# HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

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GLEN RICHARD WILLIAMS APPELLANT

AND

WRECK BAY ABORIGINAL COMMUNITY COUNCIL & ANOR RESPONDENTS

*Williams v Wreck Bay Aboriginal Community Council*
[2019] HCA 4
*13 February 2019*
C5/2018

**ORDER**

1. *Appeal allowed.*

2. *Set aside the order in paragraph 2 of the order of the Court of Appeal of the Supreme Court of the Australian Capital Territory made on 23 October 2017 and, in its place, order that the order in paragraph 1 of the order of the Supreme Court of the Australian Capital Territory made on 25 August 2016 be set aside, and, in its place, order that questions 3 and 4 in the amended special case be answered as follows:*

***Question 3***

*[I]s the* Residential Tenancies Act 1997 *(ACT), in whole or in part, a law which is not capable of operating concurrently with the* Aboriginal Land Grant (Jervis Bay Territory) Act 1986 *(Cth) within the meaning of s 46 of the* Aboriginal Land Grant (Jervis Bay Territory) Act 1986 *(Cth)?*

***Answer***

*Yes, the* Residential Tenancies Act 1997 *(ACT), in part, is a law that is not capable of operating concurrently with the* Aboriginal Land Grant (Jervis Bay Territory) Act 1986 *(Cth) within the meaning of s 46 of the* Aboriginal Land Grant (Jervis Bay Territory) Act 1986 *(Cth).*

***Question 4***

*If the answer to Question 3 is "yes", to what extent does the* Residential Tenancies Act 1997 *(ACT) not apply to Aboriginal Land for the purposes of s 46 of the* Aboriginal Land Grant (Jervis Bay Territory) Act 1986 *(Cth)?*

***Answer***

*The* Residential Tenancies Act 1997 *(ACT) does not apply to Aboriginal Land for the purposes of s 46 of the* Aboriginal Land Grant (Jervis Bay Territory) Act 1986 *(Cth) to the extent that s 8(1)(a) read with Sch 1, cl 72 and further read with s 9 of the* Residential Tenancies Act 1997 *(ACT) would prohibit subletting, and ss 54 and 128 operate upon that prohibition, on Aboriginal Land.*

On appeal from the Supreme Court of the Australian Capital Territory

**Representation**

G R Kennett SC for the appellant (instructed by Clayton Utz)

J K Kirk SC with R J Arthur and P D Herzfeld for the first respondent (instructed by Ken Cush & Associates)

P J F Garrisson SC, Solicitor-General for the Australian Capital Territory, with P M Bindon for the second respondent (instructed by ACT Government Solicitor)

## CATCHWORDS

### Williams v Wreck Bay Aboriginal Community Council

Constitutional law (Cth) – Powers of Commonwealth Parliament – Territories – Inconsistency between Commonwealth and Territory laws – Where Council empowered under *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) ("Land Grant Act") to grant leases over certain land within Jervis Bay Territory ("JBT") – Where Land Grant Act does not affect application of other laws to extent other laws "capable of operating concurrently" with Land Grant Act – Where *Residential Tenancies Act 1997* (ACT) applies in JBT as if JBT formed part of Australian Capital Territory – Where *Residential Tenancies Act* provides that all leases to which it applies include "standard residential tenancy terms" including term requiring lessor to maintain premises in reasonable state of repair – Whether, and to what extent, *Residential Tenancies Act* is law which is not capable of operating concurrently with Land Grant Act.

Words and phrases – "alter, impair or detract from", "anti-exclusivity provision", "capable of operating concurrently", "complete or exhaustive statement", "implicit negative proposition", "indirect inconsistency", "residential tenancy agreement", "standard residential tenancy terms", "statutory power".

*Constitution*, s 109.
*Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth), ss 6, 7, 12, 38, 40, 41, 42, 46.
*Australian Capital Territory (Self-Government) Act 1988* (Cth), s 28.
*Jervis Bay Territory Acceptance Act 1915* (Cth), s 4A.
*Residential Tenancies Act 1997* (ACT), ss 8, 9, 10, 54, 128, Sch 1.

1 KIEFEL CJ, KEANE, NETTLE AND GORDON JJ. Wreck Bay is within the Jervis Bay Territory ("the JBT"). The Wreck Bay Aboriginal Community Council ("the Council") is empowered under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) ("the Land Grant Act") to grant leases in respect of certain land within the JBT.

2 In 1986, pursuant to s 8 of the Land Grant Act, an area of land was granted by the Commonwealth to the Council[1]. The land granted to the Council was declared to be "Aboriginal Land". By virtue of s 10 of the Land Grant Act, "that land (including all rights, title and interests in that land) [was] vested in the Council without any conveyance, transfer or assignment".

3 The Council was established by the Land Grant Act as a body corporate with perpetual succession[2]. As originally established, it consisted of "the persons who [were] registered members at that time"[3]. Mr Glen Williams, the appellant, was not one of these persons; he joined the Council as a registered member in 1989[4]. Since then the appellant has resided in premises on Aboriginal Land provided by the Council ("the premises"). The appellant remains in occupation of the premises[5], which are in substantial disrepair[6].

4 In a dispute between the Council and the appellant concerning the obligation of the Council under the *Residential Tenancies Act 1997* (ACT) to keep premises leased to the appellant in a reasonable state of repair, questions

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**1** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 209 [1].

**2** Land Grant Act, s 4.

**3** Land Grant Act, s 5. The term "registered member" is defined in s 2(1) to mean a person whose name is on the register kept in accordance with Div 2 of Pt IV of the Land Grant Act.

**4** *Wreck Bay Aboriginal Community Council v Williams* (2016) 312 FLR 60 at 62 [18].

**5** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 209 [2].

**6** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 210-211 [5].

arose as to whether, and to what extent, the *Residential Tenancies Act* applies to that lease.

5 These questions were agitated in this Court between the appellant and the Attorney-General for the Australian Capital Territory, who were broadly on one side, and the Council on the other. The arguments of the parties involved consideration of the effect of s 46 of the Land Grant Act, which deals with the application of the laws in force in the JBT to Aboriginal Land, and of the effect of the Land Grant Act on the grant of leases of Aboriginal Land by the Council.

6 The Council contended that s 46 does not allow the application to Aboriginal Land of provisions of the *Residential Tenancies Act* that would oblige the Council to maintain leased premises in a reasonable state of repair because, it was said, that would impair the operation of the Land Grant Act. The appellant and the Attorney-General argued that s 46 allows the operation of any law in force in the JBT that may be obeyed simultaneously with the provisions of the Land Grant Act. It is not necessary to resolve this aspect of the controversy between the parties because the provisions of the Land Grant Act, considered as a whole, do not require that a lease of Aboriginal Land contain no terms other than those imposed by the Land Grant Act or expressly agreed to by the Council.

7 In order to explain this conclusion, it is necessary to begin with a brief explanation of how it is that the laws of the Australian Capital Territory ("the ACT") operate in the JBT.

**The Jervis Bay Territory**

8 The JBT consists of land which was previously part of New South Wales ("NSW"). The *Seat of Government Act 1908* (Cth) required that the "territory to be granted to or acquired by the Commonwealth for the Seat of Government shall contain an area not less than nine hundred square miles, and have access to the sea"[7]. The 1909 agreement[8] between the Commonwealth and NSW for the

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**7** See s 4.

**8** The agreement was ratified and confirmed by s 3 of the *Seat of Government Acceptance Act 1909* (Cth) and s 5 of the *Seat of Government Surrender Act 1909* (NSW).

surrender of the land that is now the ACT included a provision that NSW would grant the Commonwealth certain identified territory at Jervis Bay[9].

9 A further agreement for the surrender of the territory at Jervis Bay to the Commonwealth was reached in 1913[10]. The territory was surrendered by NSW by s 6 of the *Seat of Government Surrender Act 1915* (NSW) and accepted by the Commonwealth by s 4(1) of the *Jervis Bay Territory Acceptance Act 1915* (Cth) ("the Acceptance Act"). Section 4(4) of the Acceptance Act provided that "[t]he territory so accepted shall be known as the Jervis Bay Territory".

10 Since self-government was granted to the ACT[11], the position with respect to the laws applicable in the JBT has been as stated in s 4A(1) of the Acceptance Act:

> "Subject to this Act, the laws (including the principles and rules of common law and equity) in force from time to time in the Australian Capital Territory are, so far as they are applicable to the Territory and are not inconsistent with an Ordinance, in force in the Territory as if the Territory formed part of the Australian Capital Territory."

11 It was not controversial in the present case that the *Residential Tenancies Act* is in force in the JBT.

## The proceedings

12 The appellant commenced proceedings in the ACT Civil and Administrative Tribunal ("ACAT") seeking orders that[12]:

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**9** See cl 5 of the First Schedule to the *Seat of Government Acceptance Act 1909* (Cth) and cl 5 of the First Schedule to the *Seat of Government Surrender Act 1909* (NSW).

**10** The agreement was ratified and confirmed by s 3 of the *Jervis Bay Territory Acceptance Act 1915* (Cth) and s 5 of the *Seat of Government Surrender Act 1915* (NSW).

**11** The position before the granting of self-government is described in *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 211-212 [10]-[12].

**12** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 211 [6].

(a) pursuant to s 83(b) of the *Residential Tenancies Act* the Council undertake necessary repairs to the premises; and

(b) pursuant to s 83(d) of the *Residential Tenancies Act* the Council pay compensation for breaches of the residential tenancy agreement in the sum of $15,000.

13 Initially, the Council contended that ACAT did not have jurisdiction because it was not established that there was a residential tenancy agreement between the Council and the appellant within the meaning of the *Residential Tenancies Act*. ACAT rejected that contention, concluding that while no written lease had been located there had been a written lease which required the appellant to pay $35 per week, that the appellant had paid rent for 12 weeks but had not paid any rent since then, and that no steps had been taken to remove him or his family from the property[13].

14 Having resolved that jurisdictional issue, ACAT referred questions of law to the Supreme Court of the ACT pursuant to s 84 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT). A special case was filed in the Supreme Court. In that Court, it was conceded by the Council that leases of Aboriginal Land granted by it under the Land Grant Act are within the definition of residential tenancy agreements in the *Residential Tenancies Act*[14]. Under the special case as amended, the parties agreed that only the following questions needed to be answered[15]:

> "3 [I]s the [*Residential Tenancies Act*], in whole or in part, a law which is not capable of operating concurrently with the [Land Grant Act] within the meaning of s 46 of the [Land Grant Act]?
>
> 4 If the answer to Question 3 is 'yes', to what extent does the [*Residential Tenancies Act*] not apply to Aboriginal Land for the purposes of s 46 of the [Land Grant Act]?"

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**13** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 210 [3]. See *Williams v Wreck Bay Aboriginal Community Council* [2015] ACAT 79.

**14** *Wreck Bay Aboriginal Community Council v Williams* (2016) 312 FLR 60 at 62 [14].

**15** *Wreck Bay Aboriginal Community Council v Williams* (2016) 312 FLR 60 at 61 [2]-[3].

15 The primary judge (Elkaim J) answered question 3 "No"[16]. It was therefore unnecessary for his Honour to answer question 4.

16 The Council appealed to the Court of Appeal of the Supreme Court of the ACT. The Court of Appeal (Murrell CJ, Burns and Mossop JJ) unanimously allowed the Council's appeal[17].

17 Before summarising the reasons of the Court of Appeal it is desirable to set out the material provisions of the Land Grant Act and the *Residential Tenancies Act*.

**The Land Grant Act**

18 The Land Grant Act sets out the functions of the Council in s 6. These include the holding of title to Aboriginal Land and the exercise, for the benefit of members of the Community[18], of the Council's powers as owner of Aboriginal Land.

19 The functions of the Council also include the provision of community services to members of the Community and the management and maintenance of Aboriginal Land[19].

20 Section 7(2) provides that the powers of the Council include the power to dispose of real and personal property and the power to enter into contracts for the purposes of the Act.

21 Section 12 provides that, subject to s 13, where land vests in the Council under the Act, the buildings and improvements on that land also vest in the Council.

