HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

ALAN GRIFFITHS ON BEHALF OF THE
NGALIWURRU AND NUNGALI PEOPLES
AND ANOR APPELLANTS

AND

MINISTER FOR LANDS, PLANNING
AND ENVIRONMENT AND ANOR RESPONDENTS

Griffiths v Minister for Lands, Planning and Environment
[2008] HCA 20
15 May 2008
D8/2007

ORDER

1. *Appeal dismissed.*

2. *Appellants to pay the costs of the first respondent.*

On appeal from the Supreme Court of the Northern Territory

Representation

S J Gageler SC with S A Glacken for the appellants instructed by (Northern Land Council)

D F Jackson QC with R J Webb QC for the first respondent (instructed by Solicitor for the Northern Territory)

Interveners

R G Orr QC with M A Perry QC intervening on behalf of the Attorney-General for the Commonwealth of Australia (instructed by Australian Government Solicitor)

R J Meadows QC Solicitor-General for the State of Western Australia with G J Ranson intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor for Western Australia)

M G Sexton SC Solicitor-General for the State of New South Wales with S B Lloyd intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW)

CATCHWORDS

Griffiths v Minister for Lands, Planning and Environment

Real property – Compulsory acquisition – Section 43(1) of *Lands Acquisition Act* (NT) ("LAA") empowered Minister, subject to LAA, to compulsorily acquire land "for any purpose whatsoever" – Whether s 43(1) of LAA conferred power on Minister to acquire land solely to enable it to be sold or leased for private use.

Aborigines – Native title – Compulsory acquisition of native title rights and interests – Section 11(1) of *Native Title Act* 1993 (Cth) ("NTA") provided that native title could not be extinguished contrary to NTA – At time of notification of compulsory acquisition appellants had commenced proceedings for determination of native title to lots – Lots otherwise consisted of vacant Crown land – Whether s 24MD(2) of NTA permitted extinguishment of native title by compulsory acquisition when no non-native title rights and interests subsisted.

Statutes – Construction – Compulsory acquisition of native title interests – Whether s 43(1) of LAA conferred power on Minister to acquire interests including native title interests – Whether statute so providing is subject to interpretive principle that acquisition of native title interests must be stated in clear and plain terms – Whether distinction drawn between acquisitions for governmental and non-governmental purposes.

Aborigines – Native Title – Compulsory acquisition of native title rights and interests – Nature of such native title interests in Australian law – Whether such interests do or may include special features arising from spiritual, cultural or social connection between native title owners and their land – Communal character of native title – History of denial and later recognition of native title rights and interests in land in Australia – Whether such special characteristics of native title rights and interests import requirement for express provisions in legislation for compulsory acquisition of such rights and interests – Whether the LAA sufficiently or at all provides for acquisition of native title rights or interests in circumstances of the present case.

Words and phrases – "compulsory acquisition", "native title".

Lands Acquisition Act (NT), ss 5A, 43(1).
Native Title Act 1993 (Cth), ss 11(1), 24MD(2), 223.

1 GLEESON CJ. I agree with the orders proposed by Gummow, Hayne and Heydon JJ, and with their reasons ("the joint reasons") for those orders. I would make the following additional observations about the second issue dealt with in those reasons, that is, the construction of s 24MD(2)(b) of the *Native Title Act* 1993 (Cth).

2 Section 24MD(2) provides for the extinguishment of native title on just terms as to compensation if:

> "(a) the act is the compulsory acquisition of the whole or part of any native title rights and interests under a law of the Commonwealth, a State or a Territory that permits both:
>
> (i) the compulsory acquisition by the Commonwealth, the State or the Territory of native title rights and interests; and
>
> (ii) the compulsory acquisition by the Commonwealth, the State or the Territory of non-native title rights and interests in relation to land or waters; and
>
> (b) the whole, or the equivalent part, of all non-native title rights and interests, in relation to the land or waters to which the native title rights and interests that are compulsorily acquired relate, is also acquired (whether compulsorily or by surrender, cancellation or resumption or otherwise) in connection with the compulsory acquisition of the native title rights and interests; and
>
> (ba) the practices and procedures adopted in acquiring the native title rights and interests are not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests when their rights and interests are acquired[.]"

3 The evident concern of these three conditions of the operation of the substantive provisions of s 24MD(2) relating to extinguishment of native title rights and interests, and compensation, is to avoid racial discrimination. Paragraphs (a), (b) and (ba) address potential kinds or sources of discrimination.

4 The argument for the appellants fastens upon the word "all" in par (b). The appellants submit that the condition expressed in par (b) can only be satisfied where there are some non-native title rights and interests in the subject land, and they also are acquired. Textually, the argument is inconclusive. There are many contexts, including legislative contexts, in which the word "all" means "any and all". To say, for example, that a company may qualify for a certain order relating to the administration of its affairs only if it has paid all its debts does not disqualify a company that has never traded and therefore never had any debts. Context and purpose will determine whether satisfaction of a condition that all

non-native title rights and interests also be acquired is rendered impossible by the circumstance that there are no such rights and interests to acquire.

5 Such a circumstance, if it exists, would appear to be fortuitous, and unrelated to any discernible legislative object. There is, no doubt, a great deal of land in the Northern Territory in which there are no interests other than native title interests. The same is probably true of Western Australia. How would it advance a legislative purpose against discrimination to distinguish between such land and land where there is a single, perhaps relatively unimportant, non-native title right or interest? Why should the existence of, say, a short-term unregistered lease mean that, during the subsistence of the lease, par (b) could be satisfied, but, upon expiry of the lease, par (b) could not be satisfied? The legislative purpose is against discrimination and discriminatory acquisition. To make the presence or absence of a non-native title right or interest of any kind determinative of the application of s 24MD(2) does not advance that purpose.

6 It may be added that whether or not any non-native title right or interest exists at any particular time could be a matter of uncertainty. Such rights and interests may not be known at the time of acquisition. It is difficult to accept that there was a legislative acceptance of a possibility with such obvious adverse consequences for reasonable certainty and predictability in land management.

7 The construction for which the appellants contend appears to produce a curious, in fact inexplicable, new form of discrimination between different kinds of native title rights and interests: those that co-exist with non-native title rights and interests, and those that do not. The former, according to the appellants, are subject to extinguishment by s 24MD(2), whereas the latter are not. Discrimination is judged by making comparisons. The comparisons required by pars (a), (b) and (ba) respectively are different, but all are directed to the same ultimate question: whether, in the compulsory acquisition of native title rights and interests, there is equality of treatment between native title and non-native title rights and interests. That question is capable of being answered by postulating the existence of non-native title rights and interests and asking how they would be affected. It does not require the identification of actual rights or interests and demonstration of how they are affected.

8 The aim of the legislation is not to ensure that every time some native title rights and interests (regardless of their nature and extent) are acquired there will also be some non-native title rights and interests (regardless of their nature and extent) that also must be acquired. That would be a crude form of equality, but not one that advanced any rational objective. The construction contended for by the first respondent and the interveners better fits the statutory context, the history (as explained in the joint reasons) and the legislative purpose.

9 GUMMOW, HAYNE AND HEYDON JJ. This appeal from the Northern Territory Court of Appeal[1] (Martin CJ, Mildren and Riley JJ) concerns land at the Town of Timber Creek which is situated at the junction of the Victoria River and Timber Creek in the north-west of the Territory. The Town largely comprises unalienated "Crown land" within the meaning of that term in the *Crown Lands Act* (NT) ("the CLA"). The Crown land is unaffected by any interest or tenure which might be called "ordinary title", but this appeal was conducted on the footing that there exists with respect to that Crown land "native title" within the meaning given to that expression by s 223 of the *Native Title Act* 1993 (Cth) ("the NTA").

10 The term "Crown lands" is defined in s 3 of the CLA as meaning:

> "all lands of the Territory, including the bed of the sea within the territorial limits of the Northern Territory, and including an estate in fee simple that is registered in the name of the Territory, but does not include reserved or dedicated lands".

Section 4 imposes a general bar upon the alienation of "Crown lands" otherwise than in pursuance of that statute; this reflects for the Territory the general position in Australia that the authority of the executive to dispose of Crown lands must be derived from statute[2]. Section 9 empowers the Minister (the first respondent) in the name of the Territory, but subject to the CLA, by instrument in the appropriate form to grant an estate in fee simple in or lease of vacant Crown land. The vacant Crown land in the Town of Timber Creek in which there exists native title includes certain Lots ("the Lots") in respect of which the Minister proposes to acquire compulsorily that native title. The purpose of doing so is to enable the Lots then to be alienated by the Territory by sale or lease for private use in the manner described later in these reasons.

11 To bring about the acquisition the Minister relies upon provisions of the *Lands Acquisition Act* (NT) ("the LAA"). Section 43(1) of the LAA empowers the Minister, subject to that statute, to acquire compulsorily land "for any purpose whatsoever" by causing to be published in the *Gazette* a notice declaring the land to be acquired. That power is conditioned upon compliance with applicable pre-acquisition procedures specified in Pts IV (ss 31B-41) and IVA (ss 42-42D) of the LAA. The term "land" is defined in s 4 as including an "interest" in land which in turn is defined as including "native title" rights and

---

1 *Minister for Lands, Planning and Environment v Griffiths* (2004) 14 NTLR 188.

2 *Western Australia v Ward* (2002) 213 CLR 1 at 121 [166]-[167]; [2002] HCA 28.

interests within the meaning of s 223 of the NTA. Upon publication in the *Gazette* of a notice of acquisition, "the land" described therein vests in the Territory freed and discharged from all interests and restrictions of any kind (s 46(1)).

12 Section 5A(1) provides that the LAA applies in relation to an acquisition of an interest in land comprising native title rights and interests, being an acquisition which is an "act" to which there apply the consequences set out in sub-ss (6A) or (6B) of s 24MD of the NTA. It will be necessary to refer further to the NTA but it should be indicated here that the appeal in this Court turns upon the interaction between the NTA and the LAA, one a law of the Commonwealth and the other a law of the Territory. This is foreshadowed by the above provisions which link acquisitions under the LAA to s 24MD of the NTA.

13 Section 24MD(6A) gives to native title holders the same procedural rights in relation to a compulsory acquisition under Territory law as they would have as holders of ordinary title to the land in question and to any adjoining land. Section 24MD(6B) assumes that the purpose of that compulsory acquisition may be the conferral in relation to the land concerned of rights and interests upon persons other than the Territory; in such cases, special provision is made for the determination of objections by an "independent body", but compliance by the Territory with that recommendation is not mandated in all circumstances.

14 Pursuant to the pre-acquisition procedures provided in Pt IV of the LAA, in 2000 the Minister notified the appellants (Alan Griffiths and William Gulwin on behalf of the Ngaliwurru and Nungali Peoples) of proposals to acquire all interests including native title rights and interests (if any) in the Lots. Thereafter some of the Lots were to be dealt with by granting Crown leases to Warren Pty Ltd for agricultural purposes of a commercial nature, including cattle husbandry and goat breeding, and other Lots were to be offered at public auction for the grant of Crown leases and use for "commercial/tourism development". That purpose appears to have engaged s 24MD(6) of the NTA.

15 Conformably with the NTA, s 34 of the LAA (which is in Pt IV) provides for the making of objections to proposed acquisitions. The objections by the appellants were heard by the Lands and Mining Tribunal ("the Tribunal")[3] and on 22 March 2002 the Tribunal recommended in favour of the compulsory acquisition of the native title but subject to conditions designed:

---

3 Established by the *Lands and Mining Tribunal Act* 1998 (NT). The Tribunal is the second respondent to the appeal in this Court but played no active part in the appeal.

> "to ensure that in due course in the event that native title is indeed determined by the Federal Court to have existed (but for the acquisition and consequent extinction of native title) the Northern Territory is possessed of an amount which at least hopefully will be equal to or a major contribution towards any compensation which would fall to be paid by the Northern Territory Government as a consequence of such determination".

16 In the meantime, the appellants had commenced on 10 December 1999 proceedings in the Federal Court under s 13 of the NTA for a determination of native title to vacant Crown land situated within the Town. A determination was made on 28 August 2006[4]. The Full Court of the Federal Court varied the determination in the appellants' favour on 22 November 2007[5].

17 On 1 June 2002 the Minister accepted the recommendations of the Tribunal. The appellants then commenced proceedings in the Supreme Court of the Northern Territory to set aside the recommendations of the Tribunal and the decision of the Minister to act on those recommendations. On 31 July 2003 the primary judge (Angel J) made orders setting aside the recommendations and decision[6].

18 However, an appeal by the Minister to the Court of Appeal was successful. On 10 May 2004, the orders of Angel J were set aside and the Supreme Court proceedings dismissed. The appeal to this Court is brought by special leave from that decision of the Court of Appeal. Counsel for the Attorneys-General of the Commonwealth, Western Australia and New South Wales were heard in support of the first respondent, the Minister.

The issues

19 The appellants seek reinstatement of the orders made by Angel J. They put forward two grounds for doing so. The first concerns the construction of the compulsory acquisition provisions of the LAA. In particular, the appellants focus upon s 43(1)(b) of the LAA which states:

---

4 *Griffiths v Northern Territory (No 2)* [2006] FCA 1155.

5 *Griffiths v Northern Territory* (2007) 243 ALR 72.

6 *Griffiths v Lands and Mining Tribunal* (2003) 179 FLR 241.

"Subject to this Act, the Minister may acquire land under this Act for any purpose whatsoever –

(aa) ...

(a) ...

(b) if the pre-acquisition procedures in Parts IV and IVA as applicable have been complied with – by compulsory acquisition by causing a notice declaring land to be acquired to be published in the *Gazette*."

The appellants submit that notwithstanding the phrase "any purpose whatsoever", the section does not confer power upon the Minister to acquire land from one person solely to enable it to be sold or leased by the Territory for private use to another person.

20 The second issue flows from the circumstance that the Lots are unalienated Crown land in which the only outstanding interests therein are native title. The appellants appear to concede that the contrary would have been the case under the NTA were there subsisting interests or tenures of others derived from the Crown, but they refer to the statement in s 11(1) of the NTA that native title is not to be extinguished contrary to that statute and then submit that the NTA contains no provision permitting the acquisition proposed under the Territory law.

21 For the reasons which follow neither submission should be accepted and the appeal should be dismissed.

22 It is convenient to turn first to the construction of s 43 of the LAA.

"For any purpose whatsoever"

23 In considering the restriction which the appellants would by a process of construction place upon those words in s 43 of the LAA, it is appropriate first to look to the provenance of that section. This course was taken by Martin CJ in the Court of Appeal[7].

