HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

DOUGLAS WILSON APPLICANT

AND

MICHAEL ANDERSON & ORS RESPONDENTS

Wilson v Anderson [2002] HCA 29
8 August 2002
S101/2000

ORDER

1. *Special leave to appeal granted and the appeal treated as instituted and heard instanter.*

2. *Order 1 of the orders made by the Full Court of the Federal Court on 5 April 2000 is set aside and in its place order that the questions for separate decision be answered as follows:*

   Question (a):

   By virtue only of

   i. *the Western Lands Act 1901 (NSW); and*

   ii. *the regulations thereunder, as in force at the time of the grant of the Lease;*

   did the Lease confer upon the lessee under the Lease a right to exclusive possession of the leased land?

   Question (b):

   If the answer to question (a) is "No", by virtue of

i. the Western Lands Act 1901 (NSW);

ii. the regulations thereunder, as in force at the time of the grant of the Lease; and

iii. one or more of the terms and conditions of the Lease;

did the Lease confer upon the lessee under the Lease a right to exclusive possession of the leased land?

Answer to questions (a) and (b)

Save to say that the Lease conferred upon the lessee a right of exclusive possession over the land, the subject of the Lease, as the expression "a right of exclusive possession over … land" is used in s 23B(2)(c)(viii) and s 248A of the Native Title Act 1993 (Cth), it is inappropriate to answer questions (a) and (b).

Question (c)

If the answer to question (a) or question (b) is "Yes", were any native title rights the exercise of which involved the presence on the leased land by the holders of the native title:

i. extinguished by the grant of the Lease; or alternatively

ii. suspended upon the grant of the Lease for the duration of the Lease?

Answer

Save to say that by operation of ss 23B and 23E of the Native Title Act 1993 (Cth) and s 20 of the Native Title (New South Wales) Act 1994 (NSW), the grant of the Lease extinguished any native title in relation to the land covered by the Lease and the extinguishment is to be taken to have happened when the Lease was granted, it is inappropriate to answer this question.

3. *Otherwise the appeal is dismissed.*

4. *First respondent to pay the appellant's costs of the appeal in this Court.*

On appeal from the Federal Court of Australia

Representation:

D F Jackson QC with J M C Emmerig for the applicant (instructed by Blake Dawson Waldron)

C J Birch SC with J J T Loofs for the first respondent (instructed by Craddock Murray Neumann)

V B Hughston with S B Lloyd for the second respondent (instructed by Crown Solicitor for New South Wales)

J Basten QC with R W Blowes for the third respondent (instructed by Chalk & Fitzgerald)

Intervener:

T I Pauling QC, Solicitor-General for the Northern Territory with R J Webb intervening on behalf of the Attorney-General for the Northern Territory (instructed by Solicitor for the Northern Territory)

CATCHWORDS

Wilson v Anderson

Aboriginals – Native title – Extinguishment – Application for determination of native title to land and waters – Claim area partly subject to lease granted "in perpetuity" under *Western Lands Act* 1901 (NSW), s 23 – Whether "lease in perpetuity" conferred upon lessee a right of exclusive possession over leased land – Whether grant of lease extinguished any native title in relation to land covered by lease – Operation of Div 2B of Pt 2 of *Native Title Act* 1993 (Cth) and Pt 4 of *Native Title (New South Wales) Act* 1994 (NSW) – Whether grant of lease a "previous exclusive possession act" under *Native Title Act* 1993 (Cth), s 23B.

Property – Real property – "Lease in perpetuity" – Operation of *Real Property Act* 1900 (NSW) in respect of perpetual leases – Historical development of statutory "lease in perpetuity" and other species of perpetual tenure as substitutes for Crown grant of determinable fee simple – Whether imposition of conditions and tenurial incidents on grantee of "lease in perpetuity" denied to grantee right of exclusive possession.

Practice and procedure – Observations on appropriateness of practice of reserving for separate determination questions respecting alleged extinguishment of native title.

Words and phrases – "previous exclusive possession act", "lease".

Native Title Act 1993 (Cth), ss 23B, 23E, 242(1), 248A.
Racial Discrimination Act 1975 (Cth).
Crown Lands Act 1884 (NSW).
Real Property Act 1900 (NSW).
Western Lands Act 1901 (NSW), ss 18, 23, Sched A.
Crown Lands Consolidation Act 1913 (NSW).
Native Title (New South Wales) Act 1994 (NSW), s 20.

1 GLEESON CJ. This is an application for special leave to appeal from a decision of the Full Court of the Federal Court[1]. On the hearing of the application there was full argument on the merits of the proposed appeal.

2 The central issue is whether native title rights and interests claimed in respect of land in the Western Division of New South Wales, assuming they otherwise existed, were extinguished in consequence of the grant in 1955 (with effect from 31 August 1953) of a lease in perpetuity pursuant to s 23 of the *Western Lands Act* 1901 (NSW) ("the Western Lands Act").

3 The nature of the proceedings, the facts, and the relevant statutory provisions are set out in the joint judgment of Gaudron, Gummow and Hayne JJ ("the joint judgment"). For the reasons there explained, the question to be addressed is whether the lease conferred upon the lessee a right of exclusive possession over the subject land, within the meaning of s 23B(2)(viii) and s 248A of the *Native Title Act* 1993 (Cth) ("the NTA"). If it did, then by operation of ss 23B and 23E of the NTA and s 20 of the *Native Title (New South Wales) Act* 1994 (NSW), the grant of the lease was a "previous exclusive possession act", it extinguished native title in relation to the subject land, and the extinguishment is taken to have happened when the act was done. I would answer the question in the affirmative.

4 The legislation governing the case was enacted, and amended, in response to decisions of this Court, notably *Mabo v Queensland [No 2]*[2] and *Wik Peoples v Queensland*[3]. In *Wik*, Brennan CJ explained the principles as to extinguishment that were stated in *Mabo [No 2]*, and taken up in legislation. He said (omitting references)[4]:

> "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'. 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. 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

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1 *Anderson v Wilson* (2000) 97 FCR 453.

2 (1992) 175 CLR 1.

3 (1996) 187 CLR 1.

4 (1996) 187 CLR 1 at 84-85.

> 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. 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.
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> 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'. Such an intention is not to be collected by inquiry 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.
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> 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."

5 In the majority judgment in *Western Australia v Ward*[5] there is a discussion, consistent with what Brennan CJ said in *Wik*, of the subject of "clear and plain intention".

6 Where, as in the present case, the Court is considering an argument as to whether there has been extinguishment by reason of the second of the three kinds of law or act referred to by Brennan CJ then, as his Honour said, and as was repeated by the majority in *Ward*, no question arises as to whether, at the time of the act said to extinguish native title, there was any specific intention to extinguish such title, or even as to whether anyone adverted to the existence of native title. In such a case, the test is one of inconsistency. If it is satisfied, the extinguishment results from the inconsistency, not from the existence of a purpose of abrogating native title rights or interests.

7 That is not to say that matters of intention are irrelevant. A decision as to whether an act, such as the grant of an estate in land, creates rights inconsistent

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5 [2002] HCA 28 at [78].

with native title rights and interests, may turn upon a question of construction of an instrument, or of a statute pursuant to which an instrument was made. Questions of construction and interpretation are bound up with the matter of intention. But it is necessary to keep in mind what intention involves, and the intention that is relevant.

8 The concepts of meaning and intention are related, but distinct. It is not presently necessary to distinguish between construction and interpretation[6]. The words are often used interchangeably. In the construction or interpretation of a statute, the object of a court is to ascertain, and give effect to, the will of Parliament. Courts commonly refer to the "intention of the legislature". This has been described as a "very slippery phrase"[7], but it reflects the constitutional relationship between the legislature and the judiciary. Parliament itself uses the word "intention", in the *Acts Interpretation Act* 1901 (Cth), as a focal point for reference in construing its enactments. Certain words and phrases are said to have a certain meaning unless a contrary intention is manifested in a particular Act. Parliament manifests its intention by the use of language, and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the legislative will. This is a familiar judicial exercise. The law of contract seeks to give effect to the common intention of the parties to a contract. But the test is objective and impersonal. The common intention is to be ascertained by reference to what a reasonable person would understand by the language used by the parties to express their agreement[8]. If the contract is in the form of a document, then it is the meaning that the document would convey to a reasonable person that matters. The reason for this appears most clearly in the case of commercial contracts. Many such contracts pass through a succession of hands in the course of trade, and the rights and liabilities of parties other than the original contracting parties are governed by them. As Lord Devlin observed, writing extra-judicially, it is only the document that can speak to the third person[9]. In the case of a will, or a deed, or other written instrument, the object of a court is to discover, and give effect to, the intention of the testator, or parties;

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6 cf *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 78 per Isaacs J.

7 *Salomon v Salomon & Co* [1897] AC 22 at 38 per Lord Watson.

8 *Gissing v Gissing* [1971] AC 886 at 906 per Lord Diplock; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 at 502 per Lord Diplock; *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540.

9 Devlin, *The Enforcement of Morals*, (1965) at 44.

but it is in the meaning of the instrument, discovered according to established principles of construction, that such intention is found.

9 This is not to say that the exercise is formal and literalistic. On the contrary, common law and statutory principles of construction frequently demand consideration of background, purpose and object, surrounding circumstances, and other matters which may throw light on the meaning of unclear language[10]. And there are presumptions which may be called in aid to resolve uncertainty.

10 This is the context in which references to intention are made.

11 In the present case, the question for decision is whether an instrument of title to land, issued pursuant to a statutory power, conferred a certain right. The answer to that question might directly affect, not only the original title-holder, but also transferees, mortgagees, and others who might later need to enforce the rights conferred by the instrument. And it might indirectly affect others. If there is a right of exclusive possession in the lessee, then plainly that has consequences for persons the lessee might wish to exclude; and for the means by which such exclusion might be achieved. As the passage from the judgment of Brennan CJ shows, this being a case in which an act is said to fall within category (ii) of the three categories mentioned, the argument is about whether the instrument conferred a right of exclusive possession, which is a right inconsistent with the continued right to enjoy native title. To the extent that there may be uncertainty about that matter, then it is necessary to decide the meaning of the instrument of title and the legislation pursuant to which it was issued.

12 It is consistent with the decision in *Wik* that, just as a grant of an estate in fee simple of a parcel of land in a rural area would extinguish native title, so also would a grant of a residential tenancy of land on which there was a dwelling house, where the instrument of lease conferred a right of exclusive possession on the tenant. Depending on the circumstances, it may be unlikely in the extreme that either party to the lease paid any attention to the subject of native title. It is not suggested that, in deciding whether a grant of an estate in fee simple extinguishes native title, it is relevant to enquire whether the parties to the grant addressed their minds to the position of people who might have had native title rights and interests in the land. What is relevant is that, objectively considered, there was an intention to create an estate that was inconsistent in its incidents with continuing native title rights and interests. The same applies to the creation of a leasehold estate which confers a right of exclusive possession in the lessee. That statement may appear tautologous. But the decision in *Wik* shows that

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10 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; [1998] 1 All ER 98.

"lease", like "intention", can be a slippery word. In a straightforward case, such as a residential tenancy, it may be easy to conclude that a lessee was intended to have a right of exclusive possession. Such a conclusion would then lead directly to the assignment of the case to category (ii) of Brennan CJ's three categories.

13 In *Wik*, some members of the Court, in dealing with questions of construction of statutory provisions, and instruments of title issued under those provisions, for the purpose of considering whether rights of exclusive possession were conferred, took account of circumstances, including the situation of Aboriginal people, as throwing light on intention. For example, Toohey J, after referring to colonial history, and relations between pastoral activities and Aboriginal people, said[11]:

> "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."

14 A majority of the Court in *Wik* accepted that if, as a matter of construction, the leases there in question conferred a right of exclusive possession, native title was extinguished[12]. Partly because of the size and location of the subject land (one holding was 1,119 square miles in area; another was 535 square miles[13]), the consequences for Aboriginal people were regarded by some members of the Court as having a bearing upon the question of construction[14]. But, insofar as there was a question of intention to be decided, the question was whether the intention was that the lessees should have exclusive possession of the land.

15 It was not submitted by any party, in the present case, that the Court should refuse to follow *Wik*. Any such submission would have faced the obvious difficulty that Parliament has enacted legislation in response to, and on the basis of the principles accepted and applied in, *Wik*. In *Brodie v Singleton Shire*

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11 (1996) 187 CLR 1 at 120.

12 (1996) 187 CLR 1 at 84-86 per Brennan CJ, 100 per Dawson J, 155 per Gaudron J, 167 per McHugh J, 176 per Gummow J.

13 (1996) 187 CLR 1 at 71.

14 eg (1996) 187 CLR 1 at 154 per Gaudron J.

Council[15] I stated my views about the importance of adherence to precedent in cases where the legislature has acted on the faith of judicial decisions. Some of the considerations that applied there operate even more powerfully in the case of *Wik*.

16 *Wik* decided that, having regard to the legislation under which they were granted, and the terms and conditions of the instruments of lease, certain pastoral leases did not confer upon the lessees a right of exclusive possession.

17 The Court is presently concerned with different legislation, and different instruments of lease. Uninformed by *Wik*, I would readily have come to the conclusion that the lease in perpetuity presently in question conferred a right of exclusive possession. The decision in *Wik* does not require any different conclusion.

18 The nature of the incidents of a statutory lease in perpetuity under the Western Lands Act was considered by the Court of Appeal of New South Wales in *Minister for Lands and Forests v McPherson*[16]. The issue in that case concerned whether a lessee could obtain relief against forfeiture. The argument against such relief was that the statute embodied a self-contained scheme, and that the incidents of a statutory lease were to be found within the four corners of the statute. In rejecting that argument, Kirby P, with whom Meagher JA agreed, said: "In the case of an interest called a 'lease', long known to the law, the mere fact that it also exists under a statute will not confine its incidents exclusively to those contained in the statute."[17] Later, he said: "Whilst the 'leasehold' envisaged by the Act has particular incidents, it remained a 'leasehold'."[18] Mahoney JA, referring to earlier legislation which was followed by the Western Lands Act, said that "the rights described as 'lease' in the 1884 Act were essentially the rights given to a lessee under a lease of land as understood under the common law"[19].

19 The decision in *Wik* makes it necessary now to approach such general statements with caution. Even so, as the joint judgment in the present case demonstrates comprehensively, the history of perpetual leases of Crown land in New South Wales shows a strong affinity between the interests granted under

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15 (2001) 75 ALJR 992; 180 ALR 145.

16 (1991) 22 NSWLR 687.

17 (1991) 22 NSWLR 687 at 696.

18 (1991) 22 NSWLR 687 at 702.

19 (1991) 22 NSWLR 687 at 707.

such leases and freehold estates. There is nothing surprising or novel about a conclusion that the incidents of a statutory lease are not exhaustively defined by statute, and may include the incidents of a lease as provided by the common law. Exactly such a conclusion underlay the decision of the Privy Council in *Southern Centre of Theosophy Inc v South Australia*[20]. That case concerned a perpetual lease of land pursuant to South Australian Crown lands legislation. The issue was as to the application to the land of the common law doctrine of accretion. The land was bordered by an inland lake. An area of about 20 acres was added to the land by the deposit of soil and sand resulting from longshore drift, the retreat of water, and wind-blown sand. The State of South Australia argued, unsuccessfully, that the doctrine of accretion did not apply to an interest in land granted pursuant to a statutory scheme[21]. Reliance was placed on passages in the judgment of this Court in *Davies v Littlejohn*[22] referring to the statutory basis of interests in land created under Crown lands legislation. Lord Wilberforce, who delivered the judgment of the Privy Council, saw no reason why the doctrine of accretion should not apply to the leasehold interest in question[23]. That decision was not referred to either in argument, or in the judgments, in the later case of *McPherson*, but it reached that same conclusion with respect to the common law doctrine of accretion as was reached in *McPherson* with respect to the equitable doctrine of relief against forfeiture. Essential to both decisions was a finding that the incidents of a statutory perpetual leasehold were not exhaustively defined by the statute.

20 Section 23 of the Western Lands Act, pursuant to which the lease in the present case was granted, in the form it took at the time of the grant, empowered the Minister to grant leases of Crown lands as leases in perpetuity or for a term. The Act enabled leases for a term to be extended to leases in perpetuity (s 18E). Such an extension had occurred in the case of the lease in *McPherson*[24]. Such leases might be of land set apart for grazing (s 19B), or of land set apart for agriculture, or for agriculture and grazing combined, or for mixed farming or any similar purposes (s 19C). It may be doubted that the juristic nature of the leases referred to in the opening words of s 23 would vary, in relation to the matter of rights of exclusive possession, according to whether they were perpetual or for a term, but that issue does not arise for decision. It is also unlikely that their relevant juristic nature would vary according to whether the subject land had

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20 [1982] AC 706.

21 [1982] AC 706 at 711.

22 (1923) 34 CLR 174.

23 [1982] AC 706 at 716.

24 (1991) 22 NSWLR 687 at 705.

been set apart for grazing, agriculture, or mixed farming. But the various possibilities emphasise the difference between the lease holding presently in contemplation and those of the lessees in *Wik.*

21 As the joint judgment shows, when regard is had to the genesis of the interest in land referred to in the Western Lands Act as a lease in perpetuity, and its affinity with freehold title, the inference that it was the intention of the legislation that the Minister should be empowered to grant leases which conferred upon lessees a right to exclusive possession of land is compelling. *Wik* does not deny the relevance of the use by the statute of the term "lease". But it requires a court to look further. In the present case, when one considers the object and purpose of the legislation, the primary impression created by the statutory language is not weakened; it is strongly reinforced. And the language of the instrument of lease, which uses the language of demise historically associated with the conferring of a right of exclusive possession, read in the light of the statutory power and purpose, evinces the same intention.

22 I agree with the orders proposed by Gaudron, Gummow and Hayne JJ.

23 GAUDRON, GUMMOW AND HAYNE JJ. This application for special leave to appeal arises from the determination by the Full Court of the Federal Court (Black CJ, Beaumont and Sackville JJ)[25] of several questions reserved for separate decision by that Full Court. This Court heard full argument on the special leave application.

The proceedings in the Federal Court

24 Section 81 of the *Native Title Act* 1993 (Cth) ("the NTA") confers jurisdiction, exclusive of other courts except the High Court, on the Federal Court to hear and determine applications relating to native title. The first respondent, Mr Anderson, instituted for and on behalf of the Euahlay-i Dixon Clan proceedings in the Federal Court pursuant to ss 13 and 61 of the NTA for a determination of native title. The native title rights and interests sought to be established by the determination were expressed in the application as an entitlement of the Euahlay-i Dixon Clan "as against the whole world to the use, possession and enjoyment of their country, including all waters and land within the area of the application, subject to and in accordance with the customs and laws of the Euahlay-i Dixon clans"[26].