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**16** See *Wreck Bay Aboriginal Community Council v Williams* (2016) 312 FLR 60 at 66 [53]-[54].

**17** See *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 230 [88].

**18** "Community" is defined in s 2(1) to mean "the community known as the Wreck Bay Aboriginal Community".

**19** Land Grant Act, s 6(cb), (ce).

22 Section 13 allows for the continued occupation by the Commonwealth or an Authority[20] of land occupied or used by them on the vesting of the land in the Council under the Land Grant Act. Section 13(3) provides that nothing in s 13 prevents the granting by the Council under s 38 of a lease of land vested in the Council to the Commonwealth or an Authority. If such a lease is granted, the land ceases to be land to which s 13 applies.

23 Part V of the Land Grant Act is entitled "Dealings with Aboriginal Land". It includes s 38, which provides:

> "(1) Except as provided by this Part, the Council shall not deal with or dispose of, or agree to deal with or dispose of, any estate or interest in Aboriginal Land.
>
> (2) Subject to this section, the Council may grant a lease of Aboriginal Land (other than land within the Booderee National Park or the Booderee Botanic Gardens):
>
> (a) to a registered member or registered members for use for domestic purposes;
>
> (b) to a registered member or registered members for use for business purposes;
>
> (c) to a registered member or registered members for use for the benefit of the members, or of a significant number of the members, of the Community;
>
> (d) with the consent in writing of the Minister – to a person other than a registered member, or to persons at least one of whom is not a registered member, for use for domestic purposes;
>
> (e) with the consent in writing of the Minister – to a person other than a registered member, or to persons at least one of whom is not a registered member, for use for business purposes; or
>
> (f) to the Commonwealth or an Authority.

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**20** "Authority" is defined in s 2(1) to mean "an Authority established by or under a law of the Commonwealth or a law in force in the Territory".

(3) Except with the consent of the Minister, the term of a lease shall not exceed:

(a) in the case of a lease to which paragraph (2)(a) applies – 99 years;

(b) in the case of a lease to which paragraph (2)(b) or (c) applies – 25 years; or

(c) in any other case – 15 years.

(4) The Council may grant a person a licence to use Aboriginal Land (other than land within the Booderee National Park or the Booderee Botanic Gardens).

(5) Where the Council grants a lease of, or a licence to use, Aboriginal Land to the Commonwealth or to an Authority under this section, the rent and other amounts payable under the lease or licence shall be determined by the Minister.

(6) The *Lands Acquisition Act 1989* does not apply to the grant of a lease under this section."

24 Section 40 of the Land Grant Act makes special provision for the rights of registered members of the Council who were in lawful occupation of land before it became Aboriginal Land. It obliges the Council to grant a lease for the maximum period permitted by s 38(3) to such persons. Section 40 also constrains the powers of the Council to require payment by such persons in respect of buildings or improvements on the land leased to them. These special provisions do not apply to the appellant because he was not in occupation immediately before the land became Aboriginal Land.

25 Section 41 confers on lessees of Aboriginal Land a limited right to grant a sub-lease of that land. As will be seen, the *Residential Tenancies Act* does not permit subletting by a tenant.

26 Section 42 provides for the transmission upon the death of a registered member who has the benefit of a lease or sub-lease of Aboriginal Land of that benefit to a relative.

27 Section 46 provides:

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

**The *Residential Tenancies Act***

28 The *Residential Tenancies Act* commenced operation in the ACT on 25 May 1998. Subject to a number of limited exceptions which are not presently relevant, as enacted it was expressed to apply to "any residential tenancy agreement commencing on or after the commencement day" and, from 1 July 2000 onwards, to "all residential tenancy agreements"[21]. The term "residential tenancy agreement" is defined broadly as an agreement that confers on the tenant a right, for value, to occupy premises as a home[22]. As noted above, it is now common ground between the parties that the lease between the Council and the appellant is capable of falling within that definition.

29 The *Residential Tenancies Act* provides by s 8(1)(a) that a residential tenancy agreement "must contain, and is taken to contain, terms to the effect of the standard residential tenancy terms mentioned in schedule 1"[23]. Section 9(1)(a) provides that terms which are inconsistent with the standard residential tenancy terms are void. Section 10 makes provision for ACAT to endorse terms that are inconsistent with the standard residential tenancy terms upon a joint application by the parties. A term so endorsed is not void[24].

30 Relevantly for present purposes, the standard residential tenancy terms in Sch 1 include cl 55, which provides:

> "(1) The lessor must maintain the premises in a reasonable state of repair having regard to their condition at the commencement of the tenancy agreement.
>
> (2) The tenant must notify the lessor of any need for repairs.

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**21** See *Residential Tenancies Act*, s 4(2) as enacted.

**22** See *Residential Tenancies Act*, ss 6A to 6F.

**23** Prior to 1 January 2006 such terms were referred to as "prescribed terms".

**24** See *Residential Tenancies Act*, ss 8(1)(d)(ii), 9(1)(b).

(3) This section does not require the tenant to notify the lessor about anything that an ordinary tenant would reasonably be expected to do, for example, changing a light globe or a fuse."

31 Clause 57 provides:

"Subject to clause 55, the lessor must make repairs, other than urgent repairs, within 4 weeks of being notified of the need for the repairs (unless otherwise agreed)."

32 Clause 59 provides:

"The tenant must notify the lessor (or the lessor's nominee) of the need for urgent repairs as soon as practicable, and the lessor must, subject to clause 82, carry out those repairs as soon as necessary, having regard to the nature of the problem."

33 And cl 72(1) provides:

"The tenant must not assign or sublet the premises or any part of them without the written consent of the lessor."

34 Section 83 of the *Residential Tenancies Act* empowers ACAT to make the following orders in relation to a tenancy dispute:

"(b) an order requiring performance of a residential tenancy agreement or occupancy agreement;

...

(d) an order requiring the payment of compensation for loss of rent or any other loss caused by the breach of a residential tenancy agreement or occupancy agreement".

## The Court of Appeal

35 It is now convenient to consider the reasons of the Court of Appeal. As to the operation of s 46 of the Land Grant Act, the Court said[25]:

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**25** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 219 [45].

> "[I]t is clear that a law operating in the JBT will not be capable of operating concurrently if the rights, obligations, powers, privileges and immunities created by it conflict with those created by the [Land Grant Act] ... A conflict will exist where there is some not insignificant impairment of those rights and obligations, powers, privileges and immunities. To pick up the language used by Dixon CJ in *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 in the context of s 109 of the *Constitution*, if the applied law 'would alter, impair or detract from' the operation of the [Land Grant Act] then it would be incapable of operating concurrently with the [Land Grant Act]."

36 As to whether the application of the *Residential Tenancies Act* would impair the operation of the Land Grant Act, the Court of Appeal focussed on two issues[26]:

> "(a) First, whether the power of the Council to grant leases was a statutory power or simply an incident of ownership in common with any other holder of freehold title.
>
> (b) Second, whether under the [Land Grant Act] the determination of the terms on which leases are granted is a statutory discretionary power of the Council (subject to the express provisions of the [Land Grant Act]) or simply a discretionary power equivalent to that of any other landlord and hence subject to qualification by the provisions of applied laws operating in the JBT?"

37 As to the first issue, the Court of Appeal noted that the Land Grant Act does not use the expression "freehold" or "fee simple" in its description of the nature of the title that exists in Aboriginal Land[27]. It noted that the Land Grant Act was enacted after the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("the Northern Territory Act"), which refers to a grant of land as a "grant of an estate in fee simple"[28]. The Court of Appeal observed that, in contrast to the language used in the Northern Territory Act, the title granted by the Land Grant

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**26** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 224 [64].

**27** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 224 [65].

**28** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 224-225 [67].

Act is not expressly stated to be an estate in fee simple[29]. The Court of Appeal continued[30]:

> "The [Land Grant Act] creates the concept of Aboriginal Land and, where that statutory status is granted, provides for the vesting of the land in the Council under s 10. While the terms of s 10 reflect an intention to make as full a grant of property as possible, and hence a title which might be seen as equivalent to an estate in fee simple, there has been a deliberate decision not to characterise it as such and to give it a statutory description which departs from the approach adopted under the Northern Territory Act."

38 The Court concluded that, notwithstanding the amplitude of the title vested in the Council, the terms of the Land Grant Act do not support the proposition that what was granted was an estate in fee simple intended to put the Council in a position equivalent to any other landowner, subject only to the specific qualifications upon its power specified in the Land Grant Act. Rather, it was said to be consistent with "an intention to define the nature of the interest given to the Council by reference to the terms of the statute"[31]. The Court held that the interest granted to the Council was best described as "a form of statutory title not *necessarily* picking up the general law incidents of ownership"[32]. Accordingly, the Court held that the powers of the Council to dispose of interests in the land are best characterised as "statutory powers forming part of a statutory scheme rather than the Council merely being placed in the position of any other landowner"[33].

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**29** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 225 [68].

**30** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 225 [68].

**31** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 225 [68].

**32** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 225-226 [70] (emphasis in original).

**33** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 225-226 [70].

39 As to the second issue, the Court acknowledged that s 38 of the Land Grant Act does not state expressly that it is intended to exclude other laws that might apply in relation to the conditions of leases, and does not expressly confer power to grant leases "on terms that the Council thinks fit"[34]. While an express provision to that effect would have made it clear that the statutory power to lease would be inconsistent with a law that sought to dictate the terms of such a lease, the Court of Appeal nevertheless held that[35]:

> "there are features of the [Land Grant Act] that collectively indicate that the power of the Council to grant leases should not be treated as one subject to laws specifying mandatory terms for such leases. In other words, the power of the Council to grant a lease should be interpreted as including the power to determine for itself the terms of those leases and not subject to qualification by provisions which would alter the terms of those leases."

40 The features of the Land Grant Act referred to by the Court of Appeal in this regard were:

(a) the power to deal with or dispose of any interest or estate in Aboriginal Land is taken away from the Council by s 38(1), and then given back by s 38(2), subject to conditions[36];

(b) the Land Grant Act contemplates the granting of 99-year leases, and a lease of such length is practical only if the terms can be established by the contracting parties. It would be inconsistent with the purpose of providing secure tenure if the terms of such a long-term lease were subject to modification by a law of general application[37];

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**34** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 226 [71].

**35** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 226 [74].

**36** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 226-227 [75].

**37** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 227 [76].

(c) the long-term nature of the leases is reinforced by the provisions which deny the right of the Council to payment for buildings existing upon the land at the time it becomes Aboriginal Land. This circumstance suggests that the lease is more analogous to ownership under a Crown lease than a residential tenancy[38]; and

(d) these provisions of the Land Grant Act exist in a context where the Council is controlled by its members in a reasonably direct manner. The circumstance that the fundamental purpose of the Land Grant Act is to extend long-term control of land to an Aboriginal community which acts through the vehicle of the Council is more consistent with interpreting s 38(2) as encompassing within it the power to determine the terms upon which leases to its own members are to be granted[39].

41 The Court of Appeal, having held that s 38(2) was to be understood as conferring a power upon the Council to grant leases on such terms and conditions as it thinks fit[40], went on to conclude[41]:

> "Once s 38(2) is so interpreted, the modification of leases granted by the Council pursuant to the provisions of the [*Residential Tenancies Act*] would clearly involve a significant qualification or impairment of the statutory power of the Council."

42 Accordingly, the Court of Appeal answered the questions posed in the special case as follows[42]:

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**38** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 227 [77].

**39** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 228 [79].

**40** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 228 [80].

**41** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 228-229 [81].

**42** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 229-230 [86]-[87].

(a) Question 3:

"The [*Residential Tenancies Act*] is not capable of operating concurrently (within the meaning of s 46 of the [Land Grant Act]) with the [Land Grant Act] insofar as:

a. s 8 requires a lease granted by the Council to contain the standard residential tenancy terms within the meaning of the [*Residential Tenancies Act*]; and

b. s 9 renders void terms of a lease granted by the Council that are inconsistent with the standard residential tenancy terms."