24 The *Northern Territory (Self-Government) Act* 1978 (Cth) ("the Self-Government Act") came fully into operation on 1 July 1978 (s 2). Before the commencement of the Self-Government Act the acquisition of land in the

---

7 (2004) 14 NTLR 188 at 191-193.

Northern Territory was controlled by federal legislation, the *Lands Acquisition Act* 1955 (Cth) ("the 1955 federal law"). Section 6 thereof empowered the Commonwealth to acquire land "for a public purpose", and that term was so defined in s 5(1) as to apply to a purpose in respect of which the Parliament of the Commonwealth had power to make laws and, in relation to land in the Northern Territory, any purpose in relation to that Territory. The term "for public purposes" had appeared in s 13 of the earlier statute, the *Lands Acquisition Act* 1906 (Cth), and had been similarly defined in s 5.

25 The identification in the federal legislation of "public purpose" with heads of legislative power reflected the terms of s 51(xxxi) of the Constitution. But it also was consistent with what appeared in a line of English authority beginning in the 19th century. This treated as "public purposes" those required and created by the government of the country, being purposes of the administration of that government[8].

26 Following the commencement of the Self-Government Act, the LAA was enacted and included s 43 in the following form:

> "Subject to this Act, the Minister may acquire land *for public purposes* by causing a notice declaring that land to be acquired to be published in the *Gazette*." (emphasis added)

Further, the expression "public purpose" was defined in s 4 of the LAA as meaning a purpose in relation to the Territory and as including a purpose related to the carrying out of a function by a statutory corporation.

27 In 1982[9] s 43 was amended so that it then simply read "Subject to this Act, the Minister may, under this Act, acquire land". Following the amendments made to the NTA by the *Native Title Amendment Act* 1998 (Cth) ("the 1998 NTA Amendment"), the LAA was extensively amended[10]. In particular, s 43 was repealed and s 43 substantially in its present form was introduced.

28 What had supervened was not only the 1998 NTA Amendment, but the decision of this Court in *Clunies-Ross v The Commonwealth*[11]. That litigation

---

8 See *Bank Voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at 298, reversed on other grounds [1954] AC 584.

9 By s 10 of the *Lands Acquisition Amendment Act* 1982 (NT).

10 By s 10 of the *Lands Acquisition Amendment Act (No 2)* 1998 (NT).

11 (1984) 155 CLR 193.

concerned the power conferred by s 6 of the 1955 federal law to "acquire land for a public purpose". The Court construed that expression as limited to an acquisition of land needed, or proposed for use, application or preservation for the advancement or achievement of a public purpose. The power did not extend to purposes "quite unconnected with any need for or future use of the land"[12], and did not extend to the taking of land merely in order to deprive the owner of the land and thereby advance or achieve some purpose in respect of which the Parliament had power to make laws.

29 Against that background, the absence from s 43 in its post-1998 form of any reference to "public purpose" and the presence of the expression "for any purpose whatsoever" may readily be understood as a removal by the Territory legislature of any ground for the limitation of the statutory power by reference to considerations which had prevailed in *Clunies-Ross*.

30 It is unnecessary in this case to determine what nevertheless may be the limits to the scope of the power conferred by the broad words of s 43. This is because the expression "for any purpose whatsoever" as it appears in s 43(1) must at least include for the purpose of enabling the exercise of powers conferred upon the executive by another statute of the Territory. Those purposes include the exercise of the power conferred by s 9 of the CLA. This provides that subject to that statute the Minister may in the name of the Territory and by instrument in the appropriate form grant an estate in fee simple or lease of Crown land. Further and more detailed provisions respecting the alienation of Crown land are found in the balance of Pt 3, Div 1 (ss 9-18) of the CLA.

31 Further, it is pertinent, though not critical, to note that as Mildren J observed in the Court of Appeal[13]:

> "it is difficult to see why, in the circumstances of this case, the acquisitions could not be for what might be regarded as a legitimate Territory purpose, and there can be no doubt that such a purpose falls within the ambit of [s 43(1)(b)]. It is very much the business of government to promote industry in or around towns by providing land for the use of industry, whether the industry be manufacturing, tourist businesses or goat farming."

---

12 (1984) 155 CLR 193 at 200.

13 (2004) 14 NTLR 188 at 216.

32 Further, the Territory is established by s 5 of the Self-Government Act as a body politic, and subject to the requirement of just terms imposed by s 50, the Legislative Assembly is empowered by s 6 to make laws for the peace, order and good government of the Territory. This constitutional position of the Territory differentiates it from the situation of local government bodies whose powers fell for consideration in such cases as *Werribee Council v Kerr*[14]. The statement in that case by Higgins J, with reference to the powers of the appellant conferred by the *Local Government Act* 1915 (Vic), that municipal councils had not been empowered to interfere with the private title of A for the private benefit of B[15] is inapt to describe in the Territory the interrelation between the powers conferred by the LAA and the CLA.

33 Nor, given that statutory structure, has any case been presented which would bring this case within the situation considered in *Samrein Pty Ltd v Metropolitan Water Sewerage & Drainage Board*[16]. This Court indicated in *Samrein* that if it had appeared on the evidence that the Board had been seeking to acquire the land in question for an ulterior purpose there would have been an ostensible but not a real exercise of the power granted by its statute[17].

34 For these reasons the appellants fail in their attack upon the conclusions reached by the Court of Appeal respecting the construction of s 43 of the LAA.

Native title

35 Here also the issue which arises is best understood by first making some reference to the background in the case law and statute law.

36 In *Mabo v Queensland [No 2]*[18] Deane and Gaudron JJ remarked:

> "The personal rights conferred by common law native title do not constitute an estate or interest in the land itself. They are extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive

---

14 (1928) 42 CLR 1.

15 (1928) 42 CLR 1 at 33.

16 (1982) 56 ALJR 678; 41 ALR 467.

17 (1982) 56 ALJR 678 at 679; 41 ALR 467 at 468.

18 (1992) 175 CLR 1 at 110.

possession. They can also be terminated by other inconsistent dealings with the land by the Crown, *such as appropriation, dedication or reservation for an inconsistent public purpose or use,* in circumstances giving rise to third party rights or assumed acquiescence." (emphasis added)

Their Honours added[19]:

"Our conclusion that rights under common law native title are true legal rights which are recognized and protected by the law would, we think, have the consequence that any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s 51(xxxi) [of the Constitution]."

37 Against that background and as enacted in 1993, the NTA made specific provision, among "permissible future acts"[20], for compulsory acquisition. Section 23(3) stated:

"If the act is the acquisition, under a Compulsory Acquisition Act, of *the whole or part of any native title rights and interests*:

(a) the non-extinguishment principle applies to the acquisition; and

(b) nothing in this Act prevents any act that is done in giving effect to the purpose of the acquisition from extinguishing the native title rights and interests; and

(c) if the Compulsory Acquisition Act does not provide for compensation on just terms to the native title holders for the acquisition, they are entitled to compensation for the acquisition in accordance with Division 5." (emphasis added)

In relation to the Territory, the term "Compulsory Acquisition Act" was defined in s 253 as a law of the Territory permitting the compulsory acquisition by the Territory of native title rights and interests and of other interests in relation to land and waters, and providing for compensation for the acquisition of any native

---

19 (1992) 175 CLR 1 at 111.

20 These included the extinguishment on or after 1 January 1994 of any legal right in the exercise of power conferred by statute, which could be done in relation to the land concerned if the native title holders concerned instead held ordinary title to it (ss 233, 235). Section 235 was repealed by the 1998 NTA Amendment.

title rights and interests and containing provisions to the same effect as s 79 of the NTA. Section 79 dealt with requests for non-monetary compensation.

38 It may be accepted that the LAA was a Compulsory Acquisition Act within the definition in s 253 of the NTA. The result was that where all that could be acquired in respect of particular unalienated Crown land were native title rights, s 23(3) of the NTA would apply to the extinguishment of that native title.

39 With the decision in 1996 of this Court in *Wik Peoples v Queensland*[21], it became apparent that grants of interests under legislation using such terms as "pastoral lease" would not necessarily extinguish all incidents of native title in respect of the relevant areas. In such a situation, a compulsory acquisition might now be made of the native title rights, but not of the concurrent pastoral lease. Were that to be permitted by the NTA, this would be likely to offend the *Racial Discrimination Act* 1975 (Cth) ("the RDA") as it has been interpreted by this Court[22].

40 Section 23(3) appeared in Div 3 (ss 21-44) of Pt 2 of the NTA. The Division was headed "Future acts and native title". That Division was repealed by Sched 1, Item 9 of the 1998 NTA Amendment. What then was introduced into the NTA by the 1998 statute[23] was a new Div 3, with the same chapeau but extending from s 24AA to s 44G and divided into Subdivs A-Q.

41 Subdivision M (s 24MA-s 24MD) dealt with future compulsory acquisition. In Ch 15 of the Explanatory Memorandum to the Native Title Amendment Bill 1997 there appeared the following:

> "15.1 ***Subdivison M of Division 3***, inserted by ***Item 9 of Schedule 1***, is based on sections 23 and 235 of the current NTA, which are repealed by these amendments. In brief, this Subdivision means that legislation will be valid to the extent it relates to an onshore place if it affects native title areas in the same way as, or no less beneficially than, it affects freehold areas. It also means that a non-legislative

---

21 (1996) 187 CLR 1.

22 The effect of that interpretation is explained in *Western Australia v Ward* (2002) 213 CLR 1 at 96-109 [98]-[134].

23 Sched 1, Item 9.

> act can be done validly over native title areas if that act could be done validly over freehold areas or if [it] is the creation or variation of a right to mine for opals or gems.
>
> 15.2 The non-extinguishment principle will apply unless the act is the compulsory acquisition, under a non-discriminatory law, of native title and non-native title rights are also acquired (ie the acquisition power is exercised in a non-discriminatory way). Generally, the native title holders would be entitled to compensation for the act in the same way that freeholders would be. For compulsory acquisitions, native title holders will either be entitled to just terms compensation under the relevant compulsory acquisition laws or entitled to compensation under Division 5 of Part 3 of the NTA. Native title holders will also have the same procedural rights for the act as freeholders would have for that act."

42 A Supplementary Explanatory Memorandum of amendments to be moved in the Senate on behalf of the government included the following with respect to an amendment proposed to cl 24MD(2):

> "This amendment to proposed subsection 24MD(2) makes it clear that when native title rights are subject to a non-discriminatory compulsory acquisition process, the non-native title rights in the area concerned, if any, must be acquired, but that this acquisition can be through a compulsory acquisition or by surrender, cancellation, resumption, or otherwise. The purpose of the amendment is to ensure that the methods under which non-native title rights are acquired are sufficiently broad to cover the whole range of circumstances under which State and Territories in fact acquire those rights."

43 What is apparent from these Parliamentary materials is a legislative proposal to proceed on the basis provided by the previous s 23, permitting future compulsory acquisition of native title rights, but also to ensure that where, as it now appeared to be feasible, native title rights subsisted concurrently with non-native title rights, any power of acquisition was exercised in a non-discriminatory fashion by acquiring and extinguishing both species of rights.

44 However, the appellants submit that this proposal miscarried and was not fully translated into s 24MD(2). This is said to be so because unlike the repealed s 23, the new legislation does not meet the case where all that is present are native title rights and there are no subsisting non-native title rights which might also be acquired and extinguished.

45 If Subdiv M applies to a future act then, subject to the provisions in Subdiv P dealing with the right to negotiate, that act is valid. This follows from s 24MD(1). The critical provision is s 24MD(2). This provides (par (c)) that a compulsory acquisition will extinguish the whole or part of the relevant native title rights and interests if three conditions are satisfied. These are contained in pars (a), (b) and (ba). First, the act must be the compulsory acquisition of the whole or part of any native title rights and interests under a law (in the present case of the Territory) that permits both the compulsory acquisition by the Territory of native title rights and interests and the compulsory acquisition of non-native title rights and interests in relation to land or waters (par (a)). The LAA is such a statute. Secondly, the practices and procedures adopted in acquiring the native title rights and interests must not be such as to cause the native title holders a disadvantage which is greater than that caused to the holders of non-native title rights and interests when their rights and interests are acquired (par (ba)).

46 The critical condition for the operation of the extinguishment permitted by s 24MD(2) is that found in par (b). This condition is in the following terms:

> "the whole, or the equivalent part, of *all* non-native title rights and interests, in relation to the land or waters to which the native title rights and interests that are compulsorily acquired relate, is also acquired (whether compulsorily or by surrender, cancellation or resumption or otherwise) in connection with the compulsory acquisition of the native title rights and interests". (emphasis added)

47 The appellants fix upon the word "all" as requiring the presence of at least some non-native title rights. However, the word "all" has various meanings and shades of meaning. It may be used in the sense of "any whatever", as in the phrases "denial of all responsibility" and "beyond all reasonable doubt". It may be used in the sense of "such number as proves to be the case".

48 Observations by Lord Bingham of Cornhill in *R (Quintavalle) v Secretary of State for Health*[24] are pertinent here:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole

---

24 [2003] 2 AC 687 at 695.

> should be read in the historical context of the situation which led to its enactment."

Thus, in par (b) of s 24MD(2) the phrase "all non-native title rights" must be read against the legislative history detailed above in these reasons.

49 With that in mind, it would be an odd construction which read par (b) of s 24MD(2) as denying, contrary to what had been the case under the previous s 23(3), the possibility of compulsory acquisition where all that existed for that acquisition were native title rights and interests. The better construction of the paragraph treats "all" as identifying such non-native title rights and interests as may exist in relation to the land or waters in question. Put shortly, "all" may be read as "any".

50 Counsel for the Commonwealth Attorney-General pointed to an example of the mischief to which par (b) is addressed; a situation that after *Wik* could have arisen under the previous s 23(3). This was the compulsory acquisition in land the subject of a pastoral lease of the native title interests only, leaving the pastoral lessee to enjoy that interest without any concurrently existing native title interests. To take par (b) further by insisting that before native title might be acquired there had to be other subsisting interests would be to reverse the effect of the NTA as previously it operated and would do so where there was no discriminatory operation of the compulsory acquisition law which conflicted with the scheme of the RDA and the NTA.

51 It follows that the appeal respecting the construction of s 24MD(2) fails.

Orders

52 The appeal should be dismissed with an order for costs in favour of the first respondent.

53 KIRBY J. This is an appeal from a judgment of the Court of Appeal of the Supreme Court of the Northern Territory[25]. That Court's orders allowed an appeal from orders made in the Supreme Court, at first instance, by Angel J[26].

