[594] *House v The King* [1936] HCA 40; (1936) 55 CLR 499 at 504-505; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* [1981] HCA 39; (1981) 148 CLR 170 at 177; *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368 at 435-436, 441. Cf *Possfund Custodian Trustee Ltd v Diamond* [1996] 2 All ER 774 at 778-781; [1996] 1 WLR 1351 at 1355-1358.

[595] [1995] 2 AC 633 at 693-694; approved *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 740-741 per Lord Browne-Wilkinson; applied *Mulcahy v Ministry of Defence* [1996] 2 WLR 474 at 477-478.

[596] [1992] HCA 23; (1992) 175 CLR 1 at 61.

[597] [1992] HCA 23; (1992) 175 CLR 1 at 60, 71.

[598] *Cherokee Nation v State of Georgia* [1831] USSC 6; (1831) 30 US 1; *Worcester v State of Georgia* [1832] USSC 39; (1832) 31 US 515. See*Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 193 per Toohey J; Reynolds, *Aboriginal Sovereignty. Reflections on Race, State, and Nation* (1996); Hooker, *Legal Pluralism. An Introduction to Colonial and Neo-Colonial Laws* (1975).

[599] cf *Coe v Commonwealth* [1993] HCA 42; (1993) 68 ALJR 110; 118 ALR 193; *Walker v State of New South Wales* [1994] HCA 64; (1994) 69 ALJR 111; 126 ALR 321 per Mason CJ.

[600] See Rogers, "The Emerging Concept of 'Radical Title' in Australia: Implications for Environmental Management" (1995) 12 *Environmental and Planning Law Journal* 183; Stuckey, "Feudalism and Australian Land Law: 'A Shadowy, Ghostlike Survival'?" (1994) 13 *University of Tasmania Law Review* 102. cf*North Ganalanja Aboriginal Corporation v State of Queensland* (1995) 61 FCR 1 at 29; 132 ALR 565 at 591 per Lee J.

[601] Blackstone, *Commentaries on the Laws of England*, vol 2, 105.

[602] Fry, "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158 at 159-160. cf Edgeworth, "Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared After *Mabo v Queensland*" (1994) 23 *Anglo-American Law Review* 397.

[603] (1993) 104 DLR (4th) 470; affirmed sub nom *R v Van der Peet* (1996) 137 DLR (4th) 1.

[604] (1993) 104 DLR (4th) 470 at 494-497 applying *Paul v Canadian Pacific Ltd* (1988) 53 DLR (4th) 487 at 505; *R v Sparrow* (1990) 70 DLR (4th) 385 at 411. See also the warning of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 403, noted in *Mabo [No 2]*[1992] HCA 23; (1992) 175 CLR 1 at 195 per Toohey J.

[605] Second Reading of the Aboriginals Protection and Restriction of the Sale of Opium Bill 1897 (Q), Queensland Legislative Assembly, *Parliamentary Debates* (Hansard), 15 November 1897 at 1538-1539.

[606] Queensland Legislative Assembly, *Parliamentary Debates* (Hansard), 15 November 1897 at 1539.

[607] Debate in Committee on the Aboriginals Protection and Restriction of the Sale of Opium Amendment Bill 1897, Queensland Legislative Council,*Parliamentary Debates* (Hansard), 8 October 1901 at 1139

[608] *Queensland Government Gazette* No 7, Vol LXIX, 8 January 1898 at 66; *Queensland Government Gazette*, No 150, Vol LXXII, 18 November 1899 at 1166.

[609] Annual Report of the Northern Protector of Aboriginals for 1903, Queensland, *Parliamentary Papers*, (1904) at 870.

[610] Annual Report of the Northern Protector of Aboriginals for 1900, Queensland, *Votes and Proceedings*, (1901) vol 4 at 1335-1337.

[611] [1992] HCA 23; (1992) 175 CLR 1 at 70.

[612] Transcript of proceedings at 197.

[613] cf Constitution s 51 (xxxi); *Mutual Pools & Staff Pty Ltd v The Commonwealth* [1994] HCA 9; (1994) 179 CLR 155; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

[614] See *Oceanic Sun Line Special Shipping Company Inc v Fay* [1988] HCA 32; (1988) 165 CLR 197 at 252.

