

IN THE FEDERAL COURT OF AUSTRALIA )  
QUEENSLAND DISTRICT REGISTRY )  
GENERAL DIVISION )

No. QG 104 of 1993

BETWEEN: THE WIK PEOPLES  
WHO INCLUDE THE PERSONS MENTIONED IN THE  
SCHEDULE, EACH OF WHOM BRINGS THIS PROCEEDING  
ON THEIR OWN BEHALF, AND ON BEHALF OF THE WIK  
PEOPLES

Applicants

AND: THE STATE OF QUEENSLAND

First Respondent

AND: COMMONWEALTH OF AUSTRALIA

Second Respondent

AND: ABORIGINAL AND ISLANDER AFFAIRS CORPORATION

Third Respondent

AND: COMALCO ALUMINIUM LIMITED

Fourth Respondent

AND: ALUMINIUM PECHINEY HOLDINGS PTY. LTD.

Fifth Respondent

AND: COUNCIL OF THE SHIRE OF AURUKUN

Sixth Respondent

AND: NAPRANUM ABORIGINAL COUNCIL

Seventh Respondent

AND: PORMPURAAB ABORIGINAL COUNCIL

Eighth Respondent

AND: EDDIE HOLROYD

Ninth Respondent

AND: CAMERON CLIVE QUARTERMAINE and DOREEN RUTH  
QUARTERMAINE

Tenth Respondents

AND: MERLUNA CATTLE STATION PTY. LTD.

Eleventh Respondent

AND: JOHN BOCK

Twelfth Respondent

AND: ABORIGINAL AND TORRES STRAIT ISLANDER  
COMMISSION

Thirteenth Respondent

AND: KEITH JOHN SHEPHERDSON, SHIRLEY BEVERLEY  
SHEPHERDSON, IAN KEITH SHEPHERDSON and  
ANDREW JAMES SHEPHERDSON

Fourteenth Respondents

AND: RICHARD JOHN PRICE and JOHN RICHARD PRICE

Fifteenth Respondents

AND: RICHARD MATTHEW PRICE

Sixteenth Respondent

AND: GEOFFREY JOHN QUEST and ROBERT JOHN FRASER

Seventeenth Respondents

AND: MYLES KENNETH GOSTELOW and DEBRA ANN GOSTELOW

Eighteenth Respondents

AND: TEAYORRE PEOPLE

Nineteenth Respondents

Coram: Drummond J  
Date: 29 January, 1996  
Place: Brisbane

#### REASONS FOR JUDGMENT

This proceeding involves the determination, pursuant to O. 29, r. 2(a) the Federal Court Rules of a number of issues in the action separately from other issues in the litigation. The action was brought by the Wik Peoples, an

Aboriginal clan or group, for a declaration that it has certain native title rights over a large area of land in North Queensland. They also claim damages and other relief, if it be found that their native title rights have been extinguished. One of the respondents is the Thayorre People, another Aboriginal clan or group, who have cross-claimed for a similar declaration in respect of lands that, in part, overlap those the subject of the Wik Peoples' claim.

This proceeding involves the determination of the question whether certain legislation passed by the Imperial Parliament and by the Queensland Parliament in the middle of the last century, operated well into this century to prevent the Queensland Parliament passing laws that permit the grant of pastoral leases over Crown land, unless those leases contain a term that ensures the continued existence of native title in the lands over which such leases are granted.

Another question for determination is whether the grant of a pastoral lease that does not contain a term protecting native title and which confers the right to exclusive possession of the land on the pastoralist, necessarily extinguishes native title in the land leased.

There is also a question whether any native title rights which the Wik Peoples may once have had, that extended to minerals, have survived the passing by the Queensland Parliament of certain mining legislation since 1909.

The final question is whether the Wik Peoples can claim damages and other relief from the State of Queensland, Comalco Aluminium Limited ("Comalco") and Aluminium Pechiney Holdings Pty. Ltd. ("Aluminium Pechiney"), if the grant by the State of rights, including mining rights, to each of these companies, extinguished the Wik Peoples' native title in those lands. The issue here is whether two agreements, one between the State and Comalco, the other between the State and Aluminium Pechiney, bar any such claims to damages because those agreements were approved by the Queensland Parliament in 1958 and 1975 respectively.

#### Question 1A

"Has the power of the Parliament of Queensland to pass laws dealing with the leasing or occupation of lands for pastoral purposes within Queensland at any time been limited, by the proviso in s. 2 of the New South Wales Constitution Act 1855 (Imp), the proviso in s. 4 of the Australian Waste Lands Act 1855 (Imp), the Letters Patent issued on 6 June, 1859, or by Clause 17 of the Order in Council made on 6 June, 1859 pursuant to that Act, or by s. 30 or s. 40 of the Constitution Act 1867 (Qld), to a power to enact only such laws as:

- (a) do not extinguish or impair Aboriginal title (if any) or possessory title (if any) of the Wik Peoples which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales; or
- (b) permit grants for pastoral purposes of leases, licences or permissions which:
  - (i) are subject to a reservation in favour of the Wik Peoples and their predecessors in title of the rights and interests of the Wik Peoples and their predecessors in title comprising

their Aboriginal title (if any) which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales;

- (ii) do not confer rights to exclusive possession on the grantees thereof;
- (iii) confer only rights consistent with the concurrent and continuing exercise of the rights (if any) of the Wik Peoples and their predecessors in title under their Aboriginal title (if any) which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?"

To obtain the answers they seek, the applicants have to show:

- (1) that something in the nature of an undertaking was given by or on behalf of Her Majesty, prior to 1855, to preserve to Aborigines access to their traditional lands notwithstanding that those lands might thereafter be leased for pastoral purposes. To be of any use to the applicants, the undertaking, when given, had to be one which was intended to endure for an indefinite future time; it must also have remained in effect, at least until the passing of the legislation in 1855.

(The content of the undertaking, as alleged in para. 268A of the further amended

statement of claim, is a fairly complex one, viz., to preserve native title rights from any extinguishment or impairment; to include in every lease or lesser interest of Crown lands made for pastoral purposes a reservation preserving the widest range of native title rights in the lands; to confer on pastoral lessees only an exclusive right of pasturage, not an exclusive right of possession and, moreover, to ensure that no rights were conferred on lessees or occupiers of Crown lands that would be inconsistent with the continuing exercise of the widest range of native title rights in those lands.);

- (2) that such undertaking is within the expression "contracts, promises or engagements ... lawfully made" used in the various statutes and instruments referred to in the Question;
- (3) that one or other of the statutes or instruments referred to imposed a limit upon the power of the Queensland Legislature to legislate inconsistently with the undertaking.

Despite the reference in the question to "possessory title", the applicants have undertaken, for reasons explained in The Wik Peoples v The State of Queensland (1994) 49 F.C.R. 1 at 13, not to pursue any such claim in the present action, but to seek relief only in respect of their claim to Aboriginal, i.e., native, title. It is not suggested that the undertaking contended for could amount to a "contract" within the statutory phrase, but that it did amount to a "promise or engagement". In argument, it was accepted that the native title rights said to be so preserved could only exist in unimproved lands disposed of for pastoral purposes and could not extend to cultivated or "fenced in" lands.

The relevant provisions of s. 2 the New South Wales Constitution Act 1855 (Imp) ("the NSW Act 1855"), which contain the proviso picked up by the instruments and the Queensland legislation referred to in the Question, provide:

"From the Day of the Proclamation of this Act in the said Colony of New South Wales (the said reserved Bill, as amended as aforesaid, having been previously assented to by Her Majesty in Council as aforesaid,) so much and such Parts of the several Acts of Parliament mentioned in the Schedule (2.) of this Act as severally relate to the said Colony of New South Wales, and are repugnant to the said reserved Bill, amended as aforesaid, shall be repealed; and the entire Management and Control of the Waste Lands belonging to the Crown in the said Colony, and also the Appropriation of the gross Proceeds of the Sales of any such Lands, and of all other Proceeds and Revenues of the same, from whatever Source, arising within the said Colony, including all Royalties, Mines, and Minerals, shall be vested in the Legislature of the said Colony: ... Provided, that nothing herein contained shall affect or be construed to affect any Contract or to prevent the Fulfilment of any Promise or Engagement

made by or on behalf of Her Majesty, with respect to any Lands situate in the said Colony, in Cases where such Contracts, Promises, or Engagements shall have been lawfully made before the Time at which this Act shall take effect within the said Colony, nor to disturb or in any way interfere with or prejudice any vested or other Rights which have accrued or belong to the licenced occupants or Lessees of any Crown Lands within or without the settled Districts, under and by virtue of the Provisions of any of the Acts of Parliament so repealed as aforesaid, or of any Order or Orders of Her Majesty in Council issued in pursuance thereof."

In Mabo v The State of Queensland (1988) 166 C.L.R. 186, Dawson J rejected an argument that the proviso in s. 2 the NSW Act 1855, which was later incorporated in s. 30 and repeated in s. 40 the Constitution Act 1867 (Old) was a limitation on the legislative power of the Queensland Parliament to pass a statute extinguishing, inter alia, native title rights in respect of the Murray Islands. His Honour reached this conclusion at 239 for two reasons: firstly, for there to be a limitation on Queensland legislative power with respect to the Murray Islands by reason of the proviso in s. 2 of the 1855 Act, there would have to be a relevant Crown contract, promise or engagement in existence at the time that Act came into force; there could be no such Crown undertaking with respect to the Murray Islands because they only became part of the then Colony of Queensland by annexation in 1879. Secondly, his Honour said:

"... In any event, any contracts, promises or engagements or rights of the type referred to in the proviso to s. 2 of The New South Wales Constitution Act have long since ceased to exist and are not, nor were they in 1985, the source of any limitation upon



the power of the Queensland Parliament to deal with waste lands."

His Honour identified the "vested or other rights" referred to in the proviso as "those rights of occupation under lease or licence which were introduced in New South Wales to cope with the problem of squatting, the reference to settled districts arising from an Order in Council of 9 March 1847 which had divided the Colony into unsettled, intermediate and settled districts and introduced leases of varying duration in these districts". Although his Honour did not identify the content of the "contracts, promises or engagements" referred to in the proviso, he referred to the observation of Isaacs J in Williams v The Attorney-General for New South Wales (1913) 16 C.L.R. 404 at 454 to the effect that these "limiting provisions upon the power to deal with waste lands" had long since become exhausted and to that being the reason why, when the Constitution Act 1902 (NSW) was passed, s. 8 (which repealed the power of the New South Wales Legislature to make laws regulating the disposal of Crown waste lands and re-enacted that power) omitted any reference to the limitation upon the power imposed by s. 2 of the 1855 Act. His Honour also said, at 240:

"... Because of the conclusion which I have reached that the limitation upon the power to deal with waste lands cannot, in any event, affect that power in relation to the Murray Islands, it is unnecessary to consider the extent to which the limitation has ever been effective in view of the power of the Queensland legislature to amend its Constitution without regard to manner or form."

Wilson J, at 201, agreed with Dawson J's reasons and conclusions on the point; Mason CJ agreed generally with Wilson J: at 195.

These dicta present a formidable barrier to the acceptance of the applicants' arguments, even if it could be said that they are not binding on me in strict point of law.

Later authority on the point does not assist the applicants. Substantially the same issues raised by Question 1A arose in the application on behalf of the Waanyi People to the National Native Title Tribunal for a determination under the Native Title Act 1993 (Cth) that native title existed over certain land in North Queensland. In his reasons for directing the Registrar of the National Native Title Tribunal not to accept the application, French J, sitting as President of the Tribunal, thought that a consideration of the ordinary meaning of the words of the proviso in s. 2 the NSW Act 1855, considered without reference to "the mass of extrinsic material" put before him by the various parties, showed that it did not operate as a limitation on legislative power: see Re Waanyi Peoples Native Title Application (1995) 129 A.L.R. 118 at 144. The President's direction was appealed to the Full Court of this Court: see North Ganalania Aboriginal Corporation v State of Queensland (1995) 132 A.L.R. 565. Hill J, the only member of the Court to consider the question, did not find it necessary to determine whether the proviso operated as a limitation on legislative power. However, his

Honour, at 614, considered that the historical evidence made it clear that the promises and engagements referred to in the proviso "were promises or engagements made to promisees or engagees, not recommendations made in despatches passing between London and Sydney". His Honour expressed agreement with Dawson J in Mabo (No. 1), supra, at 239, in thinking that all contracts, promises and engagements of the kind referred to in the proviso had long ceased to exist before 1904, when the pastoral lease there in question was granted, and could not be the source of any limitation upon the power of the Queensland Parliament then to deal with waste lands: at 614.

A mass of historical material dealing with the regulation of, and alienation of, interests in land in the Colony of New South Wales in the first half of the nineteenth century was put before me. This area has been the subject of examination, not only in the North Ganalanja Case, supra, but also in cases that include Williams v The Attorney-General for New South Wales, supra, and Council of the Municipality of Randwick v Rutledge (1959) 102 C.L.R. 54. Although the applicants and other parties made wide ranging reference to this historical material, I need refer only to a relatively small part of it, in order to put into historical context the documentary material relied on by the applicants to make out the promise or engagement the subject of the limitation on Queensland legislative power that is said to exist.

Until 1831, full power of disposal of the Colony's waste lands was vested in the Governor. Governor Phillip's second Commission of 2 April, 1787, conferred on him:

"... full power and authority to agree for such lands tenements and hereditaments as shall be in Our power to dispose of and grant to any person or persons upon such terms and under such moderate quit rents services and acknowledgments to be thereupon reserved unto Us according to such instructions as shall be given to you under Our Sign Manual which said grants are to pass and be sealed by Our Seal of Our said Territory and its dependencies and being entered upon record by such officer or officers as you shall appoint thereunto shall be good and effectual in law against Us Our heirs and successors."

Later commissions were in similar terms: see, for example, Governor Darling's Commission of 16 July, 1825. In Williams v The Attorney-General for New South Wales, supra, at 449, it was said that this power was exercised at the discretion of the Governor and in accordance with instructions issued by the Colonial Office. Despite the direction in the Governor's Commission that the disposition of the Colony's land was to be by way of formal grant, it was held that this power included within it the power to negotiate and to make promises for such grants: Dumaresq v Robertson (No. 3) (1860) 2 Legge 1291 at 1293; Richards v Whitford (1864) 3 N.S.W.S.C.R. (Law) 110 at 123-124.

The system that existed up to 1831 was described by Governor Gipps in a despatch of January 1842 to the Secretary for the Colonies, in the course of dealing with the Governor's

reasons for rejecting a claim by a Dr. Douglass to a land grant said to have been made by Governor Brisbane (although there was an unsuccessful attempt by the Imperial authorities in 1824-1825 to introduce a system under which the primary method of disposal of Crown lands would be by way of sale at public auction: see Professor Campbell, "Promises of Land from the Crown: Some Questions of Equity in Colonial Australia", University of Tasmania Law Review, Vol. 13, No. 1, 1994, p. 1 at p. 3). Governor Gipps wrote:

"... Unfortunately in the times of Sir Thomas Brisbane and of all Governors of this Colony down to the year 1832, the practice prevailed of issuing, not Grants, but only promises of grants, - or more correctly speaking permissions to select land, to be afterwards confirmed by Grants; and the difference is very essential, inasmuch as land granted becomes the immediate and unquestioned property of the Grantee, - whereas a promise of a Grant or permission to select, confers only an inceptive right, to be confirmed on the performance of certain conditions by the person receiving the promise.

These conditions varied at different times, but there were some which were never dispensed with; and amongst these indispensable conditions were the following:-

First - that the intended grantee should select the land and report his selection to the Surveyor-General or Colonial Secretary.

Secondly - that he should, through the Colonial Secretary, on the recommendation of the Surveyor-General, receive an authority to take possession of the lands so selected.

It never was the practice of this government to point out to an intended grantee the land which he was to receive; it was the invariable custom to give him permission to select land; and until his selection was approved his title was incomplete."

Professor Campbell, *supra*, at pp. 3-4, describes this system in the form it took from 1826, when it became apparent that the attempts of 1824-1825 to introduce a system of sale of Crown lands at public auction were impracticable:

"In the light of these difficulties, a modified scheme was introduced in September 1826. This scheme was designed to promote land settlement by Europeans and also to ensure that settlement was appropriately controlled. The scheme involved the establishment (within New South Wales) of the so-called Limits of Location, that is to say the geographical limits beyond which settlers would not be permitted to go in search of the lands on which they wished to be located. It also involved a regime under which persons wishing to select land within those Limits might do so with official sanction. Application for a permit to select land was first to be made to the Colonial Secretary (an officer attached to the Governor's establishment), and if the application was approved, the applicant would be supplied with a letter to the Surveyor-General who would then give the applicant written authority to search for a location. Once a location was selected, the selector was to inform the Surveyor-General of the selection, and, if the Governor approved of the selection, the Colonial Secretary would issue the selector with a written permit to enter into possession 'until His Majesty's pleasure be made known or the Grant be made out'."

In 1831, the Secretary of State, Lord Ripon, implemented a new system for the disposal of all Crown lands by sale at public auction, with a minimum upset price. This provided both for the sale of the entire interest in the land and for leases of land. In a despatch to Governor Darling of 9 January, 1831 outlining the effect of the new regulations that were proposed, Lord Ripon instructed the Governor not to make any further grants of land until he received the formal instrument containing the new regulations, except grants "to

persons to whom you may already have made positive promises and to those who may ... have proceeded to the Colony on the faith of obtaining land" under certain earlier arrangements published by the Colonial Office. The new regulations made under the prerogative power of the Crown were published in the New South Wales Gazette on 1 July, 1831.

By the early 1830s the practice of squatting was widespread in New South Wales. Large tracts of Crown lands, situate outside the boundaries of settlement and usually suitable only for grazing, were being used by pastoralists to run their cattle and sheep without either the authority or sanction of the Crown. Recognising the reality of the situation, the New South Wales Government further extended the limits of location; these, by 1835, in direct response to Batman's treaty with the Aborigines of Port Phillip Bay and on the recommendation of Governor Bourke, included that district. In 1836, by the local Act 7 Will. IV, No. 4 the New South Wales authorities implemented a system of annual pasturing licences in respect of grazing lands outside the new limits.

1839, the local Legislature passed the Act 2 Vic., No.27 (N.S.W) re-enacting the 1836 provisions and giving increased powers to the local Commissioners of Crown lands for the maintenance of order in the districts to which they were assigned. Section 26 provided:

"... no possession nor occupation of any land taken or had under any 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."

This reflects what was an enduring concern of the colonial authorities: to retain ultimate control over the disposition of the large tracts of sparsely settled lands within the Colony.

By this time, the situation of the Aboriginal inhabitants of the Colony was the subject of much concern to the Imperial and colonial authorities. With the abolition of slavery in 1833 the focus of the humanitarian movement in the United Kingdom shifted to the plight of the Empire's indigenous population. On 1 January, 1834, one of the leaders of that movement, Thomas Foxwell Buxton, moved the House of Commons that an Address be presented to His Majesty, to take measures to secure to the native inhabitants of the colonies the protection of their rights and to promote and spread civilisation amongst them, and "lead them to the voluntary reception of the Christian religion." The motion was carried unanimously by the House. Copies were circulated to the colonial Governors with the instruction that the principles it embodied be applied to the betterment of the indigenous inhabitants.

What has been seen as one of the earliest tests of the Imperial government's resolve to protect the rights of Aborigines came in 1835 in response to Batman's treaty with the local Aboriginal tribes for the acquisition of land at



Port Phillip Bay. Governor Bourke issued a proclamation on 2 September, 1835 declaring the possession of lands pursuant to any treaty, bargain or contract with the Aborigines void and of no effect against the rights of the Crown. In Despatch No. 142 of 13 April, 1836, in which his approval of Governor Bourke's actions was conveyed, the Secretary of State, Lord Glenelg, referred to the "many circumstances" which led to the conclusion "that the Aborigines should be placed under a zealous and effective protection, and that their Rights should be studiously defended". Similar issues to those raised by Batman's treaty arose in 1840 when several tribal chiefs from the southern island of New Zealand, on a visit to Sydney, were induced by a group of leading New South Wales settlers to sell them large tracts of their native lands. The response of Governor Gipps, who then had responsibility for New Zealand, was to introduce into the New South Wales Legislative Council legislation to the same effect as Governor Bourke's proclamation of 2 September, 1835. In the second reading speech of the Bill, Governor Gipps was explicit in his recognition of native title. - His speech can be seen as expressing an official view that was then widely held: see the comments of Lord Russell, the Secretary of State, on this speech in his reply to Governor Gipps in Despatch No. 30 of 16 January, 1841 and the report of the House of Commons Select Committee on Aboriginal rights, printed 26 June, 1837, which suggested that responsibility for the plight of Aborigines fell on the shoulders of the Imperial government, and more specifically on those of the colonial governments. It was

this report which recommended the appointment in Australia of protectors of Aborigines, invested with both coronial and magisterial powers, to cultivate relations with the local tribes and to secure the maintenance and protection of their rights. A copy of this report was forwarded by the Colonial Office to the New South Wales Governor, together with detailed instructions as to the implementation of its recommendations.

As the boundaries of white settlement encroached more and more on their native lands, conflict between the settlers and Aborigines increased. The local Act of 1839 (2 Vic., No. 27) already referred to vested in the Commissioners of Crown lands extensive powers to deal with atrocities committed both by and against Aborigines beyond the limits of location. It also provided for the establishment of a force of Border Police to assist the Commissioners in their duties. By notice published in the Gazette of 22 May, 1839, the Governor identified "one of the principal objects which the Council had in view to passing the Act" as being "to put a stop to the atrocities which have of late been so extensively committed beyond the boundaries, both by the Aborigines and on them".

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 objective 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.

In 1842, the principles embodied in Lord Ripon's regulations received statutory recognition with the passage of the Land Sales Act 1842 (Imp) (5 & 6 Vict., Chap. 36). It was the first Imperial statute regulating the mode of disposal of Crown lands in New South Wales (and the other Australian colonies that then existed). By s. 2, it was provided that the waste lands of the Crown in the Australian colonies were not to be alienated by the Crown either in fee simple or for any less estate or interest otherwise than by way of sale conducted in accordance with the regulations under the Act. Section 5 authorised the Governor to make such conveyances and alienations. Section 3, which took the form of a proviso to s. 2, declared that nothing in the Act should prevent the Crown: "from excepting from Sale, and either reserving to Her Majesty ... or disposing of in such other Manner as for the

public Interests may seem best, such Lands as may be required for ... the Use or Benefit of the aboriginal Inhabitants of the Country ..." and for certain other public purposes. The policy underlying Lord Ripon's regulations and the Act of 1842 can be seen from the judgments of Isaacs J in Williams v The Attorney-General for New South Wales, supra, at 449-450. The Imperial Government saw the revenues to be raised from the sale of the Colony's waste lands as a means of effecting two objectives: the development of the Colony by the direct application of part of those revenues to it and also the promotion of emigration from an increasingly overcrowded England. Section 19 of the 1842 Act provided that half of the gross proceeds of such sales was to be applied to meet the costs of assisting emigrants not possessing the means to do so, of moving to the Colony; the balance was to be appropriated to the colonial public service. The effect of the Statute was to curtail the Royal prerogative with respect to the waste lands of the Crown. Thereafter, only dispositions of such lands made in accordance with its provisions were permissible: - Williams v The Attorney-General for New South Wales, supra, at 450; Attorney-General v De Kevser's Royal Hotel Limited [1920] A.C. 508 at 526 and 539-540; R v Bradley (1935) 54 C.L.R. 12 at 17. Section 20 of the Act provided:

"... nothing herein contained shall affect or be construed to affect any Contract, or to prevent the Fulfilment of any Promise or Engagement, made by or on the Behalf of Her Majesty with respect to any Lands situate in any of the said Colonies in Cases where such Contracts, Promises, or Engagements shall

have been lawfully made before the Time at which this Act shall take effect in any such Colony."

