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**IN THE HIGH COURT OF AUSTRALIA
BRISBANE OFFICE OF THE REGISTRY**

Matter No. B8 of 1996

**BETWEEN THE WIK PEOPLES AND
OTHERS**

Appellants

**AND THE STATE OF QUEENSLAND
AND OTHERS**

Respondents

Matter No. B9 of 1996

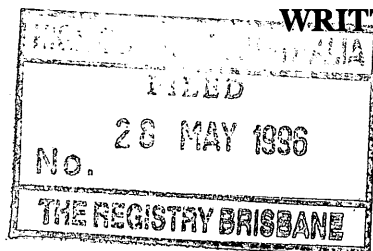
BETWEEN THE THAYORRE PEOPLE

Appellants

**AND THE STATE OF QUEENSLAND
AND OTHERS**

Respondents

**WRITTEN SUBMISSIONS OF THE FOURTH RESPONDENT
(COMALCO ALUMINIUM LIMITED)**



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PART ONE - PASTORAL LEASES

Native title is extinguished by inconsistent Crown or legislative dealing.

The rule in Mabo [No 2]

1. Native title will be extinguished by the exercise of legislative or executive power if the exercise of a power reveals a clear and plain intention to do so¹. A clear and plain intention to extinguish native title will be established by the grant of an estate in land: *Mabo [No 2]* established the principle that native title is extinguished by inconsistent Crown or legislative dealings, such as the grant of an estate in fee simple or a lease².

The basis of the rule in Mabo [No 2].

2. The Imperial Crown acquired sovereignty over the lands which are the subject of the appellants' claims in 1788 upon the arrival of the First Fleet³. That this was so may not be challenged in the municipal courts⁴.

3. Upon the acquisition of sovereignty, the common law of England became the law of that land, protecting and binding colonists and indigenous inhabitants alike and equally⁵. The Wik Peoples and the Thayorre People became British subjects owing allegiance to the Imperial Sovereign and entitled to such rights and privileges and subject to such liabilities as the common law recognised and applicable statutes provided⁶.

4. Concomitant with the importation of the common law of England was the acceptance of the doctrine of tenure as an essential principle of the land law of Australia and under which -

¹ *Mabo [No 2]* (1992) 175 CLR 1 per Brennan J. at 64, *Western Australia v The Commonwealth* (1995) 183 CLR 373, at 423.

² *Mabo [No 2]* (1992) 175 CLR, at 68, 69, 71, 73 per Brennan J (with whom Mason CJ and McHugh J agreed), at 89, 110 111 per Deane and Gaudron JJ. Dawson J in *Western Australia v The Commonwealth* (1995) 183 CLR, at 492-494; see also *Re Waanyi People's Native Title Application* (1995) 125 ALR 118 per President French J at 138 and *North Ganalanga Aboriginal Corporation & Another v State of Queensland & Another* (1995) 132 ALR 565. In *North Ganalanga* although Hill J said of the statements as to extinguishment by Brennan J and Deane and Gaudron JJ in *Mabo [No 2]* that "these expressions of opinion may strictly be dicta" (at 617 line 30, Jenkinson J concurring at 577 line 20), at 616-617 their Honours also treated *Mabo [No 2]* as having established that the grant of a lease conferring a right of exclusive possession extinguishes native title. Lee J, dissenting, concluded (at 589-590) that this question was not decided in *Mabo [No 2]*.

³ *Mabo [No 2]* (1992) 175 CLR per Deane and Gaudron JJ. at 78 - 79.

⁴ *Mabo [No 2]* (1992) 175 CLR per Brennan J. at 31, Deane and Gaudron JJ. at 79.

⁵ *Mabo [No 2]* (1992) 175 CLR per Brennan J. at 37, Deane and Gaudron JJ. at 80.

⁶ *Mabo [No 2]* (1992) 175 CLR per Brennan J. at 38.

“... it was an essential postulate that the Crown have such a title to land as would invest the Sovereign with the character of Paramount Lord in respect of a tenure created by grant and would attract the incidents appropriate to the tenure, especially the Crown’s right to escheat [Wright, *Introduction to the Law of Tenures*, 4th ed (1792), p.5]. The Crown was invested with the character of Paramount Lord in the colonies by attributing to the Crown a title, adapted from feudal theory, that was called a radical, ultimate or final title: see, for example, *Amodu Tijani v Secretary, Southern Nigeria* [[1921] 2 AC 399, at pp 403, 404, 407]; *Nireaha Tamaki v Baker* [[1901] AC 561, at p 580]; cf *Administration of Papua and New Guinea v Daera Guba* [(1973) 130 CLR 353, at pp 396-397]. The Crown was treated as having the radical title to all the land in the territory over which the Crown acquired sovereignty. The radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty. As a sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign’s beneficial demesne.”⁷

5. Neither the acquisition of sovereignty nor the importation of the common law and the doctrine of tenure operated to extinguish such rights and interests as the indigenous peoples might have had in the land which they occupied. The majority judgment in *Western Australia v The Commonwealth* held⁸:

“At common law, a mere change of sovereignty over a territory does not extinguish pre-existing rights and interests in land in that territory. Although an acquiring Sovereign can extinguish such rights and interests in the course of the act of State acquiring the territory, the presumption in the case of the Crown is that no extinguishment is intended. That presumption is applicable by the municipal courts of this country in determining whether the acquisition of the several parts of Australia by the British Crown extinguished the antecedent title of the Aboriginal inhabitants.”

6. Those native title rights are accommodated by the land law of this country in much the same way as the English legal system accommodated the recognition of rights and interests derived from occupation of land in a territory over which sovereignty was acquired by conquest without the necessity of a Crown grant⁹. As was the case with such interests, native title is seen to be a burden on the radical title which the Crown acquired when it acquired sovereignty¹⁰.

⁷ *Mabo [No 2]* (1992) 175 CLR per Brennan J at 47 - 48.

⁸ (1995) 183 CLR, at 422 - 423. (Footnotes are omitted from the quotation.)

⁹ *Mabo [No 2]* (1992) 175 CLR per Brennan J at 48 - 49, 57.

¹⁰ *Mabo [No 2]* (1992) 175 CLR per Brennan J at 52, per Deane and Gaudron JJ, at 86-87.

7. Although the common law recognises that native title survived a change of sovereignty, native title is not an institution of the common law.¹¹ The precise nature of native title depends upon evidence of traditional laws and customs.¹² Although it is capable of being recognised as a proprietary interest or a personal and usufructuary right or interest by the common law¹³, native title is not a common law tenure¹⁴ because the doctrine of tenure (although it applies to every Crown grant of an interest in land) does not apply to rights and interest which do not owe their existence to a Crown grant¹⁵.

8. Interests held under the system of tenure (and which derive either actually or as a matter of legal fiction from Crown grant¹⁶) are not vulnerable to extinction by mere exercise of the prerogative without statutory authority. And even where statutory authority exists, a presumption applies to protect the existing tenure interest. In *Mabo [No 2]*, Brennan J observed¹⁷:

“... an interest validly granted by the Crown, or a right or interest dependant on an interest validly granted by the Crown cannot be extinguished by the Crown without statutory authority. As the Crown is not competent to derogate from a grant once made ..., a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorising any impairment of an interest in land granted by the Crown or dependent on a Crown grant.”

9. However, native title, not being an institution of the common law and not owing its existence to Crown grant, is not protected by this presumption¹⁸. Although native title interests survive the change of sovereignty, they are vulnerable to extinction by exercise of the new

¹¹ *Mabo [No 2]* (1992) 175 CLR per Brennan J at 59.

¹² *Mabo [No 2]* (1992) 175 CLR per Brennan J at 58, Deane and Gaudron JJ at 87-88, 110.

¹³ *Mabo [No 2]* (1992) 175 CLR per Brennan J at 61, cf. per Deane and Gaudron JJ who (at 88 - 89 and 110) regard it as being merely a personal right.

¹⁴ *Mabo [No 2]* (1992) 175 CLR per Brennan J at 61, Deane and Gaudron JJ at 100 “... the absence of any presumption of a prior grant ...” and 110. See also *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 which cautioned against the tendency to render native title conceptually in terms appropriate only to systems which have grown up under English law.

¹⁵ *Mabo [No 2]* (1992) 175 CLR per Brennan J at 48 - 49.

¹⁶ “It became a fundamental maxim, and necessary principle (though in reality a mere fiction) of our English tenures, ‘that the King is the universal Lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has, mediately or immediately, been derived as a gift from him, to be held upon feudal services’.” Blackstone, Commentaries, Bk II, Ch 4, pp 50 - 51, quoted in *Mabo [No 2]* (1992) 175 CLR, at 47 per Brennan J.

¹⁷ *Mabo [No 2]* (1992) 175 CLR, at 64.

¹⁸ See *Mabo [No 2]* (1992) 175 CLR, at 64 where Brennan J concluded “But, as native title is not granted by the Crown, there is no comparable presumption affecting the conferring of any executive power on the Crown the exercise of which is to extinguish native title.” It seems that this passage was referred to with approval in *Western Australia v. The Commonwealth* (1995) 183 CLR, at 439 n.208.

sovereign power. This vulnerability was confirmed by the Privy Council in *Sobhuza II v Miller*¹⁹ where Viscount Haldane (speaking of "... the true character of the native title to land throughout the Empire, including South and West Africa ...") referred with approval to *Amodu Tijani v Secretary, Southern Nigeria*²⁰ and concluded:

"The notion of individual ownership is foreign to native ideas. Land belongs to the community and not to the individual. The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is sovereign. Obviously, such a usufructuary right, however difficult to get rid of by ordinary methods of conveyancing, may be extinguished by the action of a paramount power which assumes possession or the entire control of the land."²¹

10. The majority judgment in *Western Australia v. The Commonwealth* put the comparison in these terms:

"So far as [title to land granted by the Crown] consists in ownership of or a legal or equitable interest in land, it cannot be extinguished without statutory authority. As Chitty says:

'the King cannot take away, abridge, or alter any liberties or privileges granted by him or his predecessors, without the consent of the individuals owning them.'

In particular, a grant cannot be superseded by a subsequent inconsistent grant made to another person. Nor can a right to use land, if granted validly by the Crown, be recalled prior to expiry unless the right is qualified by a power of recall contained in the term of the grant or is conferred by statute. At common law, however, native title can be extinguished or impaired by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title."²²

11. The starting point for a consideration of whether or not native title has been extinguished in any of the States of Australia is the proposition which the Privy Council in *Cudgen Rutile (No. 2) Ltd v. Chalk*²³ treated as fully established:

¹⁹ [1926] AC 518.

²⁰ [1921] 2 AC 399.

²¹ *Sobhuza II v Miller* [1926] AC at 525; referred to in a different context in *Western Australia v. The Commonwealth* (1995) 183 CLR, at 433 n. 191. *Sobhuza II v Miller* provides a clear example of extinction of native title by exercise of sovereign power. Although the Privy Council was referred in argument (at 519) to *Attorney-General v de Keyser's Royal Hotel* (1920) AC 508 at 562, their Lordships did not apply the presumption which is applied in respect of Crown extinguishment of Crown grants.

²² *Western Australia v. The Commonwealth* (1995) 183 CLR, at 438 - 439. (Footnotes are omitted from the quotation.)

²³ [1975] A.C. 520 at 533.

“... the Crown cannot contract for the disposal of any interest in Crown lands unless under and in accordance with power to that effect conferred by statute.”

12. The prerogative in respect of Crown lands having been replaced by statute, the question of extinguishment requires consideration of actions by the legislature or by the executive pursuant to legislative authority. If extinguishment of native title by exercise of the prerogative is not subject to the presumption that the Crown cannot derogate from its own grant (as submitted earlier), then neither is extinguishment of native title by legislative action or action of the executive pursuant to legislative authority. However, although native title is not protected by the same presumption which applies in respect of legislative or executive impairments of interests in land granted by the Crown, it is protected by the requirement that the exercise of will by the legislature or the executive reveal a “clear and plain intention” to extinguish the interest of native title holders²⁴.

13. The expression of the test by reference to intention was not, however, intended to stimulate attempts to prove the subjective intention of the legislature or the executive. Actual intention to extinguish is neither required, nor relevant²⁵. In truth the exhortation that clear and plain intention be revealed operates as a legal assumption to be brought into play in the conventional process of statutory interpretation. Extrinsic material which sheds light on the subjective intention of the legislature or of the executive is only relevant if, according to the conventional process, it may be referred to in order to shed light on the purpose or underlying object of the statute being construed²⁶.

14. When conflict between exercises of the will of the legislature or of the executive and the interest of native title holders arises by virtue of past grants of interest in land by the legislature or by the executive, the conflict is resolved by application of the rule that a grant “... which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a

²⁴ *Western Australia v The Commonwealth* (1995) 183 CLR, at 423.

²⁵ *Mabo [No 2]* (1992) 175 CLR, at 68 (Brennan J), 110 (Deane and Gaudron JJ); *Western Australia v. The Commonwealth* (1995) 183 CLR, at 422. (Dawson J, at 492, accepted, for the purposes of that case, that the reasons for judgment of Brennan J in *Mabo [No 2]* contained the basic principles for which *Mabo [No 2]* now stands as authority.)

²⁶ Pearce and Geddes, *Statutory Interpretation in Australia* (4th Ed, 1996) paras 2.2 to 2.5.

native title in respect of the same land necessarily extinguishes the native title.”²⁷ The clear and plain intention is revealed by the intention to grant the inconsistent interest²⁸.

15. But when is an interest in land inconsistent with the continued right to enjoy native title in that land? The answer depends upon an examination of the nature of the interest(s) in land created by the grant according to the land law of Australia (including the doctrine of tenure).

16. The grant of a fee simple estate in land operates to extinguish native title²⁹. The reason why that must be so is that the bundle of rights which the land law of Australia accords to the holder of such an estate is inconsistent with the continuation of the bundle of rights which the land law of Australia recognises as capable of being held by native title holders. Co-existence would be a logically untenable proposition because it would result in the law recognising (and necessarily affording its protection to) inconsistent rights³⁰. The conflict between rights created by the sovereign in the grantee and pre-existing native title interests is resolved in favour of the former. It would be irrelevant to extinguishment whether or not the grant of a fee simple was followed by actual use and occupation which was inconsistent with continuation of native title interests. If native title holders continued in possession and occupancy after the grant of a fee simple, they no longer did so under colour of enforceable native title rights.

17. The reason why the grant of a leasehold estate by the Crown must also operate to extinguish native title was expressed by Brennan J³¹ in the following passage:

“A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title. The extinguishing of native title does not depend on the actual intention of the Governor in Council (who may not have adverted to the rights and interests of the indigenous inhabitants or their

²⁷ *Mabo [No 2]* (1992) 175 CLR per Brennan J, at 68.

²⁸ It is not necessary that there be an explicit intention to extinguish native title. Indeed, it would be surprising to find one because, prior to *Mabo [No 2]* (1992) 175 CLR, the commonly held view was that native title was not recognised by Australian case law: *Western Australia v. The Commonwealth* (1995) 183 CLR, at 431 - 432.

²⁹ *Mabo [No 2]* (1992) 175 CLR, at 69, 110, 196; *Western Australia v. The Commonwealth* (1995) 183 CLR, at 422. See also *Custodian of Expropriated Property v. Tedep* (1964) 113 CLR 318 in which the Custodian of Expropriated Property was held to have obtained by registration pursuant to the Lands Registration Ordinance 1924 (Papua and New Guinea) an indefeasible title exclusive of any possible claims of native rights. (The ordinance provided a procedure pre-registration for inquiry into the possibility of native rights.).

³⁰ In *Hamlet of Baker Lake v Minister of Indian Affairs* (1979) 107 DLR (3d) 513 at 549, Mahoney J said that co-existence of Aboriginal title with the estate of the ordinary private land holder is “... readily recognised as an absurdity. The communal right of aborigines to occupy it cannot be reconciled with the right of a private owner to peaceful enjoyment of his land”.

³¹ *Mabo [No 2]* (1992) 175 CLR, at 68.

descendants), but on the effect which the grant has on the right to enjoy the native title. If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium."

18. The grant by the Crown of a lease of previously unalienated Crown land creates in the grantee the legal rights of a lessee (including exclusive possession) in respect of the land. As was the case with the holder of a fee simple estate, the existence of the lessee's rights is logically inconsistent with the simultaneous existence of native title rights in native title holders. Furthermore, as Brennan J recognised in the passage just quoted, the grant of a lease of previously unalienated Crown land also operates to change the nature of the Crown's own interest in the land, expanding that interest from that of holding only the radical title to the land to that of lessor holding the reversion expectant upon the expiry of the term of the lease. The interest of the lessor in the reversion arises immediately on the grant of the lease because the reversion is a corollary of the relationship of lessor and lessee: thus *Woodfall's Law of Landlord and Tenant* observes that "[i]n every case there must be reserved to the landlord a reversion upon the lease, for without a reversion there can be no demise and the relationship of landlord and tenant does not come into existence."³² Technically, as Megarry & Wade note³³, "[a]ccording to feudal principles, moreover, the freehold reversioner on a term of years has an estate which is vested not only in interest but also in possession, for the grant of a lease does not deprive a grantor of seisin, and he therefore has what is properly called a freehold in possession subject to the term." Nevertheless it is still common and correct to speak of a landlord's reversion³⁴. The reversion is a right vested in the landlord which gives the landlord the right to resume absolute beneficial ownership at the expiry of the term of the lease³⁵. The combination of the newly created interests of the grantor and the grantee is inconsistent with the continued existence of the native title rights either during or after the expiration of the term of the lease. As is the case with the grant of a fee simple estate, sovereignty demands that the conflict between rights created by the sovereign (in itself and in the lessee) and pre-existing

³² *Woodfall's Law of Landlord and Tenant* (28th ed), para 1-0005.