25 The application for determination was dated 18 July 1996. It covered certain land under the *Western Lands Act* 1901 (NSW) ("the Western Lands Act") and within the Western Division of New South Wales ("the claim area"). New South Wales was first divided into three Divisions by s 8 of the *Crown Lands Act* 1884 (NSW) ("the 1884 Act") and the Western Division later fell under the distinct provisions of the Western Lands Act. The tripartite division was continued, after the repeal of the 1884 Act, by s 7 of the *Crown Lands Consolidation Act* 1913 (NSW) ("the Consolidation Act")[27]. The total area of the

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25 (2000) 97 FCR 453.

26 cf *Western Australia v Ward* [2002] HCA 28 at [51]-[53].

27 The Consolidation Act was repealed by s 185 of the *Crown Lands Act* 1989 (NSW), but the Western Division is continued under the Western Lands Act and the *Western Lands (Crown Lands) Amendment Act* 1989 (NSW) deals with the interaction between the two legislative regimes. The provisions respecting the interaction between the Consolidation Act and the Western Lands Act gave rise to difficulties in construction considered by the Full Court in *Smith v Ward* (1920) 20 SR (NSW) 299. In argument in the present matter, doubt was cast upon the correctness of that decision, but the appeal may be disposed of without resolving those doubts.

Western Division is approximately 80 million acres[28]. The claim area was stated to include:

> "all Crown Land, Crown Roads, Crown Leases, waters, creeks, reserves, National Parks, State Forests, and land held by local Aboriginal Land Councils within the area of the application".

Excluded from the ambit of the application was any "land subject to freehold grants, except such grants made for the benefit of Aboriginal people".

26 The applicant, Mr Wilson, is the current lessee of Western Lands Lease 7951 ("the Lease"). The Lease was granted to Ross Patrick Smith "in perpetuity" by the Minister for Lands on behalf of the Crown in right of New South Wales and under s 23 of the Western Lands Act. The instrument was recorded and enrolled on 16 March 1955 in the Register of Western Lands Leased at the Office of the Western Lands Commissioner ("the Commissioner") at Sydney. Subsequent dealings were noted thereon, before computerisation some time after 1980. Mr Wilson acquired the Lease by transfer by way of sale in 1984. In the intervening period since the grant, there had been several transfers by way of sale and by way of mortgage to banks, with transfers by way of release by those mortgagees.

27 The area of the land the subject of the Lease ("the Leased Land") was reduced in 1965 from 11,118 acres to 11,099 acres. The Leased Land lies within the claim area. Section 18 of the Western Lands Act required the Lease to contain the covenants, reservations and exemptions set out in Sched A, "or such of the same as the Minister may deem applicable". Schedule A contained 17 such covenants, reservations and exceptions, many of which were reflected in the terms of the Lease. Clauses 3 and 4 of the Lease obliged the lessee not to use or permit the use of the Leased Land for any purpose other than grazing and cl 2 required the lessee to make his bona fide residence there.

28 The Leased Land had been located within the area of the pastoral lease granted under the 1884 Act to the Australian Mortgage Land and Finance Company Limited and known as "Angledool". After the commencement of the Western Lands Act, the holding under the 1884 Act became Western Lands Lease No 33. Section 17 of the Western Lands Act empowered the Governor to withdraw any lands held under lease whenever it might be deemed expedient to do so for the purpose of providing for settlement, such lands to be disposed of under the provisions of the statute and not to exceed one-eighth of the area of the

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28 Lang, *Crown Land in New South Wales*, (1973) at 461.

lease. In pursuance of the provisions of s 17, one-eighth of the area that was Angledool, including what became the Leased Land, was withdrawn therefrom in 1911 for the purpose of providing small holdings in accordance with the provisions of the Western Lands Act.

29 The applicant, by notice of motion dated 23 March 1999, sought orders that would avoid the mediation procedures contemplated by the NTA[29]. The applicant also sought, pursuant to par (a) of O 29 r 2 of the Federal Court Rules, an order that certain questions be answered prior to and separately from the remainder of proceedings for the determination of native title. That is to say, the separate questions were to be answered prior to any factual inquiry respecting the existence or content of any native title rights and interests in respect of the claim area.

30 On 29 April 1999, Beaumont J made the orders sought. Thereafter, the Chief Justice of the Federal Court, acting pursuant to s 20(1A) of the *Federal Court of Australia Act* 1976 (Cth), directed that the original jurisdiction of the Court be exercised by a Full Court. There was a Statement of Agreed Facts that Mr Wilson was the lessee, that the Lease was validly granted under the Western Lands Act, that Mr Anderson was a claimant under the NTA, and that the Leased Land was subject to that claim; a copy of the Lease was annexed to the statement. On these materials, the Full Court heard the matter on 18 and 19 October 1999; judgment was delivered on 5 April 2000.

31 Before turning to consider the separate questions, it is necessary to make reference to one further matter. Before the commencement of the Full Court hearing, the first respondent moved under s 64 of the NTA to amend the Native Title Application. The motion came before Hill J and on 8 May 2000, pursuant to leave granted by Hill J on that day, the application for determination of native title was amended so that it differed from the previous application in two major respects. First, the applicants in respect of the application for determination of native title were now "Michael Anderson, Roger Gordon and Eric James Dixon on behalf of the direct descendants of Ethel and Tinka Dixon of the Nyoongah Ghurradjong Murri (Granny Ethel) clan of the Euahlayi People who lived in the Narran-Warrambool area of north-western New South Wales from the 1830's to

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29 The applicant sought orders pursuant to s 86B(2) or, in the alternative, s 86C(2) of the NTA. Section 86B(1) of the NTA requires the Federal Court to refer every application under s 61 to the National Native Title Tribunal for mediation, unless an order is made under s 86B(2) that there be no mediation. Section 86C(2) provides that a party to proceedings may, at any time after three months of mediation, apply to the Federal Court for an order that mediation cease.

about 1931". Secondly, the amended application clarified the areas that are excluded from the application by expressly excluding any land or waters covered by, amongst other things:

> "(iv) an exclusive agricultural lease or an exclusive pastoral lease;
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> …
>
> (viii) any lease (other than a mining lease) that confers a right of exclusive use over particular land or waters;
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> (ix) any other exclusive possession act as defined by s 23B of the [NTA]

which was validly vested or granted on or before 23 December 1996".

The separate questions

32 The separate questions which the applicant sought to have answered were expressed in the following terms:

> "(a) By virtue only of:
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> (i) the [Western Lands Act]; and
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> (ii) the regulations thereunder, as in force at the time of the grant of the lease;
>
> did the Lease confer upon the lessee under the Lease a right to exclusive possession of the leased land?
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> (b) If the answer to the question (a) is 'No', by virtue of:
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> (i) the [Western Lands Act];
>
> (ii) the regulations thereunder, as in force at the time of the grant of the Lease; and
>
> (iii) one or more of the terms and conditions of the Lease;
>
> did the Lease confer upon the lessee under the Lease a right to exclusive possession of the leased land?
>
> (c) If the answer to question (a) or question (b) is 'Yes', were any native title rights the exercise of which involved the presence on the leased land by the holders of the native title:

(i) extinguished by the grant of the Lease; or alternatively

(ii) suspended upon the grant of the Lease for the duration of the Lease?"

33 A number of points should be made here. First, the separate questions, if answered favourably to Mr Wilson, would have the consequence of excluding, prior to trial, the Leased Land from the ambit of the determination of native title sought by the first respondent. Secondly, the separate questions are framed in the absence of factual findings respecting the existence and content of any native title rights which existed before the alleged extinguishing act, the grant of the Lease, and in a manner similar to that of the questions which arose for determination in *Wik Peoples v Queensland*[30]. Thirdly, the separate questions make no reference to the provisions of Div 2B (ss 23A-23JA) of Pt 2 of the NTA, particularly to the concept of "previous exclusive possession act" in s 23B thereof. It will be necessary to return to consider the last of these points later in these reasons.

The practice of reserving questions for separate decision

34 It is convenient now to say something respecting the practice of reserving questions for separate determination, particularly respecting alleged extinguishment of native title. The difficulties that arise when an attempt is made to determine, in the absence of adequate findings of fact, issues of extinguishment of native title are well known. They were referred to in *Wik*[31] and *Yanner v Eaton*[32] and exemplify the general considerations referred to in *Bass v Permanent Trustee Co Ltd*[33].

35 In the Full Court, Black CJ and Sackville J observed that, while the identification of separate questions for determination can be a convenient procedure, there "are dangers in adopting the procedure, especially where no findings of fact have been made and the questions are capable of different interpretations"[34]. Their Honours recognised that the procedure had been adopted

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30 (1996) 187 CLR 1.

31 (1996) 187 CLR 1 at 131, 169-171, 204-205, 210-213.

32 (1999) 201 CLR 351 at 396 [109].

33 (1999) 198 CLR 334 at 357-358 [51]-[53].

34 (2000) 97 FCR 453 at 461.

in this case as "a 'short cut' designed, depending on the outcome, 'to obviate the necessity for [a] very complex, lengthy and expensive factual inquiry'"[35].

36 In some circumstances it is possible to determine issues of extinguishment in advance of findings as to the existence and content of the anterior native title rights and interests in question. One such example is where the extinguishing act relied upon is the grant of an estate in fee simple or of a common law lease. The grant of a fee simple extinguishes all native title rights that may exist in relation to the land the subject of the grant. This is so because the estate of fee simple "does not permit of the enjoyment by anyone else of any right or interest in respect of the land unless conferred by statute, by the owner of the fee simple or by a predecessor in title"[36]. The same reasoning applies to the grant of a common law leasehold estate[37]. In both instances "the comprehensiveness of the grant precludes any question of partial extinguishment"[38].

37 Questions respecting the satisfaction of the criteria contained in s 23B of the NTA may provide a further occasion where findings of fact that establish the ambit of any native title rights and interests claimed are not required. This is because an "act"[39] which satisfies the criteria in s 23B is a "previous exclusive possession act".

38 The identification of separate questions for determination must also be considered having regard to the provisions of s 84C of the NTA which permit a party to apply on stated grounds to strike out an application filed in the Federal Court that relates to native title. Those grounds include non-compliance with the basic requirements for an application and non-compliance with s 61A of the NTA. This section, among other things, prohibits the making of a native title determination application if a previous exclusive possession act was done in relation to the area and that act either was an act attributable to the Commonwealth or it was attributable to a State or Territory and a law of the State or Territory has made provision of the kind mentioned in s 23E in relation to the act.

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35 (2000) 97 FCR 453 at 461.

36 *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43].

37 *Yanner v Eaton* (1999) 201 CLR 351 at 395-396 [108].

38 *Yanner v Eaton* (1999) 201 CLR 351 at 396 [108].

39 See s 226 of the NTA.

The Full Court decision

39 Black CJ and Sackville J delivered a joint judgment. Their Honours found it unnecessary to answer questions (a) and (b). Their Honours answered question (c) as follows[40]:

> "Strictly unnecessary to answer, but on the materials presently before the Court, it cannot be said that any native title rights, the exercise of which involved the presence on the Leased Land by the holders of the native title, were extinguished by the grant of the Lease or suspended upon the grant of the Lease for the duration of the Lease."

40 Their Honours answered question (c) as indicated on the basis that Mr Wilson had failed to show that the rights granted under the Lease were "necessarily inconsistent with all native title rights that may exist over or in relation to the Leased Land"[41].

41 Beaumont J, in a separate judgment, did not answer question (a), and answered questions (b) and (c) as follows[42]:

> "[(b)] The Lease confers upon the Lessee a right to the possession of the leased land. This right is subject to certain exceptions and reservations that are not presently material. It is not appropriate to answer this question further at this stage of the principal proceedings."

> "[(c)] The grant of the Lease extinguished such incidents of native title (as may be held to exist), as were inconsistent with the rights conferred by the Lease upon the Lessee. It is not appropriate to answer this question further at this stage of the principal proceedings."

42 The answers given by Black CJ and Sackville J, and Beaumont J, respectively allow of the possibility that some native title rights and interests may continue to exist in respect of the Leased Land and thus favour the interests of the native title claimants represented by the first respondent. The applicant now seeks from this Court answers to the separate questions which would indicate that all the then subsisting native title rights and interests in respect of the Leased Land were completely extinguished by the grant of the Lease.

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40 (2000) 97 FCR 453 at 484.

41 (2000) 97 FCR 453 at 484.

42 (2000) 97 FCR 453 at 517, 518.

The other parties to the proceedings

43 Section 84(4) of the NTA provides in this litigation for the second respondent, the Minister for Land and Water Conservation for the State of New South Wales, to be a party. The third respondent, the New South Wales Aboriginal Land Council ("the Land Council") is a body identified in s 66(3)(a) and thus is a party as an "affected person" within the meaning of s 84(3). The Attorney-General for the Northern Territory sought and was granted leave to intervene before this Court.

Division 2B of Pt 2 of the NTA
and Pt 4 of the *Native Title (New South Wales) Act* 1994 (NSW)

44 It is convenient here to note that Div 2B of Pt 2 of the NTA commenced operation on 30 September 1998 and was therefore in force when the matter was argued before the Full Court. The provisions of Div 2B are adopted, in respect of acts attributable[43] to New South Wales, by Pt 4 of the *Native Title (New South Wales) Act* 1994 (NSW) ("the State Act"). Part 4 of the State Act (added by the *Native Title (New South Wales) Amendment Act* 1998 (NSW)) also commenced operation on 30 September 1998.

45 In their joint judgment, Black CJ and Sackville J observed[44]:

> "The parties differed as to the significance of the legislative scheme contained in the NTA. [Counsel for the applicant] founded the

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43 The term "act" is defined by s 226 of the NTA so as to include, relevantly, "the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters" (sub-s (2)(c)). Section 239 provides:

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

44 (2000) 97 FCR 453 at 459.

> submissions on behalf of [the applicant] on general law principles governing the extinguishment of native title. According to [the applicant], the Lease granted in 1955 conferred exclusive possession on [the applicant's] predecessor in title. It followed that, in accordance with the principles formulated and applied by the High Court in *Wik* and *Fejo v Northern Territory*[45], any native title rights in the leasehold area had been extinguished. There was simply no occasion to have recourse to the provisions of the NTA or the [State Act]. Native title rights in the Leased Land had been extinguished long before the NTA had come into force.
>
> …
>
> [Counsel for the Land Council] submitted that the question of extinguishment of native title could not be addressed in the present case without reference to the NTA."

46 The submission by the Land Council should have been accepted. However, their Honours said that it was "clearly correct" that "native title rights in respect of particular land might have been extinguished prior to the commencement of the legislation, independently of the regime established by Pt 2, Div 2B of the NTA"[46]. Undoubtedly native title may have been extinguished before the enactment of the NTA and of Div 2B of Pt 2 in particular. But that does not entitle a court charged with the determination of a native title application under the NTA to ignore the operation of that statute (and of satellite State and Territory laws) upon the acts constituting the alleged prior extinguishment. Section 10 of the NTA states that native title is recognised and protected, in accordance with the NTA, and s 11(1) that native title cannot be extinguished contrary to the NTA.

47 Black CJ and Sackville J relied upon the statement in this Court in *Western Australia v The Commonwealth* (*Native Title Act Case*)[47] that an act which was wholly valid when it was done and was effective then to extinguish or impair native title is "unaffected" by the NTA. Their Honours continued[48]:

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45 (1998) 195 CLR 96.

46 (2000) 97 FCR 453 at 460.

47 (1995) 183 CLR 373 at 454.

48 (2000) 97 FCR 453 at 460.

"While that observation was made before the enactment of Div 2B of Pt 2, it remains true."

As a result, Black CJ and Sackville J, and Beaumont J, respectively applied the "common law" test of extinguishment exemplified in *Wik* and did not apply the provisions of Div 2B of Pt 2 of the NTA. For reasons that will become apparent, their Honours were in error in failing to deal with the operation of the NTA and the State Act. Indeed, before the Court, all parties appeared to accept that these provisions applied and they presented their arguments accordingly.

48 The scheme of Div 2B was explained in *Ward*[49]. The Division provides for the characterisation of certain "acts" as either "previous exclusive possession acts"[50] or "previous non-exclusive possession acts"[51]. That characterisation then has consequences respecting extinguishment of native title. By force of s 23C, a "previous exclusive possession act" completely extinguishes all native title in relation to land (or waters) covered by that "act". Section 23G, on the other hand, applies to "previous non-exclusive possession acts" and, in broad terms, provides for the partial extinguishment of native title. It should be emphasised that, whilst the expressions "previous exclusive possession act" and "previous non-exclusive possession act" are defined so as to apply to Commonwealth, State and Territory "acts", ss 23C and 23G only have effect in respect of "acts" attributable to the Commonwealth. Provision is then made for States and Territories to legislate, subject to satisfaction of certain conditions, to the same effect as ss 23C and 23G in respect of all or any previous exclusive or non-exclusive possession acts attributable to the State or Territory in question (ss 23E and 23I).

49 Part 4 (ss 19-25) of the State Act was enacted in accordance with the power conferred by ss 23E and 23I of the NTA. The objects of Pt 4, as set out in sub-s (1) of s 19, are:

"(a) to confirm the complete extinguishment of native title by previous exclusive possession acts attributable to the State, and

(b) to confirm the partial extinguishment of native title by previous non-exclusive possession acts attributable to the State".

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49 [2002] HCA 28 at [8]-[10], [41]-[45], [135]-[140].

50 s 23B.

51 s 23F.

Section 20 of the State Act picks up those acts characterised as "previous exclusive possession acts" under s 23B of the NTA that are attributable to the State. The section then provides, in terms that reflect s 23C of the NTA, that (sub-s (1)):

> "(a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned, and
>
> (b) the extinguishment is taken to have happened when the act was done".

Section 23 of the State Act provides, in the same terms as s 23G of the NTA, for the partial extinguishment of native title as a result of a "previous non-exclusive possession act" attributable to the State.

50 Provision for compensation in respect of extinguishment effected by a previous exclusive or non-exclusive possession act is made by s 23J of the NTA. No question of compensation arises at this stage of the litigation, but reference to s 23J demonstrates the point that questions of extinguishment and the degree thereof do not fall for consideration purely under the common law and divorced from statute. Section 23J provides:

> "*Entitlement*
>
> (1) The native title holders are entitled to compensation in accordance with Division 5 for any extinguishment under this Division of their native title rights and interests by an act, but only to the extent (if any) that the native title rights and interests were not extinguished otherwise than under this Act.
>
> *Commonwealth acts*
>
> (2) If the act is attributable to the Commonwealth, the compensation is payable by the Commonwealth.
>
> *State and Territory acts*
>
> (3) If the act is attributable to a State or Territory, the compensation is payable by the State or Territory."

51 Sub-section (1) of s 23J has the effect of conferring upon native title holders an entitlement to compensation only where the statutory extinguishment exceeds the extinguishment that would have occurred at common law. The evident purpose of s 23J is to limit, so far as possible, the entitlement to

compensation under s 23J, to cases where the "act" is invalid by reason of the *Racial Discrimination Act* 1975 (Cth) ("the RDA") and is subsequently validated by s 14 of the NTA or s 8 of the State Act[52]. However, s 23J also may be attracted in respect of a valid "act" which, although satisfying the definition of "previous exclusive possession act", would not completely extinguish native title at common law. That a different result may be reached under Div 2B of Pt 2 of the NTA or Pt 4 of the State Act emphasises the point that it is the statutory criteria provided for by those provisions which are to be applied when determining issues of extinguishment.

