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

FIRST RESPONDENT'S SUBMISSIONS

PART I: PUBLICATION

1. This submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. The first respondent (**the Council**) agrees with the statement of issues in the appellant's submissions filed 9 May 2018 (**AS**) at [2]. The issue stated in the submissions of the Attorney-General for the Australian Capital Territory filed 6 Jun 2018 (**ACT**) at [2] is essentially the same.

3. The Council submits that the Court of Appeal was correct to answer the questions as it did. The appeal to this Court should be dismissed with costs.

PART III: SECTION 78B NOTICE

4. For abundant caution, the Council has filed and served a notice in compliance with s 78B of the *Judiciary Act 1903* (Cth). All Attorneys-General have indicated that they do not intend to intervene in the matter.

PART IV: CONTESTED MATERIAL FACTS

5. There is no contest as to the facts identified in AS [5]. However, for reasons that will become apparent, a fuller appreciation of the facts is necessary.

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6. Relevant facts are contained in the amended special case (**SC**) at Core Appeal Book (**CAB**) 6–8, though some further facts largely concerning procedural matters may be identified in the reasons for judgment of the primary judge (**PJ**) at CAB 11–17 and the reasons for judgment of the Court of Appeal (**CA**) at CAB 26–47. They may be summarised as follows.

7. The Council is the council established by s 4(1) of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) (**Land Grant Act**) (SC [1]). By s 4(2), the Council is a body corporate with perpetual succession. By s 6, it consists of "registered members", being those persons whose names are on the Register kept in accordance with Div 2 of Pt IV. Those persons are:

   (a) Aboriginals over the age of 18 years who resided in the Jervis Bay Territory on 24 May 1986 (s 17(2)); and

   (b) any person over the age of 18 years who, subsequent to the commencement of the Land Grant Act, was recognised by a motion passed at a general meeting of the Council as an Aboriginal member of the Wreck Bay Aboriginal Community (s 18(1)).

   A person may be removed from the Register if a motion passed at a general meeting of the Council is that they are not a member of the Wreck Bay Aboriginal Community (s 18(3)) or upon their death (s 18(4)). These arrangements reflect the fact, noted in the Second Reading Speech to the Bill enacted as the Land Grant Act, that "[t]he Wreck Bay Aboriginal community is an established community comprising mainly descendants of the Jervis Bay and other tribes who once inhabited the general area".[1]

8. By s 8(1), as soon as practicable after the first annual general meeting of the Council, the Minister was required to sign an instrument declaring that the land specified in the Schedule to the Land Grant Act shall become "Aboriginal Land". By s 10, that land, including all rights, title and interests in that land, was vested in the Council without the need for any conveyance, transfer or assignment. This arrangement reflects the fact,

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[1] Second Reading Speech to the Aboriginal Land Grant (Jervis Bay Territory) Bill 1986 (Cth), House of Representatives, *Parliamentary Debates* (Hansard), 29 May 1986, 4193 (Mr Holding, Minister for Aboriginal Affairs).

again noted in the relevant Second Reading Speech, that "[t] he land has always been regarded as a distinct Aboriginal area separate from other land in Jervis Bay Territory".

9. As at 22 August 2016, there were 340 registered members (SC [4]). The number of residential dwellings in the Wreck Bay Village is insufficient to house all of the members of the Council (SC [8]).

10. The appellant is a registered member (SC [5]). Since 1989, he has resided in premises, provided for him by the Council on Aboriginal Land granted to the Council under ss 8 and 10 of the Land Grant Act (SC [6]). The premises are in substantial disrepair (SC [9]).

11. The *Residential Tenancies Act 1997* (ACT) (**Residential Tenancies Act**) commenced on 25 May 1998.[2] It relevantly applies to tenancies entered prior to commencement of the Act.[3]

12. On 14 April 2015, the appellant applied to the ACT Civil and Administrative Tribunal (**the Tribunal**) for orders under the Residential Tenancies Act (SC [10]; PJ [19]; CA [3]). He did so in reliance on the fact that s 4A of the *Jervis Bay Territory Acceptance Act 1915* (Cth) (**Jervis Bay Act**) provides, in general terms, that the laws in force from time to time in the ACT are in force in the Jervis Bay Territory.