This is the first Imperial enactment recognising what are referred to as "contracts" and the fulfilment of what are called "promises and engagements". The notion of promises lawfully made with respect to lands situate within New South Wales was well known and well understood in 1842. A promise by the Governor of the day was commonly the basis upon which a person acquired an entitlement to a Deed of Grant; the form of grant prescribed for all grants both prior to and subsequent to 18 May, 1825 and advertised in the Gazette on 1 November, 1838 commenced with the following:

"Know ye that in order to promote the due settlement of our territory of New South Wales and in fulfilment of a promise made on or before the ..... day of ..... One thousand eight hundred and ..... by His Excellency ..... as Governor thereof ..." (emphasis added)

The topic has been recently examined by Professor Campbell in her article, *supra*. She says of this practice, at p. 1: "Many of these promises of grant were gratuitous in the sense that they were not supported by any consideration moving from the promisee. Such promises were commonly termed promises of grant without purchase". It was held that such gratuitous promises did not confer on the promisees any rights enforceable either at law or in equity against the Crown: Spenser v Gray (1848) 1 Legge 477 at 484; Terry v Wilson (1849) 1 Legge 522 at 531; Cockcroft v Hancy (1858) 2 Legge

1051 at 1062-1063; Hillas v Magoveran (1863) 2 N.S.W.S.C.R (Eq) 32; Day v Brunker (1891) 12 N.S.W.L.R. (Eq) 157 at 162-163. The Supreme Court, however, also held that the authorised occupant of Crown land under such a promise had certain rights against persons other than the Crown, e.g., the right to maintain trespass against a wrongdoing intruder on such occupation and the right to transfer the undefined interest involved in such occupancy: see Cockcroft v Hancv, supra, at 1062-1063. In that case, it was said that, if consideration for a promise by the Crown of a grant had been given by the promisee, then the promise might be enforceable against the Crown, i.e., as a contract. This suggestion was given effect in Dumaresq v Robertson (No. 3), supra, where a promise by Governor Darling of a grant, as an inducement to the promisee to settle in the Colony, was held to be enforceable against the Crown once the promisee fulfilled the condition to which the promise was subject by actually settling in the Colony. So far as gratuitous promises were concerned, however, Professor Campbell observes, supra, at p. 13 that it was nevertheless accepted that they should normally be fulfilled and that the fulfilment of such promises would often entail careful investigation of the dealings which had taken place in relation to the promised land since the making of the original promise in order to ascertain the person who had acquired the best claim to receive the formal grant of the legal estate.

By the 1830s, it was the practice for public notice to be given in the Gazette of the Governor's intention to issue formal grants to persons claiming that right on the basis of earlier transactions with the authorities, to give interested persons opportunity to oppose the grant sought. Professor Campbell identifies the origin of this practice as Governor Darling's proclamation of 8 June, 1829, which was intended to overcome the difficulties created by the fact that most of the land in Sydney and Parramatta was then held only under permissive occupancies granted by previous Governors, as the volume of private dealings in those lands increased. By way of example, the Gazette of 24 October, 1832 gave notice that unless written caveats were previously lodged, Deeds of Grant would be issued to 70 persons for areas ranging from 30 to 2,000 acres. The Gazette gives details of the claimant's name, the areas sought and a metes and bounds description of the area, together with the basis of the entitlement to the grant. All 70 entitlements are in the following terms: "Promised by" either Governor Macquarie or Governor Brisbane. In most cases the date on which the promise is said to have been made is given. The annual quit rent payable and its commencing date are also stated: the rents range from 1 shilling, for one of the 30 acre claims, to £16 13s 4p, for one of the 2,000 acre claims. In later Gazettes, a slightly different form of notification reflecting what Professor Campbell says, *supra*, at pp. 3-4, appears, which includes additional information, viz., the date when the taking of

possession of the land in question was authorised: see, for example, pp. 819-825 of the Gazette for 18 November, 1835.

There are many examples of similar notices in the Gazette. The first respondent's analysis of grants made in the 30 year period 1831 to 1861 reveals many thousands of grants issued on the basis of promises of grants made by the Governor of the day, often many years before publication of notice of the application for the issue of the formal deed of grant.

In 1833, the New South Wales Legislative Council passed the Waste Lands (Claims to Grants) Act (4 Will. IV, No. 9). The preamble explains the reason for this legislation in these terms:

"Whereas many persons have heretofore obtained the possession of lands in this Colony by the licence and authority of the several governors thereof, under promise of grants to be made to them duly made by the said Governor; and upon the faith thereof, large sums of money have been expended in improving and building upon the said land; but in many cases such grants have been unavoidably delayed and have not been made as aforesaid, and the said lands and premises have come into the possession of other persons claiming to have and hold the same as their just and lawful right obtained by, through or under the persons who originally obtained possession thereof as aforesaid: and in many cases, by reason of the death, incapacity, or absence of the said lastmentioned persons, and from other circumstances, it hath become impossible to produce such legal titles as would be necessary to enable the Supreme Court of this Colony to take cognisance of and determine thereon; and it is expedient and necessary that a remedy should be provided in such cases, and that such grants should be made and delivered to and in the name of those persons who have now the just and lawful right thereto, obtained as aforesaid ..."



The Act, by s. 7, provided for the appointment of Commissioners to hear and report to the Governor on the merits of applications for grants based upon promises by former Governors. This was a power of report only, with the Governor not being obliged to issue any grant recommended by the Commissioners "unless his Excellency shall deem proper so to do". By s. 4, the Governor was empowered to fix, by proclamation, a period of six months from the date of the proclamation as that within which all persons claiming entitlement to such grants were to file their claims by way of memorial with the Commissioners. The Commissioners were directed to report in favour of the applicant for grant whenever satisfied as to his or her entitlement "in equity and good conscience, to hold the land and to have a Grant". A notice was published in the Gazette of each memorial filed. This Act having expired, it was renewed in 1835 by local Act 5 Will. IV, No. 21. Whereas by s. 5 of the 1833 Act, any person was entitled, within the time limited by the proclamation, to file his application with the Commissioners, the 1835 Act only permitted claims to be considered by the Commissioners, if the claim was referred to them by the Governor; no limitation period was prescribed. The 1835 Act continued in force until repealed by s. 2 the Conveyancing and Law of Property Act 1898 (NSW), which by Part II re-enacted the provisions of this 1835 Act. But it seems that by 1902, the New South Wales authorities felt that all such promises had been honoured. Cf. Williams v The Attorney General for New South Wales,

supra, at 455; Mabo (No. 1), supra, at 239; North Ganalania Case, supra, at 614.

An analysis by the first respondent of all references in the New South Wales Government Gazette to land dealings during the period December 1831 to January 1861 suggests that notice was given of a total of 882 claims under these two Acts. This figure does not include the very many claims to grants advertised in the Gazette in accordance with Governor Darling's proclamation of 8 June, 1829, which, it appears, were referred, in cases of doubt, by the Governor to the Commissioners appointed under the 1835 Act. Compare, by way of example, pp. 595-604 of the Gazette for 15 May, 1839, with pp. 618 and 619 of the same issue.

In the 1840s, the term "engagement", like the term "promise", was also in common use to describe various forms of undertaking given by the Governor of the day with respect to the disposition of various interests in Crown lands. For example, in a memorandum of 7 December, 1844, in the New South Wales Colonial Secretaries' files, there is reference to an "engagement entered into with the [Australian Agricultural] company to reserve coal in all future grants of land". It is said that this engagement was "finally settled" on 25 June, 1830. Papers tabled in the New South Wales Legislative Council on 12 September, 1845 and described as "relating to engagements now existing between the Government and" this same Company, include letters of 18 May, 1825 and 29 April, 1826

from the Secretary of State authorising the grant of a large area of land at Newcastle to the Company and setting out the terms on which grants of the coal mines were to be made to it. There is reference in a letter of 26 July, 1848 from the Colonial Land and Emigration Office to the Permanent Under-Secretary of State of an Act having been passed by the legislature of New South Wales in October 1848 "to enable the Government to fulfil certain engagements made by former Governors respecting" the establishment of commons in a number of places in the Colony. An issue of concern to Governor Gray of South Australia was whether the Government should continue to meet the initial cost of surveying 20 large areas of land under a system whereby persons purchased 4,000 acres to be selected by them from areas of 15,000 acres, to be surveyed by the Government; in his letter of 18 May, 1840, he sought the Secretary of State's advice on whether these "engagements" with the purchasers for the government to carry out the surveys imposed a legally binding obligation on the Government.

Although the term "engagement" does not appear to be a technical term, it appears that it was in common use at the time as a term used to describe Government undertakings with respect to grants of interests in Crown land that did not amount to arrangements legally binding on the Crown.

On 1 January 1846, the Land Sales Act Amendment Act 1846 (Imp) (9 & 10 Vic., Chap. 104) was passed, following

agitation by the pastoralists for greater security of tenure than that provided for by certain local Acts, including the 1839 Act, 2 Vic., No. 27, already referred to. It did not come into force until proclaimed by the Governor on 24 April, 1847. The Imperial Act of 1846, by s. 1, made express provision for the grant of leases and occupation licences of Crown lands for terms not exceeding 14 years. Section 6 provided for the making, by Order in Council, of rules and regulations for the purposes of the 1846 Act (which purposes included the division of the Colony into three districts within which such leases or licences of three different classes could be granted). The regulations under the 1846 Act, contained in the Order in Council of 9 March, 1847 by Chapter 1 divided the lands in New South Wales into "the settled districts", the "intermediate districts" and "the unsettled districts", i.e., the residue of the entire Colony other than the areas comprised in the first two districts. Chapter 2 of the regulations dealt with the rules to be enforced in the unsettled districts; section 1 empowered the Governor to grant leases of runs of land within the unsettled districts for up to 14 years, for pastoral purposes, but without prejudice to the right of the Crown to enter upon any of the lands so leased for public purposes "agreeably to the provisions of those purposes contained in" section 9 of Chapter 2 of the regulations. Section 9 provided that nothing in the regulations or in any lease to be granted thereunder should prevent the Crown from making grants or sales of any lands within the limits of the run comprised in any such lease

for public purposes or prevent the Crown from "disposing of in such other manner as for the public interest may seem best, such lands as may be required for ... the use or benefit of the aboriginal inhabitants of the country" and for certain other nominated public purposes including "the purpose of sinking shafts and digging for coals, iron, copper, lead or other minerals".

Throughout the period prior to 1855, the Imperial government had been careful to reserve to itself the control and management of the Colony's waste lands: see Williams v The Attorney-General for New South Wales, supra, at 424. In 1855, with the grant of full representative government in New South Wales came the transfer to the Colony's new Legislature of that control. Both the NSW Act 1855 and the Australian Waste Lands Act 1855 (Imp) passed through the Imperial Parliament on the same day, 16 July 1855. The commencement of the former was conditioned on the repeal of the two Imperial Acts of 1842 and 1846 regulating the disposal of Crown lands, which repeal was effected by s. 1 the Australian Waste Lands Act 1855. This Act dealt with a range of additional matters.

The reference to "vested or other Rights" in the proviso to s. 2 the NSW Act 1855 was, as Dawson J observed in Mabo (No. 1), supra, at 239, a reference to the rights conferred on squatters and lessees under the 1846 Imperial Act and the Order in Council of 9 March 1847, something made clear by the identification of that same expression in s. 58 of the

local Constitution Act scheduled to the Imperial Act as one which related to the 1846 Imperial Act.

The proviso to s. 2 the NSW Act 1855, in so far as it relates to contracts, promises and engagements, was expressed in language identical to the proviso in s. 20 of the 1842 Imperial Act. In my opinion, the purpose of the inclusion of the proviso in s. 2 the NSW Act 1855 was to maintain the ability of the Crown to carry into effect, by the issue of formal deeds of grant, any outstanding arrangements which it had entered into under the regime existing prior to the 1842 Imperial Act and any uncompleted contracts for sale or lease made under the 1842 and 1846 Acts and the Order in Council of 9 March, 1847. There is good reason for so reading the proviso in s. 2 of the 1855 Act and not treating it as also preserving arrangements for the grant of non-contractual interests in Crown land that were first made only after 1842 and which were still outstanding in 1855. After 1842, the only way in which interests in Crown lands could lawfully be vested by the Crown in any of its subjects was by the modes prescribed by the Acts of 1842 and 1846. It is a long established principle of law that, when a statute regulating the disposal of Crown lands or of an interest in them prescribes a mode of exercise of the statutory power, that mode must be followed and observed. See Cudgen Rutile (No. 2) Pty. Ltd. v Chalk [1975] A.C. 520 at 533. Once the Act of 1842 was passed, no one could have any expectation any more that any promise or engagement with respect to Crown land in

New South Wales not amounting to a contract made under the 1842 or 1846 Acts and made by any official of the Imperial government or by that Government or even by Her Majesty, by even the most formal communication with the Governor, would be kept. It was only promises and engagements made prior to 1842 which could lawfully be honoured thereafter, pursuant to s. 20 the 1842 Act and then s. 2 the NSW Act 1855.

At the hearing, the applicants refined their argument to assert that a promise or engagement of the kind referred to in the proviso to s. 2 the NSW Act 1855, repeated in the other instruments and legislation referred to in the question, was contained in:

- (a) the Order in Council of 18 July, 1849 and Despatch No. 134, Earl Grey to Sir C.A. FitzRoy dated 6 August, 1849; or
- (b) Despatch No. 24, Earl Grey to Sir Chas FitzRoy, 11 February, 1848, the Order in Council of 18 July, 1849 and Despatch No. 134; or
- (c) the Order in Council of 18 July, 1849.

The nature, scope and content of the promise or engagement contained in one or other of these documents was said to be evidenced by documents (3) to (14) of para. 268A of

the statement of claim (which documents include the Order in Council and the two Despatches I have already referred to).

Document (3) is a report by Mr. Robinson, Chief Protector of Aborigines at Port Phillip for the year 1846 to the Superintendent at Port Phillip, Mr. Lonsdale; this was enclosed, along with the reports of other officials with responsibility for Aborigines throughout New South Wales, with Despatch No. 107 of 17 May, 1847 by Governor FitzRoy to Earl Grey, then the Secretary of State for the Colonies. The Chief Protector referred to the extent to which lands in the District had been occupied by squatters, the imminence of the grant of leases to them and to the fixed attitude of the local colonists not to recognise any claims the Aborigines might have "to a reasonable share in the soil of their fatherland" and urged that consideration be given to the establishment of reserves for the aborigines, which were "urgently needed".

Document (4) is a memorandum written by Mr. Murdoch, Chairman of the Colonial Land and Emigration Office, to Mr. H. Merivale, then Assistant Under-Secretary of the State for the Colonies, commenting on the Chief Protector's recommendation that reserves be established and also on the unjustness of the exclusion of the aborigines from the lands of which they had previously been sole occupants. Mr. Merivale's response was to query the practicability of the proposal for native reserves, in view of the character of the Australian countryside and the consequent necessity for there to be large



areas available for foraging to sustain the natives; he suggested that further information should be sought from the Chief Protector.

Document (5) is a memorandum by the Secretary of State dated 6 December, 1847 dealing with Mr. Merivale's concerns. The Secretary of State favoured the establishment of reserves for Aborigines "with a view to their preservation from being exterminated"; he suggested the South Australian model might be appropriate, where the deficiency in game available for their subsistence was made up by government rations. He emphasised the importance of impressing upon the Governor the need to do whatever was possible for the preservation of the Aboriginal race and said he should be instructed to take care that they were not driven off the grazing stations recently leased to pastoralists.

Document (6) is Despatch No. 24 by the Secretary of State to Governor FitzRoy dated 11 February, 1848. It is one of the documents said to contain the promise or engagement relied on. Earl Grey took up with the Governor the question of establishing reserves for the benefit of the natives. By this time he had come to the view that the establishment of reserves as a means of preserving the Aboriginal race was likely to be impracticable, except for small reserves set up for specific purposes. Earl Grey continued:

"But the very difficulties of thus locating the aboriginal tribes absolutely apart from the

settlers, renders it the more incumbent on government to prevent them from being altogether excluded from the land under pastoral occupation. I think it essential that it should be generally understood that leases granted for this purpose [i.e. under the 1846 Act and Order in Council of 9 March, 1847] give the grantees only an exclusive right of pasturage for this purpose and of cultivating such land as they may require within the large limits thus 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 customed, from the spontaneous produce of the soil, except over land actually cultivated or fenced in for that purpose. This is a subject to which I wish you to turn your attention. The evil of occasional depredations or acts of violence between settlers and natives in these outlying districts is one which it is vain to expect can be wholly prevented. But a distinct understanding of the extent of their mutual rights is one step at least towards the maintenance of order and mutual forbearance between the parties. 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."

Document (7) is Governor FitzRoy's Despatch No. 221 to the Secretary of State dated 11 October, 1848. The Despatch deals with the issues raised in document (6) concerning "a provision being made to secure to the aborigines the free use of unimproved Crown lands, for the purposes of hunting and in other ways seeking their subsistence as heretofore, notwithstanding the occupancy of those lands under leasehold tenure under the provisions of Her Majesty's Order in Council of 9 March, 1847". The Despatch is noted up with memoranda by the Secretary of State and various Colonial Office officials, which deal with this question. The Governor

reported that, following receipt of document (6), an instruction was given to the Crown Law officers of the Colony to insert in the instruments of lease granted under the Order in Council of 9 March, 1847 a provision securing to the aborigines rights of access and user of the kind referred to; the Governor went on to report that the response of the law officers was to advise that it was beyond the power of the Colonial government to insert such a condition in leases proposed to be granted under the 1846 Imperial Act and he requested the authority of a further Order in Council to enable that course to be followed. (The Colonial Law officers had also advised that the reservations for the benefits of Aborigines in Crown grants provided for by s. 6 of the 1842 Imperial Act and the power in s. 9, Chapter II of the Order in Council of 9 March, 1847 to make grants of land included in leases issued under the 1846 Imperial Act for the use or benefit of the Aboriginal inhabitants did not authorise the inclusion in such leases of a "general permission ... to them to enter upon" those lands.) The Governor also mentioned the action to the same effect initiated by the New South Wales Executive Council prior to the receipt in the Colony of document (6), as a result of recommendations received from one of the local Crown Lands Commissioners. Governor FitzRoy also urged that any further Order in Council should contain a clear declaration that lessees of Crown lands under the 1847 Order in Council would acquire no right over any unimproved lands within the leased areas except that of exclusive pasturage. The reason he gave for this suggestion was to ensure public

access to such lease areas for the purpose of mineral prospecting. Earl Grey's decision on the issues raised by the Governor's Despatch and by the various Colonial Office officials who considered it is recorded in a minute of 26 March, 1849 on the Despatch as follows:

"The subject is one of very great importance and I am of the opinion that all the conditions suggested by the Governor should be inserted [relating to both protecting the aborigines and mineral prospecting]. But it must also be considered what ought to be done in order to secure what is due to the natives as regards lands already leased for 14 years [under the Imperial Act of 1846]. The introduction of a condition into these leases is now impracticable, but I apprehend that it may fairly be assumed that HM did not intend and gave no power by these leases to exclude the natives from the use they had been accustomed to make of these unimproved lands and the question arises whether some declaration to that effect should not be introduced to the O in C?"

Earl Grey directed that the whole matter be referred to the Colonial Land and Emigration Office for advice.

Document (8) dated 17 April, 1848 comprises the advice of officials in that Office to the Colonial Office Permanent Under-Secretary, Mr. Merivale. The Land Office recommended that, in addition to securing to the natives the right of seeking their subsistence and to securing to the public the right of searching for minerals over the lands under lease, there were other public interests that were also worthy of protection. The Office therefore favoured a declaration by Order in Council that a pastoral lease conferred no right save that of exclusive pasturage; however,

the Office was concerned whether such a declaration could legally affect leases already granted and it was also concerned at the opposition such a declaration would provoke among the squatters and, in particular, those who did not yet have leases but had a right to demand them. The Office also rejected the making of regulations under s. 6 of the 1846 Act, designed to achieve all these objectives, as being of doubtful legality. The Land Office advice concluded:

"We regret therefore to report that we cannot perceive any mode by which the objects proposed by Sir C. FitzRoy can be completely and securely effected. We think however that the most advisable course would be one approaching to that recommended by the law officers of the Crown in New South Wales viz: of empowering the Governor to insert in all future leases such conditions as he may think necessary not only for purposes now immediately under consideration but for preventing other similar inconveniences to the public."

A draft Order in Council reflecting this advice was enclosed. The Permanent Under-Secretary, Mr. Merivale, commented on this advice on 5 June, 1849 to the Parliamentary Under-Secretary, Mr. Hawes, as follows:

"I have considered the accompanying draft Order in Council ... and believe it will be found to answer the purpose, as to future leases. As to existing leases, it is very questionable whether there are any such. But I think that sections 1 and 9 of the Order in Council vest such large powers in the Governor notwithstanding existing leases, that, if there are any such, it will be in the Governor's power nevertheless to compel the lessees to submit to reasonable terms if he thinks it desirable; not only as to access of the aborigines, but of others also, for purpose of searching for minerals etc. This to be pointed out to him carefully in the Despatch to accompany this Order in Council."

Mr. Hawes was concerned at whether the proposed Order in Council gave sufficient protection to the interests of the aborigines, saying in a note of 6 June, 1849: "The nature and extent of the access of the natives must surely be defined - or far more serious collisions may arise, than now ...". The Secretary of State agreed with Mr. Merivale's views, in a brief memorandum of 6 June, 1849, commenting that "the Order in Council prepared will I think be sufficient with the suggested explanatory Despatch".

Earl Grey's final position here is 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.

It was in these circumstances that the Order in Council of 18 July, 1849 dealt only with pastoral leases granted after the proclamation in the Colony of the Order in

Council on 23 April, 1850 and made no express reference to the inclusion of conditions or reservations in such future leases protecting the right of access of aborigines to their lands which came to be included in such leases. The Order in Council in part provided:

"And whereas it is expedient that all such pastoral leases should contain such conditions, clauses of forfeiture, exceptions, and reservations, as may be necessary for securing the peaceable and effectual occupation of the lands comprised in such leases, and for preventing the abuses and inconveniences incident thereto: it is hereby ordered ... that it should be lawful for the Governor for the time being ... to insert in any pastoral lease hereafter to be made, such conditions and clauses of forfeiture, exceptions or reservations, as to him shall seem requisite for the purposes last aforesaid."

Document (10) is the Order in Council as proclaimed in the Colony. It is another of the documents said by the applicants to contain the promise or engagement relied on.

Document (11) is a Despatch by Governor Fitzgerald to the Secretary of State dated 24 July, 1849. It concerns the application, by locally prepared regulations, of the principles reflected in the Order in Council of 9 March, 1847 to Western Australia.

Document (12), the third document said to contain the promise or engagement, is Despatch No. 134 from the Secretary of State to Governor FitzRoy of 6 August, 1849 transmitting to the Governor the Order in Council of 18 July, 1849. Earl Grey set out his view that the intention of the

government to be gathered from ss. 1 and 6 of the Imperial Act of 1846 and the Order in Council of 9 March, 1847 was "to give only the exclusive right of pasturage in the runs, not the exclusive occupation of the land, as against natives using it for the 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 his lease was really intended to convey". He went on to recognise the difficulties identified, by the Colonial Crown Law officers, presented by the existing regulatory regime "to the practical execution of that intention". He then set out how he understood the new Order in Council, i.e., that of 18 July, 1849 would be implemented by the Governor on the assumption that the Governor had already granted some leases under the Imperial Act of 1846 and the Order in Council of 9 March, 1847, saying:

"... On this supposition there will be three different classes of cases which must be dealt with viz-

- I            That of parties who already have leases when the present Order reaches you. II That of parties who at that time have not leases, but who under Chapter 2 s. 11 of the Order of March 9th [1847] have either demanded, or become entitled to demand, leases of their respective runs. III That of parties who neither have leases, nor own title to demand them, but may, in future, make application for them.

The third case is easily dealt with. The Order in Council 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 natives or other persons travelling or searching for minerals, and so forth. The same conditions will, of course, be inserted in new leases to be granted on the expiration of such subsisting ones as you may have made under the Order in Council of 9 March, 1847.

