IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY No. C5 of 2018

BETWEEN: **GLEN RICHARD WILLIAMS**
Appellant

and

WRECK BAY ABORIGINAL COMMUNITY COUNCIL
First Respondent

THE ATTORNEY-GENERAL FOR THE AUSTRALIAN CAPITAL TERRITORY
Second Respondent

APPELLANT'S REPLY

PART I: PUBLICATION

1. These reply submissions are in a form suitable for publication on the internet.

PART II: ARGUMENT IN REPLY

(a) Flaws in the first respondent's construction of s 46 of the Land Grant Act

2. The first respondent seeks to rely on two key propositions to be drawn from the *Same-Sex Marriage Case*[1], which it contends are applicable to s 46 of the Land Grant Act: RS [22]-[28]. For the reasons that follow, those propositions have no application to s 46 of the Land Grant Act.

3. The first proposition (RS [23]) flows from a conclusion that s 28 of the Self-Government Act is "*directed to the effect which is to be given to an enactment of the Assembly*" and a corollary negative conclusion that s 28 "*is not directed to the effect which is to be given to a federal law*". These conclusions rely upon the opening words of s 28 which provide that "*[a] provision of an enactment has no effect to the extent that it is inconsistent*" and the words later in the s 28 that provide that "*but such a provision shall be taken to be consistent*" in identified circumstances.[2]

4. In contrast, s 46 opens with the words "*[t]his Act [the Land Grants Act] does not affect*". Section 46 thus speaks of the Land Grant Act itself and

[1] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.
[2] Ibid at 466 [53].

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expressly governs *its* operation. While s 28 achieves its end by denying the legal effect of a Territory enactment in circumstances of inconsistency with a federal law[3], s 46 achieves its end by limiting the universe of the Land Grant Act so as to not affect the application of other laws in force in the JBT (of whatever kind) to Aboriginal Land in circumstances where concurrent operation is capable.

5. Thus, contrary to the first respondent's submissions (RS [24]) and consistently with the appellant's submissions (AS [11]), s 46 is a provision which expresses an "intention" that the Land Grant Act is not to be understood as displacing any other law in force in the JBT except where that law is incapable of operating concurrently.

6. The second proposition (RS [27]) may, in a general sense, be accepted (AS [15]); but it has no application to the Land Grant Act because s 46 confirms that the Land Grant Act is *not* a complete and exhaustive statement of the law on any subject matter (AS [15]). This denies both a "cover the field" argument and an "alter, impair or detract" argument. Leaving aside express statements of intention to cover the field[4], both arguments rely upon the construction of the first law as embodying an implicit penumbra such that another law applying to the same subject matter encroaches on the field of, or alters, impairs or detracts, the first law.[5] Indeed, the first respondent (RS [32]) accepts so much in the context of *Australian Mutual Provident Society v Goulden*[6], namely that that case can be understood as one in which provisions of the *Life Insurance Act 1945* (Cth) were construed as containing an implicit negative proposition, namely that life insurers were to be uninhibited in the manner in which they fixed premiums.

7. In the context of s 28, the relevant federal law may or may not have such a penumbra depending on its construction; and (as the *Same Sex Marriage case* illustrates) any question of capacity for concurrent operation will be determined on that basis. Similarly, in the s 109 context, the construction of the relevant federal law will determine the extent to which, absent direct inconsistency, a State law is capable of operating.

8. Section 46, as noted above, is different. It governs only the operation of the Land Grant Act, so that a necessary step in construing that Act is the application of s 46. It affects the circumstances in which inconsistency arises rather than stating any rule for resolving inconsistency; and it confirms the absence of any penumbra of the kind referred to above.

9. Accordingly, in circumstances where there can be simultaneous obedience to the Land Grant Act and another law in force in the JBT, s 46 operates to

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[3] Ibid at 466 [52]; c.f. *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) CLR 322 at 351 [75].
[4] *Dickson v The Queen* (2010) 241 CLR 491 at [33]-[35].
[5] (2013) 250 CLR 441 at [59]; *Momcilovic v The Queen* (2011) 245 CLR 1 at 111 [244]; *Burns v Corbett* [2018] HCA 15 at [88]-[92].
[6] (1986) 160 CLR 330.

deny a construction of the Land Grant Act that would affect the application of that other law to Aboriginal Land.

10. Accordingly, the first respondent's submissions RS [31]-[37] and [59] should not be accepted and, for the reasons given at AS [20]-[26], ss 8 & 9 of the RT Act are capable of operating concurrently with the Land Grant Act.

(b) Flaws in the first respondent's concurrent operation arguments

11. The first respondent's submissions (RS [38]-[60]) proceed on the basis that its arguments as to the operation of s 46 are accepted (RS [19]-[37]). That is, the first respondent does not identify any direct collision between ss 8 & 9 of the RT Act and the Land Grant Act. Rather, it contends that the *efficacy* of its leasing power would be compromised by the application of statutory implied terms such as those imposed by the RT Act (RS [58]). Accordingly, if s 46 is understood in accordance with the appellant's primary submissions (AS [11]-[19] and AR[11]), the submissions on concurrent operation fall away.

