

HIGH COURT OF AUSTRALIA

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

MURRANDOO BULANYI MUNGABAYI YANNER APPELLANT

AND

GRAEME JOHN EATON RESPONDENT

Yanner v Eaton [1999] HCA 53
7 October 1999
B52/1998

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 27 February 1998; and in lieu thereof, order that the order nisi of Williams J dated 28 November 1996 be discharged.*
3. *Order that each of the Attorney-General of the Commonwealth, the Attorney-General of the State of Western Australia, the Attorney-General of the State of South Australia and the Attorney-General of the Northern Territory pay to the appellant the additional costs incurred by him by reason of the intervention of that Attorney-General, such additional costs to be taxed.*
4. *The question of costs in respect of the proceedings in this Court and in the Court of Appeal of the Supreme Court of Queensland be reserved.*
5. *The appellant is to have leave to file and serve, within 14 days of the date of this order, written submissions on the reserved question of costs.*
6. *The respondent is to have leave to file and serve, within a further 14 days, written submissions on the reserved question of costs.*

On appeal from the Supreme Court of Queensland

Representation:

D F Jackson QC with A Vasta QC for the appellant (instructed by Hogan & Besley)

G J Gibson QC with G J Koppenol and A M Preston for the respondent (instructed by Crown Solicitor for Queensland)

Interveners:

D M J Bennett QC, Solicitor-General for the Commonwealth with H C Burmester QC and K L Eastman intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

T I Pauling QC, Solicitor-General for the Northern Territory with A D Rorrison intervening on behalf of the Attorney-General of the Northern Territory (instructed by the Solicitor for the Northern Territory)

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

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

W Sofronoff QC with G C Newton intervening on behalf of the Cape York Land Council (Aboriginal Corporation) (instructed by Ebsworth & Ebsworth)

J Basten QC intervening on behalf of Walden & Ors on behalf of the Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples and intervening on behalf of the Northern Land Council (instructed by Andrew Chalk Associates and B Miden, Northern Land Council)

M L Barker QC with W J Hammond intervening on behalf of Ben Ward & Ors on behalf of the Miriuwung and Gajerrong People (instructed by the Aboriginal Legal Service of Western Australia (Inc))

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

CATCHWORDS

Yanner v Eaton

Aboriginals – Native title – Right to hunt wild animals – Regulation by State fauna protection legislation – Whether inconsistent with continued existence of right – Whether right extinguished prior to preservation by *Native Title Act* 1993 (Cth).

Constitutional law – Inconsistency between Commonwealth and State laws – Regulation of exercise of native title right by State fauna protection legislation – Whether inconsistent with *Native Title Act* 1993 (Cth) – Operation of *Racial Discrimination Act* 1975 (Cth).

Animals – Wild animals – Property vested in the Crown – Whether constitutes absolute or full beneficial ownership.

Property – Nature of proprietary interests – Relationship between owner and subject matter.

Statutes – Construction – Meaning of "Crown" – Operation of State fauna protection legislation vesting "property" in the Crown.

Crown – Immunity – Queensland – Extent of immunity conferred by State fauna protection legislation.

Words and phrases – "property" – "Crown" – "vesting" – "wild by nature".

The Constitution, s 109.

Fauna Conservation Act 1974 (Q), ss 7, 24, 24A, 25, 27, 30, 54, 60, 67, 71(2), 83(3), 84.

Native Title Act 1993 (Cth), ss 211, 223.

1 GLEESON CJ, GAUDRON, KIRBY AND HAYNE JJ. The appellant is a member of the Gunnamulla clan of the Gangalidda tribe¹ of Aboriginal Australians. Between 31 October and 1 December 1994 he used a traditional form of harpoon to catch two juvenile estuarine crocodiles in Cliffdale Creek in the Gulf of Carpentaria area of Queensland. He and other members of his clan ate some of the crocodile meat; he froze the rest of the meat and the skins of the crocodiles and kept them at his home.

2 In 1994, the *Fauna Conservation Act* 1974 (Q) ("the Fauna Act") provided, by s 54(1)(a), that:

"A person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act."

(The Fauna Act was repealed and replaced by the *Nature Conservation Act* 1992 (Q) which came into operation on 19 December 1994. It was, however, common ground, and clearly correct, that these proceedings fell to be decided in accordance with the Fauna Act.)

3 The appellant was not the holder of any licence, permit, certificate or other authority granted and issued under the Fauna Act. He was charged in the Magistrates Court of Queensland with one count of taking fauna contrary to the Fauna Act. The appellant contended, and the Magistrate accepted, that s 211 of the *Native Title Act* 1993 (Cth) ("the Native Title Act") applied. That section provided at the relevant time:

"(1) Subsection (2) applies if:

- (a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and
- (b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and

1 The name of the tribe is sometimes spelled "Gungaletta". The spelling "Gangalidda" was given by the appellant in his interview with police.

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- (c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.
- (2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:
 - (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
 - (b) in exercise or enjoyment of their native title rights and interests.
- (3) Each of the following is a separate *class of activity*:
 - (a) hunting;
 - (b) fishing;
 - (c) gathering;
 - (d) a cultural or spiritual activity;
 - (e) any other kind of activity prescribed for the purpose of this paragraph."

4

The Magistrate found that the appellant's clan "have a connection with the area of land from which the crocodiles were taken" and that this connection had existed "before the common law came into being in the colony of Queensland in 1823 and ... thereafter continued". He further found that it was a traditional custom of the clan to hunt juvenile crocodiles for food and that the evidence suggested that the taking of juvenile rather than adult crocodiles had "tribal totemic significance and [was based on] spiritual belief". The Magistrate found the appellant not guilty and dismissed the charge.

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5 In effect, then, the Magistrate found that:

- (a) the exercise or enjoyment of native title rights and interests in relation to the land or waters where the crocodiles were taken consisted of or included hunting or fishing²;
- (b) a law of the State (the Fauna Act) prohibited or restricted persons from carrying on those classes of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the Fauna Act³;
- (c) the Fauna Act was not one that conferred rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders⁴; and accordingly
- (d) the Fauna Act did not prohibit or restrict the native title holders from carrying on those classes of activity (hunting and fishing) or from gaining access to the land or waters for the purpose of satisfying their personal, domestic or non-commercial communal needs and in exercise or enjoyment of their native title rights and interests⁵.

6 The informant (a police officer) applied for an order to review the Magistrate's decision⁶ and the order nisi for review was made returnable before the Court of Appeal of Queensland. The Court of Appeal, by majority, made the order nisi absolute, set aside the order of the Magistrates Court dismissing the complaint, and remitted the proceedings to the Magistrates Court for the matter to proceed according to law⁷. By special leave the appellant appeals to this Court.

7 The appellant contended that the Magistrate was right to dismiss the charge because in taking the crocodiles the appellant was exercising or enjoying his native

2 Native Title Act, s 211(1)(a) and (3)(a) and (b).

3 Native Title Act, s 211(1)(b).

4 Native Title Act, s 211(1)(c).

5 Native Title Act, s 211(2).

6 *Justices Act* 1886 (Q), s 209.

7 *Eaton v Yanner; Ex parte Eaton* unreported, Court of Appeal of Queensland, 27 February 1998.

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title rights and interests; these rights and interests were preserved by the Native Title Act. It followed (so the argument went) that the Fauna Act, to the extent to which it prohibited or restricted the taking of crocodiles in the exercise of those rights and interests for the purpose of satisfying personal, domestic or non-commercial communal needs, was invalidated by s 109 of the Constitution.

8 The respondent contended that any native title right or interest to hunt crocodiles in Queensland which the appellant may have enjoyed had been extinguished, prior to the commencement of the Native Title Act, by the enactment of s 7(1) of the Fauna Act which provided that:

"All fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority."

It followed, so the respondent submitted, that the Native Title Act provisions preserving native title rights and interests to hunt and fish had no relevant operation in this case, because the native title rights and interests upon which the appellant relied had been extinguished before the Native Title Act was enacted.

9 Earlier forms of Queensland fauna legislation had provided expressly that those Acts (with some presently irrelevant exceptions) did not apply to "[a]ny aboriginal killing any native animal for his own food"⁸. Unlike these earlier Acts, however, the Fauna Act did not deal expressly with Aboriginals taking native animals or birds for food. That being so, much of the argument in this Court concerned what effect the Fauna Act's vesting of "property" in some fauna in the Crown had on the native title rights and interests asserted by the appellant.

8 *Native Animals Protection Act* 1906 (Q), s 9(c). See also the *Animals and Birds Act* 1921 (Q), s 17(b) (which extended the exception to native birds as well as animals), the *Fauna Protection Act* 1937 (Q), s 25, and the *Fauna Conservation Act* 1952 (Q), s 78 (which further modified the exception by limiting its operation to Aboriginals not in employment on terms that included the provision of food by the employer).

The Fauna Act

10 The meaning of s 7(1) can be identified only by construing it in the light of the whole Fauna Act. It is necessary, therefore, to refer to a number of other provisions, but before doing so it is as well to emphasise that s 7(1) did not make *all* fauna "the property of the Crown and under the control of the Fauna Authority"⁹. What the sub-section described as "fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna" was excepted.

11 "Fauna" was defined by the Fauna Act (in effect) as any bird or mammal indigenous to Australia or declared by Order in Council to be fauna, and any animal or member of a species of animal declared by Order in Council to be fauna¹⁰. "Fauna" included the young, the egg, the carcass, skin or nest of the animal or member of species but did not include any processed products except those declared by Order in Council¹¹. "Bird" and "mammal" were defined respectively to mean a bird or mammal, "wild by nature whether native to a State or Territory of the Commonwealth, migratory or introduced, in captivity, bred in captivity or tamed"¹². Estuarine crocodiles were declared by Order in Council made on 29 August 1974 to be fauna for the purposes of the Act.

12 The Fauna Act divided fauna into four classes: "permanently protected fauna", "protected fauna", "non-protected fauna" and "prohibited fauna"¹³. Fauna other than permanently protected fauna, non-protected fauna and prohibited fauna was defined as protected fauna for the purposes of the Act¹⁴. Subject to declaration of an open season, protected fauna could lawfully be taken or kept only in certain limited circumstances: if it was orphaned, injured, sick or emaciated¹⁵; or if it was

9 The Fauna Authority was defined by s 5 as the Minister for the time being administering the Fauna Act "and subject to the Minister" the Director of National Parks and Wildlife appointed under the *National Parks and Wildlife Act* 1975 (Q).

10 s 5.

11 s 5.

12 s 5.

13 s 6.

14 s 22.

15 s 24.

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causing or likely to cause damage or injury¹⁶. In addition, a snake or estuarine crocodile might be killed if it had caused, was causing or was likely to cause injury to a person¹⁷. Non-protected fauna might be taken at any time¹⁸. An open season might be declared in respect of protected fauna and in that case permits could be issued permitting the taking of that fauna¹⁹. Additionally, the Director of National Parks and Wildlife was empowered to issue permits to fauna dealers to buy, keep, sell or otherwise dispose of protected fauna during a close season²⁰.

- 13 The terms of s 54(1)(a) prohibiting the taking or keeping of fauna without a licence are set out above. The apparent generality of that prohibition must be understood in the light of not only its reference to the holder of a licence, permit, certificate or other authority granted and issued under the Fauna Act, but also the further exemptions created by s 54(1)(b). That paragraph exempted (among other things) the keeping of protected fauna that was taken otherwise than in contravention of the Act during an open season²¹ and the taking of fauna at a time and place when and where it is non-protected fauna²². The penalty for contravening s 54(1)(a) was a fine or imprisonment (or both) and the offender was liable "in any case to an additional penalty not exceeding twice the royalty on each fauna in respect of which the offence is committed"²³.

16 s 25.

17 s 24A.

18 s 27(1).

19 Fauna Act, Pt VI.

20 s 60.

21 s 54(1)(b)(i).

22 s 54(1)(b)(ii).

23 s 54(2).

7.

14 The reference to royalty is significant. Section 67 of the Fauna Act provided:

"(1) Subject to subsection (4), royalty at the rates prescribed shall be payable to the Crown on prescribed fauna.

(2) Notwithstanding this Act or any other Act or law, payment of royalty on fauna pursuant to this Act does not transfer property in that fauna from the Crown.

(3) Rates of royalty may vary in respect of different species of fauna.

(4) The regulations may exempt from the payment of royalty species of fauna specified therein in cases where that fauna is taken otherwise than in contravention of this Act."

Fauna protection legislation in Queensland had contained generally similar royalty provisions for many years²⁴. They were introduced in 1924 to take the benefit of what was seen at the time to be a valuable and developing fur trade²⁵.

15 The obligation to pay royalty under the Fauna Act was supported by several other provisions of that Act including s 69 which made it an offence to fail to pay royalty, s 70 which provided for recovery by summary proceeding under the *Justices Act* 1886 (Q) or by action "as for a debt due to the Crown", and s 71 which permitted a fauna officer to detain fauna in respect of which royalty payable was not paid. Section 71(2) provided that:

"Fauna so seized and detained shall, without further or other authority, be forfeited to Her Majesty, unless all royalty payable thereon is paid within one month of its seizure and detention."

Similar provision was made by s 83 in respect of fauna, appliances or other things seized under the Act. Section 83(3) provided that:

"Notwithstanding this Act, the Minister may order that any fauna, appliance or other thing seized under this Act be forfeited to Her Majesty

24 *Animals and Birds Act* 1921 (Q), s 8B (inserted by s 2(4) of the *Animals and Birds Act Amendment Act* 1924 (Q)); *Fauna Protection Act* 1937 (Q), s 16; *Fauna Conservation Act* 1952 (Q), s 56.

25 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 September 1924 at 824-826.

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though proceedings have not been taken for, nor any person convicted of, an offence against this Act in respect thereof."

No doubt ss 71(2) and 83(3) must be read in the light of s 84 which provided that:

"The provisions of this Act with respect to the seizure, detention or forfeiture of fauna shall not prejudice or affect in any way the rights of the Crown with respect to fauna that by virtue of section 7 is the property of the Crown, and those rights may be exercised at any time."

- 16 What, then, is the meaning to be given to s 7(1) and its provision that some fauna is the property of the Crown and under the control of the Fauna Authority? Did it, as the respondent submitted, give rights to the Crown in respect of fauna that were inconsistent with the rights and interests upon which the appellant relied?