But the first case, that of existing leases under that Order in Council, granted as I assume before the present Despatch reaches you, cannot be dealt with in the same way. Without asserting that the Queen could not by Order in Council under the Act empower you to enforce limitations of this nature, without the consent of the lessee, I should, at all events hold that such a power, if it exists, ought not to be exercised without the clearest necessity. The value of such leases might be materially diminished by the apprehension that the Government might, at its will, vary them in important particulars.

In point of strict Law, it appears to me that the Order in Council of March 9th already enables you to enforce those or similar limitations against the holders of existing leases without the insertion of any new conditions at all. Nothing in any lease which you may grant under that Order can prevent you (under Ch: 2 Sec: 9) from reserving out of the runs such lands as may be required for the use of Aboriginal Inhabitants. This would strictly enable you, not only to reserve spots which the Natives use for their own purposes, as for instance in the case described in Mr. Mayne's letter of the 1st June 1848, but also so much land as might be requisite to give them access to such spots. Again, although it is thought that you cannot, under the existing Order interfere with the exclusive occupation of the lessee as to provide that private persons may enter to search for Minerals, yet you are yourself empowered under Ch: 2, Sec: 1, to 'enter' upon any of the lands comprised in such leases for any purpose of public defence, safety, improvement, convenience, utility, or enjoyment - words which would protect the entry of persons deputed and authorized by yourself.

It seems, therefore that the controul [sic] which you enjoy under the Order of the 9th March, over land actually leased is sufficient to enable you to prevent any practical evil arising, if lessees are disposed to insist on an unreasonable construction

of their right of occupation. At the same time I need scarcely remind you that it would be necessary to be very cautious in the exercise of such controul [sic]. These are powers placed in your hands only to be used against the will of the Lessee when great and obvious public loss, or inconvenience would result from abstaining from their emolvment. In case, however, the same object can, in any instance, be effected by arrangement, you are empowered by the Order in Council now forwarded to insert in existing leases such conditions as have been already mentioned with regard to future leases, by way of endorsement. But this is a power not to be exercised without the concurrence of the Lessees.

There remains the case of parties, who, when this Order reaches you, will not be in the actual possession of Leases but will be entitled to them under Ch: 2, Sec: 11, of the Order of 9th of March 1847, 'under' (in the words of the Order) 'the present Regulations'. I think this language renders it impossible to subject those parties to having inserted in their leases the new conditions authorized by the present Order in Council. It appears to me, therefore, that persons having this right are to be considered in this respect as on the same footing with those to whom you may actually have granted leases. But, inasmuch, as the Order of 9th March leaves the length of the term of years to be granted entirely at your discretion, you will be able and justly entitled to refuse to such persons any lease for more than a year, unless they are willing to accede to the insertion of the conditions which you may require. I do not however, wish to give you absolute directions how to treat them, as I do not know how such directions might interfere with terms or arrangements which you may have entered into before the present Despatch reaches you." (emphasis added)

In the Despatch of 6 August, 1849 by which the Secretary of State transmitted the Order in Council to Governor FitzRoy, it is clear that the Secretary then intended that the Order in Council would be used for, among others, the purpose of protecting the traditional rights of aborigines in lands over which pastoral leases were to be granted. However, it is in my opinion also clear, as the passages emphasised

show, that the Secretary of State did not purport to give the Governor a binding direction to include in all future leases such a protective provision. It is probably correct to say that the intention of both the Governor and the relevant Colonial Office officials was that the Governor would be armed by the Order in Council of 18 July, 1849 with the most effectual means considered to be available for protecting the rights of the Aboriginal inhabitants to their traditional user of lands in the Colony (and other public interests such as the proper exploitation of the Colony's mineral resources) notwithstanding the grants of pastoral leases over those lands. But it is, in my opinion, clear that the Order in Council took the form of the conferral on the Governor of a power to include, at his discretion, provisions protective of Aboriginal rights in future pastoral leases to be granted under the 1846 Act. And the Secretary did not purport to give a binding direction to the Governor to adopt means which the Secretary considered were available to the Governor to include in existing leases and in leases not yet granted but in respect of which rights of grant had accrued such a provision, although the Secretary of State explained why the Governor would be justified in so acting. The Secretary could not in any event have lawfully fettered the discretion reposed by the Order in Council in the Governor in relation to the terms on which interests in Crown lands would be disposed of by anticipatory direction: Cudgen Rutile (No. 2) Pty. Ltd. v Chalk, supra, at 533, a principle recognised by mid nineteenth century law, as appears from Tinkler v The Wandsworth District

Board of Works [1858] 2 De G. & J. 261. It may be that it was not an awareness of this principle but other considerations that caused the Secretary of State to write as he did to Governor FitzRoy. But whatever be the reason, the Secretary accepted that it should be left to the Governor to exercise the discretion conferred by the Order in Council of 1849, on a case by case basis, to ensure the protection of Aboriginal rights of access to and user for traditional purposes of land the subject of all pastoral leases to be granted in the future.

Whatever meaning be given to the expressions "promise or engagement" in the proviso to s. 2 the NSW Act 1855, the Order in Council of 18 July, 1849 cannot constitute or contain a promise or engagement of the kind contended for by the applicants. The promise or engagement contended for is an undertaking on behalf of the Crown that it would, in future, only dispose of lands for pastoral purposes on terms that ensured that native title rights were preserved. It is not possible to spell out such an undertaking from an Order in Council that leaves it to the Governor, at his discretion, to decide, when issuing a particular pastoral entitlement, whether to include in it a reservation having that protective effect. A further reason why a promise within the proviso to s. 2 the NSW Act 1855, i.e., a promise intended to endure beyond 1855, is not contained in the Order in Council of 18 July, 1849 is that, by s. 4 the Australian Waste Lands Act 1855, passed at the same time as the NSW Act 1855 and

containing in s. 4 the same proviso preserving the promises in question, power was conferred on the Legislature of any Colony, to repeal that Order in Council.

Document (13) is Despatch No. 26 from the Secretary of State to Governor FitzRoy dated 10 February, 1850 dealing with the reports by the protectors of aborigines for 1848. The Secretary of State rebuked the Governor for failing to disclose his views on the concerns raised in the protectors' reports which he had transmitted without comment to the Colonial Office:

"I am far from supposing that either yourself or the officers of the Colonial Government generally fail to take a proper interest in the success of those arrangements [for rendering more efficient the protection and improvement of the Natives]; but considering how deeply the honour of the local Government is concerned in proving that no effort has been wanting on their part to avert the destruction of the Native Race as a consequence of the occupation of their Territory by British Subjects & to render such occupation (as I am convinced it may be) the means of introducing amongst them the blessings of Civilization & Christianity, I should have been very glad if besides transmitting the Reports you had given me the benefit of knowing how far you may concur in the different suggestions which have been thrown out in them & the steps which you may have taken for carrying into effect such of those suggestions as you may approve. ...

I would also point out that the practice of driving the Natives from the cattle runs is illegal, & that they have every right to the protection of the law from such aggressions.

The whole subject is one of constantly increasing importance & the more widely the country is overspread by the Colonists & the more the Natives are consequently unsettled from their original habits of life, the more imperative is the

obligation which rests on the Government to leave no means untried of improving their social condition.

In assuming their Territory the Settlers in Australia have incurred a moral obligation of the most sacred kind to make all necessary provision for the instruction & improvement of the Natives.

The expence which may be incurred in such a service ought to constitute the very first charge on that half of the Territorial Revenue which Parliament has not otherwise appropriated & if that fund should be insufficient I can not doubt that the local Legislature would readily grant the additional means which might be required for carrying into effect any well considered measures for the benefit of the Native race. Not only is this as I have observed a Sacred duty from the Performance of which I am convinced that the representatives of the People in New South Wales would not seek to shrink but it is also the course which the much lower motive of enlightened regard for their own interest would prescribe, since the advancement of the Natives in Civilisation would do a good deal towards supplying that want of labor which is so much complained of as one of the Chief difficulties of the Colony."

This Despatch contains an important indication of the attitude of the Secretary of State at that time to the exclusion by pastoralists of aborigines from their traditional lands and to the importance of remedying, so far as possible, the consequences for the aborigines so treated by what Earl Grey referred to as "improving their social condition". The Despatch contains an expression of the strongest concern by the Secretary of State at the way in which aborigines were being treated and an urging on the Governor, in very strong terms, of the importance of taking action to suppress the illegal practices and to try to remedy the consequences of those practices. But Earl Grey took no action to have amended the regulatory tools which were then available to the Governor to achieve what the Secretary of State considered desirable:

the Governor was left to deal with this issue by the exercise of his discretionary powers under the 1842 and 1846 Acts and the Orders in Council of 9 March, 1847 and 18 July, 1849.

Document (14) is a draft dated 23 May, 1850 of what became Despatch No. 104 by the Secretary of State, Earl Grey, to the Governor of Western Australia. Earl Grey's observations here reflect the same concerns as those expressed in his communications with Governor FitzRoy including his Despatch No. 13 of February 1850. The regulations the subject of this document are contained in the Order in Council of 22 March, 1850 published in the West Australian Government Gazette on 17 December of that year. The purpose of this Despatch was to transmit to the Governor an Order in Council embodying the suggestions for the land regulations to apply in Western Australia, which were the subject of document (11), Governor Fitzgerald's Despatch No. 69 to the Secretary of State. The draft refers to an amendment to the regulations embodied in the Order in Council insisted upon by Earl Grey, which is in the following terms:

"With regard to the interest conveyed by these leases, you will observe that it is expressly provided by the Fifth Chapter of the Order in Council (cl. 7) that no pastoral lease shall preclude natives from seeking their subsistence over the run in their accustomed manner, nor settlers from passing over or examining the capabilities of the land; while the fourth clause of the same Chapter gives you the fullest power to insert in all leases such conditions and clauses of forfeiture as may be necessary for the protection of the public interest in these or any other respects."

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.

It is from this documentary material, read in the historical context outlined above, that the applicants seek to show that prior to 1855 the Crown, or those acting on its behalf, gave something in the nature of a commitment or undertaking to preserve indefinitely native title in respect of those of the Crown's waste lands over which it granted pastoral rights to others, which commitment amounted to a "promise or engagement" within the meaning of that expression



in various instruments and statutes, including the proviso to s. 2 the NSW Act 1855.

In my opinion, the historical material, which includes the two local statutes of 1833 and 1835, shows that the statutory reference to "promises and engagements" is a reference to a host of commitments made prior to 1842 by the Governors of the day, on behalf of the Crown, to make formal grants of particular interests in the waste lands of the Crown at some time subsequent to the relevant promise or engagement. The statutory expression does not refer to the concerns for the Aboriginal inhabitants of the Colony expressed from time to time by senior Imperial officials and reflected in the communications between those officials and the Governor which are relied on by the applicants. Given the early history of the procedures followed, at least prior to 1831, when Lord Ripon's regulations came into effect, for granting interests in land in the Colony, it is understandable that it was considered important to ensure that people with a good, though legally unenforceable, claim to a grant, because of the actions of the Governor of the day, should not have their expectations disappointed. The scheme contained in the local Act of 1833, re-enacted in the local Act of 1835, for ensuring that all such legitimate expectations would be met, shows the weight the authorities attached to that. Since the promises and engagements in question, which were the foundation for claims to grants in respect of Crown lands which the authorities considered should be met, if legitimate, were not

legally binding on the Crown, the inclusion in the 1855 Act of the proviso served an important object. Once the prerogative powers of the Crown to dispose of the waste lands of the Crown were fettered by the enactment of the Imperial Act of 1842 (and then by the Imperial Act of 1846, and by associated Orders in Council), it would not have been open to the Crown thereafter to honour any such promises, in the absence of the proviso that first appeared in s. 20 of the 1842 Act, repeated in the 1855 Act; this latter provision ensured that the Crown's power to fulfil such promises and engagements made prior to 1842 would continue, notwithstanding the repeal in 1855 of the 1842 Act and notwithstanding the vesting by that 1855 Act of full control over the disposition of interests in Crown lands in the new New South Wales Legislature.

The applicants' argument also involves the proposition that statements made by the Secretary of State to the Governor in formal Despatches, be they recommendations or instructions, made only after the mode in which interests in Crown lands were to be disposed of was prescribed by statute in 1842, could give rise to a promise or engagement that could lawfully be carried into effect because of the proviso to s. 2 of the NSW Act 1855. A promise made after 1842 not to grant pastoral leases unless they contained a provision that would preserve to the Aboriginal inhabitants of the land their traditional rights of access and user, would, I think, be a promise to act inconsistently with the statutory regime established in 1842. Power to act for the protection of

Aboriginal interests when exercising the authority to dispose of Crown land by alienation of the fee simple or conveyance for any lesser estate, by way of sale, given by the 1842 Act was, I think, limited until 1849 by s. 3 of that Act to power to except from any such sale and to reserve to the Crown such lands as were required for the use or benefit of the Aboriginal inhabitants of the country. That power could not, in my opinion, authorise the transfer to the purchaser of a leasehold interest under the 1842 Act of land, while subjecting that land to a condition giving the Aboriginal inhabitants access to it. Such a condition could lawfully be inserted in pastoral leases granted after the Order in Council of 18 July, 1849 issued under the 1846 Imperial Act came into force. But that could be done only by the Governor, if he considered, in the exercise of his discretion, it was appropriate to do that in the circumstances of the particular case. For the reasons given, any promise or undertaking by anyone else, including the Secretary of State, made after the Order in Council of 1849 came into effect, to include in all grants of leases under the 1842 or the 1846 Acts a term protecting traditional native rights would be inconsistent with the legislative scheme.

Even if I am wrong in thinking that the expression "promises or engagements" in the relevant legislation had a clearly understood meaning in 1855, I do not think anything in the material before me and, in particular, in the documentary material identified as being of critical significance to the

applicants' case, gives any support for a conclusion that, prior to the passing of the 1855 Imperial Act, any undertaking had been given or commitment made by or on behalf of the Crown for the benefit of Aborigines which could amount to a promise or engagement of the kind relied on. The evidence shows only that, from time to time in the 1840s, the most senior officials of the Imperial government with responsibility for colonial affairs and probably the Imperial government itself was concerned that the Aboriginal inhabitants of New South Wales would not be denied access, by the expansion of pastoral activities in the Colony to their traditional lands. Governors were exhorted, for a time, to take action to achieve that and were given the regulatory power to do that. 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. Isaac J, in Williams v The Attorney-General for New South Wales, supra, at 453, describes the provisions of the NSW Act 1855 vesting control of the waste lands of the Crown in the legislature of the Colony as "a complete reversal of policy; it was the deliberate and final abandonment of a system of political control with reference to which the Acts [of 1842 and 1846] had been framed, and it was the adoption of an entirely new line of action, a complete transfer of political power, and all the local control of the subject matter which that political power required."

Summarising, my opinion is that the material relied on by the applicants fails to establish that anyone acting on behalf of the Crown gave an undertaking that could be described as a promise or engagement within the ordinary meaning of those words, to preserve native title rights from extinguishment which was intended to endure permanently. Further, for the reasons given, the statutory expression

"promises or engagements" does not encompass undertakings to preserve native title rights said to have been given, but only undertakings to grant interests in Crown lands made before the 1842 Act came into force, which undertakings had not been carried into effect or completed by issue of a formal deed of grant when the 1855 Act came into effect. It is unnecessary to identify the full content of the expression "contracts" in the proviso. But s. 23 of the 1842 Act defined "Waste Lands of the Crown" to mean lands vested in the Crown "and which have not been already granted or lawfully contracted to be granted" in fee simple or for a term of years. The only provisions in force in New South Wales in 1842 providing for the alienation by contract of Crown lands were Lord Ripon's regulations. This definition of "Waste Lands of the Crown", in excluding from the concept lands still vested in the Crown but which the Crown had contracted to dispose of, read with the proviso in s. 20, identifies, in part, the content of the expression "contracts" in the proviso in s. 2 the NSW Act 1855. The expression "contracts" in the proviso in the NSW Act 1855 would also include uncompleted agreements for leases to be issued under the 1847 Order in Council. The term "contracts" is a clear reference to arrangements with respect to the disposition of interests in Crown waste lands involving legal obligations.

The remaining issue is whether any of the legislation or instruments referred to in the question operated as a limitation on the powers of the Queensland

Legislature. (It is unnecessary to decide whether the proviso to s. 2 the NSW Act 1855 ever operated to impose a limitation on the powers of the New South Wales Legislature.)

In my opinion nothing in any of the instruments or in ss. 30 or 40 the Constitution Act 1867 ever operated as such a limitation.

The Letters Patent of 6 June, 1859 issued under the authority of s. 7 of the Imperial Act of 1855 constituting Queensland as a Colony separate from New South Wales, by cl. 5, vested in the first Governor full power and authority, with the advice of the Executive Council, to grant any waste or unsettled lands in the new Colony, subject to the proviso that in so acting he was to observe the provisions contained in any law in force in the new Colony for regulating the sale and disposal of such lands. Such provisions included the proviso to s. 2 the NSW Act 1855, since cl. 20 of the Order in Council of 6 June, 1859 declared that that Act was to be in force in the new Colony unless and until "other provisions shall be made as to any of the matters aforesaid by Act of the Legislature of Queensland". "Other provision" was made by that Legislature when it enacted ss. 30 and 40 the Constitution Act 1867. Thereafter, s. 2 the NSW Act 1855 and its proviso ceased to apply in Queensland. (The applicants did not place any reliance on cl. 20 of this Order in Council.)

The Order in Council of 6 June, 1859, providing for the establishment of a Legislature in the new Colony, also made under the authority of s. 7 of the 1855 Imperial Act, by cl. 17, vested in the new Legislature power to make laws for regulating the sale, letting, disposal and occupation of any of the waste lands of the Crown in the new Colony, but subject to the provisos in s. 2 the NSW Act 1855 and s. 4 the Australian Waste Lands Act 1855, "which concern the maintenance of existing contracts". It is difficult to accept that that phrase does not pick up the entirety of the provisos contained in s. 2 and s. 4 of the two Imperial Acts of 1855: this phrase in cl. 17 serves only to identify the provisos intended, not to define the extent to which the provisos in the two Imperial Acts were to apply to the legislature of Queensland. However, cl. 22 of the same Order in Council conferred on the Legislature full power to repeal cl. 17, a power exercised by s. 3 the Repeal Act 1867 (Old). The application by cl. 17 of these provisos to the Queensland Legislature's power to make laws with respect to Crown lands plainly could never have been an entrenched fetter on that power.

Neither s. 30 nor s. 40 the Constitution Act 1867 could operate as a limit on the powers of the Queensland Legislature to entrench these provisos either, given the relevantly plenary powers of that Legislature as identified in McCawley v R [1920] A.C. 691 and Union Steamship Company of Australia Proprietary Limited v King (1988) 166 C.L.R. 1.



It follows from what has been said that Questions 1A(a) and 1A(b) must be answered: no.

The Native Title (Queensland) Act 1993 (Old), as amended, does not require any different answer.

### Question 1B

"If the answer to each of the questions in 1A is "no":-

1B. If at any material time Aboriginal title or possessory title existed in respect of the land demised under the pastoral lease in respect of the Holroyd River Holding a copy of which is attached hereto ("Pastoral Lease"):

- (a) is the Pastoral Lease subject to a reservation in favour of the Wik Peoples and their predecessors in title of any rights or interests which might comprise such Aboriginal title or possessory title which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?;
- (b) does the Pastoral Lease confer rights to exclusive possession on the grantee?

If the answer to (a) is "no" and the answer to (b) is "yes":-

- (c) does the creation of the Pastoral Lease that has these two characteristics confer on the grantee rights wholly inconsistent with the concurrent and continuing exercise of any rights or interests which might comprise such Aboriginal title or possessory title of the Wik Peoples and their predecessors in title which existed before the New South Wales

Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?;

- (d) did the grant of the Pastoral Lease necessarily extinguish all incidents of Aboriginal title or possessory title of the Wik Peoples in respect of the land demised under the Pastoral Lease?"

The ninth to twelfth and fourteenth to eighteenth respondents are lessees under pastoral leases of portions of the lands the subject of the applicants' native title claims. The lease of the Holroyd River Holding referred to in Question 1B has been selected as a typical example of these leases. The persons to whom the Holroyd River Holding lease was granted held a lease over the same area under the Land Act 1910 (Old) for a term of 30 years commencing from 1 October, 1944; they surrendered that lease as from 31 December, 1973, after having made application for the grant of the lease with which I am concerned the term of which commenced the following day. The question focuses solely on the current lease and ignores the earlier lease because the current lease is no doubt considered to be typical of a number of leases granted over lands in the area of the applicants' claim not previously leased. The nineteenth respondent, the Thayorre People, is a separate clan from the Wik Peoples. They claim native title over an area of land around the Edward River, which includes areas under pastoral lease; part of this land is within the southern portion of the Wik Peoples' claim. Accordingly, the Thayorre People were joined in this action and they cross-claim for a declaration of native title in respect of the

entire area in which they are interested, including the area that is within the Wik Peoples' claim.

The question raises for determination the limited issue whether, if a pastoral lease has the two specific features referred to in Question 1B(c), viz., the absence of a reservation sufficient to preserve native title rights from extinguishment and the right in the lessee to exclusive possession to the leased land, the lease will, by reason of those two features alone, necessarily extinguish any native title rights that may have existed in the land prior to the grant of the lease.

Since the question was argued, the Full Court of the Federal Court has given its decision in North Galanjanja Aboriginal Corporation v State of Queensland (1995) 132 A.L.R. 565. That was an appeal from a direction given by the President of the National Native Title Tribunal, under s. 63 the Native Title Act 1993 -(Cth), to the Registrar, not to accept an application by an Aboriginal clan for a determination under the Act that native title existed over certain land in North Queensland. The President gave the direction because, after inquiry, he concluded that the claim could not succeed, since either one of two pastoral leases that had been issued over the land in question in 1883 and then in 1907, for a term commencing in 1904, extinguished native title. The Full Court held that the President was in error in finding that the 1883 lease extinguished any native

title that may have existed, given certain factual uncertainties as to the terms of such lease as may have then issued and given that the President was only charged with determining under s. 63(3) whether the application had so little prospect of succeeding that it should be summarily rejected. However, by a majority, the Full Court dismissed the appeal on the ground that the grant of the 1904 lease necessarily extinguished any native title rights that may have existed in the lands for the reason that it conferred a right of exclusive possession to those lands on the lessee. The lease was a pastoral lease granted under Part III the Land Act 1902 (Old). It was of a very large area of land, 1,664 square miles (after the surrender of the 278 square miles the subject of the native title claim), for a term of 42 years. The lease was subject to the reservations and statutory limitations upon the lessee's possessory interest, set out in the dissenting judgment of Lee J, at 584-585. Notwithstanding this, Hill J held, at 615:

"... It follows therefore, in my view, that irrespective of the 'issue' of the 1907 lease, the term of years granted took effect as a lease from 1 July 1904. The terms and conditions applicable are those set out in the lease actually issued in 1907 which contains no reservations favourable to the applicants and which I have held was a lease in the sense that it conferred a grant of exclusive possession upon the Bank of New South Wales."

His Honour then went on, at 617, to conclude:

"... The grant of a right of exclusive possession for a term of years is clearly the grant of a right

inconsistent with the right of Aboriginal people to enjoy the rights otherwise conferred upon them by their native title. There may be a question of degree involved if the lease were but for a short term, but that is not the case here. The 1904 lease took effect for 42 years and in my view would clearly be inconsistent with the Aboriginal people maintaining their customary rights to enjoy native title.

...

... It follows thus that the grant of a pastoral lease, such as occurred in 1904 in the present case, operated as a grant inconsistent with the rights conferred by common law native title and against the wishes of the native title holders extinguished their rights."

It was for these reasons that Hill J dismissed the appeal. On the critical point, Jenkinson J, at 577, agreed with Hill J's reasons and conclusions. Lee J, dissenting, held that, for a number of reasons, including the restrictions on the interest the lessee took in the lands that were imposed by the lease instrument and the Act, that it was not open to the President of the National Native Title Tribunal to reach a conclusion, on the reference of the application to him by the Registrar under s. 63(2) that, prima facie, the claim could not be made out and so should be summarily dismissed by the President directing, pursuant to s. 63(3), the Registrar not to accept the application.