[615] Fry, "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158 at 162.

[616] *Millard on Real Property (NSW)*, (4th ed) (1935) at 474.

[617] In 1947 it was estimated that only 8% of Queensland had been alienated on freehold tenure compared with 34% in New South Wales and 54% in Victoria.

[618] Fry, "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158 at 161, 163.

[619] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 69 per Brennan J.

[620] There being no relevant reservation of Aboriginal rights which could have the consequence of preserving native title, expressed in or able to be implied from either the applicable Queensland Acts, the relevant Executive acts of the Queensland Government or the terms of the leases involved. See *The* ***Wik*** *Peoples v State of Queensland* (1996) 63 FCR 450 at 480-481, 483-487, 488; 134 ALR 637 at 666, 669-672, 673.

[621] (1995) 61 FCR 1; 132 ALR 565.

[622] (1995) 61 FCR 1 at 55-56; 132 ALR 565 at 617.

[623] (1995) 61 FCR 1 at 14; 132 ALR 565 at 577.

[624] (1995) 61 FCR 1 at 55; 132 ALR 565 at 616-617.

[625] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[626] [1992] HCA 23; (1992) 175 CLR 1 at 110.

[627] (1995) 61 FCR 1 at 55; 132 ALR 565 at 617.

[628] [1992] HCA 23; (1992) 175 CLR 1 at 71-72.

[629] Fry, "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158 at 163. There were about 70 different types of Crown leasehold at the time of this article.

[630] (1995) 61 FCR 1 at 55; 132 ALR 565 at 616.

[631] [1992] HCA 23; (1992) 175 CLR 1 at 15-16.

[632] [1992] HCA 23; (1992) 175 CLR 1 at 217.

[633] [1992] HCA 23; (1992) 175 CLR 1 at 110.

[634] [1992] HCA 23; (1992) 175 CLR 1 at 111.

[635] [1992] HCA 23; (1992) 175 CLR 1 at 197.

[636] (1995) 61 FCR 1 at 29; 132 ALR 565 at 592.

[637] [1992] HCA 23; (1992) 175 CLR 1 at 70.

[638] (1995) 61 FCR 1 at 55; 132 ALR 565 at 616.

[639] (1995) 61 FCR 1 at 24-29; 132 ALR 565 at 587-592.

[640] See Reynolds, "Native Title and Pastoral Leases" in Stephenson and Ratnapala (eds), *Mabo: A Judicial Revolution* (1993); *Yandama Pastoral Co v Mundi Mundi Pastoral Co Ltd* [1925] HCA 38; (1925) 36 CLR 340 at 353 per Isaacs J.

[641] Fry, "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158 at 161. See also Roberts, *History of Australian Land Settlement 1788-1920*(1968) at 179.

[642] The *Crown Lands Unauthorized Occupation Act* 1836 (NSW) was operative from 1 January 1837 until 31 December 1838. It was amended by the*Crown Lands Unauthorized Occupation Act* 1838 (NSW) which commenced operation on 1 January 1839.

[643] Fry, "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158 at 160-161.

[644] Section 25.

[645] *New South Wales Government Gazette*, 22 May 1839.

[646] Supplement to *New South Wales Government Gazette*, 7 October 1847 at 1070-1077.

[647] Despatch No 24, Earl Grey to Sir Charles FitzRoy 11 February 1848; Despatch No 134, Earl Grey to Sir Charles FitzRoy, 6 August 1849.

[648] Despatch No 24, Earl Grey to Sir Charles FitzRoy, 11 February 1848.

[649] *New South Wales Government Gazette*, 26 April 1850.

[650] Fry, "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158 at 161.

[651] Proclamation 10 February 1842, *Queensland Government Gazette*, 15 February 1842 at 267.

[652] Government Notice, *Queensland Government Gazette*, 10 May 1842 at 690-691.

[653] Order in Council, 6 June 1859, *Queensland Government Gazette*, 10 December 1859 at 1-3. The 1847 and 1849 Orders in Council were repealed by Queensland legislation in 1860 and 1868: see *Unoccupied Crown Lands Occupation Act* 1860 (Q), s 2; *The Crown Lands Alienation Act* 1868 (Q), s 1. Such provisions had the effect of repealing the clauses expressly permitting Aboriginal access.