54 The primary judge had held that the notices of proposal and notices of proposed compulsory acquisition, purportedly issued by the Minister for Lands, Planning and Environment of the Northern Territory ("the Minister") with respect to the land in issue in the proceedings, were invalid and of no effect. The primary judge reached this conclusion on the basis of his analysis of the *Lands Acquisition Act* (NT) ("the LAA").

55 There followed an appeal to the Court of Appeal. The Court of Appeal allowed the appeal, ordering that the challenge to the decision of the Minister compulsorily to acquire the subject land be wholly dismissed. Unless reversed by this Court, the appellants' challenge to the acquisition of their native title interest in the land will therefore fail. It was to contest such an outcome that the appellants sought, and obtained, special leave to appeal to this Court.

56 A majority of this Court[27] upholds the orders of the Court of Appeal. Accordingly, by inference, the acquisitions will now go ahead. I accept that, as the other reasons in this Court demonstrate, if a purely literal approach is taken to the language of the material provisions of the LAA, read against the statutory history of those provisions and together with provisions of the *Crown Lands Act* (NT) ("the CLA") and the *Native Title Act* 1993 (Cth) ("the NTA"), a conclusion favourable to the Minister can be persuasively explained.

57 However, another conclusion is open and in my view it is the preferable view of the legislation. In deciding the appeal, on the issue that is critical for my conclusion and orders, I am affected by considerations of legal authority, legal principle and legal policy that I will identify. These demand respect for the legal rights to property of private individuals in Australia generally, and in particular the legal rights of Aboriginal Australians to what has become known (perhaps unfortunately) as "native title" to their land. Subject to a constitutional question, which was not argued but which it will be necessary to mention[28], the legislature of the Northern Territory might, by express language, overcome the ambiguity in

---

25 *Minister for Lands, Planning and Environment v Griffiths* (2004) 14 NTLR 188.

26 *Griffiths v Lands and Mining Tribunal* (2003) 179 FLR 241.

27 Gleeson CJ; Gummow, Hayne and Heydon JJ in joint reasons; Crennan J agreeing with both; Kiefel J and I dissenting.

28 See below at [78]-[86].

the LAA that is crucial to my determination. However, having failed to enact specific and unambiguous provisions in the LAA, authorising the "private to private" acquisitions purportedly effected in this case, the general language of the LAA relied on by the Northern Territory Minister does not support the acquisitions envisaged in the notices issued by the Minister.

58 It follows that the notices of proposal and notices of proposed compulsory acquisition were invalid. The primary judge was correct to set them aside. This Court should restore the primary judge's orders. It should do so to uphold, in case of ambiguity and uncertainty, the well-established principles of the common law that are here invoked by the appellants on behalf of the Aboriginal native title holders.

The facts and legislation

59 *The facts*: The background facts are set out in the joint reasons of Gummow, Hayne and Heydon JJ ("the joint reasons")[29]. However, it is desirable to add some more detail.

60 The appellants, Alan Griffiths and William Gulwin, brought the present proceedings on behalf of the Ngaliwurru and Nungali peoples. The Ngaliwurru and Nungali peoples are a community of Aboriginal Australians who derive from a part of the north-west of the Northern Territory of Australia surrounding Timber Creek. That town was described in the Court of Appeal by Mildren J[30]:

> "Timber Creek is a small town in the Northern Territory located on the Victoria Highway 285 km west of Katherine and 193 km east of the Western Australian and Northern Territory border. Although the town has existed for well over a century, it was not until June 1975 that Timber Creek was gazetted as a town under the provisions of the former *Crown Lands Ordinance*, and it has remained proclaimed as a town ever since.
>
> The boundaries of the town straddle Victoria Highway. In addition to a number of quite small allotments there are a number of larger allotments within the boundaries of the town."

61 As was recognised by the Full Court of the Federal Court of Australia in related proceedings[31], the Ngaliwurru and Nungali peoples had maintained their long-standing connection with the Timber Creek district in spite of early violent

---

29 Joint reasons at [9]-[18].

30 (2004) 14 NTLR 188 at 202-203 [43]-[44].

31 *Griffiths v Northern Territory of Australia* (2007) 243 ALR 72.

contact with European settlers and, later, their involvement in the cattle station economy that developed in the vicinity[32]. The history of legal dealings in one of the lots concerned (Lot 109) is in some ways similar to that of the traditional lands of the Wik and Thayorre peoples, the Aboriginal communities described in *Wik Peoples v Queensland*[33]. In the case of the Ngaliwurru and Nungali peoples, there had been pastoral leases over the land. However, there was an important difference. In the case of the Wik and Thayorre, the land in question was still subject to a pastoral lease, granted under Queensland legislation. In the case of the Ngaliwurru and Nungali people's land, the pastoral leases in respect of Lot 109 near Timber Creek had lapsed. The only legal interests in the lots of land, the subject of the impugned notices, were those of "the Crown", represented by the Government of the Northern Territory, and such interests as still belonged to the Ngaliwurru and Nungali peoples.

62 Before the decision of this Court in *Mabo v Queensland [No 2]*[34], the interests of the Ngaliwurru and Nungali peoples were not treated by Australian law as legal interests at all. However, following the decisions of this Court in *Mabo*, reaffirmed in *Wik*, Australian law belatedly recognised the potential of interests in land, such as those of the Ngaliwurru and Nungali peoples, to qualify as legal interests that might be upheld in the nation's courts. Because the land in question in this appeal was unalienated Crown land, with no inconsistent interest granted to others, the situation of the land at Timber Creek presents (subject to proof) the classic circumstance in which Australian law gives recognition to an established Aboriginal native title. It does so without legal discrimination occasioned by the Aboriginal race of the traditional owners. It does so in accordance with the common law as modified by the provisions of the NTA, as enacted by the Federal Parliament in 1993 with later amendments, including in 1998, following the *Wik* decision[35].

63 At the time of the proceedings before the primary judge and also before the Court of Appeal, the claim by the Ngaliwurru and Nungali peoples to native title over the vacant Crown land situated within the town of Timber Creek was undetermined. In fact, no claim to such title had been made before the first notice of proposed acquisition was published. The events concerning one lot, Lot 109, are described in the reasons of Mildren J in the Court of Appeal[36]:

---

32 *Griffiths* (2007) 243 ALR 72 at 78-79 [14]-[18].

33 (1996) 187 CLR 1 at 67-68; [1996] HCA 40 ("Wik").

34 (1992) 175 CLR 1; [1992] HCA 23 ("Mabo").

35 NTA as amended by the *Native Title Amendment Act* 1998 (Cth).

36 (2004) 14 NTLR 188 at 203 [44].

> "From 1981 to 1997 grazing licences over [Lot 109] were held under the [CLA] by one Lloyd Fogarty, either in his own right or in the right of a company in which he has a significant interest, namely Warren Pty Ltd. [Together "Fogarty"] … During this time, Fogarty developed this land through fencing facilities for branding, horning, spraying, pest treatment, weaning onto improved pasture and tailing. Fogarty estimated that the cost of improvements made to the land were worth $50,000. On 25 September 1997 Fogarty applied under the [CLA] to purchase the lot. The application was favourably received by the Minister and on 2 February 2000 a notice of proposed acquisition of all interests in Lot 109 including native title interests, if any, in the lot was published. On 11 May 2000 a native title claim was filed together with a notice of objection to the acquisition by the present [appellants]."

64 The Fogarty interests also applied to purchase Lot 47, which was likewise the subject of a notice of proposed acquisition, published on 30 August 2000, and a notice of proposal, dated 4 September 2000. The appellants had filed a native title claim in respect of that Lot on 10 December 1999[37]. Subsequently, following requests received for the release of land for commercial and/or tourism-related purposes, certain other lots in the town (Lots 97, 98, 99, 100 and 114) were the subject of a notice of proposed acquisition, published on 24 January 2000, and a notice of proposal dated 2 February 2000. On 11 May 2000, the appellants filed a native title claim in respect of those lots.

65 The inference is inescapable that the Ngaliwurru and Nungali peoples, living in and near Timber Creek, would have continued to use the land in harmony with the activities of the Fogarty interests, at least for a time, had the purchase applications not been made by Fogarty (and had the desire to purchase land in the town not been expressed by other interests), resulting in the Minister's move to acquire *all* interests, notably the native title interests, in the specified lots. It was those moves that propelled the Ngaliwurru and Nungali peoples to invoke the protection of their interests by the Australian courts.

66 To secure such protection, the Ngaliwurru and Nungali peoples initiated a two-pronged endeavour. The first was an urgent move to object to the Minister's proposed acquisitions of the identified lots under the LAA. The second was a dependent move involving a substantive application to the Federal Court of Australia for a determination, under the NTA s 13, that the Ngaliwurru and

---

37 Although it pre-dates the notice at issue in the proceedings, the claim appears to have followed a notice of proposal dated 3 September 1999 and a notice of proposed acquisition published on 1 September 1999, which the subsequent notice stated should be disregarded.

Nungali peoples held native title in the subject (and other) land in the town of Timber Creek.

67 A determination under the NTA was essential to any entitlement of the Aboriginal claimants to "compensation on just terms to the native title holders" for any acquisition of their native title interests that might be found to have lawfully occurred[38]. More fundamentally, establishment of such native title interests would, at once:

- identify the standing of the Ngaliwurru and Nungali peoples, in law, to object to the compulsory acquisitions proposed by the Minister;
- establish the nature and extent of the Aboriginal claimants' interests in the subject land; and
- help to explain the significance for those peoples of the propounded operation of the LAA upon their interests in this particular case.

It is only by appreciating these features of the factual background, in which the LAA was said to apply, that the arguments of the Ngaliwurru and Nungali peoples in this Court will be understood.

68 A determination in favour of the Ngaliwurru and Nungali peoples' claim to native title to vacant Crown land within Timber Creek, and to Timber Creek itself, was made by the Federal Court of Australia in August 2006[39]. In November 2007, after the hearing of the present appeal by this Court, the Full Court of the Federal Court confirmed that determination, whilst varying some of its detail[40]. The present appeal fails to be decided on that footing.

69 *The legislation*: The respective rights at law of the Ngaliwurru and Nungali peoples (represented by the appellants) and of the Minister attempting compulsory acquisition under the LAA are not to be decided at a level of broad generality. Instead, they are to be resolved by a close consideration of the language and application of the LAA, determined against the background of the CLA, the NTA and other material statutory provisions.

---

38 NTA, s 23(3). See joint reasons at [37].

39 *Griffiths v Northern Territory of Australia (No 2)* [2006] FCA 1155.

40 *Griffiths v Northern Territory* (2007) 243 ALR 72.

70 The last-mentioned provisions include the federal laws governing compulsory acquisition of interests in land in the Northern Territory before self-government[41] and the provisions of the *Northern Territory (Self-Government) Act* 1978 (Cth)[42] itself. The federal legislation, previously applicable to Territory acquisitions, included (in an important respect) a limitation upon compulsory acquisitions by requiring that they be "for a public purpose" – a phrase conventional in Australian legislation for such acquisitions and partly reflecting the language of the power afforded to the Federal Parliament by s 51(xxxi) of the Constitution to make laws with respect to:

> "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

71 After self-government was granted to the Northern Territory in 1982, the LAA was amended by the Territory legislature to provide, subject to the Act, that the Minister might "under this Act acquire land"[43]. Further amendments were enacted in 1998[44], introducing the broad language upon which the Minister placed chief reliance in these proceedings, relevantly[45]:

> "Subject to this Act, the Minister may acquire land under this Act *for any purpose whatsoever* –
>
> (aa) …
>
> (a) …
>
> (b) if the pre-acquisition procedures in Parts IV and IVA as applicable have been complied with – by compulsory acquisition by causing a notice declaring the land to be acquired to be published in the *Gazette*".

---

41 Such as the *Lands Acquisition Act* 1906 (Cth), s 5 ("public purpose") and s 13 and *Lands Acquisition Act* 1955 (Cth), s 5(1) ("public purpose") and s 6. See joint reasons at [24].

42 Joint reasons at [24].

43 *Lands Acquisition (Amendment) Act* 1982 (NT), s 10. See joint reasons at [27].

44 *Lands Acquisition Amendment Act (No 2)* 1998 (NT), s 10. See joint reasons at [27].

45 LAA, s 43(1)(b) (emphasis added).

72 The approach to interpreting the legislation adopted by the Minister, pointing not only to the text of the legislation but also to the context and extrinsic documents (including those explaining the process of legislative history), reflects the greater emphasis placed in recent times on giving effect to the purpose of legislation in determining its meaning[46].

73 The arguments in this appeal have concerned, primarily, the suggested limitations which the Ngaliwurru and Nungali peoples urged were to be implied into the grant of power to the Minister to acquire land under the LAA "for any purpose whatsoever". However, the appellants secondly argued that each of the proposed acquisitions, if otherwise within the power conferred by the LAA, s 43(1)(b), would produce a result repugnant to the provisions of the federal NTA, s 24MD. They would thus involve a direct collision between the substantive operation respectively of the applicable Territory and federal law. Upon this hypothesis, the appellants submitted that the federal law would prevail. The Territory law would be invalid to the extent of the inconsistency[47].

The issues

74 *Two statutory issues*: In resolving the arguments advanced for the Ngaliwurru and Nungali peoples, two statutory issues arise for the decision of this Court. Those issues are explained in the joint reasons. They are, in brief:

(1) The ambit of compulsory acquisition issue[48]; and

(2) The requirement of outstanding interests issue[49].

75 These issues are presented in the alternative. For the appellants to succeed in this appeal, and to secure the restoration of the orders of the primary judge, it

---

46 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; [1990] HCA 24; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384-385 [78]-[81]; [1998] HCA 28; *Foots v Southern Cross Mine Management Pty Ltd* (2007) 82 ALJR 173 at 194-196 [96]; 241 ALR 32 at 56-59; [2007] HCA 56.

47 *Northern Territory v GPAO* (1999) 196 CLR 553 at 579-583 [49]-[60], 636-638 [219]-[223]; [1999] HCA 8.

48 Joint reasons at [19].

49 Joint reasons at [20].

would be sufficient for them to prevail on either of the foregoing issues. In my view, the appellants succeed on the first.

76 I acknowledge the force of the construction argument offered by Gleeson CJ[50] and the joint reasons[51] against the interpretation of the NTA urged for the appellants on the second statutory issue. I am not inclined to disagree with the resolution of that issue favoured by their Honours. However, the larger considerations that are presented by the determination of the first issue are not involved in deciding the second issue.