(b) Question 4:

"The [*Residential Tenancies Act*] does not apply to Aboriginal Land for the purposes of s 46 of the [Land Grant Act] to the extent to which s 8 or s 9 of the former Act would apply to a lease granted by the Council."

**The appeal to this Court**

43 Pursuant to a grant of special leave to appeal to this Court, the appellant contended that the Court of Appeal erred in holding that:

(a) ss 8 and 9 of the *Residential Tenancies Act* are not capable of operating concurrently with the Land Grant Act in accordance with s 46 of the Land Grant Act; and

(b) the *Residential Tenancies Act* does not apply to Aboriginal Land for the purpose of s 46 of the Land Grant Act to the extent to which ss 8 and 9 of the *Residential Tenancies Act* would apply to a lease granted by the Council.

**The arguments as to s 46 of the Land Grant Act**

*The appellant's submissions*

44 The appellant submitted that the Court of Appeal erred in asking whether the *Residential Tenancies Act* would "alter, impair or detract from" the operation of the Land Grant Act. It was said that s 46 poses a different question, namely, whether the provisions of each Act are capable of simultaneous operation. The appellant argued that the provisions of the *Residential Tenancies Act* upon which his claim for relief rests are capable of operating concurrently with the Land Grant Act, in relation to leases granted by the Council under s 38.

45 The appellant submitted that the words "capable of operating concurrently" should be given their ordinary meaning and that on that basis, the question is whether a particular law in force in the JBT can work together, in conjunction, or in cooperation with any given provision of the Land Grant Act. Further, it was said that s 46 confirms that the Land Grant Act is not a complete and exhaustive statement of the law on any matter dealt with in that Act[43].

*The Council's submissions*

46 The Council submitted that s 46 is not a provision which expresses an intention on the part of the Commonwealth Parliament that a Commonwealth Act should be construed so as to permit the concurrent operation of other laws.

47 The Council argued that, in this context, as explained by Gummow J in *Momcilovic v The Queen*[44] in a passage cited in *The Commonwealth v Australian Capital Territory*[45] ("the *Same-Sex Marriage Case*"), the circumstance that the Commonwealth law evinces an intention to make exhaustive or exclusive provision upon a topic:

> "has come to be known as 'indirect inconsistency'. Here, the essential notion is that, upon its true construction, the federal law contains an implicit negative proposition that nothing other than what the federal law provides upon a particular subject matter is to be the subject of legislation; a State law which impairs or detracts from that negative proposition will enliven s 109."

48 The Council argued that a law which is inconsistent with an "implicit negative proposition" in the Commonwealth law cannot operate concurrently with it. Accordingly, on the basis that the Land Grant Act is correctly understood to require that the only terms of a lease of Aboriginal Land are those imposed by the Land Grant Act or expressly agreed to by the Council, there was no error in the Court of Appeal's use of the expression "alter, impair or detract from".

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**43** See *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-564; [1977] HCA 34.

**44** (2011) 245 CLR 1 at 111 [244]; [2011] HCA 34.

**45** (2013) 250 CLR 441 at 468 [59]; [2013] HCA 55.

*The Attorney-General's submissions*

49 The Attorney-General submitted that it is implicit in s 46 of the Land Grant Act that the Commonwealth Parliament did not intend the Land Grant Act to exhaustively or exclusively regulate Aboriginal Land in the JBT. He argued that to the extent that the *Residential Tenancies Act* is capable of operating concurrently with the Land Grant Act, the *Residential Tenancies Act* applies to Aboriginal Land under the Land Grant Act.

50 The Attorney-General argued that s 46 evinces an intention that the Land Grant Act is to operate within the setting of (or alongside) laws such as the *Residential Tenancies Act*, and that both Acts are to be read to operate together so far as is possible. He argued that the critical question posed by s 46 is the extent to which the *Residential Tenancies Act* is capable of operating concurrently with the Land Grant Act.

51 The Attorney-General argued that the Court of Appeal erred in substituting the test for s 109 inconsistency in place of the words actually contained in s 46 of the Land Grant Act. He argued that the task of assessing the extent to which the *Residential Tenancies Act* is capable of operating concurrently with the Land Grant Act for the purposes of s 46 is not to be dictated or controlled by reference to the jurisprudence relating to s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ("the Self-Government Act") or s 109 of the *Constitution*.

52 The Attorney-General acknowledged that where a Commonwealth law provides a comprehensive and exhaustive statement of the law in relation to a particular matter there can be no room left for concurrent operation. However, he submitted that if that field is not comprehensive and exhaustive, the provisions said to conflict can be laid side by side to determine whether there is a real conflict or whether, upon their proper construction, the provisions are non-conflicting and capable of concurrent operation.

**The arguments as to the effect of the Land Grant Act**

*The appellant's submissions*

53 The appellant submitted that even if s 46 were to be understood as inviting an enquiry as to whether the law operated to "alter, impair or detract from" the scheme of the Land Grant Act, the result of the case would be the same because the Land Grant Act does not establish a scheme the operation of which would be compromised by the application of the ordinary laws that protect the interests of tenants against exploitation.

54 The appellant argued that the Land Grant Act does not create a statutory source of power (outside the ordinary law of real property) in the Council as proprietor of Aboriginal Land. While some lease terms are dictated by ss 38(3) and 40, others are plainly not, and all these provisions assume the existence and applicability of the general body of contract and property law. It was said that, except where it does so expressly, the Land Grant Act does not purport to displace the general law pertaining to the relationship between landlord and tenant.

*The Council's submissions*

55 The Council submitted that the power to grant a lease that is conferred by s 38(2) of the Land Grant Act should be construed as including the power to determine for itself the terms of those leases and not subject to qualification by provisions which would alter the terms of those leases.

56 The Council argued that, for the reasons given by the Court of Appeal, the powers of the Council to deal with Aboriginal Land are properly to be regarded as wholly statutory in origin, and that the application of the *Residential Tenancies Act* would impair the scheme of powers and restrictions in the Land Grant Act.

*The Attorney-General's submissions*

57 The Attorney-General submitted that the Land Grant Act does not manifest an intention to state exhaustively or comprehensively the law governing the relationship between the Council as landlord and its tenants on Aboriginal Land.

58 As to the *Residential Tenancies Act*, the Attorney-General argued that it imposes a minimum default standard regulating the rights, duties and obligations of the landlord and tenant in a residential lease.

59 The Attorney-General acknowledged, correctly, that the provisions of the *Residential Tenancies Act* and the Land Grant Act which deal with subletting and sub-leasing do reveal a real conflict when laid side by side, in that the provisions of the former Act prohibiting subletting are not capable of concurrent operation with the provisions of the Land Grant Act that permit sub-leasing. That aside, the standard residential tenancy terms do not detract from the operation of the provisions of the Land Grant Act discussed above.

60 The Attorney-General contended that the questions posed in the amended special case should be answered as follows:

(a) Question 3:

"Yes, the [*Residential Tenancies Act*], in part, is a law that is not capable of operating concurrently with the Land Grant Act within the meaning of s 46 of the Land Grant Act."

(b) Question 4:

"The [*Residential Tenancies Act*] does not apply to Aboriginal Land for the purposes of s 46 of the Land Grant Act to the extent that s 8(1)(a) read with Sch 1, cl 72 and further read with s 9 of the [*Residential Tenancies Act*] would prohibit subletting, and ss 54 and 128 operate upon that prohibition, on Aboriginal Land."

**The effect of the Land Grant Act**

61 While there is force in the submissions of the appellant and the Attorney-General as to the operation of s 46 of the Land Grant Act, it is unnecessary to reach a firm view as to this aspect of the controversy between the parties.

62 Whether or not s 46 of the Land Grant Act is to be construed strictly by reference to its own terms or in light of the jurisprudence relating to s 109 of the *Constitution*[46] and s 28 of the Self-Government Act[47], it is clear that the starting point for a consideration of its operation must be a determination of the legal meaning of the provisions of the Land Grant Act understood as a whole.

63 If one asks whether there is a "textual"[48] or "direct collision"[49] with the *Residential Tenancies Act* it is readily apparent from a comparison of the provisions of the two pieces of legislation that there is no direct collision between the provisions of the Land Grant Act and cl 55 of Sch 1 to the *Residential Tenancies Act*. Clause 55 of Sch 1 to the *Residential Tenancies Act* does not

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**46** *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 524-525 [39]-[43]; [2011] HCA 33.

**47** *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 465-467 [48]-[55].

**48** *Miller v Miller* (1978) 141 CLR 269 at 275; [1978] HCA 44.

**49** *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258; [1968] HCA 2.

create any right or obligation that cannot be given effect while at the same time effect is given to the provisions of the Land Grant Act.

64 In the *Same-Sex Marriage Case*[50], this Court held that the provisions of the ACT law which provided for marriage under that law could not operate concurrently with the *Marriage Act 1961* (Cth) in accordance with s 28 of the Self-Government Act, and so were inoperative. That was because the provisions of the *Marriage Act* were "a comprehensive and exhaustive statement of the law of marriage" which necessarily contained "the implicit negative proposition that the kind of marriage provided for by the [*Marriage Act*] is the *only* kind of marriage that may be formed or recognised in Australia" (emphasis in original).

65 If one asks whether the Land Grant Act contains the implicit negative proposition that the terms and conditions of leases for which it provides are to be the *only* terms and conditions applicable to those leases[51], one can see that its provisions considered together do not purport to provide a complete statement of the law governing the rights and obligations of parties to leases granted by the Council so as to exclude the application of the law generally applicable to leases within the JBT. Accordingly, the ordinary law of the land in respect of the irreducible minimum level of habitability applies to leases granted pursuant to s 38(2).

*Australian Mutual Provident Society v Goulden*

66 The Council argued that this Court's decision in *Australian Mutual Provident Society v Goulden*[52] supported its contention that to apply cl 55 of the standard residential tenancy terms would impair the operation of the Land Grant Act.

67 In *Goulden*, Gibbs CJ, Mason, Brennan, Deane and Dawson JJ noted the circumstance that the Commonwealth statute there under consideration did not "establish a detailed and special code of contract or insurance law to be applied in relation to the contracts of insurance written by registered life companies". In relation to those contracts "the ordinary provisions of the local law of the particular State or Territory [were] left to apply except to the extent that they

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**50** (2013) 250 CLR 441 at 468 [58]-[59].

**51** *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 467-468 [57].

**52** (1986) 160 CLR 330 esp at 336-337; [1986] HCA 24.

[might] be so modified or excluded by provisions dealing with particular subject-matters"[53]. Their Honours contrasted[54] the approach of the statute in this regard with its approach to the matters in respect of which it made special provision, which included the statutory funds of life insurance companies and the rates of premium charged.

68 In relation to such matters, their Honours concluded that the special provisions of the Commonwealth Act established the entitlement of registered life insurance companies to set their premiums as they saw fit in respect of the classes of risks which they were willing to underwrite. On that basis, their Honours concluded that it would "alter, impair or detract from" the scheme of Commonwealth regulation established[55]:

> "if a registered life insurance company was effectively precluded by the legislation of a State from classifying different risks differently, from setting different premiums for different risks or from refusing to insure risks which were outside the class of risk in respect of which it wished to offer insurance".

69 The contrast drawn by the Court in *Goulden* is instructive. The contrast is between Commonwealth laws that operate within the framework of the general law and Commonwealth laws which operate to lay down a rule or rules in terms which convey that the rule or rules so stated, *and no other rules*, are to govern a given case. The provisions of the Land Grant Act are not of this latter character. They do not purport to state comprehensively and exhaustively what shall be the rules in relation to the rights and obligations of the parties to a lease[56]. In particular, they say nothing about the rights or obligations of the parties in relation to the maintenance of leased premises.

70 In *American Dairy Queen (Q'ld) Pty Ltd v Blue Rio Pty Ltd*[57], Mason J (as his Honour then was) said of Pt XI of the *Land Act 1962* (Qld) that it "does not

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**53** (1986) 160 CLR 330 at 335.

**54** (1986) 160 CLR 330 at 335-337.

**55** (1986) 160 CLR 330 at 337.

**56** cf *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-564; *Momcilovic v The Queen* (2011) 245 CLR 1 at 116 [261].