"Property"

- 17 The word "property" is often used to refer to something that belongs to another. But in the Fauna Act, as elsewhere in the law, "property" does not refer to a thing; it is a description of a legal relationship with a thing²⁶. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of "property" may be elusive. Usually it is treated as a "bundle of rights"²⁷. But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said²⁸, that "the ultimate fact about property is that it does not really exist: it is mere illusion". Considering whether, or to what extent, there can be property in knowledge or information or property in human tissue may illustrate some of the difficulties in deciding what is meant by "property" in a subject matter²⁹. So too, identifying the apparent circularity of reasoning from the availability of specific performance in protection of property rights in a chattel to the conclusion that the rights protected are

26 Bentham, *An Introduction to the Principles of Morals and Legislation*, ed by W Harrison (1948) at 337, n 1; K Gray and S F Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, (1998) 15 at 15.

27 See, for example, *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285 per Rich J.

28 Gray, "Property in Thin Air", (1991) 50 *Cambridge Law Journal* 252 at 252.

29 See, for example, Kohler and Palmer, "Information as Property" and Magnusson, "Proprietary Rights in Human Tissue", in Palmer and McKendrick (eds), *Interests in Goods*, 2nd ed (1998) 3 and 25 respectively.

proprietary may illustrate some of the limits to the use of "property" as an analytical tool³⁰. No doubt the examples could be multiplied.

18 Nevertheless, as Professor Gray also says³¹, "An extensive frame of reference is created by the notion that 'property' consists primarily in control over access. Much of our false thinking about property stems from the residual perception that 'property' is itself a thing or resource rather than a legally endorsed concentration of power over things and resources³²."

19 "Property" is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not "a monolithic notion of standard content and invariable intensity"³³. That is why, in the context of a testator's will, "property" has been said to be "the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have"³⁴.

20 Because "property" is a comprehensive term it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter. To say that person A has property in item B invites the question what is the interest that A has in B? The statement that A has property in B will usually provoke further questions of classification. Is the interest real or personal? Is the item tangible or intangible? Is the interest legal or equitable? For present purposes, however, the important question is what interest in fauna was vested in

30 See, for example, *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 34 per Windeyer J.

31 Gray, "Property in Thin Air", (1991) 50 *Cambridge Law Journal* 252 at 299.

32 Jeremy Bentham recognised this long ago. Bentham pointed out that "in common speech in the phrase 'the object of a man's property', the words 'the object of' are commonly left out; and by an ellipsis, which, violent as it is, is now become more familiar than the phrase at length, they have made that part of it which consists of the words 'a man's property' perform the office of the whole". See *An Introduction to the Principles of Morals and Legislation*, ed by W Harrison (1948) at 337, n 1.

33 K Gray and S F Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, (1998) 15 at 16.

34 *Jones v Skinner* (1835) 5 LJ Ch (NS) 87 at 90 per Lord Langdale MR. See also *Commissioner of Stamp Duties (Q) v Donaldson* (1927) 39 CLR 539 at 550 per Isaacs ACJ; *In re Prater*; *Desinge v Beare* (1888) 37 Ch D 481 at 483 per Lord Halsbury LC, 486 per Cotton LJ.

the Crown when the Fauna Act provided that some fauna was "the property of the Crown and under the control of the Fauna Authority"?

21 The respondent's submission (which the Commonwealth supported) was that s 7(1) of the Fauna Act gave full beneficial, or absolute, ownership of the fauna to the Crown. In part this submission was founded on the dictum noted earlier, that "property" is "the most comprehensive of all the terms which can be used"³⁵. But the very fact that the word is so comprehensive presents the problem, not the answer to it. "Property" comprehends a wide variety of different forms of interests; its use in the Act does not, without more, signify what form of interest is created.

22 There are several reasons to conclude that the "property" conferred on the Crown is not accurately described as "full beneficial, or absolute, ownership". First, there is the difficulty in identifying what fauna is owned by the Crown. Is the Fauna Act to be read as purporting to deal with the ownership of all fauna that is located within the territorial boundaries of the State but only for so long as the fauna is within those boundaries, or does it deal with all fauna that has at any time been located within those boundaries? That is, does the Fauna Act purport to give the Crown ownership of migratory birds only as they pass through Queensland, or does it purport to give ownership to the Crown of every bird that has ever crossed the Queensland border?

23 Secondly, assuming that the subject matter of the asserted ownership could be identified or some suitable criterion of identification could be determined, what exactly is meant by saying that the Crown has full beneficial, or absolute, ownership of a wild bird or animal? The respondent (and the Commonwealth) sought to equate the Crown's property in fauna with an individual's ownership of a domestic animal. That is, it was sought to attribute to the Crown what Pollock called "the entirety of the powers of use and disposal allowed by law"³⁶.

24 At common law, wild animals were the subject of only the most limited property rights. At common law there could be no "absolute property", but only "qualified property" in fire, light, air, water and wild animals³⁷. An action for trespass or conversion would lie against a person taking wild animals that had been

35 *Jones v Skinner* (1835) 5 LJ Ch (NS) 87 at 90 per Lord Langdale MR.

36 Pollock, *A First Book of Jurisprudence*, 4th ed (1918) at 178.

37 Blackstone, *Commentaries*, vol II at 14, 391, 395.

tamed³⁸, or a person taking young wild animals born on the land and not yet old enough to fly or run away³⁹, and a land owner had the exclusive right to hunt, take and kill wild animals on his own land⁴⁰. Otherwise no person had property in a wild animal.

25 "Ownership" connotes a legal right to have and to dispose of possession and enjoyment of the subject matter. But the subject matter dealt with by the Fauna Act is, with very limited exceptions, intended by that Act always to remain outside the possession of, and beyond disposition by, humans. As Holmes J said in *Missouri v Holland*⁴¹: "Wild birds are not in the possession of anyone; and possession is the beginning of ownership."⁴²

26 Thirdly, there are several aspects of the Fauna Act which tend to suggest that the property in fauna conferred on the Crown may not easily be equated with the property an individual may have in a domestic animal. The property rights of the Crown would come and go according to the operation of the exception contained in s 7(1) of fauna taken or kept "otherwise than in contravention of this Act during an open season with respect to that fauna". As open seasons were declared and fauna taken, what otherwise was the property of the Crown, ceased to be. Next there are the references in ss 71(2) and 83(3) to forfeiture of fauna to the Crown. Even accepting that s 84 says that these sections shall not prejudice or affect the rights of the Crown conferred by s 7, why were ss 71(2) and 83(3) necessary if the Crown owned the fauna? Then there are the provisions of s 7(2) that "[l]iability at law shall not attach to the Crown by reason only of the vesting of fauna in the Crown pursuant to this section". The Crown's property is property with no responsibility. None of these aspects of the Fauna Act concludes the question what is meant by "property of the Crown", but each tends to suggest that it is an unusual kind of property and is less than full beneficial, or absolute, ownership.

38 *Case of Swans* (1592) 7 Co Rep 15b at 17b [77 ER 435 at 438]; *Blades v Higgs* (1865) 11 HL Cas 621 at 638 [11 ER 1474 at 1481].

39 *Case of Swans* (1592) 7 Co Rep 15b at 17b [77 ER 435 at 438].

40 *Blades v Higgs* (1865) 11 HL Cas 621 at 631 [11 ER 1474 at 1478].

41 252 US 416 at 434 (1920).

42 See also *Geer v Connecticut* 161 US 519 at 538-539, 541-542 (1896) per Field J, 543-544 per Harlan J; *Toomer v Witsell* 334 US 385 (1948); *Baldwin v Montana Fish and Game Commission* 436 US 371 (1978); *Hughes v Oklahoma* 441 US 322 (1979).

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- 27 Fourthly, it is necessary to consider why property in some fauna is vested in the Crown. Provisions vesting property in fauna in the Crown were introduced into Queensland legislation at the same time as provisions imposing a royalty on the skins of animals or birds taken or killed in Queensland⁴³. A "royalty" is a fee exacted by someone having property in a resource from someone who exploits that resource. As was pointed out in *Stanton v Federal Commissioner of Taxation*⁴⁴:

"... the modern applications of the term [royalty] seem to fall under two heads, namely the payments which the grantees of monopolies such as patents and copyrights receive under licences and payments which the owner of the soil obtains in respect of the taking of some special thing forming part of it or attached to it which he suffers to be taken."

That being so, the drafter of the early Queensland fauna legislation may well have seen it as desirable (if not positively essential) to provide for the vesting of some property in fauna in the Crown as a necessary step in creating a royalty system. Further, the statutory vesting of property in fauna in the Crown may also owe much to a perceived need to differentiate the levy imposed by the successive Queensland fauna statutes from an excise. For that reason it may well have been thought important to make the levy as similar as possible not only to traditional royalties recognised in Australia and imposed by a proprietor for taking minerals or timber from land, but also to some other rights (such as warren and piscary) which never made the journey from England to Australia.

- 28 In light of all these considerations, the statutory vesting of "property" in the Crown by the successive Queensland fauna Acts can be seen to be nothing more than "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource"⁴⁵. So much was acknowledged in the second reading speech on the Bill which first vested property in fauna in the Crown. The Minister said⁴⁶:

"It [the fur industry] is an industry that really belongs to the people, and although the Bill, amongst other things, makes it quite clear that the native

43 *Animals and Birds Act* 1921 (Q), s 8B (inserted by the *Animals and Birds Act Amendment Act* 1924 (Q), s 2(4)).

44 (1955) 92 CLR 630 at 641 per Dixon CJ, Williams, Webb, Fullagar and Kitto JJ.

45 *Toomer v Witsell* 334 US 385 at 402 (1948) per Vinson CJ (footnote omitted).

46 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 September 1924 at 825.

animals of the State belong to the people of the State, I do not think there is any doubt in the minds of any one regarding that question already. The native animals belong to the people in just the same way as the timber and the minerals belong to the people, and they cannot be sold without permission."

- 29 Roscoe Pound explained why wild animals and other things not the subject of private ownership are spoken of as being publicly owned. He said⁴⁷:

"We are also tending to limit the idea of discovery and occupation by making *res nullius* (eg, wild game) into *res publicae* and to justify a more stringent regulation of individual use of *res communes* (eg, of the use of running water for irrigation or for power) by declaring that they are the property of the state or are 'owned by the state in trust for the people.' It should be said, however, that while in form our courts and legislatures seem thus to have reduced everything but the air and the high seas to ownership, in fact the so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*. The state as a corporation does not own a river as it owns the furniture in the state house. *It does not own wild game as it owns the cash in the vaults of the treasury.* What is meant is that conservation of important social resources requires regulation of the use of *res communes* to eliminate friction and prevent waste, and requires limitation of the times when, places where, and persons by whom *res nullius* may be acquired in order to prevent their extermination. *Our modern way of putting it is only an incident of the nineteenth-century dogma that everything must be owned.*" (Emphasis added)

- 30 The "property" which the Fauna Act and its predecessors vested in the Crown was therefore no more than the aggregate of the various rights of control by the Executive that the legislation created. So far as now relevant those were rights to limit what fauna might be taken and how it might be taken⁴⁸, rights to possession of fauna that had been reduced to possession⁴⁹, and rights to receive royalty in respect of fauna that was taken⁵⁰ (all coupled with, or supported by, a prohibition against taking or keeping fauna except in accordance with the Act⁵¹). Those rights

47 Pound, *An Introduction to the Philosophy of Law* (rev ed) (1954) at 111.

48 ss 24, 24A, 25, 27, 30, 60.

49 ss 71(2), 83(3).

50 s 67.

51 s 54(1)(a).

are less than the rights of full beneficial, or absolute, ownership. Taken as a whole the effect of the Fauna Act was to establish a regime forbidding the taking or keeping of fauna except pursuant to licence granted by or under the Act.

- 31 The respondent expressly disclaimed a contention that the enactment of legislation forbidding the taking or keeping of fauna except pursuant to licence would be sufficient to extinguish the rights and interests relied on by the appellant. This concession was rightly made and it follows, therefore, from what we have said about the meaning and effect of the Fauna Act (and, in particular, the vesting of property in some fauna in the Crown) that the Act did not extinguish those rights and interests. It is as well, however, to examine why the respondent's concession was right. That examination must begin from a consideration of what is meant by native title rights and interests.

Native title rights and interests

- 32 Section 223 of the Native Title Act provides (in part):

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

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

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

- 33 The hunting and fishing rights and interests upon which the appellant relied (and which the Magistrate found to exist) were rights and interests "possessed under the traditional laws acknowledged, and the traditional customs observed", by the clan and tribe of which the appellant was a member⁵². The Magistrate found that by those laws and customs, the appellant's clan and tribe had a connection with

⁵² Native Title Act, s 223(1)(a).

the land and waters where the crocodiles were taken⁵³. At least until the passing of the Fauna Act those rights and interests were recognised by the common law of Australia⁵⁴.

34 The respondent's contention was that the Fauna Act "extinguished" these rights and interests. This led to debate about what was referred to as the "partial extinguishment of native title" and what was meant by that term. It is unnecessary, however, to examine that debate in this case.

35 It is clear that native title in land is extinguished by a grant in fee simple of that land⁵⁵. As was said in the joint judgment in *Fejo v Northern Territory*⁵⁶ "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". That is, native title is extinguished by the creation of rights that are inconsistent with the native title holders continuing to hold their rights and interests. The extinguishment of such rights must, by conventional theory, be clearly established⁵⁷.

36 The critical contention of the respondent was that the Fauna Act created a legal regime that was inconsistent with native title holders in Queensland (and, in particular, the group of which the appellant is a member) continuing to hold one of the rights and interests (the right and interest in hunting and fishing) that made up the native title the Magistrate found to exist. That inconsistency was said to lie

53 Native Title Act, s 223(1)(b).

54 Native Title Act, s 223(1)(c); *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

55 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 69 per Brennan J, 110 per Deane and Gaudron JJ; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 439 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84-85 per Brennan CJ; *Fejo v Northern Territory* (1998) 72 ALJR 1442 at 1451 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, 1468 per Kirby J; 156 ALR 721 at 736, 759.

56 (1998) 72 ALJR 1442 at 1451; 156 ALR 721 at 736. See also (1998) 72 ALJR 1442 at 1466 per Kirby J; 156 ALR 721 at 756-757.

57 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 85 per Brennan CJ, 125 per Toohey J, 146-147 per Gaudron J, 185 per Gummow J, 247 per Kirby J.

in the creation of property rights in the Crown that were inconsistent with the continued existence of the native title rights and interests.