77 I will therefore confine my reasons to the first issue. It is sufficient to do so because, in my opinion, the Ngaliwurru and Nungali peoples succeed on that issue. Specificity and high particularity are required for the Northern Territory LAA to permit the Minister to acquire the appellants' native title interests compulsorily for the private benefit of the Fogarty interests and other private interests. Such specificity and particularity are absent from the LAA. That Act, and the apparently large grant of powers to the Minister to acquire land "for any purpose whatsoever", must be read accordingly. That conclusion is fatal to the Minister's notices and to his proposed acquisitions of the appellants' native title rights and interests in the subject land.

78 *Two constitutional questions*: Before showing why this is so, I must mention two constitutional questions.

79 As I have shown, in the second statutory issue, an express constitutional question was raised by the Ngaliwurru and Nungali peoples, founded on the suggested intersection of the federal NTA and the Northern Territory LAA. Pursuant to s 78B of the *Judiciary Act* 1903 (Cth), the appellants gave notice of constitutional questions in September 2007, shortly before the argument of the appeal in this Court. On the return of the appeal, counsel appeared on behalf of the Attorneys-General of the Commonwealth and of New South Wales and Western Australia, effectively to support submissions advanced by the Northern Territory Minister. In view of the approach that I will adopt to the second statutory issue, it is unnecessary for me to address this first constitutional question.

80 However, another constitutional question lurks in the background. It was not addressed in written or oral arguments of any party or of the interveners. It was a question raised in, but not finally decided by, the decision of this Court in

---

50 Reasons of Gleeson CJ at [4]-[8].

51 Joint reasons at [43]-[51].

Newcrest Mining (WA) Ltd v The Commonwealth[52]. The question is: how does the grant of legislative power to the Federal Parliament to make laws "for" the government of any Territory of the Commonwealth, pursuant to s 122 of the Constitution, interact with the limitation on the power of that Parliament where the "just terms" provisions apply, pursuant to s 51(xxxi)?

81 In *Newcrest*, Gaudron J[53] and Gummow J[54] favoured the view that s 51 and s 122 "should be read together". As Gummow J remarked in that decision: "Section 122 is not to be torn from the constitutional fabric."[55] This was also my view[56]. I shall never cease to protest against attempts to treat the territories of the Commonwealth as somehow disjoined from the Commonwealth[57].

82 Nevertheless, in *Newcrest*, Toohey J, who otherwise agreed with Gaudron J, Gummow J and me, disagreed that the contrary authority of *Teori Tau v The Commonwealth*[58] "should no longer be treated as authority denying the operation of the constitutional guarantee in s 51(xxxi) of the Constitution in respect of laws passed in reliance upon the power conferred by s 122 of the Constitution"[59]. While noting the force of criticisms made by other members of the Court of the decision in *Teori Tau*, Toohey J held back from what he described as the "serious step to overrule a decision which has stood for nearly thirty years and which reflects an approach which may have been relied on in earlier years"[60].

83 It follows that, to this day, *Teori Tau* has not been formally overruled. Nevertheless, as a matter of constitutional principle, like Toohey J, Gaudron J

---

52 (1997) 190 CLR 513; [1997] HCA 38 ("Newcrest").

53 (1997) 190 CLR 513 at 568.

54 (1997) 190 CLR 513 at 597-598.

55 (1997) 190 CLR 513 at 598.

56 (1997) 190 CLR 513 at 652-657.

57 cf *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 370-378 [123]-[143]; [1999] HCA 44.

58 (1969) 119 CLR 564; [1969] HCA 62.

59 *Newcrest* (1997) 190 CLR 513 at 560.

60 (1997) 190 CLR 513 at 560.

and Gummow J in *Newcrest*, I regard the contrary conclusion on the operation of the Constitution as preferable. *Teori Tau* should have been overruled. All compulsory acquisitions of property in and for the Northern Territory under s 122 of the Constitution are subject to the limiting requirements of s 51(xxxi) of the Constitution. So much follows from the obligation to read the Constitution as a single legal document, giving appropriate effect to all of its provisions.[61]

84 The public purpose of all compulsory acquisitions under federal or Territory law has a constitutional origin. Unlike the Australian States[62], it would not be open to the legislature of the Northern Territory (or to the Federal Parliament pursuant to a grant of self-government to that Territory) to circumvent the dual requirements for compulsory acquisition of property provided for in s 51(xxxi) of the Constitution. That is, it would not be open to the LAA, as a Northern Territory law, to provide for the acquisition of property otherwise than "on just terms" where such acquisition was from "any State or person". Moreover, any such acquisition of property would have to be "for any purpose in respect of which the Parliament has power to make laws". This would include the power (consistent with s 51(xxxi)) granted by s 122 in respect of laws "for the government of any territory".

85 Having mentioned this second constitutional question, as a potential issue in the proceedings, I will pursue it no further. First, it was not expressly relied on by the Ngaliwurru and Nungali peoples. They had other legal fish to fry. Secondly, I would infer that it was not the subject of the notice given under the s 78B requirement. Thirdly, and in any case, I can resolve the present appeal in a way favourable to the appellants without invoking the "public purpose" requirements of the Constitution, so far as they are explicit or implicit in the language of s 51(xxxi).

86 In leaving this question, however, I would point out that it would not be specially surprising if the legislative power of the Northern Territory, being part of the Commonwealth, a federal territory provided for in the federal Constitution, were subject to the equitable and public obligations imposed by the Constitution upon federal acquisitions of property. If that were so, the legislature of the Northern Territory might say that a Minister could acquire land "for any purpose whatsoever". However such a provision would be read down to conform to the *equitable* ("just terms") and *public* ("purpose in respect of which the Parliament has power to make laws") preconditions stated in s 51(xxxi) of the Constitution.

---

61 cf *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 208 [491], 243 [607]; [2006] HCA 52.

62 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 408 [7], 432 [77]; [2001] HCA 7.

Upon this approach, a compulsory acquisition for private purposes, so as to advance private interests, could fall outside the legislative power of the Northern Territory legislature. However, while the Ngaliwurru and Nungali peoples saw the acquisition of their native title interest in their traditional land to be outside the power of the Minister, they sought to reach that conclusion by a statutory rather than a constitutional route.

The compulsory acquisitions provisions issue

87 *Belated recognition of native title*: I return to the first statutory issue which is, in my opinion, determinative of the outcome of this appeal.

88 Within a statutory provision purporting to permit the Minister to "acquire land … for any purpose whatsoever"[63], and against the background of the amendments to the legislation for compulsory acquisition of interests in land in the Northern Territory[64], where is the ambiguity? On what basis might the provisions of the LAA be read in a particular way so as to exclude the acquisition of the interests of the Ngaliwurru and Nungali peoples under the LAA?

89 Although the language of the LAA is concededly very broad, and deliberately so when the predecessors for compulsory acquisitions of land in the Northern Territory are considered, a reflection on the arguments of the appellants sustains their contention that the apparently broad language does not extend so far as to permit the acquisitions proposed by the Minister, and notified, in the present case.

90 The starting point involves a consideration of the fact that the interests of the Ngaliwurru and Nungali peoples are something more than a legal interest in land of an ordinary kind. True, native title interests are now recognised as legal interests, after more than a century and a half of denial by the Australian legal system[65]. The interests of the appellants are true legal interests which the courts of Australia will protect and defend. They are interests in "property" which, as this Court has acknowledged, involves a bundle of claims to which the law will

---

63 LAA, s 43(1)(b).

64 cf joint reasons at [24]-[31].

65 *Cooper v Stuart* (1889), 14 App Cas 286 at 291 (PC). See also *Attorney-General v Brown* (1847) 1 Legge 312 at 316-318; *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 439; [1913] HCA 33; *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 FLR 141 and *New South Wales v The Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 438-439; [1975] HCA 58.

give effect[66]. The common law recognises that such interests may be of value, whether or not they have an economic or market value[67].

91 Nevertheless, this Court will not ignore the fact that the property interests of the Ngaliwurru and Nungali peoples, now called by the Australian legal system native title interests, are not exactly the same in their origin and character as the property interests in land derived under the general common law and by statute, which make up most of the legal interests in "land" or "property" that may be acquired under enactments such as the LAA.

92 *A spiritual link to land*: One of the important considerations that moved this Court, belatedly, to recognise the native title interests of indigenous peoples was the high significance attributed to their relationship to land by the laws and customs of Australia's indigenous peoples. For the indigenous peoples who maintained traditional associations with the lands of their ancestors, such interests connote a claim of a particular spiritual or quasi-spiritual character[68]. As a general and certainly a legal characteristic, this element is missing from the general common law governing interests in land in Australia.

93 Whereas other interests in land in Australia will be interests of a purely social or economic character, it is essential to an understanding of the step taken by this Court in *Mabo* that the Court gave recognition to the special place of land in Aboriginal law and custom, and the distinctive spiritual quality inherent in it. This was, I believe, an important element in the arguments that persuaded this Court to take the very serious step of reversing the previous understandings of the common law and affording common law recognition to native title[69].

---

66 *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [17]; [1999] HCA 53 ("Yanner"). See also Gray, "Property in Thin Air", (1991) 50 *Cambridge Law Journal* 252. The analysis of Professor Gray in this article was cited with approval by Gleeson CJ, Gaudron and Hayne JJ and myself in our joint reasons in *Yanner* at 366 [18].

67 cf *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at 349 [67]; [2003] HCA 52.

68 Gray, "Equitable Property", (1994) 47(2) *Current Legal Problems* 157 at 181-188. See *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 356-357; [1982] HCA 69 ("Toohey"); *Mabo* (1992) 175 CLR 1 at 29; cf at 156; *Wik* (1996) 187 CLR 1 at 215; *Fejo v Northern Territory* (1998) 195 CLR 96 at 98 (argument); [1998] HCA 58.

69 *Mabo* (1992) 175 CLR 1 at 41, 51, 57, 61; cf at 156.

94 Thus, a fundamental distinction between the acquisition of ordinary interests in land and the existence of interests giving rise to native title in Australia is the special spiritual relationship that exists between the native title owners and the land. There is much authority from Australia and abroad that recognises that important spiritual link between indigenous peoples and their land. The Aboriginal peoples of Australia, including the Ngaliwurru and Nungali peoples, are bearers of this element common to most indigenous peoples.

95 In *Toohey*, Brennan J stated that "Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights."[70] This statement of Brennan J was cited with approval by Gleeson CJ, Gaudron and Hayne JJ and myself in joint reasons in *Yanner v Eaton*[71]. The Court there specifically acknowledged that there is a "connection with the land"[72], specifically, a "spiritual, cultural and social connection"[73]. In the Federal Court in *Western Australia v Ward*[74], Beaumont and von Doussa JJ cited *Toohey* and specifically the statement of Brennan J extracted above[75]. In *Ward*, Beaumont and von Doussa JJ also referred to the "religious relationship" described by Blackburn J in *Milirrpum v Nabalco Pty Ltd*[76], and to a "spiritual connection"[77] and "religious or spiritual" relationship[78]. When *Western Australia v Ward* was considered by this Court[79], Gleeson CJ, Gaudron, Gummow and Hayne JJ expressly affirmed that "[a]s is now well recognised, the connection which Aboriginal peoples have with 'country' is essentially spiritual"[80].

---

70 (1982) 158 CLR 327 at 358.

71 (1999) 201 CLR 351 at 373 [37].

72 (1999) 201 CLR 351 at 372-373 [37].

73 (1999) 201 CLR 351 at 373 [38].

74 (2000) 99 FCR 316.

75 (2000) 99 FCR 316 at 382 [242] per Beaumont and von Doussa JJ.

76 (1971) 17 FLR 141 at 167.

77 (2000) 99 FCR 316 at 382 [243].

78 (2000) 99 FCR 316 at 483 [666]. See also *De Rose v South Australia* (2003) 133 FCR 325 at 418 [317] and *Daniel v Western Australia* [2003] FCA 666 at [422].

79 (2002) 213 CLR 1; [2002] HCA 28 ("Ward").

80 (2002) 213 CLR 1 at 64 [14].

96 Nothing in my reasons in *Ward* casts doubt on this principle.[81] On the contrary, in that case I concluded that[82]:

> "It has been accepted that the connection between Aboriginal Australians and 'country' is inherently spiritual[83] and that the cultural knowledge belonging to Aboriginal people is, by indigenous accounts, inextricably linked with their land and waters, that is, with their 'country'. In evidence, the … appellants described the 'land-relatedness' of their spiritual beliefs and cultural narratives. Dreaming Beings located at certain sites, for example, are narrated in song cycles, dance rituals and body designs. If this cultural knowledge, as exhibited in ceremony, performance, artistic creation and narrative, is inherently related to the land according to Aboriginal beliefs, it follows logically that the right to protect such knowledge is therefore related to the land for the purposes of the NTA[84]. Indeed, as stated in *Yanner v Eaton*[85]:
>
> > 'an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.'
>
> It also follows that the right to protect cultural knowledge is, in my view, sufficiently connected to the area to be a right 'in relation to' land or waters for the purpose of s 223(1) of the NTA."

97 This Court therefore took a significant step in *Mabo* in recognising the particular and distinctive relationship between indigenous peoples and their land. Brennan J (Mason CJ and McHugh J concurring) described it as a "connexion with the land"[86]; Deane and Gaudron JJ as a "special relationship"[87]; and

---

81 (2002) 213 CLR 1 at 241 [565], 246-247 [579]-[580].

82 (2002) 213 CLR 1 at 247 [580].

83 *Toohey* (1982) 158 CLR 327 at 357-358; cf *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 158-159.

84 For evidence of the land-relatedness, see *Western Australia v Ward* (2000) 99 FCR 316 at 539-540 [865].

85 (1999) 201 CLR 351 at 373.

86 (1992) 175 CLR 1 at 70.

87 (1992) 175 CLR 1 at 86.

Toohey J saw it as having significance to (among other things) "cultural or religious life"[88].

98 In *The Commonwealth v Yarmirr*[89], this Court also referred to a "spiritual connection with a given 'country'"[90]. In a dissenting opinion in *Members of Yorta Yorta Aboriginal Community v Victoria*, Gaudron J and I highlighted the "spiritual connection" to land[91]. Although that opinion was stated in dissent, by the time *Yorta Yorta* was decided, this attribute of the native title rights of Aboriginal Australians was well settled as part of Australian common law. It marks that form of title off from all other interests in land given legal effect in Australia.

99 In its earlier report, *The Recognition of Aboriginal Customary Laws*, the Australian Law Reform Commission also made reference to the relationship of Australian Aboriginals with their land. In particular, the Commission said that "[t]he link with land must never be forgotten in seeking to understand the structure and operation of Aboriginal customary laws."[92] The report makes reference to a source that emphasised the reliance placed upon their land by Aboriginal peoples for "spiritual sustenance"[93].