**57** (1981) 147 CLR 677 at 683; [1981] HCA 65.

have the appearance of a code" intended to make comprehensive and exclusive provision for dealing with land regulated by it. The same observation can be made about the Land Grant Act. The provisions of the Land Grant Act relating to the terms and conditions of leases are plainly not comprehensive. For example, they do not state that a lessee of Aboriginal Land from the Council shall be entitled to quiet enjoyment and exclusive possession under the lease, or that the lessee is under an obligation to use the premises in a tenant-like manner. Yet, it was not suggested that these familiar incidents of a lease under the general law are not terms of a lease granted under s 38(2). Nor could such a suggestion be sustained given the legislature's use of the term "lease" to describe the subject of a grant under s 38(2) of the Land Grant Act[58].

71 In *Minister for Lands and Forests v McPherson*[59], Kirby P (as his Honour then was) said:

> "In the case of an interest called a 'lease', long known to the law, the mere fact that it also exists under a statute will not confine its incidents exclusively to those contained in the statute. On the face of things, the general law, so far as it is not inconsistent with the statute, will continue to operate."

72 In the same case, Mahoney JA observed[60] that it is "not inconsistent with the statutory nature or origin of [the right of occupation called a lease] that other rights should be implied".

*Leasing as a statutory power*

73 As to the Court of Appeal's conclusion that "the power of the Council to grant a lease should be interpreted as including the power to determine for itself the terms of those leases and not subject to qualification by provisions which would alter the terms of those leases"[61], it must be said that, to the extent that

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**58** See *American Dairy Queen (Q'ld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 684.

**59** (1991) 22 NSWLR 687 at 696.

**60** (1991) 22 NSWLR 687 at 712, citing *O'Keefe v Williams* (1910) 11 CLR 171; [1910] HCA 40.

**61** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 226 [74].

some of the language used by the Court of Appeal might be taken to suggest that the Council was empowered unilaterally to prescribe the terms and conditions of a lease not fixed by the Land Grant Act, the Council did not seek to support such a suggestion in this Court. Rather, the Council's position was that, to the extent that the Land Grant Act did not impose a term or condition, the Council might negotiate with a potential lessee to agree upon terms, but standard terms of the kind to be found in Sch 1 to the *Residential Tenancies Act* could not be imposed upon it.

74 The Council, while accepting that the power conferred by s 38(2) operates within the milieu of the general law by reason of the deployment of the "long familiar" expression "lease", sought to confine this milieu to the common law and equity. To argue that the milieu of the general law should not include statutory provisions intended to provide standard protections to every lessee whose tenancy meets the description of a residential tenancy is to argue against the equal application to all tenants within the JBT of laws calculated to preserve the health, safety and dignity of tenants. It is also to argue for the drawing of a distinction between the sources of the general law in circumstances where the text of the Land Grant Act does not invite the drawing of such a distinction.

75 As to the Court of Appeal's conclusion that the power conferred by s 38(2) is "not merely equivalent to that of any other landowner"[62], it may be accepted for the sake of argument that the power conferred upon the Council by s 38(2) of the Land Grant Act is a statutory power rather than a "regrant" of the common law rights of a landowner taken away by s 38(1). But to say that is not to deny that the Land Grant Act is far from being "a comprehensive and exhaustive statement" of the terms and conditions which are to apply to the leases granted by the Council. Nor is it to suggest that a lease granted by the Council pursuant to s 38(2) *must* not contain any terms other than those expressly stated in the Land Grant Act or expressly agreed to by the Council. To adopt and adapt the words of Wilson, Deane and Dawson JJ in *Commercial Radio Coffs Harbour v Fuller*[63], the relaxation by s 38(2) of the prohibition in s 38(1) does not confer an immunity from other laws, Commonwealth or State. Rather, the express provisions of ss 38 and 40 are readily understood as specific, and limited, qualifications upon the proposition that the terms and conditions of a lease are,

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**62** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 228 [80].

**63** (1986) 161 CLR 47 at 57; [1986] HCA 42.

like any other lease, determined under the general law by agreement of the parties subject to such statutory regulation as a competent legislature may enact.

*Some leases may be for 99 years*

76 The Court of Appeal considered that the circumstance that s 40 of the Land Grant Act contemplates leases for 99 years is inconsistent with the application of laws that might modify the terms established by the parties because "a lease of such a length is only practical if the terms can be established by the contracting parties"[64]. But that objection might be made to the application, to any long-term tenancy, of laws intended to protect the interests of lessees against the superior bargaining power of lessors. Further, the existence of a legal mechanism whereby the parties may customise the terms of their lease, such as that provided by s 10 of the *Residential Tenancies Act*, while not relevant to the proper construction of the Land Grant Act, does serve to illustrate the danger of approaching the construction of the latter Act by making a speculative assumption about what considerations of "practicality" require.

77 In addition, s 38(2) contemplates the grant of leases which do not engage s 40. Indeed, in the present case the lease to the appellant is a lease which does not attract the benefit of s 40. Nothing in the text of the Land Grant Act suggests an intention to discriminate between the different classes of lease that may be granted under s 38(2) in favour of some classes of lessee and against others in terms of ensuring that the leased premises remain in a reasonable state of repair. A legislative intention to depart from fundamental notions of equality before the law so as to favour one class of lessee over another could be expected to have been stated in clear terms. The Land Grant Act does not contain any such terms.

78 Indeed, given the operation of s 12 of the Land Grand Act to vest in the Council buildings and improvements on Aboriginal Land, and given, in addition, that it is the function of the Council under s 6(ce) "to manage and maintain Aboriginal Land", the maintenance of buildings on leased land within any of the categories in s 38(2) can be seen to be a function of the Council.

79 It may be that the cost to the Council of performing this function will lessen its ability to carry out its other functions for the benefit of the Community. But that would not be a reason to take a different view of the effect of the Land Grant Act. To observe that the ability of the Council to choose to carry out

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**64** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 227 [76].

activities for the benefit of the Community will be circumscribed by the cost to it of performing its legal obligations is not to say anything useful about the extent of those obligations. Further, to give effect to the considerations of "inconvenience" to the Council referred to by the Court of Appeal to come to the conclusion that the Land Grant Act requires that the ordinary law of the land in the JBT not apply to leases of Aboriginal Land is erroneously to give effect to "a judicially constructed policy at the expense of the requisite consideration of the statutory text and its relatively clear purpose"[65].

*Community control*

80 The Court of Appeal was influenced by the consideration that the Council is "controlled by its members in a reasonably direct manner" as "a matter which is more consistent with interpreting s 38(2) as encompassing within it the power to determine the terms upon which leases to its own members are to be granted"[66].

81 This consideration has no application in relation to leases to persons who are not registered members of the Council. Such leases may be granted under s 38(2)(d), (e) and (f). The notion of membership control of the Council affords no protection at all to these classes of lessee. The self-interest of Council members could not be relied upon to guarantee that the terms and conditions of these leases would be fair and just. Further, to the extent that the general law is available to protect these classes of lessee, nothing in the Land Grant Act suggests that the protection afforded to lessees by the general law should be available to lessees other than registered members but not to registered members. There is no reason to suppose that the Land Grant Act contemplates that leases to registered members might provide premises with a lower standard of maintenance, in terms of human habitability, than is required in leases to persons who are not registered members.

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**65** *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at 14 [28]; [2012] HCA 3. See also *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 390 [26]; [2012] HCA 56.

**66** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 228 [79].

**Conclusion and orders**

82 For these reasons, the appeal should be allowed. The questions posed by the amended special case should be answered in the terms proposed by the Attorney-General for the ACT, as follows:

Question 3:

"[I]s the *Residential Tenancies Act 1997* (ACT), in whole or in part, a law which is not capable of operating concurrently with the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) within the meaning of s 46 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth)?"

Answer:

"Yes, the *Residential Tenancies Act 1997* (ACT), in part, is a law that is not capable of operating concurrently with the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) within the meaning of s 46 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth)."

Question 4:

"If the answer to Question 3 is 'yes', to what extent does the *Residential Tenancies Act 1997* (ACT) not apply to Aboriginal Land for the purposes of s 46 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth)?"

Answer:

"The *Residential Tenancies Act 1997* (ACT) does not apply to Aboriginal Land for the purposes of s 46 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) to the extent that s 8(1)(a) read with Sch 1, cl 72 and further read with s 9 of the *Residential Tenancies Act 1997* (ACT) would prohibit subletting, and ss 54 and 128 operate upon that prohibition, on Aboriginal Land."

83 The parties have agreed to bear their own costs.

84 BELL J. I gratefully adopt the facts and procedural history set out in the joint reasons.

85 The Wreck Bay Aboriginal Community Council ("the Council") conceded before the primary judge that the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) ("the Land Grant Act") and the *Residential Tenancies Act 1997* (ACT) are capable of simultaneous obedience. It did not put its case below, or in this Court, on the basis that the Land Grant Act "cover[s] the field"[67]. The case on which the Council succeeded before the Court of Appeal of the Supreme Court of the Australian Capital Territory is that the provisions of the *Residential Tenancies Act* on which Mr Williams relies[68] are not capable of concurrent operation with the Land Grant Act because, relevantly, the imposition of a statutory obligation of repair on the Council would "alter, impair or detract from" the scheme of the Land Grant Act[69].

86 On Mr Williams' primary case, the Council's concession with respect to the capacity for simultaneous obedience to each Act is determinative. He contends that s 46 of the Land Grant Act states an interpretative rule that its provisions are to be understood as not displacing any other law in force in the Jervis Bay Territory ("the JBT"), save in the case of direct collision.

87 Section 46 provides that the Land Grant Act does not affect the application to Aboriginal Land of a law in force in the JBT "to the extent that that law is capable of operating concurrently" with the Land Grant Act. Capacity for concurrent operation is said by Mr Williams to convey a concept that is narrower than inconsistency. He submits that the Court of Appeal erred by treating s 46 as a "constitutional" provision governing the relationship between laws enacted by different legislatures as s 109 of the *Constitution* and s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ("the Self-Government Act") do. Mr Williams contends that s 46 serves to confirm that the Land Grant Act "is *not* a complete and exhaustive statement of the law on any subject" (emphasis in original) and "allows other laws in force in the JBT to operate to the greatest extent possible". Where a provision of the Land Grant Act is open to more than one construction, Mr Williams submits the construction that enables the law in force in the JBT to operate concurrently is to be preferred. The Attorney-General for the Australian Capital Territory generally supports this analysis.

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**67** *Wreck Bay Aboriginal Community Council v Williams* (2016) 312 FLR 60 at 63 [25].

**68** *Residential Tenancies Act*, ss 8, 9 and cl 55 of Sch 1.

**69** *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 337; [1986] HCA 24, citing *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J; [1937] HCA 82.

88 The submission that s 46 serves to secure the application of laws in force in the JBT to Aboriginal Land under the Land Grant Act to the greatest extent possible should be rejected. Section 46 is framed in similar terms to s 74 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). As Brennan J explained in *R v Kearney; Ex parte Japanangka*, s 74 of that Act, as a law of the Commonwealth, is given its full operation before the scope of a power created by a law of the Northern Territory, or the consequences of its exercise, are ascertained[70].

89 An enactment of the Australian Capital Territory ("Territory enactment") picked up by s 4A(1) of the *Jervis Bay Territory Acceptance Act 1915* (Cth) applies to Aboriginal Land under s 46 of the Land Grant Act to the extent that the Territory enactment is capable of operating concurrently with the Land Grant Act. There is no reason to distinguish the operation of s 46 from that of s 28(1) of the Self-Government Act, which provides that a Territory enactment has no effect to the extent that it is inconsistent with a Commonwealth Act but that the Territory enactment "shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law". The work done by s 28(1) is explained in *The Commonwealth v Australian Capital Territory*[71]:

> "The text of s 28 thus makes plain that the section is directed to the effect which is to be given to an enactment of the Assembly; it is *not* directed to the effect which is to be given to a federal law. ... It does not say, and it is not to be understood as providing, that laws of the federal Parliament are to be read down or construed in a way which would permit concurrent operation of Territory enactments."