52 As s 23B is of central importance to these proceedings, it is appropriate to say something more respecting that provision. It contains certain criteria, the satisfaction of which, by an "act", results in the characterisation of that "act" as a "previous exclusive possession act". Three requirements must be satisfied.

53 First, the "act" must be valid (s 23B(2)(a)). The "act" may be valid either because (as in this case) it was valid when done and it occurred before the commencement of the RDA or because it was a "past act" under s 228 of the NTA and was validated by s 14 of the NTA or s 8 of the State Act. Given the date of the grant of the Lease, more than 20 years before the commencement of the RDA, the "past act" provisions have no role in this case. The "act" here was valid in any event.

54 The second requirement of s 23B is that the "act" occurred on or prior to 23 December 1996 (s 23B(2)(b)). Thirdly, the "act" must have consisted of the grant or vesting of an interest which falls within any of eight specified categories. Those categories of "previous exclusive possession act" are (s 23B(2)(c)):

> "any of the following:
>
> (i) *a Scheduled interest* (see section 249C);
>
> (ii) *a freehold estate*;
>
> (iii) a commercial lease that is neither an agricultural lease nor a pastoral lease;
>
> (iv) an exclusive agricultural lease (see section 247A) or *an exclusive pastoral lease* (see section 248A);

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52 The requirement of validity in ss 23B(2)(a) and 23F(2)(a) respectively is satisfied by validation under s 14 of the NTA or s 8 of the State Act.

(v) a residential lease;

(vi) a community purposes lease (see section 249A);

(vii) what is taken by subsection 245(3) (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that subsection, assuming that the reference in subsection 245(2) to '1 January 1994' were instead a reference to '24 December 1996';

(viii) *any lease* (other than a mining lease) *that confers a right of exclusive possession over particular land* or waters". (emphasis added)

The opening phrase "any of the following" indicates that, whilst the existence of any one of the listed "acts" is sufficient, the circumstances in a given case may answer the description of more than one "act" in the listed categories.

55 The term "pastoral lease" is defined as follows in s 248:

"A ***pastoral lease*** is a lease that:

(a) permits the lessee to use the land or waters covered by the lease solely or primarily for:

(i) maintaining or breeding sheep, cattle or other animals; or

(ii) any other pastoral purpose; or

(b) contains a statement to the effect that it is solely or primarily a pastoral lease or that it is granted solely or primarily for pastoral purposes."

The expression "exclusive pastoral lease" upon which par (iv) of s 23B(2)(c) operates is defined in s 248A as follows:

"An ***exclusive pastoral lease*** is a pastoral lease that:

(a) confers a right of exclusive possession over the land or waters covered by the lease; or

(b) is a Scheduled interest."

Section 249C and Sched 1 of the Act specify those interests that are referred to in par (i) of s 23B(2)(c) as Scheduled interests. Part 1 of Sched 1 lists various interests arising under certain New South Wales statutes. Some kinds of lease

under s 23 of the Western Lands Act are listed[53] – those leases which permit the lessee to use the land or waters covered by the lease solely or primarily for any of several identified purposes: "agriculture or any similar purpose; agriculture (or any similar purpose) and grazing combined; mixed farming or any similar purpose other than grazing". As has been noted, covenants in the Lease with which this case is concerned required the Leased Land to be used only for grazing purposes. Accordingly, it was not submitted that the Lease was a lease for one of the purposes identified in the Schedule and it was, therefore, not submitted that the Lease was a "Scheduled interest".

56 A number of observations may also be made respecting the other categories of previous exclusive possession act specified in s 23B(2)(c). First, the grant or vesting of a freehold estate would, at common law (and any application of the RDA aside), completely extinguish native title[54]. Thus, the effect provided for by Div 2B of Pt 2 in respect of the grant or vesting of a freehold estate (par (ii) of s 23B(2)(c)) coincides with the result reached by the common law.

57 Paragraphs (iii)-(viii) of s 23B(2)(c) identify certain categories of "leases". For the purposes of the NTA, the expression "lease" is defined in s 242(1) to include:

> "(a) a lease enforceable in equity; or
>
> (b) a contract that contains a statement to the effect that it is a lease; or
>
> (c) *anything that*, at or before the time of its creation, *is*, for any purpose, *by a law of* the Commonwealth, *a State* or a Territory, *declared to be or described as a lease*". (emphasis added)

58 It will be apparent that the expression "lease" as defined in s 242 is wide enough to encompass for the purposes of the NTA statutory interests which may not necessarily amount to a lease as understood by the common law. The Lease at issue in this case satisfies the above definition. It was granted under s 23(1)(a) of the Western Lands Act. This section was substituted for the original s 23 by s 8 of the *Western Lands (Amendment) Act* 1934 (NSW) ("the 1934 Act"). The new s 23(1)(a) provided that it was lawful for the Minister to grant "leases" of Crown lands as "leases in perpetuity". Paragraph (c) of s 242(1) of the NTA therefore is satisfied.

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53 Sched 1, Pt 1, Item 3(4).

54 *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43].

59 The definition in s 242 of "lease" is of importance in the present proceedings because it demonstrates that the NTA postulates the existence of an interest which, although described as a "lease", is not a lease at common law. Further, the scheme of Div 2B of Pt 2 is premised upon the fact that a "lease" under the NTA may or may not confer a right of exclusive possession[55]. These considerations illustrate the flaw in reasoning that as an interest was described as a "lease" it is to be presumed that a right of exclusive possession was conferred.

60 It is possible that, as an exclusive pastoral lease or as a lease conferring a right of exclusive possession over particular land, the Lease, being a "lease in perpetuity" under the Western Lands Act, satisfies either or both of pars (iv) and (viii) of s 23B(2)(c) of the NTA; par (iv) engages the definition of "exclusive pastoral lease" in s 248A. It is in this way that the issue for determination arises – whether on grant in 1955 the Lease conferred a right of exclusive possession upon the grantee thereof[56]. That issue turns upon the meaning of the statutory expression "lease in perpetuity" and requires an examination of the nature of the perpetual holdings created under the Western Lands Act and the Consolidation Act.

61 No doubt it is right to say that rights and interests are not to be held to have been abrogated by statute, except where the intention to do so is plainly expressed. But the relevant question in the present matter is what are the rights that were created by the grant of the Lease. In particular, did the holder of the Lease acquire a right to exclusive possession of the Leased Land? That question is not to be answered by presuming its answer any more than it is to be answered by noticing that later legislation has attributed certain legal consequences to the fact of the grant of such rights. It is to be answered by analysing the nature and extent of the rights that were conferred by the grant.

Submissions in this Court

62 As already mentioned, in this Court all parties appeared to accept that Div 2B of Pt 2 of the NTA and Pt 4 of the State Act applied. The applicant submitted that the grant of the Lease under s 23 of the Western Lands Act

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55 cf *Street v Mountford* [1985] AC 809 at 816, 827.

56 There is no doubt that pars (a) and (b) of s 23B(2) are satisfied, and if the Lease confers a right of exclusive possession the grant of the Lease is a "previous exclusive possession act" by reason of satisfaction of pars (iv) and (viii) of s 23B(2)(c) of the NTA.

conferred a right of exclusive possession and that, therefore, the grant was a "previous exclusive possession act" within the meaning of s 23B of the NTA. This had the result that all native title rights and interests in the Leased Land were extinguished by operation of s 20 of the State Act.

63 The third respondent submitted that it was inappropriate to answer the separate questions because they were not expressed in terms appropriate to the application of Div 2B of Pt 2. In the alternative, the third respondent, together with the first and second respondents, submitted that the Lease did not confer a right of exclusive possession upon the applicant. The respondents accept that, if the grant of the Lease is properly characterised as a "previous exclusive possession act" under s 23B of the NTA, s 20 of the State Act has the effect contended for by the applicant.

The Western Lands Act

64 It is convenient to preface consideration of the issue for decision by attention to the scope and purpose of the perpetual lease provisions of the Western Lands Act.

65 The Lease referred to s 23 of the Western Lands Act. As that statute stood, after amendment by the 1934 Act, sub-ss (1) and (4) of s 23 stated:

> "(1) It shall be lawful for the Minister to grant leases of Crown lands –
>
> (a) as leases in perpetuity; or
>
> (b) for any term expiring not later than the thirtieth day of June, one thousand nine hundred and seventy-three.
>
> Any lease so granted shall except as otherwise provided in this Act be subject to the general provisions of this Act.
>
> …
>
> (4) (a) Upon the granting of any lease under this Act the name of the lessee, together with particulars of the area leased, the term of the lease, the amount of rent and survey fee payable to the Crown, and such other particulars as the Minister may deem desirable shall be notified in the Gazette.
>
> (b) The amount of the first year's rent, and the amount of the survey fee or the first instalment thereof, and any other amount lawfully due and payable to the Crown by the lessee, shall be paid by the lessee to the Colonial Treasurer

> within one month after the date of such notification. If such amounts be not so paid the lease shall be liable to be forfeited."

The term "Crown lands" appearing in s 23(1) was defined in s 3 as meaning Crown lands within the meaning of the Consolidation Act and as including "land held under occupation license or annual lease".

66 The definition appearing in s 5(1) of the Consolidation Act stated:

> "'Crown Lands' means lands vested in His Majesty and not permanently dedicated to any public purpose or granted or lawfully contracted to be granted in fee-simple under the Crown Lands Acts."

The expression "Crown Lands Acts" was defined in terms which included a chain of legislation commencing in 1861.

67 Of this, Jordan CJ observed in *Re E W Hawkins*[57]:

> "Provision by New South Wales statutes for the alienation of Crown lands was first made in 1861 by the two Acts 25 Vict Nos 1 and 2. In each Act 'Crown Lands' was defined as 'All lands vested in Her Majesty which have not been dedicated to any public purpose or which have not been granted or lawfully contracted to be granted in fee simple.' This definition was obviously derived from the definition of 'Waste Lands of the Crown' in s 9 of the Imperial Act 1846 (9 and 10 Vict c 104). The former of the two local Acts provided by s 3 that 'Any Crown Lands may lawfully be granted in fee simple or dedicated to any public purpose under and subject to the provisions of this Act but not otherwise', and the Governor with the advice of the Executive Council was authorised in the name and on the behalf of Her Majesty so to grant or dedicate any Crown lands. It proceeded to make provision for the sale of Crown lands and for the dedication of Crown lands to public purposes. Such sales might be conditional. The latter of the two authorised the Governor, with the advice of the Executive Council and on behalf of Her Majesty, to lease Crown lands for periods and on conditions varying with the purposes of the leases. No provision was made conferring on the lessees any right to purchase the land so leased to them."

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57 (1948) 49 SR (NSW) 114 at 117; affd sub nom *Hawkins v Minister for Lands (NSW)* (1949) 78 CLR 479.

68 His Honour then observed[58] that Crown lands legislation was not long allowed to remain in "this pristine state of simplicity". After referring to the statement made by the Privy Council in 1893[59] of the difficulties brought about by the "somewhat complex course" of Crown lands legislation in New South Wales, Jordan CJ continued[60]:

> "As the result of another half century of legislation, the general statute law on the subject is now to be found in a much amended statute of more than three hundred sections providing, in elaborate detail, in a jungle penetrable only by the initiate, for various ways in which various special and peculiar forms of interests in Crown lands may be acquired from the Crown."

69 The reference to "the general statute law on the subject" was to the Consolidation Act. But, as already indicated by reference to the Western Lands Act, that did not present the full picture. In the authoritative New South Wales text first published in 1961, shortly after the commencement of the Lease, the learned author explained the general legislative structure as follows[61]:

> "Lands disposed of by the Crown in right of the State are mostly alienated under the provisions of [the Consolidation Act], [the Western Lands Act] and the Closer Settlement Acts, the two first-mentioned relating to lands previously unalienated, and the last-mentioned to lands purchased or resumed from private owners for the purpose of subdivision to promote closer settlement of rural lands. These statutes … constitute tangled masses of legislation reflecting various shifts in governmental policy, in which new forms of tenure have, from time to time, been added to the original ones. Unlike the [*Real Property Act* 1900 (NSW) ('the RP Act')], they do not contain a code of conveyancing principles, and sections dealing with title and alienation are incidental only.
>
> Broadly speaking tenures under these Acts fall into three groups, viz: (i) purchases, which sooner or later lead to the issue of a Crown grant in fee simple; (ii) perpetual leases, which, in most cases, but not all, result in the eventual issue of a grant to the grantee 'his heirs and assigns', and (iii) leases for a limited term and licences." (footnotes omitted)

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58 (1948) 49 SR (NSW) 114 at 118.

59 *Ricketson v Barbour* [1893] AC 194 at 206.

60 (1948) 49 SR (NSW) 114 at 118.

61 Helmore, *The Law of Real Property in New South Wales*, (1961) at 353.

70 As already indicated, the Western Division was established by the 1884 Act. Thereafter, the Western Lands Act was introduced following the report of a Royal Commission into the condition of Crown tenants in the Western Division which made recommendations concerning the special problems surrounding land settlement in the dry western-fringe country of the State[62]. As enacted in 1901, s 13 of the Western Lands Act provided for application by any registered holder under the 1884 Act and succeeding legislation of a pastoral lease, such as "Angledool", and of other interests in the Western Division to bring the holding under the provisions of the Western Lands Act. Section 14 empowered the Governor to extend the term of any lease up to 30 June 1943. The control of the lands in the Western Division was taken from the Lands Department and placed with the Western Lands Commission.

71 In the Second Reading Speech in the Legislative Assembly on the Bill for the Western Lands Act, the Secretary for Lands said[63]:

> "[W]e are told in a way that we cannot doubt that there is hardly a solvent man in the western division. If this be true it means that to bring the western division into a state to carry stock there must be money expended upon it whether in water conservation, clearing, or scrubbing, and if these men [the present settlers] have no money, they must borrow to enable them to carry on. When a man lends money he naturally asks upon what security he is making the loan, and if the applicant can say, 'Here I have an absolute lease for forty-two years, and at the very most I am assessed at three or four acres to a sheep, and no matter what Government comes in or what Parliament may be sitting, the greatest rental they can put upon me is 7d per sheep,' then the man who contemplates lending the money can calculate his security. That is an absolute security, and the man who has money to lend knows what he is lending it upon."

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62 New South Wales, Legislative Assembly, *Royal Commission to inquire into the Condition of the Crown Tenants – Western Division of New South Wales*, 8 October 1901.

63 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 November 1901 at 3779. Regard may be had to the Second Reading Speech pursuant to s 34 of the *Interpretation Act* 1987 (NSW) and, in any event, under the "mischief rule": *Wacando v The Commonwealth* (1981) 148 CLR 1 at 25-27; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 99, 112-113; *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at 175 [28].

72 Nevertheless, difficulties remained in raising the necessary finance and in response the legislature enacted the *Government Savings Bank (Rural Bank) Act* 1920 (NSW). This introduced into the *Government Savings Bank Act* 1906 (NSW), s 48A, which empowered the Commissioners of the Bank to carry on the business of a Rural Bank, and s 62, which empowered the Commissioners to grant fixed or amortisation loans from the Rural Bank Department upon mortgage of, among other interests, any holding or tenure under the Western Lands Act and other Crown lands legislation. The security which might be provided was later enhanced by the insertion, by s 2 of the *Western Lands (Amendment) Act* 1930 (NSW), of s 17B into the Western Lands Act. This provided for the extension of leases thereunder, otherwise due to expire in 1943, to 30 June 1968. Then, as the Depression deepened, a further measure was taken by the *Western Lands (Amendment) Act* 1932 (NSW) ("the 1932 Act"). This provided, by s 3, for the insertion into the Western Lands Act of a new s 18E empowering the holder of a subsisting lease to apply for its extension "to a lease in perpetuity". Provision, already set out, then was made by the 1934 Act for the grant of leases in perpetuity by the insertion of a new s 23 of the Western Lands Act.

73 In the Second Reading Speech for the Bill for the 1932 Act, the Attorney-General, Sir Henry Manning, said to the Legislative Council that one of the objects of the Bill was[64]:

> "to enable the owners of leases … to convert them into perpetual leases, with the idea of enabling holders to obtain the necessary finances to carry them on. At present, as these are merely leases, it is impossible to obtain advances on them, but if they are converted into perpetual leases, advances will be made upon the security of the holding."

It was later pointed out by Mr Sheahan, the Minister for Lands, on the Second Reading Speech for the Bill for the *Western Lands (Amendment) Act* 1949 (NSW)[65] that the advent of the perpetual lease, with its concessional rental, created a goodwill value for those holdings.

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64 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 14 December 1932 at 2916-2917.

65 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 19 October 1949 at 4276.

74 Finally, s 3(1) of the *War Service Land Settlement Act* 1941 (NSW) ("the War Service Land Act") empowered the Minister, by notification published in the *Gazette*, to set apart any area of Crown land or of land acquired under the Closer Settlement Acts to be disposed of under statutes including the Western Lands Act to classes of persons including members of the forces and discharged members of the forces.

75 It was pursuant to that provision that there appeared in the *Gazette*[66] notification that Crown land including the Leased Land had been set apart to be disposed of under the Western Lands Act for the purpose of grazing exclusively to members of the forces and discharged members of the forces. Thereafter[67], there appeared notification that under the provisions of s 23 of the Western Lands Act, and in accordance with the War Service Land Act, leases of land, including the Leased Land, had been granted. The lessee of the Leased Land was identified as Ross Patrick Smith, the area as 10,820 acres and the term as from 31 August 1953 in perpetuity.

76 The Lease itself was dated some time thereafter, 11 January 1955. The instrument recited various matters and continued:

> "NOW KNOW YE that in pursuance of the provisions of the said Acts WE DO HEREBY grant unto the said ROSS PATRICK SMITH (who with his executors administrators and assigns is hereinafter referred to as the Lessee) ALL THAT piece or parcel of land being portion numbered WL.3878 containing ten thousand eight hundred and twenty (10,820) acres more or less … TO HOLD the said land unto the Lessee as a Western Lands Lease from the thirty-first day of August 1953 in perpetuity subject to the provisions of the said Acts and the Regulations thereunder and to the Reservations Exceptions Conditions and Provisions herein contained YIELDING AND PAYING therefor the yearly rent of two hundred and twenty-five pounds eight shillings and four pence or such other rent as shall be or become payable by reason of the annual rent having been or being fixed or determined in due course of law (whether because of the capital value having been or being re-determined or otherwise)".

77 The objective in making provision for holdings identified as leases in perpetuity under the Western Lands Act had been to strengthen the tenure

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66 No 17, 16 January 1953 at 164.

67 *New South Wales Gazette*, No 137, 31 July 1953 at 2497.

thereby provided and to attract the provision of finance for development of the land. However, provision previously had been made in various provisions of the Consolidation Act for the grant of what were described as leases in perpetuity. Controversy had arisen whether some of those species of perpetual lease were grants in fee simple. That controversy throws light on what was involved in the strengthening of tenure under the Western Lands Act and the affinity between that tenure and grants of a freehold estate, which plainly would extinguish native title (par (ii) of s 23B(2)(c) of the NTA).