100 The foregoing features of Aboriginal interests in land in Australia are not unique to the indigenous peoples of this country. Indeed, even a cursory glance shows that the same element in the interests of indigenous peoples in their land has been a marked feature of the claims made by indigenous peoples in virtually every society established by European settlers in the age of imperial dominion. Thus in New Zealand, the preamble to the *Maori Land Act/Te Ture Whenua Maori Act* 1993 (NZ) recognises that "land is a *taonga tuku iho* [treasure handed down by our ancestors] of special significance to Maori people".

---

88 (1992) 175 CLR 1 at 188.

89 (2001) 208 CLR 1; [2001] HCA 56.

90 (2001) 208 CLR 1 at 133 [298].

91 (2002) 214 CLR 422 at 460 [104]; [2002] HCA 58.

92 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31, (1986) vol 1 at 155 [212] ("ALRC Report").

93 ALRC Report, vol 2 at 126 [888], quoting Bell, *Daughters of the Dreaming*, (1983) at 104.

101 Canadian jurisprudence places even greater emphasis upon occupancy of lands for the purposes of land title claims. It is, however, recognised that if such[94]

> "lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture."

Further, in *R v Marshall; R v Bernard*[95] in the Supreme Court of Canada, LeBel J stated that[96]:

> "the group's relationship with the land is paramount. To impose rigid concepts and criteria is to ignore aboriginal social and cultural practices that may reflect the significance of the land to the group seeking title."

102 *Significance for acquisition of native title*: Against the background of these authorities, for this Court now to approach the present contest as if the interests in land of Aboriginal communities in the Northern Territory of Australia were wholly indistinguishable from non-indigenous interests in land would, in my view, be to miss the essential step reflected in the belated legal innovation expressed in *Mabo*. That new legal principle accepted that the common law of Australia would give recognition to native title without altering that title or imposing on it all of the characteristics of other interests in land derived from the different (and originally feudal) law of land tenures inherited by Australian law from English law upon settlement[97].

103 Whatever may still be the situation elsewhere in Australia, a significant part of the Northern Territory comprises unalienated Crown land. Indigenous Aboriginal peoples constitute more than a quarter of the population of the Northern Territory. Many still live according to traditional ways. To pretend that, after *Mabo* and the successive iterations of the NTA, native title in the Northern Territory is no more than another interest in land, functionally and legally the same as the interests recognised under the inherited system of land tenures, would be to ignore both legal and social reality. It would be to distort the facts as they exist in actuality. It would be to overlook and underrate the fundamental change to Australian law that followed *Mabo* and that despite the fact that such change was accepted and reflected in the provisions of the NTA.

---

94 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1089 [128] per Lamer CJ.

95 [2005] 2 SCR 220.

96 [2005] 2 SCR 220 at 276-277 [136].

97 (1992) 175 CLR 1 at 58-59, 110, 194-195.

Importantly, it would needlessly involve a failure of our law to live up to the promise of *Mabo*[98].

104 Native title in Australia is a special, distinctive and legally unique interest that is now given recognition by Australian common and statute law. Subject to the Constitution, like any other legal interest, it is not immune from legislative modification. Some modification has indeed occurred.

105 Nevertheless, against the background of the history of previous non-recognition; the subsequent respect accorded to native title by this Court and by the Federal Parliament; and the incontestable importance of native title to the cultural and economic advancement of indigenous people in Australia, it is not unreasonable or legally unusual to expect that any deprivations and extinguishment of native title, so hard won, will not occur under legislation of any Australian legislature in the absence of provisions that are unambiguously clear and such as to demonstrate plainly that the law in question has been enacted by the lawmakers who have turned their particular attention to the type of deprivation and extinguishment that is propounded. In *Mabo* Brennan J cited authorities from Canada, the United States and New Zealand that support the contention that "native title is not extinguished unless there be a clear and plain intention to do so"[99].

106 It follows that it is one more aspect of the special character of native title in Australia to expect in such matters that a legislature, before effecting modification and still more abolition of such title, will have:

- expressly addressed that outcome in the legislative text;

---

98 See Pearson, "The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*", (2003) 7(1) *Newcastle Law Review* 1 at 4; see also Tehan, "A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*", (2003) 27 *Melbourne University Law Review* 523 at 571.

99 (1992) 175 CLR 1 at 64. See for example *Lipan Apache Tribe v United States* 180 Ct Cl 487 at 492 (1967) in which Davis J states the requirement of a "plain and unambiguous" act and a "'clear and plain indication' in the public records"; *Calder v Attorney-General of British Columbia* [1973] SCR 313 at 404 per Hall J; Spence and Laskin JJ concurring; see also at 402 where Hall J states that a "legal right" to "Indian title" cannot "be extinguished except by … competent legislative authority, and then only by specific legislation". For discussion, see Slattery, "Understanding Aboriginal Rights", (1987) 66 *Canadian Bar Review* 727 at 749, 765-766.

- thereby assumed electoral accountability before the community for what it is doing[100]; and

- provided clear procedures and terms according to which the acquisition and deprivation will be effected.

In the absence of such legislative particularity, any impugned law will be interpreted protectively and construed in favour of indigenous land rights. In *New Zealand Maori Council v Attorney-General*[101], the New Zealand Court of Appeal interpreted the *State-Owned Enterprises Act* 1986 (NZ) protectively, reading provisions of the Act so as to comply with the indigenous land rights principles evidenced in the *Treaty of Waitangi*[102]. More generally, the Supreme Court of Canada has held in *Nowegijick v The Queen* that "statutes relating to [indigenous peoples] should be liberally construed … *in favour of* the [indigenous peoples]."[103]

107 In addition to the aforementioned attributes of democratic and electoral responsibility, Australian legislatures, on this subject, must be held accountable to the pages of history. If they intend deprivation and extinguishment of native title to occur, reversing unconsensually despite the long struggle for the legal recognition of such rights, then they must provide for such an outcome in very specific and clear legislation that unmistakably has that effect.

108 These hypotheses constitute no more than a reflection, in the particular circumstances of deprivation of native title interests of Australian Aboriginals, of

---

100 *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30]; [2003] HCA 2; *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 582 [106]; [2002] HCA 49; *Chang v Laidley Shire Council* (2007) 81 ALJR 1598 at 1610 [56]; 237 ALR 482 at 496; [2007] HCA 37 ("Chang").

101 [1987] 1 NZLR 641.

102 [1987] 1 NZLR 641 at 657-658 and 668 per Cooke P. Unlike the LAA, the New Zealand Act specifically referred to the *Treaty of Waitangi* (and thus to indigenous land rights) (see for example s 9). However, the Court was mindful to read certain provisions (for example s 27) so as to provide "added Maori protection". See Nijman, "Ascertaining the Meaning of Legislation – A Question of Context", (2007) 38 *Victoria University of Wellington Law Review* 629 at 653-656.

103 [1983] 1 SCR 29 at 36 (emphasis added). See also Slattery, "Understanding Aboriginal Rights", (1987) 66 *Canadian Bar Review* 727 at 766.

the general principle of the common law of Australia requiring that legislation depriving individuals of established legal rights must be clear and unambiguous. General language will not suffice. And in this particular context there are special historical, ethical and national reasons that explain why Australian law insists both on strictness and explicitness.

109 *Protection of democratic accountability*: It might be argued that the general principle defensive of individual rights (including in respect of interests in land) needs to be modified in the current age to accord with the greatly expanded role of governmental activities and of legislation in providing for communal interests.

110 It cannot be denied that, today, the protection of *individual* rights must find their place in the general context of legislation designed to uphold the interests of the *community* in a broad sense[104]. However, of their nature, Aboriginal native title rights, such as those asserted by the Ngaliwurru and Nungali peoples in this appeal, are not the same as individual rights asserted for the exclusive benefit of those persons or corporations that possess them. Native title rights in Australia are communal in character. They belong to the indigenous community concerned. If an Aboriginal community is to be deprived of such rights, by what (at the very least) is an unusual legislative course involving an atypical purpose of governmental acquisition of property, it is not unreasonable that such a measure should be expressly identified, considered and approved by the legislature to whose enactment that consequence is later attributed.

111 The purpose of the subject acquisitions is atypical in the following important respect. The acquisitions proposed by the Minister are not intended to carry out a form of "private to public" transaction, with subsequent public use of the land in question for a public purpose. Instead, they are essentially to carry out a "private to private" transaction. The indicated purposes are unconnected with any need or use of the land by the Northern Territory itself, its government, a government department, statutory agency or office-holder on behalf of the public. Instead, it is no more than the acquisition of the *private* (but communal) interests of the Ngaliwurru and Nungali peoples in the land over which they have claimed (and now established) their native title, for the *private* benefit of the Fogarty interests and other private interests which are wholly commercial in character. Expressed another way the acquisition is for a non-governmental rather than a governmental purpose[105].

---

104 cf *Prentice v Brisbane City Council* [1966] Qd R 394 at 406.

105 cf reasons of Kiefel J at [172] and [181].

112 On the face of things, where the native title interests of the appellants are acquired for such *private* purposes, it would be reasonable to expect the legislature of the Northern Territory to provide expressly for such a transfer of interests through intervention of *public* compulsory acquisition. It is not reasonable to oblige courts to discover the authority for such a course in the general language of the LAA, enacted and applied against the background of almost a century of the restriction of compulsory governmental acquisitions in Australia to those for identified *public* purposes.

113 Only by the courts' insisting upon express provisions to authorise such "private to private" acquisitions would the legislature be forced to consider specifically whether it should enact such a distinctive law and with what safeguards. Only in that way is that legislature obliged to assume political accountability and democratic answerability to the electors for what it is said to have enacted.

114 I accept that the requirement of democratic accountability and express lawmaking for that purpose cannot be pressed to extremes[106]. However, the compulsory acquisition of Aboriginal native title interests in Australia is incontestably a most sensitive question. Not the least is this so because of the history of earlier denials and deprivations. Against that background, it is proper to apply, to a suggested legislative authorisation of deprivation and extinguishment of native title interests belonging to an Aboriginal community in the Northern Territory, a rule obliging the terms of the authorisation to be specific and particular. Especially so, where the acquisition is for the immediate enrichment of private commercial interests (a "private to private" acquisition) and not for the conduct on the acquired land of public activities of the acquiring government ("private to public"). Upon one view, the latter type of acquisition will be tolerated in a democratic society because undertaken for an identified public benefit, not just the private gain of another[107]. The same is not self-evidently true in the case of a "private to private" acquisition where publicly beneficial outcomes depend upon hopes and expectations rather than the legal character of the acquiring beneficiary.

115 *Exceptionality of compulsory acquisition*: From the earliest days of compulsory acquisition legislation in England and Australia, statutory provisions

---

106 *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at 19-23 [64]-[75]; [2003] HCA 69; cf *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19]; [2004] HCA 37; *Chang* (2007) 81 ALJR 1598 at 1614 [81]-[83]; 237 ALR 482 at 501.

107 Gray, "There's No Place Like Home!" (2007) 11(1) *Journal of South Pacific Law* 73.

affording powers to governments or their agencies to acquire the property interests of individuals have been interpreted with considerable vigilance to protect those affected against abuse.

116 In *Webb v Manchester and Leeds Railway Co*[108], Lord Cottenham LC explained, in the context of the legislation under consideration there[109]:

> "The powers are so large – it may be necessary for the benefit of the public – but they are so large, and so injurious to the interests of individuals, that I think it is the duty of every Court to keep them most strictly within those powers; and if there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers; but they will get none from me, by way of construction of their Act of Parliament."

117 The language in which his Lordship stated his disinclination to import the propounded power of acquisition may, it is true, appear somewhat outdated in the conditions of contemporary Australia. But it may not be so inapplicable to the particular problem that is now before this Court, namely a suggested deprivation and extinguishment of hard-won native title interests of indigenous Australians for the immediate private gain of commercial interests of other private interests, without needing the consent of the indigenous owners and their satisfaction with the price to be paid for the peculiar value to them of their native title interests.

118 The statement in *Webb* was cited by this Court in *Clunies-Ross v The Commonwealth*[110]. It still carries more than a grain of truth.

119 Exceptionality of "private to private": If acquisition for public purposes is still ordinarily treated by the law, in a society such as Australia's, as exceptional, and tolerable only because performed for the benefit of the community as a whole, acquisition of one person's private interests, so as to advantage a different person's private interest, is even more exceptional. In the present case, the Minister (and his Department) repeatedly made it clear that "private to private" transfer of interests was what they had in mind.

120 Briefing the Minister on a sale application over one of the lots affected, Lot 47, the Department in August 1999 informed the Minister of the intended

---

108 (1839) 4 My & Cr 116 [41 ER 46].

109 (1839) 4 My & Cr 116 at 120 [41 ER 46 at 47-48]. See also *Gard v Commissioners of Sewers* (1885) 28 Ch D 486 at 506, 511-512.

110 (1984) 155 CLR 193 at 201; [1984] HCA 65.

offer of a Crown lease, convertible to freehold, in favour of the Fogarty interests. This led in September 1999 to the publication of a notice of proposed acquisition signifying the Territory's intention to acquire "[a]ll interests, including native title rights and interests (if any)" in the land. The same notice also identified the manner in which the Territory proposed to deal with the land, if so acquired, namely to "Grant a Crown lease term under the provisions of the *Crown Lands Act* to [a Fogarty company] for the purpose of goat breeding".

121 The same intention was made clear in the briefing to the Minister in January 2000 in respect of the proposed sale application over Lot 109, except that the envisaged purpose was stated to be "cattle husbandry". Lots 97, 98, 99, 100 and 114 were earmarked for auction "for the purpose of commercial/tourism development".

122 In a letter of April 2000, the Minister offered to approve a grant to the Fogarty interests of an estate in fee simple over Lot 109 and a Crown lease convertible to an estate in fee simple over Lot 47, subject to conditions, including that "any native title rights currently being acquired by my Department". The letter went on to state that "[t]he compensation required will be met by the Government, however, the company may be required to contribute to the administrative costs of acquisition". In May 2000, the Department wrote to the Northern Land Council informing it of the intention "to acquire and extinguish native title rights and interests over the … Lots as with all proposed acquisitions".

123 Thus, throughout these dealings, the purpose and object of the compulsory acquisition was clear. It was immediately to extinguish the *private* interests of the Ngaliwurru and Nungali peoples so as to enhance the *private* interests of the Fogartys and others. They were therefore classic "private to private" acquisitions. They involved taking from one private interest holder (with economic and other interests in the land) to enable it to be sold or leased to other private bodies for their entrepreneurial purposes.