13. The Residential Tenancies Act deals with "residential tenancy agreements" as defined in s 6A. Section 8(1)(a) provides that a residential tenancy agreement is taken to contain terms to the effect of the standard residential tenancy terms mentioned in sched 1. Those terms include terms requiring the lessor to make repairs (cll 54–60). Section 9 renders a term of a residential tenancy agreement void if it is inconsistent with a standard residential tenancy term.

14. Section 79 permits applications to the Tribunal by a party to a residential tenancy agreement for resolution of a tenancy dispute. Here, the appellant seeks orders from the

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2 Residential Tenancies Act, s 2(3) as made; ACT Gazette, No S360, 25 November 1997.

3 Residential Tenancies Act, s 4(2) as made, provided that, on and from 1 July 2000, the relevant provisions of the Act apply to all residential tenancy agreements, whenever made. While s 4 was repealed and substituted by the *Residential Tenancies Amendment Act 2004* (ACT), that repeal does not affect the transitional operation of s 4(2) as made: see *Legislation Act 2001* (ACT), s 88(1).

Tribunal pursuant to s 83(b) that the Council undertake repairs to the premises and pursuant to s 83(d) that the Council pay compensation for failing to do so (SC [13]).

15. In September 2015, the Council made a preliminary objection to the jurisdiction of the Tribunal, on the basis that there was no residential tenancy agreement between the parties within the meaning of s 6A (PJ [20]). In November 2015, the Tribunal rejected that objection: it found that, since 1989, there had been a written residential tenancy agreement within the meaning of s 6A between the Council, as lessor, and the appellant, as tenant, albeit that the appellant had not paid any rent after the first 12 weeks of the lease (SC [11]; PJ [21]; CA [3]).[4]

16. Subsequently, the Tribunal referred questions of law to the Supreme Court under s 84 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) (**Tribunal Act**) (CA [4]). In accordance with r 5802(1) of the *Court Procedure Rules 2006* (ACT) (**Court Procedure Rules**), the questions were in the form of a special case filed in June 2016 (PJ [2]; CA [4]).[5]

17. An amended special case was, by consent, filed at the commencement of the hearing before the primary judge (PJ [2]). It is in this form that the special case is contained in the CAB. The amendments were only to add questions 3 and 4 to the questions to be decided (CAB 6), as the parties agreed that those, rather than the originally stated questions 1 and 2, were the appropriate questions to be answered (CA [4]). The original questions had been directed to whether the Residential Tenancies Act was inconsistent with the Land Grant Act within the meaning of s 28(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (**Self-Government Act**). The new questions were directed to whether the Residential Tenancies Act was capable of operating concurrently with the Land Grant Act, within the meaning of s 46 of the Land Grant Act.

18. The primary judge (Elkhaim J) answered question 3 "No", and question 4 was therefore unnecessary to answer (CAB 19). The Court of Appeal (Murrell CJ, Burns and

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4 *Williams v Wreck Bay Aboriginal Community Council* [2015] ACAT 79.

5 The primary judge referred to the proceeding in the Tribunal being "removed" to the Supreme Court (PJ [22]). That is possible pursuant to s 83 of the Tribunal Act. However, in that event, the procedure is not by special case (see rr 1440–1441 of the Court Procedure Rules).

Mossop JJ) allowed an appeal and gave answers to questions 3 and 4 reflecting that Court's conclusion that ss 8 and 9 of the Residential Tenancies Act were not capable of operating concurrently with the Land Grant Act so far as they require a lease granted by the Council to contain the standard residential tenancy terms in sched 1 to the Residential Tenancies Act (CAB 49–51).

PART V: ARGUMENT

(a) Section 46 of the Land Grant Act

19. Section 46 of the Land Grant Act provides:

> This Act does not affect the application to Aboriginal Land of a law in force in the Territory *to the extent that that law is capable of operating concurrently with this Act.* [emphasis added]

20. As the appellant accepts (AS [10]), this is a specific provision to which the terms of s 4A(1) of the Jervis Bay Act are subject. Accordingly, the Residential Tenancies Act, to the extent applied by s 4A(1) of the Jervis Bay Act, can apply to Aboriginal Land, as defined and dealt with under the Land Grant Act, only to the extent that the Residential Tenancies Act is "capable of operating concurrently with" that Act.

21. Section 46 of the Land Grant Act is in form similar to s 28(1) of the Self-Government Act. That sub-section provides that a provision of an "enactment" made by the ACT Legislative Assembly "has no effect to the extent that it is inconsistent with", relevantly, a law made by the Federal Parliament but "such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law".