Other leases in perpetuity

78 At the time the Lease was granted under the Western Lands Act, the Consolidation Act provided for various species of lease "in perpetuity". There were (i) the conditional lease (ss 52, 185(1)(a)), (ii) leases for business purposes (s 75B), (iii) town leases (s 82A), (iv) conditional purchase leases (s 107), (v) Crown leases (s 134), (vi) week-end leases (s 136F), (vii) homestead farms (s 123), (viii) suburban holdings (s 128), and (ix) in irrigation areas, the irrigation farm lease and the town land lease (s 142D).

79 In the case of leases in categories (vii), (viii) and (ix), the Consolidation Act provided for the issue by the Governor of grants "to the lessee his heirs and assigns for ever" (ss 123(2), 128(2) and 144(1) respectively). At common law, that expression was peculiarly appropriate for the creation of a fee simple[68]. Section 13 of the RP Act as enacted subjected to the provisions of that statute lands unalienated from the Crown "when alienated in fee". The Registrar-General treated grants under the Consolidation Act in the categories just mentioned as grants of a fee simple thereby attracting s 13 and the RP Act as a whole[69].

80 That practice of the Registrar-General had two consequences. First, as Roper J accepted in *Nolan v Willimbong Shire Council*[70], the issue of a certificate

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68 Ryall, "Perpetual Leaseholds in New South Wales", (1937) 11 *Australian Law Journal* 223 at 225; Butt, *Land Law*, 4th ed (2001) at [807]-[809]. As the latter author points out, the Torrens legislation contains in prescribed forms the words required for the creation and transfer of interests thereunder, to the displacement of the requirements of old system conveyancing.

69 Helmore, *The Law of Real Property in New South Wales*, 2nd ed (1966) at 383; Baalman, *The Torrens System in New South Wales*, (1951) at 35-36.

70 (1939) 14 LGR 89 at 90.

of title was conclusive evidence of the fact that the grantee had an estate in fee simple. Secondly, the registered proprietor of land under the provisions of the RP Act held the same with the benefit of the indefeasibility provisions of the legislation, in particular s 42.

81 Section 2 of the *Conveyancing (Strata Titles) Act* 1961 (NSW) declared that that statute applied to land "under the provisions of the [RP Act] held … under perpetual lease from the Crown or in fee simple". Thereafter, in 1970, s 13 of the RP Act was amended by s 5 of the *Real Property (Amendment) Act* 1970 (NSW) to make it clear that land "leased as a perpetual lease under grant from the Crown" was subjected to the provisions of the RP Act.

82 Subsequently, the *Real Property (Crown Land Titles) Amendment Act* 1980 (NSW) took matters further by inserting into the RP Act a new Pt 3 (ss 13-13M) headed "Crown Lands and Lands Acquired from the Crown to be Subject to the Act". In particular, s 13B(1) provided:

> "Where land to which this Part applies is held under perpetual lease from the Crown, the Registrar-General may, by creating a folio of the Register in the name of the person who, in the opinion of the Registrar-General, is entitled to be the registered proprietor of the perpetual lease from the Crown, bring the land under the provisions of this Act."

Pursuant to this legislation the Leased Land was brought under the provisions of the RP Act and a computer folio was issued on 8 April 1987.

83 The present litigation has been so conducted that no question is raised respecting the effect that registration under the RP Act (with its consequences about indefeasibility of title) might have had upon any native title rights and interests which may then have been still subsisting. Accordingly, any consequential questions about the operation of the RDA and the validation provisions of the NTA and the State Act that would then arise have not been raised. Rather, the focus is upon the effect of the grant of the Lease many years before the commencement of the RDA and the changes to the RP Act.

84 However, in the Second Reading Speech in the Legislative Council on the Bill for the 1970 statute, the Minister said[71]:

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71 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 11 March 1970 at 4107.

> "The bill will clarify the status, under the principal Act, of a Crown grant of a perpetual lease, an anomalous tenure in the context of the principal Act. As the principal Act is now drafted, grants from the Crown are automatically registered as Torrens title, provided the land so granted has been alienated in fee. In fact, thanks to the provisions of Crown lands legislation introduced after the passage of the [RP Act], much land has since been alienated on a perpetual leasehold basis. It has been the practice of the Registrar-General to record these grants as though they were grants of a fee simple, and to treat them as such for the purposes of subsequent registration procedures. This is a common-sense approach and no mischief has flowed from it. The bill ratifies that practice."

85 As Dr Helmore pointed out[72], the Crown lands legislation did not provide for Crown grants to issue in respect of all types of perpetual lease. In particular, with respect to categories (i) and (vi) listed above, Crown grants did not issue; nor, significantly for the purposes of this case, did they issue for perpetual leases under the Western Lands Act.

86 The litigation which reached this Court as *Hawkins v Minister for Lands (NSW)*[73] concerned the status of a Crown lease under the Consolidation Act, that is to say a category (v) lease "in perpetuity" for which the legislation did not stipulate the issue of a Crown grant. The point, noted by Baalman[74], was that the lease in *Hawkins* did not appear to have been the subject of a Crown grant; the result (as with the Lease in issue in the present litigation) was that no question arose respecting the operation of the Torrens system by the attraction of s 13 of the RP Act. In *Hawkins*, this Court held that land comprised in a Crown lease remained vested in the Crown for the purposes of the definition of "Crown Lands" in s 5 of the Consolidation Act. Nor at the date of an application for conversion of the Crown lease into a conditional purchase was the land taken outside that definition; it was not land "lawfully contracted to be granted in fee-simple under the Crown Lands Acts".

87 To appreciate that the practice of the Registrar-General respecting s 13 of the RP Act had no application to the Lease is not to foreclose further consideration of the juristic nature of the issue of a statutory "lease in perpetuity".

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72 *The Law of Real Property in New South Wales*, 2nd ed (1966) at 383.

73 (1949) 78 CLR 479.

74 *The Torrens System in New South Wales*, (1951) at 36.

The lease in perpetuity and the determinable fee simple

88 Dr Helmore explained[75]:

> "A 'perpetual lease' is a contradiction of terms, and the conditions to which these tenures are subject are in no way inconsistent with the incidents of a fee simple upon condition, the right of forfeiture for non-payment of rent or breach of condition being equivalent to the right of re-entry on breach of a condition subsequent."

89 The starting point for further analysis is indicated by Dr T P Fry in the following passage[76]:

> "Freehold tenure confers upon the Crown tenant, his successors and assigns, an estate in fee simple, which is usually said to confer 'perpetual' title. 'Tenant in fee simple,' it is said in *Coke on Littleton's Tenures*, 'is he which hath lands or tenements to hold for him and his heirs for ever.' It is a rule of the Common Law which cannot be disproved by any mathematical or other argument, that a fee simple is a 'larger' estate than any leasehold estate, however long the term of years conferred by the latter, even if it be 10,000 or 100,000 years.
>
> Common Law does not recognize perpetual leasehold as a valid kind of mesne tenancy; although, if a mesne leasehold is validly created for a term of limited duration, it can be made perpetually renewable."

Dr Helmore made the point[77]:

> "The ordinary type of fee simple encountered in practice is a fee simple *absolute*, but there are also defeasible[78] fees simple, namely, *determinable* fees and a [fee] simple *upon condition*. These contain within their limitations, that is to say the words which define them, the

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75 *The Law of Real Property in New South Wales*, 2nd ed (1966) at 70.

76 "Land Tenures in Australian Law", (1946) 3 *Res Judicatae* 158 at 167.

77 *The Law of Real Property in New South Wales*, 2nd ed (1966) at 66-67. See also Butt, *Land Law*, 4th ed (2001) at [821]-[824].

78 This is the comprehensive term used in the American Restatement of the Law of Property, vol 1 at 43.

> seeds of their own destruction. They both may exist at law or in equity.[79] The distinction between the two types is in form rather than substance. The former is one which automatically terminates on the occurrence of a specified event which may or may not occur, the latter is one which has a condition annexed to it (called a *condition subsequent*[80]) upon the non-fulfilment of which either the grantor, or whoever succeeds to the grantor's interest, is entitled to re-enter and determine the fee simple. In other words, in the case of a fee simple upon condition, some positive action on the part of the person to whom the fee would pass is necessary to effect the termination."

90 In *Re E W Hawkins*[81], Davidson J observed that, whilst at common law there was no such interest in land as a lease in perpetuity, there could be "a fee simple subject to a land charge". However, at present, at the issue of the Lease in 1955 and, one may be permitted to assume, from an earlier time, in Australia the term "fee simple" was associated with and synonymous with the fee simple absolute. The defeasible fee simple to which tenurial incidents were attached cut across Australian conceptions of what was involved in freehold title.

91 It will be apparent that, in part, the controversy concerning the classification as fees simple of leases "in perpetuity" created under the Crown lands legislation has turned upon the existence of a Crown grant using a particular form of words, "to the lessee his heirs and assigns for ever". In the case of the Lease, the grant was not so expressed. However, that apart, there remain other factors tending for and against the classification of all the above categories (i) to (ix) of perpetual interests and leases in perpetuity under the Western Lands Act as fees simple[82].

92 Reference has been made earlier in these reasons to the possibility that the circumstances in a given case may answer more than one of the "acts" itemised in pars (i) to (viii) of s 23B(2)(c) of the NTA, which are "exclusive possession acts". To the extent that, with respect to the Lease, the above controversy was to

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79 For an example of an equitable determinable fee simple, see *In re Leach, Leach v Leach* [1912] 2 Ch 422.

80 Such a condition is distinguished from a *condition precedent* which is one which must be fulfilled before an interest comes into being at all.

81 (1948) 49 SR (NSW) 114 at 123.

82 See Ryall, "Perpetual Leaseholds in New South Wales", (1937) 11 *Australian Law Journal* 223 at 225.

be resolved in favour of classification as a fee simple, that would render the grant of the Lease the grant of a "freehold estate" within par (ii) of s 23B(2)(c) of the NTA. That "act" would bring about total extinguishment of any native title without going on to consider the "acts" depending upon the definition in the NTA of "lease", namely the "acts" identified in pars (iv) and (viii).

93 It is unnecessary to pursue the question of the grant of a "freehold estate". The underlying controversy, at least in part, in New South Wales has been overtaken by legislative amendment to the RP Act concerning the anterior practice of the Registrar-General. The significant point for this case lies in the legislative genesis of the very term "lease in perpetuity" and its significance for the "lease" provisions in s 23B(2)(c) of the NTA.

The genesis of the lease in perpetuity in New South Wales law

94 Before turning to this matter, it should be observed that the legislation of New South Wales did not stand alone in its creation of the paradoxical perpetual lease. Reference will be made later in these reasons to Crown lands legislation in New Zealand in 1892 and Victoria in 1898, preceding the New South Wales legislation. Further, when considering, in *Fisher v Deputy Federal Commissioner of Land Tax (NSW)*[83], laws of various Australian States which in 1915 provided for leases of Crown lands in perpetuity[84], Isaacs and Gavan Duffy JJ referred[85] to a decision of the Privy Council in an Indian appeal. In *Abhiram Goswami v Shyama Charan Nandi*[86], their Lordships approved the judgment of Jenkins J in the Calcutta decision *Kally Dass Ahiri v Monmohini Dassee*[87]. That case turned upon the construction of Ch 5 (ss 105-117) of the Indian *Transfer of Property Act* 1882[88]. Section 105 thereof defined a lease of

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83 (1915) 20 CLR 242.

84 In addition to legislation in New South Wales and Victoria, their Honours referred to ss 104, 125 and 126 of the *Land Act* 1910 (Q).

85 (1915) 20 CLR 242 at 248-249.

86 (1909) LR 36 Ind App 148 at 167.

87 (1897) 12 Indian Decisions (NS) 961.

88 With other laws, such as the *Indian Penal Code* (Act 45 of 1860), the *Indian Evidence Act* 1872 (Act 1 of 1872), the *Contract Act* 1872 (Act 9 of 1872) and the *Trusts Act* 1882 (Act 2 of 1882), the *Transfer of Property Act* was part of a significant codification movement in British India in the second half of the nineteenth century: *Halsbury's Laws of England*, 1st ed, vol 10 at 613-618.

immovable property as "a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity". Yet, s 111 provided in certain circumstances for the determination of such leases by forfeiture. But, it was argued, where was the reversion dependent upon the end of eternity? The decision of the Court in *Ahiri* was that, on the true construction of the legislation, even in respect to a grant of a lease in perpetuity, there was an interest still remaining in the lessor dependent, for example, upon the forfeiture of the lease.

95 No wholly satisfactory answer is to be found to the question whether, by the grant of the Lease, there was created and vested an estate in fee simple, whether conditional or subsequent. Nor, for the purpose of considering whether the grant of the Lease was an act bringing about extinguishment for the purposes of the NTA, is it necessary to do so. The issue, as in the Indian case, turns upon a proper analysis of the statutory regime under the Western Lands Act provided in s 23 for the creation of leases in perpetuity. Does this have the same consequences with respect to extinguishment as would have followed from the grant of a fee simple? The answer is to be found by having regard to the scope and purpose of the Western Lands Act and the anterior situation under other New South Wales legislation respecting dealings in Crown lands.

96 In *Randwick Corporation v Rutledge*[89], Windeyer J explained that the early Governors of New South Wales had under their commissions express powers to make grants of land and continued:

> "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."

There was controversy, upon which it is unnecessary to enter, as to the jurisdiction of the Supreme Court of New South Wales to issue *scire facias* for revocation and cancellation of such grants[90].

97 In his work *Freehold and Leasehold Tenancies of Queensland Land*, published in 1946, Dr T P Fry wrote[91]:

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89 (1959) 102 CLR 54 at 71.

90 *R v Hughes* (1866) LR 1 PC 81; Campbell, "Crown Land Grants: Form and Validity", (1966) 40 *Australian Law Journal* 35 at 42-43.

91 at 20. See also *Wik Peoples v Queensland* (1996) 187 CLR 1 at 171-174.

> "Before 1847 all grants of Australian land made by the Crown were grants of freehold; there were few 'grants' of leaseholds before 1847. This is understandable, because until 1855, the date of self-government in New South Wales, control of the sale of land in New South Wales … had remained in the hands of the Imperial Government, who knew only one form of 'free' land tenure: free and ancient socage.
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> In the earliest days of the settlement alienation of the land in New South Wales was by means of free grants, grants for which no purchase price was paid, but which were subject to the reservation of annual quit-rents payable to the Crown."

98 Writing in 1902 for a British audience, W P Reeves said in his work, *State Experiments in Australia & New Zealand*[92]:

> "Usually these quit-rents were supposed to equal 5 per cent of the value of the granted land, but seem never to have been higher than twopence an acre on country lands, and often lower than a farthing an acre. Sometimes the land was granted rent free for a time, with a stipulation that a quit-rent should be paid after a few years. Residence and improvement were almost always insisted upon, and a common practice was to oblige the settler to feed, clothe, and employ a certain number of convict labourers. This service was often accepted in lieu of rent, and, if rendered for a term of years, entitled the settler to hold his grant rent free for ever."

99 The quit-rent was the only incident of socage tenure ever required of a tenant in fee simple in New South Wales[93]. Beginning in 1846, various legislative provision was made in New South Wales for relief against and redemption of quit-rents. The legislation included s 143 of the *Conveyancing Act* 1919 (NSW), but it was not until the insertion in 1964 into the Consolidation Act of s 234A[94] that all quit-rents were released. Section 234A stated:

> "Where any quit-rent issues to the Crown out of any land, or the residue of any quit-rent issues to the Crown out of any residue of any land in respect of which quit-rent has been apportioned or redeemed, such land or residue shall be deemed to have been released therefrom."

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92 (1902), vol 1 at 197.

93 Helmore, *The Law of Real Property in New South Wales*, 2nd ed (1966) at 69.

94 By s 9 of the *Crown Lands (Amendment) Act* 1964 (NSW).

100 Fry observed[95]:

> "The old Australian type of freehold grants, subject to annual 'quit-rents' in perpetuity, bears a striking resemblance to Crown Perpetual Leaseholds of modern Australian land, *especially as the old type of freehold grants often imposed a condition of residence or occupation for a limited number of years and conditions of development, as other incidents of tenure*[96]." (emphasis added)

101 Of the "lease in perpetuity", W P Reeves wrote[97]:

> "Under it, the occupier has a tenure as secure as a freehold, yet can keep his capital to spend on improving his holding, while the State, though it loses the unearned increment, can always insist that a genuine working settler shall live on each farm. In more than one way the lease bears an odd likeness to the old quit-rent system of the despotic governors of New South Wales."

102 Fry, after observing that the holder of a Crown leasehold "in perpetuity" may not acquire an estate in fee simple, said[98]:

> "These perpetual Crown leaseholds nevertheless resemble such of those freehold grants made in the early nineteenth century, in respect of which quit-rents were imposed in perpetuity and in respect of which permanent improvement had to be made to the land on pain of forfeiture. Indeed, it would seem that *the princip[al] aim sought to be achieved by means of perpetual Crown leaseholds is to ensure that the widespread modern conceptions of freehold as a tenure that is free from tenurial incidents and from the liability to forfeiture for breach thereof shall not prevent the continued imposition of conditions of development, conditions of personal residence, and the like, even after land has been granted 'in perpetuity' by the Crown to the Crown tenants*." (emphasis added)

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95 *Freehold and Leasehold Tenancies of Queensland Land*, (1946) at 63.

96 See *Land Law Service*, vol 1 at 408 for an example.

97 *State Experiments in Australia & New Zealand*, (1902), vol 1 at 325.

98 *Freehold and Leasehold Tenancies of Queensland Land*, (1946) at 22. See also Fry, "Land Tenures in Australian Law", (1946) 3 *Res Judicatae* 158 at 168.

103 The legislative history in New South Wales bears out the accuracy of what is there stated. The notion of perpetual tenurial incidents created under Crown lands legislation appears first in New South Wales in the provisions (ss 17-23) of the *Crown Lands Act* 1895 (NSW) ("the 1895 Act") dealing with "homestead grants", the term used for the grant of a homestead selection. Section 17 imposed obligations upon the grantee to live on the land granted and to pay rent, and stated that these obligations "shall be incidents in perpetuity of the tenure of the lands held under a homestead grant".

104 In his Second Reading Speech to the Legislative Assembly on the Bill for the 1895 Act, the Secretary for Lands, Sir Joseph Carruthers[99], said[100]:

> "I introduce a new principle – a principle which has tended to build up the greatness of the United States, which is building up the greatness of the Anglo-Saxon community of Canada, the principle of homestead selection, a principle which will enable a man to acquire a homestead in surveyed and subdivided areas which are found suitable for the purpose on terms which will not cripple his resources in the early stages. … I cannot go so far as some of my friends and use the term 'perpetual leasehold,' but I will tell you what I do. I give them perpetual leasehold in all its incidents, in perpetual rent, which must be paid year by year. I give them the incidents and obligations of a leasehold tenure. Always having the Crown as the landlord I preserve the old title of freehold. … Whilst I attach to these holdings the elements and incidents of perpetual leaseholds, I keep the old name of freehold because it will be more valuable to the holder, and it will be less likely to lead to complications which must arise in conveyancing if there is introduced a strange and hitherto unknown tenure, which may become a fertile source of litigation by its operation."

