

HIGH COURT OF AUSTRALIA

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

JIM FEJO and DAVID MILLS
on behalf of the LARRAKIA PEOPLE

APPELLANTS

AND

NORTHERN TERRITORY OF AUSTRALIA FIRST RESPONDENT

OILNET (NT) PTY LTD SECOND RESPONDENT

Fejo v Northern Territory of Australia (D7-1998) [1998] HCA 58
10 September 1998

ORDER

1. *Remit the matter to the Full Court of the Federal Court of Australia to be dealt with consistently with the reasons for judgment of this Court.*
2. *The appellants pay the respondents' costs of the proceedings in this Court.*

Representation:

J Basten QC with R W Blowes for the appellants (instructed by the Northern Land Council)

T I Pauling QC, Solicitor-General for the Northern Territory with R J Webb for the first respondent (instructed by Solicitor for the Northern Territory)

No appearance for the second respondent

Interveners:

H C Burmester QC, Acting Solicitor-General for the Commonwealth with M A Perry and G J Loughton intervening on behalf of the Attorney-General for the Commonwealth (instructed by Australian Government Solicitor)

P A Keane QC, Solicitor-General for the State of Queensland with G R Cooper and D A Mullins intervening on behalf of the Attorney-General for the State of Queensland (instructed by Crown Solicitor for Queensland)

R J Meadows QC, Solicitor-General for the State of Western Australia with K M Pettit intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for Western Australia)

B M Selway QC, Solicitor-General for the State of South Australia with D T Seal intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for South Australia)

L S Katz SC, Solicitor-General for the State of New South Wales with V B Hughston intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

G Griffith QC with S McLeish intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

A R Castan QC with K R Howie intervening on behalf of the Yorta Yorta Aboriginal Community (instructed by Arnold Bloch Leibler)

R H Bartlett intervening on behalf of Ben Ward, John Toby, Jimmy Ward, Ronnie Carlton, Jeff Janama, Button Jones, Ben Barney, Dodger Carlton, Kim Aldus, Paddy Carlton, Murphy Simon, Sheba Dignari, Joe Lissadell, Chocolate Thomas and Peter Newry on behalf of the Miriuwong and Gajerrong people (instructed by Aboriginal Legal Service of Western Australia Inc)

G M G McIntyre intervening on behalf of the Noongar Land Council, Edna Bropho on behalf of the Swan Valley Nyungar Community, William Warrell on behalf of the Warrell Family, the Kimberley Land Council, Kenny Oobagooma on behalf of the Wororra People and the Goldfields Land Council (instructed by the Noongar Land Council and Corser & Corser)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Fejo & Anor v Northern Territory of Australia & Anor

Aboriginals – Native title to land – Extinguishment – Whether grant of fee simple extinguishes native title – Whether native title can revive when land once again held by the Crown.

Aboriginals – Native title to land – Registered native title claimants – Right to negotiate – Applications for injunction and summary dismissal – Whether court can consider merits of native title claim in determining those applications.

Native Title Act 1993 (Cth), Pt 2, Div 3, subdiv B.

- 1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. On 6 December 1996, the Larrakia people, a community or group of Aboriginal Australians whose traditional lands are said to encompass lands and waters around Darwin and the Cox Peninsula in the Northern Territory, lodged an application for determination of native title ("the application") with the Native Title Registrar ("the Registrar"). The application covers extensive portions of land in the area of Darwin, Palmerston and Litchfield. On 1 April 1997 the application was accepted by the Registrar pursuant to s 63 of the *Native Title Act* 1993 (Cth) ("the Act")¹.
- 2 The land the subject of the application includes land to the south of what is now the city of Darwin and its suburbs. In 1996, before the application was lodged, that land was subdivided by the Northern Territory into 15 parcels. Between July 1996 and the time at which the application was lodged, the Northern Territory granted Crown leases in respect of 8 of the 15 parcels. Each of those leases contained a condition that permitted the lessee, on completion of development in accordance with the terms of the lease, and payment of any sum owing to the Territory, to surrender the lease in exchange for a freehold title at no further cost. Between March and November 1997, Crown leases were issued in similar terms with respect to five of the remaining seven parcels in the subdivision. Two of those leases were issued to Oilnet (NT) Pty Ltd ("Oilnet").
- 3 In December 1997, the appellants commenced (on their own behalf and on behalf of the Larrakia people) two proceedings in the Federal Court of Australia: in one proceeding, the respondents were the Northern Territory and Oilnet; in the other, only the Northern Territory was respondent. Although the primary judge directed that the two proceedings be heard together, the matter now before this Court arises in the first proceeding (to which the Northern Territory and Oilnet

1 Section 63(1) of the Act provides:

"If the requirements of section 62 are complied with in relation to the application, the Registrar must accept it, unless he or she is of the opinion:

- (a) that the application is frivolous or vexatious; or
- (b) that *prima facie* the claim cannot be made out."

The Act will be amended by the *Native Title Amendment Act* 1998 (Cth). Some of those amendments are proclaimed to come into effect on 30 September 1998 and others on 30 October 1998. No question of the effect of any of the amendments to be made by the 1998 Act can arise in these proceedings.

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were respondents). It is therefore not necessary to deal separately with the second proceeding which, in any event, appears not to have raised any different question.

The Federal Court proceeding

- 4 The application in the Federal Court sought a number of declarations including declarations that "native title exists" in relation to the area the subject of the Crown leases to Oilnet, that "the Larrakia people are the holders of that native title" and that, before it could grant a valid lease to Oilnet, the Northern Territory was obliged by the Act either to negotiate with the Larrakia people or to compulsorily acquire their native title. It also sought injunctions, both interlocutory and permanent, restraining Oilnet from undertaking or continuing to "undertake any development of, or the erection of improvements on or affecting", the land the subject of those leases, and restraining the Northern Territory from accepting a surrender of the Crown leases that it had granted to Oilnet or exchanging those leases for a freehold title. Various other forms of relief were sought but their details are not important.
- 5 On 18 December 1997, the Northern Territory applied, by notice of motion, for orders dismissing the proceeding on the grounds that no reasonable cause of action was disclosed and that the proceeding was frivolous, vexatious or an abuse of process. On 13 February 1998, the appellants applied by notice of motion for interlocutory injunctions.
- 6 On 27 February 1998, O'Loughlin J refused the application for interlocutory injunctions and dismissed the proceeding². The appellants appealed to the Full Court of the Federal Court. There were several grounds of appeal. So much of the appeal as was comprised in the first of those grounds was removed into this Court and an order made pursuant to s 18 of the *Judiciary Act* 1903 (Cth) that the ground be argued before a Full Bench.

2 *Fejo v Northern Territory* (1998) 152 ALR 477.

3.

The ground removed

7 The ground that was removed and argued in this Court was:

"1 The learned trial judge erred in holding that a grant of land made on behalf of Her Majesty by the Governor of South Australia, pursuant to the power vested in the Governor by the Letters Patent establishing the Province of South Australia and under Act No 28 of 1872 entitled 'An Act to Regulate the Sale and Other Disposal of the Waste Lands of the Crown in that portion of the Province of South Australia commonly styled the Northern Territory', was effective to extinguish all native title rights and interests in the land the subject of the grant so that, upon the land being re-acquired by the Crown, no native title rights and interests could then be recognised by the common law."

To explain this ground, it is necessary to say something about dealings with the land before the 1996 subdivision.

Earlier dealings in the land

8 The land that was subdivided in 1996, which included the land the subject of the Crown leases to Oilnet, formed part of a tract of land granted to John James Benham by grant dated 20 April 1882. The Commonwealth acquired the land granted to Benham for the purposes of a quarantine station by notification in the Gazette to that effect on 22 December 1927. In 1935 the land (and other, surrounding land) was appointed, by proclamation under the *Quarantine Act* 1908 (Cth), as a quarantine station.

9 In 1956, the land proclaimed as a quarantine station (and still further land) was appointed to be a leprosarium "for the treatment, detention and segregation of leprosy patients". That appointment was made pursuant to powers given by the Leprosy Ordinance 1954 (NT). In April 1980, the appointments of the land as a quarantine station and as a leprosarium were both revoked. However, the grant of the land to Benham and its later acquisition by the Commonwealth are the only steps that are relevant to the ground of appeal removed into this Court.

The 1882 grant

10 Section 6 of the *Northern Territory Land Act* 1872 (SA) (referred to in the ground removed) provided that after the coming into operation of that Act

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"all waste lands in the Northern Territory [should] be sold, demised, or otherwise disposed of and dealt with in the manner and subject to the provisions" of that Act and not otherwise. Section 8 empowered the Governor of what was then the province of South Australia, "in the name and on behalf of Her Majesty [to] grant in fee simple, or for any less estate or interest, to the purchaser thereof, any waste lands".

- 11 It was accepted that the 1882 grant was made pursuant to these powers. The grant was expressed to be of the land "together with all Timber Minerals and Appurtenances to hold unto the said John James Benham, His Heirs and Assigns for ever". Words of limitation in the form "to A his heirs and assigns for ever" have long been recognised as conveying an estate in fee simple³.

The Commonwealth acquisition

- 12 The Crown grant bears a memorial recording, in accordance with the terms of the Notification of 22 December 1927, that the land was acquired by the Commonwealth in pursuance of the *Lands Acquisition Act* 1906 (Cth) ("the 1906 Act") and the Lands Acquisition Ordinance 1911 (NT). The memorial also records that "by virtue of Section 8 of the said Ordinance the land is Crown land and until the Governor General otherwise directs reserved" for the purpose of a quarantine station⁴. The land having been acquired by compulsory process rather than agreement, s 16 of the 1906 Act provided that upon publication of the notification

3 Co.Litt.1a "Tenant in fee simple is he which hath lands or tenements to hold to him and his heires for ever". *Sexton v Horton* (1926) 38 CLR 240 at 244 per Knox CJ and Starke J, 249 per Higgins J; *In re Davison's Settlement* [1913] 2 Ch 498 at 502 per Warrington J.

4 Prior to its repeal, the 1906 Act applied to land acquired by the Commonwealth for public purposes. And prior to its repeal, the Lands Acquisition Ordinance 1911 (NT) applied to land acquired by the Commonwealth in the Northern Territory for the public purposes of the Territory. Subject to the Ordinance, the Ordinance applied the provisions of the 1906 Act to the acquisition "by the Commonwealth of land in the Northern Territory for any public purpose of the Territory". It is to be taken from the reference to both the Act and the Ordinance in the Notification of 22 December 1927 that the land was acquired for the public purposes of the Commonwealth and, also, of the Northern Territory. Nothing was said to turn on this.

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of acquisition in the Gazette the land, by force of the Act, was vested in the Commonwealth

"... freed and discharged from all trusts, obligations, estates, interests, contracts, licences, charges, rates, and easements,

to the intent that the *legal estate* therein, together with all rights and powers incident thereto or conferred by this Act, shall be vested in the Commonwealth." (Emphasis added)

That Act also provided, in s 17, that, upon publication of notification in the Gazette, "the estate and interest of every person entitled to the land specified in the notification ... shall be taken to have been converted into a claim for compensation".

The appellants' contentions

- 13 The appellants contended that the 1882 grant did not extinguish native title. They also sought leave to argue that the removed ground may be supported on the basis that to decide the motion for summary dismissal of the application and the motion for injunctions it was unnecessary, or inappropriate, or beyond jurisdiction, to make what was a "determination of native title" within the meaning of s 225 of the Act. If it was necessary to do so, they sought the removal into this Court of the other grounds of appeal so that they might make this further argument.
- 14 Thus, as the argument developed, there were two central questions: first, what was the effect of the 1882 grant and the later acquisition of the land by the Commonwealth and second, what was the effect of the statutory regime for determination of native title on the disposition of the motions before the primary judge? It is convenient to deal with the second of these matters first.

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The effect of the Act

- 15 In *Western Australia v The Commonwealth (Native Title Act Case)*⁵, six members of the Court summarised as follows the provisions of the Act with respect to the recognition and protection of native title⁶:

"The first of the enacted objects of the *Native Title Act* is 'to provide for the recognition and protection of native title' (s 3(a)). This object is achieved by a statutory declaration (s 11(1)) that native title 'is not able to be extinguished contrary to this Act'. The protection given to native title by this provision removes its vulnerability to defeasance at common law by providing a prima facie sterilisation of all acts which would otherwise defeat native title. By that prima facie sterilisation, s 11(1) ensures that the exceptions prescribed by other provisions of the Act which permit the extinguishment or impairment of native title constitute an exclusive code. Conformity with the code is essential to the effective extinguishment or impairment of native title. The *Native Title Act* thus governs the recognition, protection, extinguishment and impairment of native title."