As there further explained, the starting point in applying s 28(1) is ascertainment of the legal meaning of the federal Act[72].

90 The determinative question here is whether the power conferred by s 38(2) of the Land Grant Act is, as the Court of Appeal held[73], a power to exclusively determine the terms on which a lease for use for domestic purposes is granted. The Land Grant Act vests land declared to be Aboriginal Land, including all

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**70** (1984) 158 CLR 395 at 420; [1984] HCA 13.

**71** (2013) 250 CLR 441 at 466 [53]; [2013] HCA 55 (emphasis in original).

**72** *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 467 [54].

**73** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 226 [74].

rights, title and interests in that land, in the Council[74]. The Council's power to deal with, or dispose of, any interest in Aboriginal Land is taken away by s 38(1). A limited power to grant a lease of Aboriginal Land (other than land within the Booderee National Park or the Booderee Botanic Gardens) is conferred by s 38(2). A lease for use for domestic purposes may only be granted to a registered member[75] or to registered members[76] or, with the consent in writing of the Minister, to a person other than a registered member, or to persons at least one of whom is not a registered member[77]. The term of a lease for use for domestic purposes granted to a registered member or members may not exceed 99 years and the term of such a lease granted with the Minister's consent to a person other than a registered member may not exceed 15 years[78]. A lessee and a sub-lessee of Aboriginal Land for use for domestic purposes may grant a sub-lease of the whole of the land without the consent of the Council[79]. Except with the consent in writing of the Minister, the sub-lease may only be granted to a registered member, the Commonwealth or an Authority[80], and the land must be used for domestic purposes[81]. The benefit, or a share in the benefit, of a lease or a sub-lease of Aboriginal Land for use for domestic purposes may be transmitted by will or on intestacy to a relative of the registered member[82]. The Land Grant Act does not otherwise provide for the terms and conditions of leases or sub-leases of Aboriginal Land granted for use for domestic purposes under s 38.

91 The Council acknowledges that the Land Grant Act is to be understood as enacted against a background of the common law of contract and property, including, to the extent that they may be applicable, implied covenants between landlord and tenant. On the Council's argument, it is the parties' ability to modify implied covenants by express agreement that permits their harmonious operation

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**74** Land Grant Act, s 10.

**75** Section 2(1) of the Land Grant Act defines "registered member" to mean a person whose name is on the Register kept in accordance with Div 2 of Pt IV of that Act.

**76** Land Grant Act, s 38(2)(a).

**77** Land Grant Act, s 38(2)(d).

**78** Land Grant Act, s 38(3).

**79** Land Grant Act, s 41(1).

**80** Land Grant Act, s 41(2).

**81** Land Grant Act, s 41(3).

**82** Land Grant Act, s 42(1).

under the legislative scheme of the Land Grant Act. By contrast, the Council submits, legislatively imposed conditions have the capacity to undermine the scheme[83]. The imposition of a term requiring the Council to maintain the leased premises in repair is said to have that effect.

92 Features of the legislative scheme on which the Council's argument relies include the obligation imposed by s 40 to grant leases to registered members who were in occupation of land immediately before it became Aboriginal Land for a term of 99 years. The terms and conditions of these leases are precluded from providing for any payment by the lessee in respect of a building or improvements erected on the land solely at his or her expense[84] but, in the case of buildings or improvements which have not been erected solely at the lessee's expense, may allow for payment by the lessee of a sum representing the value of the buildings and improvements at the time the land became Aboriginal Land[85].

93 The Council argues that its relationship with its registered member tenants is unlike the relationship between landlord and tenant under residential tenancy agreements of the kind contemplated by the *Residential Tenancies Act*. It identifies the policy of the Land Grant Act as being to secure Aboriginal land for present and future generations of Aboriginal people at Wreck Bay[86], through the vehicle of a body corporate that is subject to a significant degree of community control. The means of giving effect to the policy is said to be by the grant of long-term tenure to registered members under statutory leases that confer rights having more in common with ownership of land than those conferred on a lessee under an "ordinary" residential lease. While registered members who were not in occupation of the land immediately before it became Aboriginal Land ("non-original registered members") do not have an entitlement to a lease for use for domestic purposes for a term of 99 years, the Land Grant Act contemplates the grant of leases for a term of that length to non-original registered members. The provisions that allow sub-letting and the benefit of the lease to pass to a relative on the death of the registered member are relied upon as indicative of the intention that leases granted for use for domestic purposes provide long-term security of tenure.

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**83** *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [41]; [2011] HCA 33.

**84** Land Grant Act, s 40(b).

**85** Land Grant Act, s 40(c).

**86** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 29 May 1986 at 4193.

94 The claimed incapacity for concurrent operation of the Territory and federal Acts here is likened by the Council to the incapacity of State anti-discrimination legislation to operate concurrently with the regulation of life insurance companies under the Commonwealth legislation considered in *Australian Mutual Provident Society v Goulden*[87]. The State legislation in that case would have made *unlawful* the conduct of the business of registered life insurance companies in accord with the policy of the Commonwealth legislation. The inconsistency on which the Council relies here is not of that kind. The Council is required to act for the benefit of the Community in relation to housing, social welfare, education, training or health needs[88] and to provide community services to members of the Community[89]. It contends that its capacity to carry out these functions in accordance with the priorities determined by its registered members will be impaired if leases of Aboriginal Land for use for domestic purposes are subject to the standard residential tenancy terms.

95 The application of the standard residential tenancy terms to a lease of Aboriginal Land to an original occupier for use for domestic purposes for a term of 99 years may be thought to be incongruous. As the Court of Appeal observed, the incidents of these leases have more in common with "ownership under a Crown lease ... rather than a residential tenancy in the sense contemplated by the [*Residential Tenancies Act*]"[90]. A statutory obligation on the landlord, intended to protect the tenant against the former's superior bargaining power, is hardly apt to a lease for 99 years which the Council was obliged to grant subject to the terms and conditions specified in s 40(b) or (c). Why in the case of such a lease should the obligation not fall on the lessee to maintain the premises in repair?

96 Nonetheless, it is accepted that no distinction may be drawn between the Council's power to grant a lease for use for domestic purposes under s 38(2)(a) and (d), and a lease granted in accord with s 38 to an original occupier of the land on the terms and conditions specified in s 40. Apart from limiting the classes of persons to whom leases of Aboriginal Land for use for domestic purposes may be granted, and specifying maximum terms, the Land Grant Act is largely silent as to the terms and conditions of leases granted to non-original registered members and, with ministerial approval, to persons other than registered members. The power extends to the grant of a lease for any term *less* than 99 or 15 years as the case may be. While it may be the fact, as the primary judge was informed, that

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**87** (1986) 160 CLR 330.

**88** Land Grant Act, s 6(ca).

**89** Land Grant Act, s 6(cb).

**90** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 227 [77].

the Council has chosen to grant all "domestic leases" for a term of 99 years[91], it is not constrained by the policy of the Land Grant Act to do so. The provisions of the Land Grant Act which permit sub-leasing without the Council's consent and the benefit of the lease or sub-lease to pass to a relative on the death of the lessee are an insufficient basis for the contrary conclusion.

97 Application of the generally protective provisions of the *Residential Tenancies Act* to leases of Aboriginal Land for use for domestic purposes cannot be said to undermine the scheme of the Land Grant Act, given that the Council has the power to grant leases in the case of non-original registered members on terms and conditions which are of a kind "contemplated" by the *Residential Tenancies Act*[92]. As the primary judge noted, community control of the Council may be of little avail in the case of a small number of tenants who are adversely affected by the unduly detrimental conditions of their leases[93].

98 I agree with the orders proposed in the joint reasons and with their Honours' answers to the questions posed by the special case.

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**91** *Wreck Bay Aboriginal Community Council v Williams* (2016) 312 FLR 60 at 61 [9].

**92** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 227 [77].

**93** *Wreck Bay Aboriginal Community Council v Williams* (2016) 312 FLR 60 at 66 [50].

99 GAGELER J. The *Australian Capital Territory (Self-Government) Act 1988* (Cth) establishes the Australian Capital Territory as a self-governing polity with its own Legislative Assembly. Section 22 confers power on the Legislative Assembly to make laws for the peace, order and good government of the Australian Capital Territory. The power conferred by s 22 is "of the same quality as ... that enjoyed by the legislatures of the States"[94]. Section 22 is subject to s 28. Section 28 relevantly provides that a provision of a law made by the Legislative Assembly "has no effect to the extent that it is inconsistent" with a Commonwealth law in force in the Territory. However, "such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law".

100 The holding in *The Commonwealth v Australian Capital Territory*[95] made clear that a law made by the Legislative Assembly under s 22 that is "inconsistent" with a Commonwealth law in force in the Australian Capital Territory within the meaning of s 28 remains a law for the peace, order and good government of the Australian Capital Territory. The Territory law is rendered by s 28 not beyond power but merely inoperative to the extent of the inconsistency[96]. And, although a narrower approach had been suggested in academic commentary[97] and had been supported by comments in *Northern Territory v GPAO*[98], the holding in *The Commonwealth v Australian Capital Territory* also made clear that the test of whether a Territory law is inconsistent with a Commonwealth law within the meaning of s 28 is the same as the test of whether a State law is inconsistent with a Commonwealth law within the meaning of s 109 of the *Constitution*: a Territory law is not "capable of operating concurrently" with a Commonwealth law, and is therefore "inconsistent" with the Commonwealth law within the meaning of s 28, if the Territory law would operate to "alter, impair or detract from" the Commonwealth law[99]. Of s 28 it

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**94** *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 281; [1992] HCA 51, quoting *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 279; [1981] HCA 74.

**95** (2013) 250 CLR 441; [2013] HCA 55.

**96** (2013) 250 CLR 441 at 466 [52], 468 [59].

**97** See Lindell, "The Arrangements for Self-government for the Australian Capital Territory: A Partial Road to Republicanism in the Seat of Government?" (1992) 3 *Public Law Review* 5 at 10-11.

**98** (1999) 196 CLR 553 at 583 [60]; [1999] HCA 8.

**99** (2013) 250 CLR 441 at 468 [59].

can therefore be said, as it was said of s 109, that "[i]n the end" it has received a construction which accords with "essential conceptions of federalism"[100].

101 The *Jervis Bay Territory Acceptance Act 1915* (Cth) provides that laws enacted by the Legislative Assembly for the peace, order and good government of the Australian Capital Territory will also operate in the Jervis Bay Territory. Section 4A does so by relevantly providing that the laws in force from time to time in the Australian Capital Territory, so far as they are applicable to the Jervis Bay Territory, are in force in the Jervis Bay Territory "as if" the Jervis Bay Territory formed part of the Australian Capital Territory. The words "as if" introduce a statutory fiction[101]. The fiction is for present purposes important.

102 Section 4A gives no greater force to a law enacted under s 22 of the *Australian Capital Territory (Self-Government) Act*, as applied in the Jervis Bay Territory, than the law would have if the Jervis Bay Territory formed part of the Australian Capital Territory. In that way, the express qualification in s 4A incorporates the test for, and consequence of, inconsistency under s 28 of the *Australian Capital Territory (Self-Government) Act*. If the law of the Australian Capital Territory as applied in the Jervis Bay Territory would operate to alter, impair or detract from a Commonwealth law in force in the Jervis Bay Territory, then the transplanted law is to that extent inoperative in the Jervis Bay Territory – in the same way that s 28 would render the law inoperative if the Jervis Bay Territory formed part of the Australian Capital Territory.

103 The central question in this appeal can therefore be stated as whether ss 8 and 9 of the *Residential Tenancies Act 1997* (ACT) ("the RTA"), as applied in the Jervis Bay Territory by s 4A of the *Jervis Bay Territory Acceptance Act* and according to the conception of inconsistency transposed from s 109 of the *Constitution* into s 28 of the *Australian Capital Territory (Self-Government) Act*, are inconsistent with the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) ("the Land Grant Act"), to the extent that those sections of the RTA would require a lease of "Aboriginal Land" granted by the Wreck Bay Aboriginal Community Council under s 38(2) of the Land Grant Act to contain the standard residential terms mentioned in Sch 1 to the RTA and to the extent that the sections would render a term of such a lease void if it is inconsistent with such a standard residential term. I recently sought to expound the relevant conception

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**100** cf *Momcilovic v The Queen* (2011) 245 CLR 1 at 111 [241]; [2011] HCA 34, quoting Dixon, "Marshall and the Australian Constitution" (1955) 29 *Australian Law Journal* 420 at 427.