The reference by the Secretary to "perpetual leasehold" may have been provoked by the situation under the New Zealand legislation. Sections 138 and 157-158 of *The Land Act* 1892 (NZ) provided for the selection of Crown land "on lease in perpetuity"; "perpetuity", however, was measured at 999 years (s 157(1)).

105 The *Land Act* 1898 (Vic) provided in Pt 1, Div 4 (ss 79-87) for the grant by the Governor in Council of a "perpetual lease", subject to conditions

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99 Later, Premier of New South Wales, 1904-1907; thereafter, Member of the Legislative Council.

100 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 September 1894 at 436.

respecting residence, fencing, destruction of vermin, and improvements, and with a six year ban on alienation by the "perpetual lessee" (s 80).

106 In New South Wales, matters developed in 1912 with the enactment of the *Crown Lands (Amendment) Act* 1912 (NSW) ("the 1912 Act"). This appears to have introduced for the first time into the law of New South Wales the notion of "a lease in perpetuity". Section 7 stated:

> "The title to a homestead farm shall be a lease in perpetuity."

Section 13(2) stated:

> "The title to a suburban holding shall be a lease in perpetuity."

107 In the Second Reading Speech in the Legislative Assembly of the Bill for the 1912 Act, Mr Beeby, the Secretary for Lands, said of the provisions respecting homestead farms[101]:

> "Under this arrangement the tenant will have an absolute guarantee that he will have to pay to the Crown only a low and reasonable rental, based upon the capital value of the land. *A tenure of this nature after all contains all the advantages and essence of a freehold*, with the supreme advantage that the whole of the capital that a man now puts into the purchase of the land can be devoted to improvements. That is the central idea of the measure." (emphasis added)

108 In the debate in the Legislative Council on the Bill for the 1912 Act, Sir Joseph Carruthers said that, whilst he could not oppose the Bill, it was[102]:

> "a great pity that the Minister did not go back and accept the principles of the 1895 act, instead of trying to found a new tenure with a name which would be associated with himself".

In the same speech, he looked back to 1895 and spoke of the objectives sought to be obtained by the 1895 Act as follows[103]:

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101 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 February 1912 at 3174.

102 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 20 March 1912 at 4109-4110.

103 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 20 March 1912 at 4107-4109.

> "I tried to ingraft the homestead lease of Canada and the United States of America on to our statute-book, and I associated with it the good principles of the old feudal system. … I brought in the system of homestead selection, whereby men entered into covenants in perpetuity. I made one covenant the paying of rent, a second covenant the improvement of the land, and the third covenant residence upon the land. … Bearing in mind that the feudal system originated in the attachment of duties and obligations to be performed by the subject to the Crown, I attached those conditions to the homestead selection tenure, and the only objection has been that it does not enable a man to borrow as freely as he otherwise would."

Conclusions

109 The interest conferred under s 23(1)(a) of the Western Lands Act and identified as a "lease in perpetuity" was a creature of statute forming part of the special regime governing Crown land[104]. That regime included the various tenures provided for in the Consolidation Act, some of which also were identified as a "lease in perpetuity". Legislation establishing these perpetual tenures in New South Wales predated the introduction of the "lease in perpetuity" into the Western Lands Act by the 1932 Act and the 1934 Act.

110 The evident purpose of the introduction to the Western Lands Act of the perpetual tenure already established in other respects in the Consolidation Act was to strengthen the position of settlers in the Western District, particularly by giving them an asset more likely to attract the provision and continuation of finance. The character of the lease in perpetuity derived from that of the tenures established by the earlier legislation in New South Wales.

111 There had been a history in colonial New South Wales of Crown grants of freehold for which no purchase price was paid but with the reservation to the Crown of annual quit-rents. Conditions also were imposed, upon pain of cancellation or revocation of the grant and determination of the fee simple. These conditions included requirements of residence and improvement of the land. By the time of the development in New South Wales of the legislative system of Crown land tenures in the second half of the nineteenth century, there was developing the popular perception of freehold as a tenure without risk of forfeiture for breach of tenurial incidents, a perception of which legislators would have been conscious. Yet it was in the interests of the Crown to achieve the

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104 cf *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 344.

economic and social goals of land settlement with the assistance of the controls imposed by conditional grants.

112 The legislative solution began with the "perpetual" obligations imposed upon the holders of homestead grants by the 1895 Act. As Sir Joseph Carruthers later was proud to declare, the inspiration for this legislation lay in the old common law notions of tenurial incidents. The legislative regime was developed with the appearance, in the 1912 Act, of the "lease in perpetuity". By this means there was created a tenure which, like freehold tenure, was to last "for ever" but the term "lease" indicated that the continued retention of title by the grantee was dependent upon the performance of many tenurial incidents imposed to further the objectives of the legislature with respect to land development.

113 The number and scope of those incidents developed as time passed. The Lease contains a number. Reference already has been made to the requirement of residence (cl 2) and the stipulations respecting use for the purpose of grazing stock (cll 3, 4). Further, the lessee was obliged by cl 14 not to transfer, convey, assign, sub-let or mortgage the Leased Land without the written consent of the Minister; cl 20 provided that the Lease was not to be transferable except by way of mortgage for 10 years following its commencement, save to certain members of the armed forces.

114 The Lease stipulated an "unrestricted" right to proclaim travelling stock routes, camping places and other reserves (cl (l) of Sched A to the Western Lands Act) without payment of compensation and to withdraw land for the purposes of such reserves. The Lease was also expressed (cl 23(d)) to be subject to the withdrawal of land for any public purpose mentioned in the Consolidation Act[105]. A lessee was placed under obligations with respect to fencing (cl 5), destruction of vermin (cl 7), improvements (cl 12) and stocking levels (cl 15). There was an obligation to allow authorised persons to enter the Leased Land to examine improvements (cl 12) and to search for and remove minerals (cl 16). The lessee also was obliged to permit authorised persons to enter for purposes connected with soil conservation and erosion mitigation (cl 22).

115 The point of present importance is that these conditions and obligations, whether imposed directly by the Western Lands Act or permitted by the statute to be attached to the grant, were not inconsistent with the incidents of a grant of a determinable fee simple. The right of forfeiture for failure to pay rent or

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105 Section 24 of the Consolidation Act included such purposes as the provision of water supply, the interment of the dead, and use and general purposes of pastoral and agricultural associations.

non-observance of conditions is equivalent to the right of re-entry on breach of a condition subsequent attached to a determinable fee simple.

116 However, in other respects, the legislative creation of the lease in perpetuity was to have the attraction, both for leaseholders and those financing their operations upon mortgaged security, of a tenure with, as the Secretary put it in 1912, "all the advantages and essence of a freehold". Save where statute otherwise provided, that essence denied to anyone else the enjoyment of any right or interest in respect of the land[106]. For the purposes of the NTA, this included a right in the grantee of a lease in perpetuity of exclusive possession.

117 The question in this litigation thus differs from that considered with respect to the legislation in cases such as *Wik*. The pastoral lease tenures there considered lack the historical and conveyancing background from which the lease in perpetuity was derived as a substitute for the old Crown grant of the determinable fee simple.

118 The restraints upon alienation which applied to the Leased Land and the requirement to allow entry by certain persons for particular purposes and the other restrictions which we have described were consistent with the attachment of conditions to what in substance was a freehold. Their existence did not deny what otherwise was involved in the comprehensive statutory grant of a "lease in perpetuity", including the right to exclusive possession.

119 It has been pointed out earlier in these reasons that it is unnecessary to determine whether the "lease in perpetuity" under the Western Lands Act is a "freehold estate" for the purposes of the NTA. The grant here was of a "lease" within the meaning of s 242 of the NTA which, upon the true construction of the Western Lands Act, conferred upon the lessee "the essence of a freehold", including a right of exclusive possession, within the meaning of pars (iv) (with s 248A) and (viii) of s 23B(2)(c) of the NTA. Section 20 of the State Act then mandates extinguishment of any native title, with effect from the grant of the Lease.

Orders

120 Special leave to appeal should be granted.

121 Order 1 of the orders of the Full Court answering the separate questions should be set aside but otherwise the appeal should be dismissed. That has the

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106 *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43].

effect of leaving undisturbed Order 2 made by the Full Court, that the costs in that Court of the stated case be reserved.

122 In place of Order 1, the following should be substituted:

1. The questions for separate decision be answered as follows:

Question (a)

By virtue only of:

(i) the *Western Lands Act* 1901 (NSW); and

(ii) the regulations thereunder, as in force at the time of the grant of the Lease;

did the Lease confer upon the lessee under the Lease a right to exclusive possession of the leased land?

Question (b)

If the answer to question (a) is "No", by virtue of:

(i) the *Western Lands Act* 1901 (NSW);

(ii) the regulations thereunder, as in force at the time of the grant of the Lease; and

(iii) one or more of the terms and conditions of the Lease;

did the Lease confer upon the lessee under the Lease a right to exclusive possession of the leased land?

Answer to questions (a) and (b)

Save to say that the Lease conferred upon the lessee a right of exclusive possession over the land, the subject of the Lease, as the expression "a right of exclusive possession over … land" is used in s 23B(2)(c)(viii) and s 248A of the *Native Title Act* 1993 (Cth), it is inappropriate to answer questions (a) and (b).

Question (c)

If the answer to question (a) or question (b) is "Yes", were any native title rights the exercise of which involved the presence on the leased land by the holders of the native title:

(i) extinguished by the grant of the Lease; or alternatively

(ii) suspended upon the grant of the Lease for the duration of the Lease?

Answer

Save to say that by operation of ss 23B and 23E of the *Native Title Act* 1993 (Cth) and s 20 of the *Native Title (New South Wales) Act* 1994 (NSW), the grant of the Lease extinguished any native title in relation to the land covered by the Lease and the extinguishment is to be taken to have happened when the Lease was granted, it is inappropriate to answer this question.

123 The costs of the appellant of the appeal in this Court should be borne by the first respondent.

124 McHUGH J. The facts, issues and relevant legislation are set out in the judgment of Callinan J. For the reasons given by his Honour and for the reasons that I gave in *Western Australia v Ward*[107], I would grant special leave to appeal and answer the questions in the manner proposed by Callinan J.

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107 [2002] HCA 28.

125 KIRBY J. In *Re E W Hawkins*[108], Jordan CJ, writing of the statutes that then governed the alienation of Crown land in New South Wales, observed that the much amended legislation provided "in elaborate detail, in a jungle penetrable only by the initiate, for various ways in which various special and peculiar forms of interests in Crown lands may be acquired from the Crown"[109].

In the jungle of native title legislation

126 That impenetrable jungle of legislation remains. But now it is overgrown by even denser foliage in the form of the *Native Title Act* 1993 (Cth) ("the NTA") and companion State legislation (relevantly the *Native Title (New South Wales) Act* 1994 (NSW) ("the State Act"))[110]. It would be easy for the judicial explorer to become confused and lost in the undergrowth to which rays of light rarely penetrate. Discovering the path through this jungle requires navigational skills of a high order. Necessarily, they are costly to procure and time consuming to deploy. The legal advance that commenced with *Mabo v Queensland [No 2]*[111], or perhaps earlier[112], has now attracted such difficulties that the benefits intended for Australia's indigenous peoples in relation to native title to land and waters are being channelled into costs of administration and litigation that leave everyone dissatisfied and many disappointed.

127 The only way to pass through the jungle is to retain one's bearings, as the explorers of Australia have traditionally done, by keeping the eyes fixed on clear sources of light – like the rising sun in the morning or, at night, the constellation we call the Southern Cross. That is what I will try to do in these reasons.

128 Formally, the proceedings involve an application for special leave to appeal from a judgment of the Full Court of the Federal Court[113]. That application was referred into the Full Court of this Court by the panel before whom it originally came.

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108 (1948) 49 SR (NSW) 114, affirmed sub nom *Hawkins v Minister for Lands (NSW)* (1949) 78 CLR 479.

109 (1948) 49 SR (NSW) 114 at 118. The passage is set out in full in the reasons of Gaudron, Gummow and Hayne JJ ("the joint reasons") at [68].

110 Described in the joint reasons at [48]-[57].

111 (1992) 175 CLR 1 ("*Mabo [No 2]*").

112 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

113 *Anderson v Wilson* (2000) 97 FCR 453.

The facts and issues

129 The facts, contained in agreed materials, were simple in the extreme[114]. The applicant, Mr Wilson, is the lessee of land in the Western Division of New South Wales under a "lease" validly granted under the *Western Lands Act* 1901 (NSW) ("the WLA") in 1955, effective from 1953. Nothing turns on the back-dating. The respondent, Mr Anderson, is the claimant of certain land rights over the land. The claim is made on behalf of the members of his Aboriginal clan. The claimed land overlaps the leased land.

130 Mr Wilson asserts that, of its nature or character, the grant of the "lease" under the WLA ("the Lease") excludes the possibility of the subsistence of native title rights, whether under the NTA, the State Act or otherwise, whether enjoyed by Mr Anderson, his clan or anyone else. Mr Anderson disputes that assertion. He says that no such easy determination of his claim can be made in the abstract. Instead, according to Mr Anderson, what is involved is an examination of the complex questions of mixed law and fact, in the manner described by Toohey J in *Wik Peoples v Queensland*[115].

131 Only if the course followed in *Wik* is taken, Mr Anderson says, will the precise nature of the native title interests that can be proved by him and the clan he represents, become clear. Only then will all of the factual and legal incidents of the Lease be clarified. Only then, by an examination of such matters of detail, a close study of the legislation and the Lease, and a consideration of the approach adopted in *Wik* and other cases, will a lawful result be reached that determines whether the Lease does or does not confer "exclusive possession". Only if it does will it extinguish any otherwise surviving native title, defined in terms of Aboriginal law and custom that the law of Australia will recognise and uphold.

The reasonableness of separating the questions

132 It was understandable that Mr Wilson should look for a rapid path to resolution of the claim affecting the leased land. He is one of many lessees under the WLA, exposed to claims such as Mr Anderson has brought. The position of those other WLA leaseholders may be indistinguishable. Contesting such claims would not only be expensive but distracting and worrying for those leaseholders. Some of them, it may be inferred, live on land with low average rainfall, at the edge of viability. They have many worries without adding legal proceedings to them if they could be avoided.

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114 *Anderson v Wilson* (2000) 97 FCR 453 at 485-486 [153]-[158]. See joint reasons at [24]-[28]; reasons of Callinan J at [175]-[176].

115 (1996) 187 CLR 1 at 126-127 ("*Wik*").

133 In the necessary course of clarification of the law of native title, since the decisions of this Court in *Mabo [No 2]* and *Wik*, issues of extinguishment have been of the first importance. In *Fejo v Northern Territory*[116], a claim under the NTA by the Larrakia people, in respect of land in an area including Darwin in the Northern Territory, was unanimously rejected by this Court. It was held that native title was extinguished by a grant to a landholder of fee simple in the land. It was concluded that native title was not revived by the fact that the land was later acquired, and again held, by the Crown[117].

134 In effect, Mr Wilson sought to repeat the success of the Northern Territory in *Fejo*. He asserted that he was entitled to be relieved from the burden of Mr Anderson's claim by a simple analysis of the legal character of the Lease. He submitted that, by analogy with the rule in *Fejo*, the "lease in perpetuity" under the WLA was, or was equivalent to, a "freehold estate" for the purposes of the NTA[118]. If he could secure an authoritative decision similar to that in *Fejo*, by reference to nothing more than the legislation applicable to his case and the governing legal principle and policy, he could bring his ordeal to an end. He could then get on with running his lease under the WLA instead of spending his time in courtrooms.

135 Selecting separate questions that afford, in effect, a "knock-out" point in litigation and arguing them in advance of what would otherwise be lengthy and expensive proceedings, is a rational course of conduct on the part of private individuals where that course is available. Properly deployed, it can also save substantial public costs that are otherwise necessarily involved in devoting the resources of the courts, and of publicly funded litigants, in the exploration of factual questions that ultimately turn out to be irrelevant to the disposition of the matter. Some judges are less sympathetic than others to such procedures[119]. Certainly, it is true that well-intentioned attempts by interlocutory procedures to knock out claims at the threshold can, with interlocutory appeals, sometimes prove more burdensome than beneficial.

136 Nevertheless, given that Mr Wilson took what amounted to a *Fejo*-like preliminary objection to the legal viability of Mr Anderson's claim to native title,

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116 (1998) 195 CLR 96 ("*Fejo*").

117 cf NTA, s 237A.

118 NTA, ss 23B(2)(c)(ii), (3).

119 See joint reasons at [34]-[35]; cf *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 357-358 [51]-[53]; *Yanner v Eaton* (1999) 201 CLR 351 at 396 [109]; cf *Anderson v Wilson* (2000) 97 FCR 453 at 461 [29]-[30].

and given the great savings to all parties that could be secured if a *Fejo*-like conclusion were quickly arrived at[120], I would make no criticism of Mr Wilson for urging the course that was pursued or of the Federal Court for pursuing it. The procedures of courts should be flexible, not least where a point of a legal character is said to exist that may afford summary relief and where that point arises in relation to disputed questions of native title that must otherwise be resolved by plunging into the jungle of legislation and litigation. The common law has long facilitated the preliminary disposition of legal objections of this character. It has done so by way of preliminary proceedings to strike out a claim[121] and by the more formal procedure of demurrer[122], by which a party responds to another's pleading by asserting that, even if the facts pleaded be fully proved, they would not give rise to the legal claim or defence alleged.

The basic principles and presumptions

137 In *Mabo [No 2]* it was held that native title is not a creature of the common law, but is a recognition by the common law of the traditional laws of Australia's indigenous peoples[123]. Since *Mabo [No 2]*, there have been a number of decisions of the Federal Court and of this Court, seeking to clarify the intersection between Australian property law, as it has developed from its English origins, and native title rights which take their content from an ancient and very different legal system[124]. It is now accepted that it is the NTA that "governs the recognition, protection, extinguishment … of native title"[125]. However, the common law still has a significant role to play because of its express mention in the NTA and because of the consequent need to resolve questions affecting the interpretation and application of the NTA in a consistent and principled way.

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120 As Callinan J favours in his reasons at [206].

121 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128-130; cf *Jackamarra v Krakouer* (1998) 195 CLR 516 at 539-543 [66].

122 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 152; *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 135-136; *Levy v Victoria* (1997) 189 CLR 579 at 649.

123 (1992) 175 CLR 1 at 58-61. See *Fejo* (1998) 195 CLR 96 at 128 [46].

124 See for example *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373; *Wik* (1996) 187 CLR 1; *Fejo* (1998) 195 CLR 96; *Western Australia v Ward* [2002] HCA 28.

125 *Native Title Act Case* (1995) 183 CLR 373 at 453. This was implicit in *Western Australia v Ward* [2002] HCA 28 at [13], [25] and the NTA, ss 10, 11(1).