- 16 As s 10 of the Act says, "[n]ative title is recognised, and protected, in accordance with" the Act. Native title is not able to be extinguished contrary to the Act⁷ but the Act does not forbid all conduct that may affect native title⁸. Rather, it classifies some conduct affecting the use of or the title to land as "future acts"⁹ and identifies some of these as "permissible future acts". Generally

5 (1995) 183 CLR 373.

6 (1995) 183 CLR 373 at 453 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

7 s 11.

8 Section 227 provides that an act "affects" native title "if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise."

9 Section 233(1) defines an act as a "future act" in relation to land or waters if (so far as relevant in this case) it takes place on or after 1 January 1994 and it is not a "past act" (as that expression is defined in the Act) and, apart from the Act, either it validly
(Footnote continues on next page)

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speaking, a "permissible future act" is an act which can be done, on the same terms, to ordinary title-holders¹⁰, as, for example, the grant of a mining lease which could also be granted "if the native title holders [concerned] ... held ordinary title to [the land in question]"¹¹. Any future act that is not a permissible future act is an "impermissible future act"¹².

17 Section 22 provides that (subject to some other provisions which do not apply in this case) "if an act is an impermissible future act, the act is invalid to the extent that it affects native title". Section 23 provides that subject to subdiv B of Div 3 of Pt 2 (which deals with the right to negotiate) acts which are permissible future acts are valid. Thus the scheme of the Act, so far as presently relevant, is not to prohibit certain future conduct and permit other conduct. Rather, it deals with the consequences of that conduct. Some conduct will affect native title; some will not.

18 Much attention was directed in argument to the right to negotiate given by subdiv B of Div 3 (ss 26-44). Section 26(1) makes plain that subdiv B applies to only some permissible future acts: those specified in sub-s (2) of s 26. That reads:

affects native title in relation to the land or waters or the conditions specified in s 233(1)(c)(ii) apply. Those conditions are:

"(A) it is to any extent invalid; and

(B) it would be valid to that extent if any native title in relation to the land or waters did not exist; and

(C) if it were valid to that extent, it would affect the native title."

10 s 235.

11 s 235(6).

12 s 236.

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"Subject to subsection (3), the acts are as follows:

- (a) the creation of a right to mine, whether by the grant of a mining lease or otherwise;
- (b) the variation of such a right, to extend the area to which it relates;
- (c) the extension of the period for which such a right has effect, other than under an option or right of extension or renewal created by the lease, contract or other thing whose grant or making created the right to mine;
- (d) the compulsory acquisition of native title rights and interests under a Compulsory Acquisition Act, where the purpose of the acquisition is to confer rights or interests in relation to the land or waters concerned on persons other than the Government party;
- (e) any other act approved by the Commonwealth Minister, in writing, for the purposes of this paragraph."

(The exceptions created by sub-s (3) do not apply in this case.)

- 19 Before doing any of the permissible future acts that are specified in s 26(2) the Government party concerned must give public notice¹³ and notice to various persons, including any registered native title claimant in relation to the land that will be affected by its action¹⁴, of its intention to act. Provision is then made for negotiation about whether the proposed action may be taken and, if it may, on what conditions it may be done. If the parties cannot agree, there will be an arbitrated determination¹⁵. If it is agreed or determined that compensation will be paid, any amount that is paid before a determination of native title has been made is held in trust in accordance with the Act¹⁶. Thus, one possible outcome of the process of

13 s 29(3).

14 s 29(2).

15 s 38.

16 ss 41(3), 42(5)(b).

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negotiation, if it is ultimately determined that there is no native title, is that the amount paid for compensation will be repaid to the person who paid it¹⁷.

20 The Act obliges Government parties to give the notices we have mentioned. It obliges the arbitral body to which a matter is referred to take all reasonable steps to make its determination within specified times¹⁸, taking account of certain matters¹⁹. It forbids reopening (without leave of the arbitral body) of issues previously decided²⁰. It gives contractual effect to a determination by the arbitral body or an agreement that the parties reach²¹. But subject to these qualifications, the right to negotiate provisions of subdiv B of Div 3, like the rest of the Act, do not seek to prohibit certain conduct while permitting other conduct; the provisions seek only to deal with the consequences of conduct by providing that acts to which the subdivision applies are valid only if certain conditions are met²².

21 The Act provides for the making of determinations as to the existence of native title²³. Subject to the Act, the Federal Court has jurisdiction in relation to "matters arising under [the] Act"²⁴. Certain questions of law may be referred to it by the National Native Title Tribunal ("the Tribunal") if they arise in an inquiry into an unopposed application, a right to negotiate application or a special inquiry

17 s 52(2)(a).

18 s 36.

19 s 39.

20 s 40.

21 s 41.

22 s 28.

23 ss 13, 61, 225.

24 s 213(2). Further, sub-s (1A) of s 39B of the *Judiciary Act* 1903 (Cth), which was inserted by Sched 11 to the *Law and Justice Legislation Amendment Act* 1997 (Cth), provides, in par (c), that the original jurisdiction of the Federal Court includes jurisdiction in any matter "arising under" any laws made by the Parliament. See as to the scope of this phrase, *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581; *Re McJannet; Ex parte Australian Workers' Union of Employees (Q) [No 2]* (1997) 189 CLR 654 at 656-657.

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under s 137²⁵. Provision is made for "appeals" to the Federal Court from certain decisions and determinations of the Tribunal²⁶. Finally, ss 74 and 81 invest the Federal Court with jurisdiction, which is exclusive of that of all other courts save this Court, to hear and determine certain applications for determination of native title.

22 However, the Act otherwise does not deal with the ascertainment or enforcement of native title rights by curial process. It provides for the establishment of native title and recognises and protects it in the manner we have outlined. But the protection which the Act gives is protection "in accordance with [the] Act"²⁷. If actual or claimed native title rights are sought to be enforced or protected by court order, the party seeking that protection must take proceedings in a court of competent jurisdiction.

23 No doubt, one important aspect of the protection that the Act gives to native title is the right to negotiate in accordance with subdiv B of Div 3. But the protection that is given by that right is limited in two ways that are relevant in this case. First, the right that is given is a right to negotiate about particular kinds of proposal, not any and every step that may be taken in respect of land which is the subject of a native title claim. Secondly, permissible future acts of the kind which enliven the right to negotiate will validly affect native title only if the relevant conditions are met; otherwise native title will remain unaffected.

24 In *North Ganalanja Aboriginal Corporation v Queensland* ("the Waanyi Case")²⁸ the Court considered the statutory scheme for dealing with native title applications. As was said in the joint judgment in that case, the Act must be "read with an understanding of the novel legal and administrative problems involved in the statutory recognition of native title"²⁹. No doubt the provisions of subdiv B of

25 ss 139, 145.

26 s 169.

27 s 10.

28 (1996) 185 CLR 595.

29 (1996) 185 CLR 595 at 614-615 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

Div 3, conferring the right to negotiate with respect to the permissible future acts specified in s 26(2), must also be read with this understanding.

- 25 It was said in the joint judgment with respect to the right to negotiate conferred by subdiv B of Div 3 that "[i]t is erroneous to regard the registered native title claimant's right to negotiate as a windfall accretion to the bundle of those rights for which the claimant seeks recognition by the application."³⁰ The right is a valuable right that may be exercised before the validity of an accepted claim has been determined. That the right may be exercised before a claim is determined is clear from the procedures that the Act establishes including, in particular, the provisions for holding on trust negotiated compensation that is paid before a determination of native title³¹. It is also clear from the requirement in s 31 that the Government party negotiate with, among others, the "native title parties", which expression is defined in s 29(1) to include any registered native title claimant. But neither the value of the right to negotiate nor the possibility of its exercise before determination of a native title claim are matters that affect in any way the strength of the claim to native title that lies behind the right to negotiate.

The applications to the primary judge

- 26 The applications made to the primary judge (for injunction and for summary dismissal) both required consideration of the strength of the case that the appellants sought to advance. Was there a serious question to be tried³²? Should the proceeding be dismissed because it was doomed to fail³³?
- 27 In considering the applications for injunction and for summary dismissal, what significance was to be attached to the fact that there had been no determination of the appellants' claim to native title, but their application had been

30 (1996) 185 CLR 595 at 616 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

31 ss 41(3), 42(5)(b).

32 *Murphy v Lush* (1986) 60 ALJR 523 at 524; 65 ALR 651 at 653; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153-154; *Patrick Stevedores v MUA [No 3]* (1998) 72 ALJR 873 at 880; 153 ALR 643 at 652.

33 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.

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accepted by the Registrar and the appellants were therefore "registered native title claimants" for the purposes of the Act³⁴?

28 The appellants placed much reliance on a statement in the joint judgment in the Waanyi Case with respect to the mediation procedures which apply to applications for determination of native title³⁵. It was said that "[t]o submit a claim for determination of native title to judicial determination before the stage of negotiation is reached is to invert the statutory order of disposing of such claims."³⁶ They submitted that this stated a rule which had been broken in this case by the primary judge deciding, before the exercise of the right to negotiate, that the appellants' claim to native title must fail.

29 The issue before the Court in the Waanyi Case was very different from the issues that arose in this matter. In the Waanyi Case the President of the Tribunal, after hearing submissions from the applicants for native title, from two mining companies and from the State of Queensland, directed the Registrar not to accept an application for determination of native title. The Court concluded that the Registrar's decision under s 63 of the Act whether to accept or reject an application was an administrative step. As was said in the joint judgment, for the President to give a direction to the Registrar not to accept an application after an adversarial contest on arguable questions of fact and law between those who would be parties to proceedings in the Federal Court under s 74 was "practically tantamount to a proleptic exercise of the jurisdiction of the Federal Court"³⁷. It was in the adoption of this procedure by the Tribunal that the inversion of the statutory procedure lay.

30 No such inversion has occurred here. The Registrar has accepted the claim that was lodged on behalf of the Larrakia people. The Tribunal will deal with that claim in the ordinary way observing the statutory procedures, including, if they be

34 s 253.

35 See s 72.

36 (1996) 185 CLR 595 at 617 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

37 (1996) 185 CLR 595 at 623 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

applicable, those with respect to mediation³⁸. But here the appellants chose to seek relief by way of interlocutory injunction. The relief they sought was not relief in respect of a question of law referred by the Tribunal (s 145), an "appeal" from a decision or determination of the Tribunal (s 169), nor an application for determination of native title (ss 74, 81). Even if it be assumed that the matter otherwise arose under the Act so as to attract the jurisdiction of the Federal Court, the relief sought from the Federal Court was relief of the character known under the general law and adopted by the provisions of the *Federal Court of Australia Act* 1976 (Cth)³⁹. And, in accordance with long-established principle, they had to demonstrate a sufficiently arguable case to obtain that relief.

31 Moreover, the appellants chose to seek final relief which included declarations of right that native title existed in relation to the subject land and that the Larrakia people are the holders of that native title. The respondents sought summary dismissal of the proceeding that the appellants had instituted. To decide that motion, the primary judge had to decide whether the claims that the appellants had made (including the claims for declaration) were plainly bad.

32 The fact that the appellants included in their prayer for relief the declarations about native title that we have mentioned presents a prima facie obstacle to their contention that there was some impermissible inversion by the trial judge of the statutory procedure prescribed by the Act. The issue whether native title exists in relation to the subject land having been tendered as an issue by them in the proceeding that they instituted, there is obvious difficulty in their contention that this issue was not open to dispute on a motion for injunction or on a motion for summary dismissal. No doubt it was with these considerations in mind that counsel for the appellants sought to emphasise the importance of the right to negotiate under subdiv B of Div 3 of the Act and contended that injunctions should have been granted to preserve that right in this case and that, at least to that extent, the proceeding should not have been dismissed.

38 By s 72, mediation conferences are held unless the application is unopposed (s 70) or the parties have reached agreement (s 71).

39 *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161.

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Injunction and the right to negotiate

- 33 No doubt there are cases in which injunction will go in aid of statutory rights⁴⁰. It is by no means clear, however, that the interlocutory injunctions which the appellants sought in this case were sought to preserve the statutory right to negotiate conferred by the Act. Although the originating application in the Federal Court sought a declaration that the Northern Territory was obliged either to negotiate with the Larrakia people or to acquire their native title before they could grant a valid lease to Oilnet, the injunctive relief claimed was predicated on the existence of native title and directed to its preservation rather than to the enforcement of a right to negotiate with respect to conduct that would affect it. In this Court, however, the appellants contended that the claim for declarations of title had not been pursued at the hearing before the primary judge and should, for that reason, be disregarded now. Rather, so the argument went, attention should be directed to the statutory right to negotiate.
- 34 The conduct of the Northern Territory which the appellants sought to have restrained and which, on their contention, engaged the right to negotiate was the further grant of Crown leases over land in the 1996 subdivision and the grant of titles in fee simple to that land. Neither of these steps is covered by s 26(2) of the

40 See, for example, *Stevens v Chown* [1901] 1 Ch 894 at 904-905 per Farwell J; *Argyll (Duchess) v Argyll (Duke)* [1967] Ch 302 at 345-347 per Unged-Thomas J.