22. This Court considered the operation of s 28(1) of the Self-Government Act in *Commonwealth v Australian Capital Territory*[6] (***Same-Sex Marriage Case***). There are two key propositions to be drawn from that case, which the Council submits are also applicable to s 46 of the Land Grant Act.

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[6] (2013) 250 CLR 441.

23. *First*, the Court observed that s 28:[7]

> is directed to the effect which is to be given to an enactment of the Assembly; it is *not* directed to the effect which is to be given to a federal law. ... It does not say, and it is not to be understood as providing, that the laws of the federal parliament are to be read down or construed in a way which would permit concurrent operation of territory enactments.
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> ... [T]he starting point for any consideration of the operation of s 28 must be the determination of the legal meaning of the relevant federal Act .... Only then is it possible to consider whether and to what extent the enactment of the territory assembly can be given concurrent operation. [original emphasis]

24. Likewise, s 46 of the Land Grant Act does not say, and is not to be understood as providing, that the Land Grant Act is to be read down or construed in a way which would permit concurrent operation of laws in force in the Jervis Bay Territory. Section 46 is *not*, in either form or substance, a provision which expresses an "intention" on the part of the Federal Parliament that a Federal Act should be construed so as to permit the concurrent operation of other laws.[8] The appellant's submissions to the contrary (AS [11]) should be rejected.

25. That s 46 of the Land Grant Act is not a provision of this kind is hardly surprising. Such a provision is apt where another provision — notably s 109 of the Constitution — provides for the ineffectiveness of State or Territory Acts in the event of inconsistency with a Federal Act, and it is desired by the Federal Parliament to minimise the degree of inconsistency.[9]

26. Accordingly, the Court of Appeal's approach to s 46 of the Land Grant Act at CA [61] was correct, as was its conclusion at CA [61]–[62] that the starting point was the proper construction of the provisions of the Land Grant Act (as to which, for the reasons above, s 46 had nothing to say) (cf AS [18]).

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7 (2013) 250 CLR 441 at [53]–[54] (citations omitted).

8 cf, eg, *Dickson v The Queen* (2010) 241 CLR 491 at [33]–[35]; *Momcilovic v The Queen* (2011) 245 CLR 1 at [266]–[272], [343]–[367], [470]–[486], [654].

9 In addition to the provisions referred to in the cases in fn 8 see, eg, *Competition and Consumer Act 2010* (Cth), s 51AAA, within Part IV: "It is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part".

27. The *second* significant point to be derived from the *Same-Sex Marriage Case* is that "if a Commonwealth law is a complete statement of the law governing a particular relation or thing, a territory law which seeks to govern some aspect of that relation or thing cannot operate concurrently with the federal law to any extent".[10] As the Court reasoned, after identifying particular provisions of the *Marriage Act 1961* (Cth):[11]

> These particular provisions of the *Marriage Act*, read in the context of the whole Act, necessarily contain (109) the implicit negative proposition that the kind of marriage provided for by the Act is the *only* kind of marriage that may be formed or recognised in Australia. It follows that the provisions of the ACT Act which provide for marriage under that Act cannot operate concurrently with the *Marriage Act* and accordingly are inoperative. Giving effect to those provisions of the ACT Act would alter, impair or detract from the *Marriage Act*. ...
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> (109) See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1 at 111 [244].

28. The *dictum* of Gleeson CJ and Gummow J in *Northern Territory v GPAO*[12] with respect to s 28 of the Self-Government Act, relied upon at AS [13], that "the criterion for inconsistency — incapacity of concurrent operation — is narrower than that which applies under s 109, where the federal law evinces an intention to make exhaustive or exclusive provision upon a topic within the legislative power of the Commonwealth", must now be understood in light of the reasons in the *Same-Sex Marriage Case*.

29. An ACT law might be picked up and applied in the Jervis Bay Territory by s 4A of the Jervis Bay Act, but that does not mean such a law should be treated as a law of "coordinate status" to the Federal law (cf AS [10], [15]). The ACT law is not such a law, just as a State law would not be such a law if a Federal provision operated to pick up that law. The notion of "coordinate status" relies on the implicit premise that the one lawmaker can be presumed to have intended the laws to operate together so far as possible, analogously to the principle that provisions of a statute are to be given a harmonious construction. No such presumption applies where the lawmakers are different. In *Commissioner of Police (NSW) v Eaton*[13] the plurality quoted Lord

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[10] (2013) 250 CLR 441 at [52].