138 From the start of this new legal journey, it has been unquestioned that Aboriginal native title rights may be terminated by inconsistent dealings in the land on the part of the Crown (meaning, relevantly, in modern times, the organs of government of Australia acting under, or pursuant to, legislation[126]). From the beginning it has been clear that the enjoyment of native title to which successively the common law, the NTA and other legislation gave recognition, was "precarious"[127] or "inherently fragile"[128].

139 Nevertheless, once the Rubicon was crossed, as it was in *Mabo [No 2]*, and once it was made clear that the Australian legal system did, after all, accord recognition and protection to the native title rights of Australia's indigenous peoples in certain circumstances, it was fundamental that such rights would persist, in the face of legislation said to be inconsistent with them, "unless there be a clear and plain intention" to extinguish such rights[129]. It cannot be doubted that this has been one of the guiding principles of this field of jurisprudence, regularly applied and never questioned[130]. In a world of uncertainty it has been a constant. It is a beam of light in the legal jungle. Moreover, it is a bright beam because it is the product of "conventional [legal] theory"[131].

140 I say that this is a fundamental rule because this Court constantly applies the same principle to cases in which it is asserted that legislation has taken away the civil rights of non-indigenous Australians[132]. It is an old, wise and beneficial

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126 *Mabo [No 2]* (1992) 175 CLR 1 at 110.

127 *Native Title Act Case* (1995) 183 CLR 373 at 452.

128 *Fejo* (1998) 195 CLR 96 at 151 [105].

129 *Wik* (1996) 187 CLR 1 at 85 per Brennan CJ citing *Mabo [No 2]* (1992) 175 CLR 1 at 64, 111, 196; see also *Wik* at 149-155, 166 per Gaudron J, 185 per Gummow J, 247-249 of my own reasons; *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1641 [291]; 184 ALR 113 at 195; cf *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1058.

130 See eg *Native Title Act Case* (1995) 183 CLR 373 at 422-423; *Yanner v Eaton* (1999) 201 CLR 351 at 371-372 [35].

131 *Yanner v Eaton* (1999) 201 CLR 351 at 372 [35]. In that case a distinction was drawn between extinguishment and regulation of native title rights.

132 *Bropho v Western Australia* (1990) 171 CLR 1 at 17; *Wik* (1996) 187 CLR 1 at 146-147; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 414-418 [27]-[38]; *Marshall v Director-General, Department of Transport* (2001) 75 ALJR 1218 at 1229 [37]-[38], 1231 [48], 1235 [67]; 180 ALR 351 at 364-365,

(Footnote continues on next page)

presumption, long obeyed, that to take away people's rights, Parliament must use clear language[133]. The basic human right to own property and to be immune from arbitrary dispossession of property is one generally respected by Australian lawmakers[134]. This fundamental rule attributes to the legislatures of Australia a respect for the rights of the people which those legislatures have normally observed, being themselves regularly accountable to the electors as envisaged by the Constitution[135]. In some circumstances, at least in respect of federal legislation depriving people of established property rights, the presumption to which I have referred is reinforced by constitutional imperatives[136].

141 Whatever may have been its character when the Constitution first came into force and this Court was first established, the Australian legal system is now race- and colour-blind. There is no reason why the long-established principle, applied in respect of other Australians, obliging that a clear and plain intention in Parliament be established to deprive people of their rights (including rights to property interests), should not inure to protect the rights of indigenous Australians. Indeed, there is no reason why, in respect of indigenous Australians,

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368, 373. To the extent that legislation is ambiguous or the common law unclear, it is also permissible to draw upon international principles of human rights in construing the legislation: *Mabo [No 2]* (1992) 175 CLR 1 at 42. These include the rights relating to property: *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-660; *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1641-1643 [292]-[299]; 184 ALR 113 at 195-198.

133 cf *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1641 [291]; 184 ALR 113 at 195.

134 *Western Australia v Ward* [2002] HCA 28 at [111]-[113] referring to *Mabo v Queensland* (1988) 166 CLR 186 at 218; *Native Title Act Case* (1995) 183 CLR 373 at 436-437; see also *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-661.

135 cf *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* (1927) 38 CLR 547 at 559-560; [1927] AC 343 at 359-360; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 181; *Wik* (1996) 187 CLR 1 at 130, 155, 185, 250-251; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 414-416 [27]-[34]; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 328-329 [121]-[123].

136 Constitution, s 51(xxxi). See *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

McHugh J's dictum in *Marshall v Director-General, Department of Transport*[137] should not be faithfully applied. His Honour there said that legislation empowering the deprivation of rights that an Australian would otherwise enjoy "should be construed with the presumption that the legislature intended the claimant to be liberally compensated". After so many legal injustices in the past, I cannot accept that presumptions such as this are available to the settlers and their descendants and successors but not to indigenous Australians.

142 Where the rights concern native title, they may be fragile but they are still protected against accidental, unintended, collateral or unnecessary extinction. To be extinguished, a clear purpose on the part of the legislature must be manifest[138]. The inquiry is, of course, an objective, not a subjective, one. This fundamental rule is not only a statement of the repeated authority of this Court. No other principle could, in my view, be adopted in a legal system that accords equal protection to the rights of all of the people subject to it. In Australia, this includes indigenes and descendants of, and successors to, the settlers; native title claimants under the NTA and lessees under the WLA. One of the principal purposes of the NTA was to ensure that surviving native title, still existing in 1993, should *not* thereafter be extinguished contrary to the provisions of that Act[139]. That statutory principle gives expression to the fundamental rule.

143 It follows that I do not agree with the opinion of Callinan J, that the "clear and plain intention" requirement "forms no part of our law"[140]. A lot of law would be thrown overboard by me before I would contemplate discarding a principle so central to the fundamental postulate of equality before the law of this country[141].

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137 (2001) 75 ALJR 1218 at 1231 [48]; 180 ALR 351 at 368. McHugh J has taken a similar view on other occasions: eg *Australian Postal Commission v Dao [No 2]* (1986) 6 NSWLR 497 at 516.

138 See *Mabo [No 2]* (1992) 175 CLR 1 at 111, 183-184; *Native Title Act Case* (1995) 183 CLR 373 at 422-423.

139 NTA, s 11. This is described as "central" to the NTA: *Western Australia v Ward* [2002] HCA 28 at [98].

140 Reasons of Callinan J at [194].

141 *Mabo [No 2]* (1992) 175 CLR 1 at 56, 182-184. This principle is reflected in many relevant authorities: *In re Southern Rhodesia* [1919] AC 211 at 233; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 407, 409-410; *United States v Santa Fe Pacific Railroad Co* 314 US 339 at 353-354 (1941); *Calder v Attorney-General of British Columbia* [1973] SCR 313 at 401-403.

The NTA and the common law

144 In the Full Court, both Black CJ and Sackville J in their joint reasons[142], and Beaumont J in his separate opinion[143], concluded that, if native title were extinguished in the present case, it was extinguished by the general law and not by force of the NTA. For the reasons given in the joint reasons in this Court, I agree that this conclusion was incorrect.

145 As the joint reasons in this Court explain, the answer to the legal contentions of the parties was to be found not, as such, in the common law but by starting with the provisions of Pt 2 Div 2B of the NTA[144] and its State counterpart. In summary, that Division determines the effect upon native title of certain "acts". If an "act" is a "previous exclusive possession act", all native title in relation to the land or waters covered by the act is extinguished[145]. If it is a "previous non-exclusive possession act", the native title is extinguished or suspended to the extent of any inconsistency[146].

146 However, such provisions of the NTA only have effect in respect of "acts" attributable to the Commonwealth. Provision is then made for the States and Territories to enact counterpart legislation, subject to conditions, in respect of previous exclusive or non-exclusive possession acts attributable to the State or Territory in question[147]. No new question was raised in these proceedings as to the constitutional validity of such provisions[148]. Obviously, the provisions are designed to overcome any suggestions that the NTA covered the field of applicable legislation and so excluded inconsistent State or repugnant Territory legislation affecting the same subject matter[149]. It was pursuant to this facility in

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142 *Anderson v Wilson* (2000) 97 FCR 453 at 460 [25].

143 *Anderson v Wilson* (2000) 97 FCR 453 at 518 [278].

144 Joint reasons at [46]-[47]. See also *Western Australia v Ward* [2002] HCA 28 at [2].

145 NTA, s 23C.

146 NTA, s 23G.

147 NTA, s 23E. As to incompatible Territory law see *Webster v McIntosh* (1980) 32 ALR 603 at 606-607; *Northern Territory v GPAO* (1999) 196 CLR 553 at 580 [53], 636-638 [219]-[223].

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

149 Constitution, s 109. As to Territory legislation see *Northern Territory v GPAO* (1999) 196 CLR 553 at 636-638 [219]-[223].

the NTA that the State Act enacted a provision confirming the complete extinguishment of native title by previous exclusive possession acts "attributable to the State"[150]. That Act also picked up and applied to State legislation the definition of "previous exclusive possession acts" expressed in the NTA[151].

147 Therefore, the first question in this case is whether the Lease constitutes a "previous exclusive possession act". If it does, all native title to the area covered by the Lease is extinguished. This question could then be answered without reference to the contents of the native title claimed by Mr Anderson. Such a finding results in complete extinguishment of any such native title to that area, whatever it may be.

148 I agree that the answer to that question depends principally upon the meaning of the statutory expression "lease in perpetuity" under the WLA. That was the legal character of the Lease which Mr Wilson's predecessor obtained in 1955 and which was later transferred to Mr Wilson. Mr Wilson says that that character was a right of exclusive possession; that this constituted a "previous exclusive possession act"; and that it therefore extinguished all native title rights and interests in the land.

149 On his side, Mr Anderson argued that the separate questions should not be answered[152], in part because they were not expressed in terms of the NTA. However, if they were apt to an answer, Mr Anderson submitted that they should be answered as Black CJ and Sackville J had answered them in the Full Court. This was to the effect that it could not be said at this stage "that any native title rights, the exercise of which involved the presence on the Leased Land by the holders of the native title, were extinguished by the grant of the Lease or suspended upon the grant of the Lease for [its] duration"[153]. Black CJ and Sackville J held that Mr Wilson had failed to show that his rights under the Lease

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150 State Act, s 20. See s 23 regarding the effect of "previous non-exclusive possession acts" of the State.

151 State Act, s 5. By this section, the State Act also adopts the NTA definition of "previous non-exclusive possession acts".

152 In *Wik* three members of the majority criticised the terms of the questions asked as ill adapted to disposing of the key issues relating to extinguishment: (1996) 187 CLR 1 at 131 per Toohey J, 204-205 per Gummow J, 212-213 of my own reasons. This was noted in the Full Court: *Anderson v Wilson* (2000) 97 FCR 453 at 461-462 [32]-[40], 517 [264].

153 *Anderson v Wilson* (2000) 97 FCR 453 at 484 [150].

were "necessarily inconsistent with all native title rights that may exist over or in relation to the Leased Land"[154].

150 The focus of the inquiry is thus whether the Lease included a right of exclusive possession, as understood in the NTA. The phrase "exclusive possession" must be understood in the context of the development of the NTA. The NTA was drafted following this Court's decision in *Mabo [No 2]*, which marked the first recognition, by the common law of Australia, of native title rights and the rejection of the doctrine of terra nullius. The NTA therefore continued the process of integrating a previously unknown right, native title, into the tenures recognised and enforced by the Australian legal system.

151 The phrases "exclusive possession" and "non-exclusive possession" were not included in the NTA until the amendments that followed this Court's decision in *Wik*[155]. That legislative change was enacted in order to clarify the effect of "acts" by or for the Crown, which conferred "exclusive possession" or "non-exclusive possession". As is evident from the terms of the NTA and made plain by the second reading speech of the federal Attorney-General, the amendments that followed *Wik* were substantially declaratory. The Parliament did not "go beyond what can be inferred from the decisions of the High Court as to what acts [extinguish] native title"[156]. The meaning of "exclusive possession" in the NTA should therefore be consonant with the majority decision in *Wik*. At least it should be so unless the terms of the NTA demand a contrary conclusion. Upon this footing, because there is no contrary purpose evident in the NTA itself, "exclusive possession" means possession exclusive of all third parties, including native title holders exercising their rights under traditional law. This conclusion is also consistent with the presumption explained above – the presumption against extinguishment in the absence of a clear and plain purpose to do so.

Analysis of the Lease – exclusive possession?

152 *Analysis in the Full Court*: Although the judges in the Full Court erred in considering that the issue before them was to be answered by reference to the common law rather than the NTA (and its State counterpart), that error does not affect their analysis regarding the legal character of the Lease. I would adopt the analysis of Black CJ and Sackville J regarding the issue of whether the Lease

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154 *Anderson v Wilson* (2000) 97 FCR 453 at 484 [149].

155 *Native Title Amendment Act* 1998 (Cth).

156 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 September 1997 at 7889 (The Hon D R Williams).

conferred a right of "exclusive possession" upon the lessee[157]. In addition, I make the following observations.

153 *The word "lease" is insufficient*: The language and scheme of Pt 2 Div 2B of the NTA is premised upon the assumption that an instrument called a "lease", as referred to in the NTA, may *or may not* confer a right of exclusive possession[158]. So it must be in the counterpart State Act. It follows, as the joint reasons in this Court demonstrate, that an instrument, described as a "lease" in the WLA, is not to be presumed, as such, to confer a right of exclusive possession as a lease at common law might do[159].

154 This conclusion answers the reliance in this case upon the kind of argument that succeeded in the New South Wales Court of Appeal in *Minister for Lands and Forests v McPherson*[160]. The approach that I took in that Court in that case, with the concurrence of Meagher JA[161], was not inconsistent with the conclusion that a "lease" under the Queensland *Land Acts*, of the kind considered in *Wik*, did not necessarily confer the right of exclusive possession on a lessee[162]. What was said in *Wik* applies with even greater force in the present case, having regard to the language and structure of the WLA, the NTA and the counterpart State Act.

155 The starting point for the analysis in response to this question is an appreciation of the peculiarities of a "lease" under the WLA, of the history of such a "lease", and of the reasons for upgrading its original legal description to that of a "lease in perpetuity" and a consideration of whether this latter phrase (or the other statutory incidents of the "leases" under the WLA) afforded the grantee of such a "lease" an exclusive possession right or not. In the joint reasons it is demonstrated that, in this context, the use of the word "lease" does not, of itself,

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157 *Anderson v Wilson* (2000) 97 FCR 453 at 474-482 [98]-[139].

158 *Wik* (1996) 187 CLR 1 at 117 per Toohey J, 195-196 per Gummow J, 245 of my own reasons; cf at 151-152 per Gaudron J.

159 Joint reasons at [58]-[59].

160 (1991) 22 NSWLR 687.

161 (1991) 22 NSWLR 687 at 716.

162 *Wik* (1996) 187 CLR 1 at 122 per Toohey J, 204 per Gummow J, 242-243 of my own reasons; cf *Anderson v Wilson* (2000) 97 FCR 453 at 475 [105]-[106], 516 [258].

confer the right of exclusive possession[163]. The legal character of what the WLA calls a "lease" must be judged in terms of that statute's legislative scheme[164].

156 *Absence of express legislative provision*: It is also clear that the WLA itself did not, in terms, afford the right to exclusive possession. Equally, the NTA does not expressly identify "leases" under the WLA as being amongst the categories of "previous exclusive possession acts". In those categories various interests of considerable variety are specified. They include a "freehold estate"[165] but they get down to interests of quite particular kinds. The latter include "an exclusive pastoral lease"[166], a "community purposes lease"[167] and even "what is taken by subsection 245(3) (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that subsection, assuming that the reference in subsection 245(2) to '1 January 1994' were instead a reference to '24 December 1996'"[168]. It would be hard to be more specific and particular than this.

157 Despite such high particularity, no express reference is made either in the NTA or in the State Act, to a "lease" under the WLA. It is not even as if the provisions of s 23B(2)(c)(i) have been enlivened under which a facility is provided for the specification of particular interests in Sched 1 of the NTA[169]. Nor has "an interest, in relation to land or waters [been] declared by a regulation for the purposes of this paragraph to be a Scheduled interest"[170]. In short, neither the NTA nor the State Act has *expressly* specified that "leases" under the WLA constitute "previous exclusive possession acts". This could have been done. It was not. Instead, the question was left to be decided according to whether, within s 23B(2) of the NTA and its State counterpart, the WLA "lease" constituted a "previous exclusive possession act" applying the applicable legal analysis.

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163 Joint reasons at [58]-[59].

164 cf *Western Australia v Ward* [2002] HCA 28 at [173].

165 NTA, s 23B(2)(c)(ii).

166 NTA, s 23B(2)(c)(iv).

167 NTA, s 23B(2)(c)(vi).

168 NTA, s 23B(2)(c)(vii).

169 NTA, s 249C(1)(a).

170 NTA, s 249C(1)(b). See also ss 249C(2), (3).

158 *Lease "in perpetuity" is insufficient*: With respect, I cannot agree that the fact that the WLA was amended to describe its leases as being "in perpetuity" converted such "leases" from special statutory interests subject to forfeiture for breach of conditions, effectively, or in law, to a freehold estate. The history of the WLA[171] shows that the addition of the words "in perpetuity" represented something of a legislative sleight of hand. This was a truth that Sir Joseph Carruthers, one-time Secretary for Lands, never ceased to point out[172]. The phrase involved nothing more than the adoption of terminology designed to make it easier for grantees of "leases" under the WLA to raise finance by mortgage of the land. Yet borrowings sustained by mortgages are a common feature of a huge variety of legal interests that fall short of affording exclusive possession to land[173]. The incorporation of the additional phrase in the WLA did not alter the character of the peculiar statutory tenure in question.

159 It would have been relatively easy for the Parliament of New South Wales to convert the WLA "leases" to freehold land. It might have done so in 1895 when the "homestead grants" were first provided under the *Crown Lands Act* of that year[174]. It might have done so in 1912 when the notion of a "lease in perpetuity" was introduced[175]. It might have done so later, with a blast of political trumpets, when soldier settler legislation was enacted[176]. Instead, the basic structure of the WLA was retained. Presumably, this fact can be explained on the footing that the New South Wales Parliament continued to regard settlement of land in what became the Western Division of the State as presenting special problems of public policy. This was land with significant implications for the State's environment, for water conservation and possibly for relationships with the local Aboriginal peoples. To ensure the maintenance of a more active supervision by State authorities of WLA land than would be appropriate with respect to freehold, the New South Wales Parliament held back from converting the WLA leasehold to a grant of freehold. Instead, it continued

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171 Joint reasons at [64]-[77].

172 See New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 September 1894 at 435; New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 20 March 1912 at 4108-4109.

173 See, for example, the possibility of mortgages over easements: *Real Property Act* 1900 (NSW), s 3 (definition of "land" to include "easements") and s 56, especially sub-s (4).

174 Joint reasons at [103].

175 *Crown Lands (Amendment) Act* 1912 (NSW), s 7. See joint reasons at [106].