37 It is unnecessary to decide whether the creation of property rights of the kind that the respondent contended had been created by the Fauna Act would be inconsistent with the continued existence of native title rights. It is sufficient to say that *regulating* the way in which rights and interests may be exercised is not inconsistent with their continued existence. Indeed, regulating the way in which a right may be exercised presupposes that the right exists. No doubt, of course, regulation may shade into prohibition and the line between the two may be difficult to discern⁵⁸. Similarly, it may not always be easy to say whether the creation of statutory rights or interests before the enactment of the *Racial Discrimination Act* 1975 (Cth) and the Native Title Act was consistent with the continued existence of native title rights and interests. (The *Racial Discrimination Act* and the Native Title Act will, of course, have to be considered where the question concerns the effect of steps taken after the enactment of those Acts.) But in deciding whether an alleged inconsistency is made out, it will usually be necessary to keep well in mind that native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land. As Brennan J said in *R v Toohey; Ex parte Meneling Station Pty Ltd*⁵⁹, "Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights" but "[t]raditional Aboriginal land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aboriginals or Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary right with respect to it."

38 Native title rights and interests must be understood as what has been called "a perception of socially constituted fact" as well as "comprising various assortments of artificially defined jural right"⁶⁰. And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.

58 *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 188-190 per Isaacs J, 211-212 per Higgins J; *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 148-149 per Starke J, 155-156 per Dixon J; *Brunswick Corporation v Stewart* (1941) 65 CLR 88 at 93-94 per Rich ACJ, 95 per Starke J; *Municipal Corporation of City of Toronto v Virgo* [1896] AC 88 at 93-94.

59 (1982) 158 CLR 327 at 358.

60 K Gray and S F Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, (1998) 15 at 27.

Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, "You may not hunt or fish without a permit", does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.

39 Not only did the respondent not contend that such a law severed that connection, s 211 of the Native Title Act assumes that it does not. Section 211 provides that a law which "prohibits or restricts persons" from hunting or fishing "other than in accordance with a licence, permit or other instrument granted or issued to them under the law", does not prohibit or restrict the pursuit of that activity in certain circumstances where native title exists. By doing so, the section necessarily assumes that a conditional prohibition of the kind described does not affect the existence of the native title rights and interests in relation to which the activity is pursued.

40 The Fauna Act did not extinguish the rights and interests upon which the appellant relied. Accordingly, by operation of s 211(2) of the Native Title Act and s 109 of the Constitution, the Fauna Act did not prohibit or restrict the appellant, as a native title holder, from hunting or fishing for the crocodiles he took for the purpose of satisfying personal, domestic or non-commercial communal needs. The Magistrate was right to dismiss the information.

41 For completeness it is as well to note two further matters. First, although the respondent referred to the earlier decision of this Court in *Walden v Hensler*⁶¹ it must be recalled that the issues discussed in that case were radically different from those that arise in the present, not least because they arose before the passing of the Native Title Act. Secondly, a number of submissions were made in the course of argument that touched upon questions much broader than those that must be decided in this proceeding. It is neither necessary nor desirable to express any view about them when this case can be decided on the narrow question whether the Fauna Act should be given the construction for which the respondent and the Commonwealth contended. It should not be given that construction.

42 The appeal should be allowed, the orders of the Court of Appeal of Queensland set aside and in lieu it should be ordered that the order nisi be

61 (1987) 163 CLR 561.

Gleeson CJ
Gaudron J
Kirby J
Hayne J

18.

discharged. For the reasons given by Gummow J, costs should be disposed of as his Honour has proposed.

43 McHUGH J. The critical question in this case is a simple one. It is whether, by force of the *Fauna Conservation Act* 1974 (Q) ("the Act"), property in all fauna in Queensland, present or future, became or becomes vested in the Crown after the commencement of the Act. If that is the effect of the Act, the two estuarine crocodiles which the appellant killed were the property of the Crown and he had no right to kill them by reason of the *Native Title Act* 1993 (Cth) or otherwise.

44 Whether the property was vested in the Crown turns on the construction of s 7 of the Act which, at the time of its enactment, relevantly provided:

"(1) All fauna, save fauna taken or kept during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority.

(2) Liability at law shall not attach to the Crown by reason only of the vesting of fauna in the Crown pursuant to this section."

45 The Act effectively defined⁶² "fauna" to mean any bird or mammal indigenous to Australia or any animal which was declared by Order in Council to be fauna. The Act defined⁶³ "bird" and "mammal" to mean a bird or mammal "wild by nature whether native to a State or Territory of the Commonwealth, migratory or introduced, in captivity, bred in captivity or tamed". An Order in Council made on 29 August 1974 declared estuarine crocodiles to be fauna for the purposes of the Act.

46 In its natural and ordinary meaning, s 7 vests in the Crown, and takes away from everyone else, the right to deal with fauna as defined by the Act. Other provisions of the Act give a right to apply for a licence to take fauna. But s 7 destroyed all existing rights to take fauna. At common law, the only right of property in wild animals was "the exclusive right to catch, kill and appropriate such animals which is sometimes called by the law a reduction of them into possession."⁶⁴ That right arose from the possession of land on which the animals happened to be or from a Crown grant to enter another's land for the purpose of catching, killing or appropriating wild game. No doubt in Australia, the existence of common law native title rights meant that Aboriginals had similar rights over fauna.

47 Section 7 of the Act reverses the common law rules and vests all rights of catching, killing and appropriating fauna in Queensland in the Crown. It therefore gives to

62 s 5.

63 s 5.

64 *Blades v Higgs* (1865) 11 HL Cas 621 at 631 [11 ER 1474 at 1478].

the Crown the sole right of catching, killing and appropriating fauna in Queensland together with the right to exclude every other person from catching, killing and appropriating that fauna. If the term "property" has any recognisable meaning in the Act, it must at least have conferred those rights on the Crown and taken them away from every other person once the Act was proclaimed.

- 48 One aspect of the history of fauna legislation in Queensland provides convincing evidence that the intention of the Act was to take away from others all existing rights to take fauna and vest those rights in the Crown. Earlier fauna legislation in Queensland had expressly provided that that legislation did not apply to "[a]ny aboriginal killing any native animal for his own food."⁶⁵ The Act contains no such immunity for Aboriginal people. In *Walden v Hensler*⁶⁶, Brennan J had no doubt that the effect of the Act was to destroy the rights of the Aboriginal people to take fauna. His Honour said:

"But the Act changed the law. It vested the property in all fauna in the Crown (s 7) and prohibited the taking or keeping of fauna without a licence, etc. The Act eliminated any right which Aborigines or others might have acquired lawfully to take and keep 'fauna' as defined in the Act, and any entitlement which Aborigines might have enjoyed at common law to take and keep fauna (assuming that such an entitlement had survived the alienation by the Crown of land over which Aborigines had traditionally hunted)."

- 49 Undoubtedly, s 7 does more than give to the Crown the exclusive right to kill, take or appropriate fauna and to take away from others any pre-existing right to do those things. The section gives to the Crown every right, power, privilege and benefit that does or will exist in respect of fauna together with the right, subject to the Act, to exclude every other person from enjoying those rights, powers, privileges and benefits. That is the ordinary meaning of property⁶⁷, although, of

65 *Native Animals Protection Act* 1906 (Q), s 9(c). The *Animals and Birds Act* 1921 (Q), s 17(b), the *Fauna Protection Act* 1937 (Q), s 25 and the *Fauna Conservation Act* 1952 (Q), s 78 were to similar effect.

66 (1987) 163 CLR 561 at 566-567.

67 In *The Common Law* (1882), Oliver Wendell Holmes Jr said (at 215):

"When we say that a man owns a thing, we affirm directly that he has the benefit of the consequences attached to a certain group of facts, and, by implication, that the facts are true of him. The important thing to grasp is, that each of these legal compounds, possession, property, and contract, is to be analyzed into fact and right, antecedent and consequent, in like manner as every other."

In a subsequent passage, he pointed out (at 220):

(Footnote continues on next page)

course, the term can have a more limited meaning depending upon the terms of the instrument which creates it. Whatever else property may mean in a particular context, it describes a relationship between owner and object by reference to the power of the owner to deal with the object to the exclusion of all others, except a joint owner.

- 50 The appellant would have it that s 7 has a more limited meaning than that set out in the previous paragraph. His argument suggests that the property in fauna in Queensland vests in the Crown only upon other persons taking or dealing with the fauna. Another version of the argument is that the Act has effectively created a new, negative form of property – that property in s 7 is no more than a label which describes what the Crown notionally has after the Act has identified the circumstances in which others may take, possess and pay royalties to the Crown in respect of fauna.
- 51 If "property" in s 7 meant no more than the residue of other people's rights or the measure of the Crown's entitlement to royalties, it would seem to serve little purpose, if indeed it serves any purpose at all. I see no indication in the Act that "property" in s 7 has such a limited function or meaning. Words in legislative instruments should not be read as if they were buildings on a movie set – structures with the appearance of reality but having no substance behind them⁶⁸. When the Queensland legislature declared that the property in fauna is vested in the Crown, it should be taken to have meant what it said. That being so, the ordinary meaning of property should not be ignored. "Property" in s 7 should not be taken as meaning no more than the residue of control over fauna which the Crown has after others have carved out their entitlements to take and keep fauna pursuant to a licence granted by or under the Act. That is to turn the Act on its head. The content of s 7 is the starting point for, not the result of, determining the Crown's power over fauna in Queensland.
- 52 The short answer to the appellant's arguments is that s 7 says that all fauna *is* the property of the Crown. Acts of Parliament speak from their enactment. Consequently, the ordinary and natural meaning of s 7 is that, after the commencement of the Act, the property in fauna is and always remains in the Crown until it disposes of it or a person, acting in accordance with the Act, puts an end to the Crown's property in particular fauna. Moreover, the fauna is and remains "under the control of the Fauna Authority." To the absolute rule that

"The law [of property] does not enable me to use or abuse this book which lies before me. That is a physical power which I have without the aid of the law. What the law does is simply to prevent other men to a greater or less extent from interfering with my use or abuse."

68 cf *Planned Parenthood of Southeastern Pennsylvania v Casey*, Governor of Pennsylvania 505 US 833 at 954 (1992) per Rehnquist CJ (White, Scalia and Thomas JJ agreeing).

property in fauna in Queensland is in the Crown, s 7(1) contains an exception – when fauna is taken in open season in accordance with the Act, the property in the fauna passes to the person who has taken it. However, I cannot see how that exception provides any ground for thinking that the nature of the property that the Crown has in the fauna is less than every right, power, privilege and benefit that does or will exist in respect of the fauna or that from the commencement of the Act the Crown did not have the right to exclude every other person from enjoying those rights, powers, privileges and benefits. To contend that the Crown obtains no property in fauna until it is taken, killed or appropriated is to deny the plain words of s 7(1).

53 It is also to deny the assumption on which s 7(2) of the Act is based. That assumption is that, but for s 7(2), the Crown's ownership of the fauna might make it liable for the damage or harm that particular birds or mammals might cause while at large.

54 Consider also some of the consequences of upholding the appellant's arguments. The Crown would obtain property in fauna only when a bird, mammal or declared animal was killed, taken, or otherwise appropriated by a third party. Presumably, the Crown would lose its property as soon as the third party gave up possession of it – at all events if that party set the bird or mammal free. The arguments of the appellant must also mean that "the control of the Fauna Authority"⁶⁹ only commences when a third party has killed, taken or appropriated fauna. Presumably, the hapless officers of the Authority, seeing an unlicensed person about to kill or otherwise take or deal with fauna, would have no statutory authority to act until the unlicensed person takes action. Until death, taking or appropriation had occurred, the officers would have no more legal authority to act to protect the bird or mammal than any other citizen.

55 The appellant contended that it would be absurd for the legislature to have intended that the Crown should have property in wild animals before they were caught. Illustrations were given during argument – the migratory bird flying through Queensland being one example. Once it is perceived that the purpose of the Act is to put an end to arguments about who has the property in or the right to hunt fauna as defined, I see nothing absurd in the legislature of Queensland giving to the Crown the property in all fauna in Queensland – even migratory birds. In any event, it leads to no more absurd results than the opposing contention which would vest property in the Crown when a young boy trapped a migratory bird but would divest it when he let it go, making property in fauna in Queensland depend upon a kind of statutory version of what old system conveyancers called springing and shifting uses.

69 s 7(1).

56 Nor is there anything unusual in a person having property in an object of which he or she is unaware. The common law has long recognised that a person may have property in an object although he or she was unaware of its existence. Thus in *R v Rowe*⁷⁰, an indictment for larceny charged the accused with stealing a piece of iron from the bed of a canal and laid the property in the iron in the canal owner who apparently did not know of its existence. The Court of Crown Cases Reserved held that the indictment was good.

57 By declaring (s 7) that the property in fauna in Queensland is vested in the Crown and then in subsequent sections defining the circumstances in which others may take that property, the Act proclaimed upon its commencement that henceforth no one, land owner, Aboriginal or holder of a grant from the Crown, had any right to kill, take or appropriate fauna as defined. That being so, the appellant had no right which the *Native Title Act* protected when it came into force. The reasons why that is so are fully explained in the judgment of Callinan J.

58 The appeal must be dismissed.

70 (1859) Bell 93 [169 ER 1180].

GUMMOW J.

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I INTRODUCTION

59 This appeal concerns the appellant's exercise, or enjoyment, of a right, or incident, of common law native title. The case comes to this Court after findings of fact⁷¹ were made at the appellant's trial in the Magistrates Court of Queensland on a complaint by the respondent. The appellant exercised the incident of native title between 31 October 1994 and 1 December 1994, when he hunted estuarine crocodiles, killed two and shared the meat from the kill with members of his tribe. The *Fauna Conservation Act* 1974 (Q) ("the Fauna Act") prohibited the engagement in some of this conduct without a licence under that statute. The appellant had no such licence but he and the interveners⁷² supporting him submit that the *Native Title Act* 1993 (Cth) ("the Native Title Act") operated, in conjunction with s 109 of the Constitution, to permit what was otherwise

71 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 169.

72 Ben Ward & Ors on behalf of the Miriuwung and Gajerrong People; Walden & Ors; Northern Land Council; and the Cape York Land Council (Aboriginal Corporation).

prohibited by the State legislation. The respondent and the interveners⁷³ who supported him deny that proposition. They assert that, with effect from 1 September 1974 (the operative date of an Order in Council made under the Fauna Act), the State statute had extinguished any previously existing native title rights, otherwise exercisable by the appellant, to take fauna, in particular estuarine crocodiles.