³³ Megarry & Wade, *The Law of Real Property* (5th Ed, 1984) 237. See also Bradbrook, MacCallum and Moore, *Australian Real Property Law* (1991) 247.

³⁴ Megarry & Wade, *The Law of Real Property* (5th Ed, 1984) 237.

³⁵ "Reversion may be defined as that estate in the land which remains vested in the landlord during the continuance of the term granted to the tenant": *Woodfall's Law of Landlord and Tenant* (28th Ed.) para 1-005. "Reversion signifies the residue of an owner's interest after he has granted away some lesser estate in possession to some other person.": Megarry & Wade *The Law of Real Property* (5th Ed, 1984) p. 44 citing Co. Litt 142b "Reversion, reversio, commeth of the Latine word revertor, and signifieth a returning againe."

native title interests is resolved in favour of the former³⁶. If native title holders continued in possession and occupation after the grant of a leasehold estate, they no longer did so under colour of enforceable native title rights.

19. That such an alienation of land renders the alienated land free of native title is a consequence of the Crown having acted to create interests in land which take effect according to the doctrine of tenure. In *Mabo [No 2]*, Brennan J said³⁷:

“Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown’s territory). Unless the sovereign power is exercised in one or other of those ways, there is no reason why land within the Crown’s territory should not continue to be subject to native title.”

20. The corollary of His Honour’s proposition is that if the Crown has acted in one of those ways, that provides a reason why the land should not continue to be subject to native title.

The rule in Mabo [No 2] should not be revised.

21. The principle established in *Mabo [No 2]* that native title is extinguished by Crown or legislative grant of an estate in fee simple or a lease therefore rests upon:

- (a) the historical acquisition of sovereignty over the lands in which native title existed;
- (b) the consequent reception of the common law of England (and in particular the reception of the doctrine of tenure) in respect of those lands; and
- (c) the sovereignty of Parliament.

³⁶ To paraphrase *Sobhuza II v Miller* (see para 9 above), the paramount power has indicated its intention to assume the entire control of the land.

³⁷ *Mabo [No 2]* (1992) 175 CLR, at 50-51.

Each of these foundations forms part of what Brennan J referred to as “the skeleton of principle”³⁸ which gives our legal system its shape and internal consistency. For these reasons, and because the application of those principles affects title to land, in which the virtue of certainty has often been recognized,³⁹ the consistent application of the principles established in *Mabo [No 2]* is important.

22. Without advertent to *Mabo [No 2]*, the appellants’ arguments seek to persuade the Court to overrule the extinguishment principles explained in *Mabo [No 2]* and *Western Australia v The Commonwealth* and to substitute for the test of inconsistency of rights a test invoking conflict between the lessee’s use of the land and the use of the indigenous inhabitants. The adoption by the Court of that test, which would logically also apply so as to render freehold land potentially subject to native title⁴⁰, would inevitably engender further uncertainty about freehold titles, and as to which leases “co-existed” with native title. But it would also result in the Court accepting the logically unacceptable proposition that the law will recognise and afford its protection to two sets of conflicting rights over the same land at the same time.

23. In *Mabo [No 2]*, Brennan J said⁴¹ that as the various governments “have alienated or appropriated to their own purposes most of the land in this country during the last two hundred years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands. They were dispossessed by the Crown’s exercise of its sovereign powers to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown’s purposes.”

24. In Deane and Gaudron JJ’s discussion of the dispossession of the Aboriginals⁴², their Honours said:

“Throughout the rest of the century, the white expropriation of land continued, spreading not only throughout the fertile regions of the continent but to parts of the desert interior. There were some reserves established for Aborigines and some reservations, increasingly ignored, in pastoral leases protecting Aboriginal usufructuary access. On the broad front, however, land was granted by the Crown

³⁸ *Mabo [No 2]* (1992) 175 CLR, at 29.

³⁹ See, for example, *Western Australia v Commonwealth* (1995) 183 CLR 373 per Dawson J at 493-4

⁴⁰ That the logic of the appellants’ argument dictates this conclusion is demonstrated in the submission of the Thayorre People eg at paras 4.09, 5.123.

⁴¹ *Mabo [No 2]* (1992) 175 CLR, at 68.

⁴² *Mabo [No 2]* (1992) 175 CLR, at 104-109.

or dedicated or reserved for inconsistent public purposes without regard to Aboriginal claims.”

25. Deane and Gaudron JJ concluded⁴³ that native title rights were extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive possession.”

26. The Parliament enacted the *Native Title Act 1993* (“NTA”) on the premise⁴⁴, which the Parliament expressed in the preamble, that the Court had held in *Mabo [No 2]* that the Aboriginal people and Torres Strait Islanders have been progressively dispossessed of their lands⁴⁵, and that native title is extinguished by the valid grant of a leasehold estate⁴⁶.

27. The Parliament also expressed its view that the common law, as so expressed, should be altered in the interests both of the Aboriginal and Torres Strait Islanders and the broader community. The preamble provides (for the future) that acts which affect native title should only be able to be validly done in defined circumstances⁴⁷. For the past, the preamble recites that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land⁴⁸, and the preamble also refers⁴⁹ to the needs of the broader Australian community of certainty and the enforceability of acts potentially made invalid because of the (previously unacknowledged) existence of native title.

28. Those provisions of the preamble are reflected in the Act, which contains provisions which are intended to ameliorate, to the extent that the Parliament considered appropriate, what the Parliament perceived as unjust consequences of those aspects of the common law as expressed in *Mabo [No 2]*. In particular, the Act provides for-

⁴³ *Mabo [No 2]* (1992) 175 CLR, at 110.

⁴⁴ The first paragraph of the preamble provides that “This preamble sets out the considerations taken into account by the Parliament of Australia in enacting the law that follows.”

⁴⁵ Third paragraph of the preamble.

⁴⁶ The seventh paragraph of the preamble describes the Court’s decision in *Mabo [No 2]*, including that the “High Court has: ... (c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.” See, to similar effect, the Second Reading Speech to the NTA in the House of Representatives, Hansard, 16 November 1993, p 2880.

⁴⁷ Eleventh paragraph of the preamble.

⁴⁸ Fifteenth paragraph of the preamble.

⁴⁹ Ninth paragraph of the preamble.

- (a) The non-extinguishment of native title by the grant of pastoral leases in cases in which the native title claimants purchase the pastoral lease (s 47);
- (b) A fund to assist Aboriginal peoples and Torres Strait Islanders to acquire and manage land (s 201)⁵⁰;
- (c) Validation of past invalid acts affecting native title, with compensation for affected native title holders (ss 14-20);
- (d) Restrictions (in some cases amounting to prohibitions) on future acts which otherwise would affect native title (ss 21-44).

29. The States and Territories have legislated in the terms contemplated by the *Native Title Act 1993*.

30. That the Parliament, and the legislatures of the States and Territories have so legislated is a factor militating against the Court revising the principles established by *Mabo [No 2]*⁵¹.

The rights created by grant of pastoral leases.

Pastoral leases confer a right of exclusive possession.

31. It is contended by the appellants that pastoral leases are sui generis and Parliament should not be taken to have intended that a pastoral lease have the same incidents as a lease at common law. A similar argument was considered and rejected by Kirby P (with whom Meagher JA agreed) in *Minister for Lands and Forests v McPherson*⁵². In that case, his Honour had to consider whether a lease under the Western Land Acts 1901 (NSW) was a lease in the ordinary sense and, accordingly, possessed the incidents normally attending that conclusion (including the jurisdiction to grant relief against forfeiture). His Honour held⁵³:

⁵⁰ See *The Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*.

⁵¹ *John v Commissioner of Taxation of the Commonwealth of Australia* (1989) 166 CLR 417, per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ at 438-439, per Brennan J, at 451.

⁵² (1991) 22 NSWLR 687.

⁵³ *Minister v McPherson* (1991) 22 NSWLR at 695 - 696.

“A lease, on the other hand, is an interest which has been known to the common law for centuries. Long before the Western Land Acts, and indeed long before the discovery and settlement of this country, the Crown had leased land to its subjects. Those subjects thereby acquired interests in such Crown leases. ... [His Honour then referred to *O’Keefe v Williams*⁵⁴ and *Davies v Littlejohn*⁵⁵] ... The clear principle of all these decisions of the High Court is that the first duty of the Court is to examine the statute to see whether, consistently with its terms, other rights and obligations that would apply by the general law attach to the statutory entitlements and duties of the parties. In the case of an interest called a “lease”, long known to the law, the mere fact that it also exists under a statute will not confine its incidents exclusively to those contained in a statute. On the face of things, the general law, so far as it is not inconsistent with the statute, will continue to operate.”

32. Where, as in this case, the Court is called upon to determine whether a particular incident of a lease under the general law applies in respect of a statutory lease, the starting point is an assumption that the incident will continue to operate. The final answer then depends upon a detailed consideration of whether the existence of that incident of a lease is compatible with the statute⁵⁶.

33. A pastoral lease is not merely a right of pasturage or a permission to depasture⁵⁷. There was a well established difference⁵⁸ between a lease for pastoral purposes or a pastoral lease conferring an exclusive right of possession on the one hand, and a right of pasturage or a permission to depasture on the other.

34. By the language used by the Queensland legislation (i.e. terms such as “lease”, “lessee”, “rent”, “demise”, “term”, “surrender”), the legislature should be taken to have intended that the interests of a lessee are those at common law, modified by the relevant provisions of the Act.⁵⁹ Exclusive possession is one such incident of a lease which the legislature must have presumed would be granted⁶⁰. In *North Ganalanja Aboriginal Corporation v Queensland*⁶¹ Hill J (with

⁵⁴ (1910) 11 CLR 171 at 191 - 193, per Griffith CJ and 208 per Isaacs J.

⁵⁵ (1923) 34 CLR 174.

⁵⁶ This is the approach previously taken by the High Court in *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 per Mason J at 682 - 683, per Brennan J at 686.

⁵⁷ *The Yandama Pastoral Co v The Mundi Mundi Pastoral Co Ltd* (1925) 36 CLR 340, 345, 376-377.

⁵⁸ See the historical submissions at para 39 et seq below.

⁵⁹ *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 per Mason J at 682 - 683, per Brennan J at 686; *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687; *Re Waanyi People’s Native Title Application* (1995) 125 ALR 118 per President French J at 161.

⁶⁰ *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405, 408 (PC); *Landale v Menzies* (1909) 9 CLR 89, 100-101; *O’Keefe v Williams* (1910) 11 CLR 171, 191, 192-193, 196, 200, 208, 209; *Radaich v Smith* (1959) 101 CLR 209, 214, 217-218, 222, 223; *Goldsworthy Mining Ltd v The Commissioner of Taxation of the Commonwealth of Australia* (1973) 128 CLR 199, 212, 213; aff’d (1974) 132 CLR 463.

whom Jenkinson J agreed) reviewed the history of pastoral leases in Queensland and concluded that a pastoral lease granted under the Land Act 1902 was not *sui generis* but was a lease in the ordinary sense of the expression and conferred a grant of exclusive possession upon the lessee. *North Ganalanja* was followed by Drummond J in this case⁶² and applied to the Land Act 1962-1974⁶³. The nature of the interest of the lessee under a pastoral lease is the subject of detailed analysis in the submissions of the State of Queensland and the fourth respondent adopts that analysis. For the reasons there expressed, it should be concluded that the lessee possesses the right of exclusive possession as an incident of leasehold tenure.

35. This conclusion does not rest upon an implication of a term to give business efficacy to the lease in the sense explained in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*⁶⁴ and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*⁶⁵. Insofar as the conclusion rests on "implication", it rests upon the intention of Parliament based on the language which it has used. If there is any analogy with the process of implication of terms into contracts, then it is with the implication of a term which is a legal incident of a particular class of contract not with the implication of a term necessary to give business efficacy to a particular contract: see *Codelfa Construction Pty Ltd v State Rail Authority of NSW* where Mason J discussed the differences between the two processes and gave as an example of the former the landlord and tenant case of *Liverpool City Council v Irwin*⁶⁶. Implication of a term as a legal incident of a particular class of contract is an implication which occurs as a matter of law. The conditions upon which terms will be implied in order to give business efficacy to contracts discussed in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* do not apply⁶⁷.

The Crown possesses the reversion expectant.

36. In this case the Court is also concerned with the incidents of the grant of the lease from the point of view of the grantor. It would follow from the foregoing analysis that the interest of the Crown as grantor (and the incidents thereof) would be the same as that of the interest of

⁶¹ (1995) 132 ALR 565 at 609 - 615.

⁶² AB2 59 - 62.

⁶³ AB2 63 - 69.

⁶⁴ (1977) 52 ALJR 20 at 26.

⁶⁵ (1982) 149 CLR 337.

⁶⁶ *Codelfa Construction Pty Ltd v State Rail Authority of N.S.W.* (1982) 149 CLR, at 345 - 346; *Liverpool City Council v Irwin* [1977] AC 239.

⁶⁷ *Codelfa Construction Pty Ltd v State Rail Authority of N.S.W.* (1982) 149 CLR, at 345 - 346.

a lessor under the general law, except to the extent that the statute reveals an intention that they be modified.

37. The continuing interest of a lessor at common law is that the lessor holds the reversion expectant upon the expiry of the term⁶⁸. The reversion carries a number of rights including the benefit of the lessee's covenants, the right to distress for rent⁶⁹ and the right to recover possession at the termination of the term⁷⁰. At common law, the reversion may be assigned, thereby creating the relationship of landlord and tenant between the assignee and the original lessee. The most important right is the right to resume absolute beneficial ownership of the land at the expiry of the lease.

38. There is nothing in the Queensland legislation which inconsistent with the continued existence of the reversion expectant in the Crown. True it is that some of the rights which might otherwise attend the possession of the reversion expectant (e.g. the right to assign the reversion) may be taken to have been modified, but that is no reason to conclude that under the lease the Crown does not possess the reversion expectant. As the Crown receives the rent reserved out of the land, the proposition that it retains merely the radical title as lessor is unsustainable.

The history of the development of pastoral leases does not support the appellants' contention that the grant of the Mitchellton and Holroyd pastoral leases did not extinguish any native title in the land the subject of those grants.

Similar submissions have been rejected by the Courts.

39. In this section, reference to "the appellants" is to the Wik Peoples, whose submissions incorporate an article by Professor Henry Reynolds and Mr Dalziell in appendix 15 of their submissions. The appellants contend that this history demonstrates that the grant of pastoral leases under the Queensland legislation does not extinguish native title.⁷¹

⁶⁸ See paras 18 above.

⁶⁹ Megarry & Wade, *The Law of Real Property* (5th Ed, 1984) 648, 709-710.

⁷⁰ *Anderson v Bowles* (1951) 84 CLR 310 at 319.

⁷¹ The article in Appendix 15 also contains, in Part 2, reference to the constitutional developments in the Colonies between 1850 and 1855. This seems to refer to the argument, rejected by Drummond J (and in the *Waanyi* case) that Aboriginal rights over pastoral leases were immune from legislative extinguishment. The appellants have abandoned that argument.

40. Very similar submissions as to the influence of the history on the effect of pastoral leases were rejected by French J⁷² and by Hill J⁷³ in the *Waanyi* case, and they were analysed in detail and rejected by Drummond J⁷⁴ in this case.

The submissions on the history are irrelevant.

41. The appellants' submissions centre upon the policy of a different legislature of a different era and are irrelevant to the construction of the legislation in issue in this case.⁷⁵

42. The appellants' reliance upon the views expressed within the executive, notably by Earl Grey in the 1840s, as to the effect of pastoral leases is misplaced, even if the events of 150 years ago are otherwise relevant. The subjective view of the executive as to the effect of a grant is not relevant to the question whether such a grant would extinguish native title⁷⁶.

Alternatively, if the history is relevant, it supports the proposition that the Queensland legislature, in enacting the Land Act 1910 and the Land Act 1962, intended pastoral leases to confer upon the lessees the unqualified right to exclude any Aboriginal occupants.

43. The fourth respondents' submissions in this respect may be summarised as follows:

- (a) The appellants' submissions about the intention of the Imperial government in introducing pastoral leases are wrong. The general consensus at the time of the legislation (in 1846) and regulations (in 1847) which introduced pastoral leases was that such leases, because they would grant possession, would confer upon lessees the legal right to exclude Aboriginal occupants. There was then no developed policy as to the resulting legal dispossession of the Aboriginal occupants. The introduction of special provisions in the leases in favour of the Aboriginals was considered but not then adopted.

⁷² *Re Waanyi People's Native Title Application* (1995) 129 ALR 118 at 142-152.

⁷³ *North Ganalanja Aboriginal Corporation & Another v State of Queensland & Another* (1995) 132 ALR 565 at 609-614.
⁷⁴ AB 2: 283-291, 298-325.