[654] Order in Council, 6 June 1859, *Queensland Government Gazette*, 24 December 1859 at pars 17, 20.

[655] eg *Unoccupied Crown Lands Occupation Act* 1860 (Q); *Tenders for Crown Lands Act* 1860 (Q); *Occupied Crown Lands Leasing Act* 1860 (Q);*Pastoral Occupation Act* 1862 (Q); *The Pastoral Leases Act* 1863 (Q); *Pastoral Assessment Act* 1864 (Q); *Leasing Act* 1866 (Q); *The Crown Lands Alienation Act* 1868 (Q); *The Pastoral Leases Act* 1869 (Q); *Settled Pastoral Leases Act* 1870 (Q); *Crown Lands Alienation Act Amendment Act* 1876 (Q); *Settled Districts Pastoral Leases Act* 1876 (Q); *Crown Lands Act* 1884 (Q); *The Land Act* 1897 (Q); *Pastoral Leases Act* 1900 (Q); *The Pastoral Holdings New Leases Act* 1901 (Q); *Land Act* 1902 (Q); *The Land Act* 1910 (Q); and *Land Act* 1962 (Q). There were many more statutes of relevance to pastoral leases and their incidents.

[656] [1909] HCA 48; (1909) 9 CLR 89 at 100-101 per Griffith CJ; see also *Radaich v Smith* [1959] HCA 45; (1959) 101 CLR 209 at 222; *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* [1966] HCA 15; (1966) 115 CLR 1 at 8.

[657] eg *Wildash v Brosnan* (1870) 1 QCLLR 17 at 18; *Heness v Bell* (1906) 3 QCLLR 47 at 49-50. See also *R v Tomkins* [1919] St R Qd 173 at 190, 199.

[658] See Reynolds, *Dispossession. Black Australians and White Invaders* (1989), Ch 7.

[659] *Babaniaris v Lutony Fashions Pty Ltd* [1987] HCA 19; (1987) 163 CLR 1 at 15. cf *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1 at 23; Mason, "Prospective Overruling", (1989) 63 *Australian Law Journal* 526.

[660] Second Reading Speech on the Judiciary Bill, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10968.

[661] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 50:

"[R]adical title, without more, is merely a logical postulate required to support the doctrine of tenure ... and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory)."

See also *Western Australia v The Commonwealth (Native Title Act Case)* [1995] HCA 47; (1995) 183 CLR 373 at 422.

[662] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[663] *St Catherine's Milling and Lumber Company v The Queen* (1888) 14 App Cas 46 at 55; *Attorney-General for Quebec v Attorney General for Canada* [1921] 1 AC 401 at 409-410; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 403.

[664] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[665] [1992] HCA 23; (1992) 175 CLR 1 at 46-47; see also Devereux and Dorsett, "Towards a Reconsideration of the Doctrines of Estates and Tenure" (1996) 4 *Australian Property Law Journal* 30.

[666] [1992] HCA 23; (1992) 175 CLR 1 at 58.

[667] *In re Southern Rhodesia* [1919] AC 211 at 233.

[668] For example, in Ceylon (as it was then called) the doctrine was accepted by the courts, that until a change in land tenure was effected by a clear and deliberate act on the part of the Crown, the interests derived before the acquisition of sovereignty would be enforced: Hooker, *Legal Pluralism - An Introduction to Colonial and Neo-Colonial Laws* (1975) at 467 citing *Abeyesekera v Jayatillaka* (1932) 33 NLR 51.

[669] [1992] HCA 23; (1992) 175 CLR 1 at 68, 110.

[670] *In re Southern Rhodesia* [1919] AC 211 at 235.

[671] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[672] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[673] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 58-59.

[] **674**[[1992] HCA 23; (1992) 175 CLR 1 at 59, 61.

675] See *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 110 per Deane and Gaudron JJ who note that common law native title will be extinguished by a lease "conferring the right to exclusive possession".

[676] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[677] Deane and Gaudron JJ also contemplated that, at least in some circumstances, the grant of a leasehold with exclusive possession could effect extinguishment. See [1992] HCA 23; (1992) 175 CLR 1 at 110.