60 I approach the issue raised on this appeal on the footing, which is supplied both by principle and statements in the authorities in this Court⁷⁴, that for such extinguishment to be effective it was unnecessary that the statutory regime and all that constituted the native title be wholly inconsistent. Rather, the issue is one of identifying what Brennan J called "the extent of the inconsistency"⁷⁵.

II THE OFFENCE

61 The appellant was charged under s 54(1) of the Fauna Act⁷⁶. The Bench charge sheet, as amended, stated:

"That between the 31st day of October 1994 and the 1st day of December 1994 at Cliffdale Creek via Doomadgee in the Magistrates Courts District of Mount Isa in the state of Queensland [the appellant] did take fauna namely 2 [estuarine] crocodile when he was not the holder of a licence permit certificate or other lawful authority granted and issued under the [Fauna Act] and when the [appellant] was not exempted by section 54(1)(b) of the [Fauna Act]."

73 Attorneys-General for the Commonwealth, South Australia, Western Australia and the Northern Territory.

74 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 69-70, 111; *Wik* (1996) 187 CLR 1 at 124-126, 166, 203, 238; cf *Ward v Western Australia* (1998) 159 ALR 483 at 504.

75 *Mabo [No 2]* (1992) 175 CLR 1 at 70.

76 The Fauna Act has since been repealed by the *Nature Conservation Act* 1992 (Q), which came into force on 19 December 1994.

At the time of the alleged offence, s 54(1) materially provided:

"(a) A person shall not take^[77], keep^[78] or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act.

(b) Save as is otherwise expressly provided by this Act, a person who –

(i) keeps protected fauna which fauna was taken otherwise than in contravention of this Act during an open season with respect to that protected fauna in a place to which that open season refers;

(ii) takes fauna at a time and place when and where that fauna is non-protected fauna;

(iii) continues to keep fauna taken and kept lawfully prior to the date of commencement of this Act;

...

(vi) keeps dead non-protected fauna,

does not commit an offence against this Act.

(c) The exemption granted by provision (i) of paragraph (b) shall not apply to the keeping of live protected fauna by any person."

62 The facts constituting the elements of the alleged offence were not contested by the appellant at trial. The killing of the two estuarine crocodiles was a "taking" of fauna and the appellant did not hold a licence, permit, certificate or other

77 Section 5 provided:

"'take' includes –

(a) in relation to fauna, hunt, shoot, kill, poison, net, snare, spear, trap, catch, pursue, disturb, stupefy, disable, pluck, injure, destroy or damage or attempt or permit any of those acts".

78 Section 5 provided:

"'keep' includes have in possession or under control in any place, whether for the use of or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question".

authority granted and issued under the Fauna Act, nor did any of the exemptions in sub-s (b) of s 54(1) apply.

- 63 However, the appellant sought to rely on an immunity conferred by provisions of the Native Title Act as a "defence". Under cross-examination the appellant argued:

"I believe there's a greater law than a State law, there's a Commonwealth law called the Native Title Act and that was in at that stage I took the crocodiles, so I was quite confident that I was being lawful."

The appellant submits before this Court that s 54(1) of the Fauna Act is inconsistent with s 211(2) of the Native Title Act and therefore s 109 of the Constitution renders s 54(1) invalid to the extent of the inconsistency. Consequently, the appellant's alleged liability under s 54(1) of the Fauna Act never arose and the complaint laid against him had to be dismissed.

- 64 On 11 October 1996, the Magistrate found the appellant not guilty on the basis of this "defence" and he was discharged. The complainant, the respondent to this appeal, applied under s 209 of the *Justices Act* 1886 (Q) for review of the decision in the Supreme Court of Queensland. On 28 November 1996, Williams J granted an order nisi requiring the appellant to show cause before the Queensland Court of Appeal ("the Court of Appeal") why the decision and order of the Magistrate should not be reviewed on the following grounds:

- "(a) that the Magistrates Court erred in law in failing to find that any entitlement which Aborigines might have enjoyed at common law to take or hunt estuarine crocodiles has previously been validly extinguished by the enactment of the [Fauna Act] and the operation of an order in council dated 29 August 1974 made under that Act and published in the Government Gazette on 31 August 1974; and that accordingly
- (b) the Magistrates Court erred in law in finding that the [appellant] is a person who holds native title rights and/or interests within the meaning of the [Native Title Act] which rights and/or interests entitled him to take the said estuarine crocodiles."

- 65 The Court of Appeal (McPherson JA and Moynihan J, Fitzgerald P dissenting) held⁷⁹ that s 211(2) of the Native Title Act had no relevant operation as the appellant's native title right, or incident, to hunt estuarine crocodiles had been extinguished by s 7(1) of the Fauna Act and therefore the threshold requirement in s 223(1)(c) of the Native Title Act that the right was "recognised

⁷⁹ *Eaton v Yanner; Ex parte Eaton*, unreported, 27 February 1998.

by the common law of Australia" was not fulfilled. The Court of Appeal ordered that the order nisi be made absolute and that the Magistrate's order, dismissing the complaint against the appellant, be set aside. Further, the Court of Appeal ordered that the proceedings be remitted to the Magistrates Court, directing that the matter proceed according to law. From these orders this Court granted special leave to appeal.

- 66 It is convenient now to turn to consider the appellant's conduct which allegedly gave rise to the offence under s 54(1) of the Fauna Act.

III THE APPELLANT'S CONDUCT

- 67 The appellant is a member of the Gunnamulla clan of the Gungaletta, or Gangalidda, tribe of indigenous Australians. The clan's traditional land area is located around Cliffdale Creek. This area is within the land occupied by the Gungaletta tribe between Burketown and the Queensland border with the Northern Territory. Between 31 October 1994 and 1 December 1994, the appellant killed two estuarine crocodiles from Cliffdale Creek.

- 68 The appellant hunted the estuarine crocodiles using a traditional harpoon-type weapon, known as a "wock", using a dinghy powered by an outboard motor. This was an evolved, or altered, form of traditional behaviour⁸⁰. That is, the use of this mechanical device to provide transport during the hunt was not a method of hunting known to the appellant's tribe before contact with non-indigenous people. At trial, the Magistrate held that this method of hunting was consistent with the traditional custom of the appellant's indigenous community. This finding is not challenged.

- 69 The definition of "take" in s 5 includes, in relation to fauna⁸¹, to "hunt", to "attempt" to hunt and to "permit" hunting. There is no further definition in the Fauna Act of what is meant by "hunt". But its inclusion in the definition of "take" in s 5, with terms such as "shoot", "kill", "spear" and "trap", suggests it is used in the statute to identify no more than physical acts for the obtaining of possession of the fauna. However, the conduct of the appellant complied with a traditional code of conduct respecting the hunting of juvenile rather than mature crocodiles and involved tribal totemic significance and spiritual belief. The conduct of the appellant is inadequately identified in terms of the statutory definition of "take"

80 See *Mabo [No 2]* (1992) 175 CLR 1 at 70, 110; cf Grattan and McNamara, "The Common Law Construct of Native Title", (1999) 8 *Griffith Law Review* 50 at 63-65.

81 A term also defined in s 5; see Section VI of these reasons.

and its components such as "hunt". What was involved was the manifestation by the appellant of the beliefs, customs and laws of his community.

70 After the crocodiles were killed, the appellant transported and utilised the kill. The appellant ate part of the flesh of the crocodiles, part he shared with members of his clan and the remainder he froze, with the skins, and kept at his home. It was not challenged that the appellant's conduct was at all times within the customs of his community.

71 The legal character at common law of the appellant's conduct was disputed on the appeal to this Court and it is to this that I now turn.

IV COMMON LAW NATIVE TITLE

72 In *Mabo v Queensland [No 2]*, Brennan J stated the essential characteristics of native title⁸²:

"Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs."

Native title is not treated by the common law as a unitary concept. The heterogeneous laws and customs of Australia's indigenous peoples, the Aboriginals and Torres Strait Islanders, provide its content. It is the relationship⁸³ between a community of indigenous people and the land, defined by reference to that community's traditional laws and customs, which is the bridgehead to the common law. As a corollary, native title does not exhibit the uniformity of rights and interests of an estate in land at common law and "ingrained habits of thought and understanding"⁸⁴ must be adjusted to reflect the diverse rights and interests which arise under the rubric of "native title". To repeat what was said in *Wik Peoples v Queensland*⁸⁵:

"The content of native title, its nature and incidents, will vary from one case to another. It may comprise what are classified as personal or communal usufructuary rights involving access to the area of land in question to hunt

82 (1992) 175 CLR 1 at 58.

83 See *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 459; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 274-275.

84 *Wik* (1996) 187 CLR 1 at 177.

85 (1996) 187 CLR 1 at 169.

for or gather food, or to perform traditional ceremonies. This may leave room for others to use the land either concurrently or from time to time⁸⁶. At the opposite extreme, the degree of attachment to the land may be such as to approximate that which would flow from a legal or equitable estate therein⁸⁷. In all these instances, a conclusion as to the content of native title is to be reached by determination of matters of fact, ascertained by evidence⁸⁸."

73 The term "native title" conveniently describes "the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants"⁸⁹. The native title of a community⁹⁰ of indigenous Australians is comprised of the collective rights, powers and other interests of that community, which may be exercised by particular sub-groups or individuals in accordance with that community's traditional laws and customs. Each collective right, power or other interest is an "incident" of that indigenous community's native title. This case concerns the native title right, or incident, to hunt estuarine crocodiles exercised by an individual, the appellant, who is a member of a community, the Gunnamulla clan, who have native title in the land on which the individual exercised the right, within a tribe of indigenous Australians, the Gungaletta.

74 The exercise of rights, or incidents, of an indigenous community's native title, by sub-groups and individuals within that community, is best described as the exercise of privileges of native title. The right, or incident, to hunt may be a component of the native title of a numerous community but the exercise by individuals of the privilege to hunt may be defined by the idiosyncratic laws and customs of that community. For example, a finding on the evidence that, in accordance with its laws and customs, a community hunts estuarine crocodiles on its traditional lands will establish that an incident of that community's native title is hunting estuarine crocodiles on its traditional lands. However, such a finding will not necessarily dispose of the question of whether a particular individual or sub-group within that community has the privilege to hunt estuarine crocodiles. The nature and scope of the privileges in question will vary with the traditional laws and customs of the particular community so as to accord with the distinct

86 *Mabo [No 2]* (1992) 175 CLR 1 at 66-67.

87 *Mabo [No 2]* (1992) 175 CLR 1 at 89.

88 *Mabo [No 2]* (1992) 175 CLR 1 at 58.

89 *Mabo [No 2]* (1992) 175 CLR 1 at 57.

90 *Mabo [No 2]* (1992) 175 CLR 1 at 109-110.

social structure and patterns of occupancy and use of the land of that indigenous community⁹¹.

75 The common law recognition of native title limits the class of persons who may exercise such rights to those who have the requisite privilege, or entitlement, under the traditional laws and customs of the community under scrutiny. It is unnecessary in this case to consider whether this is the only limiting factor imposed by the common law; it was not challenged, other than in respect to s 54(1) of the Fauna Act, that the appellant was entitled to exercise the native title right, or incident, to hunt estuarine crocodiles in accordance with his community's traditional laws and customs.

76 Whilst recognised by the common law, native title and the rights, or incidents, thereof arise independently of the common law tenurial system⁹². It is to be noted that it was not argued that the pastoral holding, leased by the Carpentaria Land Council Corporation, which included the land on which the appellant killed the crocodiles was inconsistent with the native title right, or incident, to hunt estuarine crocodiles at issue in this case. It is unnecessary to determine whether the doctrine of inconsistency, as considered in *Wik*⁹³ and *Fejo v Northern Territory*⁹⁴, or principles of merger apply if a community of indigenous Australians holds both native title and an estate or a statutory interest with respect to the same land. However, it is convenient to emphasise that ingrained, but misleading, habits of thought and understanding lurk in this area of law. Whilst there is "an intersection" between them, common law (and statutory) estates and native title are derived from two distinct sources⁹⁵. The former is drawn from principles developed in the English common law, as modified by statute, whilst the latter finds its origin in "the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory"⁹⁶.

77 Analogies to the doctrine of merger of estates appear inapposite in dealing with the intersection between the common law tenurial system and traditional laws

91 *Mabo [No 2]* (1992) 175 CLR 1 at 61, 110.

92 *Fejo v Northern Territory* (1998) 72 ALJR 1442 at 1452, 1454; 156 ALR 721 at 737, 739.

93 (1996) 187 CLR 1.

94 (1998) 72 ALJR 1442 at 1451-1454; 156 ALR 721 at 736-740.

95 *Fejo* (1998) 72 ALJR 1442 at 1452; 156 ALR 721 at 737.

96 *Mabo [No 2]* (1992) 175 CLR 1 at 58.

and customs. Blackstone describes the operation of the doctrine of merger of estates as follows⁹⁷:

"[I]t may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged, that is, sunk or drowned, in the greater."

The coalescence of rights and interests under the doctrine of merger is apt to be misleading when considering the intersection of native title rights and interests with an estate or statutory interest in land held by one and the same indigenous community. Moreover, it should be noted that whilst at law the doctrine of merger applied irrespective of the will of the parties concerned, equity's inclination to follow the law here gave way to its preference for substance over form. As Sir William Grant MR put it in *Forbes v Moffatt*⁹⁸, in equity:

"[t]he question is upon the intention, actual or presumed, of the person, in whom the interests are united."

In Queensland, as in other States, the equity rule as to merger of estates prevails⁹⁹.

V PRELIMINARY MATTERS

78 Before construing the Fauna Act and dealing with its operation upon the native title right, or incident, exercised by the appellant, it is necessary to attend to two matters. The first is the operation of the *Racial Discrimination Act* 1975 (Cth) ("the Racial Discrimination Act") and the second is to describe the treatment by the common law of animals as the object of property rights.

Racial Discrimination Act

79 The Racial Discrimination Act commenced on 31 October 1975 ("the Commencement Date"). This is a significant date for consideration of any alleged extinguishment of native title rights by State legislation. If acts done before the Commencement Date were effective to extinguish or impair common law native title, the Native Title Act does not undo that result¹⁰⁰. The question

97 *Commentaries on the Laws of England*, vol 2 at 177.

98 (1811) 18 Ves Jun 384 at 390 [34 ER 362 at 364]. See also *Commissioner of Stamp Duties (NSW) v Perpetual Trustee Co Ltd* (1915) 21 CLR 69 at 77, 87; *In re Waugh (deceased)* [1955] NZLR 1129 at 1130.