[11] (2013) 250 CLR 441 at [59].

[12] (1999) 196 CLR 553 at [60].

[13] (2013) 252 CLR 1 at [45].

Wilberforce saying the following with respect to issue of two related statutes operating in different but overlapping fields:

> The problem is one of ascertaining the legislative intention: is it to leave the earlier statute intact, with autonomous application to its own subject matter; is it to override the earlier statute in case of any inconsistency between the two; is it to add an additional layer of legislation on top of the pre-existing legislation, so that each may operate within its respective field?

30. Those types of questions are inapposite where the lawmakers are different. To say that the lawmakers should be treated as though they were the same because one's laws are picked up by the other would be a legal fiction of the most artificial kind. The law "presumes that statutes do not contradict one another"[14] where the laws are made by the same lawmaker. There can be no such presumption where the lawmakers are different, especially where one lawmaker is empowered to override or exclude the other.

31. In this context, as indicated in the *Same-Sex Marriage Case*, if the Federal law evinces an intention to make exhaustive or exclusive provision on some topic, that must be given effect, and an ACT law that was inconsistent with that provision would not be capable of operating concurrently with the Federal law. As explained by Gummow J in the passage in *Mocilovic* cited in the *Same-Sex Marriage Case*, the circumstance where the federal law evinces an intention to make exhaustive or exclusive provision upon a topic:[15]

> has come to be known as "indirect inconsistency". Here, the essential notion is that, upon its true construction, the federal law contains an implicit negative proposition that nothing other than what the federal law provides upon a particular subject-matter is to be the subject of legislation; a state law which impairs or detracts from that negative proposition will enliven s 109. This is an example of the proposition expressed with reference to Ch III of the Constitution by Dixon CJ, McTiernan, Fullagar and Kitto JJ in the *Boilermakers' case* as follows:
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> > The fact that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise was noted very early in the development of

[14] *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at [48].

[15] *Momcilovic v The Queen* (2011) 245 CLR 1 at 111 [244] (citations omitted).

> the principles of interpretation. In Chap III we have a notable but very evident example. [Footnote omitted.]

A law which is inconsistent with the "implicit negative proposition" in the Federal law cannot operate concurrently with it. So much appears to be accepted in ACT [49].

32. Accordingly, contrary to AS [17] and ACT [44]–[47], there was no error in the Court of Appeal's use of the expression "alter, impair or detract from" (CA [45], [73], [82]). Precisely that expression was used by this Court in the Same-Sex Marriage Case, in the passage quoted in paragraph 27 above. Likewise, there was no error by the Court of Appeal in referring to a case such as *Australian Mutual Provident Society v Goulden*[16] (CA [73]). That case can readily be understood as one in which the 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.[17] A State provision (or a Territory provision) which inhibited life insurers would "alter impair or detract from" that implicit negative proposition and would not be "capable of operating concurrently" with the *Life Insurance Act*.

33. The fact that s 46 of the Land Grant Act is not a "constitutional provision" (AS [15]) does not detract from the application of these two propositions drawn from the Same-Sex Marriage Case. They do not depend on the quasi-constitutional status of s 28 of the Self-Government Act. They turn on matters inherent in the wording common to both that provision and s 46 of the Land Grant Act. They reflect the ordinary meaning of the words "capable of operating concurrently", the effect of which is not lessened by the words "capable of" which are common to both provisions (cf AS [17]). Moreover, at a more fundamental level, so far as the application of laws on Aboriginal Land is concerned, s 46 of the Land Grant Act serves much the same purpose as s 28 of the Self-Government Act. It regulates the application of the laws of the Jervis Bay Territory on that land, but doing so on the presupposition that Federal law is the superior law which is not to be undermined.

34. Similarly, the fact that s 46 of the Land Grant Act "plainly envisages that other laws applicable in the [Jervis Bay Territory] may apply to Aboriginal Land" does not

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[16] (1986) 160 CLR 330.

[17] (1986) 160 CLR 330 at 336–337.

distinguish it in any relevant way from s 28 of the Self-Government Act (cf ACT [24]). Both provisions envisage that laws applicable in the ACT other than those made by the Federal Parliament may apply — namely, those which are "capable of operating concurrently".