**101** *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 203 [115]; [2000] HCA 62.

of inconsistency in *Work Health Authority v Outback Ballooning Pty Ltd*[102]. The following reasons need to be read against the background of that exposition.

104 The standard residential terms mentioned in Sch 1 to the RTA are highly prescriptive as to the rights and obligations of the lessor and of the lessee. The standard residential terms include that the lessor must ensure at the start of the tenancy that the premises let are fit for habitation, reasonably clean, in a reasonable state of repair and reasonably secure[103]. They include that the lessor must maintain the premises in a reasonable state of repair[104], must make urgent repairs as soon as practicable[105] and must make other repairs within four weeks of being notified of the need for repairs[106]. They include that the tenant must take reasonable care of the premises and their contents and keep them reasonably clean[107], must not make any additions or alterations to the premises without the written consent of the lessor[108], must not add any fixtures or fittings without the written consent of the lessor[109], must not leave the premises vacant for more than three weeks without notifying the lessor[110], and must not assign or sublet the premises or any part of them without the written consent of the lessor[111]. They include that the lessor or the tenant may each, by written notice, terminate the tenancy on a date specified in the notice on the ground that the premises are not fit for habitation[112].

105 The important feature of the standard residential terms in Sch 1 to the RTA for present purposes, however, is not the detail of the rights and obligations they impose but the circumstance that those rights and obligations are imposed

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**102** [2019] HCA 2 at [64]-[78].

**103** Clause 54(1) of Sch 1 to the RTA.

**104** Clause 55(1) of Sch 1 to the RTA.

**105** Clauses 59 and 82 of Sch 1 to the RTA.

**106** Clauses 55 and 57 of Sch 1 to the RTA.

**107** Clause 63(c) of Sch 1 to the RTA.

**108** Clause 67 of Sch 1 to the RTA.

**109** Clause 68(1) of Sch 1 to the RTA.

**110** Clause 71 of Sch 1 to the RTA.

**111** Clause 72(1) of Sch 1 to the RTA.

**112** Clause 86(a) of Sch 1 to the RTA.

and are enforceable as terms of the lease. The effect of each standard residential term that is binding on the landlord is, relevantly, "to include in the tenancy agreement a contractual obligation binding the landlord to the tenant, not to subject the landlord to a statutory duty of performance"[113].

106 The ultimate question of inconsistency needs to be addressed by asking whether mandatory incorporation of the standard residential terms in Sch 1 to the RTA into a lease granted under s 38(2) of the Land Grant Act would alter, impair or detract from the legal or practical operation of that section. The initial stage of the requisite analysis is to determine the scope and purpose of the power in s 38(2) of the Land Grant Act that "the Council may grant a lease of Aboriginal Land". The subsequent stage of the analysis is to determine whether mandatory inclusion of such standard residential terms in such a lease would detract from the scope of the power or substantially impair achievement of the purpose for which the power was conferred.

107 In determining the scope and purpose of the power conferred by s 38(2) of the Land Grant Act, the statement in s 46 of the Land Grant Act that "[t]his Act does not affect the application to Aboriginal Land of a law in force in the Territory to the extent that that law is capable of operating concurrently with this Act" can immediately be put to one side. Section 46 is enacted on the assumption that a law in force in the Jervis Bay Territory will be inoperative to the extent that the law is not capable of operating concurrently with the Land Grant Act. The section does not instantiate some special test of inconsistency or repugnancy peculiar to the operation of the Land Grant Act.

108 The import of s 46, like s 74 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) on which it was modelled, is to clarify that the Land Grant Act is not intended to make exhaustive or exclusive provision with respect to the subject-matter of Aboriginal Land[114]. The result of that clarification of Commonwealth legislative intention is that a law in force in the Jervis Bay Territory is not to be regarded as detracting from the full operation of the Land Grant Act merely because the law has application to Aboriginal Land[115]. Aboriginal Land is unlike what might have become of places within the exclusive power of the Commonwealth under s 52(i) of the *Constitution*, were it not for the *Commonwealth Places (Application of Laws) Act 1970* (Cth) and the

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**113** *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 327; [1997] HCA 39, quoting *McCarrick v Liverpool Corporation* [1947] AC 219 at 230.

**114** cf *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563; [1977] HCA 34.

**115** cf *Victoria v The Commonwealth* ("*The Kakariki*") (1937) 58 CLR 618 at 630-631; [1937] HCA 82.

*Commonwealth Places (Mirror Taxes) Act 1998* (Cth). Aboriginal Land is not an Alsatia[116].

109 Like the *Aboriginal Land Rights (Northern Territory) Act* containing s 74, the Land Grant Act containing s 46 "must be given its full operation before the scope of a power created by a law of the Territory or the consequences of its exercise can be ascertained"[117]. Section 46 is agnostic as to whether a law in force in the Jervis Bay Territory is capable of operating concurrently with the Land Grant Act for a reason other than that the law has application to Aboriginal Land. For that reason, s 46 has no bearing on the determination of the scope and purpose of s 38(2) of the Land Grant Act.

110 Understanding the scope and purpose of the power conferred by s 38(2) of the Land Grant Act begins with understanding the nature of the body on which it is conferred. Under the Land Grant Act[118], the Wreck Bay Aboriginal Community Council is the body corporate in which the Aboriginal Land was vested on 14 March 1987[119]. The Aboriginal Land comprised "land [that] has always been regarded as a distinct Aboriginal area separate from other land in Jervis Bay Territory"[120] and included all buildings then existing on that land.

111 The Council is constituted solely by the persons who are registered members[121]. Persons who satisfied the Department administering the Act that they were Aboriginals over the age of 18 years residing in the Jervis Bay Territory became registered members shortly after the commencement of the Act[122]. Thereafter, a person has not been permitted to become a registered

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**116** cf Cowen, "Alsatias for Jack Sheppards?: The Law in Federal Enclaves in Australia" (1960) 2 *Melbourne University Law Review* 454. See *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630; [1996] HCA 58; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388; [2004] HCA 53.

**117** *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 at 420; [1984] HCA 13.

**118** Section 4(1)-(2) of the Land Grant Act.

**119** Sections 8 and 10 of the Land Grant Act. See *Commonwealth of Australia Gazette*, G16, 28 April 1987.

**120** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 29 May 1986 at 4193.

**121** Section 5 of the Land Grant Act.

**122** Section 17(2)-(3) of the Land Grant Act.

member unless the registered members present and voting at a general meeting of the Council have voted by a two-thirds majority to permit registration[123].

112 Apart from decisions in relation to membership, all decisions of the Council are required to be taken by an ordinary majority of registered members present and voting at a general meeting[124] or taken by the executive committee of the Council[125], or such other committee as the Council might choose to establish[126], acting within the scope of authority delegated by the Council[127]. The executive committee and any other committee can be comprised only of registered members[128].

113 As the Council is a creature of statute, its authority and the limits of that authority are defined by statute[129]. Under the Land Grant Act, the Council is given neither the capacities of a natural person nor the unfettered rights of a private holder of a fee simple. Rather, the Council is given specified functions, specified powers and specified duties required to be obeyed in the performance of those functions and in the exercise of those powers.

114 The functions of the Council include "to hold title to Aboriginal Land"[130] and "to exercise, for the benefit of the members of the Community, the Council's powers as owner of Aboriginal Land and of any other land owned by the Council"[131]. Those, however, are not the only functions of the Council. Its other functions include "in consultation with the Minister, to consider and, where practicable, take action for the benefit of the Community in relation to the housing, social welfare, education, training or health needs of the members of the

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**123** Sections 18(1) and 26(2) of the Land Grant Act.

**124** Section 26(1) of the Land Grant Act.

**125** Sections 28 and 34(6) of the Land Grant Act.

**126** Section 35 of the Land Grant Act.

**127** Section 36 of the Land Grant Act.

**128** Sections 29(1) and 35(2) of the Land Grant Act.

**129** *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 128-131; [1977] HCA 55.

**130** Section 6(a) of the Land Grant Act.

**131** Section 6(b) of the Land Grant Act.

Community"[132], "to provide community services to members of the Community"[133], "to engage in land use planning in relation to Aboriginal Land"[134], "to manage and maintain Aboriginal Land"[135], and "to conduct business enterprises for the economic or social benefit of the Community"[136]. The "Community" is the community known as the Wreck Bay Aboriginal Community[137], which includes but is not limited to registered members of the Council.

115 Apparent from the description of those statutorily defined functions of the Council is that performance of each of them may involve a substantial commitment of financial resources and that performance of all of them will require the Council to prioritise between them in deploying such financial resources as are from time to time available to it. Decisions as to how best to allocate the Council's financial resources in the performance of its various functions are committed by the Land Grant Act to the Council itself, except that the Council must obtain approval of the Minister administering the Act to enter into a contract for an amount exceeding $100,000 or such higher amount as may be prescribed[138].

116 The powers of the Council with respect to dealings with Aboriginal Land are defined in Pt V of the Land Grant Act. That the powers of the Council with respect to dealings with Aboriginal Land are limited to those so defined is made plain by the prescription in s 38(1) that "[e]xcept as provided by this Part, the Council shall not deal with or dispose of, or agree to deal with or dispose of, any estate or interest in Aboriginal Land". The power conferred on the Council in Pt II by s 7(1) "to do all things necessary or convenient to be done for or in connection with the performance of its functions", which by s 7(2)(a) includes, subject to the Act, power "to acquire, hold or dispose of real and personal property", is expressed by s 7(1) to be in addition to other powers conferred on

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**132** Section 6(ca) of the Land Grant Act.

**133** Section 6(cb) of the Land Grant Act.

**134** Section 6(cd) of the Land Grant Act.

**135** Section 6(ce) of the Land Grant Act.

**136** Section 6(cf) of the Land Grant Act.

**137** Section 2(1) of the Land Grant Act (definition of "Community").

**138** Section 7(3) of the Land Grant Act.

the Council by the Land Grant Act and cannot be read as extending to the subject-matter of Pt V[139].

117 The power conferred on the Council by s 38(2) is therefore not just a power to grant a lease of Aboriginal Land. It is the only power which the Council has to grant a lease of Aboriginal Land. Within Pt V, it is expressly limited in three relevant respects.

118 First, with two extensions, the power is limited to a power to grant a lease of Aboriginal Land to a registered member or to registered members. The grant of such a lease for domestic purposes is for a term of up to 99 years[140], for business purposes is for a term of up to 25 years[141], and for the benefit of the members or a significant number of the members of the Community is for a term of up to 25 years[142]. The power is thus at its core intramural.

119 One extension of the Council's power to grant a lease, beyond its power to grant a lease to a registered member or to registered members, is the power to grant a lease for a term of up to 15 years to the Commonwealth or an Authority established by or under a Commonwealth law or a law in force in the Jervis Bay Territory[143]. In respect of a lease of Aboriginal Land within Booderee National Park granted to the Director of National Parks, the Minister is given power to grant a lease to the Director on behalf of the Council if the Minister is satisfied that the Council has refused, or is unwilling, to do so[144]. The other extension of the Council's power to grant a lease is the power to grant a lease for domestic purposes or for business purposes for a term of up to 15 years to a person other than a registered member, or to persons at least one of whom is not a registered member, with the consent in writing of the Minister[145]. Within the scope of the

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**139** cf *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678; [1979] HCA 26, applying *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; [1932] HCA 9.