⁷⁵ In *North Ganalanja Aboriginal Corporation & Another v State of Queensland & Another* (1995) 132 ALR 565 Hill J said at 613 line 31: "Whatever may have been the situation at the time of the Order in Council of 1849, that had long since been repealed by the time the 1902 Act came into force. The 1902 Act must be construed in accordance with its terms."

⁷⁶ See para 13 above.

- (b) The subsequent Imperial Order in Council of 18/7/1849 gave a discretionary power to the Governor to insert special provisions in pastoral leases conferring upon Aboriginal occupants the right to forage upon pastoral lease land, and conferring particular rights of access in favour of mineral prospectors and government officials.
- (c) That Order in Council was premised on the fact that pastoral leases under the 1846 Act and the 1847 were “leases” as that word was well understood: a pastoral lease did confer an unqualified right of exclusive possession upon the lessee, but as a result of the Order in Council, the Governor could, if he chose, insert in the lease the new provisions conferring foraging rights upon the Aboriginals, and rights of access for others.
- (d) The historical evidence therefore negates the appellants’ contention that pastoral leases originally were subject to a qualification inherent in the tenure, in favour of the Aboriginal occupants.
- (e) That evidence also shows that it was always appreciated that there was a distinction between a lease, which conferred a right of exclusive possession, and a mere right of pasturage (which might amount to a profit a prendre). The latter - for which the Thayorre People now contend - was rejected in favour of leases.
- (f) The repeal in the 1860s by the Queensland legislature of the Order in Council of 18/7/1849, coupled with the enactment of provisions conferring limited rights in favour of mineral prospectors, government officials, and travellers droving stock, but not Aboriginal occupants, was consistent with a legislative policy favouring the pastoral lessees’ rights of exclusive possession.
- (g) That same policy is reflected in the *Land Act 1910* and the *Land Act 1962*, which also contain specific rights of access in favour of third parties, but none in favour of the Aboriginal occupants.

44. Before 1847, there was no statutory provision for leasing land for pastoral purposes in the unsettled districts. Early New South Wales Acts⁷⁷ provided for licences to graze cattle. In relation to those licences, *An Act further to restrain the Unauthorized Occupation of Crown Lands Act and to provide the means of defraying the expense of a Border Police* (1839) 2 Vic No 27⁷⁸ expressly provided that “no possession nor occupation of any land taken or had under or by virtue of any license as aforesaid shall be construed to give any title whatever against the Crown or to alter in any respect the rights of Her Majesty Her Heirs and Successors in respect to any such land.”

45. The Imperial statute, *An Act for regulating the Sale of Waste Lands belonging to the Crown in the Australian Colonies* (1842) 5 & 6 Vic. c. 76 (“the 1842 Act”) abridged the prerogative by requiring land to be alienated only by sale and in accordance with that Act.⁷⁹ It required grants to be made pursuant to prescribed regulations and forms. Section 5 provided that such an alienation would be “valid and effectual in the Law to transfer to and to vest in possession in any such Purchaser ... any such Lands as aforesaid for any such Estate or Interest...” The Act provided for the continuance of occupation licences for periods up to one year.⁸⁰

46. Following agitation by the pastoralists for more secure tenure,⁸¹ the 1842 Act was amended and specific statutory provision for the grant of leases for a term not exceeding 14 years was introduced by the Imperial statute *An Act to amend an Act for regulating the Sale of Waste Lands belonging to the Crown in the Australian Colonies, and to make further Provision for the Management thereof* (1846) 9 & 10 Vic. c. 104⁸² (“the 1846 Act”).

⁷⁷ *An Act to restrain the unauthorised occupation of Crown Lands* (1836) 7 Will IV No 4 (JLB 1: doc. 277); *An Act to continue and amend an Act intituled "An Act to restrain the unauthorised occupation of Crown Lands"* (1838) 2 Vic No 19 (JLB 1: doc. 278); *An Act further to restrain the Unauthorized Occupation of Crown Lands Act and to provide the means of defraying the expense of a Border Police* (1839) 2 Vic No 27 (JLB 1: doc. 279); *An Act to amend and continue for five years an Act intituled "An Act further to restrain the unauthorised occupation of Crown Lands and to provide the means of defraying the expense of a Border Police"* (1841) 5 Vic No 1 (JLB 1: doc.280).

⁷⁸ JLB 1: doc. 279, s 26.

⁷⁹ JLB 1: doc. 265, ss 1, 2; per Drummond J at AB 2:301 line 17- 305 line 5, and 314 line 22- 315 line 1, per French J in *Re Waanyi People's Native Title Application* (1995) 129 ALR 118 at 142-143, citing Isaacs J in *Williams v Attorney-General (NSW)* (1913) 16 CLR 404, 450.

⁸⁰ *Ibid*, ss 5, 17.

⁸¹ Drummond J at AB 2: 298-9. Reynolds and Dalziel mention this agitation for improved tenure at appendix 15, particularly at pp 72-75.

⁸² JLB 1: doc. 267, s 1. This was subject to a proviso that the lease should be in accordance with Rules and Regulations provided for in the Act. Section 9 made it plain that it extended to land outside the existing “limits of location”.

47. The 1846 Act contained no provision limiting the rights of possession granted by the lease. Its terms strongly suggest that the contemplated leases were to be leases in the conventional sense.⁸³

48. The regulations contemplated by the 1846 Act⁸⁴ were introduced by Order in Council of 9/3/1847, which came into effect in New South Wales on 7/10/1847 (“the 1847 regulations”).⁸⁵

49. At that time, it was recognized in New South Wales and in England that such leases (at least unless qualified in some way) would confer upon the lessees a right of exclusive possession, with potentially disastrous effect upon the Aboriginal occupants. In particular:

- (a) In response to a circular of 12/12/1843,⁸⁶ the Commissioner of Crown Lands for the Lachlan District wrote (in a letter dated 20/1/1844, which was sent to Lord Stanley in a despatch from Governor Gipps dated 11/8/44) that-

“By assimilating Licenses to Leases so much right of tenure would be given to the Squatters as to cause very serious inconvenience to the Government, particularly as regards the protection of the Aborigines. Some settlers have such a very strong feeling against the natives, that if a lease were granted them they would consider their claim to the Run so permanent that they would not allow an Aboriginal to stay upon, or even cross the stations.⁸⁷ This expulsion would be more especially put in force at the distant stations. Under the present regulations the Squatters are deterred from using violence or ill-treating the Aborigines, knowing that their conduct would be brought under the notice of

⁸³ Ibid. Sections 1 and 2 of the 1846 Act provided for a demise, a term, reservation of rent or pecuniary or other service, and conditions of forfeiture. The similar provisions of Queensland’s legislation are the subject of more detailed submissions at paras 31-35 above.

⁸⁴ Ibid. Section 6 of the 1846 Act empowered Her Majesty by Order in Council to make Rules and Regulations respecting “the more effectually making Demises or Licences...” and for “preventing the abuses incident” to “the occupation in manner aforesaid of such Waste Lands as aforesaid”

⁸⁵ AB 7:1165 is the proclamation of the 9/3/1847 Order in Council in the New South Wales Government Gazette of 7/10/1847.

⁸⁶ AB 4:690 (circular from E.D.Thomson, the Colonial Secretary to the Commissioners of Crown Lands, 12/12/1843, CO 201/347, seeking opinions on proposals relating to changes in the existing regulations, including “1st To assimilate Licences to Leases in a greater degree than they are at present assimilated.”)

⁸⁷ Emphasis added. Reynolds and Dalziel at appendix 15, p 77, accept that this is evidence of what the squatters would believe they possessed under a pastoral lease but they assert, without reference to authority, that “so much right of tenure” is not a reference to the rights that would be conferred by pastoral leases. The contrary view is more consistent with the first sentence. Even on their view, it appears that the public perception of the proposed “leases” was that the lessees could exclude the Aboriginal occupants.

the Commissioner of the District.”⁸⁸ (emphasis added) (Very similar comments were made in a letter dated 14/2/1844 from the Commissioner for Morumbidgee, also sent by Gipps to Lord Stanley.⁸⁹)

- (b) On 4/8/1845, the Colonial Land and Emigration Office,⁹⁰ commenting on the local regulations of 1844 and the agitation for leases, referred to the objections of Crown Land Commissioners to leases, and in particular the objection that “so much right of tenure would be given to the squatters as to cause very serious inconvenience to the Government, particularly as regards the protection of the aborigines, the feeling of some of the settlers being so strong against the natives, that they would not allow an aboriginal to stay upon or even to cross their station.”⁹¹
- (c) The office reported further⁹² that the plan of leasing the runs to the squatters “is open to the various other objections which we have quoted from the local authorities, of a want of control over the occupants of the lands”, discussed an alternative proposal of selling small pieces of land and annexing to them for an indefinite period “a right of pasturage” over unalienated waste lands of the Crown, and said that it was very desirable that the Commissioners “should continue to exercise, as at present, entire control over the unsold Crown lands, and thus be able to check abuses, the occurrence of which is so much apprehended by the local authorities, if possession of the unalienated land should be given up to the occupiers under leases.”
- (d) On 31/8/45, Lord Stanley, discussing the Bill for the 1846 Act in a private despatch to Governor Gipps, referred to those concerns, and said that:

⁸⁸ AB 4:695 (left column) (Letter Beckham to Colonial Secretary, 20/1/1844 enclosed in Despatch no 169, Gipps to Stanley, 11/8/44, CO 201/347).

⁸⁹ AB 4:695 (right column)-696 (Letter Bingham to Colonial Secretary, 14/2/1844 enclosed in Despatch no 169, Gipps to Stanley, 11/8/44, CO 201/347).

⁹⁰ The Colonial Land and Emigration Office was an expert body set up in 1840 to assist the Colonial Office, to which it provided legal advice: affidavit of C.S.Sheehan, paragraph 3.11 at AB 13:2347-2350.

⁹¹ AB 12:2047 at 2051, 2nd paragraph, (Report of the Colonial Land and Emigration Office, 4/8/1845, CO 201/345, enclosed with despatch no. 100, Lord Stanley to Governor Sir George Gipps, 8/8/1845).

⁹² Ibid, at AB: 2053, 2nd to 5th paragraphs.

“ 3dly. The question as to the extent of land which ought to be comprised in leases, is one on which I have felt very great difficulty.

The observations made by yourself and the Commissioners of Crown Lands in New South Wales, contained in the Appendix to the Report of the Committee of Council, would lead me to limit them to the homesteads, but on the other hand, I feel myself much pressed by the argument that the homesteads are useless without the runs attached to them, and that it is illusory to give a security for tenure for the one, without a corresponding security as regards the other...

8thly.although I admit the force of the observations made by [the Commissioners of Crown Lands] in their replies to your circular of 12th December 1843, with respect to the difficulties which may occur in preventing the settlement of improper persons on Crown lands, and in protecting aborigines, without summary powers, I think that those difficulties may be obviated by inserting sufficiently stringent provisions in whatever leases may be granted.”⁹³

- (e) Those comments were premised on acceptance of the view that the pastoral leases would confer upon the lessees the right to exclude the aboriginal occupants unless special provisions were made. It is not clear whether Lord Stanley intended to protect Aborigines by ensuring that “improper persons” did not take up leases, or whether he contemplated some partial or complete regulation of the exercise of the lessees’ rights of exclusive possession, and if so, of what nature. He does not appear to have developed this proposal. The evidence does not establish the appellants’ contention⁹⁴ that Lord Stanley apparently accepted “that despite the granting of leases, Aboriginal people would continue to occupy and use land leased for ‘grazing purposes’ ”, if that is intended to convey a qualification, inherent in the new tenure, in favour of the Aborigines.
- (f) On 4/2/1846, Governor Gipps sent to Lord Stanley draft regulations to be adopted concurrently with the leases proposed under the impending 1846 Act. The draft regulations contained an express provision that “the Leases or Licenses to be granted for terms of years under these Regulations will confer no right beyond

⁹³ AB 12:2055 at 2056, 2057 (Despatch Lord Stanley to Sir George Gipps, 31/8/1845, CO 201/358).
⁹⁴ Reynolds and Dalziel, appendix 15, p 78.

that of occupation for grazing purposes...".⁹⁵ However, that provision was not adopted in the Act or in the 1847 regulations.

- (g) In the Chief Protector of Aboriginals' annual report for 1845 (despatched by Governor Gipps to Lord Stanley in April 1846), the Chief Protector said:⁹⁶

"Hitherto I have purposely refrained from submitting the question of rights of the Aborigines to a reasonable share in the soil from a conviction that it was not necessary whilst the Lands of the Crown were held under yearly License and subject to the surveillance of Government Commissioners and 2. because it was not desirable to raise what might have been considered at that time a vexatious question. Now however that a probability exists of the waste lands being alienated and leased to Emigrants for a period of years I think I should be 1. guilty of dereliction of duty were I to omit bringing this subject under the notice of Her Majesty's Government and first I would respectfully suggest that land be reserved to be held by the Government for behoof of the natives ...

4th The future protection and support of the Aboriginal natives would seem to require fixed localities 1 Because the natives under the later regulations were said to have no right in the property of the soil and were liable to be driven away from their own lands. In reference to this subject I beg to refer to the following from a colonial newspaper - "Criminal Sitings, Supreme Court Dec, 21st 1841":

"Crown Prosecutor - "Yes your Honour but what right have they to turn a black off their run?"
Judge Willis -

"They have a right to turn either black or white off
- I will go further and say if the Government take upon themselves to be the decisors [sic] of the soil the tenant has a warrant under the decision [sic] to occupy the land and that decisor [sic] Mr Crother is the Queen of England your mistress in whose name you are this day conducting the prosecution."

⁹⁵ AB 5:788 at 797, 824 (Despatch no. 30, Sir George Gipps to Lord Stanley, 4/2/1846, CO 201/365).

⁹⁶ Enclosure 12 in despatch no 75, Gipps to Stanley, 1/4/1846 CO 201/366, quoted in appellants' submissions, appendix 15, pp 85-86.

- (h) In the Chief Protector of Aborigines' (Port Philip district) report 31/12/1846 the Chief Protector (Robinson), referred to his previous reports and, quoting from the Assistant Protector of the Loddan, said that :

"The claim of the Aborigines... to a reasonable share, in the Soil of their fatherland, has not, I regret to say, been recognised, in any of the discussions, which, for so great a length of time have agitated the public mind, on the question of rights of the Squatters, to the occupancy of the Lands of the Crown. ... the duty devolves on me to bring their Claim under the notice of her Majesty's Government for a reasonable share in the Soil of their father land, for reserves for behoof of the Aborigines; especially as the Lands of the Crown are about to be alienated, and leased to European Settlers for a period of years. ...

The following is from the report of the Assistant Protector of the Loddon on the same:- 'Another subject deeply affecting the future condition of the Aborigines is the probability 'that unless suitable reserves are immediately formed for their benefit, every acre of their Native* soil will shortly be so leased out and occupied, so as to leave them, in a legal view no place for the sole of their feet. If the occupation of Crown Lands is to be settled by the Crown granting a Lease, for years, the Natives will be deprived of all legal right to hunt over their own Native land, and according to the Dicta of certain high legal authorities, may be forcibly excluded by the Lessee, from the tract of Country, so leased ... Under these circumstances, I deem it my duty, respectfully, but earnestly, to urge the Claims of the Aborigines to due consideration, in carrying out the anticipated changes in the Tenure of Squatting Stations by the appointment of suitable reserves in every principal locality, for their support and benefit "^{96a} (Emphasis added)

- (i) Governor Gipps made a marginal notation (at *) that "it was to this end that licences renewable periodically were originally suggested as preferable to leases ... "⁹⁷

50. In 1847, Earl Grey appears to have accepted that pastoral lessees would be entitled to exclude the Aboriginal occupants, and considered that the Chief Protector's solution of providing separate reservations should be adopted:

^{96a} AB 12:2059 at 2080-2181.

⁹⁷ The distinction between a licence to depasture stock and a lease was also expressly adverted to (in the context of land within the limits of location) in the New South Wales *Votes and Proceedings of the Legislative Council*, 1847, Vd 1, p 712, referred to at the appellants' submissions appendix 12, p 2, fn 1.

- (a) The question was clearly raised in the 1846 report of the Protector for the Port Phillip District mentioned above, which Governor FitzRoy sent to Earl Grey in a despatch dated 17/5/1847.⁹⁸

- (b) The Colonial Land and Emigration Office commented on that report:

“ In the conclusion of his report the Protector notices a recommendation from the Ass^t Protector of the Loddon District, that reserves should be set apart for the natives. "Another subject," he observes "deeply affecting" the future condition of the Aborigines is "the probability that unless suitable reserves "are immediately formed for their benefit "every acre of their native Soil will shortly "be so leased out & occupied, as to leave "them in a legal view, no place for the sole "of their feet. If the occupation of Crown "Lands is to be settled by the Crown granting a "lease for years, the Natives will be deprived "of all legal right to hunt over their own native "lands, and according to the dicta of certain "high legal authorities may be forcibly excluded "by the Lessee, from the tract of Country so leased. To this point also Sir C. FitzRoy's attention should, I presume, be drawn. It would of course, be most unjust that the Natives should be extruded [sic] in the manner described by the Ass^t Protector, from the soil of which, till recently, they were the sole occupants. ”⁹⁹

- (c) The Assistant Under Secretary of State suggested that there were great obstacles in the way of establishing the Aborigines “on reserved lands in the middle of the territory occupied by scattered settlers”¹⁰⁰ and suggested that further information should be obtained from the Chief Protector.
- (d) Earl Grey's response was not that the pastoral leases would not have the effect of extinguishing the Aboriginal rights because of some qualification inherent in the tenure. On the contrary, he assumed that leases would have that effect, so that some land should be reserved for the Aborigines. In a memorandum dated 6/12/1847,¹⁰¹ Earl Grey wrote:

⁹⁸ AB 12:2153 (despatch no. 107 from Sir C.A. FitzRoy to Earl Grey, 17/5/1847, CO 201/382).