124 In his majority reasons for the Supreme Court of the United States in *Kelo v City of New London*[111], Stevens J acknowledged:

> "[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation."

125 In the same decision, O'Connor J (with whom Rehnquist CJ, Scalia and Thomas JJ joined) wrote in her dissenting reasons, to similar effect[112]:

---

111 545 US 469 at 477 (2005).

> "Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote:
>
> > 'An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority … A few instances will suffice to explain what I mean … [A] law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.'"

126 Of course, the Justices were writing in *Kelo* in the context of the requirement of the "takings" clause in the Fifth Amendment to the United States Constitution. That guarantee is applied to compulsory acquisitions by the States in that country by the operation of the Fourteenth Amendment. The judicial words cannot be imported unreservedly for operation as part of the common law of Australia.

127 On the other hand, the affront expressed both by the majority and the minority of the Supreme Court of the United States in *Kelo* to pure forms of "private to private" transfer of property under legal compulsion (specifically of interests in land) and the long acceptance of that response to such transactions in our legal tradition, is, I consider, as justified in Australia as it is in the United States.

128 Citizens will accept the compulsory acquisition of their interests in land if this is done according to law, with the payment of just compensation and for the identified public purposes of the lawmaker (assured because of the legal character and obligations of the public acquiring authority). They will accept that, in such circumstances, their private interest must give way to the lawmaker's perception of the community's interest. But an acquisition from A in order to transfer its interests in land to B for B's individual commercial gain is one of an entirely different character. As Professor Kevin Gray of the University of Cambridge has observed[113]:

> "[T]he assertion of a private form of eminent domain – the 'one-to-one transfer of property' for private rather than public benefit – remains

---

112 545 US 469 at 494 (2005), citing *Calder v Bull* 3 US 386 at 388 (1798) (original emphasis).

113 Gray, "There's No Place Like Home!", (2007) 11(1) *Journal of South Pacific Law* 73 at 74-75 (citations omitted).

> anathema in most legal traditions. This is so even though the taking is coupled with an offer of full monetary compensation. It seems wrong that the coercive power of the state should be used to force an unconsented transfer from A to B where the operation of the open market has failed to generate the required bargain by means of normal arm's length dealing."

129 In another decision of the Supreme Court of the United States[114], that Court explained that a "purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void". This consideration presents what Professor Gray describes as a "fair consensus that the practice of private eminent domain is unacceptable in modern civilised legal communities"[115], although he notes that that consensus is threatened by litigation such as the present case. He traces back to Biblical times the imposition in civilised societies of restrictions upon the power of one individual to force another individual to surrender private property interests for the pleasure or advantage of the former, including by the intervention of governmental power[116]. He explains[117]:

> "It is … one of the more ancient and majestic themes of global jurisprudence that private necessity can never demand that the lands of one individual be taken peremptorily and given to another individual exclusively for his or her personal benefit or profit. True it is that, by way of exception to the general inviolability of proprietary entitlements, we allow certain heavily controlled measures of taking in the name of the state and for communal purposes. However, such exercises of eminent domain require clear justification on grounds of public interest and must be accompanied by the payment of fair compensation – limitations which are emphatically confirmed, in some form or other, in most constitutional charters."[118]

---

114 *Hawaii Housing Authority v Midkiff* 467 US 229 at 245 (1984).

115 Gray, "There's No Place Like Home", (2007) 11(1) *Journal of South Pacific Law* 73 at 75.

116 (2007) 11(1) *Journal of South Pacific Law* 73 at 74 citing the story of Ahab and Naboth in 1 Kings 21.

117 (2007) 11(1) *Journal of South Pacific Law* 73 at 74.

118 For example the *European Convention on Human Rights* provides that: "[n]o one shall be deprived of his possessions except in the public interest" (ECHR, Protocol No 1, Art 1). See also *Newcrest* (1997) 190 CLR 513 at 658-661.

130 Were it otherwise, the promise of stable possession of interests in land would be rendered inherently fragile. As Paterson J described it in *Vanhorne's Lessee v Dorrance*[119], we would "have nothing that we can call our own, or are sure of, for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the Legislature".

131 From a practical point of view, "private to private" acquisition through the intermediary of a government's legislative power for compulsory acquisition presents the risk of disturbing features that have not hitherto been characteristic of compulsory acquisitions of interests in land under statute in Australia. They present the possibility of a "powerful commercial party [harnessing sub-national governmental power] in order to squeeze out business competition, a strategy which [is] particularly effective if coupled with a threat to relocate an anchor business (and its accompanying jobs and revenue potential) to another urban centre"[120].

132 Such acquisitions could also sometimes give rise to risks of cronyism and corruption in government[121]. They could open up the possibility of acquisitions "just so some other people can get a lot more money"[122]. As the above demonstrates, acquisitions also present the danger that *public* funds will be used to compensate, as here, the Aboriginal owners for native title interests lost whereas the land is acquired for *private* individuals and companies that are thereby, to this extent, effectively subsidised by an often opaque transfer of public funds for private gain. The risk of unexamined and unexaminable corrupt practices in such transactions is all too obvious. That is not, of course, to suggest that this was a feature of the present acquisition. However, the risk is a reason for adopting the construction of the legislation that I favour.

133 In effect, to say this is to say no more than that to construe s 43(1) of the LAA so as to permit acquisition of the native title interests of the Ngaliwurru and Nungali peoples in the subject land for a "private to private" transfer in favour of

---

119 2 US 304 at 316 (1795).

120 Gray, "There's No Place Like Home!", (2007) 11(1) *Journal of South Pacific Law* 73 at 79 citing *99 Cents Only Stores v Lancaster Redevelopment Agency* 237 F Supp 2d 1123 (CD Cal 2001).

121 Gray, "There's No Place Like Home!", (2007) 11(1) *Journal of South Pacific Law* 73 at 82.

122 As Justice Breyer observed during oral argument in *Kelso v City of New London* 545 US 469 (2005) (Transcript, 22 February 2005 at 50). See Gray, "There's No Place Like Home!", (2007) 11(1) *Journal of South Pacific Law* 73 at 83.

the Fogarty and other private commercial interests, is to interpret the LAA to permit features of compulsory acquisition of property that have not hitherto been common or normal in Australia.

134 It may be that the legislature in the Northern Territory did intend these results. However, if so, it did not expressly address such consequences. It did not clearly manifest its considered will.[123] In compulsory acquisitions of property, it is a normal rule that the law is construed with a measure of strictness[124], requiring that the legislative acquisitions power clearly applies to authorise acquisition of the property interests of one person for the benefit of others[125]. Where the acquiring authority behaves effectively as an agent for a proposed private developer, rather than as "[the agent] of the inhabitants in general", courts in Australia[126] and New Zealand[127] have, until now, conventionally been suspicious and strict in their interpretation of the propounded law. Contrary to the submissions for the Minister, the principle applies as much to a law conferring powers on a Minister as it does to one conferring powers on a local authority or other statutory authority. It is the approach that I would take to the meaning and application of s 43(1) of the LAA. It is fatal to the construction which the Minister has urged this Court to adopt in respect of that provision.

135 *The arguable textual impediment*: In response to these arguments, the Minister pointed to the great generality of the language used in the amended provisions of the LAA ("for any purpose whatsoever"); the legislative history of amendments enlarging his power; and to the express contemplation of the acquisition of Aboriginal interests in land.

---

123 La Forest JA, delivering a decision of the New Brunswick Court of Appeal in Canada, stated (in the context of the taking of Indian lands) that there was a "general presumption that the Legislature does not, in the absence of clear words, intend to interfere with vested rights": *Paul v Canadian Pacific Limited* (1983) 2 DLR (4th) 22 at 33. See also Slattery, "Understanding Aboriginal Rights", (1987) 66 *Canadian Bar Review* 727 at 766.

124 For the comparable requirement of a rule of strictness in relation to search warrants, see *George v Rockett* (1990) 170 CLR 104 at 110-111; [1990] HCA 26; *New South Wales v Corbett* (2007) 81 ALJR 1368 at 1372-1373 [16]-[22], 1382-1383 [87]-[88]; 237 ALR 39 at 42-44, 57-58; [2007] HCA 32.

125 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201. See also *Chang* (2007) 81 ALJR 1598 at 1606-1608 [34]-[42]; 237 ALR 482 at 491-493.

126 *Prentice v Brisbane City Council* [1966] Qd R 394 at 410 per Mansfield CJ.

127 *Bartrum v Manurewa Borough* [1962] NZLR 21 at 27 per Hardie Boys J.

136 In the absence of any constitutional argument that there must be a public element of some kind in order to justify the acquisitions, should this Court take the legislature at its word? Should it hold that a "private to private" acquisition is within the language now appearing in the LAA? In the presence of such language, what textual source exists to read "for any purpose whatsoever" down so as to exclude the kind of private to private purpose disclosed in the present case?

137 Leaving constitutional imperatives aside, for the reasons that I have earlier indicated, the starting point for any task of statutory construction is the text. Legislative interpretation is in every case a "text-based activity. It cannot be otherwise."[128] Although a court's usual obligation is to give effect to the purpose of the legislature derived from the statutory text, when important values appear to have been overlooked, a court is entitled to conclude that apparently broad language does not, in law, achieve departure from those values, without an explicit indication to this effect in the text.

138 There are three textual features of s 43(1) of the LAA that arguably import implied limitations on the power of acquisition of interests in land, notwithstanding the amplitude of the reference to "any purpose whatsoever":

- The first is the requirement that any acquisition be effected "subject to this Act";
- The second is the designation of "the Minister", a high public officer-holder, as the repository of the power of acquisition under the Act; and
- The third is the signification that there must be a "purpose" for the acquisition which by inference must be at least a "purpose" of the designated acquiring power, namely the Northern Territory of Australia.

139 The requirement of a "purpose", to be identified at the time of acquisition is indicated by the reference to "purpose" in s 43(1) and also in s 48(1) of the LAA. By s 48(1) it is provided (with emphasis added):

> "The Minister may, at any time while no person (other than the Crown) has an estate or interest in the land, by notice published in the *Gazette*, declare that any land acquired under this Act is no longer *required for the purpose* for which it was acquired."

---

128 *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 at 305-306 [87]; [2004] HCA 14 (footnote omitted).

140 It is such land, as referred to in a notice under s 48(1) of the LAA, that "may be dealt with as unalienated Crown land under a law in force in the Territory", in accordance with s 48(2) of the LAA. The precondition of compliance with the compulsory acquisition procedures, including publication in the *Gazette*, is specified in s 43(1) of the LAA. These sections indicate that there is no power to acquire land completely "independently of purpose"[129]. The "purpose" is not now delimited, as it previously was, by adjectival qualifications such as fulfilment of a "public purpose". But s 48 of the LAA demonstrates that a statutory "purpose" must exist. It is vital to the availability of the power of acquisition. There is no power "apart from the purpose"[130].

141 Moreover, the context also imports limitations upon the ostensible width of the phrase "any purpose whatsoever". Thus, the purpose cannot be one outside the provisions of the LAA, a public statute of the legislature of the Northern Territory. Nor can it be one alien to the general objectives of the statute, being one providing for the compulsory acquisition of private interests in land. Nor could it be a purpose foreign to the repository of the power, a Minister, acting under the statute as a public office-holder in one of the governments of Australia.

142 Although a majority of this Court have not accepted the principle that the Crown or executive governments in Australia owe fiduciary obligations to the indigenous peoples of Australia in respect of their interests in land[131], the obligation of a Minister to act in good faith, according to law, adopting fair procedures and without the operation of irrelevant and irrational purposes, is well settled in this country's constitutional and administrative law. The executive power of government conferred on a Minister by Pt IV of the *Northern Territory (Self-Government) Act* extends to the execution and maintenance of the laws of the Territory. In the context, the purpose of acquiring land must necessarily be, to some extent at least, a purpose of the Northern Territory. It cannot be a wholly personal or idiosyncratic purpose of the Minister or a corrupt purpose or a purpose wholly or substantially for the private benefit of an individual corporation. It would not be a fulfilment of the Minister's power to exercise a statutory function solely or substantially for such.

---

129 *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 103; [1950] HCA 33.

130 *Werribee Council v Kerr* (1928) 42 CLR 1 at 30; [1928] HCA 41.

131 See generally *Thorpe v The Commonwealth [No 3]* (1997) 71 ALJR 767 at 775-776; 144 ALR 677 at 687-689; [1997] HCA 21; *Bennett v The Commonwealth* (2007) 81 ALJR 971 at 994-995 [113]-[117]; 235 ALR 1 at 29-31; [2007] HCA 18.

143 There is thus a distinction between the use of land for a purpose of the Northern Territory and its disposal for the purpose of purely private gain of other parties. Arguably, the latter is outside even the kind of very broad "purposes" for which s 43(1) of the LAA provided. Had it been intended to authorise acquisition for immediate "private to private" transfer of interests in land (especially where such interests comprise native title interests of Aboriginal traditional owners) it would have been expected that such a power of acquisition and alienation would have been expressly provided for.

144 *Other examples of specificity*: To the protest that this conclusion imposes undue burdens upon the legislature which, by amendment, has deliberately endorsed language of broad generality, the answer may be offered that, when unusual purposes of acquisition have been contemplated, the legislature of the Northern Territory has indeed provided for them expressly, so as to remove any doubt that may exist by the invocation of language of generality.

145 Thus, where a particular private corporation is to be benefited by compulsory acquisition, express authorisation of that course has been enacted[132]. There are similar provisions governing acquisition by the Northern Territory for the benefit of particular local government bodies[133] and also grants to particular Aboriginal community bodies[134]. To remove any doubt, specificity, when it is desired, can be easily enacted. If that practice is sometimes observed, why should it not be insisted upon in the present case, given the countervailing considerations that favour reading down the phrase "for any purpose whatsoever"?

146 *Public or private purposes?*: The Minister argued that the creation of business investments and employment in Timber Creek was itself a legitimate *public* purpose of the Northern Territory, justifying the acquisition of the native

---

132 See eg *McArthur River Project Agreement Ratification Act* (NT), Sched 1, Item 6(2) providing that on the request of the Company, the Territory "shall use its best endeavours to voluntarily acquire or under the [LAA] compulsorily acquire land" of significance to and required for the project and "shall sell, lease or grant licenses, easements or rights of way in respect of that land to the Company on [agreed] terms".

133 *Local Government Act* (NT), ss 129-130.