35. Nor can s 46 be distinguished from s 28 of the Self-Government Act by reference to the effect of a conclusion of inconsistency under either provision (cf ACT [47]). In the case of both, the law which is incapable of concurrent operation has no effect to that extent. That is stated expressly in s 28 of the Self-Government Act and is implicit in s 46 of the Land Grant Act.

36. Further, contrary to AS [15], it is not correct to describe s 46 as directed to the operation of two ordinary Federal Acts (see also ACT [46]). It is directed to the operation of the laws in force in the Jervis Bay Territory. That has, at all times, included laws of a subordinate character to ordinary Federal Acts. When s 46 of the Land Grant Act was made, the Jervis Bay Act did not contain s 4A (as it was enacted before ACT self-government). Instead, s 4(2) provided:

> The territory so accepted shall be annexed to and be deemed to form part of the Australian Capital Territory, to the intent that all laws ordinances and regulations (whether made before or after the commencement of this Act), which are from time to time in force in the Australian Capital Territory shall so far as applicable apply to and be in force in the territory so accepted.

The "laws" to which s 46 of the Land Grant Act is directed have thus always included ordinances made by the Governor-General under s 12 of the *Seat of Government (Administration) Act 1910* (Cth). So, too, s 4A of the Jervis Bay Act now provides for the application of legislation passed by the ACT Legislative Assembly. Accordingly, as a matter of substance, s 46 of the Land Grant Act is, and has always been, directed to the relationship between laws enacted by different law-making bodies. That is so notwithstanding the complicated taxonomy developed in ACT [9]–[29].[18]

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[18] See similarly *Rizeq v Western Australia* (2017) 91 ALJR 707 at [81]; 344 ALR 421: "The expression 'surrogate federal law' has sometimes been used to describe the text as so "picked up", but the adjective 'surrogate' adds nothing to the analysis. ... [Section] 79 so operating does not alter the meaning of the text of the State law other than to make that text applicable to a federal court exercising jurisdiction in the State even though the State law on its proper construction applies only to a State court."

37. Finally, nothing in the analysis above is contradicted by the passage from the Explanatory Memorandum to the Bill enacted as the Land Grant Act quoted at AS [19][19] (see also ACT [25]). The question remains, at all times, the construction of the "specific legislative enactment in [the Land Grant] Act" referred to in that passage. In any event, it is trite that the subjective understanding of the Minister who introduced a Bill of the construction of its terms is not relevant to the true construction of those terms when enacted.[20]

(b) Concurrent operation

38. In light of the above, the Court of Appeal was correct to conclude that the provisions of the Residential Tenancies Act identified by that Court are not capable of concurrent operation with the Land Grant Act. In short, the power to grant a lease conferred by s 38(2) of the Land Grant Act should, as the Court of Appeal held, be construed "as including the power to determine for itself the terms of those leases and not subject to qualification by provisions which would alter the terms of those leases" (CA [74]). The latter part of this statement is the kind of implicit negative proposition to which the submissions above refer, similar to that recognised in *Goulden*.[21] More generally, the relevant terms of the Residential Tenancies Act do alter, impair and detract from the operation of the Land Grant Act.

39. *First*, for the reasons given by the Court of Appeal at CA [65]–[70], the powers of the Council to deal with Aboriginal Land are properly to be regarded as wholly *statutory* in origin. As explained by the Court, the absence from the Land Grant Act of any reference to the proprietary rights of the Council as being "an estate in fee simple", but the presence of that language in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), is significant (cf AS [23]). The Court of Appeal rightly described the reference in the Explanatory Memorandum to the Bill enacted as the Land Grant Act, relied upon

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[19] Second Reading Speech to the Aboriginal Land Grant (Jervis Bay Territory) Bill 1986 (Cth), House of Representatives, *Parliamentary Debates* (Hansard), 29 May 1986, 4193 (Mr Holding, Minister for Aboriginal Affairs).

[20] See, eg, *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at [31]–[32].

[21] See also *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 260–261.

at AS [24], as "a useful shorthand expression describing the political purpose of the legislation but not useful as a description of the actual legal effect of the Act" (CA [69]).