I regard the majority decision as binding authority that the executive act of granting a pastoral lease under Crown lands legislation that does not differ materially from the Land Act 1902 will extinguish any native title rights that existed in respect of the Crown land the subject of the lease,

provided the lease confers a right to exclusive possession for other than a short period on the lessee and also provided the lease does not contain a reservation sufficient to preserve those native title rights. In Hill J's opinion, it is the act of granting the lease that extinguishes native title rights; this appears from what is said at 617, where, in concluding that the grant of the 1904 lease extinguished any native title rights in the land, his Honour rejected submissions by the applicants that whether native title was extinguished "must be a mere matter of fact, that is to say, that an inquiry should be held as to whether the exercise of the native title rights continued unabated despite the grant of inconsistent rights". I also regard the majority decision as authority binding on me that a lease will confer a right to exclusive possession sufficient to have that extinguishing effect, notwithstanding the fact that the lessee's interest is fettered by conditions and statutory limitations of the kind to which the 1904 lease was subject and notwithstanding that the grant is expressed to be "for pastoral purposes only", as was the 1904 lease (at 585). The majority decision also, I think, establishes that, if the lease confers exclusive possession and does not contain a relevant reservation, the fact that it is a lease of such a large area of land that a grant for pastoral purposes may be capable, in a practical sense, of being enjoyed for those purposes concurrently with the exercise of native title rights is a consideration that is irrelevant to the extinguishing effect of the grant on native title rights.

Hill J, in the passage in his reasons I have set out, recognised that there may be a question of degree involved in determining whether a pastoral lease conferring exclusive possession extinguishes native title rights, if it is for a short period. Questions of degree may also be involved, depending on the extent of the restrictions imposed by the lease instrument and by the statute under which it is granted, as to whether the particular lease truly does confer a right of exclusive possession or at least a right of possession sufficiently exclusive to extinguish native title. If, however, it is clear from the terms of the leases the subject of Questions 1B and 1C and from the statutes under which they were granted that they must be regarded, conformably with the majority decision in the North Ganalanja Case, supra, as conferring a right sufficient to amount to exclusive possession on the lessee for a substantial period, then that decision would bind me to conclude that the leases did extinguish all native title rights that the Wik Peoples and the Thayorre People may have had.

The instrument of lease referred to in Question 1B is described as "Lease of Pastoral Holding under Part VI, Division I, of the Land Act 1962-1974". It demises and leases to the lessees an area of 2,830 square kilometres and is for a term of 30 years, commencing from 1 January, 1974. It requires the lessees to pay, during the first 10 years of the term, "the yearly rent or sum" of \$707.50 per square kilometre and in each year of each succeeding period of 10 years, "such

yearly rent or sum" as shall be determined by the Land Court. The instrument of lease issued on 27 March, 1975.

The lease is expressed to be "subject to the conditions and provisos in Part III, Division I" of the Land Acts 1962-1974 (Old) and to all other "rights, powers, privileges, terms, conditions, provisions, exceptions, restrictions, reservations, and provisos referred to, contained, or prescribed in and by the said Act, the Mining Act 1968-1974, and 'The Petroleum Acts, 1923 to 1967,' or any Regulations made or which may hereafter be made under the aforesaid Acts or any of them". It contains express reservations of all gold and minerals and petroleum and a reservation to the Crown "and to such persons as shall from time to time be duly authorised by Us in that behalf" of "the free right and privilege of access ... into, upon, over, and out of the said Land, for the purpose of searching for or working Gold and Minerals ... in any part of the said Land"; there is a reservation of "all rights of access for the purpose of searching for, and for the operations of obtaining Petroleum in any part of the said Land: AND ALSO all rights of way for access and for pipe lines and other purposes requisite for obtaining and conveying Petroleum in the event of Petroleum being obtained in any part of the said Land." There is only one other reservation in the lease instrument, viz., a reservation of "the right of any person duly authorised in that behalf by the Governor of Our said State in Council at all times to go upon the said Land, or any part



thereof, for any purpose whatsoever, or to make any survey, inspection, or examination of the same." The applicants did not suggest that this was capable of being read as a reservation having the effect for which they contended.

The lease is also granted upon two express conditions, firstly, that the lessees shall, within five years of the commencement of the lease and to the satisfaction of the Minister, construct a Manager's residence and associated buildings and an airstrip, to Department of Civil Aviation standard, for mail service and Flying Doctor Service; erect 90 miles of internal fencing; erect one set of main yards and dip; construct in "the melonhole country" three earth dams of not less than 3,060 cubic metres capacity each; sow at least 40.5 hectares to Townsville Style as a seed production area and enclose the holding with a good and substantial fence. Secondly, the lessees were required during the whole term of the lease to maintain, in a good and substantial state of repair, all improvements on the holding existing at the commencement thereof, together with the improvements effected in compliance with the first condition.

Neither the instrument of lease nor the Land Acts 1962-1974 confers on the lessee, in express terms, an exclusive right of possession over the land in question; nor do they contain any statement of the purpose for which the land the subject of the lease is to be used. The lease does

not contain any reference to the kind of rights to which the applicants make claim either.

The only relevant limitations imposed by the Land Acts 1962-1974 on the interest of the holder of a pastoral lease are a power in the Minister to give a notice to reduce overstocking (s. 233); a prohibition on destroying any trees without a permit (s. 250) and a right in any person driving stock along a road through a pastoral lease, which is not fenced out, to depasture such stock on lease lands within one half a mile from the centre line of the road (s. 375). While the holder of a pastoral lease under the Land Acts 1962-1974 is liable to have the whole or part of the leased area resumed, his position is generally equated to that of the owner of an estate in fee simple whose lands are compulsorily resumed. See ss. 306 and 308 of the Acts. But under s. 312, after the first 15 years of the term of a pastoral lease has expired, up to one third of the lease area can be resumed without compensation and under s. 313, if the pastoral lease contains a reservation authorised by s. 6(4) of a nominated area for public purposes (which include the establishment of Aboriginal reserves: s. 5), lands up to that maximum area can be resumed without compensation. This lease contains no such reservation. The position, so far as resumption is concerned, of a lessee under a pastoral lease granted under the Land Acts 1962-1974 is in sharp contrast to that of a lessee under the legislation considered in the North Ganalanja Case, supra, which gave the Crown unrestricted right to proclaim reserves

and then to resume, without compensation, any land so required, save for compensation for improvements. The restrictions imposed by the Land Acts 1962-1974 on the interest held under a pastoral lease are significantly less onerous than those imposed by the earlier legislation considered in the North Ganalanja Case.

There are a number of provisions of the Land Acts 1962-1974 that are relevant to the correct identification of the interest comprised in a pastoral lease under Part III Division 1 of the Act. Issue of the lease instrument (which occurred here) vests in the lessee an interest in the leased land: ss. 6(2) and 160(3) (where, as here, the lease has been issued in substitution for an earlier one). The absence of any comparable provision in either the Land Act 1897 (Old) or the Land Act 1902, which together governed the 1904 lease considered in the North Ganalanja Case, supra, gave rise to a difference of opinion between Hill J and Lee J as to whether the 1904 lease conferred an interest in the lands on the lessee only from the date of issue of the instrument of lease in 1907 (the view favoured by Lee J at 584) or from the date on which the term was expressed to commence (as Hill J held at 615). A failure by the lessee to perform all the conditions of the lease and a breach of any such condition render the lease liable to forfeiture: ss. 14 and 295. A pastoral lessee's interest in the lease can be dealt with as property: it can be sub-let (s. 274(2)); it can be mortgaged (s. 275); upon the pastoral lessee's bankruptcy "the property ... in any

holding of a lessee" vests in the Official Receiver or Trustee as owner upon his registration as such in the Lands Department (s. 291). The lessee's interest in the lease can also be transferred (s. 286) and an easement or right of way can be registered over it (s. 282), albeit only with the permission of the Minister. Although the Act is silent on what happens upon the expiry by effluxion of time of a pastoral lease, s. 299 provides that if a lease is determined, for any reason, before the expiration of its term, the land reverts to the Crown. The grantee of such a lease (like the lessee in the North Ganalanja Case) acquires by force of the statutory provisions an interest in the land for the term of the lease, not a lesser right of pasturage.

An interest in the lands the subject of the lease vested in the lessee of the Holroyd River Holding on the issue of the lease instrument. This lease is subject to substantially less onerous restrictions than was the 1904 lease considered in the North Ganalanja Case, supra: the potential for resumption without compensation was substantially less burdensome; the lessee's possession was not liable to be disturbed by the grant by the Crown of licences to third parties to enter and take timber and the lease was not expressed to be limited "for pastoral purposes only". There is no ground for holding that this lease is so different in any material respect from the 1904 lease that it should not be held, for the reasons for judgment of Hill J (Jenkinson J agreeing) in the North Ganalanja Case, supra, to confer on the

lessee the right to exclusive possession of the area of the lease. It follows that, upon the grant of this lease, any native title rights the applicants held in respect of those lands were extinguished, unless the lease contained a reservation sufficient to preserve those rights to the applicants.

### Implied Reservation

No such reservation of the kind referred to in Question 1B(a) is included, in express terms, in the lease. The applicants do not rely on the principles established by cases such as BP Refinery (Westernport) Pty. Ltd. v Shire of Hastings (1978) 52 A.L.J.R. 20 that govern the circumstances in which terms will be implied in contracts to give them business efficacy. They refer, however, to the history of grants of authorisations to occupy Crown lands for pastoral purposes going back into the first half of the nineteenth century. The applicants rely on the arguments advanced in relation to Question 1A and contend that, there being a limitation on the powers of the Queensland Legislature, the Land Acts 1962-1974 must be read down to require the lease to include such a reservation in order to prevent the lease being invalid as a grant in excess of the State's legislative powers. The alternative argument is that, in the absence of any such limitation on legislative power, the same sort of historical considerations relied on in relation to Question 1A justify a construction of the Land Acts 1962-1974 that results

in the implication of such a reservation in the Holroyd River Holding lease.

The main factors referred to by the applicants from which it was said that the true intention of the Queensland Parliament, when it enacted the Land Acts 1962-1974, could be inferred, are summarised as follows:

- "(a) The lessor was Queensland, a body politic presumably aware of the existence of native title in respect of the areas demised and aware of its obligations to the native title holders. The court should be loathe to find that Queensland intended to disregard those rights and callously strip the native title holders of their right to occupy and gain subsistence from their native soil without compensation.
- (b) That reluctance should be strengthened by the long history of Imperial reminders of the need for due observance of native title and the insistence that this was an important moral obligation.
- (c) It is plain that the Imperial government intended that pastoral leases not derogate from the rights of the native titleholders to occupy and gain subsistence from the lands demised.
- (d) It is plain that the Imperial government intended that pastoral leases grant only exclusive rights to pasturage. Indeed, it is plain that at least the earlier pastoral leases were granted at a time when the government believed that was the legal effect of such leases and that seems to have been the prevailing legal understanding at the time.
- (e) The pastoralists might also be presumed to be aware of the existence and rights of the native title holders if not the relevant history of government policy.
- (f) The lands demised were large tracts of unsettled bushland in remote areas. There

was no reason to suppose that the purpose of the lease would be frustrated or even impeded by the co-existence of native title. Indeed, there is no reason to suppose that a lease would have been of greater utility than a lesser interest conferring an exclusive right of pasturage for a similar term. To take but one example, incidents of native title involving periodic entry for the ceremonial purposes could have made no material difference to the utility of a lease designed to permit the grazing of cattle over some 3,000 square kilometres."

I have rejected the argument that there is a limit on the legislative power of Queensland. Nor do I think there is any justification for placing the construction argued for on the Queensland legislation under which the Holroyd River Holding lease was granted.

It is well established that, as Deane and Gaudron JJ said in Mabo v The State of Queensland (No. 2) (1992) 175 C.L.R. 1 at 111, the ordinary rules of statutory interpretation require that clear and unambiguous words be used before there will be imputed to the Legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation. They relied on this principle for the proposition that general Crown lands legislation will not be construed, in the absence of unambiguous words, as intended by the Legislature to apply to extinguish or diminish common law native title rights. Such an approach to statutory construction can only apply when the question is whether a grant under a statute has extinguished native title, i.e., when the question is do the words of the

statute said to authorise a grant extinguishing native title so clearly show an extinguishing intent that there is no possible room for the continued existence of native title? It is no longer open to the applicants (or the Thayorre People) to ask this question, in view of the decision in the North Ganalanja Case, supra. The dictum of Deane and Gaudron JJ in Mabo (No. 2), supra, is of no relevance when the question is whether the statute can be read as making positive provision for the protection of native title by impliedly including in all grants made under it a reservation with that protective effect. The question here is whether the intent of the Queensland Legislature, when it enacted the provisions of the Land Acts 1962-1974 governing the grant of pastoral leases, was that there should be included, by implication, a term protective of native title rights in all grants of pastoral leases. (Interest in this context is to be understood in the sense of the true meaning of the words used by the Parliament: Corporate Affairs Commission of New South Wales v Yuill (1991) 172 C.L.R. 319 at 321-322.)

Once it is accepted that, on its proper construction, the legislation provides for the grant of a lease that confers the right of exclusive possession on the holder, there is, in my opinion, no room for reading the Land Acts 1962-1974 as qualifying the rights so conferred with a reservation in favour of the holders of native title rights. The right to exclusive possession conferred by a pastoral lease granted under the Act is the right to use any and every



part of the leased land which the lessee wishes to use for any lawful purpose. Even if the lessee is limited by implication to using the land for pastoral purposes, he nevertheless is entitled to run, water and hold stock and to erect fences and any other appropriate structures on any portion of the leased land he wishes. Subject only to the express reservations in the lease authorised by s. 6(2) and reg. 51 the Land Regulations 1962 (Old), made under the authority of s. 382(1)(b), and subject also to s. 375 of the Acts, his exclusive possession entitles him to exclude every one else from all such parts of the land that he wishes to use in these ways. An Act which authorises the grant of a lease conferring such a right on the lessee cannot, in my opinion, also be construed as a statute which by implication qualifies that right by preventing the lessee's user of all such parts of the leased area as may be needed to be kept clear of his activities to ensure the preservation of native title rights, a qualification which could range from a very limited to a very substantial burden on the lessee's right of exclusive possession. There is, save in one respect, nothing that I can see in the text of the relevant legislation that provides any foundation for finding that all grants of pastoral leases under this statute contain, by implication, a reservation protective of native title. Provisions such as s. 50(1)(c) confirm that the Land Acts 1962-1974 provide for the grant of pastoral leases over large tracts of land: it may be possible that a lessee could conduct his activities in a way that did not necessarily involve any collision with the exercise of

native title rights. But the possibility that, in particular cases, a pastoral lessee might be able to do that is in my opinion too flimsy a basis for reading the Land Acts 1962-1974 as implying into all grants of pastoral leases the reservation in question.

The applicants argue that the legislative intent that there is to be a protective reservation in all pastoral leases is shown by the historical material on which they rely. If it is permissible to use this material as an aid to statutory interpretation, I regard this material as of little utility because it is limited to events and actions occurring in the first half of the nineteenth century. The applicants ignore events occurring in the century immediately preceding the time when the relevant legislative intent has to be ascertained, the more recent of which are more likely to throw light on the intent of the Queensland Legislature when it acted in the period 1962-1974 to pass the legislation in question.

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It is, I think, possible to gather an understanding of that legislative intent from material to which reference can be made for that purpose, in accordance with established principles of statutory construction. There is provision in the Land Acts 1962-1974 for the creation of Aboriginal reserves: see s. 334 and the definition of "Public purposes" in s. 5, which includes "Aboriginal reserves". There is nothing in the Land Acts 1962-1974 which throws any light on

the purpose intended by the Legislature to be served by such "reserves". But the legislative history of the term in prior Queensland Land Acts, as well as prior Queensland statutes and statutes in force in the State at the same time as the Land Acts 1962-1974, that deal with Aboriginal reserves established by the Crown in Crown lands are in pari materia with the sections of the Land Acts 1962-1974 that make provision for such reserves: see Statutory Interpretation in Australia, 3rd Ed., Pearce & Geddes, paras. 3.27 and 3.29; Statutory Interpretation, 2nd Ed., Bennion, pp. 429-431 and pp. 439-442. All can be considered in the search for the legislative intent.

The first Queensland legislation making provision for Aborigines was the Crown Lands Act 1884 (Old) which, by s. 95, empowered the Governor in Council to grant in trust or to reserve from sale or lease, by proclamation, any Crown lands required for a range of public purposes, including "for the use or benefit of the aboriginal inhabitants of the colony". The first Queensland legislation dealing comprehensively with Aborigines was the Aborigines Protection and Restriction of the Sale of Opium Act 1897 (Old). It provided for the establishment by proclamation of Districts for the purposes of the Act (s. 5); every reserve, which was defined to mean any reserve previously or subsequently granted in trust or reserved from sale or lease by the Governor in Council for the benefit of the Aboriginal inhabitants of the Colony under the provisions of Crown lands

legislation and which so had the same meaning that expression had in the Crown Land Acts, was to be subject to the provisions of that Act (s. 8); the Governor in Council was empowered to appoint Superintendents for these reserves (s. 7). By s. 9, it was provided:

"It shall be lawful for the Minister to cause every aboriginal within any District ... to be removed to, and kept within the limits of, any reserve situated within the same or any other District ... The Minister may ... cause any aboriginal to be removed from one reserve to another."

Only limited classes of Aborigines were exempted by s. 10 from the provisions of s. 9. The Act reflected a policy of resettling Aborigines throughout the Colony on reserves. Further control over the daily lives of Aborigines was provided for by the Aborigines Protection and Restriction of the Sale of Opium Act 1901 (Old). The policy of resettling Aborigines on reserves established by the Government and of the assumption by the Government of very extensive control over the daily lives of Aborigines first given legislative statement in the 1897 Act was re-stated in the Aborigines Preservation and Protection Act 1939 (Old), which, by s. 4, defined "reserves" by reference to Crown land legislation. The 1939 Act was repealed by the Aborigines' and Torres Strait Islanders' Affairs Act 1965 (Old). It was passed in circumstances in which there existed reserves on which Aborigines resided. This Act provided for the management of reserves (s. 13), again defined by reference to Crown lands legislation, and for a measure of control over those reserves

by the Aboriginal residents (s. 44(2)); the more intrusive powers, including the power to compulsorily remove any Aboriginal to a reserve or from reserve to reserve in the earlier legislation, were not re-enacted. However, those powers were retained over all Aborigines living on reserves when the 1965 Act came into effect: ss. 34(a) and 8(1)(a). The 1965 Act was repealed by the Aborigines Act 1971 (Old). This Act also provided for the management of Aboriginal reserves, defined in the standard way, and contained provisions giving a greater degree of control of the reserves to Aboriginal Councils established thereon. Section 28 had no counter-part in earlier Acts: it declared that residence on a reserve was voluntary. The Land Acts 1962-1974 and previous Land Acts made provision for the establishment of Aboriginal reserves that were an integral part of a policy implemented by legislation in force in Queensland over a long period of time that involved the destruction of native title by breaking the connections between Aboriginals and their traditional lands. Cf. Mabo (No. 2), supra, at 59-60, 110 and 188.

I can see nothing in the Land Acts 1962-1974 or in the material to which I was referred by the applicants to justify reading that legislation as requiring, by implication, the inclusion in grants of pastoral leases of a reservation protective of native title. The statutory material to which I have referred is an indication that, in passing the Land Acts 1962-1974 which make provision for the creation of Aboriginal reserves in Crown land, the legislative intent was one

inconsistent with the implication put forward by the applicants.

Question 1B is answered:

as to Question 1B(a): No

as to Question 1B(b): Yes

as to Question 1B(c): Yes

as to Question 1B(d): Yes

#### Question 1C

"If the answer to each of the questions in 1A is "no":-

1C. If at any material time Aboriginal title or possessory title existed in respect of the land demised under the pastoral leases in respect of the Mitchellton Pastoral Holding No. 2464 and the Mitchellton Pastoral Holding No. 2540 copies of which are attached hereto ("Mitchellton Pastoral Leases"):

- (a) was either of the Mitchellton Pastoral Leases subject to a reservation in favour of the Thayorre People and their predecessors in title of any rights or interests which might comprise such Aboriginal title or possessory title which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?;

- (b) did either of the Mitchellton Pastoral Leases confer rights to exclusive possession on the grantee?

If the answer to (a) is "no" and the answer to (b) is "yes":-

- (c) does the creation of the Mitchellton Pastoral Leases that had these two characteristics confer on the grantee rights wholly inconsistent with the concurrent and continuing exercise of any rights or interests which might comprise such Aboriginal title or possessory title of the Thayorre People and their predecessors in title which existed before the New South Wales Constitution Act 1855 (Imp) took effect in the Colony of New South Wales?;
- (d) did the grant of either of the Mitchellton Pastoral Leases necessarily extinguish all incidents of Aboriginal title or possessory title of the Thayorre People in respect of the land demised under either of the Mitchellton Pastoral Leases?"

These leases were granted over lands within the area the subject of the claim by the Thayorre People who have cross-claimed for declarations that the grant of the two Mitchellton Pastoral Leases, referred to in Question 1C, did not impair the Thayorre People's native title rights to the lands the subject of those leases.

Apart from the reference to the Mitchellton Pastoral Leases, this Question is identical to Question 1B. It was not contended on behalf of the nineteenth respondents that any reservation preserving native title could be implied in either

of the Mitchellton leases, none being expressed in the lease instruments or imposed by the Land Act 1910 (Old).

There are, however, some factual differences between the Holroyd River Holding lease, which remains current, and the Mitchellton Pastoral Leases. The grantees of the Mitchellton Pastoral Leases never took possession of their holdings. Moreover, while the first lease was for a term of 30 years from 1 April, 1915, it was forfeited for non-payment of rent on 20 July, 1918. The second lease was also granted for a term of 30 years, which commenced on 1 January, 1919; it was surrendered pursuant to s. 122 as from 31 December, 1921. In my opinion, it is of no relevance that the Mitchellton Pastoral Leases were never taken up or that one was forfeited and one surrendered, because it is the grant which North Ganalanja Aboriginal Corporation v State of Queensland (1995) 132 A.L.R. 565 establishes is the event that extinguished any native title rights which the Thayorre People may have possessed. It was said, in reliance on authority such as Jovner v Weeks [1891] 2 Q.B. 31 at 47, that there being no entry, neither lessee ever obtained an estate or interest in the land so that, for that reason, the mere grant of the lease did not affect the continued existence of native title. But s. 6(2) of the Act of 1910 was in the same terms as s. 6(2) of the Act of 1962 in providing that, upon the issue of an instrument of lease, the interest in the land therein stated vested in the lessee. Absence of entry is therefore irrelevant to the question of extinguishment, even if the



point is not concluded in any event by the North Ganalanja Case.

The lease of the Mitchellton Pastoral Holding No. 2464 was granted under Part III, Division I of the Land Act 1910. The instrument of lease, dated 25 May, 1915, is headed "Lease of Pastoral Holding" under those statutory provisions. It is in very similar terms to the Holroyd River Holding lease the subject of Question 1B. The reservation in respect of minerals is similar in scope, save that the lease being granted before the Petroleum Act 1915 (Old) came into effect, there are no reservations in respect of petroleum. The only significant difference is that this lease is expressed to be a demise to the lessee "for pastoral purposes only". It is a lease for a term of 30 years from 1 April, 1915 at an annual rental fixed by the terms of the lease. The lease was forfeited for non-payment of rent, the declaration of forfeiture being gazetted on 20 July, 1918. It appears that the land then reverted to the Crown: see ss. 134 and 135 the Land Act 1910. The Mitchellton Pastoral Holding Lease No. 2540 dated 14 February, 1919 was granted under the same provisions of the Land Act 1910 as the earlier lease and is identical with that earlier lease, save that its term of 30 years commenced from 1 January, 1919 and it includes reservations in respect of petroleum. The lease was surrendered pursuant to s. 122 the Land Act 1910 by a surrender dated 12 October, 1921. Both leases were for the same area of 535 square miles. There is in evidence a letter

from the Chief Protector of Aborigines dated 8 July, 1921 to the Under Secretary, Home Secretary's Department, expressing concern that the Lands Department did not consult the Chief Protector's Office before granting the lease: "as there are about 300 natives roaming on this country, and when the company starts operations the natives will doubtless be hunted off". The Chief Protector refers to a suggestion that the company might allow the lease to lapse and he urged that, in that event, consideration be given to reserving the area "for native purposes" before any one else is allowed to obtain possession.