99 *Judicature Act* 1876 (Q), s 5(4); *Property Law Act* 1974 (Q), s 17.

100 *Native Title Act Case* (1995) 183 CLR 373 at 454; *Wik* (1996) 187 CLR 1 at 167-168.

arises whether the Fauna Act operated to extinguish the native title right, or incident, to hunt exercised by the appellant such that, as the respondent submits, s 211(2) of the Native Title Act can have no relevant operation. It is necessary to construe the Fauna Act, in each of its forms prior to the Commencement Date, to answer this question. Any amendments thereafter, which otherwise would have effected an extinguishment, would be open to challenge under s 109 of the Constitution for inconsistency with the Racial Discrimination Act¹⁰¹. No such challenge was made by the appellant in this case. Further, the respondent and his supporters have not submitted that any other State legislation, such as the precursors to the Fauna Act¹⁰², operated to extinguish the native title right at issue. The amendments to the Fauna Act following the Commencement Date will be considered in Section VII of these reasons.

Animals at common law

80 I come now to the second matter. The common law divides animals into two categories, harmless or domestic (*mansuetae naturae*) and those which are dangerous or wild by nature (*ferae naturae*). The distinction is significant. *Ferae naturae*, such as estuarine crocodiles which are dangerous and wild by nature¹⁰³, are reduced to property at common law when killed or for so long as they have been taken or tamed by the person claiming title. What Field J identified as this qualified property right *per industriam*¹⁰⁴ ceases if the creatures regain their natural liberty. Further, the owner of a fee simple, who has not licensed the right to hunt, take or kill *ferae naturae*, has a qualified property *ratione soli* in them for the time being while they are on that owner's land¹⁰⁵. In contrast, *mansuetae naturae* found on a fee simple are owned by the landowner. Equally, a person who keeps a dangerous animal may be liable in negligence for damage done, or injury inflicted, by the animal without proof of scienter¹⁰⁶. Wright also noted a corollary that

101 *Native Title Act Case* (1995) 183 CLR 373 at 435-438; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 613-614.

102 For example, *Fauna Conservation Act* 1952 (Q), repealed by s 4(1) of the Fauna Act.

103 cf *McQuaker v Goddard* [1940] 1 KB 687 at 695, 699.

104 *Geer v Connecticut* 161 US 519 at 539-540 (1896). Field J was in dissent, but the majority decision was overruled in *Hughes v Oklahoma* 441 US 322 (1979).

105 *Blades v Higgs* (1865) 11 HL Cas 621 [11 ER 1474].

106 In *May v Burdett* (1846) 9 QB 101 at 110-111 [115 ER 1213 at 1217], Lord Denman CJ said: "[w]hoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is prima facie liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it"; *Besozzi v Harris* (1858) 1 (Footnote continues on next page)

"trespass or theft cannot at common law be committed of living animals *ferae naturae* unless they are tame or confined"¹⁰⁷.

- 81 It is appropriate now to consider the operation of the Fauna Act on the native title right, or incident, to hunt estuarine crocodiles which was exercised by the appellant.

VI THE FAUNA ACT

- 82 The Fauna Act was assented to on 2 May 1974 and commenced on 1 September 1974, and was not amended in the period prior to the Commencement Date. The long title described it as an "Act to consolidate and amend the law relating to the conservation of fauna in its habitats and throughout its distribution in the State, the introduction into and removal from the State of fauna, and for other purposes". Section 3 divided the Fauna Act into twelve Parts. Part I (ss 1-9) and Pt II (ss 10-17) were respectively entitled "PRELIMINARY" and "ADMINISTRATION". The principal point of contention between the parties concerns the operation of s 7(1), the construction of which will be considered below. Section 6(1) of the Act divided "fauna" into four categories, (a) permanently protected fauna, (b) protected fauna, (c) non-protected fauna, and (d) prohibited fauna. Part III (ss 18-21) of the Act regulated permanently protected fauna, whilst Pt IV (ss 22-25) regulated protected fauna and Pt V (ss 26-27) regulated both non-protected and prohibited fauna. Part VI (ss 28-33), entitled "OPEN SEASONS", Pt VII (ss 34-46), entitled "SANCTUARIES, REFUGES AND RESERVES", and Pt XI (ss 67-71), entitled "ROYALTY", were broadly self-descriptive of the objects which each regulated. It will be necessary later to refer more fully to the royalty regime created by Pt XI. Parts VIII (ss 47-51), IX (ss 52-54) and X (ss 55-56) created an enforcement regime for the protection of fauna, whilst Pt XII (ss 72-94) contained miscellaneous provisions and the Schedule listed permanently protected fauna.

- 83 "Fauna" was defined in s 5 to mean "a mammal or bird: the term includes also any other animal or group of animals wild by nature declared by Order in Council to be fauna". Estuarine crocodiles neither fell within the definition of "mammal" nor "bird" in s 5. By Order in Council dated 29 August 1974 and published in the *Queensland Government Gazette* on 31 August 1974 ("the Order in Council"), the Governor in Council declared estuarine crocodiles to be "fauna for the purposes of [the Fauna Act] throughout the State" in accordance with s 11

F & F 92 [175 ER 640]. It is unnecessary to consider, for the purposes of construing s 7 of the Fauna Act as enacted in 1974, the effect, if any, of the subsequent decision of *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 on this branch of the tort law.

¹⁰⁷ Pollock and Wright, *Possession in the Common Law*, (1888) at 231.

of the Fauna Act. This occurred after the passing of the Fauna Act but before its commencement on 1 September 1974. Section 17 of the *Acts Interpretation Act* 1954 (Q) provided that the power under s 11 could be exercised at any time after the passing of the Fauna Act provided that the Order in Council made under that power did not have any effect until the Fauna Act came into operation. The initial date for considering the Fauna Act's operation on the native title right, or incident, to hunt crocodiles at issue was therefore 1 September 1974, more than a year before the Commencement Date. Upon that date, estuarine crocodiles, two of which were later killed by the appellant, were "fauna" within the meaning of the Fauna Act.

84 The respondent's submission is that, with effect from 1 September 1974, s 7(1) of the Fauna Act operated to extinguish the appellant's right as an incident of the native title of his community to hunt estuarine crocodiles. Section 7 provided:

"(1) All fauna, save fauna taken or kept^[108] during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority.

(2) Liability at law shall not attach to the Crown by reason only of the vesting of fauna in the Crown pursuant to this section."

The operation of s 7(1) turns, first, on the construction of the word "property" therein and, secondly, on the manner in which s 7 vests "property" in the Crown.

The meaning of "property"

85 Property is used in the law in various senses to describe a range of legal and equitable estates and interests, corporeal and incorporeal. Distinct corporeal and incorporeal property rights in relation to the one object may exist concurrently and be held by different parties¹⁰⁹. Ownership may be divorced from possession. At common law, wrongful possession of land might give rise to an estate in fee simple with the rightful owner having but a right of re-entry¹¹⁰. Property need not necessarily be susceptible of transfer. A common law debt, albeit not assignable,

108 Section 7(1) was amended on 15 May 1984 by the *Fauna Conservation Act and Another Act Amendment Act* 1984 (Q) ("the 1984 Amendment Act"), s 5. The words "otherwise than in contravention of this Act" were inserted after the phrase "taken or kept". Nothing turns on this amendment.

109 *Breen v Williams* (1996) 186 CLR 71 at 80-81, 88-90, 101-102, 126-129.

110 *Wheeler v Baldwin* (1934) 52 CLR 609 at 632-633.

was nonetheless property¹¹¹. Equity brings particular sophistications to the subject. The degree of protection afforded by equity to confidential information makes it appropriate to describe it as having a proprietary character, but that is not because property is the basis upon which protection is given; rather this is because of the effect of that protection¹¹². Hohfeld identified the term "property" as a striking example of the inherent ambiguity and looseness in legal terminology¹¹³. The risk of confusion is increased when, without further definition, statutory or constitutional rights and liabilities are so expressed as to turn upon the existence of "property". The content of the term then becomes a question of statutory or constitutional interpretation¹¹⁴.

86 Finkelstein J recently pointed out¹¹⁵ that, to Hohfeld, property comprised legal relations not things, and those sets of legal relations need not be absolute or fixed. Hohfeld said of "property"¹¹⁶:

"Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again – with far greater discrimination and accuracy – the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a 'blended' sense as to convey no definite meaning whatever."

"Property" is used in the latter sense in s 7(1), that is, as an aggregate of legal relations between the "Crown" and "fauna". In order to determine the content of these legal relations, it is necessary to consider: first, the manner in which

111 *National Trustees Executors and Agency Co of Australasia Ltd v Federal Commissioner of Taxation* (1954) 91 CLR 540 at 583.

112 *Breen v Williams* (1996) 186 CLR 71 at 81, 90; *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142 at 156.

113 "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 *Yale Law Journal* 16 at 21.

114 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 73-74; *Don King Productions Inc v Warren* [1999] 3 WLR 276 at 314-316; [1999] 2 All ER 218 at 232-234.

115 *Wily v St George Partnership Banking Ltd* (1999) 84 FCR 423 at 431.

116 "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 *Yale Law Journal* 16 at 21-22. See also Gray and Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, (1998) 15 at 27-30.

"property" is vested in the Crown; secondly, the Crown's immunity under s 7(2) from such liability as would otherwise have arisen from the vesting of property; thirdly, the qualification contained in s 7(1); and, fourthly, the meaning of the term "Crown".

The vesting of property and Crown immunity

87 There is a threshold matter for the purposes of determining inconsistency concerning the point in time when "property" in the estuarine crocodiles hunted by the appellant vested in the Crown. Did s 7(1) vest "property" in estuarine crocodiles in the Crown when these animals became "fauna" on 1 September 1974 or upon another event? In order to dispose of this question it is necessary to consider the operation of the immunity conferred on the Crown by s 7(2) and the significant exception within s 7(1) that "property" in fauna in the Crown does not arise where it is "taken or kept during an open season with respect to that fauna".

88 Section 7(2) operates to immunise the Crown against any claims which could have otherwise arisen as a result of the enactment of s 7(1). This leads to consideration of the doctrine of Crown immunity as it has applied to Queensland. In *The Commonwealth v Mewett*, Gummow and Kirby JJ said¹¹⁷:

"[B]efore federation, in all the Australian colonies save Victoria, legislation had established procedures whereby claims in tort as well as in contract might be brought against the colonial governments¹¹⁸."

89 Queensland was the source of this tradition¹¹⁹, enacting legislation in 1866 which was to become the dominant model for Australian Crown proceedings legislation, namely the *Claims against Government Act* 1866 (Q) ("the Claims Act"). The Claims Act was not repealed¹²⁰ until 1 July 1980. By that time, given the supervening operation of s 108 of the Constitution¹²¹, "the Crown" or colonial

117 (1997) 191 CLR 471 at 544-545.

118 *Maguire v Simpson* (1977) 139 CLR 362 at 371-373. See Finn, "Claims Against the Government Legislation", in Finn (ed), *Essays on Law and Government*, vol 2, *The Citizen and the State in the Courts*, (1996) 25 at 26-32.

119 Leeming, "The Liability of the Government under the Constitution", (1998) 17 *Australian Bar Review* 215 at 216-219.

120 *Crown Proceedings Act* 1980 (Q), s 4(2)(a) and Sched.

121 Section 108 states:

"Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the
(Footnote continues on next page)

government affected by the Claims Act was the State of Queensland¹²². Upon the enactment of s 7(2) of the Fauna Act in 1974, the State's immunity was understood to have been subject to the operation of the Claims Act. Section 7(2) thus partially replaced the shield of the Crown which had been removed by s 5 of the Claims Act¹²³.

- 90 To identify the liability at law arising from the enactment of s 7(1) of the Fauna Act, it is necessary to return to the definition of "fauna" in s 5. The definition was limited to birds and mammals which were "wild by nature" and such "other animal or group of animals wild by nature declared by Order in Council to be fauna". The condition, "wild by nature", limited the definition of "fauna" to *ferae naturae*. At common law, in respect to liability for damage caused by *ferae naturae*, liability for damage arose upon a person taking or taming the animal. Therefore s 7(2) applied only if s 7(1) vested "property" in the Crown in "fauna" such that the Crown acquired at least the equivalent legal obligations at common law of a person who had taken or tamed *ferae naturae*. It is convenient now to consider the qualification contained within s 7(1).

The qualification in s 7(1)

- 91 Not all fauna is the "property of the Crown" within the meaning of s 7(1). Fauna which is taken or kept during an open season¹²⁴ with respect to that fauna is not the "property of the Crown". The acts of taking or keeping thus perform a

Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State."

122 See *Sue v Hill* (1999) 73 ALJR 1016 at 1034-1035, 1049; 163 ALR 648 at 673-674, 693. Section 31(3)(a) of the *Acts Interpretation Act* 1954 (Q) defined "the Crown" but merely in terms of the particular monarch at the time.

123 This provided:

"Petitioner may sue as in ordinary cases. Any such petitioner may sue such nominal defendant at law or in equity in any competent court and every such case shall be commenced in the same way and the proceedings and rights of parties therein shall as nearly as possible be the same and judgment and costs shall follow on either side as in an ordinary case between subject and subject at law or in equity."

124 Section 5 defined "open season" to mean, in relation to any fauna, "the period declared by Order in Council under this Act during which that fauna may be taken".

threshold distributive function in determining whether "property" is vested in the Crown.

92 This assists in determining the statutory meaning of "property" in s 7(1). For example, if an open season be declared for estuarine crocodiles and a tourist boat "injures", "damages" or even "disturbs" an estuarine crocodile, the result is that the "property" in the crocodile does not vest in the Crown. This is because the creature has been "taken" in an "open season". Thus, where an "open season" has been declared in respect to particular fauna, the vesting and subsistence of "property" in such fauna is conditioned upon the actions of third parties. The interests in fauna created by s 7(1) differ in nature from the ordinary understanding of property in a chattel conferred by the common law.

93 These matters support a construction of s 7(1) that the legal relations, described in s 7 as the "vesting" of "property", arise only if a person "takes" or "keeps" "fauna". If the fauna is taken or kept, during an open season with respect to that fauna, "property" does not vest in the Crown. However, if fauna is otherwise "taken" or "kept", within the meaning of s 5, "property" is vested in the Crown and the immunity provided for in s 7(2) for the Crown has a relevant operation.