40. In any event, debate as to the *origin* of the Council's rights to deal with Aboriginal Land is somewhat arid in the present context. The simple fact is that s 38(1) of the Land Grant Act prohibits any dealing except as provided by Pt V and then other provisions of Pt V expressly permit certain dealings. In particular, s 38(2) expressly empowers the Council to grant leases of Aboriginal Land to a certain, limited class of persons. The apparent submission at AS [22] (see also ACT [56]) that this is not a statutory source of power is contrary to the text of s 38(2), as well as that of ss 13(3) and 40 (as noted in CA [75]). So, too, the other provisions of Pt V which *direct* the Council to make certain dealings with land carry with them a conferral of power to comply with such direction: that is both as a result of s 7(1) and implied within the terms of those other provisions of Pt V in any event.[22] The Council is a statutory corporation which has, and only has, the powers given to it by statute, and which operates under that statute.[23]

41. The significant point for present purposes is that, as the Court of Appeal concluded at CA [75], the legislative scheme cannot properly be described as one in which the Council is an ordinary "landowner" (cf AS [25(a)], [27(a)], [27(b)]). Rather, it is a detailed scheme by which the Council's powers to deal with land, and the restrictions on those powers, are carefully delimited.

42. The appellant and the ACT concede that s 41 of the Land Grant Act is inconsistent with the standard term in sched 1 to the Residential Tenancies Act preventing sub-leases without consent of the landlord (AS [26]; ACT [33]–[36], [73]). But s 41 cannot be divorced in this way from the rest of Pt V. It is an inherent part of the scheme of powers and restrictions which the application of the relevant provisions of the Residential Tenancies Act would alter.

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[22] *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 301–302; *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at [16]; *Egan v Willis* (1998) 195 CLR 424 at [83]; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [48]. See also *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* (2008) 166 FCR 108 (FC) at [37]–[38].

[23] *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [54].

43. *Secondly*, the nature of the property dealings authorised by the Land Grant Act sit uneasily with the prospect of legislative alteration of the terms of those leases, as explained by the Court of Appeal at CA [76]–[78] and [81]. The length of these terms reflects the aim of the Land Grant Act to provide "secure tenure" and "secure[ ] the land to be granted for present and future generations of Aboriginal people at Wreck Bay".[24]

44. In particular:

(a) Leases may only be granted by the Council to registered members, to the Commonwealth, or an authority, unless consented to by the Minister (s 38(2)). The same applies to sub-leases (s 41).

(b) The terms of the leases envisaged are very long-term — a 99-year term is mandated for persons in occupation of land immediately before it became Aboriginal Land (s 40), and other leases may be granted for up to 99 years for residential purposes (s 38(3)(a)).

(c) Existing occupiers at the time of the land grant were not be permitted to be required to make any payment in respect of a building or improvements erected solely at their expense, but could be required (if approved by the Minister) to make payments in respect of buildings and improvements in amounts amounting in the aggregate to the value of those building/improvements at the time at which the land became Aboriginal land (s 40). The sorts of payments thus prohibited and permitted are of a capital nature, implying something approaching ownership in the nature of the leasehold interest.

(d) Something similar is implied in the provisions for inheritance to relatives of members of "the benefit, or a share in the benefit, of a lease or sub-lease of Aboriginal Land for use for domestic purposes" (s 42).

45. Leases of the length provided for sit uneasily with the specific requirements of cl 55 of sched 1 to the Residential Tenancies Act. Thus cl 55(1) requires the lessor to "maintain the premises in a reasonable state of repair having regard to their condition at the commencement of the tenancy agreement". The nature of that obligation over a 99-year lease is radically different from that over a typical residential tenancy term. Conversely,

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[24] Second Reading Speech to the Aboriginal Land Grant (Jervis Bay Territory) Bill 1986 (Cth), House of Representatives, *Parliamentary Debates* (Hansard), 29 May 1986, 4193 (Mr Holding, Minister for Aboriginal Affairs.

much the same point may be made about the equivalent obligation on the tenant imposed by cl 64 "to leave the premises ... in substantially the same condition as the premises were in at the commencement of the tenancy agreement, fair wear and tear excepted". That might impose an obligation on the great-grandchild of the original tenant, to whom the tenancy has been transmitted in accordance with s 42 of the Land Grant Act, to restore the premises to the condition in which they were nearly a century earlier.

46. The length of the leases also sits uneasily with other aspects of the Residential Tenancies Act. Thus the prohibition in s 20 of the Residential Tenancies Act against a lessor requiring as a bond an amount greater than the first four weeks of rent is singularly inapt to a lease which may last 99 years. Similarly, both the length of the leases, and the express provision in s 42 of the Land Grant Act permitting the transmission by will or under intestacy law of "a share in the benefit" of a lease of Aboriginal Land, is inconsistent with s 127 of the Residential Tenancies Act, which provides for a sole surviving tenant to remain as the sole tenant.