The provisions of the Land Act 1910 applicable to pastoral leases are substantially the same as those applied to pastoral leases under the Land Acts 1962-1974, save that a pastoral lease granted under the Land Act 1910 was, like the 1904 lease considered in the North Ganalanja Case, supra, subject to the right of the Commissioner for Lands to issue licences to enter and remove timber, stone etc. from the lease area under s. 199: the Land Acts 1962-1974 contain no comparable provision.

The lease considered in the North Ganalanja Case, supra, and those granted under the Land Act 1910 confer substantially the same rights on the lessee and subject him to substantially the same restrictions: the 1904 lease was subject to a more restrictive limitation than the Mitchellton Pastoral Leases in that it was subject to a condition

reserving to the Crown unrestricted right to resume land for reserves without compensation (save for improvements).

In my opinion, each of the leases issued under the Land Act 1910 is subject to a less burdensome range of limitations and restrictions than the 1904 lease considered in the North Ganalanja Case. There is therefore no basis for concluding that either of the Mitchellton Pastoral Leases (which, like the 1904 lease, were both expressed to be "for pastoral purposes only") was materially different from the 1904 lease. It therefore follows that each of these leases should be held to confer the right to the exclusive possession of the leased area on the lessees. The grant of the first of the Mitchellton Pastoral Leases must therefore be taken to have extinguished any native title rights the Thayorre People may previously have enjoyed with respect to the leased lands.

A number of submissions were made on behalf of the Thayorre People based in part on the fact that the two Mitchellton leases were expressed to be "for pastoral purposes only", that raise questions as to whether the grant of a pastoral lease under Crown lands legislation is sufficient to extinguish native title.

It was submitted that, despite the line of authorities to the contrary, such as O'Keefe v Williams (1910) 11 C.L.R. 171, dealing with the nature of the interest conferred by various kinds of Crown Land Acts grants for

pastoral purposes, the preferable view is that there is no right of exclusive possession because the grant is made under a statutory scheme and the statute does not give it and the instrument denies such a possession because the lease is limited "for pastoral purposes only"; alternatively, if the lease confers a right of exclusive possession, then it is only an exclusive possession in aid of the purpose for which the lease is granted and unless fulfilment of that purpose will necessarily extinguish native title, the exclusive possession cannot. It was also submitted, in reliance on dicta of Deane and Gaudron JJ in Mabo (No. 2), supra, at 110-111, that a lease conferring the right to exclusive possession would still not be an inconsistent estate in the land so as to extinguish the native title unless the lease took the form of an "unqualified" grant and that the Mitchellton leases could not be regarded as unqualified grants because, inter alia, they were expressed to be grants "for pastoral purposes only" and that Crown Land Acts should generally not be construed to provide for pastoral grants that extinguished native title. It was submitted that there is no necessary conflict if native title rights and a leasehold interest conferring exclusive possession co-exist in the same land: (while a lessee takes subject to prior interests including profits a prendre) profits a prendre, which have similarities to certain native title rights, have long been recognised by the law as capable of co-existing with leasehold interests.

All these arguments must be rejected, given that the North Ganalanja Case, supra, binds me to hold that each of the Mitchellton Pastoral Leases conferred a right of exclusive possession of the lands on the lessee and that by itself is sufficient to extinguish native title.

Each of the parts of Question 1C must be answered in the same manner as Question 1B. The answer to Question 1C is therefore as follows:

as to Question 1C(a): No

as to Question 1C(b): Yes - both did.

as to Question 1C(c): Yes

as to Question 1C(d): Yes - the grant of the first  
of these leases extinguished  
Aboriginal title

There is nothing in the Native Title (Queensland) Act 1993 (Old) that requires different answers to those that I have given to Questions 1B and 1C.

## Question 2

"Did the Comalco Act, the Comalco Agreement, or Special Bauxite Mining Lease No. 1 (relevantly now

known as Mining Lease 7024), purport to grant rights to exploit the resources of the seabed beyond the territorial limits of Queensland?"

Reference to the Comalco Act is a reference to the Commonwealth Aluminium Corporation Pty. Limited Agreement Act 1957 (Old). The Comalco Agreement is contained in The Schedule to the Comalco Act. The form in which Special Bauxite Mining Lease No. 1 issued as ML 7024 is contained in the Third Schedule of The Schedule to the Act.

When the question was formulated, all parties assumed that all three instruments could clearly be seen either to have the effect referred to in the question or not to have that effect. The true position is more complicated. After this question had been formulated, the parties' preparation revealed a situation which made it clear that an unqualified affirmative answer to the question, so far as it concerns the Comalco Act and the Comalco Agreement, would not resolve any issue between the parties.

The Comalco Agreement is in the form in The Schedule to the Act, i.e., the form in which the Premier was, by s. 2 the Comalco Act, authorised to enter into the Agreement on behalf of the State of Queensland. Some of the provisions of the Agreement, on their face, purport to grant rights to exploit certain of the resources of the seabed beyond the territorial limits of the State. For example, cl. 20 of the Agreement gives Comalco Aluminium Limited ("Comalco") the

right to win and use "shell shell-grit coral and other calcium bearing materials ... from such parts of the sea and estuaries in or adjacent to the bauxite field as from time to time shall be specified by the Governor in Council", (although no such areas have as yet been specified). It was accepted that Comalco was entitled to argue that the Agreement should be read down so as to confine Comalco's rights to the exploitation of resources of the seabed within the territorial limits of the State.

So far as ML 7024 itself is concerned, in order to determine whether it has the effect referred to in the question, it will be necessary to undertake a factual inquiry to determine if certain areas of water within the lease boundaries are inland waters of the State of Queensland and so within the territorial limits of the State. See A. Raptis & Son v The State of South Australia (1977) 138 C.L.R. 346 at 367. It was also accepted that, if the lease should, on its face, ultimately be held to purport to extend beyond the territorial limits of the State, Comalco was also entitled to agree that it should be read down pursuant to ss. 9 and 35 the Acts Interpretation Act 1954 (Old).

Because there is, in my opinion, no real utility to be served by answering the question, in so far as it relates to the Act and the Agreement, until the factual position as to the geographical ambit of the lease is resolved, I do not propose to answer this question.

Question 3

"If any Aboriginal title or possessory title of the Wik Peoples included rights of ownership, possession or control of minerals or petroleum (other than minerals or petroleum on land below the low water mark), were those rights extinguished by:

as to minerals:

Mining on Private Land Act 1909 (or any amendment thereof)

Mining Act 1968 (or any amendment thereof)

as to petroleum:

Petroleum Act 1915 (or any amendment thereof)

Petroleum Act 1923 (or any amendment thereof)?"

Regulation of Mining in Queensland 1843-1898

Veatch, in Mining Laws of Australia and New Zealand, United States Geological Survey, Bulletin 505, 1911, describes the history of the policies of the governments of Queensland as to alienation of minerals from the time the Moreton Bay District was declared open to settlement in 1842 and lands were first sold in 1843 at p. 163:

"From settlement of colony in 1843 to 1885: No reservation of minerals in deeds.

1843 to 1860: Lands sold without regard to mineral values until discovery of gold in 1858, when government instituted policy of refusing to sell any lands "when there was any reason to suppose that they contained gold". Under the gold fields act the governor could declare specified areas gold fields and practically exempt the lands therein from sale. [See ss. 23 and 25 Gold Fields Act 1874].



1860 to 1872: Mineral lands other than gold sold in areas not exceeding 640 acres at £1 per acre after an expenditure in development of a like amount. [See s. 22 Crown Lands Alienation Act 1860 and s. 32 Crown Lands Alienation Act 1868]. Coal lands were not sold between 1860 and 1865. After 1860 all leases [as contrasted with grants in fee simple] contained a reservation of all minerals with the right to mine on payment of damages.

1872 to 1882: Mineral lands sold in areas not exceeding 320 acres at 30s. per acre after an expenditure of £1 per acre in development work. [See ss. 1, 4, 8 and 21 Mineral Lands Act 1872].

1882 to date [1911]: Sale of known mineral lands practically abandoned and policy of leasing such lands enforced in all cases [See the Mineral Lands Act 1882]. Governor empowered to constitute, by proclamation, any portion of the public land a mining district. The effect of this was generally to reserve the land from sale, but even in a mining district lands not known to contain minerals were sold. [Section 5 of the Act of 1882 empowered the Governor in Council to cancel any lease or license for pastoral purposes once the land was declared a mining district].

1885 to 1892: Gold reserved in all deeds [See ss. 3, 8 and 110 Crown Lands Act 1884].

1892 to 1898: Gold reserved in all deeds. Silver as well as gold reserved in all deeds for lands sold within a mining district or gold field.

1898 to 1899: Silver and gold reserved in all deeds. [See ss. 12 and 13 Land Act 1897]."

Up to 1882, both grants in fee of Crown lands and sales in fee of Crown lands for mineral purposes carried with them title to all minerals, although the position with respect to gold and silver is a complicated one. Veatch comments that from 1882 a policy of leasing lands containing minerals was adopted and the sale of such lands practically abandoned. Section 8 the Crown Lands Act 1884 (Old) empowered the Governor in Council to lease any Crown lands, subject to the

reservations authorised by the Act: s. 109 required all such leases to contain reservations of all mines and minerals and of the right of access for the purpose of searching for and working those mines and minerals. These provisions were repeated in ss. 12 and 14 the Land Act 1897 (Old), which replaced the Crown Lands Act 1884. Section 6(2) the Mining on Private Land Act 1909 (Old) required all grants and leases of Crown land made after the commencement of that Act to contain similar reservations; s. 6(3) the Land Act 1910 (Old), which replaced the Land Act 1897, picked up this provision. This policy has continued: see s. 6(3) the Land Act 1962 (Old) and ss. 14, 15 and 21 the Land Act 1994 (Old) read with s. 1.9(4) the Mineral Resources Act 1989 (Old) and s. 6 the Petroleum Act 1923 (Old).

#### Regulation of Mining in Queensland from 1898

The first statute of general application regulating mining in Queensland was the Mining Act 1898 (Old). This Act repealed prior mining legislation and provided for, among other things, the grant of authorisations to mine for minerals. It did not deal in any comprehensive way with the ownership of minerals in Crown or private land, apart from giving, in s. 154, statutory expression to the common law rule stated in Woolley v Attorney-General of Victoria (1877) 2 App. Cas. 163 that the prerogative rights of the Crown in respect of gold and silver mines could only be affected by express enactment. This legislation generally made provision for

mining in Crown lands only. "Crown Land" was defined in s. 3 to mean all lands vested in Her Majesty which have not been dedicated to any public purpose, or which have not been granted in fee or lawfully contracted to be so granted, or which are not under lease for purposes other than pastoral purposes; the term included all timber and camping reserves, or reserves for Aborigines. There was provision in Part V of the Act for the grant of mining leases over reserves (which were defined in s. 3 to include any land vested in any person upon trust for public purposes). Exceptionally, Part VII contained provisions authorising mining for gold and silver by third parties of certain lands owned by others, provided the lands were within the limits of gold fields or mineral fields proclaimed as such under ss. 5 and 9 and provided also that those lands were alienated in fee simple or first leased from the Crown under the Land Act 1897 only after the commencement of the 1898 Act. Upon the proclamation as a gold field or a mineral field of land within a Crown lease for pastoral purposes, the lessee could elect to treat the proclamation as a resumption of that land and to be entitled to compensation accordingly: see s. 253 the Land Act 1897 and s. 145(2) the Land Act 1910. The device of declaring Crown lands taken up for pastoral purposes, but which had not been alienated in fee, to be a mining field was traditionally adopted to ensure that Crown lands found to contain minerals in workable quantities would be available to the public for mining under authorities granted by the Government of the day, even though those lands had already been made available to others for

pastoral purposes. See Wildash v Brosnan (1870) 1 C.L.L.R. (Qld) 17 and s. 25 the Gold Fields Act 1874 (Qld).

The Mining on Private Land Act 1909 was the first Queensland legislation applicable to all private land which enabled third parties to obtain rights to mine private land. It represented the first step in a process that culminated in the Crown being the beneficial owner of all minerals in all land in Queensland, whether alienated from the Crown or not (except for specified minerals in limited areas of land alienated in the 1860s and 1870s for the express purpose of mining for those minerals), in respect of which the Crown asserted the right to control their exploitation. The process involved three stages: firstly, a declaration, repeatedly confirmed, of Crown ownership of all minerals in all lands not alienated in fee simple before 1 March, 1910, when the 1909 Act commenced; secondly, the expropriation by the Crown of ownership of all minerals (save for the excepted minerals I have referred to) in lands alienated in fee simple by the Crown prior to 1 March, 1910<sup>--</sup> and, thirdly, in relation to the excepted minerals, the vesting in the Crown of the exclusive right to authorise mining for those minerals.

The 1909 Act, which by s. 1 was required to be read as one with the Mining Act 1898, provided for the grant to owners of private land and third parties, on application made under the Act, of "mining tenements" comprising private land. The term "Private Land" was in essence defined by s. 4 of the

1909 Act to mean land alienated from the Crown for an estate in fee simple or land which was lawfully contracted to be so alienated; the term did not include a reserve and, with certain limited exceptions, did not include land alienated in fee simple before 1 March, 1910, the date of commencement of the 1909 Act. The grant of such a mining tenement conferred on its owner the right to mine for the gold or other mineral for which the tenement was sought (s. 16). The right to the gold and other mineral recovered under the authority of a miners' right or a gold or mineral lease was conferred on the holder of the relevant authority: see ss. 16(2) and 40 the Mining Act 1898.

Section 6 of the 1909 Act, in the form in which it was originally enacted, provided:

"(1.) Subject to this Act-

- (i.) Gold on or below the surface of all land in Queensland, whether alienated in fee-simple or not so alienated from the Crown, and if so alienated whensoever alienated, is the property of the Crown;
- (ii.) Silver on or below the surface of all land in Queensland, whether alienated in fee-simple or not so alienated from the Crown, and if so alienated whensoever alienated, other than land alienated in pursuance of section twenty-two of "The Crown Lands Alienation Act of 1860", or section thirty-two of "The Crown Lands Alienation Act of 1868", or section twenty-one of "The Mineral Lands Act of 1872" is the property of the Crown;
- (iii.) Copper, tin, opal, and antimony on or below the surface of all land which is situated within the limits of a gold field or mineral field, and has been alienated

in fee-simple from the Crown or lawfully contracted to be so alienated since the first day of March, one thousand eight hundred and ninety-nine, and also on or below the surface of all land wheresoever situated which is not alienated in fee-simple from the Crown at the commencement of this Act, are the property of the Crown;

- (iv.) Coal on or below the surface of land subject to "The Agricultural Lands Special Purchase Act of 1901", whether alienated in fee-simple from the Crown at the commencement of this Act or not, is the property of the Crown;
- (v.) All other minerals on or below the surface of all land which is not alienated in fee-simple from the Crown at the commencement of this Act are the property of the Crown.
- (2.) All Crown grants and leases under any Act relating to Crown land issued after the commencement of this Act shall contain a reservation of all gold and minerals on and below the surface of the land comprised therein, and also a reservation of the right of access for the purpose of searching for or working any mines of gold or minerals in any part of the land."

Save in respect of all gold and most silver and save in respect of copper, tin, opal, antimony and coal in certain classes of land, the Act of 1909 did not attempt to disturb the title to minerals acquired under grants in fee simple made prior to the commencement of that Act.

Section 6(1)(i) the Mining on Private Land Act 1909 both affirmed the Crown's prerogative right to the royal metal, gold, and in terms operated as an expropriation of any mineral gold that may have passed, prior to 1 March, 1910, into private ownership under grants in fee that included gold.

I am unable to say, from the material before me, whether the sub-section had any practical effect by way of expropriating any privately owned gold, although it is possible it may have had some such practical effect. It was only by s. 110 the Crown Lands Act 1884 that grants in fee were first required to contain a reservation of gold and Veatch, in Mining Laws of Australia and New Zealand, supra, says at p. 169:

"The early deeds of grant in Queensland contain no reservation of the royal metals, and although this region was a portion of New South Wales at the time that the common-law right of the government to the gold in all lands was proclaimed by Governor Fitzroy in 1851, this doctrine has never been enforced in this state. The decision of the privy council in 1877 that under the common law a grant in Australia does not pass to the grantee the gold and silver that may be found under the land described in the grant, unless the intention that such minerals should pass is expressly stated in apt and precise words (Woolley v Attorney-General Victoria), has never been enforced in Queensland, though it has led to several provisions at law and transactions which would otherwise be unintelligible."

The correctness of Veatch's opinion is supported by what Windeyer J said in Wade v New South Wales Rutile Mining Company Pty. Ltd. (1969) 121 C.L.R. 177 at 186. In Plant v Rollston (1894) 6 Q.L.J.R. 98, the Full Court of the Supreme Court of Queensland held that a grant in fee from the Crown confers upon the grantee possession of any gold or silver mine in the land. In Day Dawn Block and Wyndham G.M. Co. Ltd. v Plant (1901) 11 Q.L.J.R. 18, Chubb J treated Plant v Rollston as authority that the subject can lawfully mine his own land for gold to which gold he did not have any title without first having obtained a licence from the Crown, leaving the Crown to

exercise its prerogative power "how and when it pleases". In S.A. Hutchinson v Catherine Scott (1905) 3 C.L.R. 359, Griffith CJ, who gave the leading judgment in Plant v Rollston, referred to "the practice in many parts of the British Empire for owners of private land to look for gold and to take it away without being interfered with by the Crown". It appears to have been the practice in Victoria: see Ah Wye v Lock (1872) 3 V.R. (Eq) 112 at 115. That s. 6 of the 1909 Act was intended to put a stop to this practice is supported by the comments of the Attorney-General in his second reading speech on the Bill that became the 1909 Act. In Plant v Rollston, Griffith CJ also stated, at 102: "... it appears that no instance is to be found of an assertion of the right of entry [by the Crown] without the freeholder's consent since the case of Mines was decided." Section 6(2) of the 1909 Act was plainly intended to ensure that the Crown would have the right, at its election, to enter a freeholder's land and to mine for gold.

Section 6(1)(ii) the Mining on Private Land Act 1909 dealt with the other royal metal, silver, in the same manner that s. 6(1)(i) dealt with gold. However, s. 6(1)(ii) recognised that the Crown had granted, under each of the three Acts there referred to, title to and the right to mine for an extensive range of minerals that included silver: the 1909 Act made no attempt to interfere with private ownership of silver, the title to which had passed from the Crown under grants made under those Acts authorising the mining of silver.



Section 22 the Crown Lands Alienation Act 1860 (Old) empowered the Governor to grant land to persons "desirous of purchasing lands for mining purposes other than for coal or gold". Section 32 the Crown Lands Alienation Act 1868 (Old) was to similar effect (save that the minerals that could be mined under a grant under that provision included coal). Part I the Mineral Lands Act 1872 (Old) empowered the Governor to sell land to any person "desirous of purchasing the same for mining purposes other than for gold". It appears from s. 22 of the 1860 Act and s. 21 of the 1872 Act that the title such a person took was a grant in fee simple which carried with it, on the well established common law principles referred to in Forbes & Lang, Australian Mining & Petroleum Laws, 2nd Ed., para. 201, ownership of and the right to mine all the minerals in the land (other than reserved gold and coal, in the case of a title granted under the 1860 Act, and other than reserved gold, in the case of a title granted under the 1872 Act). The 1868 Act does not describe the title granted under s. 32 otherwise than by empowering the Governor "to sell" the land to persons "desirous of purchasing lands for mining purposes other than for gold": in the context of this Act, this power of sale would, I think, be a power to transfer an estate in fee simple to the purchaser in the land, including the minerals (but with a reservation to the Crown of gold). Cf. Cane v Sinclair (1884) 10 V.L.R. (Law) 60 at 64. Parliament, by s. 6(1)(ii) the Mining on Private Land Act 1909, accepted that a grant under each of these provisions passed to the grantee title to silver in the land granted. But save only

for silver, the title to which passed into private ownership under the Acts of 1860, 1868 and 1872, s.6(1)(ii), like s. 6(1)(i), in terms operated as an appropriation of any silver that may have passed, prior to 1 March, 1910, into private ownership under grants wide enough to have included silver. This provision may have had practical effect as an expropriation of some privately owned silver: it was not until the passing of s. 13 the Land Act 1897 that grants in fee were required to contain a reservation of silver to the Crown and Veatch's comments at p. 169, already set out, are as applicable to silver as to gold.

As to s. 6(1)(iii) the Mining on Private Land Act 1909, 1 March, 1899 was the date of commencement of the Mining Act 1898 (s. 2 of that Act). In view of the history of mineral regulation referred to, grants in fee of lands containing copper, tin, opal and antimony made prior to that date would have carried with them title to these minerals. But s. 58 of Part VII of the Mining Act 1898 (which Part empowered the Crown to grant authorities to third parties to mine for gold and silver in lands in proclaimed gold and mineral fields alienated in fee after that date) required grants in fee of all lands so located and made after 1 March, 1899, to contain a reservation to the Crown of copper, tin, opal and antimony, by then economically important minerals. It is apparent from the Attorney-General's second reading speech on the Bill that became the Act of 1909, that authorities to mine for these four minerals in lands granted

in fee within gold and mineral fields only after March 1899 were issued to third parties, between then and 1909, pursuant no doubt to Parts III and IV of that 1898 Act. Section 6(1)(iii) thus merely confirmed the Crown's ownership of these four minerals in certain lands, asserted by s. 58 the Mining Act 1898, even though those lands were granted in fee after March 1899. The 1909 Act made no attempt to expropriate to the Crown any of those four kinds of mineral that had passed into private ownership, e.g. by grants in fee made prior to 1899.

As to s. 6(1)(iv), the Agricultural Lands Special Purchase Act 1901 (Old) provided for the acquisition by the Crown, by legislatively ratified agreement with the fee simple owners, of certain lands intended by the Crown to be made available thereafter for selection for closer settlement under the Agricultural Lands Purchase Acts 1894-1901 (Old). By s. 5 of the Act of 1901, it was provided that every deed of grant issued in respect of land so acquired and then selected "shall contain a reservation of all coal in or under the land granted". This provision thus operated as a confirmation of the title to the coal which the Crown took on acquisition by it of the lands in question and which it intended to retain thereafter, notwithstanding the subsequent grants by the Crown of the lands to selectors. The implication in this provision is that coal in land already alienated in fee simple by the Crown at the commencement of the 1909 Act (otherwise than land subject to the Agricultural Lands Special Purchase Act 1901)

passed into the ownership of the grantee of such land, in the absence of an appropriate reservation in the grant. That this was the position in relation to coal in all such lands and in relation to all minerals other than gold and silver and the copper, tin, opal and antimony deposits I have referred to, is confirmed by s. 6(1)(v) of the 1909 Act.

Section 6(2) the Mining on Private Land Act 1909 gave effect to the policy, declared in s. 6(1)(v), that all minerals in Crown land not alienated by the date of commencement of the 1909 Act on 1 March, 1910, were to remain the property of the Crown: s. 6(2) was designed to ensure that future grants of Crown land would not carry with them title to any minerals at all and that the Crown would retain, in addition to mineral ownership, power to authorise the search for and the extraction of those minerals, notwithstanding the subsequent alienation in fee of the land in which they were contained, a power the reason for which is explained by the decision in Plant v Rollston, supra.

The Mining on Private Land Act 1909 was amended a number of times, one particularly important change being effected by the Mining Acts Amendment Act 1925 (Qld). It inserted a new s. 21A in the 1909 Act, which took effect from 12 October, 1925. By s. 21A(3), it was declared that "gold and all minerals ... on or below the surface of all land in Queensland, whether alienated in fee simple or not so alienated from the Crown, and if so alienated, whensoever

alienated, are and each of them is the property of the Crown". This operated as a general expropriation to the Crown of all minerals then in private ownership and, in particular, of all privately owned minerals in land alienated in fee simple prior to the commencement of the 1909 Act, which had for the most part not been touched by that Act. The only exception to this general expropriation of minerals, which up till then had been privately owned, was coal in land alienated in fee simple prior to the commencement of the 1909 Act (other than coal in land subject to the Agricultural Lands Special Purchase Act 1901, to which I have referred), which was declared to remain the property of the owner for the time being of that land. No attempt was then made to fetter the rights of such owners to deal with their coal: that came later.

While s. 21A(3) appropriated to the Crown all minerals (other than coal) previously in private ownership in land alienated in fee prior to 1 March, 1910, s. 21A(5) gave to the previous owners of those minerals and their successors in title to those minerals, priority to the grant of mining tenements under the 1909 Act to mine those minerals, over all others, provided such persons made application for a mining tenement within one year after the date of the passing of the 1925 amending Act. Section 21A(3) appropriated to the Crown all minerals, including silver, that had passed to the grantees of land under the Crown Lands Alienation Act 1860, the Crown Lands Alienation Act 1868 and the Mineral Lands Act 1872; but s. 21A(5) only gave this priority to such grantees

and their successors in title for the purpose of obtaining a mining tenement to mine for silver.

Section 21A the Mining on Private Land Act 1909 remained in the form it was in following certain 1950 amendments until the Act was repealed and provisions regulating mining on private land were inserted in the Mining Act 1968 (Old), by the 1971 amendments to the Mining Act 1968.

As originally enacted, the Mining Act 1968, like the Mining Act 1898, only made provision for the grant of authorities to mine Crown land, defined in s. 7 to mean land other than Crown land which has been alienated in fee simple or in respect of which a right to a grant by the Crown in fee simple has accrued to any person and other than a reserve; Part V of the 1968 Act made provision for the grant of authorities to mine over land comprised in certain classes of reserves. The provisions declaring Crown ownership of minerals continued to be found only in the Mining on Private Land Act 1909. However, the 1971 amendment to the Mining Act 1968 repealed the Mining on Private Land Act 1909 and inserted in the Mining Act 1968 a new Part XII which dealt with mining on private land. The 1968 Act (assented to in December 1968) and the 1971 amendments, including Part XII, all came into effect on 1 January, 1972. Section 110 of the new Part XII repeated the declaration in s. 21A the Mining on Private Land Act 1909 of Crown ownership of all minerals in all land in Queensland, whether Crown land or private land and, if private

land, whensoever alienated in fee simple. The section, however, excluded from this declaration of Crown ownership all the minerals (not just the silver exempted from the declaration of Crown ownership in s. 6 the Mining of Private Land Act 1909) in land alienated under the 1860, the 1868 and the 1872 Acts to which I have referred, which minerals had originally passed, by the grants, to the owners of those lands: as I have indicated, s. 21A(3) the Mining on Private Land Act 1909, which came into effect in 1925, had appropriated these very minerals to the Crown. This same 1971 exclusion of these minerals from the general declaration of Crown ownership of all minerals in Queensland is repeated in the current mining legislation, in s. 1.9 the Mineral Resources Act 1989, which repealed the Mining Act 1968 as amended. Section 21A(3) of the 1925 amending legislation did not, in form, operate as a variation of any of the grants made under the statutes of 1860, 1868 and 1872, but rather as a provision which thereafter deprived those grants of their stated effect as grants of mineral rights by appropriating those rights to the Crown. The 1971 amending legislation appears to have operated to permit those grants once again to have full effect as grants of mineral rights. But it is not necessary, in order to answer the question for my decision, to resolve the significance of this abandonment in 1971 of Crown ownership of these minerals acquired by expropriation in 1925, since it is not suggested that any of the subject lands were granted under the relevant provisions of the 1860, the 1868 or the 1872 Acts. Section 110 the Mining Act 1968-1971

acknowledged that, while coal was generally owned by the Crown, coal in land alienated in fee simple prior to the commencement of the 1909 Act remained privately owned.

Section 109 of Part XII the Mining Act 1968-1971 applied to private land those provisions of the Mining Act 1968 and of the Coal Mining Act 1925-1969 (Old) which related to the grant of mining titles over Crown land, subject to the requirement imposed by s. 112 that no person (including the owner of the land in question) should be upon the surface of any private land for any of the purposes of the Mining Act 1968-1971 or the Coal Mining Act 1925-1969, save under the authority of a permit to enter issued under s. 118 the Mining Act 1968-1971; s. 112 also provided that a mining title in respect of private land could only be granted to the holder of such a permit to enter. This section thus preserved to the Crown the exclusive right to authorise the mining of all minerals in Queensland, whether they were in Crown or private land and whether they were in Crown or private ownership.

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The complicated history of the regulation of the exploitation of privately owned coal is dealt with in the judgment of Hoare J in Meacham & Leyland Pty. Ltd. v New Hope Collieries Pty. Ltd. and The Attorney-General for the State of Queensland (Full Court of the Supreme Court of Queensland, unreported, 2 April, 1976). The limited class of persons who owned coal because they or their successors in title had obtained grants in fee simple without any reservation of coal



to the Crown prior to the commencement of the 1909 Act, remained free to deal with their coal until the Coal Mining Acts Amendment Act 1950 (Old). By s. 33A, inserted by that amending Act, the Governor in Council was authorised to grant a coal mining lease over any private land to mine for coal in that land, whether it was the property of the Crown or whether it was privately owned coal; the owner, successor in title or grantee of the right to mine privately owned coal was given priority over all others in obtaining a coal mining lease (s. 33A) and royalties payable by the coal mining lessee to the Minister on coal mined were required to be paid over by the Minister, where the coal was privately owned and the owner was not the holder of the relevant coal mining lease, to that owner (s. 33C). Amendments to the Mining on Private Land Act 1909 made at the same time as the Coal Mining Acts Amendment Act 1950 confirmed that coal in land alienated in fee simple before 1 March, 1910 (not being land subject to the Agricultural Lands Special Purchase Act 1901 in which coal was reserved to the Crown and not being land granted with a reservation of the coal therein to the Crown) was the property of the grantee of the land; all other coal was declared always to have been the property of the Crown. The Full Court in the Meacham & Leyland Case, supra, concluded that, although from 1950 to 1974 it was clear that the Crown could grant a lease to mine privately owned coal, the effect of the 1974 amendments to the Mining Act 1968 and the limiting, by the Mining Royalties Act 1974 (Old), of royalties payable in respect of coal to royalties on coal owned by the Crown,

resulted in the Crown losing the right it had from 1950 to 1974 to grant leases for the purpose of mining privately owned coal; the owner of that coal was held, from 1974, to be the only person with that right. Amendments made to the Mining Act 1968-1974 by the Mining Act Amendment Act 1976 (Old) (which provided for the payment of royalty to the owner of privately owned coal by the person winning such coal) and by the Mining Act Amendment Act 1976 (No. 3) (Old) (which expressly prohibited the owner of privately owned coal from granting any right to another to mine that coal and vested in the Crown the sole right to grant an authority to mine privately owned coal) were held in Meacham & Leyland Pty. Ltd. v New Hope Collieries Pty. Ltd. and Woods (Nominal Defendant) (Full Court of the Supreme Court of Queensland, unreported, 14 July, 1977) to have restored the position that obtained in relation to the mining of privately owned coal between 1950 and 1974 and to have confirmed that from 1976, only the Crown could authorise the mining of privately owned minerals, including coal.

The Mining Act 1968-1986 was repealed by the Mineral Resources Act 1989. This is the Act which now regulates, among other things, the grant of authorities to search for and mine minerals in all land in Queensland; the Act draws no distinction between Crown land and privately owned land. Section 1.9 repeats the declaration of Crown ownership of all minerals in all lands in Queensland, except for coal in land alienated in fee simple without a reservation of coal prior to

1 March, 1910 and except for minerals in land alienated in fee simple for mining purposes pursuant to the Crown Lands Alienation Act 1860, the Crown Lands Alienation Act 1868 and the Mineral Lands Act 1872. In s. 1.10, the Act repeats earlier provisions vesting in the Crown sole right to authorise the search for and the mining of all minerals in Queensland, including privately owned minerals.

In broad outline, the policy adopted by successive Queensland governments since 1909 has been to extend Crown ownership to all minerals in all lands in Queensland, whether or not those lands have been alienated in fee simple, and to vest in the Crown the sole right to grant authority to mine any minerals in Queensland, including the very limited range of minerals which remain in private ownership, viz., coal in land alienated in fee simple prior to the commencement of the Mining on Private Land Act 1909 (and possibly minerals in land alienated for mining purposes pursuant to the 1860, the 1868 and the 1872 Acts, following the enactment in 1971 of s. 110 of Part XII the Mining Act 1968-1971).

As I have said, it was not suggested that any of the lands the subject of the applicants' claims were lands alienated for mining purposes pursuant to s. 22 the Crown Lands Alienation Act 1860, s. 32 the Crown Lands Alienation Act 1868 or s. 21 the Mineral Lands Act 1872. But it is, in my opinion, plain that that component of any native title which might once have subsisted in respect of any of these

three classes of land, that extended to rights of user of minerals, would have been extinguished upon the alienation of those lands: lands alienated pursuant to the 1860, the 1868 and the 1872 Acts were sold, pursuant to the provisions in question of those Acts, expressly for the purposes of mining for all minerals other than gold and, so far as the 1860 Act is concerned, other than for coal and gold. Nor was it suggested that any of the lands in question were lands alienated in fee simple prior to 1 March, 1910. But land alienated prior to 1 March, 1910 without reservation of coal to the Crown vested in the grantee full ownership of the coal: that is sufficient to extinguish any native title rights which may once have extended to coal in lands so alienated.

In so far as the lands the subject of these proceedings comprise lands the subject of any form of Crown grant other than a grant of an estate in fee simple (as appears to be the case) and in so far as they may comprise lands which are still waste lands of the Crown, i.e. lands still held by the Crown under the radical title it acquired to those lands by annexation, any native title in so far as it extended to minerals in any of those lands which the applicants might otherwise be able to make out has, in my opinion, been extinguished by the declaration of Crown ownership of those minerals contained in s. 6(1)(v) the Mining on Private Land Act 1909. This declaration of Crown ownership of minerals has been in force continuously since then, being repeated in s. 21A of the 1909 Act, inserted by the Mining

Acts Amendment Act 1925; in s. 110 the Mining Act 1968-1971, inserted by the Mining Act Amendment Act 1971 (Old) and in the provision currently in force, s. 1.9 the Mineral Resources Act 1989. There can therefore be no question of any possible revival of native title rights because of the repeal of the 1909 Act.

It was submitted on behalf of the applicants that these statutory declarations of Crown ownership of minerals were founded on the assumption that the Crown acquired absolute ownership of the lands containing the minerals upon annexation and that this theory of acquisition by annexation of absolute ownership of the land (including the minerals in it) having been exploded by Mabo v The State of Queensland (No. 2) (1992) 175 C.L.R. 1, the inference cannot be drawn that any of the Queensland legislatures which enacted these various declarations of Crown ownership of minerals intended thereby to extinguish any native title which may have extended to minerals.

I cannot accept this argument. The clear intent of s. 6(1)(v), read with s. 6(2) of the Act of 1909, was to ensure, by declaring Crown ownership of all minerals in all land in Queensland not then alienated in fee simple from the Crown, that no person acquiring thereafter any interest in land from the Crown would acquire any title to or rights with respect to any of the minerals in that land and that full beneficial ownership in those minerals and full power to

control the exploitation of all those minerals would be vested in the Crown. Section 6(1)(i) and (ii) were in terms, designed to operate as expropriations of all gold and most of the silver that may have passed into private ownership under Crown grants prior to the enactment of the 1909 Act. The expropriation of so much of these two minerals which may have earlier passed, by relevantly unqualified Crown grants of estates in fee simple, to the grantees, which took effect at the same time as the Crown repeated the declaration of its ownership of all minerals in Crown lands unalienated as at the date of the Mining on Private Land Act 1909 shows that the Parliament intended something entirely different from merely confirming a belief (now revealed to be erroneous) that the Crown's radical title acquired on annexation conferred on the Crown absolute ownership of the land and all the minerals forming part of the land. The general expropriation of all (save a limited range of) minerals anywhere in Queensland effected by the 1925 amendment to the 1909 Act puts beyond doubt the Crown's intention to acquire full beneficial ownership and public control of the entire mineral resources of the State, irrespective of who, if any one, beneficially owned any interests in the land, apart from the minerals.

The judgments in Mabo (No. 2), supra, recognise that native title rights in respect of lands, over which the Crown only has that radical title which results from annexation, can be extinguished not only by the grant by the Crown of an estate in the land to another inconsistent with the

continuance of the native title rights, but also by the Crown acting to appropriate to itself the land (or an interest in land) for purposes or uses inconsistent with the continuance of native title rights: see per Brennan J at 50; per Deane and Gaudron JJ at 110. By s. 6 of the 1909 Act, the Queensland legislature, in my opinion, exercised its power to appropriate to itself full beneficial ownership of all minerals in Crown land then unalienated, as well as ownership of a range of minerals that may previously have passed into private ownership. The declaration of Crown ownership of minerals in unalienated Crown lands made in 1909 and the assertion by the Crown in the Act of 1909 of the exclusive right to grant authorisations to both the owner of private land and third parties to mine private lands, coupled with the assertion by the Crown in the Mining Act 1898 of the right to grant authorisations to mine for minerals in Crown lands, demonstrates this intention on the part of the Parliament to claim on behalf of the Crown full beneficial ownership of the minerals in lands of the kind that are subject of the applicants' claims.

In Walden v Hensler (1987) 163 C.L.R. 561 at 566-567, Brennan J said of s. 7 the Fauna Conservation Act 1974 (Qld), which provided that all fauna was the property of the Crown and which by s. 54 prohibited the taking of fauna without a licence issued under the Act, that it: "eliminated any right which Aborigines or others might have acquired lawfully to take and keep 'fauna' as defined in the Act, and

any entitlement which Aborigines might have enjoyed at common law to take and keep fauna (assuming that such an entitlement had survived the alienation by the Crown of land over which Aborigines had traditionally hunted)." It appears that, at common law, save for the small range of wild animals belonging to the Crown by prerogative right (as to which see 8 Halsbury, 4th Ed., paras. 1518-1520) no one, including the Crown, had any property in wild animals until they were killed or caught. See Williams, Principles of the Law of Personal Property, 18th Ed., pp. 50 and 166-169. The Crown's radical title to lands in Queensland acquired on annexation would thus appear not to have extended to fauna. In contrast, minerals, as part of the soil, are comprehended within the Crown's radical title. But the statutory declarations of Crown ownership of the minerals to which I have referred are effective, in my opinion, to convert such interest as the Crown has under its radical title in those minerals into a full beneficial ownership by the Crown. Brennan J's obiter dictum in Walden v Hensler, supra, confirms, in my view, that these declarations of Crown ownership, together with the assertion by the Crown of sole authority to permit the exploitation of the minerals, is sufficient to extinguish any native title rights which may once have conferred on the native title holders rights with respect to minerals.

Subsequent legislative action, which included the expropriation by the Mining Acts Amendment Act 1925 of all minerals in all land in Queensland then in private ownership



(save for some coal that was permitted to remain in private ownership) together with the assertion in the Mining Act 1898, the Mining on Private Land Act 1909, as amended in 1925, and in the Coal Mining Acts Amendment Act 1950 of the Crown's exclusive right to authorise the exploitation of all minerals, in all lands in Queensland (including privately owned coal), shows the clearest intention on the part of the Queensland Government to extinguish all rights to minerals possessed by anyone in Queensland (save for the right of ownership of limited coal deposits and possibly minerals alienated under the 1860, 1868 and 1872 Acts, which right of ownership is so fettered as to be restricted to the right to receive royalties on those minerals which the Crown alone could authorise to be mined). The possible restoration by the Mining Act Amendment Act 1971 to heavily fettered private ownership of a small range of minerals expropriated in 1925 does not detract from this conclusion.

In the face of this legislative activity, there is no basis for inferring that the Queensland Legislature from time to time has merely sought to declare a mistaken belief as to the consequences, so far as minerals are concerned, of annexation. The history of the relevant legislation shows that it has long been (and continues to be) the policy of the Queensland Parliament to ensure public ownership of all minerals in the State (save for certain limited exceptions) even though this has meant expropriation by legislative action of minerals which were once vested, by a combination of

legislative and executive action, in private ownership. Since 1909, the Queensland Parliament has acted to assert public ownership of all minerals in both unalienated and alienated Crown land in pursuance of a clearly discernible policy that the mineral resources of the State are an asset the exploitation of which should be under public rather than private control as an asset intended to be exploited for public rather than private benefit. That this has been the intention of the Queensland Legislature is reflected in the long titles to various of the mining statutes, e.g., the Mining Act 1968, which is entitled "An Act to Provide for the Encouragement and Regulation of Mining within the State of Queensland" and the Mineral Resources Act 1989, which is entitled "An Act to provide for the assessment, development and utilisation of mineral resources to the maximum extent practicable consistent with sound economic and land use management". Since 1909 and, certainly since 1925 at the very latest, there has been no room for arguing that, while native title rights cannot subsist in lands alienated from the Crown, they could continue to subsist in unalienated Crown lands, at least in so far as those native title rights consisted of rights with respect to minerals. If the applicants and their predecessors once enjoyed native title in relation to any of the subject lands which extended to rights of user of any minerals in those lands, they lost those rights of user by no later than 12 October, 1925 when s. 21A(3) the Mining on Private Land Act 1909 came into effect, in just the same way as all grantees from the Crown of land in fee simple without

reservation of minerals then also lost all their rights with respect to the minerals in their land (save only for those persons who held under a Deed of Grant in fee simple without reservation of coal to the Crown issued prior to 1 March, 1910, who retained ownership and, until 1950, the full right to exploit coal in their land).

It was submitted on behalf of the applicants that, because the Crown owed fiduciary duties to native title holders, it should be inferred that these general declarations of Crown ownership of minerals were not intended to apply to any minerals that might be the subject of native title. Reliance was placed by the applicants on The United States v The Northern Paiute Nation 393 F.2d 786 (1968) as an authority showing that a Crown declaration of ownership of minerals is not sufficient to extinguish native title rights in respect of minerals. Whether the Crown does owe fiduciary obligations to native title owners is a matter of assumption only at this stage of the litigation. But even if that assumption is made, there is no basis for drawing the inference as to the legislative intention suggested. It is apparent from pp. 793-796 of the report of the Northern Paiute Nation Case, where the early Spanish legislation is examined in detail, that the declaration by the Spanish Crown of ownership of mineral rights in what is now Nevada and California was accompanied by other declarations that the U.S. Court of Claims held were sufficient to preserve any sub-surface mineral rights the Indians may have had under their native title.

It was asserted in the written submissions made on behalf of the applicants that if there are substances which fell within the statutory definition of minerals in early enactments declaring Crown ownership of minerals but which substances were not included in the definition of minerals in later enactments repeating the declaration of Crown ownership of minerals, then any native title rights which the applicants might once have had in respect of such minerals would revive when the substances in question came to be excluded from the statutory definition. I indicated, in the course of argument, that I would regard this submission as hypothetical and not one with which I would deal unless counsel identified, by reference to the relevant legislation, substances of the kind referred to. No such identification was made and the assertion briefly made in the written submissions was not developed further.

It remains to observe that Question No. 3 raises for determination only whether any native title rights that may once have subsisted in relation to minerals have been extinguished by the mining legislation of the Queensland Parliament to which I have referred; nothing I have said can touch on any rights of user of the sub-surface of the lands in question comprising any native title the applicants may be able to make out apart from rights with respect to the user of substances within the statutory definition of minerals.

Regulation of Petroleum Mining in Queensland

The first Act of the Queensland Parliament devoted to the regulation of petroleum exploitation was the Petroleum Act 1915 (Old). Section 4 provided:

"Notwithstanding anything to the contrary contained in any Act or in any grant, instrument of title, or other document, it is hereby declared that petroleum on or below the surface of all land in Queensland, whether alienated in fee-simple or not so alienated from the Crown, and if so alienated whensoever alienated, is and always has been the property of the Crown."

Section 6 required all grants and leases of Crown land made under any Act after the passing of the Petroleum Act 1915 to contain a reservation to the Crown of all petroleum in the land and a reservation of the right of access for the purpose of searching for and for extracting petroleum from any part of such land. Section 4 is an explicit appropriation to the Crown of beneficial ownership of all petroleum in all land in Queensland, including petroleum that previously had vested in private ownership pursuant to grants in fee without any reservation to the Crown of petroleum.

The policy reflected in s. 4 of the 1915 Act is recorded in identical terms in s. 5 the Petroleum Act 1923, which repealed the Act of 1915. This Act continues in force as the Petroleum Act 1923-1993. The declaration of Crown ownership of all petroleum in all land in Queensland contained

in the 1915 Act and repeated in the 1923 Act is still in force.

For the same reasons that I consider that any native title rights in respect of minerals other than petroleum cannot have survived the enactment of s. 21A the Mining on Private Land Act 1909 by the Mining Acts Amendment Act 1925, any native title rights the applicants might once have had in relation to petroleum in any of the subject lands were extinguished by the Petroleum Act 1915, just as were any rights that any grantees of land from the Crown in fee may have had, prior to the enactment of that legislation, in petroleum in their land.

Question 3 is therefore answered as follows:

as to minerals:	Y	e	s	-
				by the <u>Mining on Private</u>
				<u>Land Act 1909</u> or, at the
				latest, by the <u>Mining Acts</u>
				<u>Amendment Act 1925</u>

as to petroleum:	Y	e	s	-
				by the <u>Petroleum Act 1915</u> .

Nothing in the Native Title (Queensland) Act 1993 (Old), as amended, in my opinion, calls for a different answer.

Question 4

"May any of the claims in paragraphs 48A to 53, 54 to 58(a), 59 to 61, 61A to 64 and 65 to 68 of the Further Amended Statement of Claim be maintained against the State of Queensland or Comalco Aluminium Limited notwithstanding the enactment of the Comalco Act, the making of the Comalco Agreement, the publication in the Queensland Government Gazette of 22 March 1958 pursuant to s. 5 of the Comalco Act of the proclamation that the Agreement authorised by the Comalco Act was made on 16 December 1957 and the grant of Special Bauxite Mining Lease No. 1?"

The applicants' claims

The claims set up by the applicants that are referred to in this question proceed on the assumption that (contrary to the applicants' primary position) any one of, or any combination of, the enactment of the Commonwealth Aluminium Corporation Pty. Limited Agreement Act 1957 (Old) ("the Comalco Act"), the making of the Comalco Agreement the subject of that Act and the granting of Special Bauxite Mining Lease No. 1 (i.e. ML 7024) did extinguish the applicants' native title in the areas the subject of Comalco Aluminium Limited's ("Comalco") entitlements.

In their pleading, the applicants allege that each of the decisions to enter into the Comalco Agreement and to grant ML 7024 is void because the applicants and their successors in title, as the relevant native title holders, were denied an opportunity to be heard in opposition to the making of those decisions, in breach of the rules of

procedural fairness, with the result that each of the Comalco Agreement and ML 7024 is invalid and unenforceable (further amended statement of claim paras. 48A-53 and amended application para. C.2.(c)).

Next, the applicants allege that the State of Queensland was under fiduciary and trust obligations to the applicants and their predecessors in title, that the State of Queensland breached these obligations in the way it went about making the decisions to enter into the Comalco Agreement and to grant ML 7024 and in making that Agreement and granting that lease; it is also alleged that Comalco was a participant in these breaches by the State of Queensland. Declarations are sought as to the invalidity of the Comalco Agreement and the grant of the lease; damages and an account are sought against the State of Queensland, in respect of its breach of these obligations. An account is also sought against Comalco in respect of benefits derived by it in consequence of the State of Queensland's breaches of obligation and by reason of its participation in the commission by the State of Queensland of its breaches of fiduciary and trust obligations. A declaration is sought that Comalco holds so much of the lease areas as are within the lands the subject of the applicants' native title claims on trust for the applicants (further amended statement of claim paras. 54-58(a) and paras. 59-61 and amended application paras. C.2.(g)-(i)).



Next, it is alleged that each of Comalco and the State of Queensland has been unjustly enriched, at the expense of the applicants and their predecessors in title, by taking benefits each has obtained under the Comalco Agreement and ML 7024; an account is sought against each in respect of those benefits (further amended statement of claim paras. 61A-64 and amended application para. C.2.(j)).

Finally, it is alleged that because the Comalco Agreement and ML 7024 are each invalid and unenforceable for the reasons already referred to, Comalco has no lawful entitlement to exploit the bauxite ores in the relevant land; an appropriate injunction is sought to stop Comalco's operations (further amended statement of claim paras. 65-68 and amended application para. C.5). This last part of the further amended statement of claim also seeks to base the claim for the injunction against Comalco on the invalidity of the Comalco Act, which is said to flow from the fact that the Act, in so far as it purports to authorise the exploitation of the resources of the seabed beyond the territorial limits of the State of Queensland, is beyond the legislative power of the State of Queensland. I have declined to answer question 2, which raises this issue of the invalidity of the Comalco Act and it is unnecessary to consider this one element of the applicants' claim further. It was, also, contended in argument, without objection, that the Comalco Act was void as an invalid exercise of legislative power, and it is necessary to deal with this particular argument.

The statutory and factual framework

The Comalco Act was assented to on 12 December, 1957. It includes the following:

"2. **Execution of Agreement authorised.** The Premier and Chief Secretary is hereby authorised to make, for and on behalf of the State of Queensland, with Commonwealth Aluminium Corporation Pty. Limited ... the Agreement a copy of which is set out in the Schedule to this Act ...

3. **Executed Agreement to have force of law.** 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.

The Governor in Council shall by Proclamation notify the date of the making of the Agreement.

4. **Variation of Agreement.** The Agreement may be varied pursuant to agreement between the Minister for the time being administering this Act and the Company with the approval of the Governor in Council by Order in Council and no provision of the Agreement shall be varied nor the powers and rights of the Company under the Agreement be derogated from except in such manner.

Any purported alteration of the Agreement not made and approved in such manner shall be void and of no legal effect whatsoever.

Unless and until the Legislative Assembly, pursuant to subsection four of section five of this Act, disallows by resolution an Order in Council approving a variation of the Agreement made in such manner, the provisions of the Agreement making such variation shall have the force of law as though such lastmentioned Agreement were an enactment of this Act.

5. **Proclamations and Orders in Council.** (1) Any Proclamation or Order in Council provided for in this Act or in the Agreement may be made by the Governor in Council ...

(2) ...

(3) Every such Proclamation or Order in Council shall be published in the Gazette and such publication shall be conclusive evidence of the matters contained therein and shall be judicially noticed.

(4) Every such Proclamation or Order in Council shall be laid before the Legislative Assembly within fourteen days after such publication if Parliament is sitting for the despatch of business; or, if not, then within fourteen days after Parliament next commences to so sit.

If the Legislative Assembly passes a resolution disallowing any such Proclamation or Order in Council ... such Proclamation or Order in Council shall thereupon cease to have effect, but without prejudice to the validity of anything done in the meantime.

..."

The agreed facts establish that the Agreement was executed by the Premier and Comalco on 16 December, 1957; the Proclamation notifying the date of the making of the Agreement was published in the Gazette of 22 March, 1958. The condition therein referred to being satisfied on 20 June, 1958, Comalco became entitled, pursuant to cl. 8 of the Agreement, to the immediate grant of a Special Bauxite Mining Lease for what is referred to in that clause as "the western bauxite field" for an initial term of 84 years commencing on 1 January, 1958 and it also became entitled, pursuant to cl. 11(c) of the Agreement, to occupy the area to be leased and to exercise all the rights and powers intended to be granted under the lease, pending the issue of the instrument of lease. The lease instrument, identified as ML 7024, issued on 3 June, 1965; it was in the form set out in the Third Schedule to the Agreement, as required by cl. 11(a) of the Agreement. This

lease has been varied a number of times, in the manner provided for by s. 4 of the Act.

The invalidity of the Comalco Act

The applicants in their written submissions in reply submitted that the Comalco Act was invalid because Parliament vested legislative power in the executive government by enacting legislation that gave power to the executive government to enter into the Comalco Agreement, by purporting to give that Agreement the force of law and by going on to give to the executive government, in conjunction with Comalco, unrestricted power to amend an agreement having statutory effect; this was said to be contrary to the requirements of s. 40 the Constitution Act 1867-1972 (Old) which vests "The entire management and control of the waste lands belonging to the Crown in the said Colony of Queensland and also the appropriation of the gross proceeds of the sales of such lands and of all other proceeds and revenues of the same from whatever source arising within the said colony including all royalties mines and minerals" in the Legislature.

The legal status of the Comalco Act and the Comalco Agreement were considered by the Full Court of the Supreme Court of Queensland in Commonwealth Aluminium Corporation Limited v Attorney-General [1976] Qd.R. 231. The argument there advanced by Comalco was that s. 4 the Comalco Act (and the clauses of the Agreement permitting variation only with

the consent of Comalco, which, by s. 3 of the Act, had the force of law) were laws prescribing the manner and form, for the purposes of s. 5 the Colonial Laws Validity Act 1865 (Old), for the passing of any law to vary the Agreement; Comalco argued that a mining royalty Act, passed in 1974 without the agreement of Comalco but which operated to require Comalco to pay greater royalties than those payable under the Comalco Agreement, was a variation to that Agreement which had not been passed in the manner and form so prescribed and so could not alter Comalco's royalty obligations which were said to be fixed by the Agreement. Wanstall SPJ and Dunn J rejected Comalco's argument. Dunn J said, at 260:

"... There is, in my opinion, nothing in the Act to prevent it being repealed tomorrow; if that were to occur, unfulfilled promises to exercise executive power could not lawfully be fulfilled. When the structure of the Agreement and the scope and purpose of the Act are understood, the provisions of s. 4, enabling variation of the Agreement and prohibiting variation except as provided for by the section, are to be understood as a legislative command directed to the Executive and the plaintiff, and not as a restraint upon legislative power self-imposed by the Legislature. Just as it may, by repealing the Act, deprive of force the promises from which the 'powers and rights of the company under the Agreement' are derived, so it may I think deprive them of force by enacting legislation which is inconsistent with or conflicts with those promises."

Wanstall SPJ expressed a similar opinion, at 237.

The reason why the present applicants' argument as to the invalidity of the Act cannot prevail is indicated by Wanstall SPJ. At 235-6, his Honour said:

"It is not the plaintiff's case that the Queensland Parliament may not amend or repeal any statute, even its constitution, merely by passing inconsistent legislation - so much its counsel readily concede ... - but they contend with considerable ingenuity that s. 4 of the 1957 Act and clause 3 of the agreement are colonial laws which prescribe the manner and form in which the agreement may be varied, i.e. only by agreement between the plaintiff company and the Minister with the approval of the Governor in Council, and that, in terms of the last paragraph of s. 4, this operates to give the agreed variation 'the force of law as though (it) were an enactment of (the 1957) Act'. Thus, it is said, a variation so made amounts to a 'law passed' according to prescribed manner and form within the meaning of the proviso to s. 5 of The Colonial Laws Validity Act. The argument treats this process as indistinguishable from an exercise of legislative power by a delegate under the authority of an Act of Parliament. But it conveniently ignores the principle which validates a legislature's delegation of its function, namely that all the time it retains intact its own power to withdraw or to alter the authority it has conferred upon its agent, a reservation which paradoxically the plaintiff's case asserts has not been made in this instance."

The principle referred to by Wanstall SPJ was relied on by the Privy Council in Cobb & Co. Ltd. v Kropp [1967] 1 A.C. 141 to uphold the validity of certain Queensland legislation which empowered the Commissioner for Transport to fix, in his discretion, fees imposed on transport operators, as the price of obtaining permits to carry goods within Queensland. It was common ground that the licence fees amounted to taxation and that the Commissioner's power to exact these fees would be illegal and void unless done with the authority of Parliament. The Privy Council said, at 156-157:

"In their Lordships' view the Queensland legislature were fully warranted in legislating in the terms of

the Transport Acts now being considered. They preserved their own capacity intact and they retained perfect control over the Commissioner of Transport inasmuch as they could at any time repeal the legislation and withdraw such authority and discretion as they had vested in him. It cannot be asserted that there was a levying of money by pretence of prerogative without grant of Parliament or without parliamentary warrant.

...

The legislature were entitled to use any agent or any subordinate agency or any machinery that they considered appropriate for carrying out the objects and purposes that they had in mind and which they designated. They were entitled to use the Commissioner for Transport as their instrument to fix and recover the licence and permit fees. They were not abrogating their power to levy taxes and were not transferring that power to the commissioner. What they created by the passing of the Transport Acts could not reasonably be described as a new legislative power or separate legislative body armed with general legislative authority (see R v Burah). Nor did the Queensland legislature 'create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence' (see In re The Initiative and Referendum Act). In no sense did the Queensland legislature assign or transfer or abrogate their powers or renounce or abdicate their responsibilities. They did not give away or relinquish their taxing power. All that was done was done under and by reason of their authority."

The Commonwealth Aluminium Corporation Case, *supra*, establishes that the Queensland Parliament has always retained for itself full authority to repeal or amend the Comalco Act and full authority to alter the Comalco Agreement, notwithstanding that the Agreement is given by s. 3 of the Act the force of law, and notwithstanding the fact that the provisions of s. 4 of the Act prescribe the only mode whereby the executive government of the State has power to amend that Agreement. In my opinion, there is therefore no basis for

holding the Comalco Act to be invalid as an unconstitutional abrogation of legislative authority by the Queensland Legislature.

The invalidity of the Comalco Agreement

In order to lay a basis for the submission that the validity of the Comalco Agreement can be challenged because of the breaches of duty alleged against those involved in the process leading up to the making of the Agreement, the applicants contend that s. 3 the Comalco Act only gives the Agreement statutory force to the extent that that is necessary to make the Agreement lawful and effective; it is then submitted that this limited legislative sanction that is said to be conferred on the Agreement by s. 3 does not involve any legislative sanction of the processes involved in negotiating the Comalco Agreement and that s. 3 should not be construed as suspending the obligations on the executive government to give procedural fairness to persons likely to be affected adversely by a decision to enter into the Agreement, as are the Wik Peoples, or otherwise to override the private rights and interests of third parties. The result is said to be the invalidity of the Comalco Agreement (and so of the lease, whose own validity is dependent on the Agreement).

The applicants' argument here is not that s. 3 the Comalco Act does not give the Comalco Agreement statutory force, but rather that it only gives it such statutory force



as is necessary to ensure that its terms could be implemented, notwithstanding prohibitions which would otherwise have existed under the provisions of other Queensland legislation. The judgment of Dunn J in the Commonwealth Aluminium Corporation Case, supra, at 258-259, demonstrates why, unless the Comalco Agreement was given the force of law by s. 3, the executive government could not lawfully have agreed to grant the mining lease and the water rights promised by the Agreement and the authorisation to establish a town that is contained in the Agreement: for example, an agreement made by the executive government to grant a mining lease of Crown land will be invalid if it conflicts with the mode prescribed by the Mining Acts for the grant of mining leases. See Cudgen Rutile (No. 2) Pty. Ltd. v Chalk [1975] A.C. 520 at 533-4. If the Legislature had stopped with s. 2 the Comalco Act, which authorised the entry by the executive government into the Comalco Agreement, the executive still could not lawfully have implemented the Agreement, in so far as that would have required it to override the various Queensland statutes regulating the grant of mining titles and water rights and the conduct of local government.

The applicants accept that s. 2 the Comalco Act puts beyond doubt the authority of the Premier to execute the instrument of agreement and secures for the executive government parliamentary approval of the transaction; they contend that s. 2 does not change the contractual status of the Comalco Agreement and, in particular, it does not convert

the terms of the Agreement into statutory provisions. These propositions are established by Sankey v Whitlam (1978) 142 C.L.R. 1, per Stephen J at 77, citing P.J. Magennis Proprietary Limited v The Commonwealth of Australia (1949) 80 C.L.R. 382, per Dixon J at 410. See also Placer Development Limited v The Commonwealth (1969) 121 C.L.R. 353 at 368. The applicants' argument does give s. 3 an operation extending beyond what s. 2 achieves. But it involves giving s. 3 no greater effect than a provision which in terms authorised the State of Queensland in its capacity as a party to the Comalco Agreement, to perform its obligations under the Agreement, notwithstanding the provisions of any act or law that would otherwise have prohibited that.

I cannot accept that the words of s. 3 the Comalco Act, which declare that upon the making of the Comalco Agreement its provisions "shall have the force of law as though the Agreement were an enactment of this Act", should be read as if they were qualified in this way. The applicants referred to a passage in the judgment of Stephen J in Sankey v Whitlam, supra, at 77, in support of the argument that, if the statutory force given by s. 3 the Comalco Act to the Comalco Agreement is limited as they contend it should be, the Agreement otherwise has effect merely as a contract and so is open to attack on the grounds that any contract can be challenged. Stephen J there held that the Financial Agreement 1927, "approved" by the Financial Agreement Act 1928 (Cth) and "validated" by the Financial Agreement Validation

Act 1929 (Cth), did not go beyond giving parliamentary approval to that transaction and did not have the effect of converting the Financial Agreement 1927 into "a law of the Commonwealth" within the meaning of that term in s. 86(1)(c) the Crimes Act 1914 (Cth); so an information alleging a conspiracy to breach s. 86(1)(c) the Crimes Act 1914 (Cth) by agreeing to borrow in contravention of the Financial Agreement 1927 was therefore unsustainable since the Financial Agreement 1927 was not "a law of the Commonwealth". Stephen J, however, contrasted the limited effect statutory approval and validation of an agreement has with the effect of legislation that imposes a statutory obligation on the parties to carry out the terms of the contract, a provision which Aickin J, agreeing with Stephen J, said, at 106, gives to the contractual terms themselves "the force of law". The same distinction is referred to in the judgments of Gibbs ACJ, at 31, and Mason J, at 89-90.

Section 3 the Comalco Act gives the Comalco Agreement (which required parliamentary authorisation contained in s. 2 of the Act to make it binding as a contract between the parties). There is, in my opinion, no warrant for giving the words of s. 3 anything other than their ordinary meaning, viz., the provisions of the Agreement are to have the same legal effect as they would have if they were sections of the Act itself. Cf. Institute of Patent Agents v Lockwood [1894] A.C. 347 at 360. In my opinion, s. 3 confers full statutory status on the Comalco Agreement and thus gives it an

entirely different character from a mere contract. Cf. Caledonian Railway Company v Greenock and Wemyss Bay Railway Company (1874) L.R. 2 Sc. & Div. 347 at 349. In consequence, there is no basis upon which the applicants can maintain claims to any of the relief sought in these sections of their pleading that are based on allegations of improper conduct or breach of duty on the part of those involved in the processes of negotiation that led up to the making of the decision by the executive government and Comalco to enter into the Agreement.

It is an orthodox legal principle that the doctrine of the sovereignty of Parliament means that the courts must accept as binding law statutes enacted by parliamentary process. See e.g. Labrador Company v The Queen [1893] A.C. 104 and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 N.S.W.L.R. 372 at 395-397. It follows from this principle that the Courts have no authority "to go behind what has been enacted by the legislature, and to inquire 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": Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] A.C. 308 at 322. In that case, the appellant, as native owner of certain lands, claimed that the Board breached the duty to safeguard his interests which it owed him as his statutory agent in respect of the lands, and that this breach resulted in the passing of an Act which authorised the Board

to compromise a dispute with another by paying a sum to that other; the Act also imposed a charge on the appellant's land securing to the Board repayment of that sum with interest. The appellant sought an indemnity from the Board in respect of the amount secured on his lands by this charge. He did not seek to set aside the charge created by the Act and he did not challenge the validity of the Act, but based his claim to be compensated for the burden imposed on the land by the statutory charge entirely on the conduct of the Board that constituted one of the circumstances which led up to the enactment of the legislation. The Privy Council explained why the application of the principle referred to in the Labrador Company Case, supra, necessarily doomed the action to failure, at 323:

"... Before the court can accede to the appellant's claim for an indemnity against the charge imposed by s. 14 of the Act of 1935, the court will require not only to find that the respondent board owed to the native owners the duty alleged, and that it committed the breaches of that duty which are alleged, but also that the enactment of s. 14 was the reasonable and natural consequence of such breaches, and, even assuming the duty and breaches to have been established, the third and last essential step for the appellant's success would involve an inquiry by the court of the nature prohibited by the principle of Labrador Co. v The Queen."

In British Railways Board v Pickin [1974] A.C. 765, the basic principle of constitutional law was affirmed. There, the respondent's claim to certain land was met by the Board relying on a private Act, promoted by the Board, which vested the land in the Board; the respondent's response was

that the Board had procured the Act by misleading Parliament and that it could not therefore rely on the vesting section in it to deprive the respondent of his title. The House of Lords held that the respondent's response had properly been struck out. The decision is summarised in the headnote in this way: "the function of the court was to consider and apply the enactments of Parliament, and accordingly, in the course of litigation, it was not lawful to impugn the validity of a statute by seeking to establish that Parliament, in passing it, was misled by fraud or otherwise, nor might a litigant seek to establish a claim in equity by showing that the other party, by fraudulently misleading Parliament had inflicted damage on him." Although in Pickin, supra, the respondent's case depended upon the Court treating the Act as void of any effect, dicta in the judgments show that a claim which does not challenge the validity of an Act, but which asserts that statutory rights conferred by an Act should be fettered in favour of persons disadvantaged by the Act because of the circumstances leading up to the passing of the Act, also infringes the principle. Lord Morris at 789-790 said:

"Nor, in my view, should any redrafted pleading be allowed which revives in altered form an attack upon the validity of the enacting provisions of an Act of Parliament. 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 to have enacted as it did and only did so enact as a result of what the two paragraphs of the amended reply alleged." [viz., because of a fraud by the Board in procuring the Act and because of a failure by the Board to comply with the standing

orders of Parliament regulating the passing of private Acts in promoting the Bill which became the Act in question.]

The other members of the Court were of the same view: see per Lord Reid, at 787-788; Lord Wilberforce, at 798; Lord Simon, at 798-799 and Lord Cross, at 802.

Determination of the applicants' claims that the State of Queensland breached various duties it owed to the Wik Peoples in the course of making the decisions to enter into the Comalco Agreement and to grant ML 7024 would require the Court to ignore the statutory direction in s. 3 the Comalco Act to treat the Agreement as if it were itself a statute of the Queensland Parliament and decide whether, despite that statutory direction, it should declare the Agreement to be of no force at all and so incapable of authorising the grant of a valid mining lease. To do that would involve a denial, in the clearest way, of the doctrine of Parliamentary Sovereignty. Determination of these claims and the grant of the relief claimed by the applicants would also involve fixing the State of Queensland and Comalco with liability to the Wik Peoples in respect of any loss of their native title rights brought about by the passing of the Comalco Act. The implications in the doctrine of the sovereignty of Parliament, identified in the Aotea District Maori Land Board Case, *supra*, and Pickin, *supra*, in my view, prohibit the Court making any of the determinations and granting any of the relief sought by the applicants. Because it was a matter of statutory obligation

for the executive government to grant the lease, it would conflict with the doctrine of Parliamentary Sovereignty, as explained in the cases, to hold that breaches of duty that may have occurred in the course of the executive government's dealings with Comalco with respect to the land that led up to the passing of the Act could either invalidate the Agreement or the lease or give rise to a claim for compensation by persons, such as the Wik Peoples, who say their interests are detrimentally affected by the making of the Comalco Agreement and the grant of ML 7024.

It does not help the applicants to point to authorities such as FAI Insurances Limited v Winneke (1982) 151 C.L.R. 342 that establish that the Courts will, in appropriate circumstances, review decisions made by the executive government. Even if it were otherwise open to the Court to examine whether the decision of the Queensland Government to enter into the Comalco Agreement was reviewable, any deficiencies in that decisional process as potential sources of remedies for the applicants became irrelevant once the Comalco Agreement was executed and then, by force of s. 3 the Comalco Act, acquired statutory status.

The Courts have asserted limited authority to review the validity of subordinate legislation which is given, by the statute under which the making of that subordinate legislation is itself authorised, the same force and effect as if it was enacted in the Act itself. In Foster v Aloni [1951] V.L.R.



481, the Full Court of the Supreme Court of Victoria held that, although it was not open to it to invalidate regulations so protected only because the Court considered that they did not fall within one of the heads of power to make regulations contained in the Act, the Court could still strike down the regulations if it was manifest that they were irrelevant to any of those heads of statutory power. The basis upon which this principle depends is that the statute only authorises the executive to make regulations on particular topics and it is only regulations relating to those topics that have statutory force. However, there is no room for applying any such principle to the Comalco Agreement. There is no statutory criterion to which any of the provisions of the Agreement must conform if they are to have the statutory force conferred by s. 3 the Comalco Act: that section expressly gives statutory force directly to each and every provision of the Agreement. It necessarily follows, in my opinion, that each provision of the Comalco Agreement is as immune from challenge as are the provisions of an Act of Parliament of a Legislature like that of Queensland which, for all presently relevant purposes, has plenary legislative power. (It was not suggested that the otherwise plenary powers of a Legislature like that of Queensland, which is modelled on the Parliament at Westminster, are limited by implications to be drawn from the doctrine of separation of powers or, alternatively, from the fundamental fact that a political organisation such as the State of Queensland is a parliamentary democracy, a topic recently considered by Hayne JA in The Broken Hill Proprietary

Company Ltd. v Rex Dagi; The Attorney-General for the State of Victoria v Rex Dagi (Victorian Court of Appeal, unreported, 15 December, 1995).

The invalidity of ML 7024

The applicants argue that even if the Comalco Agreement is valid, ML 7024 is still open to challenge. The applicants submit that this lease, although granted pursuant to the provisions of the Comalco Agreement, does not itself have any statutory force which would immunise it from attack on the ground of deficiencies in the process leading up to its being granted. Comalco concedes that it is not open to it to contend that the mining lease has statutory status, in view of The Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna (1978) 52 A.L.J.R. 286 at 291, a decision of the Privy Council on a set of arrangements similar to those contained in the Comalco Act and the Comalco Agreement.

However, while the lease does not have the force of statute, it was granted pursuant to the Comalco Agreement, which does have statutory force. It follows that, upon satisfaction of the condition referred to in cl. 8(a) of the Agreement (something which happened on 20 June, 1958), that provision of the Comalco Agreement then operated as an unconditional statutory command to the State of Queensland to grant Comalco the mining lease for the term therein set out.

Clause 11 is a statutory command to the State of Queensland that this lease is to be in the form and contain the conditions set out in the Third Schedule to the Act. Clause 11(c) of the Agreement conferred on Comalco, once the condition referred to in cl. 8(a) of the Agreement was satisfied, the equivalent of a statutory right, pending the issue of the lease, to occupy the area to be comprised in it and to exercise all the rights and powers to be granted by the lease.

In my opinion, where a provision having statutory force, as does cl. 8(a) of the Agreement, imposes a relevantly unconditional obligation on the executive government to grant a lease and an unconditional entitlement in the object of the power to receive the grant of that lease, there is no room for holding that the executive government, before obeying the legislative command to grant the lease, must accord procedural fairness to those whose rights, interests or expectations may be prejudiced by the carrying into effect of the legislative command. Nor is there any room for holding that obedience to the statutory command can expose the body carrying out the command to liability where compliance with the statute necessarily invokes the doing of something that would otherwise be a breach of trust or of some other duty. It does not affect the duty of the executive government to comply with the statutory obligation arising under cl. 8(a) of the Comalco Agreement and s. 3 the Comalco Act by granting the lease, that the obligation could be varied pursuant to cl. 3 of the

Comalco Agreement by agreement between the executive government and Comalco, in the manner prescribed by s. 4 of the Act. So long as the obligation to grant the lease stood unvaried, the executive government was duty bound to comply with it: Corbett v South Eastern and Chatham Railway Companies' Managing Committee [1906] 2 Ch. 12 at 20-21.

Comalco relied, in supporting the validity of the lease, on a line of authority that includes The Mersey Docks and Harbour Board Trustees v Gibbs (1866) L.R. 1 H.L. 93 at 112, Allen v Gulf Oil Refining Ltd. [1981] A.C. 1001, Geddis v Proprietors of the Bann Reservoir (1878) 3 App. Cas. 430; Rudd v Hornsby Shire Council (1975) 31 L.G.R.A. 120; Caprino Pty. Ltd. v Gold Coast City Council (1982) 53 L.G.R.A. 243 and Foxlee v Proserpine Shire River Improvement Trust [1990] 1 Qd.R. 111 for the proposition that, because the Legislature authorised the grant of ML 7024, the making of the grant could not be wrongful and could not give rise to an action against the grantor. These cases show that when authority is conferred by statute on an organisation to carry out certain works, the extent of the immunity conferred on the organisation from legal action by persons injured as a result of the execution of the works will always be governed by the proper construction of the statute. Subject to that, if the execution of the works so authorised necessarily involves the creation of what would otherwise be an actionable nuisance, the statute will be read as depriving the persons injured thereby of their remedy in nuisance against the organisation,

but it will not be read as depriving persons injured by the negligence of the organisation in carrying out the authorised work or injured by the carrying out of work outside the scope of the statutory authorisation. This line of authority is an illustration of the principle that, if the doing of something is either expressly or by necessary implication authorised by statute, no one can claim any remedy at law or in equity if the person's interests are injured by the action.

Peinkinna, supra, is an example of the application of this principle to deny a claim based on an allegation that a trustee acted in breach of trust by entering into an agreement with respect to the trust property. The Director of Aboriginal and Islanders Advancement was trustee under the Queensland Land Acts of 1910 and 1962 of certain land reserved under those Acts for Aboriginal inhabitants of the State. The Aborigines Act 1971 (Old) empowered the Director, as trustee of these reserves, to enter into agreements with miners seeking access to the reserves under which a miner was obliged to pay a share of the profits of the mining venture to the trustee "for the benefit of Aborigines resident on the reserve, or other Aborigines as the agreement provides". The Director entered into an agreement ("the Director's Agreement") with a miner, Aurukun Associates, under which he agreed terms on which he was prepared to permit the miner to mine on the reserves in return for a share of the profits to be paid to him "on behalf of Aborigines". Aboriginal residents on the reserves alleged the Director acted in breach

of his duties as their trustee by entering into the Director's Agreement, in so far as it required the share of mining profits to be held not for the benefit of those residents, but for the benefit of Aborigines generally; they claimed declarations that the profits to be paid to the Director under the Director's Agreement were held on trust for them. The Director's Agreement was made on 4 December, 1975, i.e., almost two weeks before the miner entered into an agreement ("the franchise agreement") with the State of Queensland for the grant to the miner of a bauxite mining agreement. The Aurukun Associates Agreement Act 1975 (Qld) was passed on 12 December, 1975; scheduled to the Act was the form of the franchise agreement, which was executed on 22 December, 1975; cl. 19 of Part VIII of the franchise agreement imposed an obligation on the miner (and made it a condition of the mining lease) to carry out its obligations under the Director's Agreement, the form of which was scheduled to the form of franchise agreement. Section 2 of the Act authorised the State of Queensland to enter into the franchise agreement and s. 3, like s. 3 the Comalco Act, gave the franchise agreement, upon the making of it, "the force of law as though the agreement were an enactment of this Act". The mining lease promised by the franchise agreement was later granted. Kneipp J, in dissent in the Full Court of the Supreme Court of Queensland (unreported, 5 October, 1976), would have allowed the demurrer by the State of Queensland to the plaintiff's statement of claim. He rejected the State's argument that s. 3 of the Act gave the force of law to the Director's

Agreement, in view of the references to it in the franchise agreement which was itself given by s. 3 that statutory effect, saying at 8: "Merely to refer in a statute to a contract, even with approval, is not sufficient to give the contract statutory force ..." The Privy Council, at 291, agreed with this. Kneipp J also said, at 8-9:

"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 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 as 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."

The Privy Council said, at 291:

"The Board agrees with Kneipp J in thinking that the legislature has by statute recognized the

obligations of the Director's Agreement as being, in the judge's words, 'proper and suitable to this particular occasion'.

...

... the Board agrees with Kneipp J that the Director's Agreement has been recognized 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."

Even though the Director's Agreement was made before the relevant Act was passed, the later statutory recognition of that Agreement as a valid agreement was by itself enough to prevent any challenge to the Director's entry into it as a breach of trust. Given this, there is no reason to doubt that that same statutory recognition would be enough to prevent the success of any challenge to the validity of the Agreement on that or any other ground, including the ground of a failure by the Director to comply with obligations of procedural fairness in the making of his decision to enter into it.

In re Earl of Wilton's Settled Estates [1907] 1 Ch. 50 is authority for the proposition that a statutory declaration, which not only confirms an agreement and makes it binding on the parties thereto but also directs that the agreement "shall and may be carried into effect", operates to bind persons to the agreement even though they were not parties to it and even though the agreement was made in breach of trust owed to them by the vendor and detrimentally affected their proprietary interests. There, trustees of a settlement were required to carry into effect a contract for the sale of



a fee simple interest in settled lands made by the life tenant, even though he had no such title to sell and was in breach of trust to the remaindermen in doing so (at 55); neither the trustees nor the remaindermen were parties to the contract and the contract price, fixed under the agreement by arbitration, was less than that which the purchaser had been prepared to pay. The statutory direction that the agreement be carried into effect enabled the vendor to sell property he did not own and denied those who were not parties to the agreement, but whose property interests were detrimentally affected by the sale entered into a breach of trust owed to them, the right they would otherwise have had to invalidate the transaction.

The applicants submit that Peinkinna, supra, and In re Earl of Wilton's Settled Estates, supra, are distinguishable and do not govern the fate of their challenge to the validity of the lease. It was said that the questions raised here put in issue the consequences that flowed from the State of Queensland acting in breach of fiduciary duty and trust that arose from the relationship between the State and the Wik Peoples. I do not consider there is any relevant difference between the position of the present applicants and that of the remaindermen in In re Earl of Wilton's Settled Estates and of the claimants in Peinkinna: the applicants say that the State's breach of duty to them constituted by its grant to Comalco of the mining lease deprived them of their native title rights in the lands. The remaindermen in In re

Earl of Wilton's Settled Estates were deprived of their property rights by reason of the Earl's breach of trust and the complaint of the claimants in Peinkinna was that they had been deprived of their beneficial interest in the miner's payments by the Director's breach of trust; but the legislative approval of the actions complained of extinguished any avenue for legal redress.

Since the obligation to grant the lease imposed by cl. 8(a) of the Comalco Agreement has the force of a statutory command, it is no reason for refusing to make the grant that other persons whose interests are affected by the grant may have been denied opportunity to oppose the making of the grant; it is also apparent that the making of the grant cannot be held to have involved the grantor or the grantee in conduct actionable at the suit of third parties as a breach of trust or fiduciary duty.

The applicants submit that the decision of the Privy Council in Reid-Newfoundland Company v Anglo-American Telegraph Company Limited [1912] A.C. 555 supports the Wik Peoples' case that a party who contracts with the Government can still be liable for breaches of fiduciary duty or trust, notwithstanding that it has conducted its business pursuant to an agreement which has legislative approval. This authority was the subject of extensive submissions. This was the third Privy Council appeal in a long-running dispute. In none of the hearings was any reliance placed by the contractor on the

legislative confirmation of either of the two relevant contracts. It is thus, at best, an authority sub silentio. Finn, in Fiduciary Obligations, para. 206, treats it as a case in which the owner, Anglo-American Telegraph Company ("the AAT"), attached a condition restricting the use to which property of which it always retained ownership could be put, a condition which Reid and Reid-Newfoundland Company were aware of when they acquired access to the AAT's property and for breach of which they were required to account to the AAT. It is more accurate, I think, to treat it as a case in which Reid and Reid-Newfoundland Company took title to property - the special telegraph wire - which title was subject to a restriction in favour of the AAT, of which both had notice. They were obliged to account to the AAT for the profits they made by using the wire in breach of this restriction.

The factual background to this case is as follows: in 1888 the Newfoundland Railway Company, entered into an agreement with the AAT under which the AAT acquired the exclusive right until 1916 to erect along the railway company's rights-of-way and to operate for its own business of "seeking its profits by supplying telegraphic conveniences to the public" - [1910] A.C. 560 at 563 - such number of telegraph lines as it wished. The AAT also agreed to erect a special wire to be available exclusively to the railway company for its own railway operations; the railway company agreed not to use the special wire for any other purpose. (See the report of the decision of the Newfoundland Supreme

Court in (1909) 9 N.L.R. 401 at 402.) Prior to 1898, the railway company's receiver conveyed to the provincial Government the title to that company's lands, including all the telegraph lines, poles and wires on those lands, but "subject to the subsisting contract with" the AAT ((1909) 9 N.L.R. 401 at 405). In March 1898, the Government entered into the railway contract with Reid, which took the form of a lease to him of the entire railway system of the province for 50 years, together with a sale of the reversion. This railway system comprised the system in existence in 1888, and the extensions later made by the Newfoundland Railway Company and then by the Government ((1909) 9 N.L.R. 401 at 405). The railway contract was scheduled to the Newfoundland Railway Act 1898. By s. 2 of the Act, this agreement was "approved and confirmed" and it was declared "to be valid and binding upon the said parties thereto ...". While there was no express mention of the AAT's rights under the 1888 agreement in the 1898 agreement, s. 82 recorded the agreement of Reid to take over and assume control and arrangement of the several telegraph lines in the Colony "belonging to the Government", while by s. 93 Reid agreed, at the option of the Government, to purchase and take over "the interest and property of the Government in and to the telegraph lines, material and property of and pertaining to the Government telegraphic system ...". The Government's interest and property in the telegraph system existing as at 1898 was not unfettered ownership of the system but only ownership subject to the AAT's rights under the 1888 contract, as its title revealed.

Reid-Newfoundland Company was assignee from Reid of the benefits and burdens of his 1898 railway contract with the Government under cl. 29 of an agreement made in 1901 between the Government and Reid, which also provided for the incorporation of the Reid-Newfoundland Company. This assignment agreement of 1901 was itself scheduled to the Newfoundland Railway Amendment Act 1901 which, by s. 4, "approved and confirmed" the assignment agreement and declared it to be "valid and binding upon the said parties ...". Like the 1898 agreement, the 1901 agreement made no express reference to the fact that the Government had acquired title to the lands in question only subject to the 1888 agreement between Newfoundland Railway Company, the original owner of the lands, and the AAT. By cl. 16 of the 1901 agreement, the Government resumed possession and control of the then-existing telegraph system from 1 September, 1901. Clause 23 provided: "The Government relieves the Contractor from obligations under the Contract of 1898 to construct and maintain [certain specified] telegraph lines ... and the Government reserves to itself, except as herein provided for and except as provided for in the Anglo-American Telegraph Company's Charter, the exclusive right to construct, maintain and operate lines, offices and stations for ... telegraphic communication." This provision was careful to provide that the Government's reservation of ownership of the telegraph system did not extinguish the AAT's rights with respect to that system.

In the first phase of this litigation, the Supreme Court, in a decision affirmed by the Privy Council in an apparently unreported case but referred to at 563 of [1910] A.C. 560, held that Reid-Newfoundland Company's right to use the special wire constructed by the AAT pursuant to the 1888 agreement was limited to use by it for the purposes of the railway, as the railway existed in 1888 and that Reid-Newfoundland Company did not have any right to use the special wire either for purposes of the railway as subsequently developed or for the purposes of Reid's and Reid-Newfoundland Company's other businesses, including their shipping businesses and other commercial undertakings. An order was made in favour of the AAT for an account of all messages sent by Reid and by Reid-Newfoundland Company over the special wire since 1 April, 1888, other than messages connected with the operation of the railway as it existed when the contract of 1888 was made: see the report of [1912] A.C. 555 at 559.

Following this first decision, Reid-Newfoundland Company constructed its own additional telegraph line in 1907 dedicated to operating the railway extensions made after 1888; this led to the judgment in the Supreme Court of 1 May, 1909 and the Privy Council appeal, reported in [1910] A.C. 560. In this second phase of the litigation, the Supreme Court in its judgment of 1 May 1909, found for the AAT and issued an injunction restraining the Reid-Newfoundland Railway Company from operating the new telegraph line upon its leased lands, an order that it forthwith remove this telegraph line and a

declaration that the plaintiffs were entitled to an account "of all messages which have been sent or received by or on behalf of [Reid-Newfoundland Company] or any other person over" the new line. The Privy Council reversed this Supreme Court decision and held that the Reid-Newfoundland Railway Company was entitled to erect the 1907 line, it being a line erected and used solely for the purpose of operating the extended railway as it then existed: see [1910] A.C. 560.

The third phase of the litigation involved a question which arose during the taking of the account ordered in favour of the AAT in the first phase of the litigation, viz, whether Reid-Newfoundland Company, as assignee from Reid, was liable to account, in respect of non-authorized messages sent over the special wire in the period from 1 April, 1898, when Reid acquired possession of that wire, to 2 November, 1899, on the ground that the AAT was barred by the statute of limitations from enforcing its rights in this period. The Supreme Court found for the AAT on this issue. The Privy Council affirmed the Supreme Court decision on this issue on the following ground set out in [1912] A.C. 555 at 559:

"... the appellants took over the railway together with the 'special wire' comprised in the agreement of August 11, 1888, with notice of the limitations and conditions attached to the user of that wire. It seems to their Lordships that when and as often as the appellants used the special wire for the transmission of unprivileged messages an obligation in the nature of a trust arose on their part, and it became their duty to keep an account of the profits accruing from such use of the wire, and to set those profits aside as moneys belonging to the respondents. To such a duty, so created, the

Statute of Limitations can have no application unless by express statutory provision. The appellants are accountable as trustees ..."

At no stage of the litigation was it suggested that the statutory confirmation of the 1898 contract between the Government and Reid and of its 1901 assignment to Reid-Newfoundland Company had the effect of freeing Reid and Reid-Newfoundland Company from the restrictions imposed by the 1888 agreement on their user of the special wire. The reason for this is clear enough. The title Reid took under the 1898 contract and the title assigned to Reid-Newfoundland Company under the 1901 contract was the title the Government had acquired from the Newfoundland Railway company, a title subject to the restrictions on the user of the special wire which were imposed by the 1888 contract with the AAT. The Government never had the right to sell to Reid in 1898 the right to unrestricted use of the special wire. Clauses 82 and 93 of the 1898 agreement are inconsistent with any suggestion that the Government purported to sell to Reid greater rights than those which it had acquired from the Newfoundland Railway Company. Clause 23 of the 1901 assignment agreement shows that the parties contracted on the basis that the 1888 contract continued to fetter the otherwise absolute title to the telegraph system that the Government acquired from Newfoundland Railway Company and sold to Reid, which it then permitted Reid to assign to Reid-Newfoundland Company. Legislative approval of the 1898 and 1901 contracts could not



therefore operate to extinguish the AAT's rights under the 1888 contract with respect to the special wire.

The applicants also submitted that the U.S. Supreme Court decision in Nevada v United States 103 S. Ct. 2906; 463 U.S. 110; is authority for the proposition that the supremacy of the Legislature is limited in so far as fiduciary obligations owed by the government cannot be extinguished by legislative enactment. This was said to be a decision in which it was held that an Indian tribe had a remedy against the U.S. Government for breach of fiduciary duty, even though the Government had acted under statutory authority. A central issue in the case was whether the claim to additional rights to water from a river made by the U.S. Government on behalf of an Indian tribe in an action it commenced in 1973 was barred by the 1944 decree that finally determined an action brought in 1913 by the U.S. Government, representing that same tribe and also those interested in a Government desert reclamation project. In the 1913 action the U.S. Government sought a final determination as to the rights to water from the river of the two interests it then represented and of the defendants, private land owners with rights to the river waters under State law. The tribe's argument in the 1973 action was that there could be no res judicata by the decree in the 1913 action because the U.S. Government was in breach of its fiduciary duty to the tribe by representing it and a conflicting interest in that action. The Supreme Court upheld the plea of res judicata on the ground that a 1902 statute of

the U.S. Congress authorised this dual representation: at 2917 and 2924, per Rehnquist J. However, in note 16 to his reasons, at 2925, Rehnquist J said:

"The Tribe makes the argument that even if res judicata would otherwise apply, it cannot be used in these cases because to do so would deny the Tribe procedural due process ... In these cases, the Tribe, through the Government as their representative, was given adequate notice and a full and fair opportunity to be heard. If, in carrying out its role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties. As we have noted earlier, the Tribe has already taken advantage of that remedy." (emphasis added)

What his Honour was referring to in the last sentence was what he said in note 14 to his judgment, at 2921:

"We, of course, do not pass judgment on the quality of representation that the Tribe received. In 1951 the Tribe sued the Government before the Indian Claims Commission for damages, basing its claim of liability on the Tribe's receipt of less water for the fishery than it was entitled to ... In a settlement the Tribe was given \$8 million in return for its waiver of further liability on the part of the United States."

In my opinion, what was said in note 16 to the judgment provides no support for the proposition advanced by the applicants in reliance on the case. The U.S. Supreme Court held that, if ordinary principles applied, the United States would have breached the fiduciary duty it owed the tribe by representing both the tribe and conflicting interests in the 1913 suit: at 2917. But the statute of 1902

authorised that dual representation, so that could not amount to a breach by the United States of its fiduciary duty to the tribe: at 2917 and 2924. However, that is as far as the statute of 1902 went in authorising conduct that would otherwise have amounted to a breach of fiduciary duty by the Government. It remained fully liable to its Indian wards for any other breach of fiduciary duty not the subject of statutory authorisation. The Nevada Case, supra, is therefore consistent with English and Australian authority in giving full recognition to the supremacy of the Legislature in every area in which the Legislature has chosen to act and provides no support for the applicants' argument.

### Conclusion

As to the applicants' contentions that the decision to enter into the Comalco Agreement and to grant ML 7024 were made by the State of Queensland in breach of fiduciary and trust obligations, in which breaches Comalco participated, in so far as that is the foundation for a claim that the Agreement and the grant of the lease are void, that relief can only be granted if ss. 2 and 3 the Comalco Act are ignored. In so far as those allegations are the foundation for the claims to 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 of Queensland to enter into the Comalco Agreement, yet it is that very action that is specifically authorised by s. 2 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 authority. So far as Comalco is concerned, there is the additional problem that, by reason of s. 3 of the Act and cl. 8 of the Agreement, Comalco had a statutory right to the grant of ML 7024: to allow the applicants to claim damages and an account in respect of the benefits it derived from the grant of the lease would be to burden its unfettered statutory right in favour of the applicants.

The applicants also claim an account by the State of Queensland and by Comalco based on the allegation of unjust enrichment said to arise from their entering into the Comalco Agreement, from the grant of ML 7024 and from the implementation of the Agreement and the lease, with knowledge that the Aboriginal title rights of the Wik Peoples would thereby be adversely affected. They do not allege that their right to these accounts depends on them proving the invalidity of the Agreement or of the lease, only that it is unjust for the State of Queensland and Comalco to retain the benefits each got under the Agreement and the lease having regard to the knowledge each possessed as to the impact on the Aboriginal title of the Wik Peoples of this entry into and their performance of the Agreement and the lease. In my opinion, this amounts to a claim that the State of Queensland and Comalco have been enriched by reason of their involvement in the Agreement and the lease in a way that is said to be

unjust, not because the Comalco Agreement or the lease is defeasible on some legal or equitable ground, but solely because of the unfairness that is said to have resulted to the Wik Peoples from the making of the Comalco Agreement and the grant of ML 7024. Such a claim is not maintainable under Australian law: see David Securities Pty. Limited v Commonwealth Bank of Australia (1992) 175 C.L.R. 353 at 378-9. Moreover, even if a claim for unjust enrichment of the kind formulated by the applicants could otherwise be made, it would involve the imposition of a burden on the benefits conferred directly by statute on Comalco and, in so far as the State of Queensland obtained benefits under the Agreement, e.g., in respect of rent pursuant to cl. 14 and in respect of royalty pursuant to cl. 22, it similarly would involve depriving the State of Queensland of entitlements directly conferred by statute. This claim is unsustainable on the separate ground that, to allow it, would infringe the principle of the Labrador Company Case, supra, and related authorities to which I have referred.

The applicants' claim to an injunction restraining mining depends on the Agreement and the lease being held to be invalid, an impossible task for the reasons given.

The answer to Question 4 is: No.

Nothing in the Native Title (Queensland) Act 1993 (Old), as amended, affects this conclusion.

Question 5

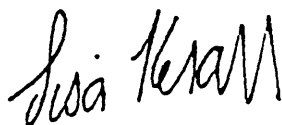
"May any of the claims in paragraphs 112 to 116, 117 to 121, 122 to 124, 125 to 127, 128 to 132, and 141 to 143 of the Further Amended Statement of Claim be maintained against the State of Queensland or Aluminium Pechiney Holdings Pty. Ltd. notwithstanding the enactment of the Aurukun Associates Agreement Act 1975, the making of the Aurukun Associates Agreement, the publication in the Queensland Government Gazette of the proclamation of the making of the Agreement pursuant to the Act and the grant of Special Bauxite Mining Lease No. 9?"

Essentially the same issues are raised by this question as are raised by Question 4. It is to be noted that the Aurukun Associates Agreement Act 1975 (Old) and Aurukun Associates Agreement referred to in the question were the subject of the litigation in The Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna (1978) 52 A.L.J.R. 286.

For the same reasons that I have answered Question 4 in the negative, I answer Question 5 in the same way.

I certify that this and the preceding 157 pages are a true copy of the reasons for judgment herein of the Honourable Justice Drummond.

Associate:



Date:

29 January, 1996

**B E T W E E N**

STATE OF QUEENSLAND and  
ABORIGINAL AND ISLANDER AFFAIRS CORPORATION

Applicants

**A N D**

THE WIK PEOPLES

First Respondents

COMMONWEALTH OF AUSTRALIA

Second Respondent

COMALCO ALUMINIUM LIMITED

Third Respondent

ALUMINIUM PECHINEY HOLDINGS PTY LTD

Fourth Respondent

COUNCIL OF THE SHIRE OF AURUKUN

Fifth Respondent

NAPRANUM ABORIGINAL COUNCIL

Sixth Respondent

PORMPURAABW ABORIGINAL COUNCIL

Seventh Respondent

EDDIE HOLROYD

Eighth Respondent

CAMERON CLIVE and DOREEN RUTH QUARTERMAINE

Ninth Respondents

MERLUNA CATTLE STATION PTY LTD

Tenth Respondent

JOHN BOCK

Eleventh Respondent

ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION

Twelfth Respondent

KEITH JOHN, SHIRLEY BEVERLEY, IAN KEITH and  
ANDREW JAMES SHEPERDSON

Thirteenth Respondents

RICHARD JOHN and JOHN RICHARD PRICE

Fourteenth Respondents

RICHARD MATTHEW PRICE

Fifteenth Respondent

RICHARD MATTHEW QUEST and ROBERT JOHN FRASER

Sixteenth Respondents

MYLES KENNETH and DEBRA ANN GOSTELOW

Seventeenth Respondents

THE THAYORRE PEOPLE

Eighteenth Respondents

This and the previous 79 pages marked with the letters "PAS3" is the exhibit mentioned and referred to in the Affidavit of PAUL ANTHONY SMITH sworn herein on the twentyseventh day of March 1996.



~~A Justice of the Peace/Solicitor~~