[678] *Landale v Menzies* [1909] HCA 48; (1909) 9 CLR 89 at 100-101.

[679] *Radaich v Smith* [1959] HCA 45; (1959) 101 CLR 209 at 222; *O'Keefe v Malone* [1903] AC 365 at 377.

[680] *American Dairy Queen (Q) Pty Ltd v Blue Rio Pty Ltd* [1981] HCA 65; (1981) 147 CLR 677 at 686; *Minister for Lands and Forests v McPherson*(1991) 22 NSWLR 687 at 696-697, 712-713. cf *O'Keefe v Malone* [1903] AC 365 at 377.

[681] *Wildash v Brosnan* (1870) 1 QCLLR 17 at 18; *Macdonald v Tully* (1870) 2 QSCR 99 at 105-106; *R v Tomkins* [1919] St R Qd 173 at 190, 194-195, 198-199.

[682] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[683] [1992] HCA 23; (1992) 175 CLR 1 at 68.

[684] *Land Act* 1910 (Q), ss 100, 103, 106, 108, 122, 130, 135. cf *Land Act* 1962 (Q), s 122.

[685] cf *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* [1973] HCA 7; (1973) 128 CLR 199 at 213; affirmed [1975] HCA 3; (1975) 132 CLR 463. See also *Glenwood Lumber Company v Phillips* [1904] AC 405 at 408-409.

[686] Pastoral lease land did not remain Crown land for the purpose of *Land Acts*: see *Land Act* 1897 (Q), s 4; *Land Act* 1910 (Q), s 4; *Land Act* 1962 (Q), s 5. However, it did remain Crown Land for many other statutes: see *Mining Act* 1898 (Q), s 3; *Mining Act* 1968 (Q), s 7; *Petroleum Act* 1923 (Q), s

3;*Forestry Act* 1959 (Q), s 5. Pastoral lease land remained subject to the issue of licences to cut timber, to dig and remove stone, gravel etc. The holders of such licences were also entitled to depasture animals used for the purpose of exercising the rights under the licence: *Land Act* 1897 (Q), s 227; *Land Act* 1910 (Q), s 199. The pastoralist did not have the power to restrict a person duly authorised from cutting or removing timber or material or from searching for metal or minerals: *Land Act* 1897 (Q), s 229; *Land Act* 1910 (Q), s 200. The pastoralist could not ringbark or destroy trees without permission or cut down trees other than for the purpose of the pastoral holding: *Land Act* 1897 (Q), s 231; *Land Act* 1910 (Q), s 201; *Land Act* 1962 (Q), s 250. Pastoral leases contained a condition reserving in favour of the Crown the right to proclaim reserves and to resume land required for the purpose of such reserves: *Land Act* 1902 (Q), ss 12(1)(iii),(iv) and (v); *Land Act* 1910 (Q), s 6(4); *Land Act* 1962 (Q), s 6(4). One of the purposes for which a reserve could be proclaimed was for the use and benefit of Aboriginal inhabitants of Queensland: *Land Act* 1897 (Q), s 190; *Land Act* 1910 (Q), s 4; *Land Act* 1962 (Q), s 5. A pastoral lease was subject to resumptions without compensation payable except for improvements: *Land Act* 1897 (Q), s 209; *Land Act* 1910 (Q), s 146; *Land Act* 1962 (Q), ss 307, 314. A person driving stock was entitled to pass through a pastoral lease and depasture stock on any part of the land within half a mile of the road used for droving: *Land Act* 1897 (Q), s 230; *Land Act* 1910 (Q), s 205; *Land Act* 1962 (Q), s 375.

[687] 2 Co Litt 270a.

[688] [1918] 1 Ch 202 at 206. See also *O'Keefe v Williams* [1910] HCA 40; (1910) 11 CLR 171 at 190. cf *North Ganalanja Aboriginal Corporation v State of Queensland* (1995) 61 FCR 1 at 53-54; 132 ALR 565 at 614-615 per Hill J.

[689] *Property Law Act Amendment Act* 1975 (Q). See now *Property Law Act* 1974 (Q) s 102. Cf *Conveyancing Act* 1919 (NSW), s 120.