134 *Pastoral Land Act* (NT), s 111. See also LAA, s 46(1A).

title interests of the Ngaliwurru and Nungali peoples. That point of view recommended itself to the Court of Appeal[135].

147 However, if this were the case, it is no more than an indirect feature of the immediate transfer of the native title interests to the private rights of the Fogartys. Whether it was actually necessary, in order to procure the economic benefits, to acquire the interests of the Ngaliwurru and Nungali peoples by compulsion rather than by free negotiation in the open market, depriving them of rights of entrepreneurship that would otherwise belong to them by reason of their native title, is a matter of speculation.

148 It will rarely, if ever, be the case that compulsory acquisition of land will be proposed without some supposed public purpose. In the end, however, it remains necessary to decide whether what occurred is truly for a purpose of the Northern Territory or simply for the purpose of private economic gain which has some incidental or indirect advantages for others. Whilst the use of land acquired under compulsion by privatised utilities has complicated the traditional rationale of compulsory acquisition for public benefit in Australia[136], typically in this country, until now, the "private to public to private" acquisitions have been addressed by specific infrastructure legislation. Under such legislation, governmental authorities have ordinarily retained the acquired land, conferring rights of use on private entities on the basis of published conditions[137]. Or they have transferred interests in the acquired land under special provisions[138]. Or they have used specific powers that have engaged acquisition legislation[139] and permitted particularised uses[140].

---

135 (2004) 14 NTLR 188 at 215-216 [85]; cf Gray, "There's No Place Like Home!", (2007) 11(1) *Journal of South Pacific Law* 73 at 86-87.

136 Gray and Gray, *Land Law*, 5th ed (2007) at 449-450 [13.24].

137 See eg *Melbourne City Link Act* 1995 (Vic); *Sydney Harbour Tunnel (Private Joint Venture) Act* 1987 (NSW).

138 See eg *Lands Acquisition Act* 1993 (Tas) Pt 1A.

139 See eg *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW), s 4(2); *Land Acquisition and Compensation Act* 1986 (Vic), s 4; *Land Acquisition Act* 1969 (SA), s 6 "prescribed private acquisition" and s 12B; cf s 18. See Brown, *Land Acquisition*, 5th ed (2004) at 4-6 [1.4].

140 *Acquisition of Land Act* 1967 (Q), s 5 and Schedule 1; *Land Administration Act* 1997 (WA), s 161; *Public Works Act* 1902 (WA), s 2, definition of "public works". The general acquisition statutes of the Commonwealth and the Australian Capital Territory proceed by reference to acquisitions for a "public purpose" used in the sense stated in the *Lands Acquisition Act* 1955 (Cth), s 5(1).

149 These features of compulsory acquisition powers, and their deployment in Australia until this time, tend not only to support the expectation and requirement of specific enactment to authorise a "private to private" acquisition, rather than reliance on the general language of a statute like the LAA. They also deny acceptance of the argument that the indirect and flow-on effects from private gain justify the characterisation of the beneficiary of the acquisitions as the general public or community (here that of the Northern Territory) such that the purpose may be regarded as public or governmental. There is no *legal* guarantee that such hopes or expectations, however genuine, will be fulfilled. There is no statutory procedure or audit to hold the Fogarty and other private interests to such public purposes.

Conclusion: The general statutory power is inapplicable

150 It follows from the foregoing analysis that the absence of express provisions in the LAA to uphold the unusual kind of acquisition notified by the Minister of the native title interests in land of the Ngaliwurru and Nungali peoples is fatal to the validity of the Minister's notifications.

151 Despite the apparently wide language of the amended terms of s 43(1) of the LAA, that provision is not to be construed so as to apply to acquisitions such as those presently proposed. If the legislature of the Northern Territory means to empower the Minister, under the LAA, to acquire native title interests of Aboriginal communities such as the Ngaliwurru and Nungali peoples, in order to extinguish them in favour of private interests such as the Fogartys', the LAA must make this expressly clear. Then only would the Territory legislature assume responsibility, and accept electoral accountability, for taking such a course. Any such provision would, in turn, enliven questions as to the power of the legislature to so enact under the restricted grants of governmental power afforded by the *Northern Territory (Self-Government) Act* and having regard to the requirements of the Constitution[141] and of the LAA and NTA.

152 Insisting upon this interpretation of the LAA is not to be regarded as denying the attainment of the constitutionally valid purposes of legislation, enacted in concededly broad terms. Instead, it is a course adopted out of respect for:

- the legislature's normal observance of great care in the deprivation of the basic rights of individuals, whoever they may be;

---

141 ss 122 and 51(xxxi).

- the special care to be attributed and expected (in light of history) to deprivation by a legislature of the native title rights of Aboriginal and other indigenous communities; and

- the serious offence which the opposite construction of the LAA does to common or hitherto universal features of legislative compulsory acquisition in our legal tradition.

153 If the lawmakers in the Northern Territory (or elsewhere in Australia) are to permit "State-endorsed buy-outs of potentially valuable assets [to] be forced upon the poor and vulnerable by those who are rich and more powerful"[142], it must, in my view, be done unambiguously and expressly. General language is not sufficient. And, even then, questions may remain, in the case of the Northern Territory, as to whether any such language complies with the requirements of the federal Constitution[143].

Orders

154 The foregoing conclusion is sufficient to uphold the attack by the Ngaliwurru and Nungali peoples on the Minister's purported notifications of the acquisitions of their land. The appeal should therefore be allowed. The orders of the Court of Appeal of the Supreme Court of the Northern Territory should be set aside. In place of those orders, this Court should order that the appeal to the Court of Appeal be dismissed. The Minister should pay the appellants' costs in the Supreme Court, the Court of Appeal and in this Court.

---

142 Gray, "There's No Place Like Home!", (2007) 11(1) *Journal of South Pacific Law* 73 at 87.

143 See above at [129] referring to *Newcrest* (1997) 190 CLR 513 at 658-661.

155 CRENNAN J. The appeal should be dismissed with an order for costs in favour of the first respondent as proposed by Gummow, Hayne and Heydon JJ. I agree with their Honours' reasons and with the additional reasons of Gleeson CJ.

156 KIEFEL J. I agree that a compulsory acquisition of native title rights and interests under a law referred to in s 24MD(2) of the *Native Title Act* 1993 (Cth) ("the NTA") is, by reason of that sub-section, effective to extinguish those rights and interests where they are the only outstanding interests in unalienated Crown land. The more substantial question is whether the acquisitions in this case are for a purpose to which s 43(1) of the *Lands Acquisition Act* (NT) ("the LAA") refers. In my respectful view, they are not.

157 Section 43(1) provides that "[s]ubject to this Act, the Minister may acquire land under this Act for any purpose whatsoever". If the procedures required by the Act are followed, land may be acquired by compulsory acquisition[144]. At an earlier point in time the sub-section had required that an acquisition be for "public purposes". Native title rights and interests qualify for acquisition and compensation because they are recognised by the LAA as interests in land[145]. (I shall continue to refer to their "acquisition" in these reasons, although no other person can hold the rights, and the process referred to in s 43 is a step towards their extinguishment). The Ngaliwurru and Nungali Peoples are amongst members of estate groups in whose favour a determination of native title has been made over lands which include the lots in question, in the Town of Timber Creek in the Northern Territory[146].

158 Three notices of proposed acquisition were issued by the Minister with respect to the lands. They each advise that it is proposed to deal with the land in question by granting a Crown lease. The uses proposed under the leases are "goat breeding, hay production, market garden and ancillary"[147]; "a cattle husbandry facility"[148]; and a "commercial/tourism development"[149]. In each case it is said that, upon completion of the development, the lease may be exchanged for freehold title. The Minister has given approval for the sale of the land the subject of the two leases firstmentioned, provided the native title rights and interests are acquired. There is no suggestion that the proposed uses form part of any wider plan by the government of the Northern Territory. They were proposals put forward by the developers. It is not disputed that the acquisitions

---

144 LAA, s 43(1)(b).

145 LAA, s 4.

146 *Griffiths v Northern Territory (No 2)* [2006] FCA 1155; *Griffiths v Northern Territory* (2007) 243 ALR 72.

147 Lot 47.

148 Lot 109.

149 Lots 97-100 and 114.

involve the divestiture of rights of the native title holders in order to provide the leases and grants of land to the developers.

159 The terms of s 43(1) do not permit land to be acquired absent any purpose for the acquisition and it is apparent that the purpose required is one connected with the Minister's act of acquiring the land. These propositions are accepted by the first respondent, who puts the question on the appeal as: whether s 43 enables the Minister to compulsorily acquire native title rights in unalienated Crown land for the purpose of conferring rights and interests in the land on others. The statement does not suggest that the executive government itself has any use for, or need of, the land. The acquisition, and following extinguishment, of the interests in question is sought only so that the lands can be made available for the use of others. An underlying contention may be that an intention to effect a grant of land, within power, suffices as a purpose under s 43(1).

160 The construction of s 43(1) contended for by the first respondent is of a largely unconstrained power to acquire land, provided by the words "for any purpose whatsoever". It relies also upon the deliberate omission of the requirement that there be public purposes for the acquisition. The omission might confirm an intention that the sub-section extends to non-governmental, private, purposes.

161 The prospect that there may be a public need for a citizen's property, to which their private right must defer, provided they are properly compensated, is well known to European and western legal systems[150]. In some commentaries, notions of public necessity, public utility, public interest, the common good and the common purpose are treated as interchangeable[151]. Those notions may imply a wider socio-economic justification for the taking of property beyond a direct use for, or a need of, the land. Early Commonwealth legislation, dealing with the compulsory acquisition of property, did not state the basis for acquisition quite so broadly. The "public purpose" which permitted an acquisition was defined as "any purpose in respect of which the Parliament has power to make laws"[152]. The *Lands Acquisition Act* 1955 (Cth) altered that definition to include, in relation to

---

150 See Taggart, "Expropriation, Public Purpose and the Constitution", in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC*, (1998) 91 at 94-98.

151 See Taggart, "Expropriation, Public Purpose and the Constitution", in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC*, (1998) 91 at 94 fn 18, referring to Grotius.

152 *Property for Public Purposes Acquisition Act* 1901 (Cth), ss 2, 6.

land in a Territory of the Commonwealth, "any purpose in relation to that Territory"[153].

162 Issues concerning the exercise of a power of compulsory acquisition, to the benefit of a private interest and not for a public purpose, have arisen in cases concerning local authorities and other statutory bodies. In *Werribee Council v Kerr*[154] Higgins J observed that "[t]he Legislature did not give to municipal councils power to interfere with the private title of A for the private benefit of B"[155]. The first respondent points out, correctly, that these cases need to be understood in context. They more often involve powers limited by the specific purposes enumerated in the statute granting the power. Nevertheless, where very wide purposes have been stated, the courts have not countenanced the use of the power to benefit private interests. In *Prentice v Brisbane City Council*[156] the Council was restrained from proceeding with an acquisition because its main purpose was to assist a developer "notwithstanding that in a broad sense the interests of the city and its inhabitants were being served by the subdivision and the opening up of the lands"[157].

163 The approach evident in *Prentice* is reflected in other areas of property law[158]. It is consistent with the principle of the law, concerning statutory interference with economic interests, which is applied to the interpretation of statutes containing powers of that kind[159]. The general rule of construction was stated by Griffith CJ in *Clissold v Perry*[160] to be "that [statutes] are not to be construed as interfering with vested interests unless that intention is manifest".

---

153 s 5.

154 (1928) 42 CLR 1; [1928] HCA 41.

155 (1928) 42 CLR 1 at 33.

156 [1966] Qd R 394.

157 [1966] Qd R 394 at 410 per Mansfield CJ.

158 Gray, "There's No Place Like Home!", (2007) 11 *Journal of South Pacific Law* 73 at 75.

159 Bennion, *Statutory Interpretation*, 4th ed (2002) at 723; Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 179 [5.18].

160 (1904) 1 CLR 363 at 373; [1904] HCA 12.

In *Bropho v Western Australia*[161] it was said that any intention to infringe rights must be made "unambiguously clear".

164 Martin (BR) CJ in the Court of Appeal considered that the legislature must be taken to have intended to create an executive power wider in its scope than earlier provisions when, in 1998, it substituted the words "for any purpose whatsoever" in s 43(1)[162]. Further, in his Honour's view, it is to be assumed that, when enacting the amendment, the legislature was aware of the history of the Act and the meaning which had been given to the expression "public purpose"[163]. In the latter respect his Honour had in mind the decision in *Clunies-Ross v The Commonwealth of Australia*[164], which concerned the *Lands Acquisition Act* 1955 (Cth).

165 Section 43 of the 1978 LAA was enacted following the passing of the *Northern Territory (Self-Government) Act* 1978 (Cth), which provided the Northern Territory legislature with the power to make laws for the peace, order and good government of the Territory[165] and, with respect to the acquisition of property, only on just terms[166]. Section 43 provided that the Minister could acquire land for "public purposes", which term was defined to mean "a purpose in relation to the Territory and includes a purpose related to the carrying out of a function by a statutory corporation"[167]. The second reading speech discloses that the bill proposing it was amended "to make clear that the bill only authorises compulsory acquisitions for public purposes"[168]. In 1982 the section was amended so that it read "[s]ubject to this Act, the Minister may, under this Act, acquire land". This could hardly be more widely stated. Despite the absence of a

---

161 (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24.

162 *Minister for Lands, Planning and Environment v Griffiths* (2004) 14 NTLR 188 at 193 [14].

163 *Minister for Lands, Planning and Environment v Griffiths* (2004) 14 NTLR 188 at 193 [12].

164 (1984) 155 CLR 193; [1984] HCA 65.

165 *Northern Territory (Self-Government) Act* 1978 (Cth), s 6.

166 *Northern Territory (Self-Government) Act* 1978 (Cth), s 50.

167 LAA, s 4.

168 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 November 1978 at 726.

stated purpose, the power was explained to be "for purposes beneficial to the Territory and the people of the Territory"[169]. In 1998 the current section was included along with a number of other amendments to the LAA[170]. As Martin (BR) CJ observed[171], their purpose was to ensure that acquisitions of land that was, or which might be, subject to native title interests complied with the NTA. It was in that context that the words "for any purposes whatsoever" appeared.

166 The legislative history of s 43 does not provide much assistance in understanding the choice of expression in the 1998 amendment to s 43, or its intended operation. The context in which those amendments were effected does not provide any answer to those enquiries, given in particular that s 43(1) affects all interests in land, not just native title rights and interests. The "public purpose" requirement had been removed some time before the 1998 amendments and even before the decision in *Clunies-Ross*. Regardless of the statement appearing in the extrinsic materials to the 1982 Act, clearly enough a wide power was sought. In any event it is necessary to consider the effect of that omission and whether it extends the purpose necessary for the acquisition to one to benefit private interests.