⁹⁹ AB 12:2156 at 2158 (Colonial Land and Emigration Office Memorandum (TWC Murdoch) to Assistant Under Secretary of State (H Merivale) dated 22/11/1847 CO 201/382).

¹⁰⁰ AB 12:2159 (memorandum Assistant Under Secretary of State (Merivale) to Parliamentary Under Secretary of State (Hawes), 3/12/1847, CO 201/382).

¹⁰¹ AB 12: 2160 (Memorandum from the Secretary of State for War and Colonies (Grey), 6/12/1847, with the despatch no. 107 from Sir C.A. FitzRoy to Earl Grey, 17/5/1847, CO 201/382).

“The questⁿ of reserves for the natives is an important one - the Gov^r must be instructed to take care that they are not (as it appears to be apprehended they may be) driven off all the country which is divided into grazing stat^{ns} & let under the recent regⁿ-lat^{ns}. Land sh^d be reserved (to be held by some officers of the Gov^t as trustees) sufficient to allow of the natives being maintained upon it, & to make up for the deficiency of game for their subsistence rations sh^d be granted to them as is done in S. Australia (where the system of management seems to me in every way better) this is very important with a view to their preservatⁿ from being exterminated.”¹⁰² (Emphasis added)

- (e) Thus the earliest evidence of Earl Grey’s understanding of the effect of the pastoral leases authorized under the 1847 regulations (introduced by the Order in Council of 9/3/1847, which had then recently come into effect on 7/10/1847), was that he accepted - or at least assumed - that the leases would confer a right of exclusive possession on the lessees. Later, Earl Grey came to believe that separate reserves were inadequate, and he then proffered a different view of the effect of the leases, but that was merely based on a wrong, re-interpretation of the earlier 1847 regulations. It was not evidence of the Crown’s (or the Imperial parliament’s) original intention as to the effect of the Act and regulations introducing the pastoral leases.

51. In light of this discussion concerning the power of the intending lessees to exclude the Aboriginals, the contention¹⁰³ that at no time during the debate in the early 1840s “did attention focus on what rights of possession would be conferred by any new form of title to pastoral runs” is incorrect. It was appreciated that the new tenure-improved from the perspective of the pastoralists-would give the pastoralists a better right of possession as against others, including the Aboriginals, than mere licences or rights of pasturage.

52. Earl Grey revised his views about reserves in his despatch to Governor FitzRoy of 11/2/1848.¹⁰⁴ He referred to the comments quoted above from the Chief Protector’s 1846 report as to the effect of leases, and concluded that reserves of the kind proposed by the Chief

¹⁰² Memorandum Earl Grey to Herman Merivale (then Assistant Under Secretary of State at the Colonial Office), written on despatch Grey to FitzRoy, 17 May 1847, above. Reynolds and Dalziell quote the first part of this, but omit the emphasized part - appendix 15 at p 90.

¹⁰³ Appendix 15 of the appellants’ submissions, p 58.

¹⁰⁴ AB 12:2163 (transcription of despatch No 24, 11/2/1848, Earl Grey to Sir Charles FitzRoy, CO 201/382).

Protector would be inapplicable in Australia¹⁰⁵. However, Earl Grey did not suggest that the 1847 regulations qualified the tenure in favour of the aboriginal occupants. He then expressed the view that the aborigines should not altogether be excluded from land under the pastoral occupation, but that:

"it **should** be generally understood that Leases granted for this purpose give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such Land as they may require within the large limits assigned to them, but that these Leases are not intended to deprive the Natives of their former right to hunt over these Districts, or to wander over them in search of subsistence in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil except over land actually cultivated or fenced in for that purpose."¹⁰⁶ (Emphasis added)

53. As all of the evidence before Earl Grey showed that the new pastoral leases were understood **not** to be subject to any such limitation, he added:

"If, therefore, the limitation which I have mentioned above on the right of exclusive occupation granted by Crown leases is not, in your opinion, fully recognised in the colony I think it is advisable that you should enforce it by some public declaration, or if necessary, by passing a declaratory Enactment"¹⁰⁷.

54. This despatch did not suggest that Earl Grey believed that it was originally intended that the 1846 Act and the 1847 regulations would authorize only exclusive rights of pasturage. Nor did it give directions to the Governor on this topic, although it expressed Earl Grey's opinion, for the Governor's consideration: "I think it is advisable..."¹⁰⁸ Earl Grey did give other general "directions" on the topic of establishing separate reserves.

55. More significantly, when the Governor replied that the power to make such a declaratory enactment lay exclusively in England, no such enactment was made. Instead, the procedure ultimately adopted was the publication of a vaguely worded Order in Council authorizing the discretionary insertion in leases of provisions for Aboriginal rights to forage on the leases.

¹⁰⁵ Ibid at AB 12: 2164-2165.

¹⁰⁶ Ibid at AB 12:2166.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid at AB 12:218. (Reynolds and Dalziel's contention at appendix 15, p 44 that this amounted to an instruction is incorrect if it is intended to convey that the instruction was binding.)

56. Before Governor FitzRoy received Earl Grey's despatch of 11/2/1848, the same subject was discussed in the New South Wales Executive Council as a result of two letters of 1/6/1848 from Mayne, Commissioner of Crown Lands of the Wellington District, in which Mayne noted that "the granting of Leases of Runs will confer powers ... susceptible of abuse"¹⁰⁹ and referred to:

"the necessity for introducing into the leases of runs some general clause that will reserve to the aborigines, such free access to land, trees and waters, as will enable them to procure the animals, birds and fish etc, on which they subsist ... I am far from supposing that the rights and powers conferred by leases of runs are likely to be generally abused as regards the aborigines ..."¹¹⁰

57. This also assumed that the pastoral leases would confer the right of exclusive possession on the lessees.

58. Governor FitzRoy's despatch to Earl Grey of 11/10/1848¹¹¹ sought the necessary Imperial authority. The Governor transmitted the opinion of the Attorney General and the Solicitor General that the authority could be given by Order in Council, but he also sought "a declaration in the clearest and most explicit manner according to the principle laid down in your Lordships' Despatch of the 11th February 1848, that the lessees of Crown lands ... will acquire no right over [unimproved land] ... but that of exclusive pasturage; ..."¹¹². Although Governor FitzRoy suggested this in the context of facilitating mineral exploration and examinations of the land with a view to purchase, the suggestion echoed and referred to Earl Grey's suggestion made in the despatch of 11/2/48¹¹³ for the benefit of Aborigines. But no colonial or Imperial Act, Order in Council or Proclamation to that effect was ever made.

59. The opinion of the New South Wales Solicitor General and Attorney General 28/8/1848¹¹⁴ suggesting that the power to insert provisions "securing to the Aborigines the privilege of free access to" leased lands was vested exclusively with Her Majesty was consistent with their opinion that the pastoral leases conferred the right of exclusive possession on the

¹⁰⁹ AB 12:2181 at 2182 (Letter from Mayne 1/6/1848 enclosed in FitzRoy to Grey, 11/10/1848, CO 201/400).

¹¹⁰ AB 12:2183 (Letter from Mayne 1/6/1848 enclosed in FitzRoy to Grey, 11/10/1848, CO 201/400).

¹¹¹ AB 12:2171 (transcription of despatch No. 221, Sir Charles FitzRoy to Earl Grey, 11/10/1848 CO 201/400).

¹¹² AB 12:2172-2173.

¹¹³ AB 12:2163 at 2166.

¹¹⁴ AB 12:2184-2185 (transcription of letter from J.H.Plunkett, Attorney General to the Colonial Secretary, 28/8/48, enclosed with despatch No 221, Sir Charles FitzRoy to Earl Grey, 11/10/1848, CO 201/400).

lessees. In that respect, they said that " The third Section of the 5th and 6th Victoria ch: 36 [the 1842 Act], as also the 8th and 9th Sections of Chapter 2 of the aforesaid Orders in Council [the 1847 regulations] provide for the Grant or reservation of such particular portions of land as may be required for the use or benefit of the Aboriginal Inhabitants **but this is very different from providing that such Aboriginal Inhabitants should have a general permission granted to them to enter upon lands which had been granted or leased to others.**"¹¹⁵

60. It was the failure to make any contrary provision in the 1846 Act or in the 1847 regulations (for which Earl Grey was responsible), in the face of unmistakeable predictions of the consequences, which had produced the result that the pastoral lessees' power to exclude the Aboriginals was unregulated.

61. When Earl Grey then referred Governor FitzRoy's despatch to the Colonial Land and Emigration Office, he suggested, for the first time, that "it may fairly be assumed that H.M. did not intend & [gave?] no power by these leases to exclude the natives ...".¹¹⁶

62. Even taking this at face value, Earl Grey did not purport to know or to express Parliament's or the Crown's intention under the 1846 Act and the 1847 regulations. His comments were in any case incorrect, and said to be incorrect, by the Colonial Land and Immigration Office, which confirmed the opinion of the New South Wales Attorney and Solicitor General. The report of that office of 17/4/1849¹¹⁷, which referred to Earl Grey's opinion that the pastoral leases under the 1847 regulations gave the grantees only the exclusive right of pasturage, concluded that such leases:

".. will have conferred upon the holders not only that exclusive right of pasturage which may be conveyed by mere licence of occupation but an exclusive right of possession, ... not subject to the condition that any person beside the lessee whether Native or European should have the right of entering upon or in any way using or ranging over it."¹¹⁸

¹¹⁵ Ibid at AB 12: 2185. Reynolds and Dalziell quote from this opinion (at appendix 15, pp 94, 95). They assert that the opinion did not deal with the question whether the leases afforded lessees the power to exclude Aboriginal people from their land, but so much is at least implicit in the whole opinion, particularly the emphasized part.

¹¹⁶ AB 12: 2176 (memorandum from Earl Grey, 26/3/1849, with CO201/400).

¹¹⁷ AB 12:2186 (transcription of letter from Colonial Land and Emigration Office, 17/4/1849, signed by W. Murdoch and F. Rogers, to H. Merivale (Permanent Under Secretary Of State), CO 201/422).

¹¹⁸ Ibid at AB 12: 2188.

63. The report also dealt with¹¹⁹ the issues concerning the rights of mineral prospectors, government officers and the travelling public to enter pastoral leases. It noted that Governor FitzRoy's proposal of a declaration that a pastoral lease conferred no right but that of exclusive pasturage, would secure to the Natives the right of seeking their subsistence, it would secure to the public the right of searching for minerals, and it would secure other rights of access, such as for Government Officers and the travelling public. But the report recommended against any such declaration, and instead proposed the vague Order in Council which was later issued.

64. Earl Grey minuted his acceptance of that proposal on 6/6/1849,¹²⁰ even though the Parliamentary Under Secretary of State (Benjamin Hawes) had suggested¹²¹ that the nature and extent of the access of the natives should be defined.

65. Drummond J summarised the events leading to this Order in Council and then¹²² described Earl Grey's final position here as -

“curious, given the forcefulness of his earlier views in, for example, his Despatch No. 24 to Governor FitzRoy as to the need to properly protect Aboriginal interests in pastoral lands and given the Parliamentary Under-Secretary's concern as to the inadequacy of the Order in Council to achieve that object. It is, however, speculation whether the cautious views of the Colonial Land and Emigration Office officials, which took note of possible opposition by the settlers to the views initially advanced by Earl Grey, explain what appears to have been a change of mind on his part, especially in view of the strength of the opinions on the matter Earl Grey expressed in his Despatch No. 26 of 10 February, 1850 to Governor FitzRoy to which reference is made later.”¹²³

66. In *Mabo [No 2]*, Dawson J said of this Order in Council that the “somewhat imprecise wording of this Order in Council is self-evident and it was thus a safe prediction that ‘as the Earl refused to declare that the native rights deserved respect, they would not be respected’ (quoted in Rusden, *History of Australian* (1883), Vol II, p 513). Thus, although a clause reserving to the Aborigines ‘free access to the said parcel of land’ or to any portion of it including the trees and water which would ‘enable them to procure the animals, birds, fish and other foods of which they subsist’ was apparently inserted in Queensland leases (Reynolds, *The Law of the Land*

¹¹⁹ Ibid at AB 12: 2187-2191.

¹²⁰ AB 12: 2192 (memorandum by Secretary of State, 6/6/1849 with CO 201/422).

¹²¹ AB 12: 2192 (memorandum by Parliamentary Under Secretary of State, 6/6/1849, with CO 201/422).

¹²² AB 2:304 line 16-309.

¹²³ AB 2: 309.

(1987) p 144), the squatters ignored this provision and, by and large, they continued to drive the aboriginal inhabitants from the runs.”¹²⁴

67. Because the Crown had surrendered the relevant prerogative, the effect of leases and conditions in them could only be prescribed by Her Majesty in Council under the 1846 Act and the 1847 regulations or, as Governor FitzRoy had suggested, by new legislation. The Imperial government refused to make the declaration which FitzRoy sought. Instead, it empowered the local Governor to do what was thought appropriate.

68. As appears from the terms of the Order in Council¹²⁵, it was intended to confer upon the Governor a discretion to insert provisions in pastoral leases.

69. This was also Earl Grey’s intention: he said in his despatch to Governor FitzRoy of 6/8/1849 which enclosed the Order in Council that it:

“... will enable you to insert in all future Leases such conditions as to you may seem requisite “for securing the peaceable and effectual occupation of the Lands comprised in such Leases, and for preventing the abuses and inconveniences incident thereto,” words amply sufficient to enable you to prevent the injury to the Public which would result from the absolute exclusion of the Natives or other persons travelling or searching for mineral; and so forth.”¹²⁶

70. In the *Waanyi* case, French J¹²⁷ (and see, on appeal, per Hill J¹²⁸, Jenkinson J concurring), and, in this case Drummond J¹²⁹, held that this conferred a discretionary power. (As Drummond J also there pointed out, the Secretary not only did not give, but could not lawfully give, anticipatory directions fettering the discretion reposed by the Order in Council in the Governor in relation to the terms of the disposition of interests in Crown lands.)

¹²⁴ *Mabo [No 2]* (1992) 175 CLR at 142.

¹²⁵ AB 12: 2193-2195 (transcription of Order in Council as signed by Queen Victoria, 18/7/1849). The penultimate paragraph of it provided that it wasn’t to come into effect until proclaimed in the colony, which occurred on 26/4/1850: AB 7:1173.

¹²⁶ AB 13:2249 at 2250 (Transcription of despatch No 134, Earl Grey to Sir C.A. FitzRoy, 6/8/1849, Mitchell Library, MSA 1308).

¹²⁷ *Re Waanyi People’s Native Title Application* (1995) 129 ALR 118, 151 line 35.

¹²⁸ *North Ganalanja Aboriginal Corporation & Another v State of Queensland & Another* (1995) 132 ALR 565 per Hill J at 611 line 17 (Jenkinson J concurring at 577 line 20).

¹²⁹ AB 2:313-315.

71. The appellants' argument to the contrary, propounded by Reynolds and Dalziell in appendix 15, p 103, that the Governor did not have a discretion to decide that a condition should not be included in a future pastoral lease, is without substance. (In any case, their argument relies upon a particular view of the effect of opinions expressed by ministers and others. There is no principle by which an Order in Council can be construed by reading into it the contents of communications passing within the executive.) But even if this argument were correct, it would still be inconsistent with the proposition that a qualification of the lessees' rights in favour of Aboriginal occupants inheres in pastoral lease tenure.

72. In the same despatch of 6/8/1849 from Earl Grey to the Governor, Earl Grey repeated and elaborated on his (revised) assumption as to the intention of the 1847 regulations:

" ... comparing the terms of the 9th and 10th Vict. Cap 104 [the 1846 Act] ss 1 and 6 with those of the Order in Council of 9th March 1847 [the 1847 regulations] there can, I apprehend be little doubt that the intention of the Government was, as I pointed out in my dispatch of 11th February last, to give only the exclusive right of pasturage in the runs, not the exclusive occupation of the land, as against natives using it for ordinary purposes; nor was it meant that the public should be prevented from the exercise, in those lands, of such rights as it is important for the general welfare to preserve, and which can be exercised without interference with the substantial enjoyment by the lessee of that which is leased was really intended to convey ... but I fully appreciate the difficulties which the form of the present Order in Council opposes to the practical execution of that intention according to the view taken by your legal adviser." ¹³⁰ [This was also the view of Earl Grey's advisers.]

73. Earl Grey's ex post facto rationale as to the Government's intention is not convincing. A comparison of the 1846 Act¹³¹ with the 1847 regulations¹³² reveals, as both the English and the New South Wales legal authorities had concluded, that the Act and the regulations authorized the grant of leases in the conventional sense: in relation to the unsettled lands the 1847 regulations, in chapter 2, speak of a "grant" of a "lease" for a "term of years" (s 1), "rent", and "forfeiture" (s 5). (Those provisions may be contrasted with the limited right of pasturage provided for in chapter 4.)