47. Contrary to AS [27(d)], to identify these matters is not to fall into the error identified in *Australian Education Union v Department of Education*[25] or *Certain Lloyd's Underwriters v Cross*.[26] The error identified there is to posit a policy goal in an *a priori* way, ie from *outside* the statutory text or extrinsic material to which it is permissible to have regard, and then to construe the statute in accordance with that policy goal despite its having no basis in the text or extrinsic material. No *a priori* assumption as to the policy goal of the Land Grant Act is involved in the submissions above. The reasoning proceeds from the features of the Land Grant Act itself.

48. *Thirdly*, as the Court of Appeal explained at CA [79], the degree of community control over the activities of the Council supports a construction which gives the Council the greatest ability to set terms for community members. That is likewise consistent with the fact that the functions of the Council include exercising its powers as owner of Aboriginal Land "for the benefit of the members of the Community" (s 6(b)). Other relevant functions include acting "to engage in land use planning in relation to Aboriginal Land" (s 6(cd)) and "to manage and maintain Aboriginal Land" (s 6(ce)).

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[25] (2012) 248 CLR 1 at [28].

[26] (2012) 248 CLR 378 at [26].

Contrary to AS [27(c)], the Court of Appeal was correct to identify the degree of community control as supporting the conclusion to which it came.

49. To take one example, suppose that it were concluded by the Council that, so as to be able to fund capital works for the benefit of the community from time to time, it would include a term in leases allowing it, with a certain amount of notice, to require the payment of three months' rent in advance from all tenants. Suppose, indeed, that it took that decision after a motion at a general meeting. Yet cl 28 of sched 1 to the Residential Tenancies Act would prohibit it.

50. To take another example, suppose it were decided by the Council that it, rather than tenants, would be responsible for charges associated with the consumption of services to the premises, including electricity, gas, water and telephone. Yet a term to that effect in leases would be contrary to cl 46. Conversely, suppose the Council decided (again, let it be supposed, following a motion at a general meeting), that it was important for community safety that all leases require tenants to continue a telephone service. That would be contrary to cl 47.

51. To take yet another example, suppose it were decided by the Council that, given the lengthy lease terms, leases should permit it to require the tenant to make certain alterations, improvements or renovations to the premises from time to time, perhaps with some subsidy by the Council. That term would be contrary to cl 65.

52. Finally, as the number of residential dwellings in the village is insufficient to house all of the members of the Council (SC [8]), the Council may decide that leases should permit it to terminate a lease in various circumstances involving unsatisfactory behaviour by the tenant, so as to be more able to house better behaving members of the Council. The Council's ability to do that would be dramatically restricted by Pt 4 and cll 92–95 of sched 1 to the Residential Tenancies Act.

53. All of these possibilities illustrate how the relationship between the Council is not one of ordinary landlord and tenant. They illustrate the nature of the relationship between the Council and its members, and how that may vary from time to time. Whether or not there is an obligation on the Council or on the members to maintain the property in a particular state — or, conversely, to give it back to the Council at the end of the lease in a particular state — is simply one part of this relationship.

54. There is a substantial difference between the underpinnings of the economic/ownership model of the Residential Tenancies Act on the one hand and the Land Grant Act on the other. Landlord and tenant legislation assumes a multiplicity of landlords, all of whom are looking to maximise profit and are unrelated to their tenants, and seeks to reach a balance between such landlords and the desire of their tenants to have security and comfort. The Land Grant Act concerns a single landlord, which is constitutionally related to its tenants, and which is not intent on maximising profits other than for the collective benefit of its members/tenants. The mechanism for achieving the balance is already provided within the constitutional structure.

55. *Fourthly*, other limitations on the Council's powers are inconsistent with the Council being under the kind of obligations imposed by the terms in cll 54–60 of sched 1 to the Residential Tenancies Act. Thus, s 7(3) precludes the Council, except with the approval of the Minister, entering into a contract involving the payment by the Council of $100,000 (or any higher prescribed amount). The Council could thus not fulfil any repair obligation which would cost more than the specified sum without Ministerial approval. That does not merely manifest an incapacity to operate concurrently if the Minister declines to give permission. It reveals why the imposition of an unqualified obligation on the Council of the kind required by the Residential Tenancies Act is inconsistent, in a fundamental way, with the scheme in the Land Grant Act setting out the Council's powers and restrictions on those powers.