94 The scope of the legal relations, known as "property", between estuarine crocodiles and the Crown remains to be identified. It is necessary now to consider the meaning of "vesting" in s 7(2). In *Attorney-General for Quebec v Attorney-General for Canada*¹²⁵, a Canadian provincial statute provided that "tracts of land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian tribes in Lower Canada ... and the said tracts of land shall accordingly, by virtue of this Act ... be vested in and managed by the Commissioner of Indian Lands for Lower Canada". The Privy Council observed that¹²⁶:

"It is not unimportant, however, to notice that the term 'vest' is of elastic import; and a declaration that lands are 'vested' in a public body for public purposes may pass only such powers of control and management *and such proprietary interest as may be necessary to enable that body to discharge its public functions effectively*". (emphasis added)

125 [1921] 1 AC 401.

126 [1921] 1 AC 401 at 409. See also *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 45; *Perth Corporation v Crystal Park Ltd* (1940) 64 CLR 153 at 168; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 72 ALJR 1470 at 1480-1483; 157 ALR 414 at 427-431.

- 95 In this case, s 7(1) does not in terms provide that it is for particular public or statutory purposes that fauna "is the property of the Crown and under the control of the Fauna Authority". As a matter of construction, should s 7(1) be read as so limited?

The meaning of "Crown"

- 96 To construe s 7(1) in its statutory context, it is necessary to determine the meaning of the word "Crown" in s 7(1) in a manner which is consistent with the remaining provisions of the Fauna Act. Section 7(1) identifies the Crown in two senses. First, fauna is the property of the "Crown" and secondly, fauna was under the control of the "Fauna Authority" which was defined in s 5 to mean the "Minister and subject to the Minister the Under Secretary and the Conservator". "Minister" in turn was defined in s 5 to mean "the Minister for Primary Industries or other Minister of the Crown who at the material time is charged with the administration of this Act: the term includes a Minister of the Crown who is temporarily performing the duties of the Minister". Section 7(1) therefore placed control of fauna in a *persona designata* of the Crown, that is a Minister of the Crown in right of Queensland. In contrast, the reference in s 7(1) to fauna being the "property of the Crown" must be taken to be a reference to that body politic which is the State of Queensland.

- 97 This construction of s 7(1) accords with the structure of the Fauna Act as a whole. Section 10 provides that the "Act shall be administered" by the designated person, whilst numerous provisions throughout the remainder of the Act provide that the Governor in Council may undertake certain activities in order, broadly, to effectuate the purposes of the Act. In contrast, the "Crown", as the State of Queensland, is referred to in the Fauna Act for the limited purpose of recouping money sums which may become payable from time to time under the Act.

- 98 The principal reference to the "Crown", as the State of Queensland, is found in Pt XI of the Fauna Act. To adopt the language of Deane J in *Walden v Hensler*¹²⁷, s 7(1) provides a "basis of the royalty system which Pt XI of the [Fauna Act] establishes". The collection of royalty sums, as opposed to the physical possession of fauna, is the relevant legal interest of the Crown manifested in Pt XI (ss 67-71). Section 71(1) confirms this construction. It provides for the seizure and forfeiture of fauna in default of payment of royalty sums.

- 99 Part XI vastly expands the royalties, or sums payable, which at common law otherwise would have attached as a privilege of the Crown in respect of certain

animals¹²⁸. As first enacted in 1974, Pt XI created a royalty regime for "prescribed fauna". Sub-section (1) of s 67 provided that "royalty at the rates prescribed shall be payable to the Crown on prescribed fauna", whilst sub-s (2) stated:

"Notwithstanding this Act or any other Act or law, payment of royalty on fauna pursuant to this Act does not transfer property in that fauna from the Crown."

The persons liable for payment of royalty were identified in s 68(1):

"The following persons shall be jointly and severally liable for the payment of royalty:—

- (a) the person who takes the fauna;
- (b) a fauna dealer or other person who at any time after the taking of the fauna receives or keeps the fauna or fauna obtained therefrom.

Liability for the payment of royalty arises —

- (c) in a case to which subparagraph (a) applies, immediately upon the taking of the fauna in question;
- (d) in a case to which subparagraph (b) applies, immediately upon the receipt of the fauna in question."

The first event which triggers liability for the payment of royalty is a "taking" of prescribed fauna. At a time thereafter actual payment of the royalty may or may not be made. If that payment occurs, s 67(2) confirms that it does "not transfer property in that fauna from the Crown". Section 67(2) assumes that "property" in fauna in the Crown vests before payment of the royalty. These provisions are therefore consistent with the construction of s 7(1) considered above whereby "property" in fauna vests in the Crown upon a taking or keeping of the fauna, events anterior to any time when a royalty payment is to be made.

100 The second implicit reference in the Fauna Act to the Crown, as the State of Queensland, is found in the enforcement provisions. These impose penalties upon persons who contravene the statutory proscriptions supporting the royalty regime.

128 See *Case of Swans* (1592) 7 Co Rep 15b [77 ER 435]; Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, (1820) at 142-144. As to the meaning of "royalties of the Crown", see *Stanton v Federal Commissioner of Taxation* (1955) 92 CLR 630 at 641.

Section 54(1)(a), the text of which is set out in Section II of these reasons, is one such enforcement provision. As first enacted, s 54(2) provided:

"A person who commits an offence against this section is liable to a penalty of not less than \$50 and not more than \$1,000, and in addition to a penalty of twice the royalty payable on each fauna in respect of which the offence is committed."

The Crown, as the State of Queensland, is the entity to which the penalty was payable¹²⁹.

101 Accordingly, the State of Queensland had two interests conferred by the Fauna Act, first, the recovery of royalties under Pt XI and, secondly, the recovery of penalty sums under the various enforcement provisions in the Act, such as s 54(2). The legal relations between the Crown, as the State of Queensland, and "fauna", created by s 7(1) by the vesting of "property" in the Crown, supported these limited statutory interests. The rights of "the Crown" in fauna created by the vesting of "property" by s 7(1), as enacted in 1974, were limited to those which may have arisen, from time to time, first by way of royalty and, secondly, by penalty exacted from a person who contravened the statutory proscriptions supporting the royalty regime.

VII SUBSEQUENT AMENDMENTS TO THE FAUNA ACT

102 Before considering the question of extinguishment, it is necessary to inquire whether the amendments to the Fauna Act, subsequent to the Commencement Date and before the time of the appellant's alleged offence¹³⁰, effected a change in the Crown's rights under the Fauna Act in respect to "fauna".

103 The amendments did not materially alter the construction of the Fauna Act set out in Section VI of these reasons nor did they expand the rights conferred on

129 Earl of Selborne LC in *Bradlaugh v Clarke* (1883) 8 App Cas 354 at 358 said that it is an "incontestable proposition of law, that 'where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it'". This construction of the Fauna Act is supported by the saving provision in s 84 and by s 85 which provided that "all penalties, costs, fees, royalty and compensation recovered under this Act shall be paid into and form part of the Consolidated Revenue Fund".

130 The Fauna Act was amended by: *Fauna Conservation Act and Another Act Amendment Act* 1976 (Q), Pt II; *Fauna Conservation Act Amendment Act* 1979 (Q); the 1984 Amendment Act, Pt II; *Deer Farming Act* 1985 (Q), s 4(1), Sched 2; *Fauna Conservation Act and Another Act Amendment Act* 1989 (Q), Pt III.

the Crown arising from the vesting of "property" in the Crown in s 7(1). However, reference should be made to the insertion of s 7(1A) by s 5 of the 1984 Amendment Act. Section 66 forbade, without a permit, the breeding of prescribed fauna for gain or reward, and the sale of fauna so bred. Section 7(1A), with effect from 15 May 1984, made provision with respect to the transfer, royalty-free, of property to an authorised breeder. It stated:

"Notwithstanding the provisions of this Act, and subject to the provisions of any Act dealing with the farming of deer, the Conservator may, with the consent in writing of the Minister, transfer the property in fauna that is obtained by an authorized person from the breeding of fauna for gain or reward in accordance with the provisions of section 66 from the Crown to that authorized person and no royalty shall be payable on that fauna or any farm-bred progeny therefrom."

104 Property in the Crown would arise, in respect of fauna bred for gain or reward by a permit holder under s 66, because it was "kept" by that breeder. A royalty would be payable under s 68 because the fauna had been "taken" or had been "obtained" from such fauna. Section 7(1A) provided for a relaxation of that royalty regime.

105 It is convenient now to consider whether the vesting of these rights in the Crown in respect to estuarine crocodiles extinguished the appellant's native title right, or incident, to hunt estuarine crocodiles.

VIII EXTINGUISHMENT

106 In *Wik*¹³¹, this Court considered the effect of rights conferred by statute on native title rights. It was held that native title rights will be extinguished where they are inconsistent with the statutory rights. This requires¹³²:

"a comparison between the legal nature and incidents of the existing right and of the statutory right. The question is whether the respective incidents thereof are such that the existing right cannot be exercised without abrogating the statutory right. If it cannot, then by necessary implication, the statute extinguishes the existing right."

107 Whether in a given case native title rights have been extinguished is a question of law. The inquiry turns on the legal criterion of inconsistency. Where there has been a grant of a fee simple, the application of this criterion is not

131 (1996) 187 CLR 1.

132 (1996) 187 CLR 1 at 185. See also *Fejo* (1998) 72 ALJR 1442 at 1451; 156 ALR 721 at 736.

determined by the existence, as a matter of fact, of an indigenous community's attachment or connection to the land, whether spiritual, cultural, social or economic. This inquiry relates to the anterior question of whether, but for the relevant inconsistency, native title would still subsist. For example, a non-indigenous owner of land in fee simple may continue to permit indigenous people to retain connections to the land but this will not derogate from the conclusion that the grant of fee simple extinguished native title on that land. Further, the existence, as a matter of fact, of indigenous peoples' continued connection to land which has been the subject of a grant in fee simple does not permit a "springing" back of native title at some future time¹³³.

108 The continued subsistence of native title will turn upon the extent of the inconsistency in question. In the case of a grant of a fee simple or of a leasehold interest, as known to the common law, this second step will be unnecessary; subject to the observations above concerning the intersection of native title rights and estates, the comprehensiveness of the grant precludes any question of partial extinguishment.

109 Before turning to whether inconsistency arose in the present appeal, it is important to clarify the utility of factual findings. Factual findings are necessary to establish the ambit of the native title right as defined by the traditional laws and customs of the indigenous community. The ambit of the native title right is a finding of law. This must then be placed against the statutory rights which are said to abrogate it. The question to be asked in each case is whether the statutory right necessarily curtails the exercise of the native title right such that the conclusion of abrogation is compelled, or whether to some extent the title survives, or whether there is no inconsistency at all. Indeed, statute may regulate the exercise of the native title right without in any degree abrogating it.

110 In *Wik*, the Court considered the grant of particular statutory interests. The statutory grants did not "clearly, plainly and distinctly [authorise] activities and other enjoyment of the land which necessarily were inconsistent with the continued existence of any of the incidents of native title which could have been subsisting at the time of these grants"¹³⁴. Further, the subsistence of native title rights was not abrogated by the mere existence of unperformed conditions in the grant of a pastoral lease¹³⁵. These conditions had no immediate legal effect, in terms of inconsistency, whilst unperformed. If performance had occurred, questions would

133 *Fejo* (1998) 72 ALJR 1442 at 1452; 156 ALR 721 at 737.

134 (1996) 187 CLR 1 at 171. See Grattan and McNamara, "The Common Law Construct of Native Title", (1999) 8 *Griffith Law Review* 50 at 78.

135 (1996) 187 CLR 1 at 203.

have arisen respecting operational inconsistency between the performed condition and the continued exercise of native title rights.

111 Some analogy is provided by *The Commonwealth v Western Australia*¹³⁶. There, it was necessary to determine whether operational inconsistency under s 109 of the Constitution had arisen between Pt XI of the Defence Force Regulations, made under s 124(1) of the *Defence Act* 1903 (Cth), and the *Mining Act* 1978 (WA) in respect of a residual portion of land declared to be a defence practice area in Western Australia. The State law provided for the granting of mining exploration licences with respect to this land, subject to conditions. However, if licences were granted, inconsistency was not inevitable. The Minister for Mines could have granted the licences under the State law on terms which prevented the licensees from being on the relevant land at any time during the conduct of defence operations¹³⁷.

112 In the present appeal, the narrow issue is whether the creation of certain statutory rights, conditioned upon the exercise of power conferred by the statute, abrogated the exercise of the native title right, or incident, to hunt. The characteristics of the statutory rights created by or pursuant to the exercise of powers conferred by the Fauna Act are described in Section VI of these reasons. The power in question was exercised by the declaration of estuarine crocodiles as fauna by the Order in Council. Only then could any question of inconsistency arise.

113 The matters which require determination in the present appeal are: (i) when does the question of inconsistency properly arise?; and (ii) what is the effect of the statutory rights on the exercise of the native title right to hunt?

114 The Crown's "property" in fauna under s 7(1) of the Fauna Act arises only upon a "taking" or "keeping". Further, the provisions in the Fauna Act for the granting of permission to take fauna and for the declaration of animals to be (or not be) fauna reinforce the conclusion that any question of inconsistency arises upon, but not before, a "taking" or "keeping" of fauna.

115 The exercise of the native title right to hunt was a matter within the control of the appellant's indigenous community. The legislative regulation of that control, by requiring an indigenous person to obtain a permit under the Fauna Act in order to exercise the privilege to hunt, did not abrogate the native title right. Rather, the regulation was consistent with the continued existence of that right.

136 (1999) 73 ALJR 345; 160 ALR 638.

137 (1999) 73 ALJR 345 at 372; 160 ALR 638 at 674-675.

116 Further, as described in Section III of these reasons, the native title right to
 hunt exercised by the appellant was not merely the right to "take" estuarine
 crocodiles within the meaning of s 5 of the Fauna Act. The native title right has
 both an anterior and posterior operation. Any anterior exercise of the native title
 right, prior to a "taking" or "keeping" of an estuarine crocodile, is not inconsistent
 with the Crown's so-called "property" rights pursuant to s 7(1).

117 Accordingly, the native title right, or incident, to hunt estuarine crocodiles
 exercised by the appellant was not extinguished at any time before the "taking" of
 the estuarine crocodiles which allegedly contravened s 54(1) of the Fauna Act.

118 Finally, I turn to consider the effect of the Native Title Act on the appellant's
 common law native title right, or incident, to hunt estuarine crocodiles.