[690] 5 & 6 Vict c 36. There was an irrelevant exception preserved by s xvii, whereby the Governor's power to grant licences for periods of up to 12 months (squatters' annual licences) was preserved.

[691] Fry, *Freehold and Leasehold Tenancies of Queensland Land* (1946) at 19; *Fry*, "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158at 160.

[692] Fry, "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158 at 169.

[693] Fry, "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158 at 160.

[694] *O'Keefe v Malone* [1903] AC 365; *Glenwood Lumber Company v Phillips* [1904] AC 405.

[695] *Radaich v Smith* [1959] HCA 45; (1959) 101 CLR 209 at 222; cf *Berkheiser v Berkheiser and Glaister* (1957) 7 DLR (2d) 721.

[696] [1982] HCA 69; (1982) 158 CLR 327.

[697] [1982] HCA 69; (1982) 158 CLR 327 at 344.

[698] [1903] AC 365 at 377.

[699] *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 696.

[700] *Land Act* 1910 (Q), s 204; *Land Act* 1962 (Q), s 373(1).

[701] See the Acts contained in footnote 686 above.

[702] *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; (1947) 74 CLR 492 at 505; *Roberts v Hopwood* [1925] AC 578 at 602; *Bromley London Borough Council v Greater London Council [1981] UKHL 7;* [1983] 1 AC 768 at 813.

[703] Watts, "The Conveyancer. Timber Agreements" (1945) 19 *Australian Law Journal* 183; Baalman, "The Neglected Profit à Prendre" (1948) 22*Australian Law Journal* 302.

[704] On the rights exercisable under a profit à prendre see *Mason v Clarke* [1955] AC 778 at 796. See also *Reid v Moreland Timber Co Pty Ltd* [1946] HCA 48; (1946) 73 CLR 1.

[705] *Mabo v Queensland* ("*Mabo [No 1]*") (1988) 166 CLR 186 at 224; *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 111; *Western Australia v The Commonwealth (Native Title Act Case)* [1995] HCA 47; (1995) 183 CLR 373 at 422.

[706] *Mabo [No 1]* (1988) 166 CLR 186 at 213; *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 64, 110-111; *Western Australia v The Commonwealth (Native Title Act Case)* [1995] HCA 47; (1995) 183 CLR 373 at 423.

[707] *Mabo [No 1]* (1988) 166 CLR 186 at 213, 223.

[708] *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277 at 304; *Sorby v The Commonwealth* [1983] HCA 10; (1983) 152 CLR 281 at 289-90, 309;*Pyneboard Pty Ltd v Trade Practices Commission* [1983] HCA 9; (1983) 152 CLR 328 at 341; *Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 at 495-496; see also *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1; *Corporate Affairs Commission (NSW) v Yuill* [1991] HCA 28; (1991) 172 CLR 319.

[709] *Corporate Affairs Commission (NSW) v Yuill* [1991] HCA 28; (1991) 172 CLR 319; *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1. The courts have accepted presumptions as to the result of development of the law unforeseen at the time that original legislation was enacted. Thus, where legislation which had disturbed proprietary rights was repealed, the courts would infer that it was Parliament's intention that the repeal would revive and restore the pre-existing common law rights of property. See *Marshall v Smith* [1907] HCA 33; (1907) 4 CLR 1617 at 1634. Here, the legislative text is unchanged but a major hypothesis upon which it was drafted and enacted has been varied with retrospective effect.

[710] cf *Guerin v The Queen* [1984] 2 SCR 335 at 376; *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 201-203 per Toohey J.

[711] There are indications of legislative intent that some protection be afforded to Aboriginals in other respects: see *Aboriginals Protection and Restriction of the Sale of Opium Act* 1897 (Q); *The Aboriginals Preservation and Protection Act* 1939 (Q).

[712] *Delgamuukw v The Queen in Right of British Columbia* (1993) 104 DLR (4th) 470 at 529, quoted with approval in *Western Australia v The Commonwealth (Native Title Act Case)* [1995] HCA 47; (1995) 183 CLR 373 at 433; affirmed sub nom *R v Van der Peet* (1996) 137 DLR (4th) 289.

[713] eg *Arthur v Bokenham* 11 Mod 150 cited in *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277 at 304.