176 *War Service Land Settlement Act* 1941 (NSW). See joint reasons at [74].

to provide for a special kind of statutory leasehold. That statutory leasehold was subject to incidents that are not features of freehold land, or indeed of other leaseholds. Most important amongst these was forfeiture for breach of conditions of residence on, and maintenance of, the land. Yet there were other statutory peculiarities adapted to the special features of WLA land[177].

160 The latter included the right of the Minister, under WLA s 18, to exercise his or her powers to grant a "lease" or to modify, or add to, the terms contained in Sched A. Such modification could, in a particular case, provide that the lessee should receive by grant an interest equivalent to a mere right of occupancy[178]. To transfer land under the WLA, the lessee had to obtain the Minister's consent[179] and a large range of matters relating to the use of the land and its economy were laid down, inconsistent with freehold tenure and inconsistent with a common law lease[180]. Add to this the exceptions and reservations for entry upon the land and the power reserved to resume parcels of the land, and the similarity to the peculiar statutory tenure considered in *Wik* becomes overpowering.

161 *Unique features of WLA leases*: The particular characteristics of the WLA cannot, therefore, be wished away. They are as indelibly written on the "leases" granted to people such as Mr Wilson as were the features of the pastoral leases provided to the grantees in *Wik*.

162 I agree with the conclusion expressed by Black CJ and Sackville J in the Full Court[181]:

> "This conclusion does not mean that the history of Crown leases in New South Wales, in particular the legislation preceding the enactment of the WLA in 1901, should be ignored. At the very least, it sheds light on the scheme introduced by the WLA and the reasons for it. [But that history] reinforces the relevance of the fundamental point made in *Wik* to leases granted pursuant to the WLA. If ever there were a case of legislation adapted to the 'peculiar conditions and wants' of a geographic

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177 cf *Western Australia v Ward* [2002] HCA 28 at [171].

178 cf *Anderson v Wilson* (2000) 97 FCR 453 at 477 [113].

179 WLA, s 18G; cf *Western Australia v Ward* [2002] HCA 28 at [171].

180 See eg WLA, s 18G(1).

181 *Anderson v Wilson* (2000) 97 FCR 453 at 466 [57]. This passage resonates with what was said by Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267: "If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me."

> area, the legislation governing the grant of leases in what ultimately became the Western Division of New South Wales would seem to be it."

Conclusion: no total exclusion by law

163 It follows that the Lease did not include a right of exclusive possession and is therefore not a "previous exclusive possession act" leading to complete extinguishment of native title over the leased area. The following passage from *Wik* is most apt in this case[182]:

> "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 … 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".

This conclusion is the only conclusion consonant with a correct understanding of "exclusive possession" as it appears in the NTA and an application of the presumption explained above.

164 During the hearing of the special leave application, it was made clear by members of this Court that the way in which the separate questions were framed was less than perfect. They were not framed with any consideration for the operation of the NTA. It is not literally necessary for me to answer question (c) as it is prefaced by "If the answer to question (a) or question (b) is 'Yes'". However, I would make the following additional comments to outline the correct operation of the NTA in this case.

165 Question (c) includes whether "any native title rights the exercise of which involved the presence on the leased land by the holders of the native title [were] extinguished by the grant of the Lease [or] suspended". My conclusion relating to exclusive possession leads to the answer that native title rights were not necessarily extinguished. However, the next step is to consider whether the Lease amounted to a "previous non-exclusive possession act"[183], in which case

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182 (1996) 187 CLR 1 at 122 per Toohey J.

183 NTA, s 23F.

there is extinguishment or suspension of native title rights, to the extent of any inconsistency between those rights and the rights conferred by the Lease[184].

166 One example of a "previous non-exclusive possession act" expressly envisaged by the NTA is a "non-exclusive pastoral lease"[185]. Pastoral leases include leases that permit the lessee to use the land "solely or primarily for … maintaining or breeding sheep, cattle or other animals"[186]. Considering that cl 4 of the Lease states that "the Lessee will not use or permit to be used the said land for any purpose other than grazing", it is likely that the Lease does fit the NTA definition of a "previous non-exclusive possession act".

167 That being so, the final step would be to determine the extent of the inconsistency between the Lease, so understood, and any rights claimed by Mr Anderson. It is at this stage that the inconsistency of incidents test is applied[187]. This involves a detailed examination of the legal and factual incidents of the competing interests, in order to determine the exact inconsistencies and therefore establish any extinguishment of claimed native title rights. This is what was required by *Wik*. It is what the NTA envisages should still be done in the case of "previous non-exclusive possession acts".

168 Once one reaches that conclusion, the result follows that Mr Wilson's pre-emptive strike must fail. Unfortunately for him, there is no alternative but to conduct the painstaking analysis of the facts and the law that was upheld in *Wik*, albeit now in the context of the questions presented by the NTA and the State Act and analysis of the WLA and the incidents of the Lease.

Adhering to the majority approach in *Wik*

169 This Court should be slow to reverse the steps, taken by *Mabo [No 2]* and *Wik*, in the recognition of the native title rights of Aboriginal peoples. Particularly so, because no party in this case sought to re-argue the correctness of either of those decisions. Especially so, because the Federal Parliament accepted the holdings in those cases, adopted and amended the NTA accordingly and also facilitated the enactment of comparable companion legislation enacted by State and Territory legislatures throughout the country.

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184 NTA, s 23G.

185 NTA, s 23F(2)(c).

186 NTA, s 248(a)(i).

187 See *Wik* (1996) 187 CLR 1 at 185, 203 per Gummow J and at 221, 238 of my own reasons; *Western Australia v Ward* (2000) 99 FCR 316 at 341 [71].

170 Where the Parliament has not relevantly overriden *Mabo [No 2]* and *Wik* by clear prescription and where this Court has not retreated from the principles there stated, there are already enough legal and practical impediments to the attainment of legal protection for native title rights without now eroding the principles accepted by the majority in those two cases.

171 Where the relevant legislatures, federal and State, have held back from expressly providing that WLA "leases" represent, in effect, a grant of freehold land or clearly constitute "previous exclusive possession acts", the ordinary presumption for the interpretation of legislation applies. That is a presumption that protects the civil and property rights of all Australians. Specifically, it protects the civil and property rights to native title over land and waters enjoyed by Aboriginal Australians, unless a close analysis of the applicable law and facts demonstrates that such rights, when fully understood, are incompatible with the character or incidents, legal and factual, of the *sui generis* WLA statutory lease in New South Wales.

172 In the present case, that analysis remains to be done. The answers to the questions reserved must ensure that it is done.

Orders

173 For different reasons, grounded in the NTA and its State counterpart, I am therefore of the opinion that the actual answers to the separate questions given in the Full Court of the Federal Court by Black CJ and Sackville J were correct. As they formed the basis of the ultimate judgment of the Federal Court, in order to give effect to my opinion I would grant special leave but dismiss the appeal with costs.

174 CALLINAN J. The underlying question in this application for special leave to appeal is whether a lease granted under the *Western Lands Act* 1901 (NSW) ("the State Act") extinguished native title over the leased land. I say "underlying" because that question was not answered by the Full Court of the Federal Court in respect of whose decision this application is brought. One of the matters which this Court will have to consider is whether the Full Court was correct in holding that the question was not ripe for answering.

175 The land the subject of the lease had in 1877 been part of a much larger holding granted as a lease and described as a "run" under the *Crown Lands Occupation Act* 1861 (NSW) and *Lands Acts Amendment Act* 1875 (NSW), and used for pastoral purposes. That lease contained a number of reservations, including one to ensure that Aboriginal inhabitants of the Colony had "free access to the said Run or Parcel of Land … demised, or any part thereof, and to the trees and water thereon, as [would] enable them to procure the Animals, Birds, Fish and other food on which they subsist".

176 The long title to the State Act was as follows:

> "An Act to vest the management and control of that portion of New South Wales known as the Western Division in a board, to be called the Western Land Board; to grant extension of leases in the said division and tenant-right in certain improvements; and for all purposes necessary and incidental thereto."

Section 2 of the State Act repealed the *Crown Lands Act* 1884 (NSW) and Acts amending the same, subject to some exceptions which are not relevant. Section 4 established a Board of Commissioners to exercise various powers and to discharge duties referred to in the State Act in respect of the Western Division of New South Wales, in which area the subject land is located. A "registered holder" of land under the repealed Acts might apply to bring his lease or licence under the provisions of the State Act (s 13) and to obtain a new one under it (s 15). Particulars of all extended and new leases had to be laid before both Houses of Parliament (s 16). Part VII of the State Act made provision for the disposal of Crown lands in the Western Division available for lease. There was no provision in the State Act which sought to retain the reservation in favour of Aboriginal inhabitants made by the lease of the "run" granted in 1877.

177 The applicant does not argue that an extinguishment of native title rights occurred simply as a result of enactment of the State Act. What the applicant submitted in the Federal Court, and what he now submits here, is that the lease which was granted under the State Act and which was effective from 31 August 1953 extinguished native title. The applicant became the lessee in 1984. The *Native Title Act* 1993 (Cth) ("the Native Title Act") was not assented to until 24 December 1993.

178 The questions which were posed for the Full Court of the Federal Court and the answers which it gave were these:

"(a) By virtue only of:

(i) the *Western Lands Act* 1901 (NSW); and

(ii) the regulations thereunder, as in force at the time of the grant of the lease;

did the Lease confer upon the lessee under the Lease a right to exclusive possession of the leased land?

Answer

Unnecessary to answer.

(b) If the answer to the question (a) is 'No', by virtue of:

(i) the *Western Lands Act* 1901 (NSW);

(ii) the regulations thereunder, as in force at the time of the grant of the Lease; and

(iii) one or more of the terms and conditions of the Lease;

did the Lease confer upon the lessee under the Lease a right to exclusive possession of the leased land?

Answer

Unnecessary to answer.

(c) If the answer to question (a) or question (b) is 'Yes', were any native title rights the exercise of which involved the presence on the leased land by the holders of the native title:

(i) extinguished by the grant of the Lease; or alternatively

(ii) suspended upon the grant of the Lease for the duration of the Lease?

Answer

Strictly unnecessary to answer, but on the materials presently before the Court, it cannot be said that any native title rights, the exercise of which involve a presence on the Leased Land by the holders of the native title,

were extinguished by the grant of the Lease or suspended upon the grant of the Lease for the duration of the Lease."

179 The applicant contends in this Court that the Full Court should have answered the questions posed by holding that, upon the grant of the lease, commencing in 1953, the lessee acquired a right of exclusive possession of the subject land, and that native title rights of any kind involving access to the land were extinguished or suspended for the duration of the lease. The applicant submits that nothing that was said by the majority in *Wik Peoples v Queensland*[188] or enacted by way of amendments to the Native Title Act following that case forecloses the applicant's entitlement not only to receive answers to the questions posed, but also to receive answers declaring that extinguishment of native title has occurred.

180 It was further submitted that the Full Court erred in holding that the applicant could not succeed unless the lease granted rights necessarily inconsistent with all native title rights, despite the fact that the questions asked here related to native title rights which involved the presence on the leased land by the holders of native title only.

181 It is necessary to review the relevant provisions of the State Act in the form that it was in at the time of the grant. "Crown lands" and "Pastoral holding" were defined in s 3 as follows:

> "'**Crown lands**' means Crown lands within the meaning of the Crown Lands Acts, and includes land held under occupation license or annual lease.
>
> …
>
> '**Pastoral holding**' means pastoral holding as defined by the Crown Lands Acts, and the terms 'occupation license', 'preferential occupation license', 'scrub lease', 'improvement lease', 'homestead lease', 'settlement lease', 'special lease', 'artesian well lease', 'residential lease', and 'lease of inferior lands', 'homestead selections', and 'homestead grants', shall in this Act have the same meanings as they have in such Acts."

182 A section in an earlier enactment requiring that new leases be laid before Parliament had been repealed in 1934. Section 17(1) empowered the Governor to withdraw any lands held under lease, *other than a lease extended to a lease in perpetuity*, for the purpose of providing for settlement. Section 18 dealt with reservations and covenants. It provided as follows:

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188 (1996) 187 CLR 1.

"All leases issued or brought under the provisions of this Act shall, except as otherwise provided in this Act, expire on the thirtieth day of June in the year one thousand nine hundred and forty-three except leases extended in accordance with the provisions of section seventeen and special leases as hereinafter provided. Where an extension of lease has been granted under section fourteen of this Act, the lessee shall surrender his present lease or certificate of confirmation or grant, and a new lease shall be issued to him from the date of such surrender, and such lease as well as every new lease shall contain the covenants, reservations, and exemptions set out in Schedule A hereto, or such of the same as the Minister may deem applicable, and shall be subject to any modifications or additions contained in the notification rendering the lands available for lease in the case of new leases, and as may be determined by the Minister in the case of extended leases or those granted in lieu of leases surrendered under the provisions of this Act, and no lease shall convey any authority to carry on mining operations thereon. Every such lease shall contain a provision to the satisfaction of the Minister for the destruction of rabbits, and any lease shall, in the discretion of the Minister, after report from the Commissioner, be liable to forfeiture for breach of any of the covenants therein contained or annexed by law thereto:

Whenever in pursuance of the provisions of this Act any holding or any right, title or interest to or in any land, becomes liable to be forfeited, such forfeiture may be declared by the Minister by notification in the Gazette.

Whenever in any instrument of lease in force at the commencement of the Western Lands (Amendment) Act, 1937, or issued after such commencement, it is provided that any lease may be cancelled or cancelled and forfeited or declared to have lapsed, such cancellation or cancellation and forfeiture or lapsing may be declared by the Minister by notification in the Gazette.

No forfeiture, cancellation or lapsing shall operate to extinguish any debt to the Crown.

The Minister may, on the recommendation of the Commissioner, waive or reverse, whether provisionally or otherwise, and on such conditions as he may think fit, any such forfeiture, cancellation, or lapsing. Any reversal shall be notified in the Gazette."

183 Section 18A obliged all lessees under the State Act to fence the boundaries of the leased land subject to any supervisory or exempting power in the Commissioner appointed under the State Act (who, by 1953, had replaced the Board of Commissioners for whom the State Act originally made provision).

184 Section 18D provided as follows:

"The following provisions shall govern all leases granted or issued either before or after the passing of the Western Lands (Amendment) Act 1905 and the holders of such leases, namely:-

(i) No lease other than a special lease for that purpose shall confer any right to remove material from the leased land or to prevent the entry and removal of material by authorised persons.

(ii) A lessee may take from land under lease to him and not comprised within a timber or forest reserve such timber and other material for building and other purposes on the land or on any contiguous land held in the same interest as may reasonably be required by him.

(iii) No lessee shall prevent any persons duly authorised in that behalf from cutting or removing timber or material or from searching for any mineral within the land under lease.

(iv) A lessee shall, if the Minister so directs, prevent the use by stock of any part of the land for such periods as the Minister considers necessary to permit of natural reseeding and regeneration of vegetation; and, for this purpose, the lessee shall erect within the time appointed by the Minister such fencing as the Minister may consider necessary.

(v) A lessee shall not overstock or permit or allow to be overstocked the said land, and the decision of the Commissioner as to what constitutes overstocking shall be final, and the lessee shall comply with any directions of the Commissioner to prevent or discontinue overstocking.

(vi) A lessee shall use iron or steel posts (with wooden strainers) for the erection or repair of all fencing on the land, except that, in special cases, the Commissioner may permit the use of other posts."

185 Section 18E subjected leases in perpetuity to "such terms and conditions of improvement and maintenance thereof including water supply and the destruction of rabbits, wild dogs and other noxious animals as the Minister after report by the local land board may consider necessary to reasonably increase the carrying capacity of the land, and may impose when granting the application".

186 Section 18F imposed a condition of residence for a period of five years upon every lessee to commence to be fulfilled within six months after the inception of the lease. By s 18G, a dealing with a lease applied for after the amendment of the State Act in 1934 could only be undertaken with the prior consent of the Minister. In deciding whether to consent to a dealing, the Minister might have regard to several matters, including the desirability of "preventing undue increases in the price of land and its use for speculative or uneconomic

purposes" (s 18G(1A)(a)). An authorised sub-letting or use of the land for agistment without the Minister's consent rendered the lease liable to forfeiture (s 18G(4A)).

187 Part VII of the State Act dealt, among other things, with leases in perpetuity. Sections 23, 24 and 25 respectively provided:

> "23. (1) It shall be lawful for the Minister to grant leases of Crown lands –
>
> (a) as leases in perpetuity; or
>
> (b) for any term expiring not later than the thirtieth day of June, one thousand nine hundred and seventy-three.
>
> Any lease so granted shall except as otherwise provided in this Act be subject to the general provisions of this Act.
>
> (2) Except as otherwise provided in this Act, the Minister shall not grant a lease of any Crown lands unless such lands have *been set apart for disposal* by notification in pursuance of section twenty-four of this Act.
>
> (3) The Minister shall not grant a lease in perpetuity to an applicant who holds under any tenure (other than annual lease, preferential occupation license, occupation license or permissive occupancy then having not more than one year to run) an area of land which when added to the land applied for would substantially exceed *a home maintenance area*.
>
> For the purpose of this subsection lands held by the spouse of the applicant shall be deemed to be lands held by the applicant.
>
> The provisions of subsection thirteen of section 18E of this Act shall be deemed to be incorporated in this subsection and shall be read mutatis mutandis so as to extend to an application by a company for a lease in perpetuity under this Act.
>
> (4) (a) Upon the granting of any lease under this Act the name of the lessee, together with particulars of the area leased, the term of the lease, the amount of rent and survey fee payable to the Crown, and such other particulars as the Minister may deem desirable shall be notified in the Gazette.

(b) The amount of the first year's rent, and the amount of the survey fee or the first instalment thereof, and any other amount lawfully due and payable to the Crown by the lessee, shall be paid by the lessee to the Colonial Treasurer within one month after the date of such notification or after the date of commencement of the lease, whichever is the later. If such amounts be not so paid the lease shall be liable to be forfeited.

24. (1) The Minister, after such inquiry and report as may be deemed expedient, may declare by notification in the Gazette that the Crown lands comprised within any area to be described in the notification shall be *set apart for disposal* by way of –

(a) lease generally; or

(b) lease exclusively to holders of land under any tenure situated in the Central Division within a reasonable working distance of such lands; or

(c) lease exclusively, to holders of land under any tenure situated in the Western Division within a reasonable working distance of such lands; or

(d) lease exclusively to both classes of holders of land aforesaid.

(2) The Minister shall specify in any such notification that the land is set apart for the purpose of grazing or grazing and agriculture combined or mixed farming, or for any similar purpose or purposes.

(3) (a) Every such notification shall contain particulars of the date on and after which the lands therein described may be applied for, the period within which applications, where conflicting, shall be deemed to be made simultaneously, that the lease is to be a lease in perpetuity or the term for which the lease is to be granted, the situation and areas of such lands, and such other particulars as the Minister may deem desirable.

(b) Where such lands are set apart for the purpose of grazing, the notification may also contain particulars of the estimated rent to be paid to the Crown.