Act. It is not to create a right to mine⁴¹ or vary or extend such a right⁴². It is not an act approved by the Commonwealth Minister⁴³. Nor is it to acquire compulsorily native title rights and interests under a "Compulsory Acquisition Act"⁴⁴. The Act defines⁴⁵ a Compulsory Acquisition Act as a law of the Commonwealth, a State or Territory that permits compulsory acquisition of native title rights and interests and of other interests, by the Commonwealth, State or Territory⁴⁶, and that provides for compensation⁴⁷ determined in a particular way⁴⁸. Neither the grant of a Crown lease nor the surrender of that lease in exchange for freehold title is made under such a law. Rather, the grant of Crown leases, the surrender of those leases and the vesting of freehold title are steps taken pursuant to the provisions of Pt 3 of the *Crown Lands Act* 1992 (NT). Those provisions do not fall within the definition of a Compulsory Acquisition Act.

35 The appellants contended that subdiv B of Div 3 was nevertheless engaged. They submitted that, read as a whole, the subdivision impliedly prohibits the grant of Crown leases and, also, the surrender of those leases in exchange for freehold title without the government of the Northern Territory first undertaking the negotiation processes that are prescribed by the subdivision.

36 As the argument acknowledges (by its reference to implied prohibition) the subdivision contains no explicit provision to this effect. Nor can it be read as containing an implied prohibition of the kind alleged. Not only is there no textual basis for making such an implication, to imply such a prohibition would be to engraft on the scheme of the Act something that is foreign to it. As has been pointed out earlier in these reasons, the Act does not proceed by way of prohibiting

41 s 26(2)(a).

42 s 26(2)(b) and (c).

43 s 26(2)(e).

44 s 26(2)(d).

45 s 253.

46 par (a) of the definition in s 253.

47 par (b).

48 par (c) and s 79.

conduct; it prescribes the consequences of conduct (or, more accurately, prescribes that certain kinds of conduct will *not* have consequences adverse to native title). If the granting of leases and conversion of leases to freehold title are not permissible future acts, s 22 will apply because the grant or the conversion (or both) would be impermissible future acts. And if they are impermissible future acts they will not validly affect native title. It follows that no prohibition of the kind alleged needs to be implied to protect native title. As for permissible future acts, it is to be recalled that only some kinds of permissible future act attract a right to negotiate and that in such cases, if the statutory procedures are not followed, there is no effect on native title. There is no basis for the implication which the appellants seek to have drawn.

37 It follows that when the Northern Territory refused (as it did) to give the appellants an undertaking not to issue any further Crown lease over, or any freehold title to, land the subject of the 1996 subdivision it did not thereby threaten to do an act that would enliven the statutory right to negotiate conferred by subdiv B of Div 3 of the Act. Accordingly, the injunctions which the appellants sought could not be said to be injunctions protecting or preserving that right.

38 Moreover, the injunctions which the appellants sought cannot be said to be injunctions protecting the statutory mediation procedures which follow the acceptance of an application for determination of native title. That application having been accepted by the Registrar, the procedures required by the Act, including those with respect to mediation, if applicable⁴⁹, must be observed. And that is so notwithstanding the primary judge's decision that, so far as concerns the part of the land claimed that is in issue in these proceedings, the appellants' claim to native title must fail. We need not consider what would have been the position if no other land had been the subject of the appellants' application accepted by the Registrar under s 63.

39 That is not to say that an injunction could be granted to a registered native title claimant *only* if it could be shown that the right to negotiate or other procedures required by the Act were at issue. Whether an injunction should be granted will depend upon the facts and circumstances of each particular case and much may turn upon the nature of the conduct that is threatened. If the conduct amounts to an impermissible future act it will be invalid. But the fact that the conduct is invalid and would not affect the native title that is claimed would very

49 See s 72.

likely not be a sufficient answer to a claim for injunction to restrain conduct that would, for example, work irreparable damage to the rights and interests claimed.

40 Ordinarily, the fact that an applicant for injunction is a registered native title claimant will suggest, if not demonstrate, that there is a claim to native title that is arguable (the Registrar being obliged to accept the application unless of the opinion that it is frivolous or vexatious or that *prima facie* the claim cannot be made out)⁵⁰. But the Registrar's administrative act of accepting an application does not put the question of title beyond debate on an application by a registered native title claimant for injunction or on an application to dismiss summarily an action instituted to obtain relief of that kind.

41 A party responding to an action brought by a registered native title claimant is not restricted to seeking a review of the administrative decision of the Registrar to accept the claimant's application for determination of native title. That is because the claimant must demonstrate a sufficiently arguable case in order to obtain injunctive relief under the general law. And where relief is claimed, it is open to the respondent to demonstrate that the action brought by the claimant is doomed to fail and to contend that no arguable case for the existence of native title is or can be made out. Ordinarily, such a contention will be difficult to sustain if a claim has been accepted by the Registrar, but here it was submitted that the 1882 grant showed that the appellants' claim to native title must fail. It is to that question that we now go.

The effect of the grant of a fee simple

42 The appellants contended that the 1882 grant to Benham did not necessarily extinguish native title. It was said that if it affected native title at all, it did no more than suspend the right of the traditional owners to exercise their native title (the enjoyment of which, it was submitted, may well have continued in fact). If the grant had this effect on the right to exercise native title, it was submitted that that effect ceased when the land came once again to be held by the Crown.

43 These contentions must be rejected. Native title is extinguished by a grant in fee simple. And it is extinguished because the rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title. An estate in fee simple is, "for almost all practical purposes, the equivalent of full ownership

50 s 63(1).

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of the land"⁵¹ and confers "the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination"⁵². It simply does not permit of the enjoyment by anyone else of any right or interest in respect of the land unless conferred by statute, by the owner of the fee simple or by a predecessor in title.

44 As the appellants acknowledged, it has been said more than once in previous decisions of the Court that native title is extinguished by a grant of an estate in fee simple. Thus, as Brennan J said in *Mabo v Queensland [No 2]*:

"Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (eg, authorities to prospect for minerals)."⁵³

Similar references to extinguishment are to be found elsewhere in *Mabo [No 2]*:

"... common law native title, being merely a personal right unsupported by any prior actual or presumed Crown grant of any estate or interest in the land, was susceptible of being extinguished by an unqualified grant by the Crown of an estate in fee or of some lesser estate which was inconsistent with the rights under the common law native title"⁵⁴

and:

51 *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656 per Deane, Dawson and Gaudron JJ. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 80 per Deane and Gaudron JJ.

52 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 42 per Isaacs J quoting *Challis's Real Property*, 3rd ed (1911) at 218. See also *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 298 per Williams J and *Wik Peoples v Queensland* (1996) 187 CLR 1 at 176 per Gummow J.

53 (1992) 175 CLR 1 at 69.

54 (1992) 175 CLR 1 at 89 per Deane and Gaudron JJ.

"The personal rights conferred by common law native title do not constitute an estate or interest in the land itself. They are extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive possession."⁵⁵

To like effect are statements in the *Native Title Act Case*:

"... a grant cannot be superseded by a subsequent inconsistent grant made to another person ... At common law, however, native title can be extinguished or impaired by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title ..."⁵⁶

and in *Wik Peoples v Queensland*:

"The strength of native title is that it is enforceable by the ordinary courts. Its weakness is that it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant. Native title is liable to be extinguished by laws enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it."⁵⁷

45 The references to extinguishment rather than suspension of native title rights are not to be understood as being some incautious or inaccurate use of language to describe the effect of a grant of freehold title. A grant in fee simple does not have only some temporary effect on native title rights or some effect that is conditioned upon the land not coming to be held by the Crown in the future.

46 Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title⁵⁸. Native

55 (1992) 175 CLR 1 at 110 per Deane and Gaudron JJ.

56 (1995) 183 CLR 373 at 439 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

57 (1996) 187 CLR 1 at 84 per Brennan CJ. See also *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1398; 147 ALR 42 at 112-113 per Gummow J.

58 *Mabo [No 2]* (1992) 175 CLR 1 at 58 per Brennan J.

title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law⁵⁹. There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title. And yet the argument that a grant in fee simple does not extinguish, but merely suspends, native title is an argument that seeks to convert the fact of continued connection with the land into a right to maintain that connection.

47 As Brennan J pointed out in *Mabo [No 2]*⁶⁰, the conclusion that native title has been extinguished by a later grant of freehold to the land is a result that follows not from identifying some intention in the party making the later grant but because of the effect that that later grant has on the rights which together constitute native title. The rights of native title are rights and interests that relate to the use of the land by the holders of the native title. For present purposes let it be assumed that those rights may encompass a right to hunt, to gather or to fish, a right to conduct ceremonies on the land, a right to maintain the land in a particular state or other like rights and interests. They are rights that are inconsistent with the rights of a holder of an estate in fee simple. Subject to whatever qualifications may be imposed by statute or the common law, or by reservation or grant, the holder of an estate in fee simple may use the land as he or she sees fit and may exclude any and everyone from access to the land. It follows that, as there was no reservation or qualification on the grant that was made to Benham in 1882, that grant was wholly inconsistent with the existence thereafter of any right of native title.

48 As Brennan J also said in *Mabo [No 2]*⁶¹, "on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power". How was that new sovereign power exercised in this case? The 1882 grant to Benham was made pursuant to statute⁶². It was not made pursuant to prerogative powers. The power

59 *Mabo [No 2]* (1992) 175 CLR 1 at 59-61 per Brennan J.

60 (1992) 175 CLR 1 at 68.

61 (1992) 175 CLR 1 at 63.

62 *Northern Territory Land Act* 1872 (SA), s 8.

given by the statute was not restricted in any relevant way. Section 8 of that Act ("the 1872 Act") provided that:

"Subject to the provisions of this Act, the Governor, in the name and on behalf of Her Majesty, may grant in fee simple, or for any less estate or interest, to the purchaser thereof, any waste lands, which grants shall be in such forms as shall from time to time be deemed expedient by the Governor in Council, and shall be signed by the Governor, and sealed with the public seal of the said Province, and being so signed and sealed, shall be valid and effectual in law to transfer to and vest in any such purchaser any such lands as aforesaid so purchased by him."

49 Reference was made in argument to a number of statements found in instructions to the Governor of the Colony of South Australia and in correspondence that passed between the Imperial authorities and the colonial authorities - particularly the Colonisation Commissioners for the Colony of South Australia⁶³. Those statements reveal a concern on the part of the Imperial authorities that the rights of the Aboriginal people be respected in the course of colonising South Australia. The statements of concern are many and often expressed in powerful terms.

50 It may well be that some of these matters must be put to one side simply because at the time the instructions were given, or the correspondence passed, the area that is now the Northern Territory formed part of the Colony of New South Wales, not the Colony of South Australia⁶⁴. But whether or not that is so, there is no basis for concluding that these materials can be read as confining the statutory power given by the 1872 Act to make grants. The power is given in general terms

63 See, for example, the Letters Patent establishing the Province of South Australia, 19 February 1836, which included the following:

"PROVIDED ALWAYS that nothing in these Our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any lands therein now actually occupied or enjoyed by such Natives".

64 McLelland, "Colonial and State Boundaries in Australia" (1971) 45 *Australian Law Journal* 671 at 673-674, 677.

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that do not admit of reading down. The statutory command contained in s 6 of that Act was that:

"From and after the coming into operation of this Act, all waste lands in the Northern Territory shall be sold, demised, or otherwise disposed of and dealt with in the manner and subject to the provisions of this Act, *and not otherwise*."⁶⁵

The power to deal with waste lands in the Northern Territory (which included the land granted to Benham) was to be found wholly within the 1872 Act. Following the enactment of the *Colonial Laws Validity Act* 1865 (Imp) (28 & 29 Vict c 63) there can be no question of invalidity of the 1872 Act on the ground of some alleged discordance between the instructions that may have been given to the Governor and the terms of the 1872 Act. That Act permitted the making of an unqualified grant of an estate in fee simple.

51 It was suggested that the grant should, nevertheless, be understood as having been made subject to native title rights. The contention was put in several ways.

52 First, it was said that a grant of fee simple can be made on terms that reserve rights to others. No doubt that is true. Easements and profits à prendre are obvious examples. But this grant was not confined in any way and not made subject to any reservation. There was no conferring of rights of access to, or rights to regulate the use of, the land - whether by the Crown or some other party.

53 Next, it was sought to draw some analogy with rights recognised in English land law like rights of common or customary rights⁶⁶. But reference to those rights in the present context is misplaced. They are creatures of the common law finding

65 Emphasis added. Section 3 of the earlier New South Wales legislation also had by similar terms excluded the operation of the prerogative with respect to grants in fee simple of unalienated Crown lands: *Crown Lands Alienation Act of 1861* (NSW).

66 See, for example, Megarry and Wade, *The Law of Real Property*, 5th ed (1984) at 849-854.

their origins in grant⁶⁷ or presumed grant⁶⁸. And the rights that are now in issue - native title rights - are not creatures of the common law. That a right owing its existence to one system of law (a right of freehold tenure) may be subject to other rights created by that same legal system (such as customary rights or rights of common) is not surprising. But very different considerations arise when there is an intersection between rights created by statute and rights that owe their origin to a different body of law and traditions⁶⁹.

54 Although reference was made to a number of decisions in other common law jurisdictions about the effect of later grants of title to land on pre-existing native title rights, we doubt that much direct assistance is to be had from these sources. It is clear that it is recognised in other common law countries that there can be grants of interests in land that are inconsistent with the continued existence of native title⁷⁰; the question in each case is whether the later grant has had that effect⁷¹. In some cases the answer that has been given in other jurisdictions may have been affected by the existence of treaty or other like obligations. Those considerations do not arise here. In this case, the answer depends only upon the effect of a grant of unqualified freehold title to the land.

55 Similarly, although reference was made in argument to questions of *plenum dominium* they are not questions that arise in this case. The question in this case concerns the 1882 grant, not any later lease of the land. The Crown having granted

67 *Wood v Leadbitter* (1845) 13 M & W 838 at 842-843 per Alderson B [153 ER 351 at 354].

68 *Attorney-General v Wright* [1897] 2 QB 318. See also Megarry and Wade, *The Law of Real Property*, 5th ed (1984) at 854.

69 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 177-178 per Gummow J.

70 See, for example, in the United States, *Missouri, Kansas & Texas Railway Co v Roberts* 152 US 114 at 117-118 (1894); in Canada, *Hamlet of Baker Lake v Minister of Indian Affairs* (1979) 107 DLR (3d) 513 at 549; in New Zealand, *Te Teira Te Paea v Te Roera Tareha* [1902] AC 56 at 65; *Manu Kapua v Para Haimona* [1913] AC 761 at 766-767; *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 at 365-366; in Nigeria, *Sakariyawo Oshodi v Moriamo Dakolo* [1930] AC 667 at 670.

71 See, for example, *Buttz v Northern Pacific Railroad* 119 US 55 (1886); *R v Sparrow* [1990] 1 SCR 1075; *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470.

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no lease of the land in 1882, there is no question of the Crown becoming entitled to both ownership and possession of the land upon the lease coming to an end. The rights granted here were inconsistent with native title. The questions about leasehold interests that were considered in *Wik Peoples v Queensland*⁷² do not arise.

Revival of native title?

56 Native title to the land was not, and could not be, revived when the land came to be held again (as it was) by the Crown.

57 The facts that the original grant was made by the Governor of South Australia and the land was resumed by the Commonwealth (and later passed to the Northern Territory) may very well present difficulties in the way of an argument that native title was revived when the land came to be held once more by the Crown (or, as it was put sometimes in argument, inaccurately, "reverted to the Crown"). In addition, such an argument would have also to deal with the problems presented by the vesting of the land and the legal estate in the Commonwealth pursuant to s 16 of the 1906 Act "freed and discharged from all ... interests"⁷³ and by the conversion into a claim for compensation of "the estate and interest of every person", as provided by s 17 of that Act. But it is not necessary to deal with those matters here. The argument that native title may revive fails because the rights are extinguished by the grant of freehold title; they are not merely suspended.

58 That the grant of freehold title extinguishes rather than suspends native title rights follows from the way in which the sovereign power to create rights and interests in land was exercised. The legislation that provided for the making of grants in fee simple of waste lands provided for the creation of rights in respect of the land that were inconsistent with any continued *right* to native title. The rights created by the exercise of sovereign power being inconsistent with native title, the rights and interests that together make up that native title were necessarily at an end. There can be no question, then, of those rights springing forth again when the land came to be held again by the Crown. Their recognition has been overtaken by the exercise of "the power to create and to extinguish private rights and interests

72 (1996) 187 CLR 1.

73 See *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 27 per Knox CJ and Starke J.

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in land within the Sovereign's territory"⁷⁴. The 1882 grant extinguished native title to the land.

Conclusion and Orders

59 The primary judge was therefore right to hold that the claims that the appellants made in the action brought in the Federal Court of Australia were bound to fail. The ground that was removed into this Court is a ground that must fail. Having regard to the manner in which the argument developed in this Court and to what has been said earlier in these reasons, there is no occasion now to order removal of any other ground. The matter should be remitted to the Full Court of the Federal Court of Australia to be dealt with consistently with the reasons for judgment of this Court. The appellants should pay the respondents' costs of the proceedings in this Court.

⁷⁴ *Mabo [No 2]* (1992) 175 CLR 1 at 63 per Brennan J.

- 60 KIRBY J. In 1919, long before the recognition of the native title rights of the indigenous peoples of Australia, the Privy Council remarked, with characteristic understatement, that "[t]he estimation of the rights of aboriginal tribes is always inherently difficult"⁷⁵. Eighty years later little has changed. In this appeal, this Court finds itself exploring some of the difficulties.

Introduction

- 61 The proceedings raise two questions of importance for native title claims in Australia. The first is whether the grant of a fee simple interest in land has the effect, for all time, of extinguishing any native title in that land which the courts of Australia will recognise and enforce. This issue will be referred to as the "substantive question". The second is whether, in the present proceedings, a judge of the Federal Court of Australia⁷⁶ erred, either as a matter of power or of discretion, in resolving the substantive question. Instead of doing so, it is suggested, he should have delayed his decision on that question and provided the native title applicants with injunctive and other relief to protect various procedural rights arising from their claim. To do otherwise, it is submitted, was to make a premature determination of the substantive question and thereby to "invert the statutory order of disposing of such claims"⁷⁷. This second issue will be referred to as the "procedural question".

- 62 The facts and the course of the proceedings relevant to my opinion are set out in the reasons of the other members of the Court. There is no need for me to elaborate these further. However, before proceeding to consider the merits of both the substantive and procedural questions, it is important, for my approach, to revisit this Court's decision in *North Ganalanja Aboriginal Corporation v Queensland* ("*Waanyi*")⁷⁸.

75 *In re Southern Rhodesia* [1919] AC 211 at 233; cf *Mabo v Queensland [No 2]* ("*Mabo [No 2]*") (1992) 175 CLR 1 at 58; *Hamlet of Baker Lake v Minister of Indian Affairs* (1979) 107 DLR (3d) 513 at 543.

76 O'Loughlin J.

77 *North Ganalanja Aboriginal Corporation v Queensland* ("*Waanyi*") (1996) 185 CLR 595 at 617.

78 (1996) 185 CLR 595.

Waanyi and suggested "fatal flaws" in native title claims

63 On the face of things, the issues determined in *Waanyi* bear considerable similarity to those presented here. There, as here, a claim to native title was asserted at common law and propounded in the National Native Title Tribunal ("the Tribunal") under the *Native Title Act* 1993 (Cth) ("the Act"). There, as here, the governmental and private interests (supported by governmental interests intervening from all parts of Australia) argued that the claim to native title in question bore a fatal legal flaw. In *Waanyi*, this was the suggestion that the grant of a pastoral leasehold interest in respect of the subject land was legally incompatible with the subsistence of native title and had thus extinguished it. In the present proceedings, the fatal flaw was said to be the grant of a fee simple interest in the land; but otherwise the arguments were analogous. In both cases, the governmental and private interests were seeking swift determination of the suggested defect which, they argued, struck at the heart of the native title claim. Resolution of that issue was necessary, they suggested, to avoid subjecting all parties to a legal futility.

64 Similarities also exist between the arguments of the respective native title claimants. In *Waanyi*, as in the current matter, the claimants for native title, ultimately⁷⁹, embraced the argument that the statutory entitlement to negotiation afforded by the Act⁸⁰ rendered it inappropriate or impermissible, both in the Tribunal and in the Federal Court, to proceed directly to the substantive question. This was because so doing would deprive the native title claimants of benefits, principally the right to negotiate, which the Act afforded them. Effectively, then, the claimants in both matters sought to reserve the "fundamental" legal question to another day and a different hearing.

65 This Court in *Waanyi* upheld the native title claimants' arguments. It rejected the notion that the Court should address the suggested fatal legal flaw in their ultimate claim to native title. Doing so, the Court declined to decide what, at the time⁸¹, was a controversy plainly requiring urgent resolution, the importance of which could not be gainsaid. Instead, it stressed the significance of the scheme established by the Act and the claimants' rights under it to negotiate with those affected by their claim. The joint judgment in *Waanyi* observed⁸²:

79 (1996) 185 CLR 595 at 646-647 where the change in the submission of the claimants is described.

80 Div 3 subdiv B of Pt 2 of the Act (esp s 26).

81 See now *Wik Peoples v Queensland* ("*Wik*") (1996) 187 CLR 1.

82 (1996) 185 CLR 595 at 617.

"If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the Court and the likely parties to the litigation are saved a great deal in time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers. To submit a claim for determination of native title to judicial determination before the stage of negotiation is reached is to invert the statutory order of disposing of such claims."

McHugh J, was, if anything, even more emphatic⁸³:

"[T]he structure of the legislation makes it clear that the primary role of the Tribunal is to screen claims and to assist the parties to reach settlements. If an application is accepted, ss 66-74 provide for procedures that will result in the application being treated as unopposed, settled by agreement or referred to the Federal Court for decision. ... If the claim is disputed, it must be resolved by the Federal Court if mediation or negotiation fails. The Tribunal has no role in deciding disputed claims of native title. ... Another important circumstance is that the Preamble⁸⁴ to the Act indicates that one of the purposes of the legislation is to establish a special procedure for determining claims of native title by conciliation and negotiation between interested parties. In furtherance of this purpose, the effect of the Act is that, *irrespective of whether a claimant has native title as claimed*, as long as the claimant has a *prima facie* claim of title, he or she obtains the right to negotiate with interested parties once the Registrar accepts the claim (ss 26 42, 72). Those rights of negotiation are valuable rights. They enable an applicant to protect his or her claim against 'permissible future Acts'

⁸³ (1996) 185 CLR 595 at 637. Emphasis added.

⁸⁴ "A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

- (a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and
- (b) proposals for the use of such land for economic purposes.

It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation."

(s 26(2)). They may also result in the applicant obtaining a commercially beneficial settlement of a *doubtful or even non-existent claim*."

66 In *Waanyi*, unlike the majority, I considered that the suggested legal flaw should be determined by the Court "to avoid the risk of a barren exercise of litigation which merely postpones the resolution of the question"⁸⁵. However, in this opinion, I was alone. The rule in *Waanyi* must therefore be derived from the majority opinions.

67 If *Waanyi* stands for anything it is that the procedures of the Act, once invoked, must ordinarily be observed and allowed to take their course. Clearly this includes the statutory right to negotiate whenever it is afforded by the Act. But in my view it also extends to the orderly application of the procedures of the Act and, in proper cases, the protection of the interests of native title claimants from the intervention of the rights, interests or claims of third parties which could cause irreparable difficulties (or at least very serious inconvenience) to the subsequent pursuit of the native title claims.

The procedural question: availability of a protective injunction

68 In the manner in which both the substantive and procedural questions arise for determination, it is logical to consider the procedural question first. If the point raised is good and if, as in *Waanyi*, the procedures adopted in the Federal Court are held to have "invert[ed] the statutory order of disposing of such claims"⁸⁶, the result will be that the appellants have been deprived of "valuable rights"⁸⁷ which this Court should protect, including, possibly, that of "obtaining a commercially beneficial settlement of a doubtful or even non-existent claim"⁸⁸. That was the primary thrust of the appellants' arguments before this Court.

69 Much of the attention during the hearing was concentrated upon the arguments of the parties concerning the scheme of the Act and, in particular, whether the appellants fell within those provisions which accorded to them a statutory right to negotiate. In *Waanyi*, the objectors to the registration of the native title claim were two mining companies⁸⁹. Defending their mining interests in the land, it was they who drew to the notice of the Tribunal the details of the pastoral leases granted in 1883 and 1904 over the land the subject of the

85 (1996) 185 CLR 595 at 668.

86 (1996) 185 CLR 595 at 617.

87 (1996) 185 CLR 595 at 637.

88 (1996) 185 CLR 595 at 637.

89 (1996) 185 CLR 595 at 597.

application. Express reference was made in the reasons of this Court to Div 3 subdiv B of Pt 2 of the Act. That subdivision denies to the Commonwealth, the States and the Territories any power⁹⁰ to confer, relevantly, mining rights⁹¹ in respect of land the subject of an accepted claim to native title unless a statutory notice be given⁹². The reasons in *Waanyi* explained the scheme of the Act⁹³:

"[A] procedure [must be] followed through which ordinarily (ss 26(3), (4), 32) requires the Government to negotiate with the claimants and the miner. The negotiation is assisted, if desired, by mediation by the [Tribunal] or other arbitral body (s 31). The procedure may terminate either in an agreement (s 37) or in a determination by the [Tribunal] or other arbitral body that the Government may or may not confer the mining rights in question (or some other interest to which Sub-div B applies) or may do so subject to specified conditions (s 38). ... Thus, once an application for determination is accepted, the Act maintains the status quo as between the registered native title claimant on the one hand and the Government and those having proprietary interests or seeking rights to mine on the other, unless the parties negotiate and agree on the resolution of their respective claims or a competent authority makes a binding decision. ... The Act simply preserves the status quo pending determination of an accepted application claiming native title in land subject to the procedures referred to. The mere acceptance of an application for determination of native title does not otherwise affect rights, powers or interests."

70 The appellants argued that these words, and the emphasis by the other members of the Court⁹⁴ on the importance for the scheme of the Act of the procedures for negotiation and mediation, applied equally to their case. For a time I was inclined to accept this argument. However, in so far as it is founded on an exact analogy with *Waanyi* and on the statutory right to negotiate for which Div 3 subdiv B of Pt 2 of the Act provides, the argument breaks down. It does so when the terms are examined in which the "right to negotiate" has been expressed. To demonstrate this, it is necessary to start with the general nature and structure of the Act.

71 The purpose of the Act can be derived both from the preambular statement of the Parliament about the need for "a special procedure" and the desire to

90 s 28.

91 s 26(2).

92 s 29(2)(b).

93 (1996) 185 CLR 595 at 616.

94 (1996) 185 CLR 595 at 637 per McHugh J, and my own reasons at 658, 659.

"facilitate negotiation"⁹⁵ and from the objects clause, s 3. The latter includes among the statutory objectives of the Act provision "for the recognition and protection of native title" and for establishing "ways in which future dealings affecting native title may proceed and to set standards for those dealings". In accordance with these objectives, the Act makes an important distinction between a "permissible future act"⁹⁶ and an "impermissible future act"⁹⁷. By the definition provisions of the Act, a "permissible future act" is an act which could be done "in relation to the land concerned if the native title holders concerned instead held ordinary title to it"⁹⁸. Furthermore, s 23 of the Act states that "permissible future acts" (except in cases not presently relevant)⁹⁹ are valid, subject to the right to negotiate provisions of Div 3 subdiv B of Pt 2¹⁰⁰. An "impermissible future act", on the other hand, is defined as "any future act that is not a permissible future act"¹⁰¹. By s 22, an "impermissible future act" is "invalid to the extent that it affects native title". This means that an "impermissible future act" may be valid if the conduct does not affect native title. The way in which native title must be "affected" to attract invalidity is not spelt out. However, the word "affect" is one of large connotation¹⁰². It does not seem apt, in the context of this legislation, to adopt a narrow construction.

72 When the statutory right to negotiate is examined, in the terms in which it is expressed in s 26 of the Act, it is immediately apparent that it is limited to those specified future permissible acts covered by sub-s (2). The rights listed there are

95 Preamble to the Act.

96 s 23(1).

97 s 22.

98 s 235(5)(b)(i). In s 253, "ordinary title" is defined as "a freehold estate in fee simple" subject to certain exceptions not presently relevant.

99 s 24 (an unopposed non-claimant application); s 25 (renewals).

100 s 23(2).

101 s 236.

102 In discussing the operation of the word "affect" in s 35 of the *Judiciary Act* 1903 (Cth), McTiernan J stated in *Shanks v Shanks* (1942) 65 CLR 334 at 337: "In its ordinary usage 'affects' is a synonym for touching, or relating to, or concerning. ... This section should be construed as conferring the most ample jurisdiction that the fair meaning of the words will allow." See also *Baird v St Louis Hospital Association* (Mo) 21 SW 11 at 13 (1893).

the creation of a right to mine¹⁰³; the variations of such a right¹⁰⁴; the extension of the period for which such a right has effect¹⁰⁵; the compulsory acquisition of native title rights and interests in defined circumstances¹⁰⁶ and other acts "approved by the Commonwealth Minister, in writing, for the purposes of this paragraph"¹⁰⁷.

- 73 It was not suggested that any of these paragraphs were applicable to the present case save for par (d) relating to compulsory acquisition. It was this paragraph that the appellants relied upon to attract the statutory rights to negotiate which were held to be so important in *Waanyi*. Paragraph (d) is in the following terms:

"[T]he compulsory acquisition of native title rights and interests under a Compulsory Acquisition Act, where the purpose of the acquisition is to confer rights or interests in relation to the land or waters concerned on persons other than the Government party".

- 74 For the appellants, it was conceded that this paragraph did not, in terms, apply to their case. There had been no compulsory acquisition of whatever native title rights and interests they may have enjoyed in the subject land at all, still less an acquisition under a Compulsory Acquisition Act. That expression is itself defined¹⁰⁸, with particularity, to mean only certain laws of the Commonwealth, the States or the Territory which permit compulsory acquisition of native title rights and interests, provide for compensation and contain provisions to the same effect as s 79 of the Act in relation to the determination of compensation. None of those laws applied to the present case.

- 75 The appellants' argument to the effect that their rights and interests had been acquired by the conduct of the Northern Territory Government and its agencies (or would be so acquired in the event that a Crown lease to Oilnet were converted, as proposed, to an interest in fee simple), therefore rested on the proposition that such a construction of par (d) was necessary to prevent a government party, by its own conduct, being able to evade the obligation to negotiate and thereby to neuter that commercially valuable right otherwise belonging to a native title claimant. The appellants submitted that the provisions of the Act were not open to circumvention

103 s 26(2)(a).

104 s 26(2)(b).

105 s 26(2)(c).

106 s 26(2)(d).

107 s 26(2)(e).

108 s 253.

by the simple expedient of acquiring native title by unilateral action (if that be constitutionally valid) without the troublesome necessity to submit to a process of compulsory acquisition under a defined Compulsory Acquisition Act. It was argued that the Act implied that this had to be done in every case where there was a native title claim and, a fortiori, where one had been accepted by the Tribunal which awaited determination.

76 It is true that there are arguments of convenience to support the proposition that par (d) contains an implied negative prohibition of the kind for which the appellants contended. However, the language of the Act ultimately makes it impossible to accept this construction. In effect, it would require the deletion of the adjectival clause which qualifies "the compulsory acquisition of native title rights and interests". Such linguistic surgery cannot be reconciled with the trouble apparently taken to add that clause to the paragraph and to provide a statutory definition in elaboration of it. Furthermore, upon one view, if the broad construction which the appellants urge of par (d) were adopted, the need for the particular provisions in the other paragraphs of s 26(2) would be doubtful. Special attention was given to the creation, variation and extension of the defined mining rights. This was obviously deliberate. As its terms and history suggest, the Act is a product of compromise and political negotiation. These facts should also restrain the judicial importation of implications which do not appear to be necessary to the text. The desirability of precision and certainty in entitlements affecting interests in land provides yet another reason for restraint. Only the clearest necessity, deriving from the language and structure of the Act, would authorise a court to elaborate the statutory terms in a matter so fundamental. No such necessity exists to sustain the enlargement of the "[a]cts covered", as defined in s 26(2). The submission of an implied prohibition on the kind of "compulsory acquisition" of the appellants' native title rights and interests as occurred here must therefore be rejected.

77 For these reasons, this case is different from *Waanyi*. No statutory right to negotiate was enlivened by the acts of the Northern Territory of which the appellants complain. Consequently, the appellants cannot invoke the holding in *Waanyi* and insist that before the Federal Court determined the substance of their native title claim, the requirements of Div 3 subdiv B of Pt 2 of the Act should be complied with.

Injunctive protection of valuable statutory rights

78 This conclusion does not, however, necessarily spell an end to the appellants' attempt to obtain interlocutory relief to protect the orderly application of the procedures established by the Act. This is because the right to negotiate provisions established in Div 3 subdiv B of Pt 2 are not the only valuable statutory rights contained within the Act. On my reading of the Act, the Parliament has sought to afford to native title claimants a number of statutory rights or privileges, which are enlivened upon lodgment of a claim with the Tribunal and acceptance by the

Registrar of the Tribunal (all of which occurred here). Most notably, these include a provision encouraging parties to engage in a process of voluntary negotiation¹⁰⁹, and another, which requires that the parties enter a mediation process if no voluntary agreement is forthcoming¹¹⁰. Only if the parties still cannot reach agreement through mediation is the matter then referred to the Federal Court for judicial determination¹¹¹. Unlike the provisions of Div 3 subdiv B of Pt 2 establishing the right to negotiate, these rights apply to all native title claims once accepted into the system. They reflect the stated emphasis of the Act on the facilitation of agreement through negotiation rather than through instant recourse to judicial decision. They also provide to claimants a valuable mechanism of protection against impermissible future acts in the interim period pending determination of native title: a period in which there exists great potential for the present and future enjoyment of native title to be impaired and claims to it to be inconvenienced or frustrated.

- 79 A direct analogy, then, can be found with the *Waanyi* case. This is because the mediation provisions, like the right to negotiate provisions discussed in *Waanyi*, are valuable statutory entitlements, placed in the Act for an obvious purpose. Given this, it would be surprising if, in a proper case, a court empowered to afford equitable remedies could not protect such rights of native title claimants before the final determination of their claim. Once its jurisdiction is invoked, the power of the Federal Court to grant interlocutory injunctions is very large¹¹². By the *Federal Court of Australia Act 1976* (Cth)¹¹³, that power is to make "orders of such kinds, including interlocutory orders . . . as the Court thinks appropriate"¹¹⁴. This is not a case where the Court has acquired jurisdiction under a statute which provides an exhaustive code of the available remedies and does not authorise the

109 s 71.

110 s 72.

111 s 74.

112 *Patrick Stevedores v MUA [No 3]* (1998) 72 ALJR 873 at 883; 153 ALR 643 at 655.

113 s 23. The section "does not provide authority for granting an injunction where there is otherwise no case for injunctive relief" whether "under the general law or by statute". See *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161; *Patrick Stevedores v MUA [No 3]* (1998) 72 ALJR 873 at 883; 153 ALR 643 at 656.

114 See *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 622; consd *Patrick Stevedores v MUA [No 3]* (1998) 72 ALJR 873 at 883, 915; 153 ALR 643 at 655, 699.

grant of an interlocutory injunction¹¹⁵. The Court has such powers as are necessary and incidental to the exercise of the jurisdiction conferred on it, as here, by the Act¹¹⁶. As this Court has had occasion recently to demonstrate, this is (as it must be in the case of a national superior court such as the Federal Court) a very broad remit indeed¹¹⁷. Such powers adapt and mould themselves to the necessities of the varied and important jurisdiction which the Parliament confers upon the Federal Court. They certainly extend, in proper cases, to protecting the utility of the procedural rights conferred by legislation upon parties to litigation in the Federal Court where such rights are valuable and are seriously threatened by the conduct of others.

- 80 As discussed in *Waanyi*, arguments of convenience might sometimes support the provision of an injunction to protect a native title claimant on the basis that it had invoked valuable statutory rights¹¹⁸, and otherwise to hold all parties affected in the *status quo ante* pending elucidation of their respective rights and obligations¹¹⁹. Where the conduct of another would seriously diminish the utility of statutory rights, render the provision of such rights difficult to prove or enforce, introduce complex third party claims which could bedevil the holders of such rights or plunge them into a mire of complex and distracting litigation, equity might well intervene to afford relief. In a proper case, it would not be deflected by the theoretical argument that the Act ultimately protected native title rights and interests once they were finally established.

The requirements for injunctive relief

- 81 This said, any such claim for an interlocutory injunction would have to make good the conditions usual to the provision of such relief. These require the

115 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 425-426, 456.

116 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 620, 631; *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161.

117 *Patrick Stevedores v MUA [No 3]* (1998) 72 ALJR 873 at 883, 900-901; 153 ALR 643 at 655, 678-679; cf *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205.

118 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; *Bradley v Commonwealth* (1973) 128 CLR 557; *Patrick Stevedores v MUA [No 3]* (1998) 72 ALJR 873; 153 ALR 643.

119 According to Cotton LJ in *Preston v Luck* (1884) 27 Ch 497 at 505, the object and purpose of an interlocutory injunction "is to keep things *in statu quo*, so that, if at the hearing the Plaintiffs obtain a judgment in their favour, the Defendants will have been prevented from dealing in the meantime with the property [rights] in such a way as to make that judgment ineffectual."

demonstration that there is a serious question to be tried¹²⁰ and the establishment of the fact that the provision of such relief is warranted by the balance of convenience¹²¹.

82 These requirements necessarily invited consideration of the Northern Territory's submission that the appellants' claim to native title in respect of the subject land was unsustainable once it was shown that a valid grant of a fee simple interest had been made in respect of the same land.

83 To some extent, the appellants themselves invited the Northern Territory's submission in this regard. Instead of confining the relief which they sought strictly to the interlocutory protection of the utility of their proceedings before the Tribunal and in the Federal Court, they sought a declaration as to the existence of their native title rights and interests. Assuming that (as appears to have been the case), at trial, the appellants redefined the remedies they sought to delete the claim for such a declaration, this did not deprive the Northern Territory of its entitlement to resist the provision of any relief by way of injunction (including interlocutory injunction), by reference to the suggested unavailability of such relief, as a matter of law, certain uncontested facts being established. As I pointed out in *Waanyi*, it is by no means unusual, in considering the provision of a discretionary remedy, for a court to take into account the ultimate prospects of success¹²². Indeed, when asked to provide an interlocutory injunction to defend the utility of proceedings

120 The "serious question to be tried" test was first stated in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, where Lord Diplock said at 407: "[I]n the context of the exercise of a discretionary power to grant an interlocutory injunction ... [t]he court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried." This test has been accepted in this Court. See, for example, *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board* (1982) 57 ALJR 425; 46 ALR 398; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148; *Polyukovich v The Commonwealth* (1991) 172 CLR 501; *Patrick Stevedores v MUA [No 3]* (1998) 72 ALJR 873; 153 ALR 643.

121 The balance of convenience test derives from the discretionary character of injunctive relief. It requires the judge to consider the effects that an injunction may have on parties and any broader effect on others. Included in the balance of convenience test are such factors as whether the applicant will suffer "irreparable harm" or "special damage" if an injunction is not granted; whether damages at law would be an adequate form of relief for the applicant; and whether relative hardship would be visited on the parties concerned. See generally *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148; *Patrick Stevedores v MUA [No 3]* (1998) 72 ALJR 873; 153 ALR 643; *State Transport Authority v Apex Quarries Ltd* [1988] VR 187.

122 (1996) 185 CLR 595 at 665.

which the opponent asserts are legally misconceived, it is not only permissible for a court to consider the point. It is usually obligatory¹²³:

"This is because courts are typically concerned with husbanding the provision of relief to deserving cases ... Thus, in the present case if, although the applicants' claims ought to have been accepted by the Registrar, it is revealed, on a proper analysis of those claims, that they are bound to fail (eg because of a fatal legal flaw), whilst a procedural injustice has been done to the applicants, no substantive injustice will have occurred. Moreover, a failure to resolve the uncertainty will undoubtedly delay many genuine cases which are now before the Tribunal, which may shortly be so, or which are not lodged, because of the uncertainty."

84 Although in this case the appellants' claims were accepted by the Registrar of the Tribunal and were thus, by inference, judged by her not to be frivolous or vexatious but sufficient to demonstrate arguability¹²⁴, that decision was made on such materials as were provided to the Registrar by the appellants. It could not foreclose the determination of a legal "knock out" point which the Northern Territory, with the requisite facts, asserted it could show. In such circumstances, provided the point could be efficiently and conveniently decided¹²⁵, it would have been absurd to send the matter for trial without determining it. Not only would that have been unjust to the particular parties, who were entitled, one way or the other, to have the preliminary issue determined without delay. It would have been undesirable from the point of view of the efficient administration of justice and the resolution of an issue crucial to other analogous cases waiting in the wings. The point tendered by the Northern Territory's motion for summary dismissal had therefore to be addressed. It also arose in the proper disposal of the appellants' motion for interlocutory relief, including as it was finally re-expressed.

85 In saying this, I do not suggest that every point raised in resistance to a native title claim would warrant similar treatment. Or that every legal objection advanced by a respondent to such a claim would justify the telescoped procedures that were adopted in this case. As recognised by the primary judge¹²⁶, the point raised by

123 (1996) 185 CLR 595 at 665.

124 s 63.

125 In the event that an issue is complex and difficult it may be appropriate to suspend its determination until the trial. See for example *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 407, where Lord Diplock stated: "It is no part of the court's function at this stage of the litigation to try to ... decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

126 *Fejo v Northern Territory* (1998) 152 ALR 477 at 487.

the Northern Territory was a special one. It was either good or bad. If it was good, it was fatal to the entire argument of the appellants and of all claimants in an identical position. In such circumstances the determination of the arguability of the appellants' claim required that the point be decided. The considerations of convenience also overwhelmingly supported that course. The appellants' objections on the procedural question therefore fail. Accordingly, it is necessary to consider whether the primary judge was correct in his resolution of the substantive question.

The substantive question: extinguishment of native title

86 The following issues were presented to this Court by the argument of the substantive question:

1. Is the question avoided in this case because the grant of a fee simple interest in 1882, and the *Northern Territory Land Act 1872* (SA) pursuant to which that grant was purportedly made, were each invalid because inconsistent with a proviso to the Letters Patent establishing the Province of South Australia and authorising the Governor to exercise legislative and other powers for the Province? (The validity of the grant point).
2. If the grant of 1882 was valid, has the Court already decided that a grant of a fee simple interest is legally inconsistent with the survival of any right or interest to native title in the same land so as, in law, to extinguish any pre-existing native title? (The authority of the Court point).
3. If, as a matter of the authority of the Court, a grant of a fee simple interest does not, of its legal nature, extinguish native title, does a true understanding of the character and incidents of such title necessitate the conclusion, in this case, that any pre-sovereignty rights or interests in native title in relation to the land must be taken to be extinguished? (The extinguishment of fee simple point). In relation to this point, a number of subsidiary arguments were canvassed. These concerned whether (a) the mere exercise of the Crown's sovereign rights in relation to land converted the radical title, which in the theory of the law accompanied sovereignty rights, to a plenum dominium and thereby expelled the possibility that native title would survive; (b) plenum dominium aside, the very nature of a fee simple interest in land was incompatible with the survival of native title and so extinguished the latter by reason of the extreme fragility of native title; and (c) by analogy with various interests in land which English law long recognised as compatible with a fee simple interest, native title could likewise survive the grant of such an interest and coexist in some circumstances with fee simple.
4. Whether a valid grant of a fee simple interest in land extinguished native title forever (as the Northern Territory claimed) or was susceptible to an extinguishing effect falling short of such finality, so that, in appropriate

circumstances, native title could revive and be upheld by the common law? (The permanency of extinguishment point).

It is convenient to deal with each of these points in turn.

The validity of the original grant

87 The appellants submitted that the effect of a grant of a fee simple interest in respect of the subject land did not arise in this case. If this were correct, the suggested "fatal flaw" in their claim to native title would not arise for decision. It would be wholly theoretical to explore it. Clearly, this point must be dealt with at the outset.

88 The foundation of the appellants' argument was the suggested limitation in the power of the Governor of South Australia to make a law or otherwise to dispose of the wastelands of the Crown in the Province of South Australia which adversely affected the rights of Aboriginal natives and their descendants, including the appellants. For this argument, the appellants relied upon a proviso to the Letters Patent by which the Governor of South Australia was empowered to establish the Province of South Australia. In 1834, the Imperial Parliament by Act¹²⁷ empowered the King "with the advice of his Privy Council" to erect and establish a Province and to fix the boundaries thereof. In February 1836 the King, by Letters Patent, with the necessary advice and purporting to act in pursuance of such parliamentary power, established the Province of South Australia and fixed its boundaries¹²⁸. However, at that time, the northern-most limit of the lands so fixed was 26° S latitude. Accordingly, at the establishment of the Province, the lands which now comprise the Northern Territory of Australia (and include the land near Darwin the subject of the appellants' claims) were outside the territory of South Australia as so defined¹²⁹.

89 The Letters Patent¹³⁰ contained the following proviso:

"PROVIDED ALWAYS that nothing in these Our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of

127 4 & 5 Will IV c 95 (Imp). Commonly known as the *South Australia Colonisation Act* (1834) (UK).

128 *The State of South Australia v The State of Victoria* (1911) 12 CLR 667 at 715.

129 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 275; cf *The State of South Australia v The State of Victoria* (1914) 18 CLR 115 at 118, 140 (PC); *Raptis (A) & Son v South Australia* (1977) 138 CLR 346 at 353, 359, 366, 370.

130 The full terms of the Letters Patent are set out in *The State of South Australia v The State of Victoria* (1914) 18 CLR 115 at 119-120 (PC).

the said Province to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any lands therein now actually occupied or enjoyed by such natives".

90 The appellants argued that the Governor's powers could not exceed the authority vested in him by or under the relevant Imperial and Colonial statutes. They contended that when, later¹³¹, the area now known as the Northern Territory was annexed to the colony of South Australia and lost its status as land within the colony of New South Wales, the "limitations" upon the Governor's powers, arising from the proviso, carried over to invalidate any inconsistent provisions or powers in the *Northern Territory Land Act* and thus in the grant in 1882, made pursuant to that Act, of a fee simple interest to John Benham in the subject land.

91 This submission must be rejected. There are many reasons. I put to one side an argument that there was nothing in the Imperial Act of 1834 to authorise the inclusion of the proviso in the Letters Patent. I shall assume that the Letters Patent were valid in their entirety and had effect according to their terms. However, by those terms, the proviso is confined to the protection of the rights of the Aboriginal natives of the Province as so defined. This was the Province with the geographic boundaries fixed at its establishment in 1836. It therefore excluded any reference to Aboriginal natives in what is now the Darwin area of the Northern Territory. Secondly, when the Northern Territory, as it now is, was annexed to South Australia in 1863, separate Letters Patent were issued. They contained no equivalent to the proviso now relied upon by the appellants¹³². Therefore, simply as a matter of construction, whatever its effect may be in South Australia, the proviso had no operation in relation to the subject land. It is impossible to give to the language of the Letters Patent of 1836 an ambulatory meaning extending to lands not then part of the Province but which might at any time thereafter be added to it. It is equally impossible to give the words "Aboriginal Natives" as contained within the proviso a corresponding meaning¹³³. Thirdly, according to the terms of the proviso the only rights affected were those arising from the activities of erecting and establishing the Province of South Australia and fixing its boundaries. The Letters Patent do not purport to deny, still less do they have the effect in law of denying, the quality of other acts which would otherwise affect the rights of the defined Aboriginals and their descendants. Fourthly, the Imperial Act of 1834

131 On 6 July 1863.

132 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 278. For the later constitutional history of the Northern Territory, see *Kruger v The Commonwealth* (1997) 190 CLR 1 at 49-50 per Dawson J; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1404-1408; 147 ALR 42 at 120-126 per Gummow J.

133 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 278. See also *Mabo [No 2]* (1992) 175 CLR 1 at 107.

provided¹³⁴ that it was the Colonisation Commissioners, not the Governor, who could declare all lands in the Province to be public lands available for purchase and to sell such lands and apply the funds recovered (eg for future immigration to the Province). Thus the actual alienation of land in South Australia was, from the start, effected pursuant to express statutory provision, not the Royal Prerogative. Any limitation on the power to grant a legal interest in land would therefore have to conform to the applicable statute. A proviso in the Letters Patent of the Governor could not override such a statutory source of power. Fifthly, and in any case, the mere fact of erecting and establishing the Province of South Australia and fixing its boundaries did not of itself adversely affect the rights referred to in the proviso¹³⁵. With the wisdom of hindsight and the modern understanding of the effect of the acquisition of sovereignty over Australia by the Crown, its establishment of a settlement (such as the Province of South Australia) did not of itself adversely affect native title. Any such effect arose from later conduct which on no view could be seen as subject to the proviso's limitations.

92 These conclusions are more than sufficient to dispose of the appellants' reliance on the proviso. It is unnecessary to consider at length the many other arguments which were deployed against this submission¹³⁶. There being, then, no substance in the appellants' argument based upon the proviso to the Letters Patent of 1836 and no other relevant argument being advanced, it is necessary to turn to the Northern Territory's principal submission. This was that the grant of a fee

134 s 6. The purpose of the Act was to provide for the establishment of a separate colony and to facilitate the sale and disposition of wastelands in the colony to fund further immigration. It was not to inhibit such sale.

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

136 They included the fact that the Imperial Act, pursuant to which the Letters Patent with its proviso were made, was subsequently repealed so that, by the time of the grant of land to John Benham in 1882 the proviso would have ceased to have any effect to limit any relevant powers of the Governor. Instead, the *Wastelands Act* 1842 (Imp) subsequently governed the alienation of land in the colony. It was pursuant to that power, not the Letters Patent of 1836, that the *Northern Territory Land Act* 1872 (SA) was made. Additional arguments included the separate effect of the *Lands Acquisition Act* 1906 (Cth), s 16(1) which vested the lands in the Commonwealth "freed and discharged from all trusts, obligations, estates, interests ... to the intent that the legal estate ... shall be vested in the Commonwealth". That Act was rendered applicable to the acquisition by the Commonwealth for any public purpose of any land owned in the Northern Territory "by any person". See *Northern Australia Act* 1926 (Cth), s 55; cf *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 27-28. See also *Lands Acquisition Ordinance* 1911 (NT). And all of this leaves unexamined the operation and effect of legislation providing for registration of land title: a further consideration which it is unnecessary to explore.

simple interest in the subject land in 1882, without more, extinguished for all time any Aboriginal native title in the land which had existed at the time that the Crown acquired sovereignty over it.

Grant of a fee simple interest: the authority of the Court

- 93 Before the decision of this Court in *Mabo v Queensland [No 2]* ("*Mabo [No 2]*")¹³⁷ which gave rise to legal claims of native title in Australia, the Court had expressed in the most ample terms the meaning of an estate in fee simple at common law. In *The Commonwealth v New South Wales*, Isaacs J said¹³⁸:

"In the language of the English law, the word fee signifies an estate of inheritance as distinguished from a less estate ... A fee simple is the most extensive in quantum, and the most absolute in respect to the rights which it confers, of all estates known to the law. It confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination".

- 94 Because in the present case the formula used in the land grant of 1882 in favour of John Benham was, by common agreement, that used by conveyancers to signify the grant of a fee simple interest, submissions were made to the Court that both by authority and in principle, such a grant extinguished any subsisting native title rights.

- 95 It is clear law in this country, whatever may be the position elsewhere, that native title may be extinguished by the valid exercise of the sovereign power to grant inconsistent interests in land to third parties¹³⁹. Conformably with this proposition it was submitted that the grant of a fee simple interest, being the largest known to the law, necessarily and as a matter of legal effect, expelled any remaining native title which, before such grant, may have subsisted in the land. Several opinions, written by different Justices in successive native title cases in this Court, lend strong support to this argument.

¹³⁷ (1992) 175 CLR 1.

¹³⁸ (1923) 33 CLR 1 at 42, quoting *Challis's Real Property*, 3rd ed (1911) at 218. See also Megarry and Wade, *The Law of Real Property*, 5th ed (1984) at 39-40; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 298; *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656.

¹³⁹ *Mabo [No 2]* (1992) 175 CLR 1 at 68-69 per Brennan J, 89-90, 94, 110 per Deane and Gaudron JJ, 196-197 per Toohey J. See also *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 439.

96 Thus, in *Mabo [No 2]* Brennan J said¹⁴⁰:

"Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals)."

97 The observations of Deane and Gaudron JJ in the same case were to like effect, suggesting that native title would be "extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive possession"¹⁴¹.

98 The same opinion was repeated in *Western Australia v The Commonwealth (Native Title Act Case)* where the joint judgment contained the following statement¹⁴²:

"[A]fter sovereignty is acquired, native title to a particular parcel of land can be extinguished by the doing of an act that is inconsistent with the continued right of Aborigines to enjoy native title to that parcel - for example, a grant by the Crown of a parcel of land in fee simple".

99 Several observations in *Wik Peoples v Queensland ("Wik")* also affirm this view. Thus, Gummow J said¹⁴³:

"The extinguishment of existing native title readily is seen as a consequence of a grant in fee simple. That is because the fee simple, as the largest estate known to the common law, confers the widest powers of enjoyment in respect of all the advantages to be derived from the land itself and from anything found upon it."

140 (1992) 175 CLR 1 at 69.

141 (1992) 175 CLR 1 at 110.

142 (1995) 183 CLR 373 at 422.

143 (1996) 187 CLR 1 at 176.

In my own opinion in *Wik* I expressed a like conclusion¹⁴⁴:

"It is the peculiarity of the legal rights conferred by ... statutory leases ... which permits the possibility of co-existence of the rights under the pastoral lease and native title. Such would not be the case where an estate or interest in fee simple had been granted by the Crown. Such an interest, being the local equivalent of full ownership, necessarily expels any residual native title in respect of such land."

100 There are no expressions of opinion in this Court which contradict the foregoing conclusions. However, it must be accepted that none of the opinions cited was legally essential to the decision in the several cases referred to. To that extent, there is no holding on the point which is binding, as a matter of legal precedent. It is therefore necessary to consider the appellants' submission in terms not only of the dicta in recent legal authority but also by reference to legal principle and legal policy. The issue now being squarely presented for decision, this Court must provide the answer which most closely accords with established authority, including the reasoning sustaining its earlier decisions in native title cases. Sometimes when an important point must be decided, obiter dicta, once analysed, are found to be wanting. But is that so here?

Extinguishment by a grant of a fee simple interest

101 Native title originates in the traditions and customs of the indigenous peoples of Australia. It is from them, and not from the common law, that it takes its content¹⁴⁵. This is so in all territories over which, in earlier times, the Crown claimed sovereignty. But care must be exercised in the use of judicial authorities of other former colonies and territories of the Crown because of the peculiarities which exist in each of them arising out of historical and constitutional developments, the organisation of the indigenous peoples concerned and applicable geographical or social considerations¹⁴⁶. In the United States of America, for example, the law governing the rights of indigenous peoples to land was affected by the early recognition of a measure of sovereignty of, and the

144 (1996) 187 CLR 1 at 250. See also 90-92 per Brennan CJ, 124-125 per Toohey J; cf *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656.

145 *Mabo [No 2]* (1992) 175 CLR 1 at 57-58, 61 per Brennan J, 110 per Deane and Gaudron JJ, 178 per Toohey J.

146 *Mabo [No 2]* (1992) 175 CLR 1 at 108; cf *Coe v Commonwealth of Australia* (1979) 53 ALJR 403 at 408; 24 ALR 118 at 129.

provision of a special constitutional status to treaties with, the Indian tribes¹⁴⁷. The position in Canada¹⁴⁸ and New Zealand¹⁴⁹ has followed a different course again, affected respectively by the supervening amendment to the Constitution¹⁵⁰ and the re-interpretation of the legal relationship between the general population and the indigenous peoples¹⁵¹.

- 102 In other former territories of the Crown, such as those in West Africa, the position was also affected by the peculiarities of the circumstances by which the Crown acquired its interests (whether by settlement, cession, conquest, protectorate or as a mandated (later trusteeship) territory)¹⁵² and by the terms of applicable legislation, Orders in Council and treaties or agreements with the relevant native chiefs¹⁵³. These considerations sometimes attracted consequences to a grant of a fee simple interest which can only be explained as peculiar to the

147 See eg Art 1, s 8 ["To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes"]. See *Johnson v McIntosh* 8 Wheat 543 (1823); *United States v Sante Fe Pacific Railroad Co* 314 US 339 (1941); Berman, "The Concept of Aboriginal Rights in the Early Legal History of the United States", (1978) 27 *Buffalo Law Review* 637.

148 *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3rd) 145; *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470; *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193; *R v White and Bob* (1964) 50 DLR (2d) 613; *Francis v The Queen* (1956) 3 DLR (2d) 641; cf Cumming and Mickenberg, *Native Rights in Canada*, 2nd ed (1972); Slattery, "Understanding Aboriginal Rights", (1987) 66 *Canadian Bar Review* 727. See also now Canadian Constitution, s 35.

149 *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321; *Manu Kapua v Para Haimona* [1913] AC 761 (PC); *Inspector of Fisheries v Ihaia Weepu* [1956] NZLR 920; *In re the Ninety-Mile Beach* [1963] NZLR 461; *Faulkner v Tauranga District Council* [1996] 1 NZLR 357.

150 See eg Canadian Constitution, s 35.

151 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641; *Attorney-General v New Zealand Maori Council (No 2)* [1991] 2 NZLR 147; *New Zealand Maori Council v Attorney-General (NZ)* [1994] 1 AC 466; cf Keith, "The Treaty of Waitangi in the Courts", (1991) 14 *New Zealand Universities Law Review* 37.

152 Roberts-Wray, *Commonwealth and Colonial Law*, (1966) at 782-803.

153 Ollennu, "The Changing Law and Law Reform in Ghana", (1971) 15 *Journal of African Law* 132 at 157-167.

local needs¹⁵⁴. It is those needs, no doubt, which help to explain the way in which native title, originally perceived as a usufructuary right recognised by the common law¹⁵⁵, advanced in some jurisdictions to become, in effect, the equivalent to an estate in land with incidents similar to those afforded by the common law system of tenure¹⁵⁶.

103 The ways in which each of the former colonies and territories of the Crown addressed the reconciliation between native title and the legal doctrine of tenure sustaining estates in land varied so markedly from one former territory to the other and were affected so profoundly by local considerations (legal and otherwise) that it is virtually impossible to derive applicable common themes of legal principle. Still less can a common principle be detected which affords guidance for the law of this country. Australia is a late entrant to the field following the change of understanding in the common law as it was previously conceived, evidenced in this Court's decision in *Mabo [No 2]*¹⁵⁷ and cases since¹⁵⁸.

104 In the process of tracing the consequences which flow from *Mabo [No 2]*, two basic considerations, at least, restrain the disturbance of interests in land established by the law as previously understood. The first is that a court should not destroy or contradict an important and settled principle of the legal system¹⁵⁹. The second is that, in every society, rights in land which afford an enforceable entitlement to exclusive possession are basic to social peace and the order as well as to economic investment and prosperity. Any significant disturbance of such

154 See eg *Sunmonu v Disu Raphael* [1927] AC 881; *Oyekan v Adele* [1957] 1 WLR 876; [1957] 2 All ER 785.

155 *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 403-404; *Attorney-General of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599; *Nii Amon Kotei v Asere Stool* [1961] 1 Ghana LR 492.

156 Asante, *Property Law and Social Goals in Ghana 1844-1966*, (1975) at 29-81 esp 60-61, 67.

157 (1992) 175 CLR 1 at 25, 40, 57.

158 *Native Title Act Case* (1995) 183 CLR 373 at 427, 431-432; *Wik* (1996) 187 CLR 1 at 177, 184, 205-207.

159 cf *Mabo [No 2]* (1992) 175 CLR 1 at 30, 43 per Brennan J. Brennan J described it as impermissible to "fracture a skeletal principle" (at 43). I prefer to avoid that metaphor which suggests both a morbidity and fragility in the foundational principles of the Australian legal system which I do not detect.

established rights is therefore, ordinarily, a matter for the legislature not the courts¹⁶⁰.

105 Following the decision of this Court in *Mabo [No 2]*, legislation to elaborate the incidents of native title has been enacted¹⁶¹. The Court should therefore approach with circumspection a submission which, if correct, would cast doubt upon the validity and effectiveness of fee simple interests throughout Australia. Such interests are quite different from the peculiar pastoral leases created by Australian statutes for unique Australian conditions as examined in *Wik*¹⁶². Fee simple interests, whether granted by or under statute or otherwise, by that name or by the formula used in the land grant here, have well settled legal features. The most important of these, missing in the pastoral leases considered in *Wik*, is the right in law to exclusive possession. Of its nature, that right cannot co-exist with native title. The inconsistency lies not in the facts or in the way in which the land is actually used¹⁶³. It lies in a comparison between the inherently fragile native title right¹⁶⁴, susceptible to extinguishment or defeasance, and the legal rights which fee simple confers.

106 One may accept that the grant of a fee simple interest to John Benham, and the later acquisition of the "legal estate" by the Commonwealth pursuant to compulsory process, conferred rights that may be traced to, and are therefore defined in, legislation, not by the prerogative powers of the Crown. One may accept, further, that it is an established rule in this area of discourse that the extinguishment of native title rights, whether by legislation or act of the Executive Government pursuant to legislative power, requires clear authority evincing objectively an intention to confer legal rights inconsistent with native title rights to which the common law would otherwise accord recognition¹⁶⁵. But the

160 cf *Wik* (1996) 187 CLR 1 at 250-251.

161 For example the *Native Title Act* 1993 (Cth).

162 (1996) 187 CLR 1 at 132.

163 (1996) 187 CLR 1 at 86 per Brennan CJ, 126 per Toohey J, and 235-238 in my own reasons.

164 *Mabo [No 2]* (1992) 175 CLR 1 at 60 per Brennan J, 89 per Deane and Gaudron JJ; cf *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1398; 147 ALR 42 at 112-113. The fragility of native title is now reduced by the operation of the *Racial Discrimination Act* 1975 (Cth), where applicable and, in cases to which it applies, by the enactment of the *Native Title Act* 1993 (Cth). See the *Native Title Act Case* (1995) 183 CLR 373 at 439, 453.

165 *Mabo [No 2]* (1992) 175 CLR 1 at 64 per Brennan J, 110 per Deane and Gaudron JJ, 195 per Toohey J; *Wik* (1996) 187 CLR 1 at 122; cf *County of Oneida v Oneida* (Footnote continues on next page)

Northern Territory Land Act demonstrated clearly enough the purpose of authorising the grant of interests in land, including interests in fee simple. The grant to John Benham in 1882 used the formula appropriate to a fee simple grant. Of its legal nature, that was incompatible with the continuance in respect of the same land of the fragile native title right which the Australian legal system will recognise. Doubtless, the bundle of interests we now call "native title" would continue, for a time at least, within the world of Aboriginal custom. It may still do so. But the conferral of a legal interest in land classified as fee simple had the effect, in law, of extinguishing the native title rights. They could not co-exist with the lawful rights thereby accorded to the grantee "to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination"¹⁶⁶.

107 Legal history, authority and principle therefore combine. But they are also supported by considerations of legal policy, some of which I have mentioned. Native title is extinguished by a grant in fee simple. This statement of law must be taken as settled. It does not admit of qualification. It is true that at common law there were forms of "fee simple" falling short of fee simple absolute¹⁶⁷. However, in Australia, the term is taken to mean fee simple absolute and no contrary suggestion was made. It is also true that there may coincide with an estate in fee simple various legal rights belonging to others affecting the use of land held in fee simple¹⁶⁸. The appellants submitted that native title should be regarded as analogous with such rights so that native title might, at least sometimes, survive where not inconsistent with the full exercise of fee simple rights.

108 There are at least three reasons why this is not so. First, the rights which may be enjoyed compatibly with an interest in fee simple themselves derive from the same legal source. They are not rights, inherently fragile and liable to defeasance, arising outside that system and dependent for their effectiveness upon the extent to which a different legal system accords them its recognition. Secondly, the suggested analogy breaks down because it involves an attempt to coerce notions of native title into similarity with notions which are legally different because they originally derived from a system of land law dependent on the theory and practice of tenure and estates developed in feudal England. The suggested analogy of

Indian Nation 470 US 226 at 247-248 (1985); *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 270-271; *R v Sparrow* (1990) 70 DLR (4th) 385, 401-404.

166 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 42.

167 For example a fee simple determinable on a special event (other than the intestate death of the tenant without heir) or a fee simple determinable upon a condition. See Megarry and Wade, *The Law of Real Property*, 5th ed (1984) at 67-76.

168 Easements represent an example.

native title is quite false. Fiction should not be piled on fiction¹⁶⁹. Thirdly, the title to land in question, being derived ultimately from statute, it is necessary to consider whether the interest claimed can be reconciled with the legislative purpose of providing for the grant of an interest in fee simple. Given the legal character of fee simple, reconciliation of such an interest with native title is impossible. This is not something ascertained over time. It is fixed at the moment of the grant of legal rights incompatible, of their nature, with the survival of native title in the same land. The one expels the possibility of the other.

The permanency of extinguishment

109 These conclusions leave only the argument of the appellant that "extinguishment" of native title rights might itself be retrievable. Thus, it was suggested, if after the grant of a fee simple interest in land the subject of native title claims, the land passed from a private owner, returned to the Crown and was restored to its essential character as unalienated Crown land, native title in the land might revive. Extinguishment, it was argued, was not forever. It could be reversed by the occurrence of legal events which restored the possibility of according recognition to native title, provided the traditional owners could establish that such native title had survived in fact in the interval. The appellants sought to make this submission attractive by acknowledging that, if a court were asked to determine whether native title interests existed in land during the currency of a grant of fee simple to a private individual, the court could deny that possibility yet accept their proposition.

110 The concept of the extinguishment of the rights in land of indigenous peoples as a result of the advancing claims to legal title of the settlers appears to have originated in the decision of the Supreme Court of the United States in *Johnson v McIntosh*¹⁷⁰. The notion found its way into the reasons of members of this Court in native title cases¹⁷¹; but without much elaboration. In support of their submissions, the appellants pointed to the need to express a principle of law appropriate to Australian conditions and legal history as, it was suggested, this Court had done in *Wik*¹⁷². They sought comfort in the fact that, in *Wik*, Toohey J had reserved as a question unnecessary for consideration "whether native title rights are ... truly extinguished or whether they are simply unenforceable while

169 *Wik* (1996) 187 CLR 1 at 243.

170 8 Wheat 543 at 586 (1823); cf *Buttz v Northern Pacific Railroad* 119 US 55 (1886); *Missouri, Kansas and Texas Railway Co v Roberts* 152 US 114 at 116-118 (1894); *United States v Santa Fe Pacific Railroad Co* 314 US 339 at 347 (1941).

171 For example *Mabo [No 2]* (1992) 175 CLR 1 at 211; *Native Title Act Case* (1995) 183 CLR 373 at 452.

172 Referring to Gummow J in *Wik* (1996) 187 CLR 1 at 184.

exclusive possession vests in the holder of the pastoral lease"¹⁷³. They pointed to Australian decisions, in courts other than this Court, which, they submitted, were consistent with co-existence of native title with fee simple interests in land in special circumstances¹⁷⁴ and revival of native title in circumstances where an inconsistent Act has been repealed¹⁷⁵. Whilst willing to concede that native title might be lost irretrievably by abandonment¹⁷⁶ or by express extinguishment by valid legislation, the appellants contested that this had happened here. Correctly, in my view, they submitted that the question was not to be decided by resort to dictionary definitions of "extinguishment". Although that word is used in the *Native Title Act*¹⁷⁷, the provisions of that Act, formulated more than a century after the grant of the fee simple interest in question in these proceedings, could not determine the legal effect which that grant had when it was originally made. Once again the appellants and their supporters invoked the authority of United States¹⁷⁸, Canadian¹⁷⁹ and New Zealand courts¹⁸⁰. The appellants also emphasised, by

173 (1996) 187 CLR 1 at 108.

174 For example *Pareroultja v Tickner* (1993) 42 FCR 32 at 44 per Lockhart J. See also *Re Toohey*; *Ex parte Stanton* (1982) 57 ALJR 73 at 75, 78; 44 ALR 94 at 97, 102; *R v Kearney*; *Ex parte Jurlama* (1984) 158 CLR 426 at 432-433.

175 For example *Eaton v Yanner*; *Ex parte Eaton* unreported, Queensland Court of Appeal, 27 February 1998 at 21-23 per Fitzgerald P.

176 cf *Mabo [No 2]* (1992) 175 CLR 1 at 60 per Brennan J.

177 See eg Preamble, ss 11, 15, 17, 23(3) and 24(1).

178 *Public Access Shoreline Hawaii v Hawai'i County Planning Commission* 903 P 2d 1246 at 1258 (1995); cf McNeil, "The Extinguishment of Native Title: The High Court and American Law", (1997) 2 *Australian Indigenous Law Reporter* 365; Cohen, "Original Indian Title", (1947) 32 *Minnesota Law Review* 28.

179 *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513; *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470. Noted without disapproval in *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 213-216.

180 *Manu Kapua v Para Haimona* [1913] AC 761 at 764; *Attorney-General v Ruritana* (1909) 29 NZLR 228 at 231.

reference to local¹⁸¹ and overseas¹⁸² authority, that if native title were to be extinguished, it would require the clearest authority of law to do so.

111 I have already pointed out that care must be observed in the use of overseas authority in this context because of the differing historical, constitutional and other circumstances and the peculiarity of the way in which recognition of native title came belatedly to be accepted by this Court as part of Australian law. I have some sympathy for the appellants' contentions. In the circumstances described in the facts pleaded in the present case (including the later acquisition of the legal estate by the Commonwealth and the effective reversion of the land in question to a kind of wasteland status in which the incidents of native title could undoubtedly be enjoyed in fact) the attractions of embracing a principle of revival of native title are strong. A rule of the common law could doubtless be formulated which permitted the "lifting" of the extinguishment for a case such as the present. Such a rule might leave private owners of land in fee simple fully protected but expose to such claims governmental landholdings of the very kinds of land in which native title might often have its most practical meaning.

112 For a number of reasons of legal authority, principle and policy, I cannot accept the proposition that the extinguishment occasioned by the grant of a fee simple interest is other than irreversible:

1. In *Wik* I explained why it was impossible to accept the "factual conflict test"¹⁸³ for resolving the suggested inconsistency between the estate or interest in the land held under Australian law and the actual exercise of surviving native title rights¹⁸⁴. No member of this Court has expounded such a test. It would be inconsistent with the very nature of the native title interest as recognised by the Court. Although the appellants denied that their concept of "extinguishment" was an attempt, illicitly, to revive a principle based on the factual use of land, this is what it amounts to. The true test propounded by this Court involves a comparison between the legal character of the interest in the land under Australian law and the native title interest in the same land¹⁸⁵. By that test there is always inconsistency where the interest in question under Australian law is one of fee simple. So fragile is native title

181 For example, *Wik* (1996) 187 CLR 1 at 125-126, 130 per Toohey J, 155, 166 per Gaudron J, 168, 184-185 per Gummow J, and 235, 247, 249 in my own reasons.

182 For example, *County of Oneida v Oneida Indian Nation* 470 US 226 at 247-248 (1985); *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 270-271.

183 (1996) 187 CLR 1 at 221.

184 (1996) 187 CLR 1 at 235.

185 *Wik* (1996) 187 CLR 1 at 221.

and so susceptible is it to extinguishment that the grant of such an interest, without more, "blows away" the native title forever¹⁸⁶.

2. The suggestion that native title might nonetheless revive in certain factual circumstances is incompatible with the explanations of the incidents of fee simple under our law. That form of title is incomprehensible except by reference to the pre-existing common law¹⁸⁷. There is nothing in *Wik* which is inconsistent with this proposition. On the contrary, it was the peculiar incidents of the pastoral leases examined in that case which led the Court to hold that they fell outside traditional land law. They were to be viewed as a creature of an Australian legislature with features distinguishing their legal character from an ordinary "lease" with a legal right to exclusive possession and reversion to the Crown. There is no such distinction in the case of a fee simple interest. Once granted, it amounts to the assertion of the sovereign rights of the grantor to establish its power in respect of the land and to exclude any claim not specifically granted by it. There may indeed be exceptions where the particular legislation envisages, expressly or by necessary implication, the co-existence of fee simple and native title rights. There is absolutely no suggestion that this was the case with the *Northern Territory Land Act* 1872 (SA). If it be relevant, any such suggestion was expressly excluded by the operation of the *Lands Acquisition Act* 1906 (Cth)¹⁸⁸ under which the subject land later became vested in the Commonwealth.
3. In effect, what the appellants are seeking, once extinguishment is acknowledged as the legal consequence of the conferral of an interest in fee simple, is the affirmative provision of new rights arising out of circumstances which occurred after the initial grant. The conferral of such new rights by common law would be completely incompatible with the notion that native title rights have their origin in Aboriginal custom: not in the Australian legal system. There is a difference in principle between the recognition of the native title of the indigenous people of Australia which pre-dated the sovereignty of the Crown and "revival" of a right which has, in law, earlier been extinguished. To be enforceable under Australian common law, native title must adjust to the incidents of that law¹⁸⁹. Where one of those incidents is extinguishment, the native title in question cannot be revived. At least, it

¹⁸⁶ cf *Mabo [No 2]* (1992) 175 CLR 1 at 69-70; *Native Title Act Case* (1995) 183 CLR 373 at 439.

¹⁸⁷ *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682-683, 686; *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 696.

¹⁸⁸ s 16(1).

¹⁸⁹ *Wik* (1996) 187 CLR 1 at 237-238.

would require legislation to achieve that result and to confer the "new rights" propounded by the appellants.

4. Although this result will be disappointing to the appellants, and in some ways understandably so, it follows from Australia's legal history, authority and principle. It is also supported by strong practical considerations. Were the position otherwise, a serious element of uncertainty would be introduced into a body of law which should be as clear and certain as the law can make it¹⁹⁰. Far from giving any authority for the notion of contingent extinguishment and subsequent revival of native title rights, the law governing the legal incidents of fee simple is clear. The absolute nature of fee simple is a central feature of Australia's land system. It is not susceptible to alteration by the Court as a re-expression of the common law. Even if it were, there are countless practical reasons why the Court would stay its hand on such a matter.

Conclusion and orders

- 113 The result is that, in the undisputed facts, the Northern Territory demonstrated the "fatal flaw" which it asserted in the appellants' claim for the relief which they sought before the primary judge. No additional evidence could have altered the position or added substance to the appellants' legal claims¹⁹¹. The judge was therefore entitled to make the orders which he did. Accordingly, to dispose of the appeal, I agree in the orders proposed by the other members of the Court.

190 *Wik* (1996) 187 CLR 1 at 221.

191 cf *E (A Minor) v Dorset County Council* [1995] 2 AC 633 at 693-694; cf *Wik* (1996) 187 CLR 1 at 212.