[714] *Penny v Penny* [1965] NSWR 990.

[715] *Greville v Williams* [1906] HCA 97; (1906) 4 CLR 694.

[716] *Corporation of Yarmouth v Simmonds* (1877) 10 Ch D 518 at 528; *Goodwin v Phillips* [1908] HCA 55; (1908) 7 CLR 1 at 16; *Chief Commissioner for Railways and Tramways (NSW) v Attorney-General for New South Wales* [1909] HCA 75; (1909) 9 CLR 547 at 560. See also*Hocking v Western Australian Bank* (1909) 9 CLR 738 at 746; *The Commonwealth v*

Hazeldell Ltd [1918] HCA 75; (1918) 25 CLR 552 at 563;*Melbourne Corporation v Barry* [1922] HCA 56; (1922) 31 CLR 174 at 206.

[717] *Chief Commissioner for Railways and Tramways (NSW) v Attorney-General for New South Wales* [1909] HCA 75; (1909) 9 CLR 547 at 560.

[718] *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 68.

[719] [1992] HCA 23; (1992) 175 CLR 1 at 42-43.

[720] Fry "Land Tenures in Australian Law" (1946-1947) 3 *Res Judicatae* 158 at 163.

[721] See *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 145-160 per Dawson J.

[722] Statement of claim, pars 48A-53.

[723] Statement of claim, pars 54-58.

[724] Statement of claim, pars 59-61.

[725] Statement of claim, pars 61A-64.

[726] Statement of claim, pars 65-68.

[727] [1976] Qd R 231.

[728] *Mining Royalties Act* 1974 (Q).

[729] [1976] Qd R 231 at 239

[730] [1967] 1 AC 141 at 157.

[731] *Cudgen Rutile [No 2] Pty Ltd v Chalk* [1975] AC 520 at 535.

[732] *Commonwealth Aluminium Corporation Limited v Attorney-General* [1976] Qd R 231 at 258-260 per Dunn J.

[733] *The* ***Wik*** *Peoples v State of Queensland* (1996) 63 FCR 450 at 509; 134 ALR 637 at 693 per Drummond J.

[734] (1978) 52 ALJR 286 at 291; 17 ALR 129 at 138.

[735] [1941] AC 308 at 322.

[736] [1893] AC 104 at 123.

[737] [1974] UKHL 1; [1974] AC 765 at 791.

[738] Campbell, "Legislative Approval of Government Contracts" (1972) 46 *Australian Law Journal* 217 at 218.

[739] cf *Caledonian Railway Company v Greenock and Wemyss Bay Railway Co* (1874) LR 2 Sc and Div 347 at 348-350.

[740] See for example *Attorney-General (NSW) v Trethowan* [1931] HCA 3; (1931) 44 CLR 394 at 429-431; *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 193-198; *Bignold v Dickson* (1991) 23 NSWLR 683 at 693-694.

[741] (1946) 47 SR (NSW) 16 at 18.

[742] (1946) 47 SR (NSW) 16 at 19.

[743] *Falcon v Famous Players Film Co* [1926] 2 KB 474 at 491, cited in *University of New South Wales v Moorhouse* [1975] HCA 26; (1975) 133 CLR 1 at 12.

[744] *Adelaide Corporation v Australasian Performing Right Association Ltd* [1928] HCA 10; (1928) 40 CLR 481 at 489, 497.

[745] See *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222-223.

[746] Seddon, *Government Contracts - Federal, State and Local* (1995).

[747] *The Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna* (1978) 52 ALJR 286 at 291; 17 ALR 129 at 138-139.

[748] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 740-741.

[749] [1861-73] All ER 397 at 404; (1866) LR 1 HL 93 at 112 per Blackburn J. The aphorism assumes the absence of any constitutional limitations.

[750] Such as *In re Earl of Wilton's Settled Estates* [1907] 1 Ch 50; *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260.

[751] Section 2 of the Aurukun Act.

[752] Queensland, *Parliamentary Debates* (Hansard), vol 269 at 2409.

[753] *The Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna* (1978) 52 ALJR 286; 17 ALR 129.

[754] Part VIII, cl 19.

[755] Queensland, *Parliamentary Debates* (Hansard), vol 269 at 2541.