¹³⁰ AB 13: 2249.

¹³¹ JLB 1: doc. 267.

¹³² AB 7: 1165.

74. The regulations also provided for reserves for public purposes (sect.8 of chapter 2; this merely preserved the power conferred by the 1842 Act, s 3¹³³), and (sect. 9 of chapter 2) empowered the Governor to make grants or dispositions out of the leases for public purposes. These provisions tend to confirm that, unless such a reservation or disposition was made - as might be necessary in the interests of the expanding settlement or to create public purpose reserves - a lease of the land would be given full effect as regards the possible beneficiaries of such reservations or dispositions.

75. The appellants' contention¹³⁴ that "the qualification [that the rights conferred by the leases were not to be exercised so as to prevent the Aborigines from occupying leased lands] was implicit in the nature of the tenure" rests merely on assertion. It is inconsistent with the form of the 1846 Act, the 1847 regulations, the opinions of the Land and Emigration Office and the New South Wales law officers, the perceptions of the public as recorded by the various Protectors, and the terms of and perceived necessity for the 1849 Order in Council. Nor do Earl Grey's comments in 1848 and 1849 evidence the intention of the legislature in 1846, or of the Crown in 1847.

76. In any case, those aspects of the Imperial policy of the 1840s upon which the appellants rely were not maintained.

77. The appellants' submissions emphasize those documents in which particular officials in one period expressed concern for Aboriginal hunting and foraging on land, but the policy was more inconsistent and complex. Even Earl Grey, upon whose comments the appellants place so much reliance, seemed to frame policy with the aim at ending the hunting and foraging of the Aborigines:

"Such occupations [i.e., instruction of the Aborigines in industry, education, mechanical employment and agriculture] and the advantages which they w^d be taught to appreciate from a knowledge of them , w^d constitute the chief inducement to remain, as they advance in life, in a state of Civilization, and w^d tend to destroy that desire to return to *their wild state* which has generally influenced those whose education has not partaken of an industrial character, and who have consequently had no bond in common with Civilized Society. The advantages of such a training are perceptible, to a remarkable degree, amongst

¹³³ JLB 1: doc. 265.

¹³⁴ Reynolds and Dalziel, appendix 15, p 78-79.

the Natives of New Zealand, and making every allowance for the difference of race, I still hope to see results which w^d: more than justify the experiments in Australia. The expence attend=ing any measures of that nature should constitute the very first charge upon the Land Revenue,.....”¹³⁵

78. The influence of considerations of the kind upon which the appellants rely is summarized in a recent article in the Sydney Law Review in the following terms:

“Moreover, the general common law doctrine [of indigenous title] did have some presence (though dissentient and ineffectual) in Australian history. In some ways, the Australian denial of indigenous land rights was constructed against the backdrop of the general doctrine; that doctrine was the alternative rejected in the course of settlement. There were hints of its presence early in the history of Australian colonisation. The Admiralty’s instructions to Lieutenant James Cook in 1768 authorised him to take possession of "convenient situations" "with the consent of the natives". The instructions to the first Governor of New South Wales, Captain Arthur Phillip, did not mention the purchase of Aboriginal land, although they did caution against "any unnecessary interruption in the exercise of their [the Aborigines’] several occupations". As Deane and Gaudron JJ suggest, this phrasing should be read in the context of the profound uncertainty at the time of first colonisation as to the nature and extent of indigenous occupation in New South Wales. Governor Philip Gidley King’s handling of land dispute on the Hawkesbury River in 1804 (in which he promised to restrict settlement in order to preserve Aboriginal use of the river) carries echoes of the North American experience. Clear evidence of the currency of the doctrine in official discourse occurs especially in the second quarter of the 19th century, in the inconstant but nevertheless real imperial concern for Aboriginal hunting and gathering and the creating of reserves in areas newly opened to colonisation, in the ultimately ineffective measures to protect indigenous title in South Australia, and in other, less formal ways, such as the acknowledgment by George Gipps, Governor of New South Wales, that the North American doctrine of indigenous title applied to New Zealand.”

“[fn 38] I am not suggesting that imperial authorities unambiguously maintained that indigenous title existed in Australia. Their policy is better summarised as discomfiture with the practice of dispossession, sporadic and ultimately ineffective attempts (often associated with particular officials) to bring Australian practice into line with that of other colonies, and eventual acquiescence in the facts of settlement in Australia.”¹³⁶

¹³⁵ AB 12:2163 at 2169 (transcription of despatch No 24, 11/2/1848, Earl Grey to Sir Charles FitzRoy, CO 201/382). This is the despatch in which Earl Grey suggested that the Governor pass a declaratory enactment as to the rights of the Aborigines to access to the pastoral leases.

¹³⁶ J Webber, *The Jurisprudence of Regret: The Search for Standards of Justice in Mabo*, 17 Sydney Law Review 5, at 22-23.

79. In *Mabo [No 2]*, Dawson J traced this history¹³⁷ (referring to many of the documents now relied upon the appellants) and concluded¹³⁸ that “no basis was afforded for saying that native rights in the land were recognised or accepted”.

80. Similarly, Drummond J said:

“Throughout the period up to the mid 1840s neither the Imperial and colonial authorities sought to implement a single solution to the conditions that created this conflict. At times their object seems not to have been to leave the Aboriginal peoples with undisturbed access to their lands, but rather to convert them to a more settled way of life, to educate their children and to police instances of conflict between them and the settlers. One answer to the problems facing the authorities was considered to lie in the establishment of Aboriginal reserves. In 1840, the Colonial Land and Emigration Office (a sub-department of the Colonial Office) recommended the setting aside of areas for the use of Aborigines “which would enable them to live, not as hunters ... but as cultivators of the soil”, in a report forwarded by the Secretary of State to Governor Gipps for his consideration: see Despatch No. 128, Lord John Russell to Governor Gipps, 5 August, 1840.”¹³⁹

and:

“It may be said that it was the policy of the Imperial government, for a time, to protect what are now identified as native title rights from extinguishment by the activities of the colonists and, in particular, the pastoralists. The Imperial Government sought to implement this policy through instructions given to the Governor and by arming him with various regulatory provisions to enable the Governor to give effect to that policy. However, the Imperial authorities never took any action to compel the Governor to implement that policy, as they could have done if they wished. In the period when it might be said that there was such a policy of the Imperial government in existence, it was always left to the Governor to decide whether he would give effect to that policy in each individual grant in respect of Crown lands he made. That is, I think, a powerful indication that the Imperial authorities at no time gave anything in the nature of a commitment that native title interests would be protected on a general and permanent basis. If the views recorded in the communications and in the Order in Council of 18 July, 1849 (or in any of the other material relied on by the applicants) reflected a policy of the Imperial government, there was and could not be any assurance that it would never be changed. And in so far as there was such a policy in the 1840s, within the Imperial government, it plainly changed, as that government moved towards granting New South Wales responsible government.”¹⁴⁰

¹³⁷ *Mabo [No 2]* (1992) 175 CLR, at 139-144.

¹³⁸ *Mabo [No 2]* (1992) 175 CLR, at 144.

¹³⁹ AB 2:289-290.

¹⁴⁰ AB 2:323-4.

81. The appellants' submissions largely hinge on their proposition that "Earl Grey's views can be treated as constituting and reflecting the intentions of the Imperial government with respect to the purpose and rights to be conferred by the [1846] Act and Order in Council [the 1847 regulations]."¹⁴¹ That proposition is unsustainable, partly because even Earl Grey's views vacillated, partly because his views (if they did reflect the suggested qualification inherent in the tenure of a pastoral lease) did not find expression in any executive act or in legislation, and partly because Earl Grey was but one of many concerned with the tenure under the leases.

The Queensland legislation.

82. In Queensland, the Order in Council of 18/7/49 was repealed by the *Crown Lands Alienation Act 1868*¹⁴². The *Pastoral Leases Act 1869* again provided for the repeal of that Order in Council.¹⁴³ Although that Act used the conventional terminology appropriate for leases and substantially reproduced those provisions, formerly authorized by the Order in Council, for access in favour of others (such as prospectors and government officers), it omitted the provision in favour of the Aboriginal occupants.¹⁴⁴

83. Similarly, the *Land Act 1910* and the *Land Act 1962* contain no such provisions in favour of Aboriginal occupants. In conformity with those Acts, there are no such provisions in the Mitchellton and Holroyd leases.¹⁴⁵

84. The appellants' contention that "From the beginning Queensland legislation dealing with leases for pastoral purposes was founded on the principles developed during the 1830s and the 40s in New South Wales"¹⁴⁶ is incorrect. That contention overlooks the facts of the encroaching settlement and the repeal of the Order in Council, and is not supported by any authority. The rights of the Aboriginal occupants were simply disregarded¹⁴⁷.

¹⁴¹ Appendix 15 at p 92.

¹⁴² JLB 1: doc 293, s.1 in Schedule A. The Order in Council may have been repealed already by the *Unoccupied Crown Lands Occupation Act 1860* (JLB 1:doc 284, s 2), which repealed such parts of Orders in Council as were repugnant to that Act.

¹⁴³ JLB 2: doc. 294, s 1, schedule A.

¹⁴⁴ JLB 2:doc. 294, ss 7, 20, 21, 52, 62 (limited right in favour of persons driving stock), 67 (limitation on lessee's right to exclude persons authorised by government to search for minerals or cut timber), 68 (similar limitation for government officers inspecting land). These sections reflected the similar provisions in the *Unoccupied Crown Lands Occupation Act 1860* (JLB 1:doc 284, ss 20, 21, 22, 23, 25).

¹⁴⁵ The appellants' appendix 8 shows that the old forms of lease with provisions in favour of the Aboriginal inhabitants continued to be used, despite the absence of statutory authority, for leases granted under Queensland legislation up to *The Land Act 1897*. The latest example in the record of a pastoral lease with a reservation is 1904 : AB 6:1112.

¹⁴⁶ Appendix 15, p 5.

¹⁴⁷ As Dawson J pointed out in *Mabo [No 2]* (1992) 175 CLR, at 144-145.

85. The Queensland Crown lands legislation is consistent with a policy favouring the pastoral lessees' rights of exclusive possession. This is reflected in the Chief Protector's report in 1921 about the Mitchelton lease¹⁴⁸:

"About the year, 1919, an area of country about 635 square miles, North of the Mitchell River Aboriginal Reserve was leased by the lands Department to Mr. Walter Sydney Hood and, through him, to the Byrimine Pastoral Properties Co.

Unfortunately, this Department was not consulted, as there are about 300 natives roaming on this country, and when the company starts operations the natives will doubtless be hunted off."

86. The fourth respondent respectfully adopts Drummond J's analysis of the Queensland legislation as to reserves and making other provision for Aboriginals¹⁴⁹.

87. It is noteworthy that this legislation - which was intended to "protect" Aboriginals - contained no provision referable to the supposed right to be upon pastoral lease land, but provides for Aboriginal reserves. As Dawson J pointed out in *Mabo [No 2]*¹⁵⁰, there was a large scale programme of removals to such reserves throughout Queensland. (The power to create such reserves had of course existed when Crown lands were the subject of Imperial regulation, as is indicated by earlier references to the 1842 Act and the 1847 regulations).

88. The existence of these reserves provides one answer to the appellants' submissions that the legislature could not have intended to extinguish native title because it made no provision for what was to happen to Aboriginals excluded from leased land.

89. Another answer to that submission is that it fails to have regard to the true facts of the dispossession of the Aboriginals which were acknowledged in *Mabo [No 2]*. Deane and Gaudron JJ¹⁵¹ relied upon the history of the dispossession in determining to overturn the previous authorities. They refer to the "conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal people ..." ¹⁵² and the "white expropriation of land ... spreading to parts of the

¹⁴⁸ AB 15:2607 (Letter from the Chief Protector of Aborigines to the Under Secretary, Home Secretary's Department, 8/7/1921).

¹⁴⁹ AB 2:346-348.

¹⁵⁰ *Mabo [No 2]* (1992) 175 CLR, at 150.

¹⁵¹ *Mabo [No 2]* (1992) 175 CLR, at 120.

¹⁵² *Mabo [No 2]* (1992) 175 CLR, at 104.

desert interior”¹⁵³. Brennan J said¹⁵⁴ that the Aborigines “were dispossessed parcel by parcel, to make way for expanding colonial settlement”. One consequence of this dispossession, coupled with diseases brought by the colonists, was that it was commonly thought that the Aborigines would die out¹⁵⁵.

90. The appellants’ version of the history is unsustainable. The NTA recognised and sought to remedy some of the consequences of the history. It is not now possible to treat the historical events - including the granting of pastoral leases - as anything other than the deliberate dispossession of the Aboriginal inhabitants.

The other colonies.

91. The appellants’ historical documents relating to events in other colonies, notably Western Australia, merely provide a contrast with the manner in which the effect of the earliest pastoral leases was dealt with in New South Wales. Drummond J summarized this as follows¹⁵⁶:

“Earl Grey thus insisted on making it mandatory in the regulations to govern the disposal of Crown lands for pastoral purposes in Western Australia for all such leases to expressly recognise traditional native rights, something which he was prepared to leave only a year earlier, to the discretion of the Governor of New South Wales when the Order in Council of 18 July, 1849 was drawn up to govern the disposal of Crown lands for pastoral purposes in New South Wales. It would appear that, while the Secretary of State personally remained very concerned to protect traditional Aboriginal interests from the actions of the pastoralists in the Australian colonies, the different approaches he took in relation to Western Australia and New South Wales, so far as the Orders in Council for which he was responsible are concerned, was quite deliberate and reflected an appreciation of the different local political situations, in the one case, in a relatively highly developed colony with organised private interests and, in the other, a colony with a tiny European population a long way from the grant of self-government.”

92. The different historical treatment of the colonies in the 1840s sheds no light on the application of the rules as to extinguishment of native title to the facts of any particular case.

¹⁵³ *Mabo [No 2]* (1992) 175 CLR, at 105.

¹⁵⁴ *Mabo [No 2]* (1992) 175 CLR, at 69.

¹⁵⁵ See, for example, *Mabo [No 2]* (1992) 175 CLR per Deane and Gaudron JJ at 106, quoting from Wharton’s comments in 1893.

¹⁵⁶ AB 2:319.

Certain of the appellants' submissions are not relevant to any issue in these proceedings.

93. Question 1B¹⁵⁷ refers to the appellants' "Aboriginal title or possessory title", which are the phrases used throughout the appellants' Statement of Claim¹⁵⁸. The term "Aboriginal title" is defined on p.4 of the Statement of Claim¹⁵⁹ to have the same meaning as "native title" in the Native Title Act. By filing the undertakings directed by Drummond J on 11 March 1994, the appellants in effect accepted that the phrase "possessory title" added nothing to "native title" as defined in the Native Title Act, or alternatively agreed not to prosecute any claim for possessory title¹⁶⁰.

94. The result is that "native title" can be substituted for "Aboriginal title or possessory title" where it appears in the Statement of Claim, and in the questions for determination.

95. In their third contention, the Wik Peoples assert that a decision that pastoral leases extinguished native title upon grant does not finally determine "the matter", because it is arguable that, after grant, the State and the pastoralists acquiesced in:

- (a) the continued exercise of native title rights by the occupants¹⁶¹;
- (b) the continued occupation of the land by the Wik Peoples in accordance with their traditional customs¹⁶².

96. The result is said to be that it may now be unconscionable for either the State or the pastoralists to eject the traditional owners from their land.

97. As a matter of logic, there could not have been any continued exercise of native title rights if those rights had been extinguished. As a matter of logic, there could have been a continued occupation of the land in accordance with traditional customs.

¹⁵⁷ AB 2:328.

¹⁵⁸ See, for example, paras 8, 9(b), 10(c), 11 and 12 of the Statement of Claim at AB 1:150-151.

¹⁵⁹ AB 1:146.

¹⁶⁰ See the reasons of Drummond J of 11 March 1994 at AB 1:27-30; the order of 11 March 1994 at AB 1:33; it is not in dispute that the undertaking was given.

¹⁶¹ See contention 3 at pp 4 & 28 of their submissions.

¹⁶² See para 64 of their submissions.

98. A decision that these pastoral leases extinguished native title upon grant does finally determine the "matter" which is before this Court. The relevant matters before this Court are Questions 1B and 1C which were before Drummond J. Those questions raise neither the right to eject the traditional owners in reliance upon extinguishment, nor any equitable or legal defence to a right of ejectment which otherwise exists. This is not surprising, because there is no mention in the Statement of Claim of either the right to eject the traditional owners, or any defence to such a right. The divergence between the submissions of the Wik Peoples and their Statement of Claim becomes apparent when it is noted that:

- (a) it is asserted in para. 63 of the submissions that "it must be assumed for this case that that continued occupation was at the invitation or with the encouragement or express or tacit acquiescence of the pastoralists and the State" when no such allegation is made in the Statement of Claim;
- (b) there is no allegation in the Statement of Claim which even colourably supports the assertions in paras. 64(c) and (d) of the submissions.

99. The issue which is sought to be raised by the third contention does not arise in the matter before this Court, was not raised before Drummond J, and has not been raised in the Statement of Claim.