IX OPERATION OF THE NATIVE TITLE ACT

119 Part 13 (ss 208-215) of the Native Title Act is entitled "Miscellaneous".
 Section 211 provides:

"Preservation of certain native title rights and interests

Requirements for removal of prohibition etc on native title holders

(1) Subsection (2) applies if:

- (a) the exercise or enjoyment of native title rights and interests in
 relation to land or waters consists of or includes carrying on a
 particular class of activity (defined in subsection (3)); and
- (b) a law of the Commonwealth, a State or a Territory prohibits or
 restricts persons from carrying on the class of activity other than in
 accordance with a licence, permit or other instrument granted or
 issued to them under the law; and
- (c) the law is not one that confers rights or interests only on, or for the
 benefit of, Aboriginal peoples or Torres Strait Islanders.

Removal of prohibition etc on native title holders

- (2) If this subsection applies, the law does not prohibit or restrict the native
 title holders from carrying on the class of activity, or from gaining
 access to the land or waters for the purpose of carrying on the class of
 activity, where they do so:
 - (a) for the purpose of satisfying their personal, domestic or
 non-commercial communal needs; and

47.

- (b) in exercise or enjoyment of their native title rights and interests.

*Definition of **class of activity***

- (3) Each of the following is a separate **class of activity**:
 - (a) hunting;
 - (b) fishing;
 - (c) gathering;
 - (d) a cultural or spiritual activity;
 - (e) any other kind of activity prescribed for the purpose of this paragraph."

Part 15 (ss 222-253) is entitled "Definitions", Div 2 (ss 223-240) therein is entitled "Key concepts: Native title and acts of various kinds etc". Sections 223 and 224 inform the meaning of s 211. They materially state:

"223 Native title

Common law rights and interests

- (1) The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
 - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
 - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
 - (c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

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

"224 Native title holder

The expression ***native title holder***, in relation to native title, means:

- (a) if a prescribed body corporate is registered on the National Native Title Register as holding the native title rights and interests on trust – the prescribed body corporate; or
- (b) in any other case – the person or persons who hold the native title."

120 In *Western Australia v The Commonwealth (Native Title Act Case)*¹³⁸, the Court, after setting out the relevant text of s 211, continued:

"The usufructuary rights comprehended by sub-s (3) are, by virtue of sub-s (2)(b), rights and interests which are incidents of native title. They are, by definition (s 223(1)), rights and interests that are recognised by the common law and, by operation of s 11(1), they cannot be extinguished except in conformity with the Act. Section 211(2) removes the requirement of a 'licence, permit or other instrument granted or issued ... under the law' referred to in s 211(1)(b) as a legal condition upon the exercise of the native title rights specified in sub-s (3). If the affected law be a law of a State, its validity is unimpaired, but its operation is suspended in order to allow the enjoyment of the native title rights and interests which, by s 211, are to be enjoyed without the necessity of first obtaining 'a licence, permit or other instrument'. Again, the effect of s 211 is not to control the exercise of State legislative power, but to exclude laws made in exercise of that power (inter alia) from affecting the freedom of native title holders to enjoy the usufructuary rights referred to in s 211."

121 The appellant's conduct in hunting and killing the estuarine crocodiles was a "class of activity" for the purposes of s 211(2) of the Native Title Act. Further, s 54(1)(a) of the Fauna Act was a State law which fell within the terms of s 211(1)(b). It prohibited or restricted persons from carrying on the relevant class of activity at stake in this case, namely hunting, other than in accordance with a licence, permit or other instrument granted or issued to them under the Fauna Act. Equally, s 54(1)(a) of the Fauna Act answered the criteria in s 211(1)(c).

122 The respondent's principal contention was that the appellant's conduct did not fall within the definition of "native title" or "native title rights and interests" in s 223, because the condition in par (c) of s 223(1) that "the rights and interests are recognised by the common law of Australia" could not have been satisfied. The existence of a native title right, which was not extinguished prior to the enactment of s 211, is assumed. Section 211, in conjunction with s 109 of the Constitution,

138 (1995) 183 CLR 373 at 474.

operates to remove prohibitions or restrictions in Commonwealth, State or Territory laws which might otherwise extinguish the relevant native title right.

123 However, the common law native title right, or incident, to hunt estuarine crocodiles exercised by the appellant was not extinguished by the Fauna Act prior to the "taking" of the two estuarine crocodiles at Cliffdale Creek. Therefore the "native title right" was "recognised by the common law of Australia" within the meaning of par (c) of s 223(1), at the time when the appellant was alleged to have committed the offence against s 54(1) of the Fauna Act.

124 The Magistrate held that the conditions of s 211(2)(a) were fulfilled in this case. It was not otherwise disputed that the appellant's conduct was in "exercise or enjoyment" of his "native title rights and interests" within the meaning of s 211(2)(b). As a consequence, s 211(2) applied to the appellant's conduct. Direct inconsistency arose between the prohibition purportedly imposed on the appellant by s 54(1) of the Fauna Act and the removal of the prohibition by s 211(2) of the Native Title Act. Section 109 of the Constitution operated to deny what otherwise could have been the appellant's liability to punishment for contravention of s 54(1) of the Fauna Act. Therefore the complaint against the appellant was not well based in law.

X CONCLUSION

125 I would allow the appeal, order that the orders of the Court of Appeal be set aside and in lieu thereof order that the order nisi of Williams J dated 28 November 1996 be discharged.

126 The appellant seeks an order for costs in this Court and in the Court of Appeal. The appeal arises out of a prosecution but presents special features. The outcome is dictated by the operation, through the medium of s 109 of the Constitution upon the Fauna Act, of the Native Title Act. This attracted interventions, as to some said to be as of right under s 78A(1) of the *Judiciary Act* 1903 (Cth) and as to others admitted to require leave.

127 It is implicit in what has been said earlier in these reasons that, to the extent necessary to grant leave to any intervener, I would do so.

128 Section 78A(2) of the *Judiciary Act* provides for costs orders against intervening Attorneys-General. The appellant seeks such orders in respect of the increase in costs brought about by their interventions. In the end, as might have been expected, this case has turned upon a close analysis of the Fauna Act. The interveners supporting the respondent, the Attorneys-General, between them filed extensive materials which did not assist in that task. There is merit in the appellant's submission that this is a case for the special order he seeks against the intervening Attorneys. I would make an order against each of the intervening

Attorneys, that they pay the additional costs of the appellant resulting from their intervention.

- 129 There was no argument with respect to the general order for costs sought against the respondent. I would give the appellant leave to present written submissions as to why, notwithstanding the criminal nature of the process involved, there should be such an order in his favour in respect of the proceedings in this Court and in the Court of Appeal. The submissions should be filed not later than 14 days after delivery of judgment. The respondent should have 14 days to reply to those submissions.

- 130 CALLINAN J. This case which was commenced in the Magistrates Court in Mount Isa raises a question whether an incident, tradition, right or privilege of or interest in native title has been extinguished by the *Fauna Conservation Act* 1974 (Q) ("the Act").

Facts

- 131 The appellant was charged with having taken fauna, crocodiles, without being the holder of a licence, permit, certificate or other authority, under s 54(1)(a) of the Act. Section 54 provides as follows:

"54(1)(a) A person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act.

(b) Save as is otherwise expressly provided by this Act, a person who –

- (i) keeps protected fauna which fauna was taken otherwise than in contravention of this Act during an open season with respect to that protected fauna in a place to which that open season refers;
- (ii) takes fauna at a time and place when and where that fauna is non-protected fauna;
- (iii) continues to keep fauna taken and kept lawfully prior to the date of commencement of this Act;
- (iv) keeps aviary birds;
- (v) keeps for his own private domestic enjoyment, not more than five in total of birds of prescribed species which birds have not been unlawfully taken, and who at the same time keeps no birds other than aviary birds;
- (vi) keeps dead non-protected fauna,

does not commit an offence under this Act.

(c) The exemption granted by provision (i) of paragraph (b) shall not apply to the keeping of live protected fauna by any person.

(2) A person who commits an offence against this section is liable –

- (a) if the offence is one related to the taking of fauna, to a penalty of 100 penalty units or 12 months imprisonment or both;

- (b) if the offence is one related to the keeping of fauna, to a penalty of 40 penalty units,

and in any case to an additional penalty not exceeding twice the royalty on each fauna in respect of which the offence is committed."

132 Evidence was given in the Magistrates Court without objection, that the appellant took, during a period of five weeks, two young crocodiles from Clifffdale Creek in North Queensland. He and other members of his group or tribe froze and ate part of the catch. The area around Clifffdale Creek was traditionally occupied by the tribe or group of people, the Gungaletta people, of whom the appellant was a member. The precise length of time of this occupation was uncertain. The appellant claimed that the area had been occupied for at least 1,300 years. Dr Trigger, an anthropologist, gave unchallenged evidence that radiocarbon dating conducted in 1983 indicated that shellfish-eating people occupied the area 140 years ago (plus or minus 60 years) and 1,300 years ago (plus or minus 80 years). The appellant and Dr Trigger gave evidence that the appellant's genealogy could be traced back to 1870. The Magistrate concluded that the appellant's tribe or people were identical with those whose presence was revealed by carbon dating. The hunting and taking of crocodiles in the area was a practice which, Mr Yanner stated, his people had been following "forever". He also said that although traditional hunting methods had changed over the years, the way in which he hunted crocodiles was "[p]retty much the same" as the way in which his ancestors had. This claim was made despite the fact that the appellant used a modern boat with an outboard motor and a steel tomahawk to administer the coup de grâce to the crocodiles¹³⁹. Dr Trigger also gave evidence that "Gungaletta customs and traditions have simply been maintained from the earliest processes of colonisation through to the present, though they have changed in certain ways".

133 On the basis of this evidence and although some of it, particularly as to a possible totemic significance of crocodiles in this area, was vague¹⁴⁰, because it was neither challenged nor the subject of any objection, the Magistrate formed the view that the appellant had been doing no more than taking advantage of his native

139 In *R v Sundown* (1999) 170 DLR (4th) 385 at 398-399, the Supreme Court of Canada gave some consideration to the relevance of the means by which a treaty right to hunt may be pursued in that country by First Nation peoples. However the different history of that country, its first inhabitants, treaties made there and its legislation might give rise to different considerations from those of relevance to this country. Similarly in *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 the different legislative regime and the Treaty of Waitangi give rise to matters which are not relevant to this case.

140 For a discussion of the evidentiary problems thrown up by a case of this kind see *Mabo v State of Queensland* [1992] 1 Qd R 78 at 84ff per Moynihan J.

title right in taking and eating the crocodiles, and that that right had not been extinguished by the Act. In acquitting the appellant the Magistrate expressed himself in this way:

"[T]he evidence is that the traditional custom was to hunt crocodile for food from time to time, not just crocodile, however, but juvenile creatures. Evidence is that adults are not hunted. Quite apart from the fact that that seems rather prudent, the evidence suggests tribal totemic significance and spiritual belief. The defendant says he complies with that code of behaviour.

...

Whilst there is the authority for the proposition that 'hunting' rights as such are not available on common law principles, the clear inclusion of such in subsection (2) of section 223 of the Native Title Act now demands of the common law in Australia the statutory interpretation now provided.

Being satisfied that the provisions of clause (c) are complied with and being satisfied that the defendant is a member of a class described in all paragraphs of section 223(1), I accept that the defendant was in the exercise or enjoyment of his Native Title rights and interests, section 211(2)(b). He is therefore a person who holds Native Title rights and interests as defined in section 224.

Having accepted the criteria set out, and as referred to in the Native Title Act, I am satisfied that the defendant has established his defence to the offence alleged under the State legislation. That being the case, the defendant is found not guilty and is discharged."

134 In the Queensland Supreme Court the respondent obtained an order nisi for review of the Magistrate's decision. The Queensland Court of Appeal (McPherson JA and Moynihan J; Fitzgerald P dissenting) accepted the respondent's argument that the native title rights of the appellant had been extinguished by the operation of the Act, and accordingly held that the Magistrate erred in applying the *Native Title Act* 1993 (Cth). The Court of Appeal made the order nisi absolute and remitted the proceedings to the Magistrates Court in Mount Isa for determination according to law.

Appeal to this Court

135 The appeal to this Court may, in my opinion, be resolved by the application of s 7 (in the context of the Act as a whole) to the facts as found by the Magistrate.

136 Section 7 of the Act provides as follows:

"(1) All fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority.

(1A) Notwithstanding the provisions of this Act, and subject to the provisions of any Act dealing with the farming of deer, the [Conservator] may, with the consent in writing of the Minister, transfer the property in fauna that is obtained by an authorized person from the breeding of fauna for gain or reward in accordance with the provisions of section 66 from the Crown to that authorized person and no royalty shall be payable on that fauna or any farm-bred progeny therefrom.

(2) Liability at law shall not attach to the Crown by reason only of the vesting of fauna in the Crown pursuant to this section."

137 The word "property" is a word of the widest import. Indeed when counsel were invited to do so they were unable to suggest any more ample expression to convey the notion of absolute ownership. The Act uses the word "property" without qualification. If something less than absolute ownership were intended then an appropriate qualification in that regard could be expected to have been expressed.

138 During argument the appellant sought to say that "property" should not be given its ordinary meaning where it appears in s 7 of the Act for two reasons: first, that it was unlikely that the Queensland legislature would have intended the word to have its ordinary and natural meaning in relation to wild creatures when regard is had to their natural and generally inaccessible state until reduced to captivity, circumstances which the common law recognised and gave effect to by elaborate rules with respect to them; and, secondly, a reading of the Act as a whole dictated a conclusion that the real intention of the legislature was to do no more than protect and control fauna and regulate any access to, or exploitation of fauna to which the Act and regulations made under it referred¹⁴¹.

139 *Walden v Hensler*¹⁴² is a case in which fairly recent consideration was given by this Court to the effect and operation of s 7 and s 54 of the Act. The appellant there was an Aboriginal who was found in possession of a partly-plucked turkey and a live turkey chick. He had shot the turkey in the bush for food, and the chick was being kept until it had grown sufficiently to be released in the bush. The birds were fauna for the purposes of the Act, and the appellant had no licence to take

141 By Order-in-Council dated 29 August 1974 and published in the Government Gazette on 31 August 1974, the operation of the Act was extended to cover crocodiles.

142 (1987) 163 CLR 561.

them. At the relevant time the appellant believed, in accordance with Aboriginal custom and his own practice of a lifetime, that he was entitled to take the turkeys as "bush tucker" and that he was committing no offence in so doing.