(c) Where such lands are set apart for the purpose of agriculture or for grazing and agriculture combined, or for mixed farming, or for any similar purpose or purposes, the notification shall contain particulars of the estimated capital value of the land. Such estimated capital value shall be the value according to the capabilities and situation of the land and irrespective of any improvements thereon, but such capital value shall include any enhanced value in the land arising from or created by such improvements.

(4) (a) Crown lands within the area described in any notification in pursuance of this section, and any lands within such area which may thereafter become Crown lands shall be or become, as the case may be, *available for disposal in the manner* specified in the notification on and after such dates as may be notified in that behalf.

(b) Such Crown lands may be subdivided into blocks of such areas as the Minister may determine, and the blocks shall be taken according to such subdivision, subject to any adjustment upon survey deemed proper by the Minister.

(c) Such Crown lands shall be deemed to be Crown lands for the purposes of the Mining Act 1906, and any Act amending or replacing the same.

(5) The areas of land set apart in pursuance of this section may be limited to the surface only of such land or to the surface and to such depth below the surface as may be specified in the notification, and any lease granted in respect of such areas shall also be subject to such conditions, reservations and restrictions as to the Minister may seem necessary in the public interest, and be specified in the notification.

(6) Notwithstanding anything to the contrary in this Act or the Mining Act, 1906, or the Forestry Act, 1916-1933, or any Act amending or replacing the same Acts, the setting apart of any land in pursuance of this section *shall have the effect of revoking any reserves* from lease or from license or from lease and license or parts of such reserves or population areas within the boundaries of the land so set apart *unless the contrary is expressly declared by the terms of the notification*.

Such revocation shall take immediate effect on the expiration of the day next preceding the day on and after which the land may be applied for in pursuance of the notification:

Provided that the revocation of any reserve for mining or mining purposes or any timber reserve shall not be so effected unless, in the case of a reserve for mining or mining purposes, the consent thereto of the Secretary for Mines, or, in the case of a timber reserve, of the Minister administering the Forestry Act 1916-1933 has been obtained.

Such setting apart shall also have the effect of revoking any previous setting apart of the same land unless the contrary is expressly declared by the terms of the notification.

(7) Any notification made in pursuance of this section may by like notification be corrected, amended, modified or revoked, whether as to the whole or any part thereof; and it shall be sufficient for the purposes of any such notification if the description of the lands is in any form of general description.

25. (1) On or after the date notified for that purpose, any person who is not subject to any disqualification in that behalf specified in this Act, and in any case where the land is set apart for disposal by way of lease exclusively to holders of any specified class or classes, is a holder within such class or classes, may apply for a lease of the land set apart.

An application for a lease shall be made in the prescribed form and manner.

(2) All applications received by the Commissioner during the period in that behalf specified in the notification shall, where conflicting, be deemed to be and to have been made simultaneously.

(3) The local land board shall deal with all applications and may permit the withdrawal or recommend the disallowance of any application; or may recommend that any application be granted for the area applied for, or – with the applicant's consent – for an area greater or less than, or in a different position from, the land applied for.

Every such recommendation shall be made to the Minister.

> (4) The order of priority of applications made simultaneously shall be determined by the local land board; and where in the opinion of the local land board any such applications have equal claims to priority the order of their priority shall be determined by ballot.
>
> The local land board shall deal with the applications in the order of priority as so determined: Provided that if the local land board shall find that any application or the declaration made in connection therewith contains false or misleading particulars or statements, and that in the absence of such particulars or statements the local land board would not have considered that the application had equal claims to priority the local land board may disallow such application; and thereupon it shall be deemed to have not been included in the ballot." (emphasis added)

188 Section 44 empowered the Governor to withdraw the whole or any part of land comprised in a lease for the purpose of settlement and to pay the lessee compensation therefor.

189 In Sched A to the State Act there were set out the standard covenants, exceptions and reservations referred to in s 18. They included a covenant not to interfere with any reserves, roads, tracks or the use thereof by any person; a covenant to permit the Commissioner and all persons authorised by the Minister or the Commissioner to enter and view the whole or any part of the lease or buildings or other improvements thereon; reservations in favour of the Crown of all minerals, gems and precious stones; and the conferral of an unrestricted right to proclaim travelling stock, camping or other reserves, along with a right to withdraw land for the purposes of roads or travelling stock, camping or other reserves.

The lease

190 The lease was expressed to be a lease of the land in perpetuity for the purpose of grazing. Covenants in the lease obliged the lessee, among other things, to make the land the place of his bona fide residence; to use it for grazing purposes only; to improve it; to enclose the land with a substantial stock-proof fence; to eradicate pests and vermin; not to over-clear the land; not to obtain property rights in any timber on the land and not to ringbark or otherwise destroy timber or scrub without the Minister's permission; and not to overstock. Other provisions of the lease were designed to give effect to Sched A of the State Act.

191 The rights of the parties in this case are governed by the Native Title Act and complementary State legislation. Section 223 of the Native Title Act describes what native title is and what it encompasses. It relevantly provides:

"(1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

(2) Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests."

192 Division 2B of Pt 2 of the Native Title Act deals with "previous exclusive possession acts"[189]. Section 23B(2) relevantly defines the term as follows:

"(2) An act is a ***previous exclusive possession act*** if:

(a) it is valid (including because of Division 2 or 2A of Part 2); and

(b) it took place on or before 23 December 1996; and

(c) it consists of the grant or vesting of any of the following:

…

(iv) an exclusive agricultural lease (see section 247A) or an exclusive pastoral lease (see section 248A);

…

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189 It is unnecessary in this case to determine whether the grant of an interest conferring exclusive possession extinguishes native title at common law and hence precludes recognition of the extinguished native title under s 223(1)(c). The issue is discussed in *Western Australia v Ward* [2002] HCA 28 at [628]-[635].

(viii) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters."

Section 248A defines an exclusive pastoral lease in these terms:

"An ***exclusive pastoral lease*** is a pastoral lease that:

(a) confers a right of exclusive possession over the land or waters covered by the lease; or

(b) is a Scheduled interest."

A previous exclusive possession act extinguishes native title in relation to the land or waters covered by the lease, with the extinguishment taken to have happened when the grant was made (s 23C(1)). All parties agreed, and it is correct, that s 23C(1) was mirrored in s 20 of the *Native Title (New South Wales) Act* 1994 (NSW).

193 The question that the applicant wishes answered is whether the grant of the lease was a previous exclusive possession act which extinguished native title.

194 In *Western Australia v Ward*, I referred to the reality that in modern times exclusive possession in absolute terms has long since ceased to exist[190]. I adhere to the opinions I expressed there that the fact that timber[191] and minerals may be reserved to the lessor or others, that identified categories of persons may pass across the land for certain purposes, and that there may be special statutory provisions for vindication of a right of possession which are different from the common law right to bring an action in ejectment do not deprive a lease for pastoral purposes issued pursuant to an enactment of the character of a lease. Nor would I depart from the opinion that I formed in *Ward*, that the pursuit of pastoral purposes, properly understood, is incompatible with the pursuit of any other activity involving unrestricted access to or physical presence upon the land. I accept that whether an instrument is described as a "statutory lease" or a "lease" may not necessarily be decisive of the question whether the instrument has conferred a right of exclusive possession, although the use of the word "lease"

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190 [2002] HCA 28 at [694].

191 See also, for example, the *Vegetation Management Act* 1999 (Q), the purpose of which is to regulate the clearing of vegetation on freehold land (s 3) and which, in practice, empowers the State of Queensland to forbid land clearing without compensation: ss 3, 4, 7, 8, 9, 10.

should be given much weight[192]. Again, I would reject the notion that has unnecessarily complicated, and, if unchecked, will continue to complicate the resolution of claims for native title: the imputation to the parties to pastoral and other leases of an entirely artificial intention, contrary to the known facts, that native title was or was not to subsist. It is for that reason and the reasons that I also gave in *Ward* that the notion of a "clear and plain intention" to extinguish native title forms no part of our law, and courts should be careful to look to the legal effect of what was granted[193].

195 It is unnecessary for me to repeat what I said in *Ward* concerning the absence of a clear majority opinion in *Wik* (or relevantly its statutory enactment) as to the factors determinative of a lack of exclusive possession because, on any view, this case is distinguishable.

196 The area and location of land here in question could not be described as vast or remote, a factor which some Justices in *Wik* thought very significant[194]. I prefer the view of Beaumont J in the Full Court[195] that there is no principled basis on which to hold that large and remote pastoral leases do not confer exclusive possession but smaller ones supposedly nearer to more closely settled places do.

197 In *Wik*, in Pt III of the *Land Act* 1962 (Q), "pastoral leases" were dealt with in Div I, "stud holdings" in Div II, and "occupation licenses" in Div III. In Pt IV, "agricultural selections" were dealt with in Div II and "grazing homestead perpetual leases" were dealt with in Div IV. Similar parts had been included in the *Land Act* 1910 (Q). Some of the majority judges in *Wik* regarded these features as providing a basis for holding that a pastoral lease was a special kind

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192 I would continue to start from a presumption that when the legislature uses the word "lease", what is intended is a relationship between the parties to such an instrument that conforms to the relationship of landlord and tenant, except to the extent that the empowering enactment or the instrument granted under it varies the incidents of that relationship. There is an abundance of case law to justify that starting point: see *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 212; *American Dairy Queen (Q'ld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 686 per Brennan J; *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 691 per Kirby P, 712 per Mahoney JA; *Wik* (1996) 187 CLR 1 at 74-81 per Brennan CJ, 151 per Gaudron J.

193 *Ward* [2002] HCA 28 at [619], [625].

194 (1996) 187 CLR 1 at 130 per Toohey J, 147, 154 per Gaudron J, 232-233 per Kirby J.

195 (2000) 97 FCR 453 at 514-515 [252]-[253].

of statutory interest[196]. In contrast, the State Act here contains no special part, or set of special provisions, dealing with pastoral leases to distinguish them from common law leases. All leases here, no matter what the purpose for which the land subject to them could be used, were granted in exercise of the power conferred by s 23 of the State Act.

198 Justices in the majority in *Wik* placed weight upon provisions that, in their view, obscured or blurred the distinction between various kinds of "leases" and "licences"[197]. The State Act, however, consistently distinguished between "leases" and "licenses". Thus, leases required payment of "rent"[198], while licences required payment of a licence "fee"[199].

199 In *Wik*, Gummow J[200] and Kirby J[201], and perhaps to a lesser extent Gaudron J[202], regarded as relevant the provisions of the Queensland enactments which suggested to them that the Crown enjoyed possession of the land rather than the lessee[203]. Those Queensland provisions have no analogues in the State Act. Section 255 of the *Crown Lands Consolidation Act* 1913 (NSW), set out below, never had application to land leased under the State Act[204]:

> "On information in writing preferred in that behalf by any person duly authorized to any justice of the peace setting forth that any person is in the unlawful occupation or use of any Crown land, or in the occupation or use of any Crown land in virtue or under colour of any purchase lease or license, although such purchase lease or license shall have been forfeited or otherwise made void, or although the conditions thereof shall have been broken or unfulfilled, or although such lease or license shall have expired,

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196 (1996) 187 CLR 1 at 112-113 per Toohey J, 144-149 per Gaudron J, 199-200 per Gummow J.

197 (1996) 187 CLR 1 at 113 per Toohey J, 194, 199-201 per Gummow J.

198 State Act, ss 19B-21.

199 State Act, s 21.

200 (1996) 187 CLR 1 at 191-195.

201 (1996) 187 CLR 1 at 246.

202 (1996) 187 CLR 1 at 146, 148.

203 *Land Act* 1910 (Q), s 204; *Land Act* 1962 (Q), s 373(1).

204 *Smith v Ward* (1920) 20 SR (NSW) 299 at 302-303, 304.

> such justice shall issue his summons for the appearance of the person so informed against before two or more justices of the peace at the nearest court of petty sessions to such Crown land at a time to be specified in such summons. And at such time and place such court, on the appearance of such person or on due proof of the service of such summons on him or at his usual or last known place of abode or business, shall hear and inquire into the subject-matter of such information. And on being satisfied of the truth thereof either by the admission of the person informed against or on other sufficient evidence such justices shall issue their warrant addressed to any officer duly authorized in that behalf requiring him forthwith to dispossess and remove such person or any buildings from such land, and to take possession of the same on behalf of His Majesty, and the person to whom such warrant is addressed shall forthwith carry the same into execution."

200 In *Wik*, Gaudron J referred to s 135 of the Queensland enactment regarding forfeiture. Her Honour explained its effect in this way[205]:

> "[It brings about] 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', specifically 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."

Her Honour then stated[206]:

> "The fact that in these … 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 … that the grant of a pastoral lease under the 1910 Act did not confer a right of exclusive possession."

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205 (1996) 187 CLR 1 at 156.

206 (1996) 187 CLR 1 at 156.

The State Act had no corresponding provision. The incidents of forfeiture under the State Act are those attendant upon the forfeiture of a common law lease[207].

201 Two of the majority Justices in *Wik*[208] saw as significant the provisions in the *Land Act* 1910 (Q) and *Land Act* 1962 (Q) providing that pastoral leases vest upon the making of the grants and not – as at common law under the doctrine of *interesse termini* – upon entry into possession. In New South Wales, however, the State Act, as originally enacted and amended, never made a distinction of that kind between statutory pastoral leases and common law leases.

202 In *Wik*, two of the Justices in the majority suggested that the extensive reservations of rights of entry were indications that pastoral leases there did not confer a right of exclusive possession[209]. The three minority judges, Brennan CJ, Dawson and McHugh JJ, on the other hand, thought that the rights of entry were indications that a general right to exclusive possession (subject only to specified rights and reservations) was intended[210]. Toohey J, who was also in the majority, noted that the "lessee's right to possession must yield to [the] reservations". His Honour stated that, insofar as indigenous rights and interests involved entering or remaining on the land, "it [could] not be said that the lease conferred on the grantee rights to exclusive possession"[211].

203 With respect, I prefer the view of Brennan CJ, Dawson and McHugh JJ that the reservations do not tell against a right of exclusive possession. It has long been established that even very extensive reservations of rights of entry for official and other purposes are entirely compatible with ordinary leaseholds and also with freehold titles[212]. Nothing about pastoral leases places them in a peculiar category in this respect. In any case, the reservations in Sched A of the

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207 See the State Act, ss 17C(4)(e), 18.

208 (1996) 187 CLR 1 at 153 per Gaudron J, 198-199 per Gummow J.

209 (1996) 187 CLR 1 at 154 per Gaudron J, 246-247 per Kirby J. Gummow J simply said that the fact of the reservations did not necessarily mean that, without them, the lessee had a right to refuse entry to all persons: (1996) 187 CLR 1 at 201.

210 (1996) 187 CLR 1 at 73-74 per Brennan CJ.

211 (1996) 187 CLR 1 at 122.

212 See *Campbell v Dent* (1864) 3 SCR (NSW) 58; *Radaich v Smith* (1959) 101 CLR 209 at 222 per Windeyer J; *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 213 per Mason J; *ICI Alkali (Australia) Pty Ltd v Commissioner of Taxation (Cth)* (1978) 53 ALJR 220 at 223 per Barwick CJ; 22 ALR 465 at 470-471.

State Act applied to all leases granted under s 18, some of which undoubtedly conferred a right of exclusive possession.

204 I do not think that the fact that the lease here is a lease in perpetuity is indicative of an absence of exclusive possession in the lessee[213]. Certainly, the fact that there is no apparent right of reversion is a concept foreign to a common law notion of a lease. Nonetheless, Dixon J in *Hawkins v Minister for Lands (NSW)* was able to describe the reversionary interest in the Crown in relation to such a lease as "slight" and "technical"[214]. It is, moreover, not difficult to see why, in circumstances and places far removed from those of the United Kingdom, there should not be a special form of "statutory lease" adapted from a conventional lease at common law but retaining as far as possible the characteristics of such a lease, including a right of exclusive possession. A lease in perpetuity confers certain advantages on the Crown as lessor: it can enforce a greater measure of control over the land and the uses to which it may be put; it has what may be an easier or more attractive means of obtaining revenue by rent instead of by the exaction of a land tax or some other tax. It would be anomalous, in my opinion, to hold that a lessee in perpetuity should be in a worse position than a lessee for a term of years or months, and that the former could not exclude others from the land and would have what in substance would only be a grazing licence, whereas the latter would have a lease with common law incidents (subject to statutory modifications).

205 I have not found it necessary to decide whether the extrinsic materials relied on by the applicant should be referred to. That is because what I have said so far leads me to conclude that the lease here is distinguishable from the leases before the Court in *Wik*, and that it does confer a right of exclusive possession within the meaning of the Native Title Act and its State analogue[215]. For the same reason, it is unnecessary for me to deal with other points of distinction between this case and *Wik* and the other submissions made by the applicant.

206 There remains the question whether the applicant should be granted special leave to appeal. In my opinion, he should be. The case has been fully argued. Many, many thousands, possibly hundreds of thousands, of dollars of public and other money must have been spent to this point. There is sufficient material before the Court to provide substantial answers to the questions.

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213 *Wik* (1996) 187 CLR 1 at 153 per Gaudron J, 201 per Gummow J.

214 (1949) 78 CLR 479 at 492.

215 I would point out, lest there be any possibility of misunderstanding, that the meaning of exclusive possession under s 248A and other provisions of the Native Title Act is the same as that under the common law.

Answers to the questions should resolve many other cases and reduce much uncertainty. I would therefore grant special leave and answer the questions as follows:

(a) By virtue only of:

(i) the *Western Lands Act* 1901 (NSW); and

(ii) the regulations thereunder, as in force at the time of the grant of the lease;

did the Lease confer upon the lessee under the Lease a right to exclusive possession of the leased land?

Answer to (a): Yes. The lease conferred on the lessee a right of exclusive possession of the leased land within the meaning of that term in:

(a) par (a) of the definition of exclusive pastoral lease in s 248A of the Native Title Act; and

(b) s 23B(2)(c)(viii) of that Act.

(b) If the answer to the question (a) is "No", by virtue of:

(i) the *Western Lands Act* 1901 (NSW);

(ii) the regulations thereunder, as in force at the time of the grant of the Lease; and

(iii) one or more of the terms and conditions of the Lease;

did the Lease confer upon the lessee under the Lease a right to exclusive possession of the leased land?

Answer to (b): Yes. The lease conferred on the lessee a right of exclusive possession of the leased land within the meaning of that term in:

(a) par (a) of the definition of exclusive pastoral lease in s 248A of the Native Title Act; and

(b) s 23B(2)(c)(viii) of that Act.

(c) If the answer to question (a) or question (b) is "Yes", were any native title rights the exercise of which involved the presence on the leased land by the holders of the native title:

(i) extinguished by the grant of the Lease; or alternatively

(ii) suspended upon the grant of the Lease for the duration of the Lease?

Answer to (c): Native title rights were extinguished, not suspended, by the grant of the lease in accordance with s 20 of the *Native Title (New South Wales) Act* 1994 (NSW). Extinguishment is taken to have occurred upon the making of the grant.

207 The respondents should pay the applicant's costs of the application, the appeal to this Court, and the proceedings in the Federal Court and the Full Court of the Federal Court.