100. Similar conclusions follow in relation to the fourth contention in the submissions of the Wik Peoples. That contention is that if native title was extinguished by force of the grant itself, and if the crown owes the traditional owners a fiduciary duty in relation to their land, the crown holds the reversion of the pastoral leases on trust for the traditional owners.

101. This issue is not raised by Questions 1B and 1C. Further, no such claim is made in the Statement of Claim. In relation to the pastoral lease areas, the only issue raised is non-extinguishment¹⁶³ and the only relief sought in the Application is a declaration that native title has not been extinguished¹⁶⁴. This can be contrasted, for example, with the claim that Comalco holds ML7024 as constructive trustee for the appellants¹⁶⁵.

¹⁶³ Statement of Claim, paras 235-237, AB 1:212-213.

¹⁶⁴ Application, Part L, AB 1:138.

¹⁶⁵ See Statement of Claim, para 61(b), AB 1:167; Application para C(2)(i)(ii), AB1:128.

102. Submissions are made by the Thayorre People which similarly address issues which are not raised by Questions 1B and 1C, and are therefore not before this Court. Those issues are:

- (a) whether on the forfeiture and surrender of the Mitchellton lease in 1918 and 1921, the Crown held its beneficial interest in the land on trust for the Thayorre People¹⁶⁶;
- (b) whether the Crown held the reversion in respect of the Mitchellton leases on trust for the Thayorre People¹⁶⁷;
- (c) whether, in the event that native title was extinguished by the grant of the Mitchellton leases, the Thayorre People are nonetheless entitled to their claimed lands by virtue of their possessory title¹⁶⁸.

Fiduciary duties relating to extinguishment of native title.

103. The history of the dispossession of the Aboriginals is inconsistent with the Wik Peoples' contention¹⁶⁹ that the Crown undertook to recognise and protect the native title of the appellants and their predecessors.

104. The fourth respondent will adopt the submissions of the first respondent to the effect that there was no general fiduciary duty arising out of the relationship between the Crown and the Aboriginals, and that the Crown does not hold the reversion of pastoral leases on trust for dispossessed native title holders¹⁷⁰

Native title has been extinguished by Crown grant of pastoral leases.

105. Prior to the grant of the pastoral lease (and on the assumption that native title existed), the only persons having interests in the land were the Crown and the native title holders. The

¹⁶⁶ See submissions of the Thayorre People at pp 9 and 90-91.

¹⁶⁷ See submissions of the Thayorre People at pp 9 and 90-91, and the cross reference to para 1(h) of the Cross Claim at AB 2:265.

¹⁶⁸ See submissions of the Thayorre People at pp 10 and 92-96, and para 1(s) of the Cross Claim at AB 2:268.

¹⁶⁹ Submissions para 70(b).

¹⁷⁰ In *Re Wadi Wadi People's native Title Application* (1995) 129 ALR 167, 178-187, French J rejected a contention that such a fiduciary duty could condition the validity of an extinguishing grant.

Crown held the radical title and the undoubted legal capacity to effect an extinguishment of native title. The native title holders held (so it is assumed) proprietary and usufructuary rights in the land. The title was not allodial in nature but neither was it held of the Crown as part of the system of tenure. Prior to any extinguishment, the title of the Crown was regarded as burdened by the native title.

106. When the legislature granted the pastoral lease, the lessee obtained a leasehold estate in the land which accorded it legal rights (including exclusive possession) in respect of the land¹⁷¹. The interest of the Crown was expanded from that of holding only the radical title to that of lessor holding the reversion expectant upon the expiry of the term of the lease. Upon the expiry of the term of the lease, the Crown's interest becomes a plenum dominium.

107. For the reasons earlier advanced, the existence of the rights in the land which were created upon grant of the lease is inconsistent with the native title rights claimed by the Wik peoples. The pastoral lease must be regarded as having extinguished them.

108. Because it was the "exercise of sovereign power inconsistent with the continued right to enjoy native title" involved in the grant of the pastoral lease which extinguished native title, subsequent events such as the nature and extent of the lessee's activities on the land demised are irrelevant to the question of extinguishment¹⁷².

109. Nor would the forfeiture or surrender of a lease alter the fact of extinguishment. Thus the forfeiture of the sardine factory lease in *Mabo [No 2]* did not reverse the earlier extinguishment of native title in that case; that is because at common law, once native title is extinguished, it has gone forever and cannot be revived¹⁷³.

PART TWO - THE COMALCO ACT AND THE COMALCO AGREEMENT

Introduction

¹⁷¹ See the submissions as to the rights created by grant of the pastoral lease at para 31 et seq above.

¹⁷² *Mabo [No 2]* (1992) 175 CLR, at 68, 69, 71, 73, 89, 110, 111; *Davies v Littlejohn* (1924) 34 CLR 174 at 188.

¹⁷³ *Mabo [No 2]* (1992) 175 CLR, at 60, 72-73.

110. It is only the Wik peoples who address this question, and they are referred to in this part of the submissions as the appellants.

111. The claims which are the subject of this question proceed on the assumption that one or more of the enactment of the Comalco Act¹⁷⁴, the making of the Comalco Agreement¹⁷⁵ or the granting of ML 7024 (special bauxite mining lease no.1)¹⁷⁶ extinguished the appellants' native title. The Statement of Claim attacks the validity of the Comalco Agreement and ML 7024 (asserting that both are invalid and of no effect), on the basis of procedural unfairness¹⁷⁷ and breach by Queensland of trust or fiduciary duty in which Comalco knowingly participated¹⁷⁸. The following further claims are then made against Comalco:-

- (a) it must account to the appellants for profits made by it in consequence of the breach of fiduciary duty by Queensland, and it holds ML 7024 as constructive trustee for the appellants¹⁷⁹;
- (b) it has been unjustly enriched by the benefits it has received from the making of the Comalco Agreement and the granting of ML7024 and the operations conducted pursuant thereto, and must account to the appellants for those benefits¹⁸⁰;
- (c) it should be enjoined from continuing its operations, because it has no lawful entitlement to conduct those operations, by virtue of the invalidity of the Comalco Act and ML7024¹⁸¹.

112. It is appropriate to identify what is not in dispute.

113. Firstly, it is not alleged in the relevant paragraphs of the Statement of Claim that the Comalco Act is invalid. Nor do the appellants seek to question the validity of the Comalco Act in this Court - see para. 112 of their submissions.

¹⁷⁴ AB 16:2702-2756.

¹⁷⁵ AB 16:2757-2796.

¹⁷⁶ AB 16:2813-2833.

¹⁷⁷ paras 48A-53, AB 1:163.

¹⁷⁸ paras 54-58, AB 1:163-167.

¹⁷⁹ paras 59-61, AB 1:167.

¹⁸⁰ paras 61A-64, AB 1:168.

¹⁸¹ paras 65-68, AB 1:168-169.

114. Secondly, there are certain facts which are not in dispute. Those are:-

- (a) the Comalco Agreement was in fact made on 16 December, 1957 and was in the form set out in the schedule to the Comalco Act¹⁸²;
- (b) the Governor in Council did by proclamation notify the date of the making of the agreement¹⁸³;
- (c) the condition recited in Clause 8 of the Comalco Agreement was satisfied on 20 June, 1958¹⁸⁴;
- (d) the actual instrument of lease was issued by the State on 3 June, 1965¹⁸⁵;
- (e) as required by the Comalco Agreement, the instrument of lease was in the scheduled form¹⁸⁶;

115. As to paragraph (a) above, the Statement of Claim also alleges that the Agreement was made on that date¹⁸⁷.

116. As to paragraph (c) above, upon satisfaction of the condition recited in Clause 8 of the Comalco Agreement¹⁸⁸, Comalco was entitled, by virtue of Clause 11(c) of the Comalco Agreement¹⁸⁹, to occupy the land and to exercise all the rights and powers to be granted by the lease.

117. The fourth respondent's contentions are:-

¹⁸² Appendix 6 to the appellants' submissions, fact 14.

¹⁸³ Appendix 6 to the appellants' submissions, fact 15.

¹⁸⁴ Appendix 6 to the appellants' submissions, fact 16.

¹⁸⁵ Appendix 6 to the appellants' submissions, fact 21.

¹⁸⁶ AB 16:2813-2816 and AB 2:394, Statement of Claim para 41 (AB 2:161), Chronology C28 (AB 2:226) and para 44 (AB 2:162).

¹⁸⁷ See paras 41 (Chronology C27), 42 and 43 of the Statement of Claim, together with the definition of "Comalco Agreement" in paragraph 1 of the Statement of Claim (AB 2:147).

¹⁸⁸ AB 16:2708.

¹⁸⁹ AB 16:2709.

- (a) As a result of ss 2 & 3 of the Comalco Act, all of the provisions of the Comalco Agreement must be treated as though the Agreement were an enactment of the Queensland Parliament;
- (b) Because it has this force, no objection can be taken to the validity of the Comalco Agreement;
- (c) Because it has this force, neither the making of the Comalco Agreement, nor the grant of ML 7024 pursuant thereto, can be regarded as wrongful, whether by way of breach of the rules of procedural fairness, or breach of trust or fiduciary duty, or as resulting in unjust enrichment.

118. The response of the appellants to these contentions, relying on statements by Dunn J in *Comalco Aluminium Corporation Limited v Attorney-General*¹⁹⁰, is that the “statutory effect [of the Comalco Act] was, therefore, for a specific limited purpose, namely to override specific legislative impediments of the making of the [Comalco] Agreement”¹⁹¹. This cornerstone is then relied on to support arguments that:

- (a) There is nothing in the Comalco Act which implies any intention to validate what would otherwise be a wrong done to a third party by the entry into the Comalco Agreement¹⁹².
- (b) Because the Comalco Act did not make it mandatory for the State to enter into the Comalco Agreement, the Agreement can be impugned for want of procedural fairness¹⁹³.
- (c) The mining lease does not have the force of statute - while a form of lease was scheduled to the Comalco Agreement, the status of the lease when ultimately granted was not thereby affected¹⁹⁴.

¹⁹⁰ [1976] Qd R 231, at 260, referred to as the *Comalco* case.

¹⁹¹ See para 82 of the appellants’ submissions.

¹⁹² See paras 83-91 of the appellants’ submissions.

¹⁹³ See paras 92-108 of the appellants’ submissions.

¹⁹⁴ See paras 113-115 of the appellants’ submissions.

The status of the Comalco Agreement

119. The appellants do not address the status of the Comalco Agreement, except by saying that the purpose of the Comalco Act was merely to override specific legislative impediments to the making of the Comalco Agreement. That was undoubtedly one of the purposes of the Comalco Act, but that does not resolve the question. It is necessary to understand the status of the Comalco Agreement in order to consider its effect, and the extent to which it can be challenged. The appellants assert that the Comalco Agreement is invalid and of no effect¹⁹⁵.

120. In the *Comalco* case, Wanstall SPJ considered the effect of s 4 of the Comalco Act, which is relevantly the same as s 3, providing that:

“... the provisions of the Agreement making such variation shall have the force of law as though such last mentioned Agreement were an enactment of this Act.”

121. Wanstall SPJ said¹⁹⁶:

“It is idle to say, as does the plaintiff’s argument, that because what emerges from the use of the s 4 formula at executive level is as good as legislation, in that it will have the force of law, the formula which produced it deals with the manner and form of passing legislation. The simple truth is that where it prescribes manner or form it does so in respect of *executive action* to effectuate a variation of the agreement, and to give it the force it would have if Parliament had enacted it, legislatively.”

122. Hoare J (who dissented) said¹⁹⁷:

“In considering the 1957 Act it is essential to consider all the terms of the agreement because s 3 of the Act expressly provides “Upon the making of the agreement the provisions thereof shall have the force of law as though the agreement were an enactment of this Act.” It seems to me that the plain words of this section are to confer on the agreement the status of an Act of the Queensland Parliament. Accordingly when s 4 of the Act contains provisions setting out precisely in what manner the agreement may be varied it seems to me to be inescapable that the section is speaking of a variation (i.e. an amendment) of an Act of Parliament. ...

¹⁹⁵ Statement of Claim, paragraphs 53, 58(a) and 65; AB 1:163, 166 and 168.

¹⁹⁶ [1976] Qd R, at 237.

¹⁹⁷ [1976] Qd R, at 247-248.

To treat the section as only applying to an act of the executive government, it seems to me, involves ignoring the provisions of s 3 which has in effect converted the agreement into an Act of Parliament.”

123. This is also supported by other authority.

124. In *West Lakes Limited v The State of South Australia*¹⁹⁸, King CJ stated¹⁹⁹:-

“Section 3 of the *West Lakes Development Act*, after approving and ratifying the indenture, provides that ‘notwithstanding any other Act or law, or any instrument or order made in pursuance of any other Act or law [the indenture] shall, subject to this Act, be carried out and have effect as if the provisions thereof (including the schedule, plans and other annexures annexed thereto) were agreed to between the parties thereto and expressly enacted in this ‘Act.’ The provisions of the indenture are thereby incorporated into the statute and given statutory force.”

125. In the same case, Zelling J²⁰⁰, in referring to provisions of the same Act, stated:-

“It seems to me that what these ss 3, 15, 16 and 17 do is: first, to give the indenture the same status as if it were a part of the *West Lakes Development Act*, 1969; that is, it has statutory force.”

126. Zelling J also stated²⁰¹:-

“The provisions in the indenture on which Mr Williams relies were meant to bind the State of South Australia and the Ministers concerned contractually. For that reason, and because a great deal of what was purported could not be done without a statutory amendment, the indenture and the schedules were elevated to the status of sections in a statute
...”

127. In *Institute of Patent Agents v Lockwood*²⁰², the House of Lords considered s 101 of the *Patents, Designs and Trademarks Act*, 1883 which provided that the Board of Trade might from time to time make such general rules as they thought expedient subject to the provisions

¹⁹⁸ (1980) 25 SASR 389.

¹⁹⁹ (1980) 25 SASR, at 391.

²⁰⁰ (1980) 25 SASR, at 404.

²⁰¹ (1980) 25 SASR, at 415.

²⁰² [1894] AC 347.

of the Act for regulating the practice of registration under the Act. Section 101(3) provided that the rules made in pursuance of that section should :-

“(subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed.”

128. This was considered by the Lord Chancellor, Lord Herschell²⁰³. He noted²⁰⁴ that “subject as hereinafter mentioned” was a reference to the rules being laid before Parliament for consideration for forty days, during which any rules might be annulled by a resolution of either House. The Lord Chancellor continued²⁰⁵:-

“If not so annulled or until so annulled what is the effect? They are to be ‘of the same effect as if they were contained in this Act’. My Lords, I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the Courts. The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. ...

I own I feel great difficulty in giving to this provision, that they ‘shall be of the same effect as if they were contained in this Act,’ any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act. ...

... I think it only right to express the opinion which I entertain, that the words to which I have referred are really meaningless unless they have the effect which I have described, and they seem to me to be the apt and appropriate words for bringing about the effect which I have described. They are words, I believe, to be found in legislation only in comparatively recent years, and it is difficult to understand why they have been inserted unless with the object I have indicated.”

129. Lord Watson²⁰⁶ in relation to the same provision stated:-

“My Lords, in regard to those words which I have just read, I do not think I can express my opinion more clearly than by saying that I think they mean exactly what they say. Such rules are to be as effectual as if they were part of the statute itself.”

²⁰³ [1894] AC, at 359-361.

²⁰⁴ [1894] AC, at 359.8.

²⁰⁵ [1894] AC, at 359-360.

²⁰⁶ [1894] AC, at 365.

130. Lord Russell stated²⁰⁷:-

“But further, I think that if the rules are to be read as part of the Act (as I think they ought to be) it is not, in this case, competent to judicial tribunals to reject them. Such effect must be given to them by judicial construction as can properly be given to them taking them in conjunction with the general provisions of the Act or Acts of Parliament in connection with which they have been formulated.”

131. Lord Morris disagreed only to the extent that s 101(3) would not protect rules which were ultra vires, a question which does not arise in the present case.

132. Professor Campbell in her article, *Legislative Approval of Government Contracts*²⁰⁸, states:

“Although no set form of words needs to be used to give the terms of an agreement statutory effect and to convert what would otherwise be contractual obligations into statutory obligations, the decided cases indicate that an agreement is not given this effect if an Act does no more than authorise it to be made, approve it, ratify it, declare it valid and binding between the parties, or confirm it. An Act which contains expressions of this kind, but no more, can make an agreement contractually binding in circumstances in which, but for the Act, it would not be binding on the ground that it was not intended to create legal obligations or that it would have been ultra vires one of the parties or that its terms are invalid according to the ordinary principles of common law.

What seems to be required to translate contractual obligations into statutory obligations is a statutory provision which explicitly declares that the agreement shall take effect as if enacted in the Act, repetition of the terms of the agreement in the body of the statute, or a statutory direction that the terms of the agreement be carried out.”

133. Professor Campbell accordingly equates “a statutory direction that the terms of the agreement be carried out” with a declaration that “the agreement shall take effect as if enacted in the Act”. The latter is the formula used in the Comalco Act. The authority cited for the former is *Caledonian Railway Company v Greenock and Wemyss Bay Railway Company*²⁰⁹. That House of Lords decision was cited with approval in *Sankey v Whitlam*²¹⁰. In *Caledonian*

²⁰⁷ [1894] AC, at 367.

²⁰⁸ (1972) 46 ALJ 217 at 218.