56. More generally, the Council's other statutory obligations specified in s 6, such as to take action for the benefit of the Community in relation to housing, social welfare, education, training or health needs (s 6(ca)) and provide community services to the members of the Community (s 6(cb)), may tend against the expenditure of Council funds on strict compliance with the obligations imposed by the relevant provisions of the Residential Tenancies Act. A requirement to spend Council resources on maintaining housing — as opposed to, say, expecting residents to do that themselves — necessarily comes at the cost of the Council being unable to spend money on other matters which its membership might wish to prioritise.

57. To be clear, none of these submissions proceed on the premise, or support the conclusion, that the Council's power to grant leases conferred by s 38(2) is necessarily free from "the ordinary law of landlord and tenant" (cf AS [25(a)]). No doubt s 38(2) was enacted against the background of the common law of contract and property, including, to the extent they may be applicable, implied covenants between landlord and

tenant (cf AS [25(b)]). It is the parties' ability to modify any such implied covenants by express agreement which means that they sit entirely in harmony with the Land Grant Act.[27] Thus, to the extent that a particular applicable implied covenant were thought to be inapt to a 99-year lease, it could be modified by agreement. This stands in stark contrast to legislatively imposed terms, such as those imposed by the Residential Tenancies Act.

58. For the reasons above, when understood in its proper context, s 38(2) *does* create a special leasing power the efficacy of which *would* be compromised by application of legislative imposed terms such as those imposed by the Residential Tenancies Act (cf AS [25(a)]). At the least, it would be comprised by application of the provisions of the Residential Tenancies Act at issue here.

59. The appellant and the Attorney-General for the ACT err in seeking to confine attention to situations where the Land Grant Act and the Residential Tenancies Act create conflicting obligations which cannot be simultaneously obeyed (see AS [17], ACT [62]). So much is evidenced by the appellant's submission that "[t]he implication of a lease term requiring repairs by the landlord (pursuant to s 8 of the RT Act) does not create any inconsistent right or obligation" (AS [25(c)]). It is likewise evidenced by the concession concerning the sub-leasing provisions (AS [26]; ACT [33]–[36], [73]). This focus reflects too narrow an approach to the notion of capacity for concurrent operation contained within s 46 of the Land Grant Act. For the reasons explained above, to the extent that the Residential Tenancies Act alters, impairs or detracts from the operation of the Land Grant Act, it cannot have concurrent operation.

60. That is likewise the answer to the submission that s 38(2) of the Residential Tenancies Act itself only identifies the persons to whom and purposes for which leases may be granted and that other provisions are restrictive rather than permissive (AS [26(b)]; ACT [57], [64]). It is the *absence* of any restrictions beyond those for which the Land Grant Act makes provision, in the context of the other matters identified above, which supports the construction for which the Council contends.

61. Finally, no weight should be placed on the submission at ACT [76]–[77] that the logical consequence of the Council's success would be that the Residential Tenancies Act

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[27] *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 (CA) at 218. See eg *Project Blue Moony Pty Ltd v Fairway Trading Pty Ltd* (2000) ANZ Conv R 628 (FCAFC); *Carpet Fashion Pty Ltd v Forma Holdings Pty Ltd* (2005) NSW Conv R 56-116 (NSWCA).

cannot apply at all to Aboriginal Land in the Jervis Bay Territory. For one thing, that is not a necessary result. But even if it were to be the case, that is not a result which should be strained against. It would merely be a reflection of the fact, evident from the Land Grant Act, that Aboriginal Land under that Act generally, and leases of Aboriginal Land in particular, exist in a quite different context from those outside the Land Grant Act. That is not a result which requires "clear and unambiguous language" (cf ACT [77]). No fundamental common law (or indeed statutory) right is at issue which would attract the principle of legality. On the contrary, if anything, the degree of self-management granted to the Aboriginal community of Jervis Bay should be construed generously.

(c) Conclusion

61. For these reasons, the Court of Appeal was correct to answer the questions in the amended special case in the way that it did. The appeal should be dismissed with costs.

PART VI: CONTENTION/CROSS-APPEAL

62. There is no notice of contention or cross-appeal.

PART VII: ESTIMATE

63. The first respondent estimates that approximately 1.5 hours will be needed for presentation of oral argument.

Dated: 20 June 2018

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