140 Brennan J in *Walden*¹⁴³ quoted what Lord Westbury LC had stated in *Blades v Higgs*¹⁴⁴:

"... when it is said by writers on the Common Law of England that there is a qualified or special right of property in game, that is in animals *ferae naturae* which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word 'property' can mean no more than the exclusive right to catch, kill and appropriate such animals which is sometimes called by the law a reduction of them into possession.

This right is said in law to exist *ratione soli*, or *ratione privilegii* ... Property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *ferae naturae* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil.

Property *ratione privilegii* is the right which, by a peculiar franchise anciently granted by the Crown in virtue of its prerogative, one man had of killing and taking animals *ferae naturae* on the land of another; and in like manner the game, when killed or taken by virtue of the privilege, became the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil."

141 Brennan J then said this¹⁴⁵:

"It follows that, apart from the provisions of the Act of which the appellant was ignorant, he was entitled by law to keep the birds which he had taken. But the Act changed the law. It vested the property in all fauna in the Crown (s 7) and prohibited the taking or keeping of fauna without a licence, etc. The Act eliminated any right which Aborigines or others might have acquired lawfully to take and keep 'fauna' as defined in the Act, and any entitlement which Aborigines might have enjoyed at common law to take and keep fauna (assuming that such an entitlement had survived the alienation by the Crown of land over which Aborigines had traditionally hunted)."

143 *Walden v Hensler* (1987) 163 CLR 561 at 566.

144 (1865) 11 HL Cas 621 at 631 [11 ER 1474 at 1478-1479].

145 *Walden v Hensler* (1987) 163 CLR 561 at 566-567.

142 The law which Lord Westbury LC summarised owes its origins no doubt to many 19th century and earlier, now outdated, historical, indeed feudal conditions of questionable relevance to Australia at any time: for example, the ownership by a few of vast hunting estates, aristocratic preoccupations with the Chase, hound, horse, lure, snare, falconry, gun and dogs¹⁴⁶, uncertain agricultural yields, the poverty suffered by many which might tempt them to poach, the partial domestication of game birds to enable them to be more vulnerable to the landowner's fowling piece, Royal privilege in respect of certain animals, and competition between wealthy people to collect and keep for ornamental purposes and as curiosities exotic animals.

143 But times and views about ecology and the environment of which wild creatures are now indubitably taken to be part¹⁴⁷, change. Darwin's *On the Origin of Species* which raised the consciousness and sensitivity of Western Society to the importance and significance of the natural world, was published in 1859¹⁴⁸. By 1907 this consciousness was manifesting itself by statements and endeavours by concerned and informed people such as Dudley Le Souef of the Australasian Ornithologists Union who said in that year "[t]he wild birds do not belong to us to treat as we like"¹⁴⁹. The most effective way to ensure the survival and protection of wild creatures, particularly as the means of taking and destroying them became more efficient, was for the State to legislate in the most comprehensive way possible to obtain absolute dominion over them and this I am satisfied the legislature of Queensland did in enacting the Act. The Queensland Parliament meant exactly what it said when it used the word "property" in s 8A of the *Animals and Birds Act* 1921 (Q)¹⁵⁰ and when it repeated that word in each subsequent enactment¹⁵¹.

146 For a discussion of the changing nature of these preoccupations, see Itzkowitz, *Peculiar Privilege: A Social History of English Foxhunting 1753-1885* (1977).

147 See *The Crown v Murphy* (1990) 64 ALJR 593 at 596-597; 95 ALR 493 at 498-499.

148 For a discussion of Darwin's influence in this respect, see Verney, *Animals in Peril* (1979) at 176-184.

149 Hutton and Connors, *A History of the Australian Environment Movement* (1999) at 21. For a discussion of the emergence and manifestation of this consciousness at the same time in the United States and Europe, see Verney, *Animals in Peril* (1979); for a discussion of its emergence and manifestation in Britain, see Ritvo, "Animals in Nineteenth-Century Britain", in Manning and Serpell (eds), *Animals and Human Society* (1994) 106.

150 Section 8A was inserted by *Animals and Birds Act Amendment Act* 1924 (Q), s 2(4).

151 *Fauna Protection Act* 1937 (Q), s 15; *Fauna Conservation Act* 1952 (Q), s 6(2).

144 The second argument of the appellant is that the text of the Act as a whole requires "property" in s 7 to be read as meaning no more than an extensive power to regulate the protection and some limited exploitation of fauna. In support of this submission reference was made to s 71(2) which provides that fauna seized for non-payment of a royalty shall be "forfeited to Her Majesty", a phrase said to be incompatible with pre-existing ownership by the Crown. Reference was also made to the division of "fauna" in s 6 into four classes ("permanently protected fauna", "protected fauna", "non-protected fauna" and "prohibited fauna") and to the provisions relating to the circumstances under which permits for taking fauna in different classes are needed and may be obtained (ss 26, 27 and 53). These provisions were said to indicate that the "property" vested in the Crown under s 7 was less than absolute.

145 None of these indications in the Act is of sufficient significance and force to detract from the ordinary and natural meaning of "property" in s 7. But in any event there are other parts of the Act which reinforce this natural meaning. Section 67, particularly sub-s (2) is one:

"67(1) Subject to subsection (4), royalty at the rates prescribed shall be payable to the Crown on prescribed fauna.

(2) Notwithstanding this Act or any other Act or law, payment of royalty on fauna pursuant to this Act does not transfer property in that fauna from the Crown.

(3) Rates of royalty may vary in respect of different species of fauna.

(4) The regulations may exempt from the payment of royalty species of fauna specified therein in cases where that fauna is taken otherwise than in contravention of this Act."

146 The whole scheme of the Act is consistent with no intention other than an intention by the legislature to have absolute property in all fauna occurring or present in the State. And in my opinion there were and are no impediments which prevented it from effecting that intention by the legislation it enacted.

147 In support of his second argument the appellant referred to the difficulty in reducing wild animals to possession and of preventing them from migrating out of the State as a reason for the reading down of the word "property" in the Act. In this connexion an analogy may be drawn with the way in which, in the United States, natural gas and oil, which are fugitive minerals, are treated. There, these are regarded as having some features in common with wild animals. In that country ownership of the land generally carries with it ownership of minerals beneath it. The fact that natural gas or oil may migrate from under one property

to another, does not mean that a property owner does not own absolutely and may not exploit fully these minerals whilst they are underneath his or her land¹⁵².

148 No question of native title was argued in *Walden v Hensler*¹⁵³. However the references by Brennan J to the appellant's former rights to take the birds and to traditional entitlements before land was alienated by the Crown suggest that his Honour was well alive to the possible existence of native title rights which in fact were declared to exist only five years later in *Mabo v Queensland [No 2]*¹⁵⁴ when the issue did arise. *Mabo [No 2]* being a decision declaratory of the law did not alter the law by creating some previously non-existing right. Native title must have existed in 1987 when *Walden* was decided. Yet Brennan J was in no doubt that the fauna which had been taken by Mr Walden there were fauna which had vested in the Crown. The case stands as clear authority for at least the proposition that since its enactment s 7 has operated to vest property in fauna in the Crown.

149 There is some overseas authority for the proposition, if authority be needed, that when a statutory declaration of Crown ownership or property in fauna is coupled with a statutory exception permitting or recognising an aboriginal right or entitlement to take fauna (for example, for sustenance or other purposes), native title rights to take that fauna are not extinguished¹⁵⁵. That distinction is significant in the present case. The history of the legislation here shows that since 1924, fauna has been legislatively declared to be the property of the Crown; and from 1906 until 1974, Queensland legislation with respect to fauna was expressed not to apply

152 A landowner has, generally speaking, a right to extract the gas and oil beneath his or her land, including gas and oil which is there by the power of "self-transmission" (*Brown v Spilman* 155 US 665 (1895); *Ohio Oil Company v Indiana (No 1)* 177 US 190 (1900); *DuLaney v Oklahoma State Department of Health* 868 P 2d 676 (1993)). However, ownership of gas and oil is subject to the possibility of escape and loss of title. This is reflected in what is known as the "rule of capture", which is that "the owner of a tract of land acquires title to the oil or gas he or she produces from wells on his or her land even though part of the oil or gas may have migrated from adjoining lands, without incurring liability to the adjoining land for drainage" (38 Am Jur 2d, Gas and Oil at §10). Thus, a landowner is entitled to extract gas or oil from his property to capture the contents of the pool regardless whether this diminishes the availability of the gas or oil to his neighbours.

153 (1987) 163 CLR 561.

154 (1992) 175 CLR 1.

155 *R v Alphonse* (1993) 80 BCLR (2d) 17 at 26-27. See also *Ward v Western Australia* (1998) 159 ALR 483 at 615.

to "any aboriginal killing any native [animal or fauna] for his own food"¹⁵⁶. However that exception was excluded from the Act, and there has been no general statutory exception of that kind in force in Queensland since then.

150 The question then becomes, is property in, that is ownership by the Crown of the crocodiles which were taken by Mr Yanner so inconsistent with any native title right to it as to extinguish that right?

151 In *Wik Peoples v Queensland*¹⁵⁷, Gummow J emphasised that a person who seeks to contend that native title has been extinguished by necessary implication from the provisions of a statute carries a heavy burden. In the same case, Kirby J said¹⁵⁸:

"There is a strong presumption that a statute is not intended to extinguish native title. The intention to extinguish native title must be clear and plain, either by the express provision of the statute or by necessary implication." (footnotes omitted)

152 In both *Mabo [No 2]* and *Wik* the Justices of this Court discuss, at length, native title but attempt no definition of it. Perhaps this is because not only is it, as it has been described, fragile¹⁵⁹, but also because to non-indigenous people it may be a somewhat elusive concept. But neither its fragility nor its elusiveness absolves the Court from identifying native title rights in any case calling for their consideration. In the former case Brennan J discussed some of its nature and incidents¹⁶⁰:

"Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty ..."

156 See *Native Animals Protection Act* 1906 (Q), s 9(c); *Animals and Birds Act* 1921 (Q), ss 8A, 17(b); *Fauna Protection Act* 1937 (Q), ss 15, 25; *Fauna Conservation Act* 1952 (Q), ss 6(2), 78.

157 (1996) 187 CLR 1 at 185.

158 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 247.

159 See, for example, *Fejo v Northern Territory* (1998) 72 ALJR 1442 at 1466; 156 ALR 721 at 756.

160 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58.

153 The language of the Justices of this Court when reference is made to native title has tended to be couched, as perhaps it only can be, in terms of "incidents"¹⁶¹, "nature"¹⁶², "rights"¹⁶³, "traditions"¹⁶⁴, "customs"¹⁶⁵ and "entitlements"¹⁶⁶.

154 In *Wik*, in construing Queensland statutes enacted long before *Mabo [No 2]* the Court was unable to answer the question whether there had been an extinguishment definitively because, as Toohey J pointed out¹⁶⁷, there had not been evidence which focussed specifically on the traditions, customs and practices of the particular aboriginal group claiming the right which could be compared with the rights conferred by the leases granted by the Queensland government, to ascertain whether those rights were necessarily inconsistent with the exercise of the customs, traditions and practices of the aboriginal group claiming the right.

155 In this case there was evidence which was uncontradicted and uncontested, relevantly directed to the rights, traditions, customs and practices of the aboriginal group of which the appellant was a member, and findings of them by the Magistrate of sufficient particularity to enable, indeed to compel, the carrying out of the exercise which the majority in *Wik* was unable to carry out in order to decide whether the leases extinguished wholly or partially any of the native title rights claimed.

156 That evidence and the findings I have summarised. They point inexorably to a direct collision between the custom or right claimed here, of taking and eating

161 See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58 per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185 per Gummow J.

162 See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58 per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185 per Gummow J.

163 See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 60 per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126 per Toohey J, 185, 203 per Gummow J.

164 See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58, 61 per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126 per Toohey J; cf *Fejo v Northern Territory* (1998) 72 ALJR 1442 at 1452; 156 ALR 721 at 737.

165 See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58, 61 per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126 per Toohey J; cf *Fejo v Northern Territory* (1998) 72 ALJR 1442 at 1452; 156 ALR 721 at 737.

166 See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 61-62 per Brennan J; *Walden v Hensler* (1987) 163 CLR 561 at 565 per Brennan J.

167 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126.

crocodiles, and the ownership of them by the State of Queensland. To the extent therefore that that custom or right may be an aspect or incident of native title enjoyed by the people of whom the appellant was one, that incident or right (or custom, entitlement, tradition or practice), however it might be designated, has been extinguished by the Act under which the appellant was charged. Its exercise was inconsistent with the ownership of the fauna by the Crown¹⁶⁸. Property means, in the Act, exactly that.

157 This case may be compared with *Fejo v Northern Territory*¹⁶⁹. There this Court held that a grant of land in fee simple was an act of sovereignty and that the bundle of rights going to make up a fee simple title necessarily conflicted with and excluded native title. The word "property" as used in s 7 of the Act has at least as exhaustive an operation and meaning as fee simple. *Fejo* also held that once such a grant was made it extinguished native title for all time so that it would not be revived if and when title lapsed and the Crown resumed ownership of the land the subject of the earlier grant. And, as Gummow J said in *Wik*¹⁷⁰, "[i]f acts done before the commencement ... of the *Racial Discrimination Act* 1975 (Cth) were effective to extinguish or impair native title, the *Native Title Act* does not undo that result".

158 The *Native Title Act* is not retrospective. It does not operate to create new rights or to revive native title rights that have been extinguished. In *Western Australia v The Commonwealth (Native Title Act Case)*, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said¹⁷¹:

"An act which was wholly valid when it was done and which was effective then to extinguish or impair native title is unaffected by the *Native Title Act*. Such an act neither needs nor is given force and effect by the Act. But, as acts purporting to extinguish or impair native title might be impugned as inconsistent with the *Racial Discrimination Act* if they were done after that Act came into operation, the Parliament has chosen to include certain legislative and executive acts of the Crown within the definition of 'past acts'." (footnote omitted)

168 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 50, 64, 68-70, 89-90, 110-111, 195-196; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 418, 422, 433-434, 452-453, 492, 495; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84-86, 126, 132-133, 135, 146-147, 168-169, 185, 203, 214, 243, 244, 247.

169 (1998) 72 ALJR 1442; 156 ALR 721.

170 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 167-168.

171 (1995) 183 CLR 373 at 454.

The *Fauna Conservation Act* 1974 (Q) relevantly answers the description of an Act which was wholly valid and effective when passed in relation to any native title right in respect of the taking of fauna.

- 159 On the view that I take of the case it is unnecessary to go any further. The decision of the majority of the Court of Appeal of Queensland was correct. I would dismiss the appeal with costs.