²⁰⁹ (1874) LR 2 Sc & Div 347.

²¹⁰ (1978) 142 CLR 1 at 31 per Gibbs ACJ, at 77 per Stephen J, at 89 per Mason J and at 106-107 per Aickin J, by reference to the reasons of Stephen J. In *Sankey*, Jacobs J at 102 merely agreed with the other members of the Court on the answer to this question.

Railway Company, an agreement between the two railway companies was a schedule to an Act of Parliament. The Lord Chancellor²¹¹ recited the terms of clause 59 of the Act -

"...The said agreement shall be, and the same is hereby sanctioned and confirmed, and shall be as valid and obligatory upon the company and the Caledonian Railway Company respectively, as if those companies had been authorised by this Act to enter into the said agreement, and as if the same had been duly executed by them after the passing of this Act.

Up to this point, the enactment does no more than give statutory validity to the agreement; but the clause proceeds in these words

And it shall be lawful for the company (that is, the Greenock and Wemyss Bay Railway Company) and the Caledonian Railway Company respectively, and they are hereby required, to implement and fulfil all the provisions and stipulations in the said agreement contained.

Now, My Lords, I apprehend it to be clear beyond the possibility of argument, that when an agreement between two companies who are coming for an Act of Parliament is scheduled to the Act of Parliament, and when an enactment is found in the body of the Act that each company shall be required to implement and fulfil all the provisions and stipulations in the agreement, every provision and stipulation in that agreement becomes as obligatory and binding on the two companies as if those provisions had been repeated in the form of statutory sections."

134. The House of Lords accordingly found that a provision for arbitration in the agreement was not a voluntary agreement which would not exclude the jurisdiction of the Court, but amounted to "an Act of Parliament forcing the parties to have their disputes settled, not by the ordinary tribunals of the country, but by a reference to arbitration"²¹².

135. The effect of the three types of statutory wording referred to in the last paragraph of the quotation from Professor Campbell's article is the same: the agreement is given statutory effect.

The validity of the Comalco Agreement cannot be challenged, directly or indirectly.

136. If the Comalco Agreement has the status and effect of an Act of Parliament, no objection whatsoever can be taken to its validity.

137. The statements in *Institute of Patent Agents* have already been referred to. The only qualification to the general principle is one which has no application in the present case, and was

²¹¹ (1874) LR 2 Sc & Div, at 348-349.

²¹² (1874) LR 2 Sc & Div, at 350.

in part adverted to by Lord Morris in *Institute of Patent Agents*. Lord Morris thought that a provision giving the rules (in that case) the force of a statute would not protect the rules if they were ultra vires. This question has been considered in Australia in cases such as *Foster v Aloni*²¹³. That case concerned regulations made under the *State Electricity Commission Act*. Section 28(2) of the Act provided²¹⁴:-

"... such regulations shall be published in the Government Gazette and shall be laid before both Houses of Parliament . . . and shall have the like force and effect as if they were enacted in this Act."

138. The Full Court stated²¹⁵:-

"We are, of course, not at liberty to disregard the language of an Act of Parliament and we are bound to give it its full effect when that is discovered from the context in which it is used. Clearly not every purported exercise of the power to make regulations under this Act can pass unchallenged in the Courts. ... If, however, the words in question were only to have effect after the Court, if appealed to, had determined that the challenged regulation was within the head of power it purported to exercise, the words quoted seem to us to be mere verbiage. The real problem is, we think, to determine whether the Court may give them substantial effect without reading them as leaving to the Executive a power to enact subordinate legislation as unrestricted as to subject-matter as the power of Parliament itself. We think substantial effect may be given to the words in question without that result. Not only, in our opinion, must the condition precedent as to the recommendation of the Commission be satisfied before sec. 28(2) operates on regulations, but in the next place, such regulations must be read as part of the Act, and if, when they are so read, some inconsistency is found with sections of the Act, other than those which actually define the heads of the power to make regulations - in this case sec. 27 and sec. 28(1) - then that inconsistency must be resolved, as must any question of conflict between sections of an Act of Parliament. Normally the inconsistent section would be treated as the leading provision and the regulation as the subordinate.

But in our opinion there is a third limitation upon the operation of the words of sec. 28(2). It is not every purported exercise of power by the Executive which is by the sub-section given the effect of an Act of Parliament. It may be patently or absurdly irrelevant to the head or heads of power the Executive purports to exercise. In our opinion such a purported exercise of power would not be saved by the sub-section. But if regulations genuinely purport to be an exercise of one or more of the heads of power granted by the Act, upon a matter or matters connected with the purposes which the Commission as a statutory authority is

²¹³ [1951] VLR 481.

²¹⁴ [1951] VLR, at 483.

²¹⁵ [1951] VLR, at 483-484.

created to achieve, in that case at least, subject to the two conditions previously mentioned, the Court is not called upon to examine whether in any respect the purported exercise of power is too broad, or whether cases may not be figured, falling within the regulations, which go beyond the necessity of the occasion. Once the position we have described is reached, inquiry ceases and the regulations have statutory effect."

139. The Full Court also said²¹⁶:-

"We think the view we have expressed is in accordance with the strong dicta of a majority of the learned Lords in *Institute of Patent Agents v Lockwood* [1894] AC 347, with the opinion of the Divisional Court in *Baker v Williams* [1898] 1 QB 23, with the opinion of Lord Esher MR in *In re Langlois* [1891] 1 QB 349, at p.355, and with the opinion of that great judge and profound lawyer Sir Leo Cussen in the cases of *Heward v Blake* [1914] VLR 167, and *Dunlop v Troy* [1915] VLR 639; and no case has been brought to our attention nor have we found any which conflicts with what we have said. The provisions considered in those cases were not identical with those of sec. 28(2), but they were sufficiently similar to render the opinions referred to strongly persuasive in the present case."²¹⁷

140. None of the qualifications referred to in *Foster v Aloni* are relevant in the present circumstances. Thus a challenge to the Comalco Agreement must be regarded in the same way as a challenge to any Act of Parliament.

141. Whether a litigant is able to impugn the validity of an Act of Parliament was considered in *British Railways Board v Pickin*²¹⁸. The factual background is set out in the judgment of Lord Reid²¹⁹. In brief, many 19th century Railway Acts contained provisions to the effect that if the railway was abandoned or discontinued, the land acquired for the railway would revert to the owners for the time being of the adjoining land. The British Railways Board obtained the passage of the *British Railways Act* 1968, which by s 18 provided that such 19th century statutory provisions should not apply to any land vested in the Board. Mr. Pickin was interested in the preservation of railways, and to test the Board's rights, he purchased the estate or interest,

²¹⁶ [1951] VLR, at 485.

²¹⁷ For recent applications of these principles, see *Kwiksnax Mobile Caterers Pty Ltd v Logan City Council* [1994] 1 Qd R 291; *State Bank of South Australia v Hellaby* (1992) 59 SASR 304; and *Attorney-General (Vic) v City of Geelong* [1989] VR 641. See also *Halsbury's Laws of England*, 4th ed., Vol 44, "Statutes", para 938.

²¹⁸ [1974] AC 765.

²¹⁹ [1974] AC, at 780-782.

whatever it might be, of some adjoining owners in the land comprising an abandoned railway. Lord Reid stated²²⁰:

“As the respondent’s case developed in argument it appeared that he seeks one or other of two methods of relief against section 18. First he says that section 18 confers a benefit on the appellants and if he can prove that Parliament was fraudulently misled into enacting this benefit the court can and should disregard the section. And, secondly, he says that even if the court cannot do that and the section has taken effect, the court can on proof that Parliament was so misled nullify the resulting benefit to the appellants by requiring them to hold in trust for him the benefit which the section has given to the appellants to his detriment.”

142. Mr Pickin was, if anything, in a stronger position than the applicants, in that the Act he was seeking to impugn was a private Act, unlike the Comalco Act - see s 11 of the *Acts Interpretation Act* 1954 (Qld). What is perhaps most relevant to the present case is the statement of Lord Reid²²¹ in the following terms:

“I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.”

143. Lord Reid approved²²² the statement of Lord Campbell in *Edinburgh and Dalkeith Railway Co. v Wauchope*²²³, including the following:

“... all that a court of justice can look to is the parliamentary roll; they see that an Act has passed both Houses of Parliament, and that it has received the royal assent, and no court of justice can enquire into the manner in which it was introduced into Parliament, what was done previously to its being introduced, or what passed in Parliament during the various stages of its progress through both Houses of Parliament. I therefore trust that no such inquiry will hereafter be entered into in Scotland, and that due effect will be given to every Act of Parliament, both private as well as public, upon the just construction which appears to arise upon it.” (emphasis added)

²²⁰ [1974] AC, at 782.

²²¹ [1974] AC, at 782G.

²²² [1974] AC, at 786-787.

²²³ (1842) 8 Cl & F 710.

144. Lord Reid's conclusions upon the particular circumstances of the case²²⁴ were as follows:

"In whatever form the respondent's case is pleaded, he must prove not only that the appellants acted fraudulently but also that their fraud caused damage to him by causing the enactment of section 18. He could not prove that without an examination of the manner in which the officers of Parliament dealt with the matter. So the court would, or at least might, have to adjudicate upon that.

For a century or more both Parliament and the courts have been careful not to act so as to cause conflict between them. Any such investigations as the respondent seeks could easily lead to such a conflict, and I would only support it if compelled to do so by clear authority. But it appears to me that the whole trend of authority for over a century is clearly against permitting any such investigation.

The respondent is entitled to argue that section 18 should be construed in a way favourable to him and for that reason I have refrained from pronouncing on that matter. But he is not entitled to go behind the Act to show that section 18 should not be enforced. Nor is he entitled to examine proceedings in Parliament in order to show that the appellants by fraudulently misleading Parliament caused him loss."

145. In the present case, the principles are equally applicable to prevent the Court from enquiring into the circumstances of the Comalco Agreement, to ascertain whether it was tainted by a breach of procedural fairness, by breach of trust, by breach of fiduciary duty, or constituted unjust enrichment. It is also apparent that the principles not only protect the Act of Parliament itself from challenge, but also protect the person claiming the benefit of the Act from an attack which concedes the validity of the statute, but requires the party claiming the benefit of the statute to recompense the plaintiff.

146. The judgment of Lord Morris was to similar effect. In particular, Lord Morris stated²²⁵:

"Nor, in my view, should the same attack be allowed in shrouded form by asserting that if the Act is effective and if as a consequence some rights were taken away from some people, British Railways Board should hold their lands subject to some style of burden or equity on the basis that Parliament ought not

²²⁴ [1974] AC, at 787H-788C.

²²⁵ [1974] AC, at 790A-B.

to have enacted as it did and only did so enact as a result of what the two paragraphs of the amended reply alleged.

147. Lord Wilberforce was of the same view, stating²²⁶ that the remedy for a Parliamentary wrong, if one has been committed, must be sought from Parliament, and cannot be gained from the Courts.

148. Lord Simon was also of the same view, stating²²⁷:

“The system by which, in this country, those liable to be affected by general political decisions have some control over the decision-making is Parliamentary democracy. Its peculiar feature in constitutional law is the sovereignty of Parliament. This involves that, contrary to what was sometimes asserted before the 18th century, and in contradistinction to some other democratic systems, the courts in this country have no power to declare enacted law to be invalid. It was conceded before your Lordships (contrary to what seems to have been accepted in the Court of Appeal) that the courts cannot directly declare enacted law to be invalid. That being so, it would be odd if the same thing could be done indirectly, through frustration of the enacted law by the application of some alleged doctrine of equity.” (emphasis added)

149. To the same effect see Lord Cross²²⁸.

150. The circumstances in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*²²⁹ are closer to those in the present case. In that case, the Land Board was exposed to a contractual claim. Legislation was passed authorising the Land Board to accept an offer of settlement in an amount to be approved in the future by the relevant Minister, and providing that the amount of the settlement should be paid by the Board out of monies in its account, and should be deemed to be a loan to the native owners. That loan was to be secured by a charge upon the lands of the native owners. The claim was settled and the moneys paid.

151. The claim of the Plaintiffs as native owners of the land is set out in the report as follows²³⁰:

²²⁶ [1974] AC, at 793A.

²²⁷ [1974] AC, at 798E-G.

²²⁸ [1974] AC, at 802B-F. In *Building Construction Employees and Builders' Labourers Federation of New South Wales v minister for Industrial Relations* 91986) 7 NSWLR 372, the New South Wales Court of Appeal applied *Pickin* in rejecting a claim for a declaration that a statute was invalid because it breached fundamental rights.

²²⁹ [1941] AC 308.

²³⁰ [1941] AC, at 320.

“... that the respondent board, as the statutory agent of the native owners, owed a duty to them to safeguard their interests, that the Board had acted in breach of that duty, and that, in consequence of that breach of duty, s 14 of the Act of 1935 had been enacted. The appellant asked for the appropriate declarations [of negligence - see 322], and for an order requiring the respondent board to indemnify the native owners and their lands from and against the payment of the sum of 23,500l which the board had paid to the Egmont Company, or any part thereof.”

152. The native owners alleged that the Board had been negligent in handling the contractual dispute. It should be noted that the plaintiffs were not attempting, at least directly, to challenge the validity of the statute.

153. The judgment of the Privy Council on this point is summarised as follows²³¹:

“Their Lordships fully agree with the opinion of the Court of Appeal on this contention of the appellant. It is not open to the court to go behind what has been enacted by the legislature, and to enquire how the enactment came to be made, whether it arose out of incorrect information, or, indeed, on actual deception by someone on whom reliance was placed by it. The court must accept the enactment as the law unless and until the legislature itself alters such enactment, on being persuaded of its error.”²³²

154. Given that the status and force of the Comalco Agreement are that of an Act of Parliament, two consequences follow:

- (a) the validity of the Comalco Agreement cannot be challenged; and
- (b) damages or other relief cannot be obtained for alleged breaches of duty resulting in or constituted by the making of the Comalco Agreement, or in respect of benefits flowing from the Comalco Agreement.

155. To hold otherwise would be to take away the benefits conferred by Parliament upon the parties to the Comalco Agreement. If any remedy is appropriate, it must come from Parliament.

²³¹ [1941] AC, at 322.

²³² *Hoani Te Heuheu and Pickin* were applied in *Berkett v Tauranga District Court* [1992] 3 NZLR 206.

156. The appellants' argument based upon a breach of the rules of procedural fairness ignores the legislative status of the Comalco Agreement. It is not suggested by the appellants that a statute can be impugned for breach of the rules of procedural fairness.

The validity of ML 7024 cannot be challenged, directly or indirectly.

157. Paragraph 113 of the appellants' submissions contends that ML7024 does not have the force of statute, and that while a form of lease was scheduled to the Comalco Agreement, the status of the lease when ultimately granted was not thereby affected. Paragraph 114 of the appellants' submissions contends that the lease has no special status and does not preclude the maintenance of the claims.

158. The fourth respondent does not contend that ML 7024 has the force or status of an Act of Parliament. That contention was rejected by the Full Court of the Supreme Court of Queensland in *Peinkinna v The Corporation of the Director of Aboriginal and Islanders Advancement*²³³ and in the same case in the Privy Council, reported as *The Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna*²³⁴. That case is dealt with in paragraph 172 et seq of these submissions.

159. As noted above, the relevant provisions of the Comalco Agreement are Clauses 8 and 11. While the lease itself does not have the force of a statute, Clause 8 obliged the State, upon satisfaction of the condition, to grant the lease to the fourth respondent, and Clause 11(c) provided that from that date, the fourth respondent was entitled to occupy the area of the lease and to exercise all the rights and powers to be granted thereby. As a result, an instrument having the status of an Act of Parliament, being the Comalco Agreement, not only required (in the events that occurred) the issue of the mining lease, but expressly conferred upon the fourth respondent all the rights and powers to be granted by that lease. The Comalco Agreement also of course placed obligations on the fourth respondent, with examples of the more substantial obligations being cll. 15 and 16 thereof.

160. As a result, the Comalco agreement required, in the events which occurred, the grant of ML 7024, and did not merely authorise the grant of the lease.

²³³ Writ No 553 of 1976, unreported, 5 October 1976.

²³⁴ (1978) 52 ALJR 286.

161. The relevant principle was expressed simply in *The Mersey Docks and Harbour Board Trustees v Gibbs*²³⁵ per Blackburn J, who delivered the joint opinion of the consulted judges, with which opinion the House of Lords agreed. Blackburn J stated²³⁶:

“If the Legislature directs or authorises the doing of a particular thing, the doing of it cannot be wrongful”.

162. In *Allen v Gulf Oil Refining Ltd*²³⁷, Lord Wilberforce stated:

“We are here in the well charted field of statutory authority. It is now well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance. The right of action is taken away: *Hammersmith and City Railway Co v Brand* (1869) LR 4 HL 171, 215 per Lord Cairns. ... It is within the same principle that immunity from action is withheld where the terms of the statute are permissive only, in which case the powers conferred must be exercised in strict conformity with private rights: *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193.”²³⁸

163. In the present case, Parliament has directed the grant of a lease. There can then be no action maintained that the grant of the lease was wrongful or in breach of some duty, or that some other relief should be granted in consequence of the grant of the lease. The terms of the Comalco Agreement are not merely permissive in relation to the grant of the lease.

164. The principle is expressed in this fashion in *Halsbury's Laws of England*²³⁹:

“Where the legislature directs that a thing shall be done in any event or authorises certain works at a particular place for a specific purpose, or grants powers with the intention that they shall be exercised, although leaving some discretion as to the mode of exercise, no action will lie at common law for nuisance or damage which is the inevitable result of carrying out the statutory powers so conferred. This is so whether the act causing the damage is authorised for public purposes or private profit.”

²³⁵ (1866) LR 1 HL 93 at 112.

²³⁶ (1866) LR 1 HL, at 112.

²³⁷ [1981] AC 1001 at 1011.

²³⁸ These principles have recently been applied in Queensland in *Foxlee v Proserpine Shire River Improvement Trust* [1990] 1 Qd R 111.

²³⁹ 4th ed., Vol 1(1), at para 206.

165. The appellants' contentions as to the effect of the grant of ML 7024 by the legislature through the Comalco Agreement are directly contrary to *In re Earl of Wilton's Settled Estates*²⁴⁰. In that case:-

- (a) an agreement was entered into between the Earl of Wilton as tenant for life, Sir Frederic Johnstone as lessee, and the Corporation of Manchester as purchaser, of certain lands²⁴¹, with the agreement being conditional on the sanction of Parliament²⁴²;
- (b) the Parliament passed the *Manchester Corporation (General Powers) Act* 1904 which provided that the agreement of 26 April 1904 "is hereby confirmed and made binding on the parties thereto respectively and the same shall and may be carried into effect accordingly"²⁴³;
- (c) it was accepted by Warrington J that in selling the land, the Earl of Wilton committed a breach of trust²⁴⁴;
- (d) the statute in the case was a local and personal Act, under which the rights of a third party could only be affected if they were bound by necessary implication²⁴⁵; whereas the Comalco Act is not a private Act - see s 11 of *The Acts Interpretation Act* 1954 (Qld).

166. The purchase monies under the sale were to be paid to the trustees of the compound settlement for the purposes of the *Settled Land Acts*. Those trustees asked the Court whether they ought to concur in the conveyance of the property. The sale was opposed by those entitled to the remainder. Warrington J summarised their contentions²⁴⁶:-

"The argument for the remaindermen is that the effect of s 19 of the Act of 1904 is only to enable the Corporation to purchase, and that, whether that be so or not, it did not enable Lord Wilton to convey the settled estate and by that conveyance

²⁴⁰ [1907] 1 Ch 50.

²⁴¹ [1907] 1 Ch, at 50.

²⁴² [1907] 1 Ch, at 51.

²⁴³ [1907] 1 Ch, at 51-52.

²⁴⁴ [1907] 1 Ch, at 55.

²⁴⁵ [1907] 1 Ch, at 55.

²⁴⁶ [1907] 1 Ch, at 55.

effect the title of the remaindermen; or to put it baldly as Mr Norton did, the Act did not enable Lord Wilton to convey away somebody else's estate."

167. Warrington J held that the sanction which Parliament gave to the agreement meant:-

- (a) not only that Lord Wilton was bound to carry out the agreement, he not being able to say that the agreement was a breach of trust and one which he could not be forced to carry out; but
- (b) the remaindermen were also bound, because under the agreement the fee simple was to be conveyed, and if statutory effect were to be given to the agreement, the remaindermen could not object to the price fixed by the arbitration.

168. The case shows that a mere confirmation of an agreement, by private statute, had the result that a person not a party to the agreement, and who would otherwise have been entitled to object to (and restrain) the completion of the agreement on the ground that it was a breach of trust was unable to do so because of the sanction given by Parliament.

169. What the Comalco Agreement provided for was more than confirmation of the grant of ML 7024 - it obliged that grant. The principles in *Earl of Wilton's Settled Estates* are directly applicable to the present circumstances, and lead to the conclusion that the appellants cannot challenge the lease on the ground that it resulted from a breach of trust or fiduciary duty. In *Earl of Wilton's Settled Estates*, there was no claim by the remaindermen in the alternative, along the lines of the claim in *Hoani Te Heuheu Tukino*, or the alternative claim in *Pickin*. However, there can be no doubt that the principle in *Earl of Wilton's Settled Estates* would also apply to prevent the remaindermen in that case from mounting a claim for damages, an account of profits, an injunction, or other relief, grounded on the breach of trust.

170. The appellants address the decision in *Earl of Wilton's Settled Estates* only in paragraph 101 of their submissions. That submission ignores the existence of s 3 of the Comalco Act, as it compares the provisions of the *Manchester Corporation (General Powers) Act* 1904 with s 2 of the Comalco Act. More importantly, the appellants do not address the broader significance of the decision.

171. Given that the Comalco Agreement, which had status and force as an Act of Parliament, obliged the State to grant ML 7024, the granting of that lease pursuant to statutory authority cannot be wrongful - any right of action which might otherwise exist to challenge the grant of the lease, or to obtain damages or other relief in relation to matters resulting from the grant of the lease, cannot be maintained.

Peinkinna's case

172. The case concerned the *Aurukun Associates Agreement Act 1975*, which is the Act the subject of Question 5 in these proceedings. Using the language adopted by the statement of claim, the Aurukun Associates Agreement is the equivalent of the Comalco Agreement. As can be seen from the reasons of Lucas J in the Full Court²⁴⁷ s 3 of the Aurukun Associates Act was relevantly identical to s 3 of the Comalco Act.

173. The recitals to the Aurukun Associates Act referred to the fact that the companies, including the fifth respondent in these proceedings, had entered into an agreement ("the Director's Agreement") with the director, the defendant in the proceedings. The allegations in the statement of claim were summarised by Lucas J²⁴⁸ in this way:

"... it asserts that the entering into by the defendant of the Director's agreement was preceded by breaches by him of his fiduciary duty as trustee of the Aurukun Reserve (particularised in paragraph 9) and that he intends (contrary to his fiduciary duty as trustee) to pay moneys accruing to him 'on behalf of Aborigines' into the 'Aborigines Welfare Fund'. Assuming for the moment the locus standi of the plaintiffs to sue, there can be no doubt that the facts that are alleged, or some of them, would show a cause of action against the trustee under the general law. But it is said, in support of the demurrer, that because of the provisions of the Aurukun Associates Act, the Director's agreement must be taken to have received statutory authorisation or approval or adoption, so that it is beyond the power of any person to challenge it or to challenge anything done under it (or, I should perhaps add, anything proposed to be done under it)."

174. Lucas J²⁴⁹ set out clause 19 of part VIII of the Aurukun Associates Agreement which provided:

²⁴⁷ *Peinkinna v The Corporation of the Director of Aboriginal and Islanders Advancement* at p 4.

²⁴⁸ *Peinkinna*, at p 5.

²⁴⁹ *Peinkinna*, at p 6.

“It shall be an obligation of the companies [including the fifth respondent] under this agreement and a condition of a Special Bauxite Mining Lease that the companies shall carry out their responsibilities and obligations as defined in the agreement entered into between the director and the companies bearing date the day of 1975 and set out in the third schedule to this agreement”.

175. It can be seen therefore that the Director’s Agreement which was the subject of the litigation in *Peinkinna* was not part of the Aurukun Associates Agreement itself. Speaking in general terms, it occupied a position similar to that of special bauxite mining lease no. 1 under the Comalco Agreement.

176. Lucas J noted²⁵⁰ that it was the provisions of the Aurukun Associates Agreement which were to have the force of law, and His Honour came to the conclusion²⁵¹ that the Director’s Agreement was not a provision of the Aurukun Associates Agreement. His Honour concluded²⁵²:

“For these reasons I am of the opinion that the Director’s agreement has not been given the force of law by section 3 of the Aurukun Associates Act and its provisions, and things done under it, are not immune from challenge.”

177. Lucas J overruled the demurrer. However, it should be noted that the extract from his reasons cited above is a clear expression of opinion that the Aurukun Associates Agreement, and by analogy the Comalco Agreement, are immune from challenge by virtue of s 3 of the Aurukun Associates Act and the Comalco Act respectively.

178. Douglas J delivered a judgment to similar effect. His view on the status of the Aurukun Associates Agreement, as opposed to the Director’s Agreement, was made clear in his comments²⁵³:

“I propose now to deal with the first submission made on the demurrer. That submission was that the Director’s Agreement must be taken as having received statutory authorisation, approval and adoption, and that the total effect is that it is beyond the power of any person to challenge it, or actions taken in accordance with it. ...

²⁵⁰ *Peinkinna*, at p 6.

²⁵¹ *Peinkinna*, at pp 6-7.

²⁵² *Peinkinna*, at p 7.

²⁵³ *Peinkinna*, at p 1 of his reasons.

If the Director's Agreement is accepted as being part of the Companies' Agreement [the Aurukun Associates Agreement] (see sec. 3 of the *Aurukun Associates Agreement Act* 1975) or as being part of the Schedule to that Act within the terms of sec. 14(2) of the *Acts Interpretation Acts* 1954-1971 there can be no argument to the contrary of the above proposition."

179. Douglas J came to the same conclusion as Lucas J on the demurrer, stating²⁵⁴:

"The conclusion I come to is that neither the Act, nor the terms of the Schedule thereto makes the Director's Agreement an agreement to which section 3 of the Act applies."

180. The third member of the court was Kneipp J, who dissented - he would have allowed the demurrer. His Honour's reasons²⁵⁵ were as follows:

"The primary argument, as I understood it, was that by virtue of Section 3 of the Aurukun Act, the Franchise Agreement has the force of a statutory enactment (as has been seen, this is plainly so); that the Director's agreement is both referred to in the Franchise Agreement and is set out in a Schedule to that agreement; that the Director's agreement is thus 'incorporated' in the Franchise Agreement; and that the Director's agreement, as part of the Franchise agreement, also has statutory effect. I do not think that this is correct. Merely to refer in a statute to a contract, even with approval, is not sufficient to give the contract statutory force, although it may, of course, have the effect of giving the contract immunity from attack. And, if the Director's agreement has statutory effect, why was it provided specifically in the Franchise agreement that the Companies should carry out their obligation under the Director's agreement?

However, I think that it is clear that the Director's agreement was impliedly approved or ratified by the Franchise agreement, and that it is inconsistent with the legislative will and intent, as disclosed by the Aurukun Act and the Franchise agreement to assert that the Director's execution of it can now be called in question. The Act and the Franchise agreement constitute a special legislative package, obviously designed to set out in detail the whole of the terms and conditions on which the venture was to proceed, including terms and conditions considered suitable having regard to the fact that mining on an Aboriginal reserve was involved.

The legislation was clearly enacted on the basis that, so far as that aspect was concerned, the venture would proceed according to the terms and conditions set out in the Director's agreement. This, I think implies legislative approval of the Director's agreement, and of his executing it. To put it more narrowly, perhaps, it seems to me that the imposition on the Companies of a statutory obligation to

²⁵⁴ Peinkinna, at p 3.

²⁵⁵ Peinkinna, at pp 8-9.

observe their agreement with the director, and the inclusion of their obligations as conditions of the special statutory lease, plainly amount to legislative adoption of those obligations being proper and suitable to this particular occasion. If that be so, then surely it must be said that the Director's action in executing the agreement which spells out those obligations has been ratified by the legislature, and cannot now be called in question."

181. His Honour then stated that he thought that this view of the matter was supported by decisions relating to the confirmation of contracts by statute, and His Honour relied on *Earl of Wilton's Settled Estates* and *Manchester Ship Canal Co*, which is referred to in *Earl of Wilton's Settled Estates*.

182. In the Full Court therefore, the position was:

- (a) All three of the judges thought that Section 3 of the Aurukun Associates Act had the effect that the Aurukun Associates Agreement had the force of a statute, and that it was beyond the power of any person to challenge it;
- (b) All three of the judges were of the view that the Director's Agreement, which was the subject of express provision in the Aurukun Associates Agreement, and a schedule to that agreement, did not have the force of a statute;
- (c) The majority were of the view that the Director's Agreement was therefore not immune from challenge, whereas Kneipp J was of the view that the provisions of the Aurukun Associates Act and Aurukun Associates Agreement meant that while the Director's Agreement did not have the force of a statute, the legislature had approved and ratified the Director's Agreement in the Aurukun Associates Act and Aurukun Associates Agreement, and the Director's Agreement could not now be called in question.

183. In the Privy Council, the appeal was allowed, and the demurrer was upheld. The Privy Council adopted the reasoning of Kneipp J, stating²⁵⁶:

²⁵⁶

The Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna (1978) 52 ALJR, at 289.

“Kneipp J, in his dissenting judgment, held that the *Aurukun Associates Agreement Act* 1975 ratified and recognised as valid and subsisting the Director’s Agreement, by entering which, the plaintiffs say, the Director acted in breach of trust. It was not possible, in his judgment, to hold that by entering into an agreement thus validated by law the Director had acted in breach of trust.

Their Lordships have reached the conclusion that ss 29 and 30 of the *Aborigines Act* of 1971 constituted statutory authority for the acts alleged by the statement of claim to be in breach of trust. Their Lordships also agree with the reasoning and conclusion of Kneipp J as to the effect of the Act of 1975. Accordingly they are of the opinion that the Director’s contention that the statement of claim is bad in law is correct, and that his demurrer should be upheld.”

184. Their Lordships further stated²⁵⁷:

“The board agrees with Kneipp J in thinking that the legislature has by statute recognised the obligations of the Director’s Agreement as being, in the judge’s words, ‘proper and suitable to this particular occasion’. Section 3 of the *Aurukun Associates Agreement Act* 1975 provides that the Franchise Agreement ‘shall have the force of law as though the Agreement were an enactment of this Act’. Clause 19 of Pt VIII of the Franchise Agreement provides that:

‘It shall be an obligation of the Companies under this Agreement and a condition of the Special Bauxite Mining Lease that the Companies shall carry out their responsibilities and obligations as defined in the agreement entered into between the Director and the Companies bearing the date the day of 1975 and set out in the Third Schedule to this Agreement’.

Mr. Macrossan for the Director has gone so far as to submit that the effect of cl. 19 and the scheduling of the Director’s Agreement to the franchise agreement is to confer upon the Director’s Agreement the force of law as though it were an enactment of the Act of 1975. This view found no favour with the Full Court: neither does it with this Board. But the Board agrees with Kneipp J that the Director’s Agreement has been recognised by the statute as a valid and subsisting agreement. In the circumstances it cannot be said that by entering into it the director acted in breach of trust.”

185. The fourth respondent submits that the Privy Council decision is persuasive authority that the Comalco Agreement and ML7024 are immune from direct or indirect challenge.

²⁵⁷

(1978) 52 ALJR, at 291.

186. The extent of the attack made by the appellants upon the Privy Council decision is not clear from the appellants' submissions at paragraphs 90-91. It seems that the attack is only a very limited one, which would not affect the result of that case, nor the result of this case.

The judgment of Drummond J.

187. The analysis above is similar to that of Drummond J²⁵⁸, who concluded that:

- (a) The claim that the Comalco Agreement and ML7024 are void, on the basis that the Comalco Agreement was entered into, and ML7024 was granted, in breach of fiduciary and trust obligations in which Comalco participated, can only be maintained if ss 2 and 3 of the Comalco Act are ignored²⁵⁹;
- (b) In so far as those allegations are the foundation for the claim for damages and an account against the State of Queensland, they necessarily involve the proposition that it was a wrong, actionable in equity, for the State to enter into the Comalco Agreement. Yet it is that very action that is specifically authorised by s 2 of the Comalco Act. To do something specifically authorised by Parliament cannot give rise to any claim either at law or in equity by persons adversely affected by the exercise of the statutory authority²⁶⁰;
- (c) In the case of Comalco, there is the additional consideration that by reason of s 3 of the Comalco Act and clause 8 of the Comalco Agreement, Comalco had a statutory right to the grant of ML7024. To allow the appellants to claim damages and an account in respect of the benefits which Comalco derived from the grant of the lease would be to burden its unfettered statutory right in favour of the appellants²⁶¹;
- (d) The claim founded on unjust enrichment, to the extent that it does not rely on the invalidity of the Comalco Agreement or ML7024, is not maintainable under

²⁵⁸ AB 2:390-428.

²⁵⁹ AB 2:426.

²⁶⁰ AB 2:426-427.

²⁶¹ AB 2:427.

Australian law: see *Davids Securities Pty Limited v Commonwealth Bank of Australia*²⁶²;

- (e) Even if such a claim founded on unjust enrichment could otherwise be made, it would involve the imposition of a burden on the benefits conferred directly by statute on Comalco, and similarly would involve depriving the State of Queensland of entitlements conferred directly by statute. The claim is unsustainable on the separate ground that to allow it would infringe the principle of *Labrador Company v The Queen*²⁶³;
- (f) Any deficiencies in the decisional process resulting in the decision by the Queensland Government to enter into the Comalco Agreement became irrelevant as a potential source of remedies once the Comalco Agreement was executed and then, by force of s 3 of the Comalco Act, acquired statutory status²⁶⁴.

188. The fourth respondent respectfully submits that His Honour's reasoning and conclusions were correct.

DATED this 28TH day of MAY 1996.



HUGH FRASER



P L O'SHEA



JOHN BOND

²⁶² (1992) 175 CLR 353 at 378-379; AB 2:427-428.

²⁶³ [1893] AC 104; AB 2:428.

²⁶⁴ AB 2:407.