**140** Sections 38(2)(a) and 38(3)(a) of the Land Grant Act.

**141** Sections 38(2)(b) and 38(3)(b) of the Land Grant Act.

**142** Sections 38(2)(c) and 38(3)(b) of the Land Grant Act.

**143** Sections 38(2)(f) and 38(3)(c) read with s 2(1) of the Land Grant Act (definition of "Authority").

**144** Sections 38A and 38C of the Land Grant Act.

**145** Sections 38(2)(d)-(e) and 38(3)(c) of the Land Grant Act.

power thereby conferred on the Minister is a power to give or withhold consent by reference to considerations which include the identity of the proposed lessee and the terms of the proposed lease[146]. Ministerial veto or override of either nature is noticeably lacking from the core area of the power to grant a lease to a registered member or to registered members, save in one potential operation of that power soon to be noted.

120 The second limitation on the Council's power to grant a lease of Aboriginal Land is that its power to grant such a lease to a registered member for domestic or business purposes is hardened into a duty in the case of an existing occupier – a registered member who occupied land, with the consent of the Commonwealth or an Authority established by or under a Commonwealth law or a law in force in the Jervis Bay Territory, immediately before the land became Aboriginal Land. In such a case, the Council is obliged to grant the member a lease of that land for the maximum term permitted for a lease of that kind[147]. The terms and conditions of the lease must not provide for any payment by the member in respect of a building or improvements erected on the land solely at the member's expense[148]. However, the lease may include terms and conditions approved by the Minister which require the member to pay the Council, in respect of other buildings and improvements on the land, amounts in the aggregate equal to the value of those buildings and improvements at the time at which the land became Aboriginal Land[149].

121 The third limitation is that the terms and conditions of a lease of Aboriginal Land cannot undermine two specified prescriptions. One prescription is that the person to whom the lease has been granted has a right to grant a sub-lease to a registered member, to the Commonwealth or an Authority established by or under a Commonwealth law or a law in force in the Jervis Bay Territory and, with the consent of the Minister, to another person[150]. The other prescription is that the beneficial interest of a registered member in a lease or sub-lease for domestic purposes is capable of transmission to a relative of the member by will or under a law relating to intestacy in force in the Territory[151].

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**146** cf *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 497-498, 500-501, 505-506; [1947] HCA 21.

**147** Section 40 of the Land Grant Act.

**148** Section 40(b) of the Land Grant Act.

**149** Section 40(c) of the Land Grant Act.

**150** Section 41(1)-(2) of the Land Grant Act.

**151** Section 42(1) of the Land Grant Act.

122 Part V is otherwise silent as to the terms and conditions on which the Council is able to grant a lease under s 38(2). The silence, in my opinion, bespeaks an area of discretion designedly committed to the Council.

123 No doubt, the rights granted under s 38(2) need to answer the description of a "lease" at general law. One of the rights granted must be a right of exclusive possession for a term[152]. If the Council does not grant a right of exclusive possession, that grant cannot be the grant of a lease, and is therefore not within the scope of the power conferred by s 38(2), although it is possibly within the power separately conferred on the Council by s 38(4) to grant a licence.

124 No doubt, also, the power conferred by s 38(2) is "framed on the basis that it will operate in the context of local laws of the various States and Territories of the Commonwealth"[153]. Those laws include laws in force from time to time in the Jervis Bay Territory which might prescribe the formalities to be observed for a lease to be made or take effect or be enforced. They also include laws in force from time to time in the Jervis Bay Territory which might supply implied terms and conditions of a lease – quiet possession and non-derogation from grant being examples – of a kind which when supplied by the common law "parties can, by specific arrangement, modify or vary"[154] and which when supplied by statute are typically expressed to be able to be negatived, varied or extended by "express declaration"[155].

125 However, the whole scheme of the Land Grant Act tells, in my opinion, in favour of a construction of s 38(2) which leaves the terms and conditions of the grant by the Council of a lease of Aboriginal Land ultimately to be determined by agreement between the Council and the recipient of the grant, except to the limited extent that Pt V of the Act otherwise makes express provision. The purpose – that is, the legislatively intended practical operation – of conferring that measure of decision-making latitude on the Council, in my opinion, is to permit the Council to ensure that the terms and conditions of the grant of a lease impose no greater obligations on the Council as lessor than are sustainable and

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**152** *Radaich v Smith* (1959) 101 CLR 209 at 214, 217-220, 222; [1959] HCA 45; *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* (1966) 115 CLR 1 at 8; [1966] HCA 15; *Western Australia v Ward* (2002) 213 CLR 1 at 218-219 [489]; [2002] HCA 28.

**153** cf *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 335; [1986] HCA 24.

**154** cf *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 218.

**155** eg, s 74(2) of the *Conveyancing Act 1919* (NSW). See Edgeworth, *Butt's Land Law*, 7th ed (2017) at 368 [7.760].

consistent with such priorities as the Council might from time to time set for the deployment of its limited financial resources in the exercise of its manifold functions. Negotiating the terms and conditions for the grant of a lease to a registered member or another person, the Council must be able to restrict the terms and conditions on which it is prepared to make the grant to those which it is satisfied do not impede its ability, for example, to provide contemplated community services to members of the Wreck Bay Aboriginal Community or to take contemplated action in relation to housing, social welfare, education, training or health for the benefit of the Wreck Bay Aboriginal Community as a whole.

126 To use the language of Mason J in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*[156], picked up in *Dao v Australian Postal Commission*[157], the "Commonwealth legislative intention which sustains the conclusion that the permission is granted by way of positive authority also sustains the conclusion that the positive authority was to take effect to the exclusion of any other law".

127 The mandatory incorporation of the standard residential terms in Sch 1 to the RTA into a lease would, in my opinion, detract from the operation of s 38(2) of the Land Grant Act. It would so detract from the operation of the section by truncating, to the point of negating, the ability of the Council to determine by agreement the terms and conditions of the grant by the Council of a lease of Aboriginal Land. In so doing, it would detract from the intended practical operation of the section within the scheme of the Land Grant Act by requiring the Council to meet certain obligations in a way that has the potential to distort the Council's policy choices in carrying out its statutorily mandated functions and to impact detrimentally on its ability to carry out those functions.

128 The conclusion that ss 8 and 9 of the RTA would in those ways operate to alter, impair or detract from the legal and intended practical operation of s 38(2) of the Land Grant Act is not in tension with the holding in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[158] that the *Residential Tenancies Act 1987* (NSW) was not inconsistent with the *Defence Housing Authority Act 1987* (Cth). As recorded in the joint reasons for judgment in that case, the argument for inconsistency there was not based on "any specific provision" of the *Defence Housing Authority Act* but "upon the proposition that the Act is intended to be an exhaustive and exclusive law governing the

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**156** (1980) 142 CLR 237 at 260; [1980] HCA 8.

**157** (1987) 162 CLR 317 at 335; [1987] HCA 13.

**158** (1997) 190 CLR 410; [1997] HCA 36.

fulfilment by the DHA of its function"[159], which was to provide adequate and suitable housing for members of the Australian Defence Force and other designated persons. The answer recorded in the joint reasons for judgment was that "[w]hatever inconsistency might otherwise be demonstrated, the *Defence Housing Authority Act* makes it quite plain that it does not intend to be exhaustive or exclusive in relation to the means by which the DHA's function is to be performed"[160].

129 The closest analogy to the present case in the voluminous case law dealing with inconsistency under s 109 of the *Constitution* is found in *Australian Broadcasting Commission v Industrial Court (SA)*[161]. There provisions of the *Industrial Conciliation and Arbitration Act 1972* (SA) empowering the Industrial Court of South Australia to determine whether the dismissal of an employee was harsh, unjust or unreasonable and to order the re-employment of a dismissed employee in his or her former position were held to be inconsistent with provisions of the *Broadcasting and Television Act 1942* (Cth), which empowered the Australian Broadcasting Commission to appoint such temporary employees as it thought necessary and, with the approval of the Public Service Board, to determine the terms and conditions of employment of those temporary employees. Emphasising that the relevant provisions of the *Broadcasting and Television Act* were "not addressed to the community at large" and instead were "wholly domestic in nature, domestic to the Commission and concerned only with its staffing"[162], Stephen J (whose reasoning was not materially different from that of the other members of the Court) discerned in those provisions "a legislative intent that the subject matter comprising the engagement of temporary employees of the Commission and their terms and conditions of employment should be exclusively within the province of the Commonwealth Act"[163]. His Honour described the case as one in which "powers conferred by Commonwealth legislation are disclosed as purporting to be dealt with by State legislation in a manner which impairs and may even inhibit their exercise"[164].

130 For these reasons, I would dismiss the appeal.

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**159** (1997) 190 CLR 410 at 433.

**160** (1997) 190 CLR 410 at 433.

**161** (1977) 138 CLR 399; [1977] HCA 51.

**162** (1977) 138 CLR 399 at 406.

**163** (1977) 138 CLR 399 at 411.

**164** (1977) 138 CLR 399 at 406. See also *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 337-339.

131 EDELMAN J. Sometime in 1989, the Wreck Bay Aboriginal Community Council ("the Council") granted a lease over residential premises to one of its registered members, Mr Williams. Mr Williams has occupied the premises but has not paid rent for over 25 years. The premises are now in substantial disrepair. The lease to Mr Williams meets the requirements for a residential tenancy agreement under the *Residential Tenancies Act 1997* (ACT). If the relevant provisions of the *Residential Tenancies Act* are capable of applying to the lease then they will have the retrospective effect[165] of imposing a term that the lessor must maintain the premises in a reasonable state of repair having regard to their condition at the commencement of the tenancy agreement[166].

132 Before the Supreme Court of the Australian Capital Territory, and before the Court of Appeal of the Supreme Court of the Australian Capital Territory, the Council submitted that it was not bound by the obligation to maintain the premises because the relevant provisions of the *Residential Tenancies Act* are incapable of operating concurrently with the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) ("the Land Grant Act"). That submission was rejected in the Supreme Court but it was accepted by the Court of Appeal.

133 I gratefully adopt the background set out in the joint judgment in this Court, including the facts of the case, the details of the legislative provisions, and the summaries of the decisions below. I agree with the conclusion in the joint judgment that the appeal should be allowed. The *Residential Tenancies Act* is not relevantly incapable of operating concurrently with the Land Grant Act.

**"Capable of operating concurrently": the two issues**

134 Mr Williams' tenancy is over land that "has always been regarded as a distinct Aboriginal area separate from other land in Jervis Bay Territory"[167]. It is part of the land granted by the Commonwealth to the Council in 1986 and declared to be "Aboriginal Land" pursuant to s 8 in Pt III of the Land Grant Act. The Land Grant Act defines "Aboriginal Land" in s 2(1) as "land that is Aboriginal Land because of a declaration under Part III".

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**165** *Residential Tenancies Act*, s 4(2)(b), as enacted. See *Legislation Act 2001* (ACT), s 88(1).

**166** *Residential Tenancies Act*, s 8(1)(a) and Sch 1, cl 55(1).

**167** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 29 May 1986 at 4193.

135 Section 46 of the Land Grant Act provides:

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

136 The Council's submission was that the operation of the *Residential Tenancies Act* altered, impaired or detracted from the provisions of the Land Grant Act. Although the Council denied that it was alleging indirect inconsistency, the Council's submission was based upon an implicit assumption that the Land Grant Act exhaustively, and therefore exclusively, covered the subject matter of the terms and conditions of leases over Aboriginal Land. As the Court of Appeal expressed the point, the power of the Council to grant a lease carried the implication of a power "to determine for itself the terms of those leases and not subject to qualification by provisions which would alter the terms of those leases"[168]. Hence, the Council submitted, the obligation in the *Residential Tenancies Act* that the lessor must maintain the premises in a reasonable state of repair was not capable of operating concurrently with the Land Grant Act.

137 Mr Williams disputed the purportedly exclusive operation of the Land Grant Act over this subject matter for two reasons. First, in submissions that were adopted by the Attorney-General for the Australian Capital Territory, he submitted that s 46 of the Land Grant Act is, in effect, an anti-exclusivity provision, either preventing or militating against any implication that the Land Grant Act exclusively covers any subject matter. Secondly, and in any event, he submitted that the scheme of the Land Grant Act would not be compromised by the application of ordinary laws designed to protect tenants such as the *Residential Tenancies Act*. In other words, the Land Grant Act does not manifest an intention to cover exclusively any subject matter overlapping with that of leases over Aboriginal Land; nor does the operation of the *Residential Tenancies Act* alter, impair or detract from the Land Grant Act.