167 In *Clunies-Ross*[172] the Commonwealth sought to acquire land on Home Island, Cocos (Keeling) Islands for the sole purpose of divesting the owner of it. On one view, that favoured by Murphy J, the exclusion of the owner was to the benefit of the Island people[173]. The majority, however, held that, as a matter of language, a power to acquire land *for* a public purpose is prima facie limited to "an acquisition of land which is needed or which it is proposed to use, apply or preserve for the advancement or achievement of that purpose"[174]. Their Honours said that the purpose of which s 6 spoke was the use to which the land acquired was to be put[175]. The relevant Commonwealth purpose identified by their

---

169 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 March 1982 at 2078.

170 *Lands Acquisition Amendment Act (No 2)* (NT).

171 *Minister for Lands, Planning and Environment v Griffiths* (2004) 14 NTLR 188 at 192 [9].

172 (1984) 155 CLR 193.

173 (1984) 155 CLR 193 at 209.

174 (1984) 155 CLR 193 at 198 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ, referring inter alia to *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372-373; [1961] HCA 21.

Honours, as necessary to justify acquisition under the Act, was a "planned use, application or preservation of the land itself or of any buildings thereon"[176]. It was not sufficient that it was sought, by the acquisition, to achieve some consequential advantage which could be described as a more remote public purpose[177].

168 The majority in *Clunies-Ross* were not attempting to define a public purpose by reference to the nature of the intended use. Their references to it were not confined to some physical development of the land, in the nature of public works, or a use by the public of the land. Rather, their Honours considered that a purpose for the land necessarily involved a plan for its use. That provided the basis for the exercise of the power. They did not suggest any limitation on what such a plan might be, so long as it was with respect to the land. This construction was supported by, but not derived from, other provisions of the Act and the long title which spoke of the land being "suitable" or "required" for public purposes[178]. Expressed another way, the Commonwealth had to have a need for the land, as their Honours observed at a later point in their judgment[179].

169 The argument for the Commonwealth in *Clunies-Ross*, and the observations of the majority with respect to it, is worthy of mention. The Commonwealth sought to extend the power of acquisition beyond the purposes stated in s 6 of the *Lands Acquisition Act* 1955 (Cth). It contended that the definition of "public purpose" in that section reflected the wider provisions of s 51(xxxi) of the Constitution and should be read accordingly[180]. Section 51(xxxi) provides a law-making power for the peace, order and good government of the Commonwealth with respect to the acquisition of property, on just terms, from a State or person *for any purpose* in respect of which the Parliament has powers to make laws. It was not necessary for their Honours to determine whether the argument was correct. They did, however, observe that the cases dealing with s 51(xxxi) had assumed that the power there spoken of was confined to laws with respect to the acquisition of property "for some purpose related to a

---

175 (1984) 155 CLR 193 at 198-199.

176 (1984) 155 CLR 193 at 199.

177 (1984) 155 CLR 193 at 199.

178 See (1984) 155 CLR 193 at 199.

179 (1984) 155 CLR 193 at 200.

180 (1984) 155 CLR 193 at 200.

need for or proposed use or application of the property to be acquired"[181]. On this approach there is little difference between the purposes spoken of in the two provisions, albeit they are differently worded, and s 51(xxxi) in wider terms.

170 The authorities to which their Honours referred included the decisions of Dixon J in *Andrews v Howell*[182] and *Attorney-General (Cth) v Schmidt*[183]. One aspect of the reasoning in those cases is that the power given by s 51(xxxi) is referrable to the acquisition of property by the Commonwealth *for use by it* in the execution of its functions and administration under its laws. His Honour said that, whilst the expression "for any purpose" is doubtless indefinite, in the section it refers to the intended use of the executive government of the property acquired[184]. In *Andrews v Howell* his Honour considered that there was some difficulty in applying the provision to an acquisition of property, the purpose of which was its immediate disposal, where the executive was not itself interested in the commodity in question and which it did not intend to use for any governmental purpose[185]. The purpose there spoken of may be thought to be similar to those in the present case.

171 The relevance of the statements by Dixon J is to the construction of s 43(1) and the apparently unlimited power of acquisition "for any purpose whatsoever". No question arises on the appeal as to the relationship, if any, between s 51(xxxi) and laws made under the *Northern Territory (Self-Government) Act* 1978 (Cth)[186]. In my view the reasons of the majority in *Clunies-Ross* should be understood to say that the critical words of the provision were "acquire … for a … purpose [of the Commonwealth]". They convey a need for the land as the requirement for an acquisition. The basis for the need is the proposals for the land. The statements in *Andrews v Howell* and *Schmidt* confirm, if it be necessary, that the need for the land must be that of the acquiring authority.

---

181 (1984) 155 CLR 193 at 200-201.

182 (1941) 65 CLR 255; [1941] HCA 20.

183 (1961) 105 CLR 361 (now Dixon CJ).

184 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372.

185 (1941) 65 CLR 255 at 281-282.

186 As to which see generally *Teori Tau v The Commonwealth* (1969) 119 CLR 564; [1969] HCA 62; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; [1992] HCA 51; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513; [1997] HCA 38.

172 It follows, in my view, that the word "public" in the former s 43(1) did not have the importance attributed to it in argument and by the Court of Appeal. It did not qualify "purpose" in any meaningful way, such that its removal might imply the opposite. It confirms what otherwise appears from the section, namely that the purpose for the land is a governmental purpose. This is conformable with the plain words of the section. The expression "any purpose whatsoever", understood in this light, extends the nature of what might be proposed for the land, but refers to the government's proposals. The omission of the word "public" in the section provides no warrant for a construction that the power of acquisition may be used for private purposes in connection with the land. There is no clear statement of any such intention.

173 The majority in *Clunies-Ross* reiterated that an executive power to deprive a citizen of property by compulsory acquisition should be construed as confined "within the scope of what is granted by the clear meaning or necessary intendment of the words by which it is conferred"[187]. Their Honours had earlier observed that, if an Act was to be construed as extending to purposes quite unconnected with the need for the land, the ministerial power thereby created would be so wide that[188]:

> "subject only to monetary compensation, it would encompass the subjection of the citizen to the compulsory deprivation of his land, including his home, by executive fiat to achieve or advance any ulterior purpose which was a purpose in respect of which the Parliament has power to make laws or, in the case of land in a Territory, 'any purpose in relation to that territory'".

174 There is nothing in the LAA to suggest that it was intended to operate such that one person's interest in land might be taken in order that others might put it to some use agreed upon by the Minister. The Act itself does not state that the "purpose" for acquisition was intended to be non-governmental and no explanation to that effect was given with respect to s 43 in the bill as it was proposed. It has been observed that even in England in the 19th century, private bills which bestowed public acquisition powers on private for-profit companies were subject to procedures requiring a public case to be made out[189].

---

187 (1984) 155 CLR 193 at 201, referring to *Webb v Manchester and Leeds Railway Co* (1839) 4 My & Cr 116 at 120 per Lord Cottenham LC [41 ER 46 at 47-48] and *Simpson v South Staffordshire Waterworks Co* (1865) 34 LJ Ch 380 at 387 per Lord Westbury LC.

188 (1984) 155 CLR 193 at 199-200.

189 See Taggart, "Expropriation, Public Purpose and the Constitution", in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC*, (1998) 91 at 102-103.

175 The provision of controls and safeguards against possible executive abuse might support an inference that the power was intended to be limited only by the Minister's consideration that the acquisition was warranted. Some importance was placed upon the absence of such measures in *Clunies-Ross*[190], as confirming that no such wider power was intended.

176 The provisions of the LAA may be thought to go some way towards an independent assessment of a proposal to acquire land, but they are limited in their effectiveness as safeguards. A Tribunal is created to hear objections against the taking of land[191]. Any recommendation it makes, with respect to lands generally, that land not be taken, is made without specification of the matters to be considered by it and the Minister is required only to take the recommendation into account before proceeding to acquisition[192]. These measures cannot be said to be designed to identify wrongfully motivated acquisitions.

177 There are further requirements with respect to native title rights and interests. The Tribunal must consider matters such as the effect of the acquisition upon them, the economic or other significance of the acquisition to the Territory or the region, and the public interest[193]. Where the Tribunal recommends that such interests not be acquired, the Minister is further required to consult the Minister responsible for indigenous affairs and to be satisfied that it is in the interests of the Territory not to comply with the recommendation[194]. The expression "interests of the Territory" is defined to include social and economic benefits, including that of Aboriginal peoples and Torres Strait Islanders[195]. These requirements may more readily expose problems in the background to an acquisition, as well as its effect, but the reason for their inclusion is compliance with the procedural requirements of the NTA with respect to the compulsory acquisition of native title interests[196]. They are directed to the consideration that the Minister should give to an acquisition, because of the consequence which follows it, the extinguishment of those

---

190 (1984) 155 CLR 193 at 200.

191 LAA, s 38, the Lands and Mining Tribunal; and see NTA, s 24MD(6B)(f).

192 LAA, s 45(1).

193 LAA, s 38AA.

194 LAA, s 45(2).

195 LAA, s 45(3).

196 NTA, s 24MD(6B)(g).

rights[197]. The provisions do not assume the existence of a wide power of acquisition, nor the possibility that such a power might be exceeded. It cannot therefore be inferred by reference to them that a power, of the kind in question, was intended.

178 The first respondent relied upon certain provisions of the LAA as supporting a wider view of s 43. Reference was made to s 33(1)(b), which requires that the notice of proposed acquisition give only details of the manner in which it is proposed to deal with the lands if acquired[198]. This was said to be consistent with the power in s 43(1) extending to the acquisition of land so that it may be leased or granted to another. And there was said to be a possible assumption, in s 54(1), that land could be acquired for a third party. It provides that neither the Territory "nor any person for whom the land is acquired" is to enter upon the land within a specified period following acquisition.

179 It is true that s 33(1)(b) is not expressed to require, in terms, a statement of the purpose for the acquisition. It may be that it should. The required reference, to how it is proposed the land be dealt with, is ambiguous. It does not necessarily suggest a dealing, in a transactional sense. It is apt to refer, more generally, to what is intended to be done with the land. Section 54(1) is in a different category. It is not readily explained, although the appellants point to another provision, which may be seen as inconsistent with it. Section 48(1) refers to a situation where land acquired under the LAA "is no longer required for the purpose for which it was acquired". This implies a need for the land as the basis for its acquisition in the sense referred to in *Clunies-Ross*. In any event these provisions are not by themselves capable of supplying a meaning to s 43(1); at most they are capable of supporting or confirming a construction otherwise arrived at.

180 No member of the Court of Appeal suggested that a purpose permitted by s 43(1) may be the divesting of native title rights and interests so as to enable a grant to other persons, in order that they be able to carry out their proposals for the development of the land. Martin (BR) CJ held that the power given by s 43 did not extend to the purpose of giving the land of one citizen to another, absent a purpose related to a need for, or a proposed use of, the land[199]. Significantly, the reasons of his Honour and those of Mildren J[200] involve a search for a connection

---

197 NTA, s 24MD(2).

198 See LAA, ss 33(3)(b); 35(4)(b); 42B(1)(b).

199 *Minister for Lands, Planning and Environment v Griffiths* (2007) 14 NTLR 188 at 200-201 [36].

200 With whom Riley J agreed.

between the acquisition of the land and the Territory's need for it. Martin (BR) CJ concluded that the acquisitions referred to in the notices were for an "underlying" or "ultimate purpose" relating to the need for or proposed use of, the land[201]. Mildren J said that the promotion of industry and the provision of land to that end were both the business of government[202].

181 It is abundantly clear that in the present case no use by the Minister or the Territory is proposed, even in the most passive sense. The land is to be acquired for the purpose of its use by interested third parties who are later to be granted freehold title in the property. The use of the power of grant under the *Crown Lands Act* (NT) is a means to effect that purpose. It is not the purpose itself. Absent a governmental purpose, as s 43(1) requires, the exercise of the power stands as no more than a clearing of native title interests in order to effect leases and grants of the land for private purposes.

182 A view that there can be seen to be some governmental purpose in providing land and promoting industry relies upon a consequential effect. Even if it answers the description of a purpose, it is one remote from that which clearly explains the acquisition. It may provide some other justification for the exercise of the power, but it does not answer directly the question as to what is the purpose for the acquisition of the land.

183 Stated as aims, these potential effects hint at a socio-economic purpose as referrable to the power. An argument based upon such a purpose would involve wide notions of the public interest and social need. They might not be thought to have informed many of the statutes relating to the acquisition of land in Australia, but they may reside in law-making powers. It is possible that the purposes permitted by s 43(1) extend to purposes of this kind, but that is not a line which was pursued in argument, which merely alluded, in a general way, to some connection to governmental interest in the outcome. The Supreme Court of the United States has grappled with the question of takings of land for the purpose of economic development, most recently in *Kelo v City of New London, Connecticut*[203]. The question is one of considerable difficulty, but it does not arise on the facts of this case. The acquisition of the land was not connected to such a purpose. The evidence, such as there was on the topic, did not even suggest a public benefit as a likely outcome.

---

201 *Minister for Lands, Planning and Environment v Griffiths* (2007) 14 NTLR 188 at 202 [39] and [41].

202 *Minister for Lands, Planning and Environment v Griffiths* (2007) 14 NTLR 188 at 216 [85].

203 545 US 469 (2005).

184 The Tribunal, which considered the issues of economic and social benefit, found that the proposed leases and grants of land, for animal husbandry and associated purposes, had little economic or other significance to the region, no benefit to the appellants and there was little or no public benefit in the acquisition. The only benefit identified was that to the proposed developer[204]. In relation to the release of land for tourist and other developments, the Tribunal said that it was not possible to come to a view about whether there was a wider benefit. One could only have regard to the developer's belief in the viability of the proposal[205].

185 For these reasons I consider that the acquisitions are not a valid exercise of the power given by s 43(1) of the LAA.

186 I would allow the appeal, set aside the orders of the Court of Appeal of the Supreme Court of the Northern Territory and order in their place that the appeal to that Court be dismissed. The first respondent should pay the appellants' costs of the proceedings in the Supreme Court and of the appeal in this Court.

---

204 *Minister for Lands, Planning and Environment v Griffiths* NT LMT 26, 20, 37 at 120 [475], [479].

205 *Minister for Lands, Planning and Environment v Griffiths* NT LMT 26, 20, 37 at 128 [499].