12. Even if, however, s 46 is understood as embodying a broader concept of inconsistency (c.f. AS [27]), the first respondent's submissions should be rejected.

13. *First*, it is insufficient simply to contend that s 38(2) contains a statutory leasing power the efficacy of which is affected by the imposition of implied terms. Rather, it is necessary to construe s 38(2) as also containing an implicit negative proposition that that power is not subject to any statutory qualification on the terms upon which leases may be granted (AS [27b]). So much appears to have been accepted by the first respondent (RS [38]).

14. *Secondly*, and contrary to the first respondent's submission (RS [40]), s 38(2) cannot be construed out of its statutory context. That context critically involves an initial vesting of land in the first respondent (s 10) akin to a freehold interest (AS [21]), and the imposition of restrictions on dealing and disposing of Aboriginal Land (s 38(1)) (AS [22]). The Land Grant Act would not be construed in a way that made those restrictions otiose; so that the “freehold” interest contains within it the capacity, subject to express restrictions, to deal with or dispose of the land. Viewed in this context, s 38(2) is, as an exception to s 38(1), facultative of the exercise of rights in Aboriginal Land "vested" in the first respondent by s 10, and not a special statutory power intended to be exercisable regardless of the law that normally applies to transactions of the relevant kind.

15. *Thirdly*, the first respondent's submissions (RS [43] - [46]) miss the point. The issue is whether the legislative stipulation in all residential tenancy agreements of a term requiring a landlord to make repairs is capable of operating concurrently with the Land Grant Act. Not much is to be gained by considering, in a general sense, the uneasiness of prospective legislative alterations to leases of foot. Further, the extent of any uneasiness turns not

so much on the nature of the provisions in the Land Grant Act but rather in the manner of their potential exercise. In particular:

a. Nothing turns on the fact that leases may only be granted to registered members except with the consent of the Minister (contrary to RS [44a]). The fact that leases may be granted to non-members at all is suggestive that leasing laws in force in the JBT are intended to apply to Aboriginal Land (AS [27c]).

b. Similarly, the fact that a term of a lease shall not exceed 99 years and that the benefit of the lease is transmittable by will or a law relating to intestacy is nothing more than an embodiment of the rule against perpetuities.[7] Contrary to RS [44b], [44d] and [46], the Land Grant Act does not suggest a legislative preference, let alone a requirement, for longer term leases. In any event, these observations do not set the first respondent apart from an ordinary landowner (i.e. it has always been entirely possible for a landowner to offer a lease for an extensive period). Further, and contrary to RS [45], the fact that the first respondent has chosen to exercise a discretion to grant a lease for a longer period, and by doing so has assumed a greater burden in complying with the law, cannot be a basis upon which to construe scope of a legislative provision.

c. Further, the fact that the Land Grant Act makes specific provision for those registered members who immediately before the land became Aboriginal Land were in occupation of the land, provides no good basis for construing Land Grant Act more generally (that is, a specific provision dealing with a specific circumstance is of limited general assistance).

16. In any event, the first respondent's submissions (RS [43] and [57]) should be rejected because they suggest that the Land Grant Act should be construed as creating a legal silo whereby the common law that existed at the time the Land Grant Act came into effect remains (RS [57]) but not changes subsequent thereto including any legislated changes to the laws of leasing (such as laws mandating particular terms[8]). Such a proposition should not be implied, particularly by reason of the burden imposed by changes to the law in particular circumstances (contrary to AS[45]).

17. *Fourthly*, the analysis is not assisted by the fact that the Land Grant Act creates a process of general meetings and special general meetings (ss 21 - 26A) (contrary to RS [48]-[54]) (AS [27c]). The “mechanism for achieving the balance” postulated at RD [54] is one which subordinates each individual tenant’s rights to the will of the majority from time to time and thus enables oppression. Such a construction should not be countenanced in the absence of a clear expression of legislative intention.

[7] Megarry & Wade, 'The Law of Real Property' (6th Ed, 2000), at Ch 9.
[8] Unless alternative terms are endorsed by the ACAT (s 9 and 10 of the RT Act).

(c) Costs

18. If the appellant is not successful, no adverse costs order should be made against him for the following:

    a. He is without means.[9]

    b. He commenced his claim for repair orders in a "no cost" jurisdiction (s 48 of the *ACT Civil and Administrative Tribunal Act 2008 (ACT)*).

    c. The first respondent has a direct interest in ascertaining the legal principles the subject of this appeal in order to provide itself with guidance in respect of its future dealings (namely other members to whom it leases Aboriginal Land (*Oshlack v Richmond River Council* (1998) 193 CLR 72 per McHugh J at [100]).

Dated: 12 July 2018

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[9] He holds a Pensioner Concession Card. He has been represented by his solicitors and Counsel on a pro-bono basis.