**The first issue: is s 46 of the Land Grant Act an anti-exclusivity provision?**

138 In considering whether a Commonwealth law is inconsistent with a State law for the purposes of s 109 of the *Constitution*, or with a law of a Territory, it is common to refer to the inconsistency as either "indirect" or "direct". As I explained in *Work Health Authority v Outback Ballooning Pty Ltd*[169], it can be artificial to treat indirect inconsistency as if it did not involve altering, impairing,

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**168** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 226 [74].

**169** [2019] HCA 2 at [105].

or detracting from the Commonwealth law. However, the distinction is useful in that indirect inconsistency is often a logically anterior question. If a Commonwealth law, by expression or implication, provides that it is intended to operate exclusively over a subject matter, then within that subject matter there is no further need to examine whether any particular provisions in the State or Territory law alter, impair, or detract from those in the Commonwealth law.

139 Commonwealth legislation sometimes contains a provision that negatives indirect inconsistency by making clear that no implication should be drawn that the Act, or a part of it, covers a subject matter exclusively. In other words, the Commonwealth law might provide "that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals" and thereby enable the operation of State laws that are "not in direct conflict"[170].

140 An example of such an anti-exclusivity provision is s 51AAA of the *Competition and Consumer Act 2010* (Cth). That section provides that "[i]t is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part". Another example is s 75(1) of the *Trade Practices Act 1974* (Cth), which provided that, subject to an exception, "this Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory". In *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*[171], Mason J said that this was an expression of an intention that the Part "is not an exhaustive enactment on the topics with which it deals and that it is not intended to operate to the exclusion of State laws on those topics".

141 Although every legislative provision must be construed in its own context, there are other provisions that refer to concurrent operation but which are not anti-exclusivity provisions. One example is s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), which provides, similarly to s 109 of the *Constitution*, that a provision of an enactment[172] has no effect to the extent that it is inconsistent with, relevantly, a Commonwealth law. It then provides that a provision of an enactment "shall be taken to be consistent with [relevantly, a Commonwealth law] to the extent that it is capable of operating concurrently with that law". In *The Commonwealth v Australian Capital Territory* ("the *Same Sex Marriage Case*")[173], this Court held that the text of s 28 "is *not* directed to the

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**170** *Palmdale-AGCI Ltd v Workers' Compensation Commission (NSW)* (1977) 140 CLR 236 at 243; [1977] HCA 69.

**171** (1977) 137 CLR 545 at 564; [1977] HCA 34.

**172** Defined by s 3 in terms that include a law made under the Act by the Legislative Assembly for the Australian Capital Territory.

**173** (2013) 250 CLR 441 at 466 [53]; [2013] HCA 55 (emphasis in original).

effect which is to be given to a federal law". As this Court said in the *Same Sex Marriage Case*, the starting point is, instead, determining the meaning and application of the Commonwealth Act, including whether the Commonwealth Act is intended to cover a subject matter exclusively. Only then is it possible to consider whether the Territory law can be given concurrent operation[174]. In effect, s 28 is a provision that declares a rule of recognition for inconsistency.

142 A provision like s 28 of the *Australian Capital Territory (Self-Government) Act* is not intended to negate any implication of exclusivity of the Commonwealth law. It is not an anti-exclusivity provision. Instead, it provides for an inconsistency rule between Commonwealth laws and Territory laws in similar terms to s 109 of the *Constitution*, which applies between Commonwealth laws and State laws. The direction to focus upon the extent to which the Territory law is capable of operating concurrently with the Commonwealth law mirrors the provision in s 109 of the *Constitution* that a law of a State shall be invalid to the extent of the inconsistency with a Commonwealth law. Section 109 creates a contrast between Commonwealth laws that operate to the exclusion of State laws and Commonwealth laws that operate concurrently with State laws[175]. It is concerned with the federal system, "under which some of the legislative powers of the Parliament of the Commonwealth are exclusive of and others are concurrent with those of the State legislatures"[176].

143 Another such provision, in the Northern Territory, that declares a rule of recognition for inconsistency is s 74 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("the Land Rights Act"). Section 74 of the Land Rights Act immediately follows the self-government provision in s 73, which is concerned with the power of the Legislative Assembly of the Northern Territory to make a wide range of laws including those concerned with "Aboriginal land". Section 73(2) provides for a rule to reconcile the operation of the power in s 73(1) with the continued operation of Ordinances made before the Act. Section 74 then provides for a rule to reconcile the operation of the Land Rights Act, including the power in s 73, with other laws of the Northern Territory.

144 Section 74 of the Land Rights Act provides that the Land Rights Act "does not affect the application to Aboriginal land of a law of the Northern Territory to the extent that that law is capable of operating concurrently with this Act".

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**174** (2013) 250 CLR 441 at 467 [54]. See also *Momcilovic v The Queen* (2011) 245 CLR 1 at 115 [258]; [2011] HCA 34.

**175** *Ex parte McLean* (1930) 43 CLR 472 at 483; [1930] HCA 12.

**176** *Momcilovic v The Queen* (2011) 245 CLR 1 at 104 [220].

Sections 73 and 74 do not reduce the operation of the Land Rights Act, as anti-exclusivity provisions, in order to permit the operation of Northern Territory laws to Aboriginal land. As Brennan J explained in *R v Kearney; Ex parte Japanangka*[177], the Land Rights Act "must be given its full operation before the scope of a power created by a law of the Territory or the consequences of its exercise can be ascertained". Instead, s 74 is a "declaratory section"[178] which declares the inconsistency test that applies. The declaratory effect of s 74 is that any inconsistency between the Land Rights Act and Northern Territory legislation will be subject to the same terms as the inconsistency rule that operates by s 109 of the *Constitution* in relation to the States.

145 In summary, s 74 of the Land Rights Act is not an anti-exclusivity provision over the whole of the subject matter of "Aboriginal land". Nor is it an anti-exclusivity provision over some narrower subject matter related to Aboriginal land. Instead, like s 28 of the *Australian Capital Territory (Self-Government) Act*, it "declares" the inconsistency rule.

146 Although s 46 of the Land Grant Act is not a provision directed at the powers of Territorial self-government, the model of the Land Rights Act was one which the Land Grant Act was described as being "on all fours with"[179], including the description of the inalienable freehold title as Aboriginal Land[180]. Section 46 of the Land Grant Act was copied, almost verbatim, from the "declaratory" s 74 of the Land Rights Act. Section 46, like s 74 of the Land Rights Act and s 28 of the *Australian Capital Territory (Self-Government) Act*, is a provision that removes any doubt that might apply by declaring the rule of recognition for inconsistency.

147 Section 46 of the Land Grant Act is not an anti-exclusivity provision.

**The second issue: does the Land Grant Act manifest an intention to cover the subject matter of Aboriginal Land?**

148 Clause 55 of Sch 1 to the *Residential Tenancies Act*, when read with s 8(1)(a), imposes a term in a lease over residential premises requiring the lessor to maintain the premises in a reasonable state of repair having regard to their condition at the commencement of the tenancy agreement. It was common

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**177** (1984) 158 CLR 395 at 420; [1984] HCA 13.

**178** *Attorney-General (NT) v Hand* (1989) 25 FCR 345 at 399.

**179** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 5 June 1986 at 4689, see also at 4698.

**180** See *Gumana v Northern Territory* (2007) 158 FCR 349 at 359 [25].

ground, and rightly so, that it was possible for the Council to obey the terms of cl 55 of Sch 1 to the *Residential Tenancies Act* and the provisions of the Land Grant Act. That lack of inconsistency in direct expression contrasts, for example, with the inconsistency between cl 72(1) of Sch 1 to the *Residential Tenancies Act*, which prohibits sub-leasing without the written consent of the lessor[181], and s 41 of the Land Grant Act, which permits sub-leasing without consent of the lessor in particular circumstances.

149 The Council's submission was, in effect, a submission of indirect inconsistency. An essential preliminary step in assessing indirect inconsistency is to characterise the subject matter over which the Commonwealth law is said to be exclusive.

150 No implication could be drawn that the subject matter, characterised in the broadest terms, of Aboriginal Land in the Jervis Bay Territory was covered exclusively by the Land Grant Act. An example of laws intended to operate concurrently, deriving from an example of a subject matter intended to operate concurrently with the Land Rights Act, is local laws concerning Aboriginal Land "relating to matters such as water control, soil erosion, bushfire control and disease prevention"[182].

151 A narrower characterisation of the subject matter, in terms similar to s 38(1) of the Land Grant Act, might have been that the Land Grant Act covers exclusively only the subject matter of dealings with, or disposals of, any estate or interest in Aboriginal Land. Section 38(1) provides that the Council shall not deal with or dispose of an estate or interest in Aboriginal Land other than as provided by Pt V of the Act. The Council submitted that the effect of this provision was that all of the Council's relevant powers were to be found in Pt V. That may be so, but there is a large difference between a provision that confines the powers of the Council in dealing with, or disposing of, land and a provision that restricts the power of the Legislative Assembly of the Australian Capital Territory to impose any duties upon the Council in dealing with or disposing of land.

152 An example of a concurrent law of the Legislative Assembly of the Australian Capital Territory that might impose a duty upon the Council in dealing with land is a law concerned with the *method* of granting an estate or interest in Aboriginal Land. For instance, the Land Grant Act would be subject

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**181** Subject to endorsement of an inconsistent term by the ACT Civil and Administrative Tribunal on joint application of the parties: *Residential Tenancies Act*, ss 9(1)(b), 10 and now s 8(1)(d)(ii).

**182** Australia, House of Representatives, *Aboriginal Land Rights (Northern Territory) Bill 1976*, Clause Notes at 27, cl 74.

to the successor laws to s 3 of the *Statute of Frauds 1677*[183], requiring leases, including a demise for up to 99 years, to be in writing.

153 The Court of Appeal's conclusion, and the Council's submission, was of an even narrower characterisation of the exclusive subject matter said to be the basis for the inconsistency. The inconsistency between cl 55 of Sch 1 to the *Residential Tenancies Act* and s 38 of the Land Grant Act was said to arise from the "implicit negative proposition" that the power conferred by s 38 was not subject to qualification by provisions that would alter the terms of the leases. In other words, the allegedly exclusive subject matter of the Land Grant Act was said to concern only the *content* of a grant of an estate or interest in Aboriginal Land.

154 A conclusion of implied exclusivity over this narrower subject matter should not be accepted because it has no obvious rational basis in, and it is not consistent with, the text and structure of the Land Grant Act.

155 For its conclusion of implied exclusivity, the Court of Appeal relied upon the "fundamental purpose" of the Land Grant Act being "to extend long-term control of land to an Aboriginal community which acts through the vehicle of the Council"[184]. That purpose can be accepted. But this does not translate into an implicit negative proposition concerning exclusivity from any local laws. To do so would require that the Council not be subject to local laws concerning the manner of the grant or other matters affecting and regulating the estate granted such as water control, soil erosion, bushfire control and disease prevention.

156 As explained in the joint judgment, there are also difficulties in showing that such a characterisation of exclusivity is manifest from the text and structure of the Land Grant Act: (i) the general terms in which the content of a lease granted by the Council is expressed contrast with a detailed or specific code or scheme that indicates exclusivity; (ii) the Land Grant Act is not exclusive of common law and equitable rules concerning the content of a grant of an estate or interest; (iii) the function of the Council, by ss 6(ce) and 12, is to manage and maintain buildings on leased land within the categories in s 38(2), and there is no basis to discriminate between a lease under s 38(2) and a lease with the functional equivalent of a life tenancy due to s 40; and (iv) the Land Grant Act permits leases to be granted under s 38(2)(d), (e), and (f) to persons who are not registered members of the Council.

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**183** 29 Car II c 3. See *Civil Law (Property) Act 2006* (ACT), s 201(1).

**184** *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207 at 228 [79].

## Conclusion

157 The appeal from the judgment of the Court of Appeal should be allowed. I agree with the orders proposed in the joint judgment in this Court.