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WESTERN AUSTRALIA v WARD and OTHERS - (2000) 170 ALR 159

CROSSWALK PTY LTD and ANOTHER v WARD and OTHERS

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ATTORNEY-GENERAL OF THE NORTHERN TERRITORY v WARD and OTHERS

NINGARMARA and OTHERS v NORTHERN TERRITORY OF AUSTRALIA

FEDERAL COURT OF AUSTRALIA

Beaumont , von Doussa and North JJ

26-30 July, 2-6, 9-13 August 1999, 3 March 2000

-- Perth

[2000] FCA 0191

Aboriginals and Torres Strait Islanders -- Native title -- Meaning of native title -- Whether native title a bundle of rights -- Whether native title is a right to land -- Whether native title includes a right to maintain, protect and prevent the misuse of cultural knowledge -- Proof of native title -- Continuing connection -- Physical presence on land not essential -- Proof of biological descent -- Observance of traditional laws and customs -- Estate groups within wider community -- Overlapping of communities.

Aboriginals and Torres Strait Islanders -- Native title -- Determination of native title under Native Title Act 1993 (Cth) -- Requirements of s 225 -- Form of determination -- Identification of native title holders -- Jurisdiction to make determination in favour of Aboriginal community in absence of referral to court under s 74 of application for determination of native title -- Effect of Native Title Amendment Act 1998 (Cth) -- Whether determination must cover whole of claim area.

Aboriginals and Torres Strait Islanders -- Native title -- Extinguishment -- Meaning of extinguishment -- Meaning of inconsistency -- Partial extinguishment -- Coexistence of rights to occupy, possess, use and enjoy -- Reasonable user -- Onus of proof -- Application of presumption of regulatory in Crown grants -- Resumptions and acquisitions of Crown land from pastoral leases -- Creation and vesting of reserves -- Extinguishment by grant of leases -- Pastoral leases reserving rights of access for Aboriginal people -- Western Australian mining leases and tenements -- Special leases -- Leases of reserves -- Conditional purchase leases -- Grants to third parties -- Permits to occupy Crown land prior to issue of Crown grant -- Whether extinguishment by vesting of national park -- Leases to Northern Territory Conservation Land Corporation -- Public works -- Whether extinguishment by proclamation of "Irrigation District" -- Whether extinguishment by declaration of townsite -- Whether extinguishment by creation of lake -- Whether extinguishment by dedication of land for purpose of roads -- Extinguishment by legislation -- Wildlife conservation legislation -- National parks legislation -- Application of limitation periods to native title claims.

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Aboriginals and Torres Strait Islanders -- Native title -- Suspension -- Meaning of suspension -- Whether native title can be suspended.

Aboriginals and Torres Strait Islanders -- Native title -- Occupation of land by native title claimant group under s 47A of Native Title Act 1993 -- (CTH) Native Title Act 1993 s 47A -- (CTH) Native Title Amendment Act 1998 -- (WA) Titles Validation Act 1995.

These proceedings were commenced by an application lodged under the Native Title Act 1993 (Cth) (the NTA) on 6 April 1994 by one of the three Aboriginal groups. Following the lodgment of the initial application, two further native title claimant groups were joined to the proceedings. Each group sought a determination of native title in respect of land and waters in the north of Western Australia and, in the case of two of the claimant groups, adjacent land in the Northern Territory. The land subject to the applications includes numerous different types of land tenure and use, including vacant Crown land, pastoral leases, Crown land in or about the town of Kununurra, the Ord River Irrigation area, Lake Argyle and the Argyle Diamond project, and the Keep River National Park. The waters subject to claim included an area within the inter-tidal zone on the east side of Cambridge Gulf.

The pastoral leases in question in Western Australia were granted on conditions that expressly accepted and reserved to Aboriginal people a right to enter upon "any unenclosed or enclosed but unimproved" parts of the lease "for the purpose of seeking their subsistence therefrom and in their accustomed manner". From 1934, the relevant conditions provided a right for Aboriginal people at all times to enter upon "unenclosed and unimproved parts" of the lease "to seek their sustenance in their accustomed manner". Comparable reservations existed in respect of the pastoral leases granted within the Northern Territory.

In the judgment at first instance, Lee J held that native title existed within the area identified within the initial application for a determination of native title (the determination area). His Honour determined that the native title was held by the Miriung and Gajerrong people and in respect of that, part of the determination area known as Lacrosse Island native title was also held by the Balangarra people. His Honour's judgment required him to make decisions about the effect of the various land use and tenure types in question on the underlying native titles. In summary, save in respect of freehold grants and certain reserved Crown land that had been used in fact for the purpose for which they had been reserved, his Honour held that native title had not been extinguished within the determination area.

Where native title had not been extinguished, his Honour held that it included:

- (a) a right to possess, occupy, use and enjoy the determination area;
- (b) a right to make decisions about the use and enjoyment of the determination area;
- (c) a right of access to the determination area;
- (d) a right to control the access of others to the determination area;
- (e) a right to use and enjoy resources of the determination area;
- (f) a right to control the use and enjoyment of others of resources of the determination area;
- (g) a right to trade in resources of the determination area;
- (h) a right to receive a portion of any resources taken by others from the determination area;
- (i) a right to maintain and protect places of importance under traditional laws, custom and practices in the determination area; and
- (j) a right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the determination area.

His Honour further held that these rights were then subject to existing third party rights, which regulated, controlled, curtailed, restricted, suspended or postponed the underlying native title to the extent of inconsistency.

Various appeals were instituted against the determination and orders of the judge at first instance. The present case was the determination of those appeals.

Held:*Per curiam:***Onus of proof of extinguishment**

(i) The ultimate burden of proof rests on the applicants to establish that extinguishment has not occurred. This is so as the applicants must ultimately show that there currently exists native title rights and interests, and they will fail if the rights and interests asserted have at an earlier time been extinguished by law or Crown grant. That legal burden of proof in the strict sense must however be distinguished from an evidential burden which may rest on the party who asserts extinguishment. The party asserting extinguishment carries an evidential onus of proving the nature and content of the executive act relied upon (although the discharge of that evidential onus may be assisted by the ordinary presumptions of regularity and continuance).

Coe v Commonwealth (1993) 118 ALR 193 ; *Western Australia v Commonwealth* (1995) 183 CLR 373 ; 128 ALR 1 ; *Yanner v Eaton* (1999) 166 ALR 258 , considered

Form of a native title determination

(ii) The NTA does not require the determination to specify precisely which members of the community it is that are the common law holders of the native title rights and interests, or have or may exercise particular rights in relation to particular areas of land. The enjoyment of the communal rights of some of them is a matter which is left for the common law holders to determine among themselves in accordance with the traditional laws and customs as currently acknowledged and observed.

(iii) The degree of specificity required in a determination will depend upon the nature and extent of the native title rights and interests and is likely to vary from case to case, depending upon the evidence.

Requirements of "biological descent" and "mutual recognition"

(iv) A substantial degree of ancestral connection between the original native title holders and the present community is necessary to enable a group to be identified as one acknowledging and observing the traditional laws and customs under which the native title rights were possessed at sovereignty.

(v) So long as the court is satisfied that there remains an identifiable community entitled to enjoy native title rights and interests in accordance with traditional laws and customs as currently acknowledged and observed, the community is entitled to a favourable determination.

Mabo v Queensland (No 2) (1992) 175 CLR 1 ; 107 ALR 1 , considered

Continuing connection

(vi) Actual physical presence upon the land in pursuit of traditional rights to live and forage there, and for the performance of traditional ceremonies and customs, would provide clear evidence of the maintenance of a connection with the land. However, the spiritual connection, and the performance of responsibility for the land can be maintained even where physical presence has ceased, either because the indigenous people have been hunted off the land, or because their numbers have become so thinned that it is impracticable to visit the area. The connection can be maintained by the continued acknowledgement of traditional laws, and by the observance of traditional customs. Acknowledgement and observance may be established by evidence that traditional practices and ceremonies are maintained by the community, in so far as that is possible off the land, and that ritual knowledge including knowledge of the dreamings which underlie the traditional laws and customs, continue to be maintained and passed down from generation to generation.

(vii) In circumstances where it is impracticable for the defendant community to continue a physical presence, it may nevertheless maintain its spiritual and cultural connection with the land in other ways. Whether it has done so will be a question of fact, involving matters of degree, to be assessed in all circumstances of the particular case.

170 ALR 159 at 162

(viii) The notion of "occupancy" is indefinite. Occupation and use of land does not necessarily involve exclusive possession, or presence on every part of the land, or active use of every part of the land at all times.

Mabo v Queensland (No 2) (1992) 175 CLR 1 ; 107 ALR 1 , considered

Wheat v EL Acon & Co Ltd [1996] AC 552 ; *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493 ; *Newcastle City Council v Royal Newcastle Hospital* [1959] AC 248 , applied

Per von Doussa and Beaumont JJ:

Partial extinguishment of common law native title

(ix) The rights and interests of indigenous people which together make up native title are aptly described as a "bundle of rights". It is possible for only some of those rights to be extinguished by the creation of inconsistent rights by laws or executive acts. Where this happens "partial extinguishment" occurs. In a particular case a bundle of rights that was so extensive as to be in the nature of a proprietary interest, by partial extinguishment may be so reduced that the rights which remain no longer have that character. Further, it is possible that a succession of different grants may have a cumulative effect, such that native title rights and interests that survived one grant which brought about partial extinguishment, may later be extinguished by another grant.

(x) Extinguishment of native title rights or interests may occur in a number of situations, and the extinguishment may be a complete denial of any further native title right or interest. Alternatively, it may constitute an extinguishment or denial of the future enjoyment of some only of the rights and interests. Extinguishment may occur:

- (a) by laws or acts which simply extinguish native title;
- (b) by laws or acts which create rights in third parties in respect of an area of land or waters subject to native title which are inconsistent with the continued right to enjoy native title; and
- (c) by laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title.

In the second of these situations, extinguishment may occur at the time of the grant because of the inconsistency of incidence of native title and the grant of statutory rights, or, less commonly, may arise subsequently because of operational inconsistency in a particular part of an area over which native title previously existed. In any of these cases, the exercise of the power to extinguish native title must reveal a clear and plain intention to do so, whether the act be taken by the legislator or executive.

Yanner v Eaton (1999) 166 ALR 258 ; *Fejo v Northern Territory* (1998) 195 CLR 96 ; 156 ALR 721 ; *Wik Peoples v Queensland* (1996) 187 CLR 1 ; 141 ALR 129 , applied

Delgamuukw v British Columbia (1993) 104 DLR (4th) 470 , not followed

Mabo v Queensland (No 2) (1992) 175 CLR 1 ; 107 ALR 1 , considered

Pastoral leases

(xi) In Western Australia, the grant of a pastoral lease had the immediate effect of extinguishing the exclusivity of the native title right to possess, occupy, use and enjoy the subject land. However, as pastoral leases were granted subject to a reservation in favour of Aboriginal people, to the extent permitted by the terms of the relevant reservation, Aboriginal people retain the full right to enter upon the land for the purpose of seeking their sustenance therefrom in their accustomed manner. In the areas where that reservation applied, the Aboriginal people and the pastoral lessee had rights which coexisted, and the rights of both parties were subject to the requirement of reasonable user. The reservations did not except the native title rights to make decisions about the use and enjoyment of the land, and such rights were also extinguished to the extent of the grant to the pastoral lessee of the right to make decisions about the use of the land for pastoral purposes, including

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as to the location and extent of improvement otherwise permitted by law to be made. However, the reserved right of access ceased to exist under pastoral leases issued before 1933 when the land became enclosed and improved, and also under pastoral leases issued after 1934 when the land became enclosed or improved. Thereafter the activities of the Aboriginal people could no longer come within the limitation as to purpose and to geographical location expressed in the application reservation. In the areas where the reservations ceased to apply, native title was wholly extinguished.

(xii) Once a pastoral lessee in exercise of the authority contained in a pastoral lease encloses or improves parts of the pastoral lease, the lessee becomes entitled to the use and possession of the surface of that part of the land to the exclusion of the rights of Aboriginal people to enter to seek their sustenance in their accustomed manner. The exclusion of the rights of Aboriginal people in those areas as a matter of law effectively prevents the enjoyments of any rights and interests in respect of those parts of the land just as effectively as a grant in fee simple because, in those areas, the pastoral lessee has a right of possession exclusive of the interests of the Aboriginal people.

(xiii) The question arises as to the meaning and scope of the expressions "unenclosed or enclosed but otherwise unimproved", and "unenclosed and unimproved". These are expressions which arise under the Land Regulations of the Land Act 1933 (WA), and as such have legal meanings in that context.

(xiv) The expressed reservations in the Territory demonstrate clearly and plainly that the pastoral leases, notwithstanding the use of traditional common law language and concepts indicative of the grant of the lease entitling the lease to exclusive possession, did not extinguish all native title by granting pastoral lessees possession that was exclusive of the interests for Aboriginal people. However, they also operate to define the scope of the Aboriginal rights which were preserved. In so far as the terms of the reservations did not include Aboriginal rights, those rights were susceptible to extinguishment, and were extinguished to the extent of inconsistency with rights granted under the pastoral lease.

(xv) It is not helpful to ask whether a pastoral lease is to be strictly treated as a lease in accordance with common law principles. This is so, as pastoral leases are creatures of statute which were designed to facilitate the early settlement of remote areas of Australia.

Wik Peoples v Queensland (1996) 187 CLR 1 ; 141 ALR 129 , considered and applied in part

Minister for Lands and Forests v McPherson (1991) 22 NSWLR 687 , applied

Ownership of minerals

(xvi) By virtue of the vesting provisions of s 3 of the Constitution Act (WA) and by virtue of the proprietary provisions of s 117 of the Mining Act 1904 (WA), any native title rights to the minerals there specified within the State of Western Australia were wholly extinguished. Those provisions were intended to reserve to the legislature and the Crown the full beneficial ownership of all the minerals specified. Similarly if any native title right or interest existed in

relation to petroleum within the State and the determination area that right or interest was wholly extinguished by virtue of s 3 of the Constitution Act (WA) and s 9 of the Petroleum Act 1936 (WA).

Effect of mining tenements on native title

(xvii) The statutory character of mining leases, when the other aspects are also taken into account, are inconsistent with the coexistence of any native title rights. The statutory scheme of the Mining Act 1978 (WA) and regulations establishes a scheme which has an intended operation which, in the absence of explicit provision to the contrary is inconsistent with the use of occupation of the lands leased by any other person.

Fejo v Northern Territory (1998) 195 CLR 96 ; 156 ALR 721 ; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ; 107 ALR 1 , considered

Per North J (dissenting):

(xviii) The following general propositions apply to the resolution of questions concerning extinguishment of native title:

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(a) Native title as recognised by the common law is the title ascertained by reference to the traditional laws and customs of the Aboriginal people. Native title reflects the connection of Aboriginal people with the land and is ordinarily a communal title and a right to the land itself.

(b) The concept of extinguishment of native title involves the consequence that native title is permanently and totally abrogated for the purposes of the common law.

(c) Native title may be extinguished directly or implicitly by the Crown by a law or executive act taken pursuant to such a law.

(d) Native title will only be extinguished if the Crown has displayed a clear and plain intention to extinguish native title. That is to say, the law or act must demonstrate that the Crown intended thereby to permanently and totally abrogate the right of the Aboriginal people to the land itself.

(e) The holders of native title have rights and interests which flow from the right to the land. Thus, for instance, rights to undertake activities on the land derive from the right to the land. The right to the land is not abrogated by the abrogation of one or more of the rights and interests which derive from the holding of native title.

(f) The test for determining whether the law or act has extinguished native title is to ask whether there is a requisite inconsistency between the rights and interests created by the law or act and native title.

(g) There are degrees of inconsistency between rights and interests created by a law or act and native title. It is only where the inconsistency is of such a high degree that the necessary intention to extinguish native title is revealed. Such inconsistency may usefully be described as fundamental, total or absolute inconsistency. It must reflect the intention of the Crown to remove all connection of the Aboriginal people from the land in question.

(h) Where there is inconsistency between the rights and interests created by the law or act and native title but the degree of inconsistency is not sufficient to extinguish native title, native title will continue. However, the rights created by the law or act will take priority over native title. The exercise of rights dependent upon the holding of native title will be curtailed to the extent necessary to allow the full enjoyment of the rights and interests created by the law or act. In this sense, native title will be impaired by the creation of the inconsistent rights.

(i) Where the inconsistency is limited in duration such that the term of the native title is greater than the duration of the rights created by the law or act, the intention of the Crown thereby revealed is an intention to suspend the enjoyment of the rights dependent upon the holding of native title until the expiry of the term of the rights created by the law or act. Where the Crown makes an unqualified grant in fee simple the duration of the rights created by the grant is limitless. There is therefore a necessary absolute temporal inconsistency between the rights created by the law or act and native title, and native title is extinguished.

(j) In some cases the law or act which gives rise to rights and interests will not create a total inconsistency with native title immediately. But where the subsequent use of land pursuant to the rights and interests created by the law or act are totally inconsistent with native title in the sense described above, native title will be extinguished by that use of the land.

Note

As to common law native title generally, see *Halsbury's Laws of Australia* vol 1, ABORIGINALS AND TORRES STRAIT ISLANDERS [5-115]-[5-118].

Appeal

This was an appeal to a Full Court of the Federal Court of Australia against a judgment of a single judge of that court which was reported as *Ward v Western Australia* (1998) 159 ALR 483 .

C J L Pullin QC and *K M Pettit* for the appellants and cross-respondents in WG 6293 and second respondents in W 6020.

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M L Barker QC, R H Bartlett and *A M Sheehan* for the first respondents in WG 6293, WG 6292, WG 6294, WG 6295 and WG 6296.

J Basten QC and *K R Howie* for the second respondents in WG 6293, WG 6292, WG 6294, WG 6295, WG 6296 and appellants in W 6020.

G M G McIntyre for the third respondents and cross-appellants in WG 6293 and the third respondents in WG 6295 and WG 6296.

J D Allanson and *M A Perry* for the intervener in WG 6293 and WG 6296.

R A Conti QC and *M T McKenna* for the appellants in WG 6292.

D W McLeod and *P L Wittkuhn* for the appellants in WG 6294.

H W Fraser QC and *K R Jagger* for the appellants in WG 6295.

T I Pauling QC and *R J Webb* for the appellants in WG 6296 and the first respondents in W 6020.

Beaumont and von Doussa JJ.

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[1] There are six appeals before the court. Five appeals (the principal appeals) are against orders made by Lee J on 24 November 1998 which determined that native title exists in the "determination area" being part of the claim area identified in an application lodged under the Native Title Act 1993 (Cth) (the NTA) on 6 April 1994. His Honour determined that native title is held by the Miriuwung and Gajerrong people, and in respect of that part of the "determination area" known as Booroongoong (Lacrosse Island) native title is also held by the Balangarra peoples. The decision under appeal is reported as *Ward v Western Australia* (1998) 159 ALR 483 . In the course of these reasons references to the judgment will be identified by pages of this report. The sixth appeal concerns a consequential costs order.

Background

[2] The application for determination of native title was commenced on behalf of the Miriuwung and Gajerrong people pursuant to ss 13(1) and 61(1) of the NTA as it then stood (the old Act). The NTA was later substantially amended by the Native Title Amendment Act 1998 (Cth) which came into operation on 30 September 1998 (the new Act). The description of the area over which native title was claimed covered land and waters in the north of Western Australia (the State) and adjacent land in the Northern Territory (the Territory). The main part of the claim area was in the north-east of the State. The remainder is a contiguous part in the Territory (the Territory area).

[3] The claim area lies generally within the region known as the East Kimberley. The claim area includes parts of the present township of Kununurra, and Lake Kununurra and Lake Argyle. The total claim area is approximately 7900 square kilometres. The claim area represents a considerable variety of ecological areas ranging from mangrove coastal flats and drowned mouths of river valleys at the northern and westernmost physical boundaries to grassy alluvial plains supporting savanna forests and woodlands, deep gorges cut between sandstone divides and massive limestone outcrops associated with underlying basalt. Climatically the area lies within the tropical and sub-tropical zones, but most of the land surface experiences arid to semi-arid conditions characterised by high temperatures and winter drought. From approximately December to April the area comes under the influence of the "wet" season. The "dry" season follows, becoming warm and dusty around mid-August, continuing to late October or early November when rain may begin.

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[4] The claim area concerned vacant Crown land, reserved Crown land, Crown land in a pastoral lease granted to the Aboriginal Lands Trust, and several small areas of freehold land. Waters in the claim area include water situated within the inter-tidal zone.

[5] Separate claims for the determination of native title have been made, but not yet determined, by the Miriuwung and Gajerrong people in respect of land which adjoins the claim area. To the north of Kununurra, and extending westward to the coastal areas and to the south-east, the Miriuwung and Gajerrong people have made application for a determination in respect of a large area of land in the State held under pastoral leases issued under State legislation. The Miriuwung and Gajerrong people have also made application for the determination of native title in respect of a large adjoining area of land in the Territory held under pastoral leases issued under Territory legislation.

[6] It is necessary to consider the history of this area, and to consider how European settlers came to the region and made use of the land to understand how the claim area is distinguished from other land in the region and to under-

stand the issues raised in the appeals. It is convenient to repeat that history from the judgment of Lee J at ALR 489-91 which the parties have accepted on appeal as an accurate summary.

[7] Land in the East Kimberley was not made available to settlers by the Crown until late in the nineteenth century when a report on an expedition to the region, prepared by explorer and Crown surveyor Alexander Forrest and published in 1879, indicated that the area would be suitable for pastoral activities. Forrest stated that the Aboriginal people were friendly and in his view they were unlikely to be hostile to settlers, although he noted that they would have to learn that the cattle that would come with settlers would not be available for hunting. As Sir Paul Hasluck commented in his work *Black Australians*, 2nd ed, Melbourne University Press, Melbourne, 1970, Aboriginal people in the north of Western Australia were left to "learn" of the effects of European settlement in their region without guidance or protection from the Crown (at 63):

No attempt was made in entering into this vast new region to prepare the natives for contact, to instruct them, to give them special protection or to ensure either their legal equality or their livelihood.

As settlement spread to remote corners of the colony the difficulty of doing anything became an excuse for forgetting that it was ever hoped to do something. Official intentions shrank. The local government ignored situations that were awkward or beyond its capacity to handle and the Colonial Office also overlooked or was unaware of any need for a positive policy.

[8] The first grants of rights to depasture stock in the region were for land undefined by survey. Pastoral rights were applied for by marking on maps the approximate positions of the areas sought. In 1881 two speculators acquired pastoral rights to approximately 800,000 hectares by marking off an area that was assumed to follow the Ord River, on the understanding that when the course of the Ord River was eventually mapped the pastoral areas would be transferred to match the course of the river. Shortly thereafter, a group of pastoralists from the eastern colonies, among them Durack, Emanuel and Kilfoyle, reserved approximately one million hectares, including land on the Ord River, wherever the course of that river may be shown to be by subsequent survey and mapping: M Durack, *Kings in Grass Castles*, Corgi Books, Great Britain, 1973 (first published 1959) pp 209-10. To discourage speculators the Land Regulations for 170 ALR 159 at 169

the Kimberley District 1880 (WA) had provided that lands unstocked or understocked after the first two years of a pastoral lease be forfeited. By the end of 1883 approximately 20 million hectares of the Kimberley had been included in pastoral leases. Within six months of that date pastoral leases covering almost one quarter of that area had been surrendered or forfeited. Further leases were abandoned over the next two years and by the end of 1885 the core of the Kimberley pastoral industry remained. That was further reduced in the 1920s when a downturn in the industry caused approximately four million hectares of pastoral lease land to be abandoned or forfeited for non-payment of rent or non-compliance with conditions. The only town in the region was the port of Wyndham founded in 1886. For many years settlers depended upon sea transport for travel to and from the East Kimberley and for delivery of supplies and export of cattle and frozen meat. An abattoir and meat freezing works operated at Wyndham from 1919 until 1985. The East Kimberley pastoral industry was based on small areas of land of high quality surrounded by large areas of land of very low potential. After 100 years of pastoral activity, it would be reported that over 60% of the pastoral area of the East Kimberley had very low cattle carrying capacity, in excess of 125 hectares being required to support each head of cattle. Further, much of the Crown land used for pastoral leases was grossly degraded by the impact of cattle on the soil and pasture and by the high rates of soil erosion which followed in each wet season.

[9] Soon after the pastoral industry was established in the East Kimberley it was realised that profitability and sustainability of pastoral activities in the area were subject to a number of limitations (W J Wilkin, *The Ord Irrigation Project* (Ex 21(a) p 2)):

At all times pastoralists had to contend with extreme isolation, a severe climate, communication and transport difficulties, access problems in the wet season, shortage of stock feed in the long dry season and the low carrying capacity of much of the area. Consequently, settlement of the Kimberley region was sparse and the early hopes for the development of the region were not realised.

[10] Development of irrigated land for tropical agriculture was given early consideration. By 1926 surveys of the Ord River environs had identified approximately 60,000 hectares of land as suitable for irrigated agriculture. That land

began at the Packsaddle and Ivanhoe Plains on the Ord River and extended to the north-west to Carlton Plains and Mantinea Flats on the Ord River and to the north-east to the Weaber, Knox Creek and Keep River Plains, part of which was in the Territory. In 1941 potential dam sites on the Ord River were identified. In the same year the Department of Agriculture began trial plots of irrigated pastures on approximately five hectares of land on the Ivanhoe pastoral lease situated near the Ord River, now an area of vacant Crown land by Lake Kununurra. In 1945 an agricultural experiment and research station (the Kimberley Research Station) was established on the east bank of the Ord River on land excised from the Ivanhoe pastoral lease. Engineering studies for construction of a diversion dam, main storage dam, and an irrigation system for an area of irrigated land of 60,000 hectares began in the same year. Eventually, an Ord River Irrigation Project (the Ord Project) comprising four stages was proposed although the scheme ultimately approved was to be carried out in only three stages. The first stage involved construction of the diversion dam near the Packsaddle and Ivanhoe Plains, irrigation of approximately 10,000 hectares of land on those plains, and creation of a new town to serve the area. The second stage was the construction of the main dam and irrigation works to irrigate the

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remaining 50,000-60,000 hectares. The third stage was the construction of a hydro-electric power station on the main dam and reticulation of electrical power.

[11] Between 1959 and 1962 land was resumed by the State from the Ivanhoe pastoral lease for the first stage of the Ord Project. In 1961 a town plan was prepared and the townsite of Kununurra declared at which time the sale of freehold lots for businesses and residences within the townsite began. The diversion dam was completed in 1962. The water impounded behind the dam, Lake Kununurra, covered an area of approximately 20 square kilometres. By the end of 1965 almost the whole of the 10,000 hectares of irrigated land had been divided into lots and leased by the State on terms which included a right to purchase the freehold interest in the lots upon performance of certain conditions.

[12] In 1967 more land was resumed from the Ivanhoe pastoral lease to expand the area of the Agricultural Research Station and to provide for limited enlargement of the irrigated land on the Ivanhoe Plains.

[13] In 1969 the State began to implement the second stage of the scheme, by constructing the main dam at a site approximately 50 kilometres up-stream from the diversion dam on the Argyle Downs pastoral lease and by making a small expansion of irrigated land on the Packsaddle and Ivanhoe Plains. Included in the modified second stage were steps to protect the catchment area of the main dam from silt and pollution and to commence re-generation of areas badly eroded by pastoral activities surrounding the main dam. The main dam was completed in 1971 and in the same year the State acquired the whole of the Argyle Downs pastoral lease (a lease of approximately 4000 square kilometres), and a small area of freehold land on which the Argyle Downs homestead had been established. In 1972 the State resumed parts of the Lissadell and Texas Downs pastoral leases in the catchment area. The reservoir behind the main dam, Lake Argyle, covers an area of 700 square kilometres and at times of maximum flood may spread over 2000 square kilometres.

[14] The area of land now under irrigation is approximately 14,500 hectares. The hydro-electric power station was constructed on the main dam in 1996 and power is reticulated across the claim area to Kununurra and Wyndham and to the Argyle Diamond Mine south of Lake Argyle.

[15] The Ord Project was conceived as a major production area for cotton and rice but neither crop succeeded. Production of rice ceased in 1966 and cotton in 1974. Growers turned to seed crops, nuts, sugar and horticultural ventures such as melons and other fruits, and vegetables with success. In recent years trial crops of cotton have been reintroduced. The creation of Lake Argyle and the development of the Argyle Diamond Mine has increased public awareness of the East Kimberley region, its striking landscapes and connection with Aboriginal pre-history. Tourism is now an important part of the region's economy. It was estimated in 1991 that the contribution of tourism was approximately \$30 million per annum, a sum equivalent to the value of the agricultural products produced under the Ord Project.

[16] The claim area in the State included:

- o Crown land in and around the township of Kununurra, the Ord River irrigation area and Lake Argyle, and several freehold lots;
- o Crown land in the Glen Hill pastoral lease south-west of Lake Argyle;
- o Crown land and waters in the inter-tidal zones and mud flats on the eastern side of the Gulf and on the north coast of the State between the Gulf and the State/Territory border;

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- o Crown land in three small islands "Booroongoong" (Lacrosse), "Kanggurru" (Rocky) and "Ngarrmor-r" (Pelican) near the mouth of the Gulf; and
- o Crown land in an area loosely described as "Goose Hill" east of Wyndham and south of the Ord River.

[17] The claim area in the State also included land in which freehold interests were granted prior to 31 December 1993, namely:

- o a small area near Lake Argyle in which a telephone exchange is operated by Telstra Corporation Ltd (Telstra); and
- o the area of the former Argyle Downs homestead.

[18] Other freehold land included in the claim area is land that was alienated by the Crown after 31 December 1993. At trial the applicants contended that this land was not alienated in compliance with the "future act" provisions of the NTA and, therefore, native title had not been affected.

[19] Crown land in the claim area in the vicinity of Kununurra, Lake Argyle and the Ord River irrigation area is vacant and reserved Crown land formerly used for pastoral leases. Much of that land, now covered by Lake Argyle, and the land which surrounds it were formerly part of the Argyle Downs, Lissadell and Texas Downs pastoral leases. The balance consists of small areas of land in and around the Kununurra township, or bordering the irrigated land north of the town and formerly part of the Ivanhoe pastoral lease. An area of vacant Crown land near Kununurra is subject to a special lease for cultivation and grazing purposes. The reserved Crown land for the most part is vested in the Shire of Wyndham East-Kimberley (the Shire), or in statutory authorities, for purposes which include conservation, recreation, parkland, agricultural research, gravel, quarry, drainage, preservation of Aboriginal paintings, the use and benefit of "Aborigines" and purposes connected with the Ord Project. Some of the reserved Crown land has been leased to Aboriginal corporations, some to community organisations, and some for grazing purposes. Some parts of the Crown land are subject to tenements granted under the Mining Act 1978 (WA) and the Petroleum Act 1967 (WA). A small part of the area on which diamond mining operations are carried out on Crown land south-west of Lake Argyle by the Argyle Diamond Mine joint venture is included in the claim area.

[20] The land in the inter-tidal zones and mud flats on the north coast of the State is land between the low and high water marks and a 40 metre strip of land between the high water mark and the boundary of the Carlton Hill pastoral lease. There is a dispute as to the extent to which this land, and parts of the inter-tidal zone on the east of the Gulf were included in early pastoral leases. The mud flats and inter-tidal zone on the east side of the Gulf are Crown lands reserved for conservation purposes. The Goose Hill area is reserved Crown land part of which is used for grazing purposes under a special purpose lease to the appellant Crosswalk Pty Ltd (Crosswalk). Booroongoong and Kanggurru islands are vacant Crown lands. Ngarrmor island is Crown land reserved for the purpose of a nature reserve.

[21] The portion of the claim area in the Territory comprises the Keep River National Park, declared a park in 1981 under the Territory Parks and Wildlife Conservation Act 1976 (NT). This land was excised from the Newry pastoral leases in 1979 and leased to the Conservation Land Corporation (the Corporation) for the purpose of "carrying out the functions of the Conservation Commission" (the Commission). Under the Parks and Wildlife Commission Act

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1980 (NT) the Commission (now known as the Parks and Wildlife Commission) has the care, control and management of all land "acquired" by the Corporation. Also within the Territory area is land adjacent to the park excised from the Newry pastoral leases in 1987 and leased to the Corporation for the purpose of "carrying out the functions of the Conservation Commission". The balance of the claim area in the Territory is freehold land, contiguous with, or within, the Keep River National Park. There are three areas granted as freehold land to Aboriginal corporations under the Land Acquisition Act 1979 (NT), Part IV of the Crown Lands Act 1992 (NT) and the Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989 (NT). The freehold grants were made in 1989, 1990 and 1993.

Parties at trial

[22] The initiating application was presented to the National Native Title Tribunal (the tribunal) by "Miriuwunga Gajerronga Ningguwung Yawurrung Inc (Miriuwung and Gajerrong Families and Heritage Land Council)". The native title rights and interests claimed were described as follows:

Possession, occupation, use and enjoyment of the area. Special and exclusive relationship with and connection to the area in accordance with traditional customs, laws, practices and usages such that the area comprised Miriuwung/Gajerrong's traditional homeland.

[23] After the application had been accepted by the tribunal, the description of the claim area was amended, and the name of the applicant was changed by substituting for the corporate applicant the natural persons, now named as the first respondents in the principal appeals, who brought the claim on behalf of the Miriuwung and Gajerrong people. For ease of understanding we shall refer to them simply as "the applicants".

[24] Following publication of the notice of claim, the tribunal received notices from 127 persons with interests in the claim area who said they would be likely to be affected by a determination of native title. Pursuant to s 68 of the NTA those people became parties to the application. Proceedings by the State and the Territory challenging the decision of the registrar of the tribunal to accept the application were unsuccessful: see *Northern Territory v Lane* (1995) 138 ALR 544 .

[25] After the application was referred to the Federal Court by the registrar of the tribunal pursuant to s 74 of the NTA, directions were given to group as respondents the various parties who had notified interests in the claim area according to common interests. The State became first respondent, representing State departments, ministers and statutory authorities. The State opposed the application in respect of the whole of the claim area in the State.

[26] The Territory became the second respondent. The Territory opposed the application in respect of the Territory area with the exception of the three freehold areas granted to Aboriginal corporations.

[27] The third respondent was the Corporation as lessee of the land contained in the Keep River National Park and of the adjacent land in the Territory.

[28] Cecil Ningarmara and other Aboriginal people who claimed an interest in the Territory area separate from that of the Miriuwung and Gajerrong people became the fourth respondents. In the course of directions hearings leave was given for this group to be removed as respondents and joined as the second applicants claiming a determination of native title in their favour in respect of the

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land claimed within the Territory as members of subgroups of the Miriuwung and Gajerrong people, namely as members of the Bindjen, Nyawamnyawam and Damberal estate groups. We shall refer to this group as "the Territory applicants".

[29] The fifth respondents were the Kimberley Land Council and the Kununurra Waringarri Aboriginal Corporation. The Kimberley Land Council is a representative body under the Act. It sought to represent Aboriginal people other than those claiming on behalf of the Miriuwung and Gajerrong people who alleged interests in the claim area. During the trial leave was given to some of this group, described as the Balangarra peoples, to become the third applicants. This occurred after they had lodged with the tribunal an application for determination of native title for an area of land and waters which included Booroongoong island. We shall refer to this group as the "Balangarra peoples".

[30] The sixth respondents comprised persons and corporations who conducted business on or had interests in land in the claim area. This group included horticultural and agricultural businesses which take water from the Ord River irrigation scheme. The claim area did not include the freehold land on which horticultural and agricultural activities occurred, but included strips of Crown land adjoining the Ord River over which freeholders pumped water. This group also included tourist oriented businesses which used facilities on reserved or vacant Crown land within the claim area around Lake Kununurra and Lake Argyle. These activities were carried on under leases of reserved land, a permit to operate float aircraft on Lake Kununurra and install and maintain float landings and moorings, a jetty licence under the Jetties Act 1926 (WA), a permit to construct and use landing steps on the shore of Lake Kununurra, a licence to use a tour boat on the lake, fishing boat licences, tour boat licences, a fish farm or aquaculture licence for breeding and harvesting fish in Lake Argyle, and a licence permitting the collection and commercial use of seeds of native flora on Crown land. The groups also included persons who acquired after 31 December 1993 freehold interests in residential lots in Kununurra. Telstra was included within the group but was separately represented at trial. Telstra operated tele-

phone facilities involving an exchange, repeater station and underground cables and solar power sites on reserved or vacant Crown land, and in one case freehold land in the claim area.

[31] The seventh respondents were Crosswalk and Baines River Cattle Co Pty Ltd (Baines River). Crosswalk is a lessee under a lease granted to it under the Land Act 1933 (WA). Baines River is a lessee under a lease from the Minister of Works to graze cattle in the State in an area east of Lake Argyle on reserved land vested in the Waters and Rivers Commission.

[32] The eighth respondents were parties engaged in mining in or near the claim area, including Argyle Diamond Mines Pty Ltd and other joint venturers together referred to as "Argyle".

[33] The ninth respondents comprised other parties who held mining tenements under the Mining Act 1978 (WA), including exploration licences and rights to quarry gravel or metal on Crown land within the claim area.

[34] The tenth respondents were incorporated associations occupying reserved Crown land within the claim area under leases granted by the Shire, the reserved land being vested in the Shire under the Land Act 1933 (WA). Included among them were a sport fishing club, a water ski club and a sailing club representing recreational users of Lake Kununurra.

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[35] The eleventh respondent was the Shire.

[36] The twelfth respondent was the company which produced hydro-electric power at the main dam, but this respondent took no part in the proceedings.

[37] The thirteenth respondent, Innes Holdings Pty Ltd, carried on the business of irrigated agriculture on land which included freehold land in the claim area granted by the Crown after 31 December 1993.

[38] The Attorney-General for the Commonwealth, later replaced by the Minister for Aboriginal and Torres Strait Islander Affairs, was given leave to intervene in the proceedings, but made no submissions at trial pursuant to that leave.

[39] Preparation of the matter for trial was controlled by detailed directions. The trial commenced on 17 February 1997, much written and documentary material having been filed in advance of that date. The hearing extended in stages over many months, there being in all 83 hearing days. Evidence was taken at various sites in, or proximate to, the claim area. Judgment was delivered on 24 November 1998.

Judgment at first instance

[40] The trial judge held:

- o that the claim area, and surrounding lands, were inhabited by organised communities of Aboriginal inhabitants at the time of sovereignty -- 1829 in respect of the colony of Western Australia, and 1825 in respect of the Territory (that being the date when the Territory was included within the boundaries of the colony of New South Wales). The Aboriginal people who occupied the claim area at sovereignty functioned under elaborate traditions, procedures, laws and customs which connected them to the land. It followed that the Aboriginal communities which occupied the claim area at sovereignty possessed native title in respect of that land;
- o that the Miriuwung and Gajerrong community had maintained a connection with the ancestral communities which held the native title at sovereignty, and had maintained connection with the land to which native title applied, save for a small area to the west of Goose Hill near Wyndham known as Parry Lagoon. This small area was omitted when defining the "determination area". Lee J held that the Miriuwung community and the Gajerrong community were once occupants of adjacent territories which overlapped in part. They shared economic and ceremonial links, knowledge of Dreaming myths, Dreaming tracks and Dreaming sites such that the Miriuwung and Gajerrong had now become regarded as a composite community with shared interests;
- o the claim of the Territory applicants could not be separated from the claim on behalf of the Miriuwung and Gajerrong people of which the Territory applicants were part;

- o in respect of Booroongoong, the Balangarra peoples which had ancestral connections with Aboriginal people from the western side of the Gulf had separate and distinct traditions and connections in respect of Booroongoong from those observed and followed by the Gajerrong people, such that any determination of native title should take account of the interests of the Balangarra peoples in Booroongoong;
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- o save that in respect of freehold grants within the State, and in respect of certain reserved Crown lands that had been used in fact for roads or the erection of buildings or other fixtures and improvements for the purpose for which the Crown lands had been reserved, and their surrounding curtilages, more particularly identified in the Second Schedule to the judgment (at ALR 642), native title had not been extinguished in the determination area; and
- o other interests had been created in the determination area by the Crown, the nature and extent of which are more particularly identified in the Third Schedule to the judgment: at ALR 644. Those other interests included interests held by one or more of the many parties to the proceedings as persons entitled to use reserves, or as lessees, licensees, permit holders, tenement holders, or holders of other interests obtained under or by reason of legislation of the State, Territory or Commonwealth.

[41] The order entered pursuant to the judgment determined that native title in the determination area was held by the Miriuwung and Gajerrong people, and in respect of Booroongoong also by the Balangarra peoples. Paragraphs (3) and (5) of the order read:

(3) Subject to para (5) hereof, the nature and extent of the "native title rights and interests" in relation to the "determination area" are the rights and interests of the common law holders of native title derived from, and exercisable by reason of, the existence of native title, in particular:

- (a) a right to possess, occupy, use and enjoy the "determination area";
- (b) a right to make decisions about the use and enjoyment of the "determination area";
- (c) a right of access to the "determination area";
- (d) a right to control the access of others to the "determination area";
- (e) a right to use and enjoy resources of the "determination area";
- (f) a right to control the use and enjoyment of others of resources of the "determination area";
- (g) a right to trade in resources of the "determination area";
- (h) a right to receive a portion of any resources taken by others from the "determination area";
- (i) a right to maintain and protect places of importance under traditional laws, customs and practices in the "determination area"; and
- (j) a right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the "determination area".

...

(5) The relationship between the "native title rights and interests" described in para (3) and the "other interests" described in [the Third Schedule] is as follows:

The "native title rights and interests" described in para (3) hereof and the "other interests" described in [the Third Schedule] hereof are concurrent rights and interests in relation to that part of the "determination area" to which the "other interests" relate, but by operation of legislation or by reason of the nature and extent of the "other interests" created by the Crown, the exercise of some of those concurrent rights, including "native title rights and interests", may be regulated, controlled, curtailed, restricted, suspended or postponed.

(Note that para (5) above is from the sealed order, the terms of which are slightly different from those reported at ALR 645.)

[42] By a further judgment delivered on 6 May 1999 (*Ward v Western Australia* (1999) 163 ALR 149) Lee J ordered that the State and the Territory pay, on the

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basis of apportionment, the costs of the applicants. The State and the Territory had resisted orders for costs on the basis of s 85A which was inserted into the NTA by the new Act, at which time the trial, but for one day, was completed. Section 85A(1) provided that:

Unless the Federal Court orders otherwise, each party to a proceeding must bear his or her own costs.

[43] His Honour ordered that the State and the Territory pay 90% of the costs of the applicants, three-quarters to be paid by the State and one-quarter by the Territory. An application for costs against the State and the Territory by the Territory applicants was dismissed on the basis that they did not obtain the determination sought by them, and to the extent that they were persons to whom the orders obtained on behalf of the applicants applied, their success in the litigation was derived from the success of the applicants.

The appeals

[44] The following appeals have been instituted against the determination and orders of Lee J.

[45] In matter No WG 6293 of 1998 the State is the appellant. Three respondent groups are named. The first group is Ben Ward and others, the applicants at trial. The second group are the Territory applicants. The third group are the Balangarra peoples.

[46] The State appeals against the whole of the orders, declaration, and determination of Lee J save for the findings that extinguishment of native title had occurred in respect of the areas set out in the Second Schedule, and the findings as to the other interests held in the determination area set out in the Third Schedule. There are some 96 grounds of appeal which assert numerous errors of law and fact. The State seeks orders setting aside the determination and dismissing the application. The State also appeals against the order for costs made against it.

[47] In this matter, a notice of cross-appeal has been filed by the Kimberley Land Council on behalf of those of the applicants who identify as members of the Malngin and Gija estate groups complaining that the determination of native title should have included a determination in favour of the Malngin and Gija communities as holders of common law native title in respect of the southern part of the claim area.

[48] In matter No WG 6292 of 1998 Crosswalk and Baines River appeal against the determination in so far as it affects lands occupied by them, namely King Locations 736 and 744 (the Special Lease), and King Location 374 (the New Argyle Downs Lease). The notice of appeal challenges the findings that native title had been established in respect of these locations, that it had not been extinguished by Crown grants relating to the locations, and that the native title rights found to exist were not subordinate to the rights of Crosswalk and Baines River. Only the applicants and the Territory applicants are parties to this appeal.

[49] In matter No WG 6294 of 1998 the numerous persons and corporations who comprised the sixth, ninth, tenth and thirteenth respondents at trial appeal against the determination of native title in so far as it affects each of them. Since the appeal was instituted, the Ord River Sailing Club (one of the tenth respondents at trial) and Innes Holdings Pty Ltd (the thirteenth respondent) have discontinued their appeals, although the area of their interests is still the subject of the State's appeal. We shall refer to these as "the Alligator appellants"

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(Alligator Airways Pty Ltd being the first of the named appellants). The Alligator appellants seek orders that the determination of native title in so far as it affects the lands or waters used by them be set aside, or alternatively that the relevant areas be added to the Second Schedule as lands or waters over which native title has been extinguished. Only the applicants and the Territory applicants are parties to this appeal. The separate interests of 20 persons and corporations within this group are identified in submissions as requiring separate consideration.

[50] In matter No WG 6295 of 1998 Argyle appeals against the whole of the determination in so far as it affects the areas the subject of the Argyle mining leases and tenements. In addition to naming as respondents the applicants, the Territory applicants and the Balangarra peoples, the State is named as a fourth respondent to this appeal. Foremost among Argyle's grounds of appeal, it is contended that any native title that may have existed in respect of the Argyle areas has been extinguished by the Crown grant of the interests presently held by Argyle.

[51] In matter No WG 6296 of 1998 the Territory, through its Attorney-General, appeals against the determination of native title in respect of that part of the claim area which is within the Territory. The Territory contends that native title in that area had been extinguished by the grant of pastoral leases over the area, or alternatively by a special purpose lease and by a perpetual Crown lease both granted by the Territory to the Corporation and by the three grants of freehold to Aboriginal corporations. In the alternative, if native title continues to exist, the Territory contends that it should

have been determined that the common law native title holders are the Bindjen, Nyawamnyawam and Dameral estate groups, not the wider community of the Miriuwung and Gajerrong people of whom the three estate groups form part. The Territory also appeals against the costs order made against it.

[52] In each of these five appeals a notice of contention has been filed by the Territory applicants. These notices of contention seek to uphold the determination that native title exists in favour of the Territory applicants in respect of that part of the claim area within the Territory on the basis that native title is held by the Bindjen, Nyawamnyawam and Dameral estate groups. In the case of the Territory's appeal it is further contended that the finding that native title has not been extinguished can be upheld on grounds additional to those given by Lee J.

[53] In matter No W 6020 of 1999 the Territory applicants appeal by leave against the order made on 6 May 1999 in so far as it refused them an order for costs of the trial. The respondents to that appeal are the State and the Territory.

[54] The major issues raised by these notices of appeal are dealt with under the headings set out below. At trial more than 9000 pages of transcript were recorded, and the exhibits run into many thousands of pages. Written submissions on the appeal also run into thousands of pages. While the notices of appeal raise many major issues which are dealt with below, the notices of appeal, and more particularly the arguments presented in support of them, also challenged many findings of fact, some of them of a relatively unimportant nature. In complex appeals involving enormous quantities of material it is impracticable, in reasons for judgment, to explore at length every one of the complaints made by each appellant. We propose therefore to follow the approach adopted by other Full Courts of this court in

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Australian Breeders Co-operative Society Ltd v Jones (1997) 150 ALR 488 at 503 and *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 at 175 and to confine our reasons to the issues raised that are both significant and consequential.

Common Law native title

[55] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ; 107 ALR 1 established that on the acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to that part. Where native title rights and interests in or in relation to that land existed at the time, the common law in Australia recognises those rights and interests as a burden on that radical title. The term "native title" is used to conveniently describe the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants: at CLR 57 per Brennan J. In expressing their agreement with the reasons of Brennan J, Mason CJ and McHugh J, at CLR 15; ALR 7, said that six members of the court were in agreement:

... that the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs to their traditional lands ...

[56] The principles declared by *Mabo (No 2)* have been applied in subsequent decisions by the High Court: see *Western Australia v Commonwealth* (1995) 183 CLR 373 at 452, 492 ; 128 ALR 1 (the *Native Title Act* case); *North Galanjanja Aboriginal Corp v Queensland* (1996) 185 CLR 595 at 613 ; 135 ALR 225 (the *Waanyi* case); *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84-5, 100, 129, 135, 175-6 and 213 ; 141 ALR 129 (*Wik*); *Fejo v Northern Territory* (1998) 195 CLR 96 at 126-8 and 154 ; 156 ALR 721 and *Yanner v Eaton* (1999) 166 ALR 258 at 268-9, 277-8 and 298 . These decisions have been recently discussed in a Full Court of this court in *Commonwealth v Yarmirr* (1999) 168 ALR 426 at 434 (the *Croker Island* case).

[57] The concepts of native title recognised by the common law do not constitute a title which is an institution of the common law. In *Fejo* Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said at CLR 128; ALR 737 :

Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law.

[58] It follows that the existence and content of native title is a question of fact to be ascertained by evidence as to the laws and customs of the indigenous inhabitants, on a case by case basis: *Mabo (No 2)* at CLR 58 and 61, the *Native Title Act* case at CLR 452 and *Wik* at CLR 169. As we observed in the *Croker Island* case, at 435, native title is therefore "highly fact specific".

[59] In *Wik*, Gummow J, citing *Mabo (No 2)*, said at CLR 169; ALR 219 :

The content of native title, its nature and incidents, will vary from one case to another. It may comprise what are classified as personal or communal usufructuary rights involving access to the area of land in question to hunt for or gather food, or to perform traditional ceremonies. This may leave room for others to use the land either concurrently or from time to time. At the opposite extreme, the degree of attachment to the land may be such as to approximate that which would flow from a legal or equitable estate therein. In all these instances, a conclusion as to the content of native title is to be reached by determination of matters of fact, ascertained by evidence [footnotes omitted].

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[60] In *Mabo (No 2)* Brennan J made a number of general observations about the nature and incidents of native title. First, as native title is not an institution of the common law, it is not alienable by the common law. However, his Honour observed at CLR 59-60; ALR 43 that many clans or groups of indigenous people have been physically separated from their traditional lands and have lost their connection with it, but:

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

[61] Secondly, native title, being recognised by the common law may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual. Recognition, however, is dependent on the native title arising under the laws and customs of the indigenous inhabitants not being so repugnant to natural justice, equity and good conscience that judicial sanctions must be withheld (at CLR 59), and so long as recognition would not "fracture a skeletal principle of our legal system": at CLR 43.

[62] Thirdly, where an indigenous people (including a clan or group) as a community, are in possession or are entitled to possession of land under a proprietary native title, that communal title enures for the benefit of the community as a whole and for the subgroups and individuals within it who have particular rights and interests in the community's lands: at CLR 62.

[63] Where native title survived the Crown's acquisition of sovereignty and radical title, the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title. Brennan J at CLR 69; ALR 51 said:

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

Deane and Gaudron JJ referred to extinguishment at CLR 110; ALR 83 :

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

[64] In the joint judgment of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ in the *Native Title Act* case their Honours said at 452-3 that:

The content of native title is ascertained by reference to the laws and customs of the people who possess that title, but their enjoyment of the title is precarious under the common law: it is defeasible by legislation or by the exercise of the Crown's (or a statutory authority's) power to grant inconsistent interests in the land or to appropriate the land and use it inconsistently with enjoyment of the native title. *170 ALR 159 at 180*

[65] In *Fejo*, Kirby J at CLR 151 referred to "the inherently fragile native title right, susceptible to extinguishment or defeasance ...".

[66] The High Court in *Fejo* at CLR 126 confirmed that native title is extinguished by a grant in fee simple because the rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any rights or interests in land which together make up native title. The court held that once native title had been extinguished, it was necessarily at an end, and could not revive if the land came to be held again by the Crown. In their joint judgment Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said, at CLR 128; ALR 737-8 :

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

[67] Native title is liable to be extinguished by laws enacted by, or with the authority of, the legislature or by the acts of the executive in exercise of powers conferred upon it: *Mabo (No 2)* at CLR 63-4 per Brennan J, CLR 110-11 per Deane and Gaudron JJ, and CLR 195-6 per Toohey J. In *Wik* Brennan CJ observed at CLR 84-5, that such laws or acts may be of three kinds: (i) laws or acts which simply extinguish native title; (ii) laws or acts which create rights in third parties in respect of a parcel of land subject to native title which are inconsistent with the continued right to enjoy native title; and (iii) laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title.

[68] A law or executive act of the first kind will not have the effect of extinguishing native title "unless there be a clear and plain intention to do so": *Mabo (No 2)* at CLR 64, 111 and 196, and *Wik* at CLR 85. Such an intention is not to be collected by inquiry into the state of mind of the legislators or of the executive officer but from the words of the relevant law or from the nature of the executive act and the power supporting it. The test of intention to extinguish is an objective test.

[69] In the second situation a law or executive act which creates rights in third parties inconsistent with a continuing right to enjoy native title extinguishes native title to the extent of the inconsistency, irrespective of the actual intention of the legislature or the executive and whether or not the legislature or the executive officer adverted to the existence of native title. (See also *Mabo (No 2)* at CLR 68 and the *Native Title Act* case at CLR 422.) The exercise of power must, however, be in terms that "clearly, plainly and distinctly" create rights that are inconsistent

with the continued exercise of native title rights and interests: see *Wik* at CLR 171 and *Yanner* at 289 per Gummow J. Where the exercise of power is made under statutory authority, the statute must authorise the creation of rights which have this effect: see *Mabo (No 2)* at CLR 63.

[70] In the third situation, the Crown acquires a full beneficial ownership that extinguishes native title by acquisition of native title. This may occur by acquisition, by or under a statute, in which case the question is simply whether the power of acquisition has been validly exercised. Alternatively, the Crown, without statutory authority may acquire beneficial ownership simply by appropriating land in which no interest has been alienated by the Crown. The appropriation will give rise to the Crown's beneficial ownership only when the land is actually used for some purpose inconsistent with the continued enjoyment of native title, for example by building a school, or a court house, or laying a pipeline. Brennan CJ noted that the mere reservation of land for the intended purpose, which does not create third party rights over the land, does not alter the legal interests in the land, but the Crown's exercise of its sovereign power to use unalienated land for its own purposes extinguishes, partially or wholly, native title interests in the land used: *Wik* at CLR 85-6.

[71] In the *Croker Island* case we observed at 438-9, that in *Wik* all seven members of the High Court propounded similar tests to determine whether a statutory grant by the Crown was inconsistent with the continued enjoyment of native title: Brennan CJ, with whom Dawson and McHugh JJ agreed at CLR 86-7, Toohey J at CLR 126 and 132-3, Gaudron J at CLR 135, Gummow J at CLR 185 and Kirby J at CLR 221 and 238. The test was described by Kirby J at CLR 221 as "the inconsistency of incidents" test, and we shall adopt that description. The test requires a comparison between the legal nature and incidents of the existing native title and of the statutory grant. The question is whether the respective incidents are such that the native title rights cannot be exercised without abrogating rights created by the statutory grant. If they cannot, then by necessary implication the native title rights are extinguished. The question is not whether the estate or interest granted had been exercised, in fact, in a way that was incompatible with the exercise of native title rights, but whether it was legally capable of being so exercised: see Brennan CJ at CLR 87, and Kirby J at CLR 238.

[72] The inconsistency of incidents test approved by the members of the High Court in *Wik* was applied in *Fejo* at CLR 126-7 and 154-5.

[73] Where a law or executive act creates rights in a third party which are inconsistent with the continued enjoyment of native title rights, the inconsistency, and extinguishment, will occur at the time of the grant. The grant may, however, confer or impose on the grantee a power or condition to be exercised or performed in the future and which, until exercised or performed, has no immediate legal effect in terms of inconsistency: see *Wik* at CLR 166 per Gaudron J. In *Wik*, Gummow J at CLR 203 instanced conditions in pastoral leases requiring improvements to the land under which the construction of an airstrip and dams in compliance with the conditions could, at the time of the performance of the conditions, bring about an abrogation of native title. See also *Yanner* at 289. Inconsistency arising in this situation may conveniently be described as operational inconsistency.

[74] The NTA is parliament's response to the decision in *Mabo (No 2)*. The main objects of the NTA are set out in s 3:

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Main objects

3. The main objects of this Act are:

- (a) to provide for the recognition and protection of native title; and
- (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
- (c) to establish a mechanism for determining claims to native title; and
- (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

[75] Whereas *Mabo (No 2)* held that the common law recognised native title rights and interests in land, s 6 of the NTA provides that the NTA extends to the coastal sea of Australia and to any waters over which Australia asserts sovereign rights under the Seas and Submerged Lands Act 1973 (Cth).

[76] "Native Title" is one of the key concepts in the NTA, and is defined in s 223 as follows:

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

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

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

[77] The interpretation of this definition and the application of the principles discussed in *Mabo (No 2)* to the coastal sea, are considered in the *Croker Island* case. As we there noted at 441-2, the notion of extinguishment of native title by law or executive act is not referred to in s 223 of the NTA. However, it is clear that if native title were so extinguished before the Racial Discrimination Act 1975 (Cth) it cannot be revived, nor can it be recognised and protected under the NTA: see the *Native Title Act* case at CLR 452-4 and *Yanner* at 269. The principles concerning extinguishment that are central to the present case do not turn on provisions in the NTA, as the Crown grants, reservations and uses which the appellants say caused extinguishment occurred (with very few exceptions) before 1976. It is only those communal, group or individual rights and interests of Aboriginal peoples presently possessed under the traditional laws acknowledged, and the traditional customs observed by them that can be the subject of a determination of native title on the application made under s 13(1) of the NTA.

[78] The trial judge in the present case formulated principles by which to determine whether extinguishment has occurred in terms which we consider depart from the inconsistency of incidents test approved by the High Court in *Wik* and *Fejo*. His Honour said (at ALR 508):

Furthermore, extinguishment by inconsistent acts of the Crown may be said to be effected by the grant of tenures by the Crown that confer on third parties rights to use the land in a way inconsistent with the exercise of rights that attach to native title, and by the exercise of those rights. Such circumstances have been described as extinguishment by "adverse dominion": see *United States v Santa Fe Pacific Railroad Co* 314 US 339 (1941) at 347.

In *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 per Lambert JA at 670-2 it was stated that for extinguishment to be effected in this manner three

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conditions were required to be satisfied. First, that there be a clear and plain expression of intention by parliament to bring about extinguishment in that manner; secondly, that there be an act authorised by the legislation which demonstrates the exercise of *permanent* adverse dominion as contemplated by the legislation; and thirdly, unless the legislation provides the extinguishment arises on the creation of the tenure inconsistent with an aboriginal right, there must be *actual use* made of the land by the holder of the tenure which is permanently inconsistent with the continued existence of aboriginal title or right and not merely a temporary suspension thereof ...

[79] The trial judge does not expressly say that he adopts an adverse dominion test which involves the three conditions stated by Lambert JA in *Delgamuukw*, but it is apparent from his consideration of pastoral leases, and other grants to third parties later in his judgment, that he has done so.

[80] We consider that this test of adverse dominion departs from the principles laid down by the High Court in the following respects. The first condition stated by Lambert JA propounds a test that there be a clear and plain intention by parliament to extinguish native title by the creation of third party rights. That requirement does not give due weight to the inconsistency of incidents test, the importance of which underlies the following statement in the joint judgment in *Fejo* at CLR 128; ALR 737:

As Brennan J pointed out in *Mabo (No 2)*, the conclusion that native title has been extinguished by a later grant of freehold to the land is a result that follows not from identifying some intention in the party making the later grant but because of the effect that that later grant has on the rights which together constitute native title.

[81] The inconsistency of incidents test requires a comparison between the legal nature and incidents of the statutory right which has been granted and the native title rights being asserted. The question is whether the statutory right is inconsistent with the continuance of native title rights and interests. It is to be noted that Lambert JA in *Delgamuukw* at 671 said that he did not think that there was any basis in principle for saying that inconsistency between the grant and native title necessarily means that it is the native title that must give way. This view is not consistent with the inconsistency of incidents test adopted in Australia.

[82] The second condition stated by Lambert JA, namely that the grant "demonstrates the exercise of *permanent* adverse dominion ..." introduces a notion of permanency which has not been required by the High Court. In *Mabo (No 2)*, Brennan J at CLR 68-9 and Deane and Gaudron JJ at CLR 110 recognised that a lease granting exclusive possession will extinguish native title. A lease is only for a term of years, and is not permanent. The notion that native title can revive at the conclusion of the term of the lease is, in our view, inconsistent with the joint judgment in *Fejo* at CLR 131.

[83] The notion that a grant of statutory rights inconsistent with the continuance of native title rights must be *permanent* to bring about extinguishment is also inconsistent with the observations of Brennan J in *Mabo (No 2)* at CLR 68; ALR 50 that:

... if a reservation is made for a public purpose other than for the benefit of the indigenous inhabitants, a right to continued enjoyment of native title may be consistent with the specified purpose -- at least for a time -- and native title will not be extinguished. But if the land is used and occupied for the public purpose and the manner of occupation is inconsistent with the continued enjoyment of native title, native title will be extinguished. A reservation of land for future use as a school, a court house or

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a public office will not by itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native title which would thereby be extinguished.

[84] The use of land for a school, a court house or a public office may not be permanent, but more importantly, his Honour's examples indicate that extinguishment occurs as a result of the inconsistent use independent of the likely duration of that use.

[85] If the grant of statutory rights is a grant only for a short finite period, the grant may not be inconsistent with the continuance of native title rights. Whether extinguishment occurs will depend on all the circumstances and is likely to involve matters of degree. However, as a general proposition, we consider that an inconsistent grant of statutory rights, other than for a finite short time, will extinguish native title rights to the extent of the inconsistency. Even in the case of inconsistent grants stated to be of short duration, for example a lease for a short term, if at the time of the grant there was a likelihood that the grant would be renewed at the end of the term, so as to make the duration of the lease in fact indefinite, extinguishment to the extent of the inconsistency would occur.

[86] The third condition stated by Lambert JA requires "actual use" by the holder of the tenure which is permanently inconsistent with the continued existence of native title. The requirement of actual use is again contrary to the inconsistency of incidents test approved in *Wik* and *Fejo*. Under that test, conflict in actual use is only a material consideration where the grant itself does not extinguish native title, but the later exercise or performance of a power or condition contained in the grant does so. We have earlier referred to this as operational inconsistency.

[87] In *Wik* and *Fejo* it was not necessary for the High Court to consider whether there could be "partial extinguishment" of native title: that is, whether if the grant, the exercise of a right or privilege contained in the grant or the Crown use of land, were not wholly inconsistent with the rights of the holders of native title, but were inconsistent with the enjoyment of some only of those rights, the inconsistent rights are extinguished to the extent of the inconsistency. Whether partial extinguishment of this kind is a possible legal consequence of a statutory grant is a major issue of contention between the parties in this case.

Partial extinguishment

[88] The question of "partial extinguishment" of native title rights has not been authoritatively determined by the High Court, nor has it been determined by a decision of a Full Court of this court. The respondent's contention in *Yanner* was that s 7(1) of the Fauna Conservation Act 1974 (Qld) had extinguished the appellant's native title right to hunt young estuarine crocodiles and to that extent had partially extinguished native title rights traditionally enjoyed by the community of which he was a member. In their joint judgment, Gleeson CJ, Gaudron, Kirby and Hayne JJ said it was unnecessary for the decision of the case to examine that submission, and the issue was left open. We will return to judgments of the other members of the court in *Yanner* later in these reasons.

[89] In *Mabo (No 2)* Brennan J at CLR 57 used the term "native title" as a convenient description of the rights and interests of indigenous inhabitants of land. However, native title is not an institution of the common law: *Mabo (No 2)* at CLR 59 and 61, and *Fejo* at CLR 130. In *Yanner* at 299 Callinan J observed that the language of the justices of the High Court when reference is made to native title has tended to be couched, as perhaps it only can be, in terms of

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"incidents", "nature", "rights", "traditions", "customs" and "entitlements". (His Honour gave references to occasions when those terms have been used.) In the *Waanyi* case at CLR 616 it was said in the joint judgment in relation to the right to negotiate conferred by Subdiv B of Div 3 of the Act that "[i]t is erroneous to regard the registered native title claimant's right to negotiate as a windfall accretion to the bundle of those rights for which the claimant seeks recognition by the application". And in *Fejo* in the joint judgment at CLR 126 it is said that a grant of fee simple is inconsistent with native title holders continuing to hold any of "the rights or interests which together make up native title".

[90] The notion that the rights and interests of indigenous people, conveniently described as native title, constitute a bundle of rights appears to fit comfortably with the principle stated in *Mabo (No 2)* by Brennan J at CLR 69, that where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title "native title is extinguished to the extent of the inconsistency". The postscript to the judgment of Toohey J in *Wik* at CLR 132; ALR 188 also accords with this description, where his Honour said with the concurrence of Gaudron, Gummow and Kirby JJ that:

If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield to that extent, to the rights of the grantees.

[91] These statements of principle would suggest that if particular rights and interests of indigenous people in or in relation to land are inconsistent with rights conferred under a statutory grant, the inconsistent rights and interests are extinguished, and the bundle of rights which is conveniently described as "native title" is reduced accordingly.

[92] However, the trial judge rejected an argument to that effect urged by the appellants. His Honour held (at ALR 508) that:

Native title at common law is a communal "right to land" arising from the significant connection of an indigenous society with land under its customs and culture. It is not a mere "bundle of rights": see *Delgamuokw v British Columbia* (1997) 153 DLR (4th) 193 per Lamer CJ at 240-1. The right of occupation that is native title is an interest in land: see *Mabo (No 2)* per Brennan J at CLR 51. There is no concept at common law of "partial extinguishment" of native title by the several "extinguishment" of one or more components of a bundle of rights. It follows that there cannot be a determination under the Act that native title exists but that some, or all, "native title rights" have been "extinguished".

Strict regulation of the rights parasitic upon native title by suspension, suppression, curtailment or control of those rights by legislation or by acts of the Crown which may thereby involve a grant of rights of use of Crown land to third parties may impair native title but strict regulation of the exercise of such rights of itself, will not mean that native title has been extinguished.

and later his Honour added (at ALR 510):

Fundamental inconsistency between the exercise of rights granted to third parties by act of the Crown and the exercise of any right that attaches to native title may show an intention by the Crown to extinguish native title, but inconsistency with the exercise of some only of those rights will not. Native title will remain a right to the land under which other native title rights may be enjoyed.

[93] The expression "fundamental inconsistency" is not one used in the test of inconsistency propounded in the judgments in *Wik*. Nor in any of the judgments

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of the High Court does the notion of parasitic or dependent rights flowing from native title find expression. That is a notion which his Honour appears to have derived from Canadian authorities. However, as Gummow J pointed out in *Wik* at CLR 182, in Canada the basic legal framework developed quite differently. In *Fejo* the joint judgment at CLR 130 expressed doubt that much direct assistance is to be had from decisions in other common law jurisdictions, and Kirby J at CLR 148-9 said that care must be exercised in the use of authorities from other former colonies and territories, noting that the position in Canada (and New Zealand) had followed a different course. Canadian jurisprudence owes much to s 35(1) of the Constitution Act 1982 (Can).

[94] The trial judge construed the statement of Brennan J in *Mabo (No 2)* that an inconsistent grant would extinguish native title "to the extent of the inconsistency" as referring to the extinguishment of native title to the extent that there is an area of land in respect of which inconsistent rights may have been granted by the Crown with the intent of extinguishing native title. In this sense there could be partial extinguishment, that part of the area formerly the subject of native title would no longer be subject to any native title rights. This would amount to a partial extinguishment in geographical dimensions, and not a partial reduction in the number of the rights and interests otherwise enjoyed by the Aboriginal community. That conclusion appears to be drawn from observations in *Wik* by Gaudron J at CLR 166 and Gummow J at CLR 203; ALR 246 relating to inconsistency arising from the performance of conditions in pastoral leases. The passage from the judgment of Gummow J, which his Honour cited, reads:

It may be that the enjoyment of some or all native title rights with respect to particular portions of the ... (pastoral lease) would be excluded by construction of the airstrip and dams and by compliance with other conditions. But that would present particular issues of fact for decision. The performance of the conditions, rather than their impositions by the grant, would have brought about the relevant abrogation of native title.

[95] The observations of Gaudron and Gummow JJ refer to what we have earlier described as an operational inconsistency. The appellants' argument that there can be a partial extinguishment of rights by the several extinguishment of one or more components of a bundle of rights is an argument distinct from the possibility that operational inconsistency may wholly extinguish native title in respect of a particular area of land.

[96] As the common law does not recognise "native title" as an institution of the common law it is, in our opinion, a mistake to treat native title as a legal construct which is separate from the rights and interests of indigenous people. While references may be found in judgments of members of the High Court to the "incidents" of native title (for example, *Mabo (No 2)* at CLR 58 per Brennan J, *Wik* at CLR 185 per Gummow J, *Yanner* at 274 and 278 per Gummow J and at 293 per Callinan J) care is needed in the use of this expression. Under the tenure system of the common law, legal and equitable estates in land are institutions of the common law. Rights attaching to those estates as a matter of law, are described as incidents of the estates or of the title. Rights attaching to common law tenures of that kind are truly pendant or parasitic on the title. That, however, is not the case in respect of "native title", and the quality of the rights and interests conveniently described as native title cannot be elevated to something akin to a common law tenure by describing them as "incidents".

[97] To describe native title as a bundle of rights is not to deny the possibility that in a particular case the rights and interests may be so extensive as to be in

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the nature of a proprietary interest in land, a possibility recognised by Brennan J in *Mabo (No 2)* at CLR 51 and Gummow J in *Wik* at CLR 169. Moreover, it is not inaccurate to describe proprietary interests as a "bundle of rights": *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285 per Rich J and *Yanner* at 264 .

[98] As earlier observed, in *Yanner*, the question whether there could be an extinguishment of some only of the rights and interests constituting native title, in consequence of inconsistency arising from a legislative prohibition on the exercise of a particular right, was left open by Gleeson CJ, Gaudron, Kirby and Hayne JJ. The respondent's argument was, however, addressed by Gummow and Callinan JJ. Callinan J would have dismissed the appeal on the ground that the native title right relied on by the appellant had been extinguished by the legislation. At 288-9 Gummow J considered the issue of extinguishment and at [112] posed the narrow question for decision as "whether the creation of

certain statutory rights, conditioned upon the exercise of power conferred by the statute, abrogated the exercise of the native title right or incident to hunt". His Honour concluded that the statute, properly construed, did not have that effect. However, his discussion of the extinguishment issue supports the notion of a partial extinguishment. The remaining member of the court, McHugh J, held that s 7(1) of the Fauna Conservation Act had vested in the Crown the right to deal with fauna (which included estuarine crocodiles), and took away from everyone else all existing rights to take fauna: at 271 . The practical effect of that conclusion was to deny any present right to the appellant (or his community) to take estuarine crocodiles, but it does not necessarily follow that such a right was permanently extinguished, as opposed to being merely suspended. In *Yanner*, therefore, four members of the court expressly left open the question of partial extinguishment, one member of the court did not deal with the question, and the reasoning of two members of the court supports the notion of partial extinguishment.

[99] In the joint judgment in *Yanner*, four members of the High Court at 269-70 made the following observations in relation to the topic of alleged inconsistency arising from the statutory regulation or prohibition of rights or interests that may be exercised, and native title rights and interests:

... in deciding whether an alleged inconsistency is made out, it will usually be necessary to keep well in mind that native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land. As Brennan J said in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 358; 44 ALR 63, "Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights" but "[t]raditional Aboriginal land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aboriginals or Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary right with respect to it."

Native title rights and interests must be understood as what has been called "a perception of socially constituted fact" as well as "comprising various assortments of artificially defined jural right": K Gray and S F Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, 1998, 15 at 27. And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land. Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, "You may not hunt

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or fish without a permit", does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.

[100] The authors of "The Idea of Property in Land" cited by their Honours describe three ways in which common law jurisprudence can conceive of property in land. The first two ways are discussed under the headings "Property as a Fact" and "Property as a Right". Under the first of these headings the authors say at 18-19:

Much of the genius of the common law derives from a rough-and-ready grasp of the empirical realities of life. According to this perspective, the identification of property in land is an earthily pragmatic affair. There is a deeply anti-intellectual streak in the common law tradition which cares little for grand or abstract theories of ownership, preferring to fasten instead upon the raw organic facts of human behaviour. This perspective is preoccupied with what happens on the ground rather than with what emerges from the heaven of concepts. Accordingly, the crude empiricism of this outlook leaves the recognition of property to rest upon essentially intuitive perceptions of the degree to which a claimant successfully asserts de facto possessory control over land. On this view property in land is more about fact than about right; it derives ultimately not from "words upon parchment" but from the elemental primacy of sustained possession. Property in land is thus measurable with reference to essentially behavioural data; it expresses a visceral insight into the current balance of human power relationships in respect of land [footnotes omitted].

[101] The authors go on to say that concealed within this behavioural notion of property is, inevitably, some primal perception of the *propriety* of one's nexus with land which asserts that the land is "proper" to one; that one has some significant self-constituting, self-realising, self-identifying connection with the land. Yet, in terms of the empirical perspective which treats property in land as "a perception of socially constituted fact", it is the mode of behaviour consciously adopted by the claimant occupier that is the critical determinant.

[102] The authors, while recognising that an aspect of the behavioural notion of property is a perception of belonging to the land, which in the context of native title would include spiritual, cultural and social connection with the land, it is the empirical facts, and the behavioural data that evidences that connection, which is recognised and protected by the common law.

[103] In *Fejo* six members of the High Court in their joint judgment at CLR 126 say that a grant of fee simple "simply does not permit of the enjoyment by anyone else of any right or interest in respect of the land", and at CLR 128: "[t]he rights of native title are rights and interests that relate to the use of the land by the holders of the native title".

[104] In our opinion references to enjoyment of rights and interests in respect of the land, and to use of the land in these passages, confirm that the native title rights and interests that are recognised and protected by the common law are those which involve physical presence on the land, and activities on the land associated with traditional social and cultural practices. (See also *Mabo (No 2)* at CLR 188 per Toohey J.) While the relationship of indigenous people with their traditional home land is "primarily a spiritual affair", or as Blackburn J described it in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167, a "religious relationship", the common law applies to protect only the physical enjoyment of rights and interests that are of a kind that can be exercised on the land, and does not protect purely religious or spiritual relationships with land.

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[105] Under the heading "Property as a Right" the authors of "The Idea of Property in Land" say, at 27:

A rather different -- and not entirely consistent -- focus is provided by the competing assessment of property in land as comprising various assortments of artificially defined jural right. On this view, the law of real property becomes distanced from the physical reality of land and enters a world of conceptual -- indeed some would say virtually mathematical -- abstraction. In sharp contrast to the crudely empirical foundations of property as a fact, the vision of property as a right rests upon a complex calculus of carefully calibrated "estates" and "interests" in land, all underpinned by the political theory implicit in the doctrine of tenure [footnotes omitted].

[106] It is clear from judgments in *Mabo (No 2)* and *Fejo*, to which we have already referred, that native title is not an institution of the common law, and not a common law tenure. We do not understand the reference in the joint judgment in *Yanner* to native title "comprising various assortments of artificially defined jural right" to be an endorsement of a notion that native title is an abstract form of title from which pendant rights are derived.

[107] Once rights and interests that involve the physical use and enjoyment of land are identified, their recognition by the common law gives rise to jural rights under the common law system. Native title rights and interests thus give rise to jural rights which are "artificially defined" under the common law because they arise from the acknowledgment and observance of traditional laws and customs under a different legal system. The common law accords a status to, and permits enforcement of, those rights according to common law principles. The artificiality is a consequence of the intersection of the common law system of law with traditional laws and customs of the indigenous people.

[108] That the common law does not provide for the protection or enforcement of purely religious or spiritual affiliation with land, divorced from actual physical use and enjoyment of the land, has the consequence that the continued recognition of traditional laws and observance of traditional customs may substantially maintain a connection between the indigenous people and the land even after native title rights and interests have under Australian law been totally extinguished, for example by a grant of freehold. This possibility is acknowledged in the joint judgment in *Fejo* at CLR 128; ALR 737 in the following passage:

The underlying existence of the traditional laws and customs is a *necessary* prerequisite for native title but their existence is not a *sufficient* basis for recognising native title. And yet the argument that a grant in fee simple does not extinguish, but merely suspends native title is an argument that seeks to convert the fact of continued connection with the land into a right to maintain that connection.

See also *Fejo* at CLR 151 per Kirby J, and *Yanner* at 288 per Gummow J. We return to the topic of the maintenance of a substantial connection with land later in these reasons.

[109] In our opinion the rights and interests of indigenous people which together make up native title are aptly described as a "bundle of rights". It is possible for some only of those rights to be extinguished by the creation of inconsistent rights by laws or executive acts. Where this happens "partial extinguishment" occurs. In a particular case a bundle of rights that was so extensive as to be in the nature of a proprietary interest, by partial extinguishment may be

so reduced that the rights which remain no longer have that character. Further, it is possible that a succession of different grants may have a cumulative

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effect, such that native title rights and interests that survived one grant that brought about partial extinguishment, may later be extinguished by another grant.

[110] In our opinion the trial judge erred in holding that there is no concept at common law of partial extinguishment of native title.

[111] In summary, extinguishment of native title rights or interests may occur in a number of situations, and the extinguishment may be a complete denial of any further native title right or interest. Alternatively, it may constitute an extinguishment or denial of the future enjoyment of some only of the rights and interests. Extinguishment may occur: (1) by laws or acts which simply extinguish native title; (2) by laws or acts which create rights in third parties in respect of an area of land or water subject to native title which are inconsistent with the continued rights to enjoy native title; and (3) by laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title. In the second of these situations, extinguishment may occur at the time of the grant because of the inconsistency of incidents of native title and the grant of statutory rights, or, less commonly, may arise subsequently because of operational inconsistency in a particular part of an area over which native title previously existed. In any of these cases the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the legislature or the executive.

[112] It will be necessary later in these reasons to consider allegations by one or more of the appellants that total or partial extinguishment of native title in parts of the claim area has occurred in each of these ways.

Onus of proof of extinguishment

[113] The parties in their submissions have addressed issues relating to onus of proof.

[114] On an application under s 13 of the NTA for a determination of native title, the applicants must establish that as Aboriginal peoples or Torres Strait Islanders they are presently possessed of communal, group or individual rights and interests in relation to land or waters where those rights and interests fulfil the requirements of s 223(1)(a), (b) and (c). That will require the applicants to prove the existence of rights and interests held by them under traditional laws acknowledged and traditional customs observed in the relevant area, that they have the necessary descendant relationship with former holders of native title in that area, and that by those laws and customs, they have substantially maintained connection with the land. They must also establish the ambit or content of the native title rights and interests as defined by the traditional laws and customs of their community; cf *Yanner* at 288-9 per Gummow J. On those matters the applicants plainly carry both an evidential onus of proof, and the ultimate onus, or burden, of proof.

[115] The central issue canvassed by the parties in their submissions is whether an onus of proof rests on the applicants to negative extinguishment where extinguishment by inconsistent law or statutory grant is alleged by a party to the application. It follows from the provisions of Pt 3 of the NTA that the Commonwealth minister and the relevant State or Territory minister will be parties to an application in the Federal Court, and if extinguishment is to be an issue it is likely that it will be raised by a minister, if not by another party. This is the practical reality that flows from the Crown in right of the Commonwealth, State, or Territory concerned being in the best position to know the pertinent facts.

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[116] In *Coe v Commonwealth* (1993) 118 ALR 193 the relief sought by the plaintiff included declarations to the effect that the Wiradjuri tribe are the owners of land constituting a large part of southern and central New South Wales. On an application by the defendants to strike out the proceedings, Mason CJ at 206 said that he did not consider the State of New South Wales carried the onus of proving extinguishment. The Chief Justice said:

It seems to me that, if the plaintiff asserts native title to land, then the plaintiff must establish the conditions according to which native title subsists. Those conditions include (a) that the title has not been extinguished by inconsistent Crown grant and (b) that it has not been extinguished by the Aboriginal occupiers ceasing to have a requisite physical connection with the land in question. In *Mabo (No 2)* at CLR 70; ALR 51, Brennan J said:

“Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan.”

[117] The claim in that case was not made under the NTA, but in the Supreme Court of New South Wales seeking a declaration according to common law principles. Even in an application now brought under the NTA we think it is probably correct, in strictness, to say that the ultimate burden of proof rests on the applicants to establish that extinguishment has not occurred. This is so as the applicants must ultimately show that there currently exists native title rights and interests, and they will fail if the rights and interests asserted have at an earlier time been extinguished by law or Crown grant.

[118] That legal burden of proof in the strict sense must however be distinguished from an evidential burden which may rest on the party who asserts extinguishment, and this distinction leads to another, namely the distinction between alleged extinguishment by a law on the one hand, and acts of State or executive action on the other which are said to effect extinguishment.

[119] Where extinguishment is said to arise by force of legislation, the legislation itself is a matter of public record that needs no evidential proof. The application of the legislation to the facts of the case is a matter of law, no evidence is required to prove the law, and the legal effect of the legislation is not dependent upon evidence as to the state of mind of the legislators. It is well established by the cases (for example, *Mabo (No 2)* at CLR 64 per Brennan J, CLR 110-11 per Deane and Gaudron JJ and at CLR 195-6 per Toohey J) that the legislation must manifest clearly and plainly an intention to extinguish native title rights and interests before it will have that effect. That requirement is a rule of law relating to the interpretation of a statute, and not a rule of evidence relating to onus of proof. The following passages from the joint judgment in the *Native Title Act* case at CLR 422-3; ALR 12 are to be understood as referring to the rule of law relating to interpretation of a statute, not to questions of evidential proof:

Although an acquiring Sovereign can extinguish such rights and interests in the course of the act of State acquiring the territory, the presumption in the case of the Crown is that no extinguishment is intended ...

... To discharge the onus, it is necessary to show at least that the Crown has manifested clearly and plainly an intention to extinguish all native title. So much is required of any statute which is said to extinguish native title which has survived acquisition of a territory by the Crown and there is no reason why some lesser standard should be applied in ascertaining the Crown's intention when exercising the prerogative

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power to acquire new territory. It may be that even stricter proof is required. In *Re Southern Rhodesia* Lord Sumner said the presumption of the survival of property rights upon conquest was applicable “in the absence of *express confiscation* or of subsequent expropriatory legislation”.

[120] The effect of the rule of interpretation and the presumption that no extinguishment is intended is that doubtful expressions and doubtful provisions in legislation are to be resolved in favour of those who are asserting native title. Similar rules of law apply where extinguishment by executive act is asserted when construing the empowering legislation and the written instruments by which the executive act is effected. Where extinguishment is said to arise from an act of State, or executive act, evidence is required to prove the fact and content of the act of State or executive act. For example, where it is alleged that native title is extinguished by the grant of a lease, the fact of the grant and the terms of the lease must be established by evidence in the same way as any other fact that must be proved. In that situation, absent proof of the executive act, the court would have no basis for finding extinguishment. Thus, in accordance with ordinary principle, the party asserting extinguishment carries an evidential onus of proving the nature and content of the executive act relied upon (although the discharge of that evidential onus may be assisted by the ordinary presumptions of regularity and continuance). However, once proved, the effect of that act upon native title rights is a matter of law. For example, if it is proved that a lease has been granted over the subject land, it is then a question of law to interpret the meaning and effect of the terms of the lease.

Summary of findings at trial on native title issues

[121] Before turning to the submissions made about the trial judge's findings of fact, it is convenient first to summarise the findings that were made by the trial judge, and the material which was relied upon to support them.

Findings on Aboriginal connection with the claim area at sovereignty

[122] The finding that the claim area and surrounding lands were inhabited by organised communities of Aboriginal inhabitants at the time of sovereignty functioning under elaborate traditions, procedures, laws and customs which connects them to the land, was based on writings of anthropologists, on reports prepared for the purposes of the case by archaeologists and on reports of historians. Dr Fullagar gave evidence for the applicants that there was general agreement among archaeologists that Aboriginal people lived in the north-west of Australia for at least 40,000 years. He described the conclusions reached from scientific testing of archaeological material found at the Miriwun rock shelter at Lake Argyle. This showed that the site had been used by Aboriginal people for at least 18,000 years. Archaeological work at that site and in the region demonstrated a pattern of use and occupation of the land by Aboriginal people over thousands of years. The sites attested to regular, not random, use of the land by organised groups of people and suggested activities consistent with the occupation of a homeland. Dr Fullagar considered it beyond doubt that the claim area had been occupied by Aboriginal people for thousands of generations.

[123] The reports of historians referred to records of maritime explorers and cartographers who observed Aboriginal people carrying on subsistence activities at Booroongoong (Lacrosse Island) and in the Gulf before 1820, and groups of Aboriginal people were observed by overland explorers who traversed the region after sovereignty and before European settlers. Dr N Green, an historian who

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gave evidence for the State, considered that it was beyond question that Aboriginal people occupied the claim area before sovereignty and when settlers first arrived in the mid-1880s.

[124] The evidence provided clear support for the finding that Aboriginal communities occupied the claim area at sovereignty, and were possessed of native title in respect of that land at the time. This finding is not the subject of challenge on appeal.

Aboriginal connection with the claim area after sovereignty

[125] Continuing Aboriginal connection with the claim area generally was disputed by the State, and by other respondents at trial in respect of their particular areas of interest.

[126] Lee J commenced his discussion of the evidence on this topic with the observation that unless there is evidence to the contrary, it may be inferred that when European settlement of the claim area began some 60 years after sovereignty was asserted, the Aboriginal inhabitants then in occupation of that area were connected both to the land of the claim area and with the Aboriginal people who occupied the claim area at sovereignty. The question whether native title continued thereafter involved an assessment of the nature of the changes European settlement wrought upon the Aboriginal people occupying the claim area at the time of settlement. His Honour's discussion of the evidence on that question, and whether the Miriwung and Gajerrong community maintain such a connection, is lengthy (at ALR 514-52) and is dealt with under headings:

(a) Historical evidence

[127] Archaeological evidence showed continuity of use of particular areas of land after European colonisation. That evidence, coupled with ethnographic material, identified sites within the claim area as places of continuing ceremonial or mythical significance. There was evidence that rock paintings at some sites had spiritual and mythological meanings that have been handed down through the generations. His Honour found that the knowledge of Aboriginal people of the significance of such sites, together with the archaeological material, pointed to the observance or acknowledgment of traditional laws and customs by a community subsequent to settlement and of the maintenance of some form of connection with the land thereafter. Dr Gregory gave evidence that artefacts made from European materials and the depictions of rock art demonstrated that the sites continued to be used during the "contact period", which was a matter of importance, as ethnographic materials suggest that such art is only carried out in the "country" of the artist.

[128] With the advent of the pastoral industry, which absorbed the Aboriginal communities, there was evidence that the former lifestyle of Aborigines in the area of congregating in the dry season and dispersing in the wet season was reversed by a pattern of employment and residence on pastoral properties in the dry season, and movement and congregation in the wet season during "holiday time". Formerly, the common pattern of land use was that Aboriginal people split into small family groups for hunting, collecting and foraging for much of the year, and that during the dry season large gatherings would occur for ceremonial, ritual, social and trading purposes. There were seasonal movements to the coast and lowland plains in the dry season, and to the higher country which provided places of shelter in the wet season. Notwithstanding this change of lifestyle, there

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was evidence that trading and exchange of artefacts was continued between groups within and outside the claim area after settlement.

[129] Dr Gregory gave evidence that traditional Aboriginal societies in the region were initially militant and mounted resistance against European intrusions in the form of raids on stations, cattle spearing and physical retreat to less accessible places such as rugged sandstone country. He said it took 50 years between 1880 and 1930 before "pacification" or conquest of Aboriginal people in the region was effected by the use of force by settlers and law enforcement officers. During that time many Aboriginal people in the East Kimberley were killed by settlers and by others, including miners around the Halls Creek gold fields after 1885. Witnesses for the applicants in their evidence referred to this period as the "shooting time". In some areas Aboriginal groups were virtually annihilated by reason of these events, disease and malnutrition. Aboriginal numbers were also affected by the removal of large numbers of male Aboriginal people to remote prisons after conviction on charges relating to the killing of cattle, the removal of large numbers of young Aboriginal males from the Kimberley region for use as divers in the pearling industry, the aggregation and relocation of Aboriginal people from the region at ration stations established some distance away at Moola Bulla and Violet Valley, and the gathering of Aboriginal people and control of their traditional practices at settlements established by church missions in the region.

[130] The introduction of cattle by pastoral enterprises seriously depleted usual sources of sustenance, making it difficult for remaining Aboriginal people to follow their nomadic way of life. The demand for labour by pastoral enterprises also saw inhabitants of the region taken into pastoral homesteads, where males were used as stockmen and females used in domestic service. The homestead became the source of food for both employed and unemployed Aboriginal people.

[131] The effect of European settlement was greater around the pastoral properties in the Ord River valleys than in the more remote coastal areas. In those more remote areas, up to the 1930s, small groups of Aboriginal people maintained a nomadic lifestyle, taking sustenance from the land and avoiding the "white man". Although by then the majority of Aboriginal people in the region were living and working on cattle stations, there were others who stayed away in the ranges and were visited by family and friends during the wet or holiday season.

[132] His Honour considered oral histories, some given by witnesses, and others recorded by an historian, Dr Shaw, in the early 1970s. Those histories include graphic accounts of massacres in the 50 years leading up to "pacification" and of the enforced removal of Aborigines from their bush life to station life. These histories were from people who identified themselves as Miriuwung or Gajerrong people. One of the people from whom an oral history was obtained by Dr Shaw, Grant Ngabidj, was a Gajerrong man born in about 1904. He gave an account of early contact with settlers which was related by Dr Shaw (at ALR 517) as follows:

Soon after Grant was able to walk and run about, William Weaber a German station manager together with his brother and a number of white and Aboriginal station people from Queensland took up Ningbing Station, in 1907-08. Grant witnessed these persons round up many of his local group, most of whom were shot subsequently after he, his sister and their mother were removed from the scene.

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[133] Dr Green, in reports prepared for the State, also described killings of Aboriginal people that occurred as a result of the Kimberley gold rush, and massacres that occurred between 1884 and 1926. His Honour observed that set-

tlers no doubt believed that their property and lives were under threat, and history records that in early years a number of drovers and pastoralists were attacked and killed -- events that led to savage reprisals and pre-emptive action.

[134] His Honour noted that Grant Ngabidj told Dr Shaw (at ALR 519) :

There were all Gadjerong people along the coast until the white men shot them. Half of them died and some of the young boys were brought into the stations to quieten them and to learn the horses, like me. All the Gadjerong people were taken out of their country and put on the stations or were killed. There are no people left there now.

[135] There is evidence that there was a community described as ``Doolboong" that as neighbours of the Miri-uwung and Gajerrong existed in the coastal area. Bulla Bilinggiin, born in about 1899, told Dr Shaw in 1974 (at ALR 519):

Dulbung is finished. Everybody died ... and there was all that Dulbung lot from the coast down from Ningbing, down from Wyndham back this way.

[136] Grant Ngabidj told Dr Shaw that Doolboong country was below Goose Hill, and that a number of Doolboong people lost their lives in the Forrest River massacre in 1926. At a Royal Commission appointed in 1927 to inquire into the events at Forrest River, a medical officer stationed at Wyndham gave evidence that (at ALR 519):

I calculated that in the north during the last 50 years something like 10,000 natives had disappeared by devious means, not necessarily old age. Their natural game has been either exterminated or frightened away. Wherever a white man sets foot or uses firearms he frightened away the game. The native game being in diminished numbers their place taken by flocks and herds of their white oppressors.

[137] Dr Green suggested that the extent of upheaval inflicted on Aboriginal inhabitants in the latter part of the nineteenth century and early twentieth century may have resulted in the replacement of those inhabitants by other Aboriginal communities, and that perhaps the Miriuwung or Gajerrong communities had come to the claim area at that time.

[138] His Honour observed that the degree of dislocation and decimation caused by the arrival of settlers and miners in the East Kimberley in the 1880s and 1890s, and thereafter, cannot be underestimated in its effect of dispossessing Aboriginal inhabitants and of fracturing their communities. However, his Honour considered that in cross-examination Dr Green conceded that a number of propositions set out in his reports were to be read with qualification, and that he had raised the ``replacement" possibility as one to be borne in mind, not to suggest that there was evidence to support it. Dr Green agreed that there was no question that whenever Aboriginal people went, or were taken, into pastoral station homesteads they continued, and have continued to the present, to practise their ``law". Traditional usufructuary activities were pursued as circumstances permitted.

[139] His Honour concluded that the account given by Grant Ngabidj to Dr Shaw that the Gajerrong people were taken out of their country and put on the stations, and that there were no people left (in their country), was to be understood in that light. His Honour considered that there was abundant evidence that although separated from their homeland country, most Aboriginal people were on stations in proximity to their country and continued to be bound or

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connected to the country, by their customs and beliefs, and renewed contact with it by returning to the place in the ``holiday time" of the stations. Writings of anthropologists, referred to by his Honour, noted that the Aborigines were a deeply religious people whose religious feeling was manifest through ritual observance and through mythical expressions, and the information stored in them, which led to a deep emotional attachment to the land.

[140] His Honour also referred to the effect of the 1968 Pastoral Award, which saw Aboriginal people leave pastoral properties, and to acts of the Crown which entrenched disadvantages suffered by Aboriginal people, such as the failure to extend suffrage to them in federal elections until 1962, and in State elections until 1971. Education of Aboriginal people was also restricted, access to the State education system being denied to Aboriginal children until the 1950s.

(b) Linguistic evidence

[141] Ms Kofod, a consultant linguist, gave evidence for the applicants to the effect that the existence of the Miriuwung and Gajerrong languages, and the use thereof by Aboriginal people, indicated a continuing existence of an identifiable Aboriginal community and of the maintenance of connection with land with which the group had been associated by repute. Ms Kofod had observed and studied speakers of the Miriuwung and Gajerrong languages for periods of three or four months in each year between 1971 and 1974, again in 1986 and on numerous periods in 1987 and 1988. His Honour described her as an impressive witness whose evidence could be relied upon.

[142] Ms Kofod stated that the Miriuwung and Gajerrong languages are related languages being part of a group of languages known as Jerrag. There are differences between the languages and each may be treated as a distinct and separate language, used for separate "countries", albeit areas with overlapping boundaries. The people of each "country" related parallel Dreaming (Ngarranggarni) stories for different areas of land in each country. Based on time spent with Miriuwung people over 25 years, and observing their knowledge of the land, its resources and continued use, Ms Kofod considered their knowledge of the mythical connections with the land handed down by ancestors, their desire to establish a language and cultural centre to preserve and promote the Miriuwung and Gajerrong languages, their desire to impart to the young their knowledge about the land they claimed as "country", and their desire to establish "outstations" on "country", led to the conclusion that the Miriuwung and Gajerrong people had continued to maintain a connection with the land claimed as "country" since the advent of European settlement in the region.

[143] A report was submitted by the State from Dr B A Sommer in response to Ms Kofod's report. Dr Sommer suggested the possibility that the Miriuwung and Gajerrong community had taken over habitation of the area from another group or groups. As to that suggestion his Honour concluded (at ALR 524):

It may be thought that in the absence of any evidence that such an event had occurred subsequent to the formation of a colony, there would be little room for such speculation. It was made clear by Ms Kofod that the extent of the use of the Miriuwung language in respect of features of the claim area, coupled with ethnographic material relating to widespread Dreaming and spiritual connections with the land for Miriuwung and Gajerrong people, speak quite forcefully of lengthy occupation of the relevant area and make it most improbable that the Miriuwung and Gajerrong were first connected with the land some time after 1825 or 1829.

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[144] In the evidence presented the claim area was said to be Miriuwung and Gajerrong country partly because that is where the languages belong, not because it is country inhabited by people who speak Miriuwung or Gajerrong. His Honour concluded that the mutual possession of a language connected with the land was an incident of identification of the community, as was mutual recognition of membership of that community, mutual acknowledgment and observation of traditional law, customs and practices, and the recognition by others of the existence of the community.

(c) "Primary" evidence of applicants

[145] Numerous "primary" witnesses were called on behalf of the applicants, and also by the Territory applicants. His Honour described the evidence from a number of them as "impressive", and found there to be no issue of credibility in respect of any of the primary witnesses. While some had greater knowledge than others of relevant matters, his Honour said that they all spoke of a community based on the tradition of forebears. His Honour said (at ALR 526):

Having due regard to the difficulties they faced, and interpreting the evidence with consciousness of the special nature of the Aboriginal claims, I found the "primary" witnesses for the first and second applicants to be convincing in their description of connection to land and acknowledgement of traditional practices. I was impressed by evidence of profoundly held views and beliefs given in a forthright manner without embroidery. Evidence given by senior and respected people, and by others who deferred to them, produced a very clear impression of witnesses who understood that they shared membership of a distinct social group or community identified by common beliefs, mutual recognition of membership, shared use of, or reference to, the Miriuwung or Gajerrong languages, and observance, as members of that community, of practices based on traditional laws or customs. Evidence of an organised community which observed traditional practices, laws or customs was most convincing.

(d) Anthropological evidence

[146] The applicants adduced expert evidence in written reports and in oral evidence from two anthropologists, Mr Akerman and Associate Professor Christensen. Their reports drew together and discussed in a contemporary conceptual framework diverse written and unwritten ethnographical material relating to the Miriuwung and Gajerrong people, for the purposes of the proceedings. The reports made reference to earlier works conducted in the 1920s and 1930s by Professor Elkin and Ms Kaberry. Ms Kaberry had conducted field work in the region, under Professor Elkin's supervision, in 1934 and in 1935-36, leading to the publication of the leading text *Aboriginal Woman; Sacred and Profane*, George Routledge & Sons Ltd, London, 1939 and a number of shorter articles. Her field notes and the numerous genealogical charts recorded in her field diaries were available to the anthropologists who gave evidence, as were the field notes of a linguist, Arthur Capell, who worked in the region between 1938 and 1939. The Territory applicants tendered anthropological reports from Mr Barber and Dr Palmer, and also led further oral evidence from them. The Balangarra peoples tendered an anthropological report from Ms Doohan, together with genealogies and genealogical charts prepared by her.

[147] The State tendered a report and led oral evidence from Professor Maddock, who was the only anthropologist called to give evidence for the respondents at trial. He had not conducted field work in the claim area, and his report was a comment on the opinions of the other anthropologists expressed in their reports.

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[148] Associate Professor Christensen and Professor Maddock prepared supplementary reports after hearing the "primary" evidence led at trial.

[149] His Honour described the evidence of the anthropologists as clear, objective and helpful. Mr Akerman and Associate Professor Christensen emphasised the continuity of connection between the people who regarded themselves as the Miriuwung and Gajerrong community today, and the organised societies in occupation at the time of settlement. Professor Maddock's report, however, was directed to the possibility of population shifts into, or out of, the claim area and the extent of the possible change to the system of social organisation that had existed in the claim area at the time of sovereignty.

[150] His Honour observed that it was apparent during the cross-examination of Professor Maddock that he agreed with significant aspects of the Miriuwung and Gajerrong people's case that communal native title is held by a wider community than a "local descendant group" (being a group of the kind in which statutory rights in land may be vested under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)). His Honour found that there was accord between the anthropologists, that in respect of parts of the claim area "local descent" or "estate groups" anchored in areas of country by a particular site or geographic feature with which they had a special bond, were part of the framework of the traditional laws or customs of the Miriuwung and Gajerrong people in respect of land. The rights distributed to such subgroups under traditional laws and customs included the right to use a particular area of land for the benefit of that "estate group" and the right of some in that group (the "Dawawang") to "speak for" that land and as to its use. Attached to those rights were responsibilities which included a duty to "care for" the country and to protect Dreaming sites, art sites and other places of significance in the "estate" area. His Honour noted that (at ALR 529):

"Estate groups", however, were not self-contained, or autonomous functioning societies in occupation of the land. They were subgroups of the Miriuwung and Gajerrong community from which rights and duties devolved under the traditional laws and customs of that community.

[151] His Honour discussed the kinship and subsection systems and totemism recognised in the East Kimberley. The evidence of Mr Barber and Dr Palmer was that one effect of the subsection system is to extend behavioural rules based on kinship to persons who are not related consanguinely. His Honour concluded (at ALR 530):

Both the kinship and subsection system tend to suggest that from the Aboriginal perspective relationships between people, and their relationship with land, do not depend solely, or necessarily, on biological descent, a view confirmed by Ms Doohan in her evidence. Other factors said by both the anthropologists and the "primary" witnesses to be relevant to the existence of such a connection were adoption, place of birth or place of conception. These so-called "secondary" mechanisms are not regarded as aberrations to a general rule but as demonstrative of the interconnectedness of various aspects of Aboriginal society.

[152] His Honour also noted that the anthropological evidence emphasised the comprehensive influence of the Dreaming (Ngarranggarni) and totemism. Associate Professor Christensen stated that the Dreaming simultaneously provided for local independence and authority (for example, "Dawawang" rights related to particular "estate groups") and the affirmation of mutual dependence on neighbouring subgroups through ritual and ceremony. Mr Akerman described

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the wide scope of Dreaming, and the responsibilities of different "estate groups" along the Dreaming track for segments of it. He confirmed the link between Dreaming, ceremony and ritual. Anthropological evidence confirmed the evidence of "primary witnesses" that major ceremonies were held in association with neighbouring and sometimes more distant communities.

(e) Genealogical evidence

[153] Genealogical evidence was adduced from the "primary" witnesses and from the anthropologists called by the applicants, the Territory applicants, the Balangarra peoples and the Kimberley Land Council. Evidence also included charts prepared by the anthropologists, charts and field notes prepared by Ms Kaberry in the 1930s, and oral histories recorded by Dr Shaw. By that evidence the applicants sought to establish that they had forbears who were members of an Aboriginal community or communities that occupied the claim area well before contact with European settlers and, by inference, before sovereignty was asserted by the State or the Territory. Further, by showing relationships between Aboriginal people, the material was relied upon to establish the existence of an identifiable community that had a connection with land through forbears and which observed, or acknowledged, traditional laws and customs of the forbears.

[154] Having regard to the general consistency of the content of the charts with the tenor of the "primary" evidence of the applicants, his Honour expressed his satisfaction as to the reliability of the methods employed by the anthropologists in preparing the charts. His Honour considered the charts represented the accepted social recognition of kinship and "biological descent" in its widest sense. His Honour held that the requirement of "biological descent", referred to by Brennan J in *Mabo (No 2)* at CLR 70 involved a broad understanding of descent, not the application of a narrow and exclusive test. His Honour said (at ALR 532):

... it is not a requirement that a "biological" connection be made between each member of the Miriuwung and Gajerrong community and an ancestor who was in occupation of the claim area at the time of sovereignty as a member of an identifiable and functioning society. What is required is that there be sufficient connection by way of actual, or implied, genealogical links to show that the community in occupation of the land at sovereignty was the predecessor of a community that now claims native title. Part of that connection is shown by demonstrating the observance, or acknowledgement, by the community in some practical form of traditional laws or customs. As far as the requirement of descent is concerned, it is sufficient to show that an inference may be drawn that known ancestors were connected with the community in occupation at the time of sovereignty and with members of the present community.

[155] His Honour said that the genealogies showed a broad spread of links between ancestors identified in the judgment and the representative applicants. After considering the evidence as to the genealogical links, including those going back to Grant Ngabidj who was married to Maggie Darrng, identified by one witness as the last of the Dool-boong, his Honour concluded (at ALR 535):

The interlocking connections, vertical and lateral, with numerous members of the Miriuwung and Gajerrong community were extensive and more than sufficient to support the conclusion that members of the Miriuwung and Gajerrong community had ancestral links to the community in occupation of the claim area at the time of sovereignty.

[156] On this aspect of the case his Honour noted that the Territory made it clear from the outset of the trial that it was not part of the Territory case to say that the Miriuwung and Gajerrong people were not the "right people in the Aboriginal way" for the Territory part of the claim area.

(f) Observance of traditional laws, customs and practices to maintain connection with prior community and with the land

[157] His Honour concluded that the evidence was "clearly sufficient" to hold that the Miriuwung and Gajerrong community retained a form of practice of traditional laws and customs that showed that, as far as practicable, the community had a connection with the land attributable to an ancestral community. His Honour said he had no doubt that the community relied upon links with forbears for the right to enjoy, or the obligation to perform, the numerous activities identified in the evidence: at ALR 539 . Activities identified in the evidence referred to by his Honour included:

- o almost without exception members of the Miriuwung and Gajerrong community retain, and are known to each other by Aboriginal names, in addition to European names;
- o the subsection or "skin" names still form part of the organisation of the community;
- o marriage rules based on the subsection system have yielded to the influence of the surrounding European lifestyle, but the avoidance rules and taboos of that system remain relevant to community behaviour and are adhered to;
- o avoidance of places according to the requirements of traditional laws is observed, and the names of the recently deceased are not spoken;
- o traditional ceremonial practices are still followed, including initiation ceremonies;
- o the passing down of ritual knowledge incrementally from elders to others continues to be followed; rules on the restriction of access to such knowledge are rigidly applied;
- o Ngarranggarni stories are known and referred to regularly and the elder members of a community regard themselves as obliged to transfer this knowledge to the younger members. (His Honour referred to important Ngarranggarni stories relating to the claim area, which were spoken of in evidence);
- o rules relating to control of knowledge of separate men's and women's law are followed and regarded as important in the organisation of a community;
- o there is a deep community interest in the preservation of Miriuwung and Gajerrong languages;
- o traditional skills handed down through generations remain; for example, the making of spears still serves a purpose in fishing in riverine pools; and members of the community continue to hunt fish and gather traditional foods;
- o the members of the Miriuwung and Gajerrong community retain substantial knowledge of the location and use of bush foods and bush medicines; and
- o hunting and fishing practices are not only motivated by the desire for sustenance but by the desire to maintain a connection with the land and

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with ancestors: there was evidence of specialised knowledge of the methods for hunting certain animals, and for the proper or customary way to prepare and cook them.

[158] His Honour also referred to another current activity. He said (at ALR 538):

There was evidence of the contemporary use of natural resources found in and around the claim area for ceremonies and tool-making, in particular, ochre for the former. Consistent with the "primary" evidence, the archaeological evidence suggested that sources of ochre within Miriuwung and Gajerrong country were limited and that all locations of ochre were associated with sacred sites.

[159] Having discussed the above activities his Honour said (at ALR 539) :

As the ecology of the claim area, and the nature of the occupation of it by the Miriuwung and Gajerrong people, has changed since settlement their opportunity to engage in traditionally-based activities on the land has been restricted. However, against the historical background discussed above, namely, the manner in which people were brought into the stations in the early years of settlement; the changes brought about by the pastoral industry and by the Ord River irrigation scheme; the drift from the pastoral stations into the town of Kununurra in the late 1960s and 1970s; the story presented by the evidence remains that of a people who have sought to maintain their connection with land in a practical sense. First, through the use of "holiday time" while working on the stations and, thereafter, by seeking to establish outstations on traditional country to give them the opportunity and authority to continue traditional links.

As noted earlier in these reasons, there is a very strong affiliation with particular areas of land by particular groups in the Miriuwung and Gajerrong community, not restricted to the groups represented by the second applicants. The court was left with the impression that fundamental ties to the land remain. There is acceptance of obligations to care for country and to protect sites of spiritual and ancestral significance. Community members know their land by place names that have been passed on by members of Miriuwung and Gajerrong communities making connection with the land of particular significance to them.

(g) Conclusions

[160] His Honour addressed the question of whether a communal title was held by the Miriuwung and Gajerrong community, or vested in persons who "speak for" the "estate groups" of the Miriuwung and Gajerrong community, as asserted by the Territory applicants.

[161] His Honour observed that the clear thrust of the evidence from both the applicants and the Territory applicants was to the effect that there is an organised community of Aboriginal people, described as Miriuwung and Gajerrong, which possess the languages and the Ngarrangarni that are part of, or run through, the claim area being a community which observes traditional laws and customs. Without exception the "primary" witnesses identified themselves as Miriuwung or Gajerrong, and were regarded by others as Miriuwung or Gajerrong. His Honour said (at ALR 542):

Being satisfied that there is a Miriuwung and Gajerrong community that has an ancestral connection with the Aboriginal community, or communities, which occupied the claim area at the time of the assertion of sovereignty in the State or the Territory, it follows that the communal title in respect of the claim area is the title of the Miriuwung and Gajerrong people. In observing, or acknowledging, customary rules or practices, the community may be so organised that responsibility for, and, indeed, control of parts of the area occupied by the community may be exercised by subgroups whether described as "estate groups", "families" or "clans" but the traditional laws

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and customs which order the affairs of the subgroups are the laws and customs of the community, not laws and customs of the subgroup.

[162] His Honour was satisfied that the Miriuwung and Gajerrong community had maintained a connection with the ancestral communities which held the native title at sovereignty, and had maintained connection with the land to which that native title applied.

Boundaries of Miriuwung and Gajerrong land

[163] His Honour considered the evidence as to the boundaries of Miriuwung and Gajerrong territory. The extent of the Miriuwung and Gajerrong communities' rights and interests in the claim area was disputed by the respondents. According to the applicants' witnesses, while the Miriuwung and Gajerrong communities were, generally speaking, occupants of adjacent territories, the territories did overlap in part. Ethnographic maps suggested that the approximate boundary extended from the Ord River, north of Goose Hill, to Point Springs, north-east of Kununurra, and further east into the Northern Territory beyond the Territory part of the claim area. To the north was Gajerrong territory and to the south Miriuwung territory. The respondents at trial mainly disputed the boundaries and the extent of the Gajerrong territory, but also challenged the extent of the Miriuwung territory in three respects, these being in the west in the Goose Hill area, in the south in the Glen Hill area, and in an area south-east of Lake Argyle.

Miriuwung boundaries

[164] In respect of the Goose Hill area, the State suggested that there had been a northward movement of the Miriuwung people, and that the Miriuwung connection with that area was therefore of recent origin. In respect of the southern parts of the claim, it was suggested that the area was Gija territory last century, and, by inference, that the Miriuwung community had expanded southward.

[165] In respect of the Goose Hill area his Honour held that in the past there had been a shared Miriuwung-Goolawerrenge use of that area, and that the Miriuwung identification with the country was not of recent origin. However, in respect of portion of the claim area to the west of Goose Hill known as the Parry Lagoon area, the applicants' witnesses disclaimed an interest, saying that the area belonged to another community. That area was excluded from the determination area in the final orders.

[166] As to the southern part of the claim area his Honour concluded on the whole of the evidence that historically the Miriuwung people were connected with that area, and that the connection had been maintained. However, his Honour noted that the evidence suggested that the area in question may have been shared and that native title was also held by the Malngin and Gija communities, but that (at ALR 546-7):

No determination to that effect can be made in this proceeding under the Act as amended. If communal title is asserted by communities claiming connection with the original Malngin and Gija communities, that may require an application for declaration of a common law right in a court of competent jurisdiction.

Gajerrong boundaries

[167] The respondents at trial contended that all or at least the greater part of the claim area, said by the applicants to have been Gajerrong country, was

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occupied at sovereignty by other communities and not by people who identified themselves as Gajerrong. In particular the respondents at trial contended that part of the area was Doolboong country. After analysing the evidence relevant to this topic, his Honour rejected the contention that people who now identify themselves as Gajerrong and who assert a right to the claim area north of Miriuwung did so as the result of the introduction, post-sovereignty, of Gajerrong speaking peoples from outside the claim area. While there is little doubt that there has been a dramatic thinning of population in this part of the claim area, and a loss of the cultural and language diversity that may have been present at the time of sovereignty, his Honour was satisfied that a connection with ancestors who were members of the original community occupying the land had been demonstrated. His Honour said the evidence suggested the conclusion that in part of the northern claim area, those identified as Doolboong, Wardenybeng and Gajerrong had in the past mixed together socially and culturally and exploited the resources of the land together. However, apart from one person who was identified in evidence but was not called by the Kimberley Land Council as a witness, there was no evidence that there was any Aboriginal person identified as Doolboong or Wardenybeng who asserted an interest in the part of the area claimed as Gajerrong territory.

[168] His Honour held that the Gajerrong identity of the present community is rooted in the past and lends weight to the contention that the community has maintained, as far as practicable, a connection with the claim area since the time of sovereignty.

Claims of the Territory applicants and the Balangarra peoples

[169] His Honour held that the claim of the Territory applicants could not be separated from the claim made by the applicants on behalf of the Miriuwung and Gajerrong community of which the Territory applicants were part. On the Balangarra peoples' claim, his Honour held that from the time of sovereignty rights and interests in Booroongoong were shared between Gajerrong people and Aboriginal people from the western side of the Gulf, through whom the Balangarra peoples claimed. His Honour held that both groups had a continuing connection with Booroongoong, and that

both groups had maintained their connection with the island. As to the evidence linking the Gajerrong peoples with Boorroongoong his Honour said (at ALR 551):

There was also evidence that Boorroongoong was part of the country connected with the Gajerrong people, that they have knowledge of Dreamings associated with that area, distinct from that of Kaalgi [an ancestor of one of the Balangarra peoples], which link the island with Gajerrong country on the eastern side of the Gulf, that the Gajerrong men swam to the island on logs for hunting and that Gajerrong people continue to assert rights and responsibilities in relation to the island under their laws and customs.

Arguments on appeal

[170] It is convenient to deal with the submissions of the appellants under the headings which follow.

Jurisdiction issue, and form of the determination

[171] Apart from challenges to factual findings about the existence of native title and to conclusions on extinguishment issues, the State's grounds of appeal raise questions as to the jurisdiction of the court, and as to the form of the determination itself. It is contended that:

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- o the court had no jurisdiction under the NTA to make a determination of native title in favour of the Balangarra peoples, as the tribunal had not referred to the court an application for determination as required by ss 74 and 81 of the NTA;
- o even if the findings of fact of the trial judge are accepted, those findings do not support a determination that the Miriuwung and Gajerrong people are the common law holders of native title rights and interests in the determination area. It is said that the determination should have been in favour of the members of each estate group in relation to their separate areas of "country". These submissions are supported by both the Territory and the Territory applicants. It is contended that the determination should have identified areas and boundaries within the determination area which delineate the "country" of particular estate groups, and also the members of each estate group. Further, it is contended that para 3 of the determination identifies rights and interests that go beyond any evidence at trial, of activities of the kind described being carried out by the applicants on the land;
- o the determination, in any event, is defective as it fails to state (and the judgment fails to make findings about):
 - which people hold the native title and how the holders are to be identified from time to time, for example by patrilineal descent from named ancestors. The determination also fails to identify the laws and customs of the native title holders governing transmission;
 - the rights arising under common law of other members of the public, for example the right of members of the public to fish in tidal waters;
- o the trial judge should have included a determination that native title does not exist in that portion of the claim area to the west of Goose Hill known as Parry Lagoon.

[172] These questions turn on the requirements of the NTA. As already noted, in the course of these proceedings the new Act came into force. Pursuant to the transitional provisions in Table A of the Native Title Amendment Act 1998 (Case 3 in item 6), the original application is taken to have been made to the Federal Court and is to be treated as if it were made to the Federal Court under the relevant provisions of the new Act. As the application was lodged by the applicants under the old Act it is, however, necessary to make reference to a number of provisions in the legislation both before and after the amendments.

[173] The third main object of the NTA, set out in s 3, is "to establish a mechanism for determining claims to native title". This object reflects the statement in the Preamble which says:

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

[174] The NTA lays down procedures intended to achieve the stated object. The statutory scheme for dealing with applications under the provisions of the old Act was considered by the High Court in the *Waanyi* case at CLR 613-15.

[175] The old Act, ss 13 and 61, provided that an application for a determination of native title was made in the first instance to the registrar of the

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tribunal. The new Act provides that applications are made to the Federal Court but otherwise the terms of s 13 are the same as in the old Act. Section 13(1) in the old Act relevantly provided:

An application may be made to the Registrar under Part 3:

- (a) for a determination of native title in relation to an area for which there is no approved determination of native title; or
- (b) to revoke or vary an approved determination of native title on the grounds set out in subsection (5).

[176] Section 13(5) provides that the grounds for variation or revocation of an approved determination of native title are that events have taken place since the determination was made that have caused it to no longer be correct, or that the interests of justice require the variation or revocation. Section 13 of the old Act, when read with s 225 of the old Act, indicate that a determination of native title in respect of an area of land, once made, was intended to determine the rights and interests both of the claimants and any other persons holding an interest in the land. That intention has been made even clearer by amendments incorporated into the new Act. Section 61A(1) of the new Act provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title, and s 68 says that if there is an approved determination of native title in relation to a particular area, the Federal Court must not conduct any proceeding relating to an application for another determination of native title or make any other determination of native title in relation to that area except on an application for revocation or variation of the first determination under s 13(1) or on a review or appeal of the first determination.

[177] The expression "native title", defined in s 223 of the NTA, recognises that native title rights and interests include communal, group or individual rights and interests. The nature and incidents of native title are to be ascertained by evidence in the particular case. In *Mabo (No 2)* the evidence showed that traditional communal title remained in existence. That title was held by the Meriam people, and the common law could, by reference to the traditional laws and customs of those people, identify and protect the native rights and interests to which they gave rise. Brennan J said, at CLR 60; ALR 43 :

Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so).

and at CLR 61; ALR 44 :

Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.

[178] Brennan J had earlier described the nature of the communal title and enjoyment under it of particular rights by individuals or groups within that community at CLR 51-2; ALR 36 :

Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason that title

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should not be recognised as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory. The fact that individual members of the community, like the individual plaintiff Aborigines in *Milirrpum* (1971) 17 FLR 141 at 272, enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title. Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. There may be difficulties of proof of boundaries or of membership of the community or of representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law. That being so, there is no impediment to the recognition of individual non-proprietary rights that are derived from the community's laws and customs and are dependent on the community title. A fortiori, there can be no impediment to the recognition of individual proprietary rights.

[179] Brennan J contemplated that under the laws and customs of a community holding communal native title there could be within that community smaller groups, even individuals, that enjoyed particular rights (and responsibilities) in relation to different parts of the land in relation to which the native title rights and interests existed.

[180] Part 3 of the NTA deals with applications to the Federal Court for the determination of native title. Part 4 of the Act deals with determinations of the Federal Court. Section 61(1) sets out the applications that may be made. The kind of application which is relevant in this case is a "Native title determination application". The old Act provided that the "persons who may make application" were "A person or persons claiming to hold the native title either alone or with others". Section 61(3) provided that an application made by a person or persons claiming to hold native title with others must describe or identify those others, although in doing so it was not necessary to name them or to say how many there were. The description of the persons who may make such an application in the new Act is:

A person or persons authorised by all the persons (the "native title claim group") who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

[181] Under the new Act the person or persons named becomes the applicant (s 61(2)) and s 251B describes the way in which a native title claim group may authorise the person or persons bringing the application. The NTA plainly contemplates a claim by a group or community of people.

[182] Under the procedure of the old Act which was followed in this case, the registrar of the tribunal, on being satisfied that the procedural requirements of s 62 were fulfilled, accepted the application, and took the action required by the former s 66 to give notice of the application to all persons whose interests might be affected by a determination in relation to the application. Section 66(2) provided that the registrar was to be taken to have given notice to all persons whose interests may be affected by a determination in relation to an application if the registrar:

- (a) gives notice containing details of the application to:
 - (i) the registered native title claimant (if any) in relation to the area covered by the application; and
 - (ii) the Commonwealth Minister; and
 - (iii) if any of the area covered by the application is within the jurisdictional limits of a State or Territory -- the State Minister or Territory Minister for the State or Territory; and
 - (iv) any registered native title body corporate in relation to any of the area covered by the application; and
 - (v) any person who holds a proprietary interest in any of the area covered by the application; being an interest that is registered in a register of interests in relation to land or waters maintained by the Commonwealth, a State or a Territory; and
 - (vi) any representative Aboriginal/Torres Strait Islander body for any of the area covered by the application; and
- (b) notifies the public in the determined way of the application.

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[183] Under the new Act, notice of an application is to be given to a similarly wide category of people, now including the local government body for the area covered by the application.

[184] Under s 68(2) of the old Act, any person covered by s 66(2)(a)(i)-(vi) or any person whose interests might be affected by a determination in relation to the application, on notifying the registrar in writing within a specified time, became a party to the application. If the application was not settled, such persons became a party to the proceedings in the Federal Court once the application was referred under s 74: see s 84(1). Under the new Act similar provisions prescribe who shall be parties to the proceedings: see s 84 as amended.

[185] Under s 62(1)(c) of the old Act an application for native title determination was required to "contain a description of the area over which the native title is claimed". The requirement to describe the land is more extensively laid down in s 62(2) of the new Act. Further, the new Act requires a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests): s 62(2)(d).

[186] Under the old Act, and more plainly so under the new Act, the procedure for the bringing of a claim was intended to identify a particular geographic area, and to notify all those who may have or claim an interest in or in relation to that area. The provisions as to parties indicate that the Act intended that persons wishing to be heard, in particular in opposition to the claim, had the opportunity to become a party and to be heard.

[187] If an application for determination of native title is opposed, and not settled by agreement through the process of mediation or otherwise, the NTA provides for the curial determination of the claim by the Federal Court. Section 94A of the new Act provides:

An order in which the Federal Court makes a determination of native title must set out details of the matters mentioned in section 225 (which defines "determination of native title").

[188] Section 225 of the new Act provides:

A "determination of native title" is a determination whether or not native title exists in relation to a particular area (the "determination area") of land or waters and, if it does exist, a determination of:

- (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
- (b) the nature and extent of the native title rights and interests in relation to the determination area; and
- (c) the nature and extent of any other interests in relation to the determination area; and
- (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
- (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease -- whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

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[189] Section 225 of the old Act was less demanding of detail, but nevertheless required a determination of whether native title existed in relation to a particular area of land or water, and if so, who held it, whether the native title rights and interests conferred possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others and, in any case, the nature and extent of any other interest in relation to the land or waters that may affect the native title rights and interests. Section 225(a) by its terms contemplates that a determination may be made in favour of a group of persons holding common or group rights. There is no requirement that each member of the group be named or otherwise identified.

[190] The scheme of the NTA was and is to have before the court in a matter that requires curial determination, all parties who hold or wish to assert a claim or interest in respect of the defined area of land. This process is to bring about a decision which finally determines the existence and nature of native title rights in the determination area, and which

also identifies other rights and interests held by others in respect of that area. As the determination is to be declaratory of the rights and interests of all parties holding rights or interests in the area, the determination operates as a judgment in rem binding the whole world: *Wik Peoples v Queensland* (1994) 49 FCR 1 ; 120 ALR 465 .

[191] Lee J dismissed the challenge to the jurisdiction of the court to make a determination of native title in favour of the Balangarra peoples, saying (at ALR 552):

It is apparent from the provisions and objects of the Act that the court is given jurisdiction to resolve a dispute by determining whether native title exists. Once a matter attracting jurisdiction is before the court the whole of the dispute as to the existence of native title in respect of the land the subject of the application referred to the court, and arising out of the facts which underlie that matter, can be dealt with by the court if the appropriate parties are properly joined to the litigation to have that dispute resolved.

[192] In our opinion Lee J was plainly correct in so holding. Even if the Balangarra peoples had not obtained leave to be joined as an applicant, and had participated in the hearing as respondents, the jurisdiction of the court extended to making an order which determined that they held native title rights and interests within the determination area. Section 225 expressly requires the court to determine the persons or each group of persons holding the common law rights comprising native title, and the nature and extent of those rights and interests. Section 225 does not limit the jurisdiction of the court solely to defining the rights and interests of the named persons who initiate the claim for a determination of native title.

[193] Section 213(1) of the NTA provides that if, for the purpose of any matter or proceeding before the Federal Court, it is necessary to make a determination of native title, that determination must be made in accordance with the procedures in the NTA. In our opinion that requirement was fulfilled in respect of the determination in favour of the Balangarra peoples. The Balangarra peoples were parties claiming an interest in the area the subject of the claim. They became parties as respondents pursuant to s 68 of the old Act. Their participation

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in proceedings was therefore in accordance with the procedures of the NTA and, as we have noted, the provisions of s 225 and the in rem nature of the proceedings required the court to make a determination in respect of the rights and interests claimed by them. Upon their establishing the rights and interests claimed, they were entitled to a favourable determination declaring those rights and interests. The fact that the trial judge, as a matter of procedural convenience, gave leave to the Balangarra peoples to become applicants, did not affect the jurisdiction of the court to make a determination in respect of their rights and interests. Moreover, when judgment was delivered, s 67 of the new Act required that the court make such order as it considered appropriate to ensure that the overlapping claim of the Balangarra peoples be "dealt with in the same proceeding".

[194] The challenge to the jurisdiction of the court in respect of the determination in favour of the Balangarra peoples fails.

[195] We turn to the complaint that the trial judge's findings cannot support a determination in favour of the Miriuiuwung and Gajerrong community.

[196] If the court proposes to make a determination that native title exists, at the time of making the determination the court is required by ss 55-57 of the NTA to make additional determinations concerning the manner in which the native title is to be held. Similar obligations rested on the tribunal under provisions in the old Act. The procedures laid down in the sections result in native title being held either in trust for the common law holders by a prescribed body corporate (s 56(2)(b)), or by the common law holders themselves: s 56(2)(c). Section 57(1) provides that if the determination under s 56 is that the native title rights and interests are to be held in trust by a prescribed body corporate, the prescribed body corporate, after becoming a registered native title body corporate, as defined in s 253, must also perform any other functions given to it as a registered native title body corporate under particular provisions of the NTA, and any functions given to it under the regulations. Sections 56(4) and 58 empower regulations making provision in respect of the holding in trust of native title rights and interests, and functions which a registered native title body corporate is required to perform. Section 57(2) and (3) deal with cases where native title rights and interests are not to be held in trust by a prescribed body corporate. In those cases the court is required to nominate a prescribed body corporate which must perform functions given to it under the NTA and regulations. The Native Title (Prescribed Body Corporate) Regulations (the regulations) prescribe these functions. In particular, a prescribed body corporate is required to act as agent or representative of the common law holders in respect of matters relating to the native title, to manage the native title rights and interests, to consult with, and act in accordance with the directions of, the common law holders in per-

forming any of its functions, and to enter into agreements in relation to the native title binding on the common law holders if the common law holders have been consulted about and have authorised the agreements, and the agreements have been made in accordance with processes set out in the regulations.

[197] The regulations in force at the time of judgment have since been replaced by the Native Title (Prescribed Bodies Corporate) Regulations 1999 which in relevant respects contain similar provisions. The regulations provide for decision-making that involves consultation with the common law holders of native title rights and interests. The regulations establish a regime under which decisions concerning the management of native title rights and interests by the

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common law holders will be taken through the registered native title body corporate. The registered native title body corporate becomes the entity that speaks for and makes decisions on matters concerning the native title in dealings with public authorities and members of the public other than the common law holders themselves: see, for example, ss 24BC and 24BD(1), 24CC and 24CD(2), and 24DE(1) and (2). To this end, the regulations provide for the giving of a document by the common law holders which will be taken as evidence that the necessary consultation and decision-making process has occurred in relation to a decision.

[198] By force of s 59 of the NTA and the regulations, a prescribed body corporate is an Aboriginal Association incorporated under the Aboriginal Councils and Associations Act 1976 (Cth) on or after 30 December 1994 for the purpose of being the subject of a s 56 or s 57 determination. An Aboriginal Association is taken to be incorporated for that purpose only if all members of the association are persons who, at the time of making the s 56 or s 57 determination, are included, or proposed to be included, in the native title determination as native title holders, and if at all times after the determination is made all members of the association are persons who have native title rights and interests in relation to the land or orders to which the native title determination relates. An Aboriginal Association incorporated under the Aboriginal Councils and Associations Act is by s 43 required to have rules which include rules making provision for and in relation to the procedure for settling disputes between the association and its members, and the procedure for the conduct of meetings of the governing committee of the association.

[199] The regime created by the interaction of the Act, the regulations, and the Aboriginal Councils and Associations Act establishes a registered native title body corporate as the entity with which a public authority and members of the public are to deal in relation to the management and administration of native title rights and interests which have been determined to exist. As between the registered native title body corporate and the common law holders of native title rights and interests, their relationship is governed by the regulations and rules of the body corporate relating to the control and governance of that body.

[200] The evidence led by the applicants in support of their claim for a determination in favour of the Miriwung and Gajerrong as a composite community identified within the claim area separate estate groups who treated as their "country" discreet areas within the claim area. Within the State the evidence showed that there were the Yirralalem, Yardanggarlm, Wiram, Ngamoowalem, Mandangala, Gulalawa and Nganalam estate groups and in the Territory there were the Bindjen, Damberal and Nyawamnyawam estate groups. It is clear, however, that his Honour treated those estate groups as subgroups of either the Miriwung or Gajerrong communities. Further, while his Honour treated the territory of the Gajerrong community as adjacent to and separate from the territory of the Miriwung community, he held that they shared economic and ceremonial links which were reinforced when the extensive depletion of Gajerrong people after European settlement saw the Miriwung and Gajerrong "become regarded as a composite community with shared interests": at ALR 541. This finding is criticised by the State because his Honour did not say by whom they had "become regarded" as a composite community, but we think it is clear that his Honour meant that the members of each of the communities so regarded themselves. The effect of his Honour's findings is that the composite

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community, which had ancestral connection with the Aboriginal community or communities which occupied the claim area at the time of sovereignty, observed in common traditional laws and customs, in the observance of which subgroups, whether described as estate groups, families or clans, had responsibility for and control of discreet areas of "country" within the claim area.

[201] In our opinion, those findings, assuming that they are justified by the evidence, support a finding that the native title rights and interests existing in the area were possessed by the Miriwung and Gajerrong community. The enjoyment of particular rights or responsibilities and control for different areas of "country" followed from the observance of the traditional laws and customs of that community.

[202] As Brennan J observed in *Mabo (No 2)* at CLR 51, there may be difficulties of proof of boundaries or membership of the relevant community, but those difficulties afford no reason for denying the existence of native title rights and interests. The requirement of the NTA that the claim area be precisely identified in the application, and that the ultimate determination of native title identify a determination area, prescribe the need for precision in specifying the perimeter boundaries of the area in question. Moreover, s 225 requires the court to determine the nature and extent of native title rights and interests in relation to the determination area. Within that area, however, the NTA does not require the determination to specify precisely which members of the community that is the common law holder of the native title rights and interests, have or may exercise particular rights in relation to particular areas of land. The enjoyment of the communal rights or some of them is a matter which is left for the common law holders to determine among themselves in accordance with the traditional laws and customs as currently acknowledged and observed.

[203] It was submitted by the State that the determination in favour of the Miriung and Gajerrong people was in error because it had the effect of giving Miriung people an interest in Gajerrong country and vice versa notwithstanding the finding that the Miriung country and the Gajerrong country were separate territories. The State further contended that the determination was defective because it failed to state the matters required by s 225 of the NTA. The State contended that the determination should identify and declare what particular native title rights are held, and may be exercised and enjoyed, by particular people or groups in respect of particular areas within the determination area. In particular the rights and interests which may be exercised and enjoyed by members of each estate group should be identified along with the boundaries of the country over which those rights exist.

[204] Those submissions fail to recognise that rights of occupation, use and control of particular areas enjoyed by the Miriung and Gajerrong community, and the estate groups within it, are a consequence of the communal title shared by the composite community under the traditionally based laws and customs as currently acknowledged and observed by it.

[205] The degree of specificity required in a determination will depend upon the nature and extent of the native title rights and interests, and is likely to vary from case to case, depending upon the evidence. In *Mabo (No 2)*, the court declared that "the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands" (save for the islands of Dauer and Waier and certain parcels of land excluded from the declaration). The declaration was made in those terms notwithstanding

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evidence that under the traditionally based laws and customs of the Meriam community, as currently acknowledged and observed, individuals within that community occupied and cultivated plots of land to the exclusion of other members of the community. It was not necessary for the declaration to spell out the personal or usufructuary rights of particular individuals within the community. The declaration as made determined the nature and extent of the native title rights held by the Meriam people as against the whole world. As between themselves, the Meriam people determined their respective rights and interests according to their laws and customs.

[206] In a claim under the NTA where findings as to the native title rights and interests held by an indigenous community are similar to those made in *Mabo (No 2)*, a determination that the community is the common law holder of native title rights and interests which entitle them as against the whole world to possession, occupation, use and enjoyment of the determination area would be sufficient, without further definition of rights and interests which may be enjoyed by different members of the community.

[207] If the evidence establishes that the indigenous community is entitled as against the whole world to possession, occupation, use and enjoyment of the land, that entitlement will be similar in its enjoyment to the incidents which attach to a freehold title. Subject to the general laws of Australia which regulate or restrict the use and enjoyment of the land, in so far as those laws apply to the indigenous community, the community will have the right to control access to the land, to make decisions as to its use and as to the use and enjoyment of its resources, subject to its own traditionally-based laws and customs. The activities which members of the community may undertake in accordance with their laws and customs are not frozen in time at sovereignty, and may include activities of the kind undertaken from time to time by other members of the Australian community who use and enjoy a freehold title. In the present case we construe para 3 of the determination to declare that, subject to the concurrent rights and interests identified in the Third Schedule held by others in relation to parts of the determination area, the native title rights and interests of the common law holders in the determination area are an entitlement as against the whole world to possession, occupation, use and enjoyment. That entitlement is exclusive to the Miriung and Gajerrong community, save for the concurrent rights and interests identified in the Third Schedule, and save that in respect of Boorroongoong the Balangarra peoples and the Miriung and Gajerrong people have concurrent rights and interests.

[208] The appellants contended that para 3 of the determination identifies rights and interests which go beyond any evidence at trial of activities of the kind described being carried out by the applicants on the land at any time. However, we do not think that his Honour intended the list of rights and interests set out in para 3 of the determination to reflect findings of the actual exercise of rights disclosed by the evidence. Rather, the list is intended to reflect activities permitted by the native title rights and interests which arise by reason of common law holders having an exclusive right to possess, occupy, use and enjoy the determination area subject only to the concurrent rights and interests of others set out in the Third Schedule. The list, by the terms of para 3, is not intended to be exhaustive. Other rights flowing from the right to possess, occupy, use and enjoy the land may include rights to carry on other activities which are not listed. Should a dispute arise between the holders of native title, and other members of

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the public or a regulatory authority as to the lawfulness of an activity carried out on the land, or a use to which the land is put, the dispute would fall for resolution by a court of competent jurisdiction.

[209] A determination, once made, is intended to declare the existence of native title, both for the past and for the future. It would be an impossible task in a case where the native title rights and interests comprise an exclusive right to possess, occupy, use and enjoy the land, to specify every kind of use or enjoyment that might flow from the existence of that native title. Section 225 cannot have been intended to impose such an impossible task on the court. To read s 225 in the demanding way for which the State contends is to read it without an understanding of the novel legal and administrative problems involved in the statutory registration of native title: the *Waanyi* case at CLR 614-15.

[210] In cases where the evidence establishes that the nature and extent of rights and interests in relation to land enjoyed by an indigenous group are less than an exclusive right to possess, occupy, use and enjoy the land, it will be necessary to sufficiently identify them. If the rights held are, for example, limited to rights to fish or hunt in certain areas (rights perhaps limited to certain species of animal), or for a particular purpose, or limited to a right merely to pass over land, then the description of the right might most conveniently be expressed by describing the activity or activities which the right permits. However, as we understand his Honour's reasons for judgment, he held that the rights and interests in relation to land held by the Miriuwung and Gajerrong people were not limited in a way that required a detailed description of permitted activities.

[211] It will be necessary to return in due course to para 3 of the determination, if other grounds of appeal which challenge factual findings and the findings as to non-extinguishment succeed.

[212] The State also contended that the determination fails to comply with s 225, as it does not provide a means of determining from time to time who are the people who constitute the community or group comprising the common law holders of native title. In our opinion the NTA imposes no such obligation on the court. Section 225(a) requires the court to determine "who the persons or each group of persons, holding the common or group rights comprising the native title are". That is a requirement that the persons or group of persons (which includes a community) holding the title, at the time of the determination, be identified. That is necessary for the purposes of enabling an appropriate prescribed body corporate to be nominated and appointed in compliance with ss 56 and 57 of the NTA and the regulations.

[213] However, once the determination is made, and a registered native title body corporate has been appointed to hold the native title in trust, or as representative of the common law holders, the ascertainment of who is a common law holder is a matter to be determined, if necessary, in a court of competent jurisdiction, by reference to the traditionally based laws and customs of the common law holders named in the determination, as those laws and customs are at the time currently acknowledged and observed: see *Mabo (No 2)* at CLR 59. The occasion for a dispute requiring curial determination should be rare. The need should not arise in dealings between third parties and the registered native title body corporate as that body has the capacity and standing to represent the common law holders from time to time. Such a dispute is more likely to arise between the registered native title body corporate and people claiming to be

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entitled to be recognised as common law holders. That would be a dispute between people with a close knowledge of the relevant traditional laws and customs.

[214] A decision in a particular case as to who is or is not a member of a group or community which is the common law holder of native title is likely to give rise to consideration of the kind discussed in *Shaw v Wolf* (1998) 163 ALR 205 and *Northern Land Council v Olney* (1992) 34 FCR 470 ; 105 ALR 539 .

[215] It is also contended that the determination fails to comply with the requirements of s 225, as it does not identify rights of other members of the public arising under the common law. This issue flows from an observation by his Honour (at ALR 638) that:

No submissions were made on a public right to fish and navigate in tidal waters that may have been part of the common law received in Australia at sovereignty and the effect of that right upon native title in so far as the claim area includes such waters: see *Yarmirr v Northern Territory* (1998) 156 ALR 370 per Olney J at 430 .

[216] A Full Court of this court in the *Croker Island* case has since upheld Olney J's finding that the common law recognises a public right to fish and navigate in the tidal waters of the coastal sea of Australia. As the determination stands as a declaration to the whole world of the rights and interests both of native title holders and of others in respect of a determination area, we consider s 225(c) does require the court to consider whether public rights arising under the common law exist in relation to a claim area, and if so to reflect those rights, in the determination, even if only by a general reference to rights arising under the common law. In the present case, the complaint relating to common law rights would be catered for by an additional item in the Third Schedule namely:

- (j) Other interests held by members of the public arising under the common law.

[217] The obligation arising under s 225(c) may be onerous and difficult to meet where the evidence suggests that there is a holder of interests in relation to the land who neither participates in the hearing nor in any other way asserts an entitlement to have those interests recognised in the determination. It is, however, not necessary in this case to determine how that situation is to be managed, although it should be noted that if the determination fails to recognise an existing interest, there may be scope for the holder to have the determination varied pursuant to s 13(1) and (5) of the NTA on the basis that "the interests of justice require the variation".

[218] When considering the challenges to factual findings it will be necessary to return to the requirements of s 225(c), in connection with submissions made on the evidence by the State and the Kimberley Land Council, that Malngin and Gija people had interests in the determination area that are not recorded in the determination.

[219] Ground 29 of the State's notice of appeal contends that the determination should have included a determination that native title does not exist in the area known as Parry Lagoon. That part of the claim area was excluded from the determination area, because no claim was made to that area by witnesses for the applicants. In our opinion it was open to the trial judge under the NTA simply to exclude a portion of the claim area from the determination area, and to make no determination in respect of it. While s 225 provides that a determination of native title is a "determination whether or not native title exists in relation to a particular area ...", it does not mandate that a negative determination must be made in respect of part of an area covered by an application where the evidence fails to

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satisfactorily disclose the position one way or the other. In our opinion, in these special circumstances, it was open to the trial judge to decide that it was not appropriate, in that respect, to exercise his jurisdiction to make a determination whether native title exists. This was a matter essentially for his Honour's judgment, in the light of the indications in the evidence that the Parry Lagoon area was for the Boogayi people, who apparently had all died out. This posed difficulties, given the in rem character of any determination. While it may have been technically open on the evidence for his Honour to consider whether a negative determination should be made in relation to the Parry Lagoon area, it was also open to the court to decide that it should decline to exercise that jurisdiction, if the interests of justice required. In approaching this choice, there was a strong discretionary element. In the absence of any suggestion of abuse of process (cf *Ernst & Young v Butte Mining plc* [1996] 1 WLR 1605), we are not persuaded that the discretion miscarried.

Challenges to factual findings on native title issues other than extinguishment

[220] Senior counsel for the State, Mr Pullin QC, followed by Mr Pettit, led the attack on the findings of fact which underlie the conclusion that native title exists, and that the Miriuwung and Gajerrong people are common law holders of the native title. The submissions made were supported by other appellants.

[221] Broadly stated, the following challenges arise from submissions of some or all of the appellants:

- o the findings of the trial judge that each of the applicants had established the necessary continuing connection with the determination area since sovereignty are not supportable on the evidence. In particular:
 - the evidence does not establish the requirements identified in *Mabo (No 2)* by Brennan J (at CLR 70) of "biological descent" and "mutual recognition" (the Territory eschewed this submission);
 - the trial judge erred in failing to apply a strict test of patrilineal descent;
 - the evidence does not establish that the Miriuwung and Gajerrong people are a single community;
 - the evidence does not establish that the named applicants who brought the proceedings in a representative capacity had a continuing connection with the whole of the determination area within the State. It is said that, in respect of some areas, there is no evidence at all of connection since sovereignty, and that in other areas, such as Booroongoong, the lease areas of Crosswalk and Baines River and some areas around Kununurra, the scant evidence of presence on the land over the last few decades by those now claiming native title rights and interests shows no more than random visits to the area insufficient to establish a continuing connection in accordance with indigenous laws and customs;
 - on the evidence it should have been found that the flooding of Lake Kununurra in the early 1960s and Lake Argyle in the early 1970s necessarily ended any continuing connection in accordance with the indigenous laws and customs with the flooded areas;
 - the evidence does not establish that the Balangarra peoples were a group with sufficient identity to be recognised as a claimant

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community, that the applicants represent such a community, or that the Balangarra peoples had any continuing connection with Booroongoong;

- o contrary to the evidence and the requirements of the Act, the determination failed to identify and state the rights and interests in the determination area:
 - of the Malngin and Gija estate groups;
 - of the Doolboong, Wardenybeng and Goolawarrenc peoples; and
- o in failing to make findings about, and to give reasons therefore in respect of, such matters as:
 - the ancestry of each of the representative applicants;
 - membership of particular estate groups and their "country";
 - the recognition of each of the representative applicants by other members of communities within the determination area; and
 - continuing occupation of those parts of the claim area where the State disputed a continuing connection;

the trial judge erred in law such that the determination should be set aside and either recast by this court or remitted to the court below.

Approach of Full Court

[222] In the course of presenting these submissions, the State has sought to challenge many specific findings on matters of detail as to the ancestry and connection of applicants and witnesses to parts of the claim area, and for this purpose the court has been directed to short passages in the evidence of witnesses which appear to contradict particular findings. These aspects of the State's submissions, in effect, invite the court to re-evaluate the mass of evidence received by the trial judge over the course of a very lengthy trial. Such a task would place an impossible burden on an appeal court. Numerous witnesses gave evidence at many sites of importance to the applicants. The trial judge observed (at ALR 497):

Evidence was usually given in English, but most often it was in broken form, using words of the Miriuwung or Gajerrong languages for names of people, places, objects, animals and for description of cultural matters ...

The difficulties courts face in receiving and dealing with evidence of Aboriginal witnesses is well known, particularly when English is at best a second, or lesser, language and the grasp of it is limited. A transcript cannot convey nuances of gesture, move-

ment or expression that bear upon an understanding of the evidence received in such circumstances. Similarly, a transcript which presents as a seamless continuum of questions and answers may suggest more comprehension of the process by a witness than the court observes.

[223] His Honour went on to observe that it was apparent to him that for a number of witnesses the adversarial system of trial, and their limited ability to express themselves fluently in English, hindered articulation of their evidence. It is apparent from reading the transcript that on many occasions an Aboriginal witness, when answering questions, sought and obtained assistance from other Aboriginal people present at the time, and often the answers recorded indicate that the witness's response was accompanied by gesture pointing to a feature of the landscape. A reading of the transcript cannot meaningfully convey the response of the witness.

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[224] Moreover, in many instances we have found when reading the transcript references given in support of the State's submissions, that the interpretation placed on passages by the State is not the only interpretation open, and is often inconsistent with other passages in the evidence of the same witness to be found in nearby pages.

[225] In these circumstances, so long as there is evidence which is open to an interpretation that supports the finding of the trial judge, we consider this court should not interfere with the findings.

[226] The written submissions of the State challenging factual findings have been answered in great detail in the written submissions and attached schedules of the applicants. Our own reading of the evidence to which we have been referred, and the applicants' submissions, satisfy us that there was evidence capable of supporting the findings of fact made by the trial judge. We are not persuaded that the trial judge fell into error in any of the ways alleged.

[227] The arguments in support of the findings of fact contended for by the State on appeal were put before the trial judge. In our opinion there is no basis for the State's submission that his Honour did not give adequate attention to those submissions. On the contrary, the major ones are expressly addressed in the judgment, where reasons are given for their rejection.

[228] The judgment reveals a thorough analysis of evidence from many sources, which led the trial judge to conclude that the present Miriuwung and Gajerrong community is a descendant community identifiable with the Aboriginal people in occupation of the determination area at sovereignty, and that the community has substantially maintained connection with the land by observing, as far as practicable, the traditional laws and customs of its predecessors as presently acknowledged and observed. The conclusions reached by his Honour were not based only on the evidence of primary witnesses, but on evidence from the many sources which he has identified. The evidence of the primary witnesses was assessed against historical evidence of oral histories recorded in the past, and the anthropologists' evidence and genealogies prepared by them.

Requirements of "biological descent" and "mutual recognition"

[229] We have earlier set out his Honour's conclusion that the requirement of "biological descent" referred to by Brennan J in *Mabo (No 2)* at CLR 70 involved a broad understanding of the notion of descent, not the application of a narrow and exclusive test. The State challenges this conclusion as being inconsistent with the requirement stated by Brennan J. Moreover, the State contends that a strict patrilineal descent test should have been applied which would have had the consequence that a number of the applicants would not have established ancestral connection with the native title holders at sovereignty.

[230] Brennan J in *Mabo (No 2)* at CLR 61; ALR 44 addressed the question of inheritance and transmission of native title rights. His Honour said:

The incidents of a particular native title relating to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests in land and the grouping of persons to possess rights and interests in land are matters to be determined by the laws and customs of the indigenous inhabitants ... But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according

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to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.

[231] That passage does not suggest that a strict test of "biological descent" is to be applied. The reference to "biological descent" in Brennan J's judgment appears in a summary of conclusions at CLR 70; ALR 51 where his Honour said:

Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

[232] When these two passages are read together we think it plain that his Honour was not intending to lay down as an invariable requirement that there be strict "biological descent". Rather, we understand Brennan J to be expressing a requirement that there be an identifiable community with an entitlement to the present enjoyment of native title rights in relation to land arising from the adherence to traditionally based laws and customs. A substantial degree of ancestral connection between the original native title holders and the present community would be necessary to enable a group to be identified as one acknowledging and observing the traditional laws and customs under which the native title rights were possessed at sovereignty.

[233] Extensive evidence was led concerning the adoption (or "growing up") of children by members of the Miriuwung and Gajerrong community, and within subgroups of the community. In our opinion, the reference by Brennan J to "biological descent" was not intended to exclude such people from membership of the community. The trial judge did not err in rejecting the State's contention that a narrow and exclusive test of biological descent was required.

[234] A requirement of "biological descent" does not mandate that descent be patrilineal. The identity of those presently entitled to enjoy native title rights, is to be ascertained by reference to the traditional laws and customs as currently acknowledged and observed. The evidence in this case is to the effect that under the traditional laws and customs, a whole range of relationships may lead to membership of the community, including "father's country", "father's mother's country", "mother's country", "mother's mother's country", "regent's country", the country of a spouse, and spiritual conception or birth within the area. In the course of argument the State placed reliance upon Ms Kaberry's book *Aboriginal Woman; Sacred and Profane* as providing evidence of a requirement of patrilineal descent. Ms Kaberry's work lends support to the view that in relation to the enjoyment of particular areas of land by what are now referred to as "estate groups", patrilineal descent was of primary importance. However, Ms Kaberry acknowledged a wide variety of relationships with land, including the right to "walk about" or "live and hunt" in a person's mother's country, a person's mother's mother's country, a person's father's mother's country and the place where the person was born: p 137. The evidence of the applicants discloses that they identify with traditional Miriuwung or traditional Gajerrong country, and have a primary right to "speak for" particular areas within that country. Persons or families are associated with different areas not simply by patrilineal descent, but also through other relationships, for example through mother or grandmother. Some of the witnesses emphasised the importance of a right to speak for country derived through one's father's father, as against a right derived through one's mother's father or some other line of descent. Thus, in some areas witnesses spoke of people being "in front" and others "being behind", and the

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possibility was identified of a person being "in front" in one area and in another "being behind", but having influence in more than one area. Differing interests of this kind are explained by the different relationships recognised by the traditional laws and customs under which rights and responsibilities arise.

[235] On the evidence, the traditional laws and customs acknowledged and observed by the communities in the determination area at sovereignty, and as currently acknowledged and observed by those recognised among themselves as present members of the Miriuwung and Gajerrong community, did not impose a requirement of strict biological descent, let alone patrilineal descent as a prerequisite to membership. The trial judge was plainly correct as a matter of fact to observe that the genealogies admitted into evidence showed "a broad spread of links with ancestors" among the representative claimants and other witnesses who had given evidence in support of the claim. His Honour identified these people at ALR 533-5. That broad spread of links is in our opinion sufficient proof of "biological" connection be-

tween the present community and the community in occupation at the time of sovereignty. His Honour's approach was correct in point of law and correct as a matter of fact on the evidence.

[236] The State contends that the trial judge upheld a "choice" rule, where a person can choose either father's country or mother's country, and that such a choice rule is in reality evidence of a loss of connection with land, and a complete breakdown in the observance and adherence to traditional laws and customs. That submission is based on the sentence emphasised in the following passage of the judgment (at ALR 540):

According to the evidence received in this matter "estate" or "family" subgroups continue to play a part in defining a Miriuwung and Gajerrong community. As implied in the description, an "estate" or "family" subgroup is based on descent but on the evidence received in this case its structure now is flexible, not limited to a "once and for all" delineation by birth under a system of strictly patrilineal or matrilineal descent. *A person may be included in such a subgroup by adoption and may opt in, or opt out, by exercise of choice.*

There were numerous examples of evidence to that effect in this case, in particular, in evidence given by Rita and Stephanie Boombi, Peter Newry, Button Jones, John Toby and George Dixon.

The evidence established that while there may remain a patrilineal bias or expectation in the organisation of such subgroups, young Aboriginal people may have several choices presented by lines of descent as to which subgroup they will identify themselves. Other grounds of choice may be provided by the locus of conception, birth and by adoption. According to the general tenor of the evidence in this case, any right to claim membership of a subgroup, and thus of the community as a whole, may depend upon the course of life of the child concerned. According to life experience, what degree of association the child establishes with one family group rather than another, and what degree of education the child receives in traditional or religious matters of the relevant family group will determine what election is available or has been made: K Maddock, *The Australian Aborigines -- A Portrait of their Society*, pp 39-41 [emphasis added].

[237] As is plain from the full passage, the choice available is not one freely to be made at the whim of the young person concerned. On the contrary, the choice is dictated by association of a child with a particular family group and his or her upbringing. The choice, when made, will determine with what area of country the person is primarily associated. Even then, the person may be recognised as having rights of a secondary nature in other sub-areas where he or she will be recognised as "being behind". The choice identified by his Honour in the evidence is not suggestive of a loss of connection with the land.

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[238] On the question of recognition, the State complains that not all people who claimed in evidence to be Miriuwung were in fact recognised as Miriuwung. The examples given by the State in its submissions are contested by the applicants, and there appears to be evidence sufficient to support the conclusions reached by his Honour in respect of those witnesses whom he has treated as recognised members of the present Miriuwung and Gajerrong community. However, even if there were persons who claimed to be members of the community who were not so recognised, that is not a reason for denying the applicants' claim. So long as the court is satisfied that there remains an identifiable community entitled to enjoy native title rights and interests in accordance with traditional laws and customs as currently acknowledged and observed, the community is entitled to a favourable determination. The status of a person claiming to be a member of the community would be a matter for resolution between the registered native title body corporate and that person at a later stage.

Miriuwung and Gajerrong community

[239] The State contends that every relevant witness claimed to be either Miriuwung or Gajerrong, and a great majority of those who claimed to be Miriuwung gave evidence that they had a full array of rights only in an estate area. Those witnesses did not claim that other estate areas were their "country". To that point, the submission appears to be correct, but it does not follow that there is not now a Miriuwung and Gajerrong community which acknowledges and observes traditional laws and customs under which members of the community enjoy differing arrays of rights within and outside their particular family or estate country. It follows from what we have earlier said that it is not necessary for each of the named applicants who bring the proceedings in a representative capacity to establish that they possess rights and interests uniformly over the entire determination area. His Honour has addressed in detail the evidence that the Miriuwung community and the Gajerrong community at one time acknowledged and recognised separate territories. His Honour has given reasons for his conclusion that the two communities in more recent times have become regarded

(among themselves) as a composite community with shared interests. In our opinion that conclusion was in accordance with the evidence.

Continuing connection

[240] Early in his reasons for judgment, the trial judge held that the determination area was inhabited by organised communities of Aboriginal inhabitants at the time of sovereignty, operating under elaborate traditions, procedures, laws and customs which connected them with the land. The only inference available from the historical and anthropological evidence is that at sovereignty, the communities whose descendants now comprise the Miriuwung and Gajerrong community, enjoyed exclusive possession, occupation and use of almost the entirety of the determination area. In times before sovereignty, actual physical presence on some areas of the country may have been rare, having regard to the life-style and seasonal movements of the indigenous population. Nevertheless, the whole is properly to be regarded as their country as there were no other people exercising similar rights. Their possession, occupation, use and enjoyment of the land is fairly to be treated as "exclusive". Only at Booroongoong, in areas at Goose Hill, and in the south-east portion of the determination area was possession, occupation and use shared with other indigenous communities.

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[241] It is common ground that, in order to establish entitlement to native title, the applicants are required to establish that connection with the land has been substantially maintained through the acknowledgment and observance, so far as practicable, of traditional laws and customs. With the arrival of European settlement, the ways in which the indigenous people were able to possess, occupy, use and enjoy their rights and interests in the land underwent major change. The indigenous population was substantially reduced in numbers, and land uses introduced by the settlers killed or frightened off much of the resources of the land upon which the indigenous inhabitants depended for their day to day sustenance. In these circumstances, the presence of members of the community on large areas of the determination area understandably diminished. In some areas of concentrated settler activity the reasonable inference is that Aboriginal presence became impracticable, save as people employed in the pastoral enterprises that had moved on to their lands. The evidence paints a clear picture of it being impracticable after European settlement for members of the indigenous population to maintain a traditional presence on substantial parts of the determination area. However, it does not follow that the surviving members of the indigenous population have not substantially maintained their connection with the land.

[242] The evidence as to the relationship of the applicants and their ancestors to the determination area accords with evidence which has frequently been given in other cases, about the nature of the relationship of Aboriginal peoples with their lands. That relationship has been described as a "religious relationship" (*Milirrupum v Nabalco Pty Ltd* at 167) and as "primarily a spiritual affair": *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 358; 44 ALR 63 .

[243] Actual physical presence upon the land in pursuit of traditional rights to live and forage there, and for the performance of traditional ceremonies and customs, would provide clear evidence of the maintenance of a connection with the land. However, the spiritual connection, and the performance of responsibility for the land can be maintained even where physical presence has ceased, either because the indigenous people have been hunted off the land, or because their numbers have become so thinned that it is impracticable to visit the area. The connection can be maintained by the continued acknowledgment of traditional laws, and by the observance of traditional customs. Acknowledgment and observance may be established by evidence that traditional practices and ceremonies are maintained by the community, in so far as that is possible, off the land, and that ritual knowledge including knowledge of the Dreamings which underlie the traditional laws and customs, continue to be maintained and passed down from generation to generation. Evidence of present members of the community, which demonstrates a knowledge of the boundaries to their traditional lands, in itself provides evidence of continuing connection through adherence to their traditional laws and customs.

[244] In *Mabo (No 2)* at CLR 188; ALR 146-7 Toohey J said:

The requirements of proof of traditional title are a function of the protection the title provides. It is the fact of the presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights. Presence would be insufficient to establish title if it was coincidental only or truly random, having no connection with or meaning in relation to a society's economic, cultural or religious life. It is presence amounting to occupancy which is the foundation

of the title and which attracts protection, and it is that which must be proved to establish title. Thus traditional title is rooted in physical presence. That the use of land was meaningful must be proved but it is to be understood from the point of view of the members of the society [footnotes omitted].

That passage must, however, be understood as a general observation regarding the proof required for the recognition of traditional title by the common law. It is not to be understood as laying down the requirement of actual physical presence as essential to the maintenance of a connection by traditional laws and customs, in circumstances where that physical presence is no longer practicable or in circumstances where access to traditional lands is restricted or prevented by the activities of European settlers. In circumstances where it is impracticable for the descendant community to continue a physical presence, it may nevertheless maintain its spiritual and cultural connection with the land in other ways. Whether it has done so will be a question of fact, involving matters of degree, to be assessed in all the circumstances of the particular case.

[245] In the present case, in so far as the State's submissions maintain that physical occupation of the land is a necessary requirement for continuing connection with the land, those submissions cannot be accepted.

[246] The notion of "occupancy" is in any event indefinite. Occupation and use of land does not necessarily involve exclusive possession, or presence on every part of the land, or active use of every part of the land at all times. In *Wheat v E Lacon & Co Ltd* [1966] AC 552 at 578 Lord Denning observed:

In order to be an "occupier" it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be "occupiers".

[247] In *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493, and in the Privy Council, [1959] AC 248, it was held that a large expanse of vacant land was "used or occupied" by a hospital which maintained the land in its natural state to provide a barrier against noise, dust and fumes, and opportunities for future expansion. In the Privy Council Lord Denning said at 255:

An owner can use land by keeping it in its virgin state for his own special purposes. An owner of a powder magazine or a rifle range uses the land he has acquired nearby for the purpose of ensuring safety even though he never sets foot on it. The owner of an island uses it for the purposes of a bird sanctuary even though he does nothing on it, except prevent people building there or disturbing the birds.

[248] Ground 7(a) in the State's notice of appeal challenges what is said to be an implicit finding that Miriwung people and their ancestors have occupied and used the northern mud flats, the islands off the coast of Western Australia and the eastern coastal region of the Cambridge Gulf from Goose Hill to a point north of Ningbing Station. It is not correct that there was a finding that "Miriwung people" occupied this area. On the evidence, this area was occupied and used by the ancestors of the Gajerrong community, some of whom in earlier times identified as Doolboong and Wardenyng. Dodger Carlton and Kim Aldus gave evidence identifying the limits of this country, and there was evidence from these witnesses, supported by anthropological evidence, that justified the finding that this was Gajerrong country, and that present members of the Miriwung and Gajerrong community had relevantly maintained connection with the country through adherence to their traditional laws and customs.

[249] The trial judge discussed the evidence concerning the relationship of the Doolboong, Wardenyng and Gajerrong groups at ALR 547-50. It is possible that Gajerrong may have been an overall tribal label by which the society in occupation of the northern part of the claim area was identified, even at the time of sovereignty. However that may be, the evidence discussed by his Honour plainly supports the conclusion that as far back as living memory goes, those who identified as members of the three groups mixed together socially and culturally, and exploited resources of the land together. Moreover, descendants of those people now identify with the Miriwung and Gajerrong community, and that connection is rooted in their acknowledgment and observance of traditional laws and customs.

[250] Grounds 7(b), (c), (e) and (f) challenge implicit findings that the requisite connection had been established by the applicants in relation to areas in the Carr Boyd Ranges, to the east and south of Bow River, to the east of Lake Argyle in the area to the north of the Behn River, and around Point Springs. There is however evidence, identified by the applicants in Appendix G to their written submissions, which provides a basis for these findings.

[251] Ground 7(d) challenges the finding of relevant continuing connection with the areas now covered by Lake Kununurra and Lake Argyle which were flooded in 1962 and 1972 respectively. It is argued that the inundation of these areas by water has effectively prevented any continuing connection.

[252] The inundation of the areas by water makes it impracticable to enjoy native title rights and interests in so far as they involve activities ordinarily carried out by physical presence on the land. However, by continuing to acknowledge and observe traditional laws and customs involving ritual knowledge, ceremony and customary practices, the spiritual relationship with the land can be maintained. In our opinion it was open on the evidence for the judge to hold that this was the case in respect of the areas covered by the lakes.

[253] Grounds 7(g) and (h) challenge findings that Gajerrong country included the three islands in the north of the determination area, and the finding that any Gajerrong people or their ancestors occupied or used the islands, or the east coast of Cambridge Gulf. The evidence of enjoyment of native title rights and interests in these islands by members of the Doolboong, Wardenyng and Gajerrong groups was extremely limited. Dodger Carlton gave evidence that his only visit to Booroongoong was by helicopter, just before the native title claim was lodged and that he had never been to Ngarrmorr (Pelican Island). No other primary witness gave evidence of going to the islands. Nevertheless, we are satisfied that there was sufficient evidence to support the findings made by the trial judge. The evidence was not merely confined to "assertions" by Dodger Carlton that the islands belonged to him, as the State contends. The trial judge at ALR 548-9 relied on Ms Kaberry's genealogies, and Associate Professor Christensen's analysis of them, to support the finding that Gajerrong territory included Booroongoong. Grant Ngabidj's oral history to Dr Shaw described Ngarrmorr, and the journey of Aboriginal peoples to it. Grant Ngabidj identified himself as Gajerrong. There was also evidence from Ms Kofod that some 20 years earlier Paddy Carlton and an old lady, Daisy Jandony, told her of the spiritual connections of Gajerrong people to Booroongoong. In addition Dr Shaw had recorded from Grant Ngabidj Dreaming stories for Booroongoong, and Dodger Carlton also made reference to Dreamings associated with the island and other parts of Gajerrong territory. In the result, Associate Professor Christensen,

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Professor Maddock and Ms Doohan were ad idem in their expert opinions that there are recognised native title interests in Booroongoong from both sides of the Cambridge Gulf. The fact that there was no evidence led of recent or regular visits to the islands by members of the Miriwung and Gajerrong community is not fatal. The islands are remote and impracticable for members of the present community to access, except where means of transport is provided by other people. The absence of physical presence, as earlier explained, does not mean that members of the present community have lost or abandoned their connection with the islands. In this respect it is important that Dodger Carlton, in his own right and as regent for Kim, Mark and Brexie Aldus, continues to assert that relationship.

[254] Ground 7(i) contends that the evidence given by witnesses claiming to be Miriwung or Gajerrong in respect of various areas identified in ground 7, and indeed in the whole determination area, "was evidence of merely random or coincidental visits, and did not amount to occupation of any of those lands". Reference is made to random or coincidental visits in the passage earlier set out from the judgment of Toohey J in *Mabo (No 2)* at CLR 188, but his Honour was there saying that it would be insufficient to establish title if such visits were truly random "having no connection with or meaning in relation to a society's economic, cultural or religious life". In this case, the evidence given as to visits to the various areas by witnesses and their ancestors, included evidence of visits which were connected with economic, cultural or religious life. The evidence gives a picture of the applicants and their ancestors exercising Aboriginal rights and interests where and when the opportunity arose after European settlement. That evidence includes activities and "foot walking" during holiday time and weekend activities when traditional practices were pursued.

[255] Grounds 7(j) and (k), in effect, challenge his Honour's reliance upon the evidence of Ms Kofod that the extent of use of Miriwung and Gajerrong languages in respect of features of the claim area was probative of the length of occupation of the area by ancestors of the Miriwung and Gajerrong community. In our opinion the evidence was entitled to the weight which his Honour gave to it. Moreover, the impugned passage from the judgment, which appears at ALR 524, makes it clear that his Honour assessed Ms Kofod's evidence in conjunction with ethnographic material relating to widespread Dreaming and spiritual connections with the land for Miriwung and Gajerrong people. That material was properly to be taken into account.

[256] Ground 7(l) complains of an observation which his Honour made to the effect that Gajerrong and Wardenyng languages could be regarded as mutually understood dialects. That observation was not a finding that led to any particular conclusion, and in any event the observation was supported by the evidence of Dodger Carlton and Professor Maddock.

[257] The Crosswalk and Baines River appellants, in relation to the land in King Locations 736 and 744 (the Crosswalk special lease, situated south of the Ord River, and to the west of Kununurra) and King Location 374 (the Baines River New Argyle Downs lease, situated to the south-east of Lake Argyle) adopted submissions of the State to the effect that the evidence did not establish that a connection had been substantially maintained by the descendants of the native title holders at the time of sovereignty. Further, in relation to the King Locations, it is contended that the trial judge did not examine and make findings in relation to evidence that these areas had been the subject of intensive and

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substantial grazing activity for more than 100 years. Save as employees of the leaseholders, Aboriginal people had not lived on these properties for many years. The Crosswalk and Baines River appellants contend that proof of continuing connection with the land is necessary in respect of discreet areas within the claim area, such as the King Locations, and as there was no evidence of any kind of continuing physical presence on the King Locations, there should have been findings that native title rights and interests in those areas no longer remain.

[258] The New Argyle Downs Station is approximately 720 square kilometres in area. It is part of the original Argyle Downs Station. The manager of the station gave evidence that the soil quality and the pasture quality of the New Argyle Downs Station is very high in comparison with other stations. It has a consistently high level of cattle breeding and fattening conducted on it -- some 12,000 head in most years. The manager said that since he has held that position, from 1980, he is aware of only very limited presence in the area of Miriuwung people. Mr Ben Ward, who in evidence claimed a spiritual connection with the area, had asked for and received permission to fish on the edge of Lake Argyle about four times in the last 18 years but he was not aware of other people coming down to the New Argyle Downs Station. Ms Margaret Moore, a member of the Miriuwung and Gajerrong community, visited the station with her children about once per month, but for the purpose of visiting her husband, an employee on the station. The limited presence of Aboriginal people, as the appellants' submission acknowledges, is consistent with the high level of cattle breeding and fattening conducted on the property.

[259] Evidence of connection with this area was given by Mr Jeff Janama, his "son" Mr Ben Ward ("grown up" by Mr Janama), Ms Marjorie Brown and her sister Ms Myrtle Ward, in the presence of many members of their family. Ms Brown and Ms Ward had been born at the Argyle Downs homestead, as had their father Mr Jimmy Ward. These witnesses gave evidence of traditional connections with the land surrounding the old Argyle Downs homestead, and extending on to the land now the subject of the New Argyle Downs lease. It is clear that those members of the present Miriuwung and Gajerrong community, and their ancestors, had a close spiritual, cultural and social connection with the land now comprised in the New Argyle Downs lease. A number of them who are said to speak for this country have since the flooding of Lake Argyle, lived to the north of the area at Alligator Hole and Yardangarm. While the evidence of actual presence on the New Argyle Downs lease in recent years is minimal, none of the witnesses for the applicants said that their connections with the land had ceased. In our opinion it was open to his Honour to find on the evidence that a connection had been substantially maintained with this area, so far as it was practicable to do so.

[260] The evidence of continuing connection with the Crosswalk special lease is stronger. That property is also an area with high stock carrying capacity, where some 6000 steers per year are fattened as part of the operation of the Carlton Hill and Ivanhoe stations. In late 1994 the area was included in the declaration of the "Noogoora Burr Quarantine Area" which further restricted human access.

[261] The only direct evidence from a primary witness called by the applicants, as to recent physical presence on the land, was given by Mr David Newry, who spoke of entering the land on a number of occasions, without permission, to fish since the mid-1980s. However, there was further evidence from the station manager, Mr Warriner, that he had seen Messrs Ronnie Carlton, Dodger Carlton,

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Terry Carlton, Warren Dawe and Ms Roberta Dawe in the general area of the Crosswalk lease, driving about, fishing and getting bush tucker. He had seen Mr Ronnie Carlton fishing both in the mud flats area well to the west, and in the Ord River closer to the lease. In his written evidence, Mr Warriner said:

(24) I do not try to stop Aboriginal people from travelling over the station. Occasionally some Aboriginal people ask me if they can enter the station to hunt the wild turkeys that are found on some parts of the leases. I always allow these requests.

...

(26) I have never seen any Aboriginals use any part of the reserves lease for any traditional ceremonies.

(27) To the best of my knowledge ceremonies occur in Kununurra. I know this because occasionally someone from the Aboriginal community will call me and ask for a "killer" (that is, a bullock) for a ceremony ...

[262] The Crosswalk lease is well inside the determination area, and the trial judge, in determining whether connection had been substantially maintained with that area, was entitled to have regard to Aboriginal activities in the surrounding areas which could support a finding that the community continues to acknowledge and observe traditionally based laws and customs which maintain their connection with the land. The evidence that ceremonies continue to occur in Kununurra, and that members of the present Miriuwung and Gajerrong community who live in the general area continue to gather bush tucker, observe customary bush medicine and other practices, is supportive of the evidence of the primary witnesses that they maintain a connection with the general area within which the Crosswalk lease is situated. We consider it was open to the trial judge to find that the Miriuwung and Gajerrong community had substantially maintained connection with the area of the Crosswalk lease, so far as it was practicable to do so.

[263] Submissions were made by the Alligator appellants that connection had not been substantially maintained in respect of discrete allotments within the township and irrigation areas of Kununurra. Some of these areas were small, for example leases and licences in respect of a quarrying operation. In respect of these areas, the nature of the operations conducted by the lessees or licencees probably rendered any access to or physical presence on the land quite impracticable, if not impossible. Moreover, these areas are within close proximity of the places of residence of many members of the present Miriuwung and Gajerrong community and close by place where traditional ceremonies and customs continue to be performed. The implicit findings of the trial judge that connection with the land in those areas has been substantially maintained was open on the evidence, and the grounds of appeal which challenge those findings are not made out.

The Balangarra peoples

[264] The State contends that the trial judge erred in law and in fact in concluding that the Balangarra peoples were a group with sufficient identity to hold native title. In support of this submission the State refers to evidence of the anthropologist retained by the Balangarra peoples, Ms Doohan, which explains how the name "Balangarra peoples" came to be established. It was chosen as an appropriate name in which to bring a claim for native title by Aboriginal people attending a meeting in Wyndham at the Shire Hall in about 1994. The name was considered appropriate as it means "all of the people", or as Ms Doohan says in her anthropological report "one mob together for country". The State points out

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that witnesses who gave evidence in support of the claim included Ms Mona Williams who said that her people were from the Arrwarri tribe, Mr Victor Martin who said that his grandfather's tribe was called Jangaloo, and Mr Laurie Waina, who was said by Mr Martin to be a Kwini person. On this evidence, the State contends that there are no people who were recognised by other Aborigines as Balangarra peoples before the Wyndham meeting, and that the historical information reveals that there were at least three tribal groups in the area.

[265] The question of the identity of the people bringing the claim in the name of the Balangarra peoples was canvassed before the trial judge, as was the evidence now relied upon by the State. In finding in favour of the claim by the Balangarra peoples, his Honour said (at ALR 551) :

It was apparent that Victor Martin acknowledged and observed laws and customs in relation to land by reason of his membership of a wider community. There was limited primary evidence led by the third applicants as to the identity of the group said to hold native title, no doubt because of the comparatively small area of land involved. However, the evidence that was led was consistent with Ms Doohan's report in which she identified a group observing separate laws and customs, which group included the third applicants who made the claim as representatives of that group, however the relevant group may have been identified at sovereignty.

[266] In our opinion it is not to the point that the name adopted by the third applicants was one of recent origin chosen for the purposes of the proceedings. What is important is that these applicants are the descendant members of an identifiable community which possessed native title rights and interests at the time of sovereignty under traditionally based laws and customs, and that there remains an identifiable community, the members of whom are identified by one another as members of that community, who continue to live under its traditional laws and customs as currently acknowledged and observed. The trial judge so found.

[267] While the evidence referred to by the State suggests that the applicants included descendant members from at least three tribal groups, the evidence of those witnesses indicates that they each considered themselves to be Kwini people. Ms Doohan explains in her report that Kwini (or Qwini) is used by the applicants in the sense that they are collectively connected to localities within the country which they claim. Ms Doohan noted that in a 1939 article by A Cappell, "Mythology in northern Kimberley, north-west Australia", reporting on field studies in 1938-1939, he says that "the tribes of the Forrest River have no common name, but may be collectively called by the name of the southernmost Gwi:ni" [sic].

[268] Ms Doohan gave reasons for concluding that the applicants seeking a determination for the Balangarra peoples are presently an identifiable community defined by a common body of law and custom which is distinct from that of other Aboriginal groups, by certain practices which she identified, and by common territory regarded as encompassing land which included Booroongoong Island. She was of the opinion that the applicants, and only the applicants, were the descendants of those people who were the original occupiers of the land and waters comprising that territory.

[269] In our opinion the trial judge was entitled to act on the expert evidence of Ms Doohan, supported as it was to an extent by the limited primary evidence which he received from witnesses claiming to be members of the community who had recently assumed the Balangarra peoples' identity.

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[270] On the question of continuing connection by members of the community now identifying as Balangarra peoples with Booroongoong there was primary evidence that Aboriginal people from the western side of the gulf regarded Booroongoong as part of their country. Ms Kaberry had documented an oral history from Kaalgi, Mr Victor Martin's grandfather, of his travel from the western side of the Gulf in dugout canoes to hunt for flying fox, and to live on the island for a time to escape massacres. Kaalgi reported having Dreaming and ritual connection with the island.

[271] It seems that Kaalgi's visits were before 1939. As to more recent occupation, the applicant Mr Vernon Gerrard said that he had visited the island on a boat when he was a small boy (probably before the Second World War) but had not been back since. He reported that another community member had gone to the island to catch turtle when Mr Gerrard was a young man. Mr Laurie Waina gave evidence that he visited the island in the early 1960s but in the course of his employment. While there he found some turtle. That evidence apart, there was no evidence of recent physical presence on the island. However, for reasons already given, the absence of visits to the remote island does not necessarily establish that spiritual and cultural connections have been lost or abandoned. The evidence of the applicants was to the contrary. In our opinion there was evidence upon which the trial judge could base his findings.

Malngin and Gija estates

[272] The evidence indicates that groups referred to as Malngin and Gija were recognised by primary witnesses as having interests in country in the south-eastern portion of the determination area, east of Bow River. It seems that a group referred to as Gija occupied land mainly to the south of the determination area, and a group referred to as Malngin occupied land to the east, extending well into the Northern Territory.

[273] In so far as we have been able to familiarise ourselves with the evidence relating to these groups, it does not appear to satisfactorily explain their relationship (if the two are related), or their social structure. The groupings appear to be based on language, rather than on other indicia of a structured community, and it appears to us to be an open interpretation of the evidence that the groups are subgroups of some wider community which recognises the particular usufructuary and other rights claimed by these groups. Indeed, the evidence is open to the interpretation that in the areas in question, such a recognition was accorded by Miriwung and Gajerrong people in accordance with the traditional laws and customs to which they adhered. This appears to be the consequence of the determination made by the trial judge.

[274] The trial judge noted that two members of the group who identified as Gija people, Messrs Joe Lissadell and Chocolate Thomas, were included among the first applicants as representatives of the Miriuwung and Gajerrong people. His Honour concluded in a passage to which we have earlier referred that (at ALR 546):

Having regard to the whole of the evidence, I am satisfied that, historically, Miriuwung people were connected with the southern part of the claim area and that the connection has been maintained.

The evidence also suggests, however, that in respect of that part of the claim area the right to use the area may have been shared and native title also held by Malngin and Gija communities. No determination to that effect can be made in this proceeding under the Act as amended. If communal title is asserted by communities claiming connection

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with the original Malngin and Gija communities, that may require an application for declaration of a common law right in a court of competent jurisdiction.

[275] The determination itself does not refer to native title rights and interests held by Malngin or Gija communities. On the contrary, the determination is that the native title rights and interests in that area are held by the Miriuwung and Gajerrong community.

[276] The State contends that the determination is defective in that it fails to recognise the rights and interests of the Malngin or Gija people. The cross-appeal by the Kimberley Land Council contends that the determination should be amended so as to provide that the determination area is held by the Miriuwung and Gajerrong people "and in respect of the southern part of the determination area is also held by Malngin and Gija people".

[277] It is not entirely clear what his Honour intended in the passage from the judgment that we have cited. For reasons earlier explained, we consider that the court had jurisdiction to make an order that declared interests of a Malngin and Gija community, or communities, if the community or communities were recognised to exist independently of the Miriuwung and Gajerrong community. His Honour elsewhere in the judgment (at ALR 552) said that the Act gave the court jurisdiction to deal with the whole dispute as to the existence of native title. It seems that his Honour's conclusion was not based on a lack of jurisdiction in the matter before the court. His Honour's observation that if community title is asserted by the groups, which he describes as "Malngin and Gija communities", that may require an application for a declaration, suggests that his Honour considered that such a "community title" was that of a subgroup whose rights and interests, following the determination, would lie against the registered native title body corporate, in the same way as claims by estate or family groups, who are indisputably subgroups of the Miriuwung and Gajerrong community, would lie if their rights and interests as members of that community were in doubt. We think this is the way the determination should be interpreted.

[278] An alternative interpretation of his Honour's refusal to include reference to the Malngin and Gija communities in the determination, is that in the course of pre-trial procedures, his Honour had directed that the Malngin and Gija groups, if they asserted an entitlement to a determination in their own right, they were to file an application which properly particularised the claim. That procedure was followed by the Kimberley Land Council in respect of the Balan-garra peoples' claim, but not in the case of the Malngin and Gija. The issue was raised again on the first day of the trial. On the third day of the trial, counsel for the Kimberley Land Council handed to his Honour a proposed draft application in the name of Ms Thelma Birch, Mr Frank Chulung, Ms Marjorie Brown and Mr Chocolate Thomas claiming native title rights and interests on behalf of their families in the southern portion of the claim area. Counsel explained to his Honour that the claim for native title would be similar to the claim of the Meriam people in the Murray Islands as it seemed that the customs and traditions which connected the applicants with the land encompassed all groups in the area. That explanation is consistent with the interpretation of the determination which we favour. Although the application was then foreshadowed, no such application was filed.

[279] We do not think that the determination made by the trial judge is inconsistent with his observation that the evidence suggests that "the right to use the area may have been shared and native title also held by Malngin and Gija

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communities". It is consistent with the determination that the Malngin and Gija groups have usufructuary and other rights to use the area as an estate or family subgroup in accordance with the laws acknowledged and customs observed by the wider Miriuwung and Gajerrong community. However, for reasons which appear below, we consider that native

title has been wholly extinguished in the southern portions of the claim area including in the areas where the Malngin and Gija assert native title.

Doolboong, Wardenybeng and Goolawarrenc

[280] The State also challenges the determination on the ground that it fails to identify and state the rights and interests in the determination area of the Doolboong, Wardenybeng and Goolawarrenc peoples. His Honour dealt with evidence that in the past there may have been a shared Miriuwung Goolawarrenc use of Goose Hill and that people claiming Doolboong and Wardenybeng connections mixed in the areas to the north. The evidence linked Wardenybeng in times past with the northern portion of the claim area more recently treated as Gajerrong country. However, there is ample evidence to support the conclusions of his Honour that the Doolboong, Wardenybeng and Goolawarrenc no longer exist as separate Aboriginal communities, and now identify as part of the wider Miriuwung and Gajerrong community. In any event, if people still identify as Doolboong, Wardenybeng or Goolawarrenc in the determination area, they would do so as members of subgroups whose rights and interests are appropriately protected by the determination in its present form. As we have already explained, it was not necessary for his Honour to make findings about the ancestry of each of the representative applicants, about the membership of particular estate groups, or about their continuing connection with particular parts of the determination area. It is sufficient that the determination declare the existence of native title rights and interests in the determination area which are held by the Miriuwung and Gajerrong community. Matters of detail as to the identity and rights of particular members of that community are matters to be determined with the registered native title body corporate.

Extinguishment

[281] For convenience we shall deal with the submissions made on the appeal in the order and under the headings adopted by the trial judge.

Pastoral leases

[282] It is appropriate to deal first with the appellants' submissions that the grant of pastoral leases both in the State and the Territory have extinguished all, or alternatively many, of the native title rights and interests claimed by the applicants, as virtually the whole of the claim area at one time or another has been the subject of pastoral leases. The only land not so covered is areas of the coastal flats below the high water mark, and the islands. There is also a question whether a pastoral lease purportedly granted in relation to part of the Goose Hill area, and pastoral leases purportedly granted before the Land Act 1898 (WA), were validly issued, but we put that question aside for the moment.

[283] Over the years most areas within the boundaries of the original pastoral leases have been resumed for a variety of purposes, and are now the subject of other statutory grants or interests that require separate consideration later in these reasons. Glen Hill is the only part of the determination area which is still held under a pastoral lease. If a pastoral lease had the effect in law of extinguishing

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wholly or in part native title in the lands to which it applied, the resumption of part of that land does not have the effect of reviving native title to the extent that it was extinguished.

[284] The submissions of the parties have focused heavily on the decision in *Wik* which held that pastoral leases issued under Queensland legislation did not necessarily extinguish all native title rights and interests. In *Wik* neither the legislation nor the pastoral leases contained a reservation in favour of Aboriginal people. The reasons of the members of the High Court consider the historical background which led to the granting of pastoral leases in eastern Australia, and analyse the nature and extent of rights granted to a pastoral lessee. The central question, on which the court divided, was whether a pastoral lessee obtained a right to exclusive possession. If so, that right would not permit the enjoyment by anyone else of any right or interest in respect of the land and would totally extinguish native title. The majority of the court held that having regard to the historical setting, the nature of the statutory scheme, the limited purpose of the lease (for pastoral purposes) and the extent of reservations which permitted the entry of Crown servants and others on to the land, the grant of a pastoral lease did not give a right of possession which excluded the Aboriginal people who hitherto had occupied the land. Accordingly, the statutory scheme under which the pastoral leases in question were granted, did not clearly and plainly apply to extinguish native title.

[285] In relation to pastoral leases in the State, much attention has been given by the parties in their submissions to expressions used in the legislation, and to the forms of the prescribed pastoral leases. The appellants contended that *Wik* is distinguishable, and that the history of the legislation relating to pastoral leases in the State plainly and clearly shows that a pastoral lease in the State is truly a "lease" according to common law precepts, and accordingly constitutes a grant of exclusive possession to the pastoral lessee. It is contended that by the adoption of terms and concepts which have technical legal meanings such as "lease", used in contradistinction to "licence", the grant of power to the Governor in early regulations to alienate land in "fee simple or for any less estate or interest", "sublet", "assign", "underlet", and "demise and lease", combine to indicate that under the legislation in force from time to time pastoral leases have had the character of leases at common law, and in substance constituted a demise of the land itself, carrying with it a legal right to exclusive possession: *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405 ; *Radaich v Smith* (1959) 101 CLR 209 at 222; and *Street v Mountford* [1985] AC 809 at 816, and see also the recent decisions of *Bru-ton v London & Quadrant Housing Trust* [1999] 3 WLR 150 and *KJRR Pty Ltd v Commissioner of State Revenue* 99 ATC 4335 discussed at (1999) 73ALJ 787. Other grounds of distinction were also suggested. Pastoral leases in the State have been available in undifferentiated form under the relevant legislation for areas of less than 3000 acres in relatively settled green pasture areas of the south-west to very large areas of semi-arid lands near Eucla and "quite rough" terrain in the Kimberley, and in the State the Land Act 1933 (WA) s 106(2), discussed below, makes specific statutory provision for Aboriginal access. The matters identified by counsel are points of difference between the situation in Queensland, and in the State, but we do not consider they provide grounds that render the reasoning of the High Court in *Wik* inapplicable to the State legislation.

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[286] In the present case, however, both in the State and in the Territory, the terms of the early pastoral leases, and more recently the provisions of the legislation under which pastoral leases have been granted, contain reservations in favour of Aboriginal people which, in our opinion, make it clear that as a matter of law the pastoral leases in the claim area did not authorise the total extinguishment of all native title rights and interests. For this reason, this case raises questions which did not arise for the consideration of the High Court in *Wik*. Here it is necessary to consider the extent, if at all, to which pastoral leases affect native title, short of complete extinguishment.

[287] We do not think it is particularly helpful in this case to ask whether a pastoral lease is strictly to be treated as a lease in accordance with common law principles. This is so, as pastoral leases are creatures of statute which were designed to facilitate the early settlement of remote areas of Australia: *Wik* at CLR 122 per Toohey J, CLR 152 per Gaudron J, and CLR 176-7 per Gummow J. As pastoral leases are creatures of statute, the first duty of the court is to examine the statute and to see whether, consistently with its terms, other rights and obligations that would apply by the general law attach to the statutory entitlements and duties of the parties or are modified: *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 696 per Kirby P.

[288] The application of the inconsistency of incidents test adopted in *Wik* requires an identification of the ambit of the native title rights upon which the applicants rely, and a comparison of those rights with the statutory rights arising under pastoral leases as well as under the legislation pursuant to which they were granted. In the present case this exercise requires a consideration of the relationship between the rights of the native title holders and the pastoral lessees, rather than between the pastoral lessees and various people other than native title holders in whose favour various reservations in the pastoral lease might operate. The latter exercise assumed importance in *Wik* because there was no reservation in favour of Aboriginal people which demonstrated that a pastoral lessee did not have exclusive possession.

[289] In carrying out this comparison, the ambit of the native title rights and interests found by his Honour to exist at the date of sovereignty, and prior to European contact, comprised rights and interests to possess, occupy, use and enjoy the land to the exclusion of all others within the determination area, which more particularly included the rights and interests specified in para 3 of the determination.

[290] We accept that the form of the pastoral lease from time to time prescribed, and the use of terms and concepts which have well known technical common law meanings, are indications in favour of the conclusion that a pastoral lease was to be in the nature of a demise of the land carrying with it all the rights which would normally be enjoyed by a common law lessee, save for the restrictions on those rights imposed by the exceptions, reservations and limitations expressed in the grant. The limitations as to use for a prescribed purpose, namely for pastoral purposes, and reservations which permitted the Crown and others to use parts of the land for certain purposes are not necessarily inconsistent with the lessee otherwise having exclusive possession: *Goldsworthy Mining Ltd v FCT* (1973) 128 CLR 199 at 212-13. The reservations in this case in favour of Aboriginal people, however, plainly indicate that in relation to Aboriginal

people exercising the reserved rights, a pastoral lessee does not have a right of exclusive possession. The rights granted by pastoral leases, even if they

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have numerous features of a common law lease, are qualified in favour of Aboriginal people by the reservation and the empowering legislation: see *Mabo (No 2)* at CLR 89, 110 and *Fejo* at CLR 128.

[291] The question for decision here concerns the meaning and scope of the right expressly reserved in favour of Aboriginal people, and the meaning and scope of the rights of pastoral lessees which are to be ascertained from the substance as well as the form of rights granted by the pastoral lease.

[292] It is necessary to consider separately the position under the State and the Territory legislation.

(i) Western Australia

[293] In the *Native Title Act* case at CLR 433-4 in the joint judgment, it was held that native title in Western Australia was not extinguished by the establishment of the Colony of Western Australia, and that any extinguishment thereafter occurred only parcel by parcel in consequence of the valid exercise of the power to grant interests in some of those parcels, and to appropriate others of them for the use of the Crown inconsistently with the continuing right of Aboriginal people to enjoy native title.

[294] The early history of pastoral leases in Australia is described by Toohy J in *Wik* at CLR 108-10 and by Drummond J in *Wik Peoples v Queensland* (1996) 63 FCR 450 at 457; 134 ALR 637 and following. By an Order in Council made on 22 March 1850, pursuant to the Sale of Waste Lands Act 1842 (Imp), pastoral leases were introduced in the Colony of Western Australia in the same manner as in New South Wales. Pastoral leases were introduced to avoid problems of conflict which had arisen in New South Wales out of the assertion of rights by pastoralists, which denied traditional rights of Aboriginal inhabitants. The Order in Council contained the following official directive (*WA Government Gazette*, 17 December 1850):

Nothing contained in any pastoral lease shall prevent aboriginal natives of this colony from entering upon the lands comprised therein, and seeking their subsistence therefrom in their accustomed manner ...

[295] This term from the Order in Council was incorporated as an exception and reservation into the Land Regulations 1851 (WA) later proclaimed in Western Australia, and into the Land Regulations proclaimed in 1860, 1864, and 1872. In the Land Regulations proclaimed in 1878 the exception and reservation was amended so as to apply to "any unenclosed or enclosed but otherwise unimproved part of the demised Premises".

[296] The first pastoral leases in the claim area were granted under the Land Regulations 1882 (WA). These pastoral leases:

- o conferred no right to soil or timber (reg 82);
- o were subject to reservations of (reg 85):
 - the right to lay out public roads;
 - the right to take indigenous produce, rock or soil for public purposes;
 - the right to cut and remove timber;
 - the right to sell any mineral land;
 - the right to sell any portion of the pastoral lease and exercise a right of immediate entry;
 - the right to depasture stock on "unenclosed or enclosed but otherwise unimproved land";
- o were subject to a power to immediately determine the pastoral lease over any land which may be reserved, sold or otherwise disposed of under the regulations, compensation being provided only for improvements: regs 79 and 81.

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[297] Leases were issued in the form prescribed in Sch No 11, which expressly declared the above exceptions and reservations and in addition declared a right of entry for mineral exploration and provided:

Except and always reserved to Us, Our Heirs and Successors ... full right to the Aboriginal natives of the said Colony at all times to enter upon any unenclosed or enclosed but otherwise unimproved part of the said demised Premises for the purpose of seeking their subsistence therefrom in their accustomed manner.

[298] An identical exception and reservation in favour of Aboriginal people was included in the form of pastoral lease set out in the Land Regulations 1887 (WA) which replaced the Land Regulations 1882 in respect of pastoral leases issued in the Kimberley Division of the colony. Responsible self-government commenced in the colony in 1890. The Land Act 1898 (WA) in ss 106 and 107 maintained the exceptions and reservations, upon the grant of a pastoral lease which had been contained in the 1882 regulations. Section 92 of the Act provided that all pastoral leases were to be issued in the form set out in Sch No 24, and that form repeated the reservation and exception in favour of Aboriginal people set out in the Schedule No 11 to the Land Regulations 1882.

[299] The Land Act 1933 consolidated and amended the Land Act 1898. The terms and conditions of pastoral leases remained largely unchanged save for one important omission. The form of the pastoral lease, contained in the Nineteenth Schedule, did not include a reservation in respect of an Aboriginal right of access. However, by the Land Act Amendment Act 1934 (WA), s 106(2) was inserted. As the State contends that the Land Act 1933, as amended by the insertion of s 106(2), had the effect of extinguishing native title, and substituting a statutory right of Aboriginal access, it is necessary to consider s 106 in its entirety. The section appears in Pt VI of the Land Act 1933 which deals with pastoral leases. Section 90 provides that any Crown lands within the State which are not withdrawn from selection for pastoral purposes, and which are not required to be reserved, may be leased for pastoral purposes at the rent, and subject to the conditions thereafter prescribed. Section 96 makes provision for pastoral leases in the Kimberley Division. Section 97 deals with the position and boundaries of leases. Sections 98 to 101 deal with the term, rent, and review of assessment of rent. Section 102 requires that every pastoral lease shall be granted on condition that improvements as prescribed be effected by the lessee. Section 103 provides for the forfeiture of pastoral leases, if the lease is not stocked in a prescribed manner. Section 104 provides for the re-appraisal of rent in certain circumstances. Section 105 provides that a pastoral lease gives no right to soil, and a very restricted right to timber, and s 107 requires a pastoral lessee desiring to ringbark trees to obtain prior permission. The remaining sections of Pt VI make provision for withdrawal or resumption of land, compensation for improvements, and the surrender and transfer of leases. That is the setting within which s 106 appears. The marginal note for the section is "Reservations". The section as enacted in the Land Act 1933 read:

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106. The right is reserved to the Minister:

- (a) to lay out, declare open, and make, either permanently or for temporary use, public roads through any land held under pastoral lease:
- (b) to take away any indigenous produce, rock, soil, or other material; and to fell, cut, and remove all or any timber, sandalwood, or other woods which may be required for public purposes, from any such land:
- (c) to issue licenses to any persons to cut, remove, and cart away any timber, sandalwood, or other woods or to quarry, dig for, and cart away any rock, soil, or other material growing or being upon any such land;
- (d) to sell, lease, or otherwise dispose of any mineral land comprised within the limits of any pastoral lease:
- (e) to sell, lease, or otherwise dispose of any other portion of such lease subject to the provisions of this Act, at any time, and with a right of immediate entry, but subject to section one hundred and eight; and
- (f) to depasture any horses or cattle in the employ of the Government while working on or passing over the said land, and to water them at any natural sources there, together with a right for any person to pass over any such land which may be unenclosed, or enclosed but otherwise unimproved, with or without horses, stock, or vehicles, on all necessary occasions.

[300] Those provisions were renumbered s 106(1) by the 1934 amendment, and s 106(2) provided:

The aboriginal natives may at all times enter upon any unenclosed and unimproved parts of the land the subject of a pastoral lease to seek their sustenance in their accustomed manner.

[301] It is accepted by the parties that no pastoral leases were issued under the Land Act 1933 in respect of land in the claim area before the 1934 amendment came into operation.

[302] Section 106(2) has not been amended since its insertion, although a number of the reservations in s 106(1) have been repealed.

[303] Pastoral leases have always been deemed "Crown land" for the purposes of land and resource management: see the Land Act 1898 (WA) s 3; the Land Act 1933 (WA) s 3; the Mining Act 1904 (WA) s 3; the Mining Act 1978 (WA) s 8; the Petroleum Act 1936 (WA) s 4; the Petroleum Act 1967 (WA) s 5; the Land Drainage Act 1925 (WA) s 6; the Wildlife Conservation Act 1950 (WA) s 6; and the Conservation and Land Management Act 1984 (WA) s 11.

[304] The duration of pastoral leases has been for long periods. Under the Land Regulations 1880 leases could be granted for up to 13 years, under the Land Regulations 1887, up to 20 years, and under the Land Act 1898 up to 30 years. Under the Land Act 1933 pastoral leases could be granted up to 50 years. The areas covered by pastoral leases in the Kimberley Division have covered large areas, varying from 10,000 to about 993,364 acres. Many exceeded 250,000 acres.

[305] In summary, pastoral leases under the Land Regulations of 1882 and 1887 were granted on conditions that expressly excepted and reserved to Aboriginal people a right to enter upon "any unenclosed or enclosed but otherwise unimproved" parts of the lease "for the purpose of seeking their subsistence therefrom in their accustomed manner", and from 1934 the legislation provided a right for them at all times to enter upon "unenclosed and unimproved parts" of the lease "to seek their sustenance in their accustomed manner".

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[306] We do not accept the contention of the State that s 106(2) had the effect of confirming a total extinguishment of native title and creating a new statutory right of Aboriginal access. In pastoral leases granted under the Land Regulations, the prescribed term plainly operated as an exception, that is a keeping back of part of the rights granted to the pastoral lessees, and did not create a new right in favour of Aboriginal people: see *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 194 per Windeyer J; *Yandama Pastoral Co v Mundi Mundi Pastoral Co Ltd* (1925) 36 CLR 340 at 377 per Higgins J; and *Wik* at CLR 201 per Gummow J. By its terms, s 106(2) is not expressed to be an exception or reservation. However, s 106(1) and (2) are preceded by the marginal note "Reservations" and each of the paragraphs in s 106(1) plainly operates as a reservation as that expression is understood in Australia. Moreover, s 106 is situated between ss 105 and 107 each of which express limitations upon the extent of the rights granted to a pastoral lessee. When s 106(2) is read in context, we think it is plain that it was intended to operate as a reservation in respect of pastoral leases issued after it was inserted into the Land Act 1933. However, s 106(2) is expressed in terms that go further than merely preserving an existing native title right of access to seek sustenance. The subsection elevates that right to a statutory right, and, moreover extends the scope of that right to all "Aboriginal natives". That it does so does not carry the implication that the pre-existing native title right is abolished.

[307] Being cast in the wide terms in which it is, s 106(2) caters for the situation where Aboriginal people from other areas obtain permission from the native title holders to enter their country, an event which the evidence establishes was not uncommon in relation to major ceremonies. This construction of s 106(2) is consistent with the following observations of Brennan J in *Mabo (No 2)* at CLR 66-7; ALR 48-9 :

Nor is native title impaired by a declaration that land is reserved not merely for use by the indigenous inhabitants of the land but "for use of Aboriginal Inhabitants of the State" generally. If the creation of a reserve of land for Aboriginal Inhabitants of the State who have no other rights or interest in that land confers a right to use that land, the right of user is necessarily subordinate to the right of user consisting in legal rights and interests conferred by native title. Of course, a native title which confers a mere usufruct may leave room for other persons to use the land either contemporaneously or from time to time [footnotes omitted].

[308] Counsel for the State contended that the trial judge erred in not having regard to statements of relevant ministers during the debate on the Land Act Amendment Act 1934 concerning the clause that became s 106(2). It was said

that these speeches confirm that parliament intended that a pastoral lease was intended to confer a leasehold estate, not some new form of interest in land sui generis. As we have already said we do not think that the issues relating to pastoral leases in the present case fall to be determined by characterising a pastoral lease as a "lease" in the strict common law sense, or as a statutory creation of its own kind. Rather, it is necessary to ascertain the meaning and effect of s 106(2) itself. We consider the parliamentary debate confirms the construction that we have placed on that provision. In the Legislative Council, the Honorary minister responsible said (Hansard, 6 December 1934, p 1808):

Originally, in fact since 1851, natives have had the right to enter upon any enclosed or unenclosed but otherwise unimproved parts of pastoral leases. That stipulation was for many, many years included in the pastoral leases which were granted. When the consolidating measure was before parliament, that condition was deleted from the bill.

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As a result, it became necessary for the condition to be excised from any new leases granted. As a consequence, the Aboriginal had no right whatever in regard to large areas of Western Australia ...

... All that the Aborigines Department at present desire is that the natives shall have the same right as they have had since, at least, the year 1851 ...

... at present I say we have no right to take away from the natives something which they have enjoyed since the year 1851.

[309] We agree with the trial judge that the reference to seeking subsistence, or sustenance, from the land in an accustomed manner makes it plain that in the exception and reservation clauses, and in s 106(2) of the Land Act 1933, the Crown acknowledged an existing right of access to land over which the Crown had granted rights to depasture stock, that is, to pursue "pastoral purposes". His Honour held that such an acknowledgment was inconsistent with any intention to wholly extinguish native title. On his Honour's view of the law, that there was no concept of partial extinguishment, it was unnecessary to consider whether pastoral leases extinguished some, but not all, native title rights and interests. His Honour considered whether the evidence disclosed that any pastoral lessee by actual use of the land in a manner permanently inconsistent with the continued existence of native title had brought about total extinguishment in relation to particular areas. His Honour said that of the improvements contemplated by the Land Acts, only dwelling houses, and possibly reservoirs and dams, would be of sufficient permanence to indicate intention to extinguish native title by adverse dominion. However, there was no evidence to establish permanent improvements of that kind.

[310] We are unable to agree that the grant of pastoral leases has caused no extinguishment. For reasons earlier given, we consider that native title can at law be partially extinguished to the extent that inconsistent rights have been created by a statutory grant. While the law which has authorised the creation of pastoral leases has undergone amendment and change over the years, the substantive rights granted to a pastoral lessee have remained substantially the same. The pastoral lessee is granted the right to use the land for "pastoral purposes", an expression which is given further meaning by the definition of a "pastoral lease" as a lease of an area to any person for grazing purposes: see the Land Regulations 1882 reg 2; the Land Regulations 1887 reg 2; the Land Act 1898 s 3; and the Land Act 1933 s 3. The pastoral lessee has the right to use and occupy the land for that purpose subject only to the conditions, exceptions and reservations contained in the pastoral lease. The pastoral leases were for substantial terms not for finite short periods. The pastoral leases imposed minimum requirements as to stocking and improvements, but contemplated, and by implication authorised, that the minimum requirements could be exceeded. Where stock numbers were exceeded, rent adjustments could follow: Land Regulations 1887 reg 73; Land Act 1898 s 100; and Land Act 1933 s 101. In the case of improvements, provision was made for compensation in the event of withdrawal or resumption of land, provided the same were made bona fide for the purpose of improving the land or increasing the carrying capacity: Land Regulations 1882 regs 79 and 81; Land Regulations 1887 reg 105; Land Act 1898 s 145; and Land Act 1933 s 140. The improvements envisaged by these provisions were extensive in kind and included fencing.

[311] Native title rights may coexist with other interests. In *Mabo (No 2)* Brennan CJ said at CLR 67 that "a mere usufruct may leave room for other persons to use the land either contemporaneously or from time to time". And in

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Wik, Gummow J at CLR 169, referring to the exercise of traditional usufructuary rights, said that "this may leave room for others to use the land either concurrently or from time to time".

[312] The pastoral leases envisaged and authorised activities which, depending on their intensity, had the potential to directly clash with the pursuit by Aboriginal people of their traditional activities on the land. Notwithstanding that potential, the grants expressly recognised the coexistence, to an extent, of the activities both of the pastoral lessees and the Aboriginal people. The reservation in favour of the Aboriginal people contained in the pastoral leases in question in

this case, granted before 1933, reserved to them the full right to enter upon any unenclosed or enclosed but otherwise unimproved part of the land for the purpose of seeking their subsistence in their accustomed manner. To the extent that the grants brought about a situation where the Aboriginal people on the one hand, and pastoral lessees on the other, had coexisting rights to be present on the land for their respective purposes, the law required that those rights be exercised by each party reasonably, having regard to the interests of the other. Each was entitled to exercise their respective rights, subject to the requirement of reasonable user: see *Boyle v Holcroft* [1905] 1 IR 245 ; *Peech v Best* [1931] 1 KB 1 ; and *Mason v Clarke* [1955] AC 778 . These cases concern the interrelationship of farming and sporting rights, but provide useful guidance on the principles of reasonable use.

[313] In *Boyle v Holcroft* the plaintiff was the grantee of exclusive fishing rights running through a farm of which the defendant was the tenant. The defendant erected a barbed wire paling along the bank of the river which interfered with fishing. Barton J said at 249-50:

On behalf of the defendant it is said that the river is shallow, and the river-bank broken in some places; and that this paling was put up for the purpose of preventing escape and trespass of cattle. If this paling was reasonably necessary, and was erected bona fide for a purpose of that kind, the defendant would, in my opinion, be in a very strong position. The right of fishing must be exercised in view of the occupying tenant's right to use all proper and reasonable means which may be necessary from time to time for the management and cultivation of his farm. In cases of this kind, two rights in eodem solo have to be reconciled -- the tenant's right to manage and cultivate his farm in all proper and reasonable ways consistent with the conditions of his tenancy, and the landlord's right of fishing and of entering upon the lands for that purpose ... I take it that, as a general rule, so long as the tenant is bona fide and reasonably managing and using the lands, the owner of the fishing rights must be content to exercise his right upon the lands in the condition in which they may happen to be from time to time. On the other hand, the tenant must not, under cover of farm user or management, unreasonably or mala fide cause or maintain an obstruction to the exercise of the right of fishing, and may be restrained by injunction from doing so.

[314] In *Peech v Best* the plaintiff was the grantee of shooting rights, a profit à prendre. Scrutton LJ said at 14:

... both landlord and sporting tenant must use their land reasonably having regard to the interest of the other, and will be liable for damage caused to the other by extraordinary, non-natural, or unreasonable action.

This passage was approved by the House of Lords in *Mason v Clarke* at 796.

[315] Further guidance on the principles of reasonable user may be found in cases which concern the use of land by adjoining owners and in the law of nuisance: see *Southwark London Borough Council v Tanner* [1999] 3 WLR 939

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at 954-5; *Jones v Pritchard* [1908] 1 Ch 630 at 638; and *Miller v Jackson* [1977] QB 966 at 980. See also *Nickells v Melbourne Corporation* (1938) 59 CLR 219 at 225.

[316] The immediate consequence of the grant of these coexisting rights, in the areas where coexisting rights existed, was to destroy the exclusive nature of the native title right to possess, occupy, use and enjoy the land. Henceforth the right was one to be shared, not only with the pastoralist in pursuit of the pastoralists' right to use the land for grazing purposes, but with other people who come on to the land pursuant to other reserved rights. Moreover, in so far as the native title included rights to make decisions regarding the use and enjoyment of the land and access to the land, that exclusivity was destroyed. Any right to make decisions about the use and enjoyment of the land was also destroyed to the extent that it was inconsistent with the grant to a pastoral lessee of the right to make decisions about the use of the land for pastoral purposes. There could be no native title right to control access by the pastoral lessee, and those to whom the pastoral lessee granted permission to enter. In relation to people entering upon the land for one of the reserved purposes, actual entry would constitute a use inconsistent with the original native title, and to that extent native title would be regulated, though not necessarily extinguished. Whether extinguishment occurred would depend on the nature and degree of use undertaken pursuant to the right of entry.

[317] The scope of the rights reserved to the Aboriginal people in grants made prior to 1933 was limited to unenclosed or enclosed but otherwise unimproved land. It will be noted that a similar reservation in respect of the right of

any person to pass over the land was contained within the general reservations which now find expression in s 106(1)(f) of the Land Act 1933. The exception and reservation by its terms did not reserve to the Aboriginal people any right to enter upon enclosed and improved parts of the land. As a matter of construction we consider that pastoral leases granted in the terms prescribed prior to 1933 plainly and clearly intended that in respect of enclosed and improved areas the rights both of native title holders and of any other people to enter or pass over that part of the land (otherwise than in exercise of one of the other reserved rights) were abrogated.

[318] Under the reservation in favour of Aboriginal people enacted in 1934 by s 106(2) of the Land Act 1933, the rights of Aboriginal people in relation to pastoral leases were further restricted. Whereas s 106(1)(f) continued to provide a right to any person to pass over unenclosed or enclosed but otherwise unimproved land with or without horses, stock or vehicles on all necessary occasions, the right of Aboriginal people at any time to enter upon parts of the land to seek their sustenance in their accustomed manner was restricted to "unenclosed and unimproved parts of the land".

[319] While on the one hand the reservations in favour of Aboriginal people express a clear intention that the grant of a pastoral lease does not necessarily extinguish native title, on the other hand, the terms of the reservations delineate both in terms of purpose and geographical location the extent of the rights which are not adversely affected by the grant of the pastoral lease. Correspondingly, activities of Aboriginal people that do not come within the limitations as to purpose and geographical location in respect of which their rights are reserved, are by clear implication not permitted as of right, as they are inconsistent with the rights of possession and use otherwise granted to pastoral leases.

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[320] The question then arises as to the meaning and scope of the expressions "unenclosed or enclosed but otherwise unimproved", and "unenclosed and unimproved". These are expressions which arise under the Land Regulations and the Land Act 1933 respectively, and as such have legal meanings in that context.

[321] The State contends that "enclosed" means fenced. The applicants challenge this interpretation. They point to the definition of "fence" in the Land Act 1898 and the Land Act 1933. Under those definitions "fence" means any substantial fence, not being a brush fence, proved to the satisfaction of the minister to be sufficient to resist the trespass of great and small stock, including sheep, but not including pigs or goats. The expression "great" stock includes cattle. The applicants argue that in this sense fences are intended to control the movement of stock, not people. That may be so, but we do not think it assists the applicants. To "enclose" means "(1) to shut in: close in on all sides; (2) to surround as with a fence or wall: to enclose land ...": *The Macquarie Concise Dictionary*, 3rd ed. The meaning of "enclosed" is to be ascertained having regard both to the reservation in favour of Aborigines, and the reservation in respect of the right of any person to pass over unenclosed, or enclosed but otherwise unimproved land with or without horses, stock or vehicles (the reservation now contained in s 106(1)(f)). In that reservation we think it is clear that "unenclosed" means unfenced so that entry with or without horses, stock or vehicles is unrestricted, and "enclosed" means "fenced".

[322] Assistance in ascertaining the meaning of "unimproved" is given by provisions for the valuation of "improvements" contained within the regulations and the Land Acts. In particular, reg 105 in the Land Regulations 1887 provides that no payment or valuation shall be made pursuant to the regulations in respect of any improvements, nor shall any improvements be considered pursuant to the regulations:

... unless the same shall consist of wells of fresh water, reservoirs, tanks or dams of permanent character and available for the use of stock; ... or of fences, sheds and buildings erected for farm or shearing and station purposes, not being dwelling houses (except where such dwelling houses exist upon a pastoral lease) or of cultivation, subdivision fences, clearing, grubbing, drainage, ringbarking ... or any improvement for maintaining or improving the agricultural or pastoral capabilities of the land.

A similar definition was contained in the Land Act 1898 s 145 and in the Land Act 1933 s 140. However, after 1963 a dwelling house on a pastoral lease was not considered an improvement for the purposes of the Land Act 1933: see Land Act Amendment Act 1963 (WA) s 24.

[323] While these provisions list items that will be treated as improvements for the purposes of valuation and payment, for example on the resumption or withdrawal of land from a pastoral lease, we do not think that the list exhaustively defines improvements. The description of improvements in s 140 and in the earlier versions applies for the specific purpose stated, namely valuation and payment under the regulations. In our opinion in the reservations, the

word "improvement" carries its ordinary English meaning, namely "a bringing into a more valuable or desirable condition, as of land; a making or becoming better: a betterment": *The Macquarie Dictionary*, 3rd ed. Items of the kind listed in s 140 will constitute improvements but other items or work may also constitute an improvement.

[324] However, to identify the presence of an improvement, or several improvements dotted about a large area of land, does not necessarily justify the

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conclusion that the whole of the land is improved land. The nature of the improvement, and matters of degree will arise. In the case of a well, dam or watering point an area close around the improvement would reasonably be considered "improved land", but land, say one kilometre away, may not fall within that description. Questions of this kind can only be answered case by case as they arise, and do not lend themselves for blanket determination on an application for determination of native title over a very large area of land.

[325] In our opinion it would be sufficient for the purposes of making a determination of native title for the court to determine that an Aboriginal group claiming native title in respect of specified land holds a full right of entry in accordance with whichever of the reserved rights of entry is appropriate to the case, without entering upon the further task of defining geographically those portions of the land which are unenclosed, enclosed but unimproved, or unenclosed and unimproved. In the event of a dispute later arising as to the rights of the native title holders in relation to a particular area of land, any court of competent jurisdiction could determine whether that land came within the reservation.

[326] In the present case, however, evidence was led as to the situation in parts of the determination area, such that this factual issue can be determined in some areas, but, as we understand the evidence, it did not extend to the whole of the determination area. The evidence included a substantial statement of agreed facts, Ex 55, Schs 1A to 1F of which specify agreed "enclosures" in relation to the Argyle Downs Station, pastoral lease 3114/738; the Ivanhoe Station, pastoral lease 3114/640; the Carlton Hill Station, pastoral lease 3114/1176; the Glen Hill Station, pastoral lease 3114/425; the Lissadell Station, pastoral lease 3114/1001; and the Texas Downs Station, pastoral lease 3114/995. (There were no agreed items on the Goose Hill Station.) The agreement is that in respect of each of the "enclosures" they existed prior to 1972 and were located as shown in the maps attached to the statement of agreed facts. Parts of the areas on the Argyle Downs pastoral lease have since been inundated by Lake Argyle. These schedules of agreed "enclosures" are based on a report on pastoral improvements prepared for the purposes of the proceedings by J W Holmes in November 1996. Notwithstanding the applicants' submissions to the contrary, a perusal of the report satisfies us that the enclosed areas were sufficiently fenced or otherwise contained by natural boundaries to be "enclosed" within the meaning of s 106(2) and the earlier reservations. In respect of those agreed enclosures, we think the evidence justifies this court making such a determination. However, in respect of other areas within those stations, and on the Goose Hill Station, and elsewhere, there was no agreement about the extent of the enclosures. In the absence of a finding by the trial judge about areas where there was no agreement, this court is in no position to find the facts.

[327] As we have noted, the pastoral leases envisage and authorise that the lessee will carry out improvements, including fencing. Quite apart from any limitation on the rights of Aboriginal people arising from the express terms of s 106(2) and the earlier reservations in their favour, improvements effected by a pastoral lessee, depending on their nature, may bring about an operational inconsistency which has the effect of wholly or partially extinguishing the native title rights which survived the grant of the pastoral lease. In the present case,

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however, effect must also be given to the consequence which improvements, in particular fencing, have in the application of the express terms of the reservations in the pastoral leases and s 106(2).

[328] In our opinion the effect of the reservations is that once a pastoral lessee in exercise of the authority contained in a pastoral lease encloses or improves parts of the pastoral lease, the lessee becomes entitled to the use and possession of the surface of that part of the land to the exclusion of the rights of Aboriginal people to enter to seek their sustenance in their accustomed manner. The exclusion of the rights of Aboriginal people in those areas as a matter of law effectively prevents the enjoyment of any rights and interests in respect of those parts of the land just as effectively as a grant in fee simple because, in those areas, the pastoral lessee has a right of possession exclusive of the interests of the Aboriginal people.

[329] In summary, we consider that in Western Australia, the grant of a pastoral lease had the immediate effect of extinguishing the exclusivity of the native title right to possess, occupy, use and enjoy the subject land. However, as pastoral leases were granted subject to a reservation in favour of Aboriginal people, to the extent permitted by the terms of the relevant reservation, Aboriginal people retained the full right to enter upon the land for the purpose of seeking

their sustenance therefrom in their accustomed manner. In areas where that reservation applied, the Aboriginal people and the pastoral lessee had rights which coexisted, and the rights of both parties were subject to the requirement of reasonable user. The reservations did not except native title rights to make decisions about the use and enjoyment of the land, and such rights were also extinguished to the extent of the grant to the pastoral lessee of the right to make decisions about the use of the land for pastoral purposes, including as to the location and extent of improvement otherwise permitted by law to be made. However, the reserved right of access ceased to exist under pastoral leases issued before 1933 when the land became enclosed and improved, and also under pastoral leases issued after 1934 when the land became enclosed or improved. Thereafter the activities of the Aboriginal people could no longer come within the limitations as to purpose and geographical location expressed in the applicable reservation. In areas where the reservation ceased to apply native title was wholly extinguished.

[330] As the trial judge concluded that the pastoral leases had not brought about extinguishment, it was unnecessary for him to consider submissions by the applicants that the State had not proved that valid leases were issued under the Land Regulations 1882 and the Land Regulations 1887 in respect of pastoral leases issued prior to 1898. On the view that we take of the matter, there is no need now for us to consider that argument because even if they were not validly issued at or before the end of the terms of those leases, later pastoral leases subject to the reservations then required by law were issued encompassing the same areas (except in respect of lands that had been resumed in the meantime and reserved by the Crown for specific purposes -- which are considered later in these reasons). Even if the purported grants of pastoral leases prior to 1898 did not affect native title because they were invalid, the subsequent leases, in our view, have done so. According to the records of the State the claim area was blanketed by some 45 pastoral leases granted under the Land Regulations 1882, and 38 granted under the Land Regulations 1887. Over time these were replaced by 42 pastoral leases granted under the Land Act 1898. The pastoral leases renewed under the Land Act 1933 covered larger areas and were fewer in

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number. It seems a series of leases covering the area were issued for terms of up to about 50 years in the mid-1930s, and then consolidated and reissued between 1966 and 1974 for terms expiring on 30 June 2015, save however for areas that in the meantime had been surrendered or withdrawn and become reserved lands or the subject of some other grant.

[331] Presently Glen Hill, the only continuing pastoral lease, is held by the Aboriginal Lands Trust, and is occupied by an Aboriginal Corporation, the Mandangala Corporation. On the evidence the Glen Hill pastoral lease is held over the area by the Aboriginal Lands Trust in trust for people who are members of the Miriuwung and Gajerrong community including John Toby who is a named applicant. In these circumstances, s 47(2) of the NTA provides that any extinguishment of the native title rights and interests by any of the following acts must be disregarded:

- (a) the grant of the lease itself;
- (b) the creation of any other interest itself in relation to the area;
- (c) the doing of any act under the lease or by virtue of holding the interest.

In written submissions to this court the applicants sought to rely on s 47(2)(b). The State, however, contended that the applicants should not be permitted to do so because they had failed to give particulars before trial about the possible application of s 47 to Glen Hill. But the evidence at trial is to the effect we have stated, and s 47, being a requirement of the NTA, must be applied. In our opinion, the determination should reflect the operation of s 47 in relation to the Glen Hill area, with the consequence that native title in that area is not extinguished.

(ii) Northern Territory

[332] The reservations in favour of Aboriginal people in legislation applying from time to time in the Territory, have been expressed in terms which more widely cover traditional Aboriginal activities on land than the reservations expressed in State legislation. In the result, although we conclude that pastoral leases granted in respect of the Territory portion of the determination area have also brought about partial extinguishment by abrogating native title rights to *exclusively* possess, occupy, use and enjoy the land, we consider that there has not been total extinguishment in respect of any area.

[333] In 1825 the Territory claim area was included in the colony of New South Wales by Letters Patent which extended the boundary of New South Wales west to 129° East longitude. In 1863 the Territory was separated by Imperial Order from New South Wales, and annexed to South Australia. It remained under the control of South Australia until 1911 when the Territory was surrendered to the Commonwealth: see the *Croker Island* case at 449. It remained under Commonwealth control until self-government was granted in 1978.

[334] There have been in all, five pastoral leases granted over the claim area in the Territory. Most of the area was subject to a pastoral lease granted in 1893, and the balance of the area was subject to another pastoral lease granted in 1897. These two leases were granted under the Northern Territory Crown Lands Act 1890 (SA). The leases were in statutory form under regulations made under the Act which in substantial respects were similar to the pastoral leases issued by the State. Under s 6 of the Act, the Governor was empowered to alienate Crown lands. Section 60 required pastoral leases to contain covenants to stock the leased land, and to contain prescribed terms. Regulation 39 prescribed that pastoral leases shall contain a condition for the protection of Aborigines. The leases were

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for terms of 42 years, and were granted ``for pastoral purposes''. They contained reservations in respect of timber and minerals, for resumption, and for entry by the minister and any person authorised by him to lay roads, and for access by any person to use roads and tracks to cross the land, and to do so with travelling stock where that right was conferred by any Act or regulation. The leases contained covenants to pay rent, rates and taxes, to insure, to keep in good repair, and to destroy vermin and noxious weeds. Of present importance, each lease contained a reservation in the following terms:

... Excepting out of this lease to Aboriginal Inhabitants of the Province and their descendants during the continuance of this lease full and free right of ingress, egress and regress into upon and over the said lands and every part thereof and in and to the springs and natural surface water thereon and to make and erect such wurlies and other dwellings as the said Aboriginal Natives have been heretofore accustomed to make and erect and to take and use for food birds and animals *ferae naturae* in such manner as they would have been entitled to do if this lease had not been made ...

[335] In 1929 a new lease was granted in exchange for the two earlier leases, which covered the entire claim area within the Territory. The new lease was granted pursuant to the Crown Lands Ordinance 1927 (Cth). In accordance with s 34(b) of the Ordinance the pastoral lease contained a reservation in favour of Aboriginal Inhabitants of North Australia. The reservation in the lease was in terms that are not materially different from the reservation stipulated in the earlier leases. The lease was granted for a term of almost 40 years. Before it expired it was re-executed on 30 July 1952, and in 1958 it was exchanged for a new lease granted under the Crown Lands Ordinance 1931 (Cth). Both leases covered the entire claim area within the Territory, and indeed a much wider area beyond the boundaries of the claim. The new lease was stated to be for a period of 50 years, but in 1979 was exchanged for another lease granted under the Crown Lands Ordinance 1931, expressed to be for a period of 30 years. This lease (the Newry lease) also covered the entire claim area within the Territory.

[336] The lease granted in 1958 included a reservation in favour of Aboriginal people similar to that contained in the earlier leases. The Newry lease, however, issued in 1979, following the 1978 amendments to the Crown Lands Ordinance 1931-1978, expressed the terms of the reservation in favour of Aboriginal people differently. Its covenants and reservations were otherwise similar. Section 24(2) provided:

(2) ... in any lease under this Ordinance a reservation in favour of the Aboriginal inhabitants of the Northern Territory shall be read as a reservation permitting the Aboriginal inhabitants of the leased land and the Aboriginal inhabitants of the Northern Territory who in accordance with Aboriginal tradition are entitled to inhabit the leased land:

- (a) to enter and be on the leased land;
- (b) to take and use the natural waters and springs on the leased land;
- (c) subject to any other law in force in the Northern Territory, to take or kill for food or for ceremonial purposes animals *ferae naturae* on the leased land; and
- (d) subject to any other law in force in the Northern Territory, to take for food or for ceremonial purposes any vegetable matter growing naturally on the leased land.

[337] In 1969 s 116A had been inserted into the Crown Lands Ordinance 1931 which provided that a person who had acquired a right to a Crown lease had, until the lease was granted or the right to the lease forfeited or determined, "a right of exclusive possession of the land to be included in the lease but that right is

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subject to the reservations, covenants, conditions and provisions to be contained in the lease". That section was repealed in 1981, after the last of the leases was granted.

[338] The trial judge held that the exception to the statutory interests granted by South Australia in the first leases, and the statutory reservations in the later leases granted by the Territory was an acknowledgment by the Crown of rights of the type attaching to a subsisting native title. He held that the form of the statutory interest described as a pastoral lease "was moulded to coexist with the exercise of the existing rights of Aboriginal people", and plainly indicated that the Crown, in granting the pastoral leases, had no intention to extinguish native title: at ALR 561. His Honour rejected the Territory's submission that the reservations constituted the substitution of statutory rights in lieu of native title.

[339] For reasons already given by us in relation to the reservations in favour of Aboriginal people in the State, we agree with the trial judge that the pastoral leases granted in the Territory did not totally extinguish native title rights. On the contrary, the reservations express a clear intention that those native title rights described in the reservations are held back from the grant, and remain Aboriginal rights for the enjoyment of Aboriginal people. For the reasons given in relation to s 106(2) of the Land Act 1933 (WA) we also agree with the trial judge that the reservations, even in the forms expressed in s 21 of the Crown Lands Ordinance 1927 (Cth) and s 24(2) of the Crown Lands Ordinance 1931 (Cth), did not operate to extinguish all native title rights, and to substitute statutory rights.

[340] As with the reservations in favour of Aboriginal people in the State, we consider that the express reservations in the Territory on the one hand demonstrate clearly and plainly that the pastoral leases, notwithstanding the use of traditional common law language and concepts indicative of the grant of a lease entitling the lessee to exclusive possession, did not extinguish all native title by granting pastoral lessees possession that was exclusive of the interests of Aboriginal people. However, on the other hand, they operate to define the scope of the Aboriginal rights which were preserved. In so far as the terms of the reservations did not include Aboriginal rights, those rights were susceptible to extinguishment, and were extinguished to the extent of inconsistency with rights granted under the pastoral lease.

[341] It will be noted that the reservations in each of the leases, save for the last issued in 1979, reserved "full and free right of ingress, egress and regress into upon and over the leased land *and every part thereof* ..." for the specified purposes. The reservation contained no geographical limitation excluding enclosed or improved areas.

[342] The inclusion of the reservations as substantive sections in the enabling legislation, and in the pastoral leases themselves, clearly and plainly indicated that both Aboriginal people and the pastoralists had some coexisting rights over the land. As has been said, under the common law, parties possessing coexisting rights are required to exercise them reasonably, having regard to the other coexisting interest.

[343] The grant of coexisting rights to be present on the land, however, had the inevitable effect that native title which hitherto consisted of exclusive rights to possess, occupy, use and enjoy the land ceased to be exclusive, and the native title right to make decisions about the land was abrogated to the extent that such a right conflicted with the right of the pastoral lessee to make decisions about the use of the land for pastoral purposes, including to make improvements required

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or envisaged by the pastoral leases, and to comply with covenants in the pastoral leases. The rights reserved to Aboriginal people were confined to rights of access for a specified purpose. In the Territory there have been no limitations in the pastoral leases which had the potential for total extinguishment in respect of enclosed or improved areas.

Other Territory tenures -- Keep River National Park and leases to Conservation Land Corporation

[344] The claim area in the Territory is currently comprised of five tenements covering land surrendered to the Crown in 1979, 1987 and 1990. The Territory contends that the grant of these tenements extinguished any remaining native title, or alternatively, in the case of tenements now held by the Conservation Land Corporation (the Corporation), permitted activities which have had that effect.

[345] In 1979 NT Portion 1801 was surrendered from the Newry pastoral lease, and in 1980 it was leased in perpetuity to the Corporation. The lease to the Corporation is a special purpose lease under the Special Purposes Leases Act 1953 (NT), expressed to be for the purpose of carrying out the functions of the Conservation Commission, now the Parks and Wildlife Commission (the Commission). In 1981 NT Portion 1801 was declared the Keep River National Park.

[346] In 1987 the adjoining NT Portion 3121 was surrendered from the Newry pastoral lease, and was leased in perpetuity to the Corporation under the Crown Lands Act (NT) for the purpose of carrying out the functions of the Commission. Although it appears that NT Portion 3121 was leased to the Corporation with the intention that it would later be included in the Keep River National Park, no declaration to this effect has been made.

[347] In 1989 and 1990 three freehold grants were made within the claim area of the Territory to each of the Binjen Ningguwung Aboriginal Corporation, the Nyawamnyawam Dawang Aboriginal Corporation and the Dumbal Aboriginal Community Association. These freehold areas are known as Bucket Springs, Policeman's Hole and Bubble Bubble respectively. Bucket Springs and Policeman's Hole were excised from land leased to the Corporation, thus if the grants to the Corporation extinguished native title, there was no remaining native title which could have been extinguished by the freehold grants. Bubble Bubble, which adjoins NT Portion 3121 was acquired from the Newry lease. Similarly, to the extent that the pastoral leases had partially extinguished native title, the extinguished rights were already destroyed regardless of the effect of the subsequent transaction.

[348] The Corporation and the Commission were established under the Parks and Wildlife Commission Act 1980 (NT). The function of the Corporation is to acquire, hold and dispose of real property (including any estate or interest in real property) in accordance with the Act. Section 29 provides that the Corporation is not an authority or instrumentality of the Crown, and is not subject to the control or direction of the minister or the Crown: see *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 at 404, 423; 52 ALR 31. The functions of the Commission include promoting the conservation and protection of the natural environment of the Territory; establishing and managing parks, reserves and sanctuaries; and carrying out such other functions as are conferred on it by the Act: s 19. One of the functions conferred on the Commission by the Act is to have the care, control and management of all land acquired by the Corporation: s 39(6). The

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Commission, in the performance of its functions and the exercise of its powers, is subject to the direction of the minister: s 22.

[349] Both the Special Purposes Leases Act 1953 and the Crown Lands Act provide for the grant of leases in perpetuity, subject to a covenant that the land will be used only for the purpose for which it is leased. Each Act provides for forfeiture of the lease in the event that it is used for some other purpose. Neither Act required, nor did the leases that were granted contain, reservations in favour of Aboriginal people. Both leases specified that they were granted for the purpose of carrying out the functions of the Commission in accordance with the Territory Parks and Wildlife Conservation Act 1976 (NT), and for no other purpose. Notably, the Territory Parks and Wildlife Conservation Act provides:

122(1) Subject to subsection (2), nothing in this Act prevents Aboriginals who have traditionally used an area of land or water from continuing to use the area of land or water for hunting, for food gathering (otherwise than for purposes of sale) and for ceremonial and religious purposes.

(2) The operation of subsection (1) is subject to regulations made for the purposes of conserving wildlife in any area and expressly affecting the traditional use of the area by Aboriginals.

[350] The trial judge drew no distinction between the special purpose lease and the Crown lease, nor is it suggested that he should have done so. His Honour noted that a perpetual lease is a creature unknown to the common law, and that these leases were interests prescribed by statute, and granted for a statutory purpose. His Honour commented that the effect of the leases was little different from a reservation of Crown land for a prescribed public purpose, or the vesting of reserved land in a body to manage and control Crown land for the public purpose of the reservation: at ALR 563. In each case, the purpose of the lease was to allow the Commission to carry out its statutory functions in respect of the management of land and the protection and conservation of wildlife. However, as those statutory powers and functions are limited by s 122 of the Territory Parks and Wildlife Conservation Act, his Honour held that the leases could not be read as intended to create an interest free of the Aboriginal right at law to make traditional use of any part

of the leased land for hunting, food gathering, ceremonial or religious purposes. For this reason his Honour held that neither lease extinguished native title. His Honour had, of course, earlier held that the preceding pastoral leases had not extinguished native title.

[351] The Territory challenges the conclusions of the trial judge. It is contended that the grant of both the special purpose lease and the Crown lease extinguished all native title in relation to the land as each lease conferred a right of exclusive possession on the Corporation subject only to the reservation expressed in each lease. It is stressed that neither lease contained a reservation in favour of Aboriginal people. The Territory contends that s 122 merely provides for hunting and food gathering by Aboriginals for limited traditional purposes, and does no more than allow them to enter the land for those purposes where, absent the provision, they would be excluded from such activities by the grant. It is contended that the section cannot support a view that all native title rights can coexist with the performance of the functions of the Corporation and the Commission.

[352] We are not persuaded that his Honour fell into error in concluding that s 122 governs the statutory powers and functions of the Corporation and the Commission. While the leases were granted to the Corporation, the Corporation

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merely holds the interests, but has no power or function in respect of the care, control and management of the land. Those are powers and functions vested in the Commission. The relevant functions of the Commission in relation to the claim area include the conservation and protection of the natural environment, and the establishment and management of parks, reserves and sanctuaries. Those are not functions that are necessarily inconsistent with the enjoyment of native title rights: see *Mabo (No 2)* at CLR 70. As the statutory powers and functions of both the Corporation and the Commission are circumscribed by s 122, the rights granted by the lease do not permit of an interpretation that excludes the exercise and enjoyment of all native title rights. It is important to remember that a "lease", even in the strict common law sense, will only extinguish native title where the lease is an "unqualified grant": see *Mabo (No 2)* at CLR 89, 110 per Deane and Gaudron JJ. Here the leases were qualified by the statutory limitations on the exercise of powers and functions by the Corporation and the Commission.

[353] The Territory also submits that in respect of NT Portion 1801 the declaration of that land as a park pursuant to s 12(1) of the Territory Parks and Wildlife Conservation Act in 1981 effected a statutory vesting (in fee simple) of the land in the Corporation. Relevantly, s 12(7) of that Act provides:

Upon the declaration of a park or reserve under subsection (1), all right, title and interest both legal and beneficial held by the Territory in respect of the land (including any subsoil) within the park or reserve, but not in respect of any minerals, becomes, by force of this subsection, vested in the Corporation.

[354] The trial judge noted that the land was already leased to the Corporation before the declaration occurred, and that by s 13(4) of the Territory Parks and Wildlife Conservation Act if any land leased by the Corporation, as lessee, ceased to be land within a park or reserve, the lease of that land is, by force of this subsection, "surrendered". His Honour observed, we think correctly, that s 12(7), read in the context of s 13, appears to contemplate that where land is leased to the Corporation by the Territory, no greater interest is "vested" in the Corporation under that section upon the declaration of the land as a park. Moreover, his Honour considered that even if s 12(7) did vest a further interest in the Corporation, the vesting of the further interest did not extinguish native title as the Corporation still enjoyed only a statutory interest, determinable at will (by revocation of the declaration of the park) which fell far short of an interest in fee simple that would have the effect of extinguishing native title. Moreover, the "vesting" in the Corporation was a vesting of the interest by statute for management of the land for a public purpose and no more, and the public purpose was one that was subject to s 122.

[355] In our opinion his Honour did not err in reaching these conclusions. Notwithstanding the language of s 12(7) we agree with his Honour that the "vesting" was of the kind described by the Privy Council in *Attorney-General (Quebec) v Attorney-General (Canada)* [1921] 1 AC 401 at 409:

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

See also *Yanner* at 285 per Gummow J.

[356] In the alternative the Territory contended that if the grant of the leases did not extinguish all native title rights, the rights granted to the Corporation are inconsistent with a number of native title rights asserted by the applicants, and to

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the extent of the inconsistency partial extinguishment has occurred. The Territory contends that the grant of the leases extinguished the native title right to *exclusive* possession, occupation, use and enjoyment of the land, and extinguished the exclusive right to make decisions about the use of the land. In deciding whether partial extinguishment in these ways occurred by reason of the grants, the starting point must be the ambit of the native title rights existing at the time of the grants. We have already concluded that the pastoral leases which preceded the grant extinguished the exclusivity of native title rights, and the right to make decisions about the use of the land for pastoral purposes. In so far as these rights had already been extinguished, the grant of the leases had no further effect on the applicants' native title. Moreover, having regard to the purpose of the leases, which is more sympathetic to the exercise and enjoyment of the traditional activities and customs of the Aboriginal people than the depasturing of stock, we do not think that the rights granted by the leases restrict the enjoyment of native title rights to any extent greater than under the pastoral leases. In our opinion the grant of the leases in perpetuity to the Corporation has not brought about the partial extinguishment of any native title rights and interests that had not already been extinguished by the pastoral leases.

[357] Next it is contended by the Territory that the construction of improvements by the Commission extinguished native title to the land on which the improvements are constructed -- an assertion of operational inconsistency. The trial judge dismissed this contention in a sentence, saying that while management of the park involved carrying out improvements, the improvements effected were of a minor nature insufficient to reflect an overriding intention by the Crown to have native title extinguished by manner of use of the park area: at ALR 563 .

[358] The improvements consist of unsealed access and service roads, small unsealed car parking areas for visitors to the park, walking tracks including a foot bridge and track markers, interpretive signs for visitors, boundary fences and cattle grids, a building housing a ranger station, a communications aerial, workshop, rangers' houses, an "air-strip", bores and watering points, a gravel pit, an information shelter, a bird hide and camping facilities for visitors. The "airstrip" is a rough, unsealed area in an open section of country, with an airsock erected on a pole. These improvements are depicted in photographs. A number of the improvements were placed on the land by the former pastoral lessee, at times when the reservation in favour of Aboriginal people preserved access to "every part" of the lands. The evidence indicates that improvements effected by the Commission are carried out after consultation with the Aboriginal inhabitants who include the native title holders. In so far as improvements are effected with the consent of the native title holders, that use is not indicative of a use inconsistent with the surviving native title rights. Rather, it is consistent with the continued exercise by the native title holders of a non-exclusive right to make decisions about the use of the land for purposes other than pastoral purposes. The minor nature of most of the improvements, the fact that the improvements are not of a kind or for a purpose that is inimical to the exercise of native title rights, and the limitation imposed on the powers and functions of the Corporation and the Commission by s 122 of the Territory Parks and Wildlife Conservation Act, justify the conclusion that no native title rights or interests which existed at the time of the grant of the leases to the Corporation have subsequently been extinguished by works carried out by the Commission.

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[359] We do not consider that the leases to the Corporation, or the declaration of NT Portion 1801 as the Keep River National Park extinguished native title rights, in so far as they survived the grant of the pastoral leases. In these circumstances it is unnecessary for us to consider submissions made by the applicants, and the Territory applicants, that the acts were "category D past acts", and that any extinguishment effected by the vesting of NT Portion 1801 as a park could not bring about extinguishment by virtue of s 23B(9A) of the NTA, nor the contrary submission of the Territory that if the acts were "past acts" they were "Category B past acts" which by operation of s 7 of the Validation (Native Title) Act 1994 (NT) brought about extinguishment "to the extent of any inconsistency".

[360] Ground 32 of the Territory's grounds of appeal contends that the trial judge erred in law in failing to hold that native title was extinguished or partially extinguished in the Territory by the management regime established by the Territory Parks and Wildlife Conservation Act and the regulations and by-laws promulgated thereunder. In written submissions this ground was confined to the Keep River National Park in respect of which it is argued that the man-

agement regime is inconsistent with the continuing exercise of some or all of the native title rights claimed. However, the submissions do not go beyond saying:

... it must be self-evident, that in so far as the native title rights are said to be exclusive rights, any act of management and control of the park must extinguish that native title right, at least to the extent of any exclusivity.

[361] We have already expressed our conclusion that the exclusivity of native title rights was extinguished by the grant of the pastoral leases. If that were not so, we would agree that the special purpose lease of NT Portion 1801 would have brought about a similar effect on native title.

[362] The Territory Parks and Wildlife Conservation Act ss 18-21, makes provision for the preparation of a plan of management as soon as practicable after a park or reserve has been declared. The preparation of the plan is to take into account public representations, and is then to be laid before the Legislative Assembly. After approval, the plan comes into force, and the Commission is required to perform its functions and exercise its powers in relation to the park to which the plan relates in accordance with the plan and not otherwise. The statutory requirement that there be a plan of management prepared in this way is not indicative of an intention to extinguish native title rights. By-laws promulgated under the Act on 24 January 1984, which related generally to all parks and reserves, contain a number of provisions which regulate access to the parks and reserves and activities carried on therein. Again, these by-laws do not indicate an intention to extinguish native title rights, although in some respects native title rights, or rather customary practices, may be regulated by them, for example as to the lighting of fires. On 12 August 1992 the Keep River National Park Local Management Committee Regulations were promulgated. The function of the committee thereby established is to advise the Commission on issues relevant to the management of the park. The regulations provided that the committee shall consist of seven members, one of whom shall be an Aboriginal nominated by the "Murranwong-Gadgerong" families with an interest in living areas in the park, and one shall be an Aboriginal appointed from Aboriginal groups with an interest in the park but not proposing to live in it. The inclusion of Aboriginal people with an interest in the area on the Management Committee is not indicative of an intention to impair or abrogate native title rights. The court

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was informed by counsel for the Territory during argument that "cooperative and friendly arrangements" exist between the Territory and Aboriginal representatives in relation to the management of the Keep River National Park, indicating that the intention apparent from the Local Management Committee Regulations that the Commission exercise its management functions having regard to the maintenance, not destruction, of the interests of the native title holders has been carried into effect.

[363] Finally, the Territory raises the question of the three statutory freehold grants in respect of the Bucket Springs, Policemans Hole, and Bubble Bubble areas. Ground 31 of the notice of appeal contends that the trial judge erred in failing to find that these grants extinguished any native title in relation to the subject areas of land which may have been held by persons other than members of the organisations to whom the freehold grants were made. As counsel for the Territory applicants points out in written submissions, the ground of appeal is curiously worded as it invites the question as to the date on which membership must be determined, and whether native title is thereby turned into a life interest which can no longer be passed on by succession according to traditional laws and customs. In written submissions in support of this ground the Territory acknowledged that at trial it expressly did not rely upon the grants of freehold title to the Aboriginal corporations as having an extinguishing effect on native title, except to say that if exclusive rights of occupation and use are found in relation to those community living areas, they are rights pursuant to statutory grant and are not native title rights at common law. The submissions appear to do no more than reserve the right to argue before the High Court in an appropriate case that the decision of the Full Court of the Federal Court in *Pareroultja v Tickner* (1993) 117 ALR 206 was wrongly decided. The trial judge relied upon that decision as compelling the conclusion that having regard to the nature of the interests created under the relevant statutory provisions, it is not possible to be satisfied that the statute evidences a clear and plain intention that a grant of freehold under the Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989 (NT) extinguishes native title to the relevant land. We agree that the principles discussed and applied in *Pareroultja* lead to that conclusion, and it was not suggested before us that we should not follow *Pareroultja*.

[364] The Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989 was passed for the purpose stated in s 3, namely to give effect to the Memorandum of Agreement between the Commonwealth and the Northern Territory on the granting of Community Living Areas in the Northern Territory pastoral districts signed on 7

September 1989, a copy of which is printed as a Schedule to the Act. It is plain from the terms of the Act that it is intended to benefit Aboriginal people, and to foster the interests of those with historical residential association with the area of a pastoral lease, not to destroy such native title rights and interests as might exist in lands made available by freehold grant under the Act for the benefit of Aboriginal people.

[365] The land for Bucket Springs and Policeman's Hole was surrendered from perpetual leases held by the Corporation in June 1989. Grants in fee simple were then made under the Crown Lands Act to the Binjen Ningguwung Aboriginal Corporation and the Nyawamnyawam Dawang Aboriginal Corporation respectively. Later, the grants were converted to "an estate in fee simple for the purpose of an Aboriginal community living area" under s 16 of the

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Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act after that Act was passed. We were told in argument by counsel for the Territory that the grants under the Crown Lands Act were made for the purposes of Aboriginal community living areas, and nothing turns on the fact that the grants of freehold were first made under the Crown Lands Act. We accept that to be the case. Bubble Bubble was acquired pursuant to s 46(1) of the Lands Acquisition Act 1979 (NT), and an estate in fee simple granted directly to the Dumbrol Aboriginal Community Association for the purpose of the Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act, pursuant to a procedure provided in s 46(1A) of the Lands Acquisition Act.

[366] In summary, we consider that the grant of the pastoral leases over the claim area in the Territory brought about a partial extinguishment of native title rights, but that the subsequent grants of the two perpetual leases, and three freehold areas did not bring about any further extinguishment of native title. Counsel for the Territory applicants drew the court's attention to s 47A of the NTA which he contended had the effect of saving native title from extinguishment by the grants of estates to the Aboriginal Corporations as the grants were "for the benefit of Aboriginal people" within the meaning of the section. We agree with that contention. Moreover, we think s 47A(2)(b) has the wider consequence that the prior grants of pastoral leases are also to be disregarded in respect of the areas covered by the freehold grants. The three freehold grants are in respect of areas held as mentioned in s 47A(1)(b)(ii) but we do not consider they were grants "for the provision of services (such as health and welfare services)" within the meaning of those words in s 47A(2)(b). The notion of "services" in s 47A(2)(b) is a benefit arising from the acts of those providing the services. The conveyances of the land to the Aboriginal corporations were not for the purpose of enabling someone to carry out thereon acts which constitute services. Once the pastoral leases are disregarded, the native title rights and interests in the land transferred to the Aboriginal corporations confer possession, occupation, use and enjoyment of the land on the common law holders to the exclusion of all others (subject, however, to s 47(3)).

Freehold interests in the State

(i) Crown grants

[367] The trial judge held that native title was extinguished by the following freehold grants within the claim area:

- o in 1921 a grant in fee simple of 400 hectares of land which had been within the Argyle Downs pastoral lease. This land was conveyed upon the fulfilment of conditions of a conditional purchase lease issued under s 62 of the Land Act 1898;
 - o in 1974 a grant in fee simple to the Commonwealth of Australia of land from the former Argyle Downs pastoral lease. The location became known as the Lake Argyle Telephone Exchange;
 - o the grant of freehold interests in residential lots of land described as the Lakeside Stage 4 subdivision. These lots were sold by auction in 1994, but they had been planned, surveyed and marked out well before that date. By operation of ss 228 and 229(4) of the NTA the preparation of the lots for sale before 1 January 1994 constituted "public work" and, as a "past act" intended to extinguish native title, was validated by s 5 of the Titles Validation Act 1995 (WA); and
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- o in July 1996 in respect of two parcels of land vested in Murlroam Pty Ltd under s 118CA of the Land Act 1933. His Honour held that the "past act" provisions of s 228(3) of the NTA applied so that the grant was validated under the Titles Validation Act 1995 with the consequence that native title was extinguished.

[368] There is no cross-appeal by the claimants in respect of these findings.

[369] The trial judge held that grants to S G Muller and Innes Holdings Pty Ltd which occurred after 1 January 1994 could have no effect on native title unless the requirements of the "future act" provisions were met, and as we understand his Honour's reasons, he was not so satisfied. Innes Holdings Pty Ltd was one of the Alligator appellants, but its appeal has been discontinued. The State nevertheless challenges this finding. These grants are both within areas of land resumed under s 109 of the Land Act 1933 for the Ord Project. As we are of the opinion that native title was wholly extinguished in these areas before the grants were made (see below), there is no need for us to consider this ground of appeal.

(ii) Permit to occupy Crown land prior to the issue of Crown grant

[370] In January 1918 Reserve 16729 was created which included land formerly held in other reserves, under pastoral leases, and under a special lease. The area of the reserve was approximately 30,000 hectares outside the township of Wyndham. A major part of this land is outside the determination area. In June 1918 the purpose of the reserve was amended to "for use and requirements of the Government of the State in connection with the Wyndham Freezing, Canning and Meat Export Works". The Wyndham Freezing Canning and Meat Works (the meat works) was conducted by a body incorporated as a State Trading Concern. The works were established in June 1918. On 27 September 1918 a permit to occupy rural lands was granted to the meat works. Section 16 of the Land Act 1898 provided that after payment of the purchase money and fee payable for a Crown grant, and having performed all conditions, a purchaser shall, on application, receive from the minister a permit to occupy in the form set out in the appropriate Schedule to the Act, being a certificate that the purchaser is entitled to a Crown grant. The trial judge held that between 1918 and 1962 the reserve was used for grazing and watering of cattle before the cattle were taken to the meat works at Wyndham. However, it seems that a grant in freehold to the meat works did not proceed as there is no record of the issue of a sealed deed of grant as required by s 12 of the Land Act 1898. His Honour noted that the history of the matter suggested that the Crown regarded the interest accorded by the permit as sufficient for the purposes for which the reserve was to be used. His Honour held that neither the permit nor the manner of use of the land for the purpose for which the reserve was created demonstrated a clear and plain intention by the Crown to extinguish native title in the land, and he noted that the reserve was a substantial area which remained undeveloped save for its use for the purposes of grazing and watering cattle.

[371] The fulfilment of the conditions for the grant of a permit under s 16 entitled the grantee to a grant in fee simple, and the purpose of the permit was to authorise entry for the taking of possession of the land in advance of the completion of the formalities associated with the sealing and recording of a grant in fee simple. A grant in fee simple would undoubtedly have extinguished native title.

[372] The permit to occupy authorised and empowered the meat works:

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... at any time after the date hereof, to enter upon the said tract or parcel of land, and to hold and enjoy the same for its absolute use and benefit; subject to the provisos contained in the prescribed form of Crown Grant for rural lands under "The Land Act, 1898".

[373] We consider that the grant of the permit entitled the grantee to exclusive possession of the land, a right that would have been perpetuated by the grant in fee simple. We consider that in these circumstances the statutory grant was plainly and clearly intended to extinguish native title, as the grantee obtained a right to exclusive possession which was intended to continue in perpetuity. In our opinion the grant of the permit had the effect of wholly extinguishing native title. However, even if this were not the case, for reasons which appear elsewhere we consider that other transactions in relation to Reserve 16729 would have wholly extinguished native title in some portions, and partially extinguished it in the balance of the area.

Roads

[374] As the trial judge concluded that native title was not wholly extinguished by the resumption of pastoral lease land for the Ord Project, and the subsequent use of the land for that purpose, it was necessary for him to consider if other transactions wholly extinguished native title in respect of small and discrete areas within the resumed lands. In this context, submissions were made by the State and other respondents that certain areas dedicated or used as roads had extinguished native title. This submission was upheld in the case of a number of roads which are identified in the Second Schedule to the determination (about which there is no cross-appeal). However, his Honour was not satisfied that native title had been extinguished in respect of land described as Martin's Gap Rd, nor did his Honour refer to evidence which had been led from Mr Roy Hamilton, an engineer involved with the construction of the main dam, about an early access road on the Argyle Downs pastoral lease which had been used by construction personnel for access to the top dam until the new Lake Argyle Road was completed. The State's grounds of appeal contend that both Martin's Gap Road and the access road extinguished native title.

[375] For reasons which appear below in connection with the Ord Project, we consider that native title was otherwise extinguished in the area of Martin's Gap Rd. However, if we are wrong in that regard, it appears to us that the evidence sufficiently discloses that there was a dedication of part of Martin's Gap Rd, and that the problem which his Honour noted (at ALR 573) about the evidence arises from the inconsistency between a map prepared by the State and a survey diagram made in about 1969 which were admitted into evidence. The State submits that it is obvious that the person who drafted the plan has shown the dedicated section of the road incorrectly. That error apart, maps show that there is a Martin's Gap Rd which includes a configuration similar to the portion of dedicated land shown on the map admitted into evidence. We think that the probability of there being a dedicated road as alleged was sufficiently high to require that the State be given the opportunity to lead further evidence on the topic to clarify the situation so that the determination correctly declared the public interest in the road, if indeed it existed as the State alleges.

[376] As to the access road, it is entirely understandable that the trial judge made no reference to it in his judgment. It was not a road that was initially pleaded. It was referred to in passing by the witness. The road was never surveyed. No evidence was led to establish its exact location. No evidence was

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led about the construction works, if any, which were associated with the road. The impression given by the evidence is that it was a temporary track, the course of which was dictated by the lie of the land, and that at all times it was intended to be a temporary means of access. At the time the land was part of the Argyle Downs pastoral lease, and presumably entry was gained by the construction personnel with the consent of the pastoral lessee. As it was at all stages intended that the access track be a temporary one, that use could not amount to an operational inconsistency of the kind that would extinguish native title. Moreover, there was no resumption of land from the pastoral lease at that time for road purposes, there was nothing in the nature of a declaration of Crown land as a public road, nor is there any evidence that the access track was ever used and thereby accepted by the public: see *Fourmile v Selpam Pty Ltd* (1998) 152 ALR 294 at 309-10.

Creation of reserves in the State

[377] Within the claim area there are numerous parcels of land that have at one time or another been reserved under the Land Regulations 1882, the Land Act 1898 or the Land Act 1933.

[378] The Land Regulations 1882 empowered the Governor, by reg 29, to except from sale and reserve Crown land for specified purposes including "any purpose of ... public utility ... or for otherwise facilitating the improvement and settlement of the Colony". Under reg 33 the Governor was empowered by order published in the *Government Gazette* (WA) to direct that a reserve vest in, and be held by, any corporation in trust for like or other public purposes specified in a vesting order.

[379] The Land Act 1898 empowered the Governor, under s 39, to except from sale and either to reserve to Her Majesty, or to dispose of in such other manner as for the public interest may seem best, any lands vested in the Crown that may be required for specified purposes including any purpose of public utility or for otherwise facilitating the improvement and settlement of the colony. The Governor was empowered to direct that any reserve vest in and be held by a municipality or other person in trust for like or other public purposes specified in the vesting order. The Governor was also empowered to grant the fee simple of any reserve to secure the use thereof for the purpose for which the reserve was made, or to lease the reserve in a form prescribed by a Schedule to the Act: see s 42.

[380] The Land Act 1933, in s 29, empowered the Governor, subject to such conditions and limitations as he thinks fit, to reserve to His Majesty, or to dispose of in such manner as for the public interest may seem fit, any lands vested in the Crown and the purpose for which any such lands are so reserved or disposed of shall be specified in the reservation or disposition. Section 30 required that reserves be notified in the *Government Gazette*. Section 31, prior to amendment in 1949, provided that the Governor may by notice and thereafter by proclamation declare a reserve for certain purposes to be a Class A reserve by which classification the land so reserved shall remain dedicated to that purpose until an Act of Parliament provides otherwise, or to be a Class B reserve by which reserved land shall remain reserved from alienation, or otherwise being dealt with, subject to cancellation of the reserve by the Governor by notice in the *Government Gazette* after presentation to both Houses of Parliament of a special report giving reasons for the cancellation. All other reserves were classified as

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Class C. Under s 37 there was an unfettered power to cancel and amend the boundaries, or change the purpose, of any reserve not classified as Class A.

[381] In 1982 s 29 was amended to allow land to be reserved for a specified purpose without the requirement that the purpose be a purpose specified in the Act.

[382] Section 32 of the Land Act 1933 empowered the Governor to lease a reserve for any purpose if the reserve is not immediately required for the purpose for which it was made, for a term not exceeding 10 years. In 1960 the section was amended to allow the grant of a lease or licence of land reserved for the purpose of parks or for recreation and amusement of the inhabitants for a term of one year for the purpose of depasturing stock notwithstanding that the land is being used for the purpose for which it is reserved.

[383] Section 33 of the Land Act 1933 provided that by order the Governor may direct that any land vest in or be held by any person for the purpose for which the land is reserved. In 1949 s 33 was repealed and a provision substituted which authorised the Governor to direct that reserved land be vested and held by any person for the purpose for which the land was reserved, subject to such conditions and limitations as the Governor shall deem necessary to ensure that the land is used for the purpose, and to confer upon that person power to lease for the purpose the whole or any part of the land. The amendments also permitted the Governor to direct that any land shall be granted in fee simple to any person subject to the condition that the person shall not lease or mortgage the land without the consent of the Governor and subject to such other restrictions and limitations as the Governor shall deem necessary to ensure that the land is used for the purpose for which it was reserved.

[384] In 1987 s 33 was amended to include in the reserved purpose "any purpose, ancillary, and beneficial" to that purpose. Section 34B of the Land Act 1933, inserted in 1982, empowered the Governor to revoke any vesting order in respect to reserved land. In that event, leases granted by a person in whom the reserve had been vested prior to revocation were to continue as if the Crown were the lessor.

[385] At trial the State submitted that the creation of reserves for a purpose had the effect of withdrawing the fullness of the use of the land for any other purpose and thereby extinguished native title. The trial judge rejected that submission, and before this court the State contends that he was in error in doing so.

[386] The trial judge pointed out that under the legislation an offence of unlawful occupation of public lands applied equally to vacant Crown land and land reserved for or dedicated to any public purpose: the Land Act 1898 s 135 and the Land Act 1933 s 164. His Honour referred to *Mabo (No 2)* at CLR 66 per Brennan J and at 114 per Deane and Gaudron JJ, and to *Wik* at CLR 190-4 per Gummow J. At these references members of the High Court explain why, in similar legislation proscribing unlawful occupation by "any person", such a provision is not directed to native title holders in occupation of land, and does not evidence a legislative intention to extinguish native title. In our opinion his Honour was correct to apply that reasoning, and correct in his conclusion that the creation of reserves, without more, did not extinguish native title. The power in s 32 of the Land Act 1933 to lease reserves not immediately required "for any purpose" supports this conclusion.

[387] His Honour, correctly in our opinion, held that the effect of the

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reservation of land was to enable the Crown to hold back from alienation areas of land which it deemed necessary to retain for use for public purposes: see *Wik* per Gummow J at CLR 200-1. By reserving land for a public purpose it protected the land from sale, but did not alter the control of the land which remained with the Crown. No rights were created in favour of third parties, and accordingly no question of the enjoyment of rights by others inconsistent with the continuation of native title could arise. If the land were both reserved and dedicated for a public purpose, for example

by the classification of reserved land and as Class A under s 31 of the Land Act 1933, an issue might then arise as to whether the dedication created rights in members of the public, or a section of the public: see *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54 per Windeyer J at 74. If so, a further question would arise as to whether the rights created in members of the public were inconsistent with the continued enjoyment of asserted native title rights.

[388] In respect of these issues, Brennan J in *Mabo (No 2)* said at CLR 66; ALR 48 :

Native title was not extinguished by the creation of reserves nor by the mere appointment of "trustees" to control a reserve where no grant of title was made. To reserve land from sale is to protect native title from being extinguished by alienation under a power of sale ...

and at CLR 67; ALR 49 :

The power to reserve and dedicate land to a public purpose and the power to grant interests in land are conferred by statute on the Governor in Council of Queensland and an exercise of these powers is, subject to the Racial Discrimination Act, apt to extinguish native title ...

Then, after considering the effect of the grant of a lease, his Honour continued in a passage to which we have already referred, at CLR 68; ALR 50 :

Where the Crown grants land in trust or reserves and dedicates land for a public purpose, the question whether the Crown has revealed a clear and plain intention to extinguish native title will sometimes be a question of fact, sometimes a question of law and sometimes a mixed question of fact and law. Thus, if a reservation is made for a public purpose other than for the benefit of the indigenous inhabitants, a right to continued enjoyment of native title may be consistent with the specified purpose -- at least for a time -- and native title will not be extinguished. But if the land is used and occupied for the public purpose and the manner of occupation is inconsistent with the continued enjoyment of native title, native title will be extinguished. A reservation of land for future use as a school, a courthouse or a public office will not by itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native title which would thereby be extinguished. But where the Crown has not granted interests in land or reserved or dedicated land inconsistently with the right to continued enjoyment of native title by the indigenous inhabitants, native title survives and is legally enforceable.

[389] It follows that while the mere reservation of land for a public purpose has not extinguished native title, it will be necessary in the case of each reservation to consider whether there is also a dedication which has created inconsistent rights in the public, or a use which has this effect, having regard to the nature of the purpose.

[390] The State also contended that pursuant to the ordinary meaning of the word "vest" the vesting of reserved Crown lands in any person, where that occurred, had the effect of a conveyance of an estate in the land with the right to

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exclude others, thus evidencing a clear and plain intention to extinguish native title. In our opinion the trial judge correctly rejected this general proposition. The power to vest reserved land in a person for the reserved purpose in s 33 of the Land Act 1933 was considered by the High Court in *City of Perth v Crystal Park Ltd* (1940) 64 CLR 153 . In that case Crown land reserved for the purpose of recreation and parking pursuant to s 33 was vested by the Governor in the State Gardens Board. Rich ACJ at 162 and Williams J at 168 considered that the word "vest" is a word of elastic import and of limited meaning when lands are vested in a public body for a public purpose. Their Honours referred to the opinion of the Privy Council in *Attorney-General (Quebec) v Attorney-General (Canada)* [1921] 1 AC 401 at 409 where it was said:

It is not unimportant, however, to notice that the term "vest" is of elastic import; and a declaration that lands are "vested" in a public body for public purposes may pass only such powers of control and management and such proprietary interest as may be necessary to enable that body to discharge its public functions effectively: *Tunbridge Wells Corporation v Baird* [1896] AC 434 , an interest which may become divested when these functions are transferred to another body. In their Lordships' opinion, the words quoted from s 1 are not inconsistent with an intention that the Commissioner should possess such limited interest only as might be necessary to enable him effectually to execute the powers and duties of control and management, of suing and being sued, committed to him by the Act.

See also *Yanner* at 267 and 285-7 .

[391] These passages require that where reserves have been vested in a person for the reserve purpose, it will be necessary to consider the nature and circumstances of the reserve and the purpose for which it was created to ascertain if the vesting granted to the authority more than merely the rights necessary for the control and management of the reserve. The trial judge embarked on that exercise in a separate part of his judgment, and we shall follow the same course.

Limitation Act 1935 (WA)

[392] Ground 28 of the State's notice of appeal contends that the trial judge erred in law in failing to hold that in Western Australia native title is extinguished at common law or pursuant to the Limitation Act 1935 (WA) or the Crown Suits Act 1947 (WA) in circumstances where claimants have not occupied parts of the claim area for 12 years or more, or alternatively six years, and have not brought an action within that time to recover such land. The trial judge dealt with arguments based on this legislation at ALR 581-2 , and rejected them.

[393] The Limitation Act 1935 (WA) by its terms does not apply to an application for determination of native title under the NTA. Section 4 relevantly provides that no person shall bring an action to recover any land but within 12 years next after the time at which the right to bring the action accrued. An "action" is defined to mean a civil proceeding commenced in a Western Australian court of competent jurisdiction. An application under the NTA is not such a proceeding. Further, "land" is defined in s 3 of the Limitation Act in terms which make it clear that it is intended to apply to common law tenures. Native title is not an institution of the common law and in our opinion does not come within the definition of "land" in s 3. The Crown Suits Act 1947 is legislation in respect of proceedings brought against the Crown in the right of the Government of Western Australia to enforce a right of action. As the trial judge pointed out, it is not necessary for proof of the existence of native title to show that it has been asserted against the Crown, and an application under the NTA for a determination

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that native title exists is not a proceeding to enforce a right of action against the Crown in the right of the Government of Western Australia. Further, even if this view is wrong and by their terms the Limitation Act or Crown Suits Act purport to impose a limitation period upon proceedings determining native title in relation to land in Western Australia, in our opinion that limitation would be inconsistent with the scope and purpose of the NTA in providing for the recognition of native title rights which, by their very nature, are rights of antiquity. To the extent of that inconsistency, the limitation period so imposed would be invalid under s 109 of the Constitution.

[394] In *Mabo (No 2)* at CLR 89-90 Deane and Gaudron JJ stated that common law native title could be effectively extinguished by an inconsistent dealing by the Crown with the land and instanced the reservation or identification of land for an inconsistent use or purpose where the actual occupation or use of the native title holders was terminated. In those circumstances their Honours considered that an ultimate lack of effective challenge "would found either an assumption of acquiescence in the extinguishment of the title or a defence based on laches or some statute of limitations". In that situation a proceeding taken by the native title holders to challenge the validity of the dealing by the Crown which denied them continued occupation or use would not be a proceeding under the NTA, but a proceeding of a different kind which would plainly be to enforce a right of action against the Crown. The imposition of a time limit in those circumstances by State legislation would not be inconsistent with the NTA. However, it is not a situation of that kind which is presently asserted by the State as the basis for invoking the Crown Suits Act.

[395] The State also seeks to invoke the provisions of the Limitation Act in another way. *Mabo (No 2)* acknowledges, at CLR 60, that native title might be lost where the indigenous community does not substantially maintain connection with the land, and "the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs". The State contends that the 12-year limitation period specified in s 4 provides a useful analogous indicator of the outer limit of the period of interruption of connection with the land which can occur without breaking continuity of connection. Thus it is argued that if the evidence shows that the applicants have not been in occupation or possession of the land for a period upwards of 12 years, the common law will no longer recognise their native title. We reject this submission. We have already explained that connection may be substantially maintained without actual physical presence on the land. The length of time over which there has been no physical presence on the land will be a relevant consideration in determining whether the tide of history has washed away any continuing con-

nection between the descendants of original native title holders and the land. However, that will be but one of many factors to be considered. As we have already explained, if physical presence on the land is impracticable by reason of the attitude or activity of non-Aboriginal people who have taken over the use of the land, evidence as to the absence of physical presence will not necessarily indicate a breakdown in the spiritual and traditional cultural connection with the land. That connection can be maintained in other ways.

Proclamation of the Ord Irrigation District

[396] Early in this judgment we summarised briefly the development of the Ord Project. The implementation of the project led to successive resumptions of land

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from pastoral leases, and also to the "bargain and sale" acquisition of the Argyle Downs pastoral lease. The proclamation of the Ord Irrigation District, and the later proclamation of two extensions to the District are interrelated with the development of other aspects of the Ord Project. Stage 1 of the Ord Project involved the resumption of parcels of land for the construction of the diversion dam and associated works, for irrigable farmland, and for the Kununurra townsite in 1960 and 1961: see below. The diversion dam was constructed between 1960 and 1962. Irrigation first began in the 1960-61 wet season on a "pilot" farm. The first release of lands occurred in May 1962 when, pursuant to s 84 of the Land Act 1933, the Governor by notice in the *Government Gazette* defined and set apart Crown lands as "special settlement lands" and declared the same open for selection. The proclamation of the Ord Irrigation District took place in the context of these developments.

[397] In 1960, pursuant to s 27(5) of the Rights in Water and Irrigation Act 1914 (WA) by proclamation it was declared that Pt III of that Act applied to the Ord River and its tributaries. In 1962 under s 28 of the Rights in Water and Irrigation Act by Order in Council the Ord Irrigation District (the District) was constituted. The District proclaimed covered the land intended to be irrigated during the first stage of the Ord Project, the diversion dam and levies, a pumping station, and two miles of the diversion dam storage (Lake Kununurra) closest to the dam wall. The District was extended in 1965 to cover additional land being irrigated as part of the first stage, and the western end of Weaber Plain. The District was extended again in 1973 to include all areas in Western Australia planned to be irrigated under the Ord Project, the whole of the former Argyle Downs pastoral lease, the area of freehold land on which the Argyle Downs homestead was located, and the whole of the Ord River catchment area upstream of the main dam. Pursuant to s 27(4) of the Rights in Water and Irrigation Act, every river, stream, water course, lagoon, lake, swamp or marsh within the boundaries of the District became subject to Pt III of the Act.

[398] Upon the application of Pt III to the Ord River and its tributaries, and then to the District, by s 4(1):

The right to the use and flow and to the control of the water at any time in any water-course, and in any lake, lagoon, swamp or marsh, and in any spring, and subterranean source of supply shall, subject only to the restrictions hereinafter provided, and until appropriated under the sanction of this Act, or of some existing or future Act of Parliament, vest in the Crown.

[399] The trial judge rejected the submission of the State that the proclamation of the District and its extensions, and the application of Pt III to the Ord River and its tributaries had the effect of extinguishing native title to the extent of all property in the beds of water-courses, lakes, etc and to rights to control the use and flow of waters and to any right to impede or resist any control, conservation or regulation of the waters by or on behalf of the Crown. The State contends that the trial judge erred in this conclusion.

[400] We consider that s 4(1) of the Rights in Water and Irrigation Act is a clear example of a statutory provision where all that is vested in the Crown is only such powers of control and management as are necessary to enable the Crown to discharge the powers and functions arising under the Act. We do not consider that the mere vesting effected under s 4(1) evidenced an intention to extinguish native title rights.

[401] The State contends that all rights to take and use water that might

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otherwise have existed are abolished by Pt III of the Rights in Water and Irrigation Act, and replaced by statutory rights. Attention is drawn to the provisions of ss 6, 7, 14 and 17 of the Act. In our opinion these sections do not have the

effect of replacing pre-existing rights to use water with new statutory rights. Section 6 prohibits the diversion or appropriation of water from any water-course, lake, etc "save in the exercise of the general right of all persons to take water for domestic and ordinary use, and for watering cattle and other stock from any water course ...". That section, far from destroying existing rights, and substituting new rights, is expressed to preserve existing rights. So too is s 7 which preserves certain rights of the owner or occupier for the time being of land adjacent to any water-course, lake, etc. Section 14 provides that all owners and occupiers of land alienated from the Crown through or contiguous to which runs any water-course, lake, etc shall in respect of such ownership or occupation have rights free of charge to the water for domestic and ordinary use of themselves and their respective families and servants and for watering cattle or other stock. Again, we interpret this section as one reserving existing, although now regulated, rights, and not as a section which creates entirely new rights. Section 17 imposes conditions regulating "[t]he right of any owner or occupier of lands adjoining the bed of any water-course, lake" etc to take and use water from a water-course, or of any lake, etc wholly or partially supplied with water from, or whose volume may be increased by public works commenced under the Act. Again, the section by its terms, regulates an existing right, and does not create an entirely new one.

[402] Similarly, s 5, to which the State refers in its submissions, which provides that where a water-course, lake, etc forms the boundary or part of the boundary of a parcel of land, the bed thereof shall for the purposes of the Act be deemed to remain the property of the Crown and not to have passed with the alienation of the land, is a provision intended to do no more than ensure that the Crown has the necessary administrative powers of control and management for the purposes of the Act.

[403] The State contends that for the purposes of the Act native title holders are not "occupiers" so as to have the benefit of sections in favour of "the owner or occupier" and thus by necessary intendment, the Act does not reserve pre-existing rights of native title holders. "Occupier" is defined to mean a "person by whom, or on whose behalf, any land is occupied, and if there is no occupier the person entitled to possession". In our opinion that definition is wide enough to include native title holders who in accordance with their laws and customs occupy lands, even where that occupation coexists with occupation by a pastoral lessee.

[404] Further, the State contends that s 8 of the Rights in Water and Irrigation Act by implication excludes the rights of native title holders to the exclusive use of water. That section provides that no right to take and divert water from a water-course, lake, etc shall be acquired by any person by length of use or otherwise other than in accordance with the provisions of the Act. That section by its terms is prospective in its operation, and cannot be construed as evidencing a legislative intention to extinguish native title rights.

[405] We consider that the application of Pt III of the Rights in Water and Irrigation Act to parts of the claim area which occurred when the Ord Irrigation District was proclaimed, and later extended, did not have the effect of wholly extinguishing native title. However, if and in so far as the claimants otherwise

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were the native title holders of exclusive rights to possess, occupy, use and enjoy the area, the application of Pt III had the effect of destroying that exclusivity. The Act imposed restrictions upon the diversion or obstruction of any water-course, lake, etc and on the use of water. These restrictions necessarily removed the exclusivity of the right to control the use and enjoyment of the water. However, for reasons we have already expressed, we consider that the grant of pastoral leases over the areas in question had already extinguished the exclusivity of native title rights.

[406] The State further relied at trial, and before this court, on by-laws made in 1963 under the Rights in Water and Irrigation Act, and contended that the by-laws had the effect of extinguishing native title. The by-laws provide for the protection of water, grounds and works from trespass and injury, make provision for the supply and control of water, and for the imposition of rates and charges in respect of waters made available for irrigation purposes. By-law 4 prohibits trespassing within fenced off ground adjacent to or reserved for water supply or irrigation works, and the unauthorised entry upon any water or irrigation work not open to the public. By-law 5 prohibits camping and lighting of fires in specified areas in the District, and other by-laws prohibit interference with flora, or the shooting, trapping or taking of fauna within a prescribed distance of any reservoir within the District. Other by-laws concerned the taking and use of water from any works, trespass and interference with any works, and fishing from or in the vicinity of the diversion dam. The trial judge, correctly in our view, held that at the highest these by-laws controlled the exercise of some rights of native title but did not signify a Crown intention to wholly extinguish native title in the prescribed areas. The regulations, however, would have the effect of removing the exclusivity of any right to make decisions about the possession, occupancy, use and enjoyment of water and some of the land in the proclaimed Districts.

Proclamation of townsite of Kununurra Resumption and acquisition of Crown lands from pastoral leases for Ord River Irrigation Project and other purposes

[407] It is convenient to deal with these two topics together as, like the proclamations under the Rights in Water and Irrigation Act, they form part of the implementation of the Ord Project. The proclamation of the townsite of Kununurra occurred sometime after the resumption of land had commenced. In considering the effect of the various steps progressively taken to achieve the implementation of the Ord Project on native title, we think it is important to consider the many grants and other transactions in relation to the land affected by the Ord Project in a comprehensive way which recognises their interrelationship.

[408] As we have earlier mentioned, the Ord Project proceeded in three stages. The first stage involved the resumption of land for the construction of the diversion dam, the works required to irrigate and develop 10,000 hectares of irrigation land (including such things as earthworks to establish contours and gradients for farm units, constructing irrigation channels, drainage channels, stormwater protection drains, and a pumping station) and infrastructure including roads and the town of Kununurra. A drainage system, partly constructed and partly natural, was as essential to the Ord Project as the provision of irrigation water to protect farms against flooding and water inundation from higher areas during heavy rains, and to remove excess water from the farms.

[409] The second stage involved the resumption of more land, the construction of the main dam (built between 1969 and 1971, and opened on 30 June 1972,

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creating Lake Argyle), works necessary to develop an additional 60,000 hectares of land (including the construction of another pumping station in 1971 to supply Packsaddle Plains), further infrastructure to support the Ord Project (including roads and protective fencing around Lake Argyle as part of an erosion control program), the extension of the Ord Irrigation District in 1973, and the release of more farm units. The final stage involved the construction of a hydro-electric power station and the provision of installations incidental to the reticulation of the power generated by the station. It should be noted that there are also plans for the Ord Project to be expanded to encompass a further 50,000 hectares or more of irrigable land -- hence the third extension of the Ord Irrigation District.

[410] All these components of the Ord Project were included in initial plans. Areas resumed from pastoral leases were carefully planned, having regard to immediate and prospective needs. Areas resumed took account of such diverse factors as the need for buffer zones against spray drift, control of erosion and flooding on lands above the irrigation areas, weed control, the need for high land for stock in the wet, the progressive expansion of the irrigation areas, the management of human activity around and below the dams and on the banks of the lakes, and the control of stock and erosion in the catchment areas. On the last topic, for example, by 1960 it was estimated that 12 million tons of material were being eroded from the 17,800 square mile Ord River catchment area each year. The yearly silt load of the River was approximately one-eighth of the anticipated capacity of the proposed diversion dam. The protection and regeneration programs led to the resumption of pastoral land in the catchment area. Planning issues in relation to the township required consideration of issues relating to sewage disposal, power reticulation, community living and recreation areas and so on. The Alligator appellants colourfully, but we think accurately, emphasised the interrelated and interdependent elements of the Ord Project by saying that practically the entire area that has been developed is linked and criss-crossed with irrigation supply channels and drains such that the Ord Project can in a practical sense be regarded as a "living, breathing entity, protected from heavy external natural runoff by levies and hillside drains, with water distributed by a precise combination of gravity and pumping and drained back into the Ord and Keep River Systems by means of artificial drainage linking up with natural drainage patterns". And while "the Project harnesses, to some extent, the natural topography and forces of nature, nevertheless there is a fundamental imposition of a completely new order onto the landscape ... involving precision engineering solutions applied on a very large scale".

[411] The following incremental steps occurred in the course of the implementation of the Ord Project:

- o 1947: 2000 acres or thereabouts resumed from the Ivanhoe pastoral lease for "Agricultural Research Station". This land was later included within the second farm area, and is known as the Kimberley Research Station;
- o 1960, January: 6400 acres resumed from the Ivanhoe pastoral lease "for the purpose of 'the Ord River Irrigation Project' ". This land was resumed for the diversion dam and associated works area;
- o 1960, February: declaration under the Rights in Water and Irrigation Act, s 27(5), in respect of the Ord River and its tributaries;

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- o 1960, May: 12,625 acres resumed from the Ivanhoe pastoral lease ``for the purpose of `Ord River Irrigation Project' ". This resumption was for the development of the pilot farm area and the preparation of the first farm area;
 - o 1961, February: 7436 acres resumed from the Ivanhoe pastoral lease ``for the purpose of Kununurra Townsite". By proclamation under s 10 of the Lands Act 1933 published in the *Government Gazette* on 10 February 1961, headed ``NEW TOWNSITE -- KUNUNURRA" the townsite was constituted and set aside as ``Town and Suburban Lands". The defined boundaries of the townsite included the land resumed in 1961 specifically for the purposes of the townsite, and additionally part of the land which had earlier been resumed in 1960 for the diversion dam and associated works;
 - o 1961, September: 30,790 acres or thereabouts resumed from the Ivanhoe pastoral lease ``for purposes of the `Ord River Irrigation Project' ". This land was for the development of the second farm area, and is immediately to the north of the first farm area. This area incorporates the land resumed in 1947 for the Agricultural Research Station;
 - o 1961, November: 345 acres resumed from the Ivanhoe pastoral lease ``for purpose of an `Aerial Landing Ground' ". This land now comprises the Kununurra airport;
 - o 1962, July: 23,208 acres resumed from the Ivanhoe pastoral lease ``for the purpose of the `Ord River Irrigation Project' ". This land was to allow for the development of the third farm area, and virtually completed the resumption of all the land considered irrigable on the area known as the Ivanhoe Plain;
 - o 1962, July: proclamation under the Rights in Water and Irrigation Act constituting the first Ord Irrigation District;
 - o 1963, July: Ord Irrigation District By-laws, 1963 promulgated;
 - o 1963, December: 2304 acres resumed from the Ivanhoe pastoral lease ``for the purpose of extending Reserve No 22609 (Agricultural Research Station)". This land adjoined the land resumed in 1947, and constituted an extension to the Kimberley Research Station to enable research into cattle breeding and the use of supplements for cattle breeding;
 - o 1965, August: second extension to the Ord Irrigation District proclaimed, which covered additional land being irrigated as part of the first stage, and the western end of Weaber Plain which at the time was intended to be an early development of the second stage of the Ord Project;
 - o 1967, August: 37,235 acres resumed from three different pastoral leases each of which constituted part of the Ivanhoe Station, ``for the purpose of an `Ord River Irrigation Project' ". This land was to the north-east of the previous resumptions to provide a modest extension of the first stage area, and to cover the western end of Weaber Plain;
 - o 1967, September: 1967 acres resumed from the Ivanhoe pastoral lease ``for the purpose of an `Ord River Irrigation Project' ". This land was immediately to the south of the diversion dam and associated works area, and was resumed to prevent damage from stock, and to control activities on and around the vicinity of the levy bank at the southern end of the diversion dam; and
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- o 1967, April, June and December: land resumed from a number of pastoral leases outside the claim area, but in the catchment area of the Ord Project ``for the purpose of `Regeneration of eroded areas in the Ord River Dam Catchment Area' ". These resumed areas constitute Reserve 28538, but being outside the claim area require no further consideration.

Each of the above resumptions of land from pastoral leases occurred under s 109 of the Land Act 1933.

- o 1971: the Argyle Downs pastoral lease (998,364 acres), and the 1000 acre Argyle Downs Homestead area held as freehold, were acquired by the Minister for Works under a ``bargain and sale" transaction. The agreement for sale was signed on 23 November 1970 with completion occurring in April 1971, when the transfer of the pastoral lease was recorded on the certificate of title. As this was a bargain and sale transaction, it was not governed by s 109 of the Lands Act 1933. The source of power and the consequences for native title which flow from acquisition are discussed below;
- o 1972, June: 117,184 acres and 23,017 acres respectively resumed from the Lissadell and Texas Downs Stations ``for the purpose of `Government Requirements' ". The two areas resumed adjoin the southern boundary of the former Argyle Downs pastoral lease. The resumed portion of Lissadell includes parts of Lake Argyle when full to the normal supply level, and would be largely inundated when Lake Argyle is

- at maximum flood level. The portion resumed from Texas Downs also includes a portion of Lake Argyle when at maximum flood level. These areas were resumed to prevent stock losses from flooding and for erosion protection;
- o 1972, November: 3361 hectares resumed from the Ivanhoe pastoral lease for "Ord River Irrigation Project -- (Packsaddle Plains Area) Extension". This resumption followed the completion of the main dam, to enable an extension of the irrigation area into the Packsaddle Plains to the south of, and above the water level of the diversion dam; and
 - o 1975, December: 1085 hectares resumed from the Ivanhoe pastoral lease for "Ord River Irrigation Project -- Packsaddle Plains Area -- Extension". This resumption was for a further extension of the Packsaddle Plains irrigation area.

The last two acquisitions were expressed to be pursuant to the Public Works Act 1902 (WA) and the Rights in Water and Irrigation Act.

- o 1973, June: proclamation of the second extension to the Ord Irrigation District.

[412] As earlier noted, pastoral leases granted under the Land Act 1933 in the form of the Nineteenth Schedule were granted subject to the powers, conditions and reservations contained in Pt VI of that Act (ss 89E to 115). Section 109, prior to its amendment in 1963 relevantly provided that the Governor may resume, enter upon and dispose of the whole or any part of the land comprised in any pastoral lease for any purpose "as in the public interest he may think fit". Following an amendment in 1963, s 109 empowered the Governor to resume, enter upon and dispose of the whole or any part of the land comprised in a

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pastoral lease "as in the opinion of the Governor may be required for any purpose of public utility or for otherwise facilitating the improvement and settlement of the State".

[413] We do not understand any party to dispute that s 109 empowered the Governor to resume the lands from the pastoral leases. Nor do we understand it to be disputed that upon resumption the land relevantly vested in the minister under s 3(2) of the Rights in Water and Irrigation Act. Section 3 relevantly provides:

(1) The general administration of this Act shall be under the control of the Minister.

(2) All lands acquired for or dedicated to the purpose of this Act, and all irrigation works constructed, or in the course of construction under this Act, and all irrigation works constructed by the Government before the commencement of this Act which the Governor may, by Order in Council, declare to be subject to this Act, shall vest in the Minister on behalf of Her Majesty ...

[414] The State contended before this court that the trial judge erred in rejecting its contention that native title was wholly extinguished by either the resumption of the lands under s 109 of the Land Act 1933 or by the vesting of the lands in the minister pursuant to s 3(2) of the Rights in Water and Irrigation Act.

[415] The resumptions were undertaken, plainly enough, to terminate the interests of the pastoral lessee. However, the State contended that a resumption under s 109 has a further purpose as the Governor is empowered to resume, enter upon and dispose of *the land*, and not just interests in the land. The State added that s 109 should be construed in light of the fact that upon resumption the statutory right of Aboriginal access under s 106(2) of the Land Act 1933 will cease to operate. The State said that "the resumption *itself* effected an extinguishment by reason of the crystallisation of the reversion, acquisition of the land under s 109, and termination of the operation of s 106(2)". It is contended that s 109 should be construed as having the effect that upon resumption all right and title in the land is acquired by the Crown, to the exclusion of any outstanding native title or other rights.

[416] We do not accept these contentions. We have already expressed our conclusion that s 106(2) operates as a reservation in respect of otherwise existing rights and reserved native title rights would be unaffected by the resumptions. Moreover, the permissive language of s 109 does not require the conclusion that the Governor is required, upon a resumption, to dispose of land. The Crown can continue to hold the resumed land as Crown land for the purpose for which it was resumed.

[417] In *Mabo (No 2)* at CLR 68; ALR 49, Brennan J observed that:

If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium.

Kirby J pointed out in *Wik* at 225, that this is not part of the binding rule established by *Mabo (No 2)*. The order of the court did not reflect such a view, and in our opinion it was effectively rejected in judgments in *Wik* at CLR 128-9 per Toohey J, CLR 155 per Gaudron J, CLR 187-90 per Gummow J, and CLR 224-5 per Kirby J.

[418] Having concluded that the resumptions under s 109 did not without more indicate a clear and plain intention to extinguish native title, the trial judge said

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that extinguishment would occur, if at all, when the land was appropriated by the Crown for a public purpose and used for that purpose in a manner inconsistent with the continued enjoyment of native title. This led his Honour to consider the use to which discrete parcels of land had been put, those parcels comprising in the main various reserves established for one purpose or another in and around Kununurra, and discrete allotments of vacant land. In this respect his Honour took a narrow view of the requirement of appropriation and use, requiring, it would seem, actual use of virtually every part of every parcel of land in a permanent manner such as to establish "adverse dominion". For reasons earlier given, we think his Honour erred in the test which he applied to determine if the various uses and grants by the Crown created rights that were inconsistent with the continued enjoyment of native title rights. Moreover, we think that his Honour erred in not considering the Ord Project as a whole when considering the effect of its implementation upon the continued enjoyment of native title rights and interests.

[419] While we are of the opinion that the resumption of land under s 109, even though for a stated purpose, did not, standing alone, reveal a clear and plain intention to extinguish native title, the carrying into effect of that purpose could do so. There is a close analogy to be drawn between the effect of a reservation for a purpose, described by Brennan J in *Mabo (No 2)* at CLR 68, and the resumption of land held under a pastoral lease for a purpose. Paraphrasing the statement of Brennan J, it seems to us that if a resumption is made for a public purpose other than for the benefit of the indigenous inhabitants, a right of continued enjoyment of native title may be consistent with the specified purpose, at least for a time, and native title will not be extinguished. But if the land is used and occupied for the public purpose, and the manner of occupation is inconsistent with the continued enjoyment of native title, native title will be extinguished. In the present case, the several purposes for which resumptions were made under s 109 were carried into effect. The land was vested in the minister under s 3(2) in pursuance of that purpose. Even though that vesting was of less than a full beneficial interest, for the purpose only of the management and control necessary to carry out the purpose, that management and control has been extensively exercised to implement the Ord Project, including the extensive construction of the dams, the irrigation areas, the roads, the power station and the infrastructure of the township of Kununurra and so on. In our opinion this is a use of the land for a public purpose in a manner which is inconsistent with the continued enjoyment of native title.

[420] A similar conclusion follows from the application of the Rights in Water and Irrigation Act. The provisions of s 3(2) are set out above. Not only the land acquired for the purpose of the Act, but all irrigation works constructed under the Act vest in the minister. "Works" is defined in s 2 as follows:

"Works" means works for the conservation, supply, and utilisation of water, together with all sources of supply, streams, reservoirs, artesian wells, non-artesian wells, buildings, machinery, pipes, drains, and other works constructed or erected for the purposes of this Act, and all appurtenances to the same, and all lands reserved, occupied, held, or used in connection with works.

[421] Not all of the land resumed under s 109 of the Lands Act 1933 is included within the claim. The claim area does not include land which has been developed as irrigated lands or used for roads or drains, nor does it include land used for the airfield or the land resumed in 1947 for the Kimberley Research Station. Nor does the claim area include that part of the land resumed for the Kununurra

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Townsite, and actually used for that purpose, but it does include Reserve 37883 which is now the Mirima (Hidden Valley) National Park. This park is a substantial area which comprises the north-east portion of the land resumed and

declared as the Kununurra Townsite. Within the land resumed under s 109, the claim area covers various lands which are not used for irrigated lands, roads, drains or areas within the built up area of the Kununurra township. It includes areas described as vacant Crown land on which intensive activities have not occurred, and it includes numerous reserves which have been established by the minister for one purpose or another. However, the land which is claimed is important to the overall operation of the project as it provides buffer zones, drainage, protection against erosion and flooding from higher levels, and makes provision for a range of township and community purposes, and for future expansion of the scheme. There is a substantial part of the fourth farm area resumed in 1967 in the north-eastern sector of the project area which has not yet been developed. It was resumed, however, for the purpose of future development which is envisaged to take place in due course with the construction of a second main channel running from Lake Kununurra, the extension of the road system including a major bridge over the Keep River, a major drainage system project to protect from run-off from the hills to the north, and the installation of an irrigated farm drain network.

[422] The areas resumed were settled upon following detailed and prolonged research and engineering investigation. Regard was paid in some areas for the need to achieve rational boundaries, but we think the evidence justifies the conclusion that the areas selected were otherwise thought to be necessary to accommodate the numerous differing requirements of a project of this kind, including the need to make provision for future development and buffer zones around areas of intensive use. The areas were selected at a time well before it was appreciated that Aboriginal people may have native title claims over the land concerned, and it cannot be suggested that excessive areas were claimed for the ulterior purpose of defeating native title. With the exception only of the Mirima (Hidden Valley) National Park we consider that the land acquired under s 109 of the Land Act 1933 was reasonably required for the purpose for which it was resumed, and has been applied and used for that purpose. Even though some of the land has not been subjected to active earthworks and other development, and has not yet been irrigated, that does not mean that the land is not committed to and in use as part of the project. Earlier in these reasons we referred to dicta from *Wheat v E Lacon & Co Ltd* and *Newcastle City Council v Royal Newcastle Hospital*. Those dicta support the view that land held for future expansion, and as a buffer zone, is land which is used in a relevant sense for the purposes of the project. Further, we consider that these lands, again with the exception only of the Mirima (Hidden Valley) National Park, come within the definition of "works" in the Rights in Water and Irrigation Act. While the mere vesting of lands acquired and dedicated for the purpose of the Act in the minister may not be inconsistent with the continued enjoyment of native title rights for so long as the land remains undeveloped, once "works" are carried out, the management and control of those works "and all appurtenances to the same, and all lands reserved, occupied, held or used in connection with works" give rise to operational inconsistency which has the effect of wholly extinguishing native title rights.

[423] The interests asserted by parties within the Alligator appellant group illustrate the types of uses to which the remaining areas of Crown land within the

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resumed areas are put by people whose activities reflect the implementation of the Ord Project. There are, on our reckoning, 34 parties whose properties are separated from the Ord River or Lake Kununurra by a strip of Crown land over which they pump water for their irrigation requirements (and there is evidence that there are a further six people in the same situation who are not parties to the proceedings). There are statements from 20 of these parties who depose to having their own pumps situated on Crown land for the purpose of obtaining water allocations for irrigation purposes. Further, the evidence shows there are a further 30 parties whose lands are further removed from the foreshore of Lake Kununurra, or the Ord River, who exercise their right to draw water by conveying it across Crown land. There are also mining leases permitting their holders to extract gravel from Crown lands, and there are leases for two stone crushing plants which meet the demand for gravel and aggregate.

[424] With the exception of the Mirima (Hidden Valley) National Park, we consider the evidence supports the view in this case that all the land resumed under s 109 is land that was reserved, and is now occupied, held and used by the minister, or others to whom the land has been alienated "in connection with the works".

[425] We have excepted the Mirima (Hidden Valley) National Park from the foregoing conclusions. The area of this park is substantial -- 2067.9 hectares. It was included in the area declared as the Kununurra Townsite following investigations carried out in 1959 at the request of the State government. In October 1959 the Department of Lands' Staff Surveyor reported (following a visit to the area) that major factors controlling the choice of the town site included the need to stay away from the black soil plains that would cause difficulties in erecting and maintaining buildings and providing a functional septic system, and the need for the presence of natural vegetation, particularly shade trees. The site chosen was considered to meet these, and other, requirements and to provide suitable land for expansion of the township. We are, however, unable to find in the evidence any satisfactory explanation for why it was thought necessary

to declare so large an area as the townsite, or why it was thought necessary to include the hilly area which is now the National Park.

[426] As events turned out, the township developed further to the west, and partly on land which had been resumed for the diversion dam and associated works. Geographical features, it seems, provided a natural separation of the Mirima (Hidden Valley) National Park from the developed area of the township. The establishment of the National Park was first proposed in 1967 when tourists were becoming increasingly interested in the area. It contains caves and unusual geological formations as well as a good variety of fauna, native paintings, and areas important to the Aboriginal people. The area was created as a reserve and proclaimed as a national park in 1982.

[427] The actual township of Kununurra, and all its associated infrastructure, was a necessary and integral part of the Ord Project, and constitutes part of the "works" for the purposes of the Rights in Water and Irrigation Act. However, the evidence does not establish that the area of the Mirima (Hidden Valley) National Park was at the time of the resumption, or at any time since, necessarily reserved, occupied, held or used in connection with the Ord Project, including the township itself. For this reason we think that the Mirima (Hidden Valley) National Park is to be treated differently from the rest of the land that was resumed. While it was resumed for a purpose, it has not been so used or applied. Instead, it has been

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proclaimed as a national park. It will be necessary later in these reasons to consider the effect of that reservation and proclamation on native title as the park is within the area claimed.

[428] The lands resumed under s 109 of the Lands Act 1933 from the Lissadell and Texas Downs pastoral leases were not resumed for the express purpose of the Ord River Irrigation Project, but "for the purpose of Government Requirements". Nevertheless, in the context in which the resumptions occurred, it is plain that the resumptions were intended for the purposes of the Rights in Water and Irrigation Act, and that the land vested in the minister under s 3(2) of that Act. Although the proclamations for the resumption of the land from these pastoral leases were dated 9 June 1972, they were published in the *Government Gazette* on 23 June 1972. In the same *Government Gazette*, the reservation of the whole of the resumed lands for "Government Requirements" was notified. The lands now form part of Reserve 31165. The effect of these resumptions on native title is considered below.

[429] We have so far dealt with land resumed under s 109 of the Land Act 1933. The acquisitions of land in 1972 and 1975 immediately to the south of the diversion dam to enable an extension of the Packsaddle Plains Irrigation Area were not effected under s 109. The notices of resumption published in the *Government Gazette* were headed "Rights in Water and Irrigation Act, 1914-1971; Public Works Act, 1902-1972". Both of these Acts contain separate powers for compulsory acquisition of land. Section 62 of the Rights in Water and Irrigation Act empowers the minister to acquire land "within any District for the purposes of this Act". However, at the date of the first of these acquisitions, the Packsaddle Plains area was not within the declared Ord Irrigation District. It may be assumed therefore that the power of acquisition in the Public Works Act was utilised, and that the Rights in Water and Irrigation Act was referred to as the land was being acquired for the purposes of that Act. That this assumption is correct gains support from the terms of the notices of resumption themselves.

[430] The Public Works Act, s 10, empowers the Crown, the government, or any local authority, where authorised under any Act to undertake, construct or provide any public work to acquire the land required for that purpose under the provisions of the Public Works Act. Section 17 provides for a notice to be published that certain land has been set apart, taken or resumed under the Act for the public purpose therein expressed. Section 18 provides:

Upon the publication of the notice referred to in s 17(1) in the *Government Gazette*:

- (1) as the Governor may direct and the case require the land referred to in such notice shall, by force of this Act, be vested in the Crown, or the local authority, for an estate in fee simple in possession or such lesser estate for the public work expressed in such notice, freed and discharged from all trusts, mortgages, charges, obligations, estates, interests, rights-of-way, or other easements whatsoever; and
- (2) the estate and interest of every person in such land, whether legal or equitable, shall be deemed to have been converted into a claim for compensation under the provisions hereinafter contained.

Provided that the Governor may, by the same or any subsequent notice, declare that the estate or interest of any lessee or occupier of the land shall continue uninterrupted until taken by further notice.

[431] The forms of notice published in respect of both the 1972 and 1975 acquisitions specify that the resumption was for the "Ord River Irrigation

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Project -- Packsaddle Plains Area -- Extension". Both notices declared that the land described in the notice has "been set apart, taken, or resumed" for that public work purpose and directed that:

the said lands vest in Her Majesty for an estate in fee simple in possession for the public work herein expressed, freed and discharged from all trusts, mortgages, charges, obligations, estates, interests, rights-of-way or other easements whatsoever.

[432] In our opinion the vesting in the Crown for an estate in fee simple in possession brought about by the notices of resumption in the terms set out above had the effect that the Crown became the absolute beneficial owner of the land, and clearly and plainly evidenced an intention that any remaining native title be wholly extinguished.

[433] We are unable to agree with the conclusion of the trial judge that the specification in the notices of resumption that the public work was "Ord River Irrigation Project -- Packsaddle Plains Area -- Extension" indicated that the provisions of s 3 of the Rights in Water and Irrigation Act would apply to simply vest the land in the minister on behalf of the Crown: at ALR 587-8 . In our opinion it is plain from the notice of resumption that the land vested in the minister under the Public Works Act, and that the land vested for an estate in fee simple in possession. For this reason, the resumptions in 1972 and 1975 are in our opinion distinguishable from the resumptions under s 109 of the Land Act 1933.

[434] The 1971 acquisition of the Argyle Downs pastoral lease was by bargain and sale transaction, not pursuant to legislative power of resumption or acquisition. The whole of the pastoral lease then remaining was acquired. In 1968 a study group was established to consider the effect of flooding on Argyle Downs which would result from the construction of the main dam as it then appeared to the planners that "resumption of the whole station must be considered as a distinct possibility". In June 1968 the study group reported that it considered the areas of land which would remain of pastoral value after the flooding was "insufficient to be of economic use". In August 1968 the pastoral lessee was notified that the construction of the main dam would commence in March 1969 and that it was considered that "on completion of these works the land of pastoral value remaining in the lease will be insufficient to be of economic use and because of other government requirements in the area it has been recommended that the whole of the land in the [pastoral lease] be taken over by the Crown".

[435] However, by the following year the government had decided that the whole of the Argyle Downs pastoral lease was needed in any event as, apart from the dam project itself, the area was needed for conservation and regeneration. The Under Secretary for Lands wrote (Ex 23, p 23):

... the area upstream of the Dam will require continuous control to limit silt movement into the basin and the application of soil conservation measures and control of stocking will be a pre-requisite of any leasing of this land.

[436] With very minor exceptions the whole of the land resumed from the Argyle pastoral lease is the subject of the claim. The areas around the main dam, around the spillway constructed some kilometres to the east, along the Ord River between the main dam and Lake Kununurra, and in the spillway tributary are plainly integral parts of the Ord Project. So too is Lake Argyle itself, including the areas subject to periodic maximum flooding. There are other areas in the north-east, north-west and west of the former pastoral lease where the relationship between the land and the operation of the Ord Project is not so

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readily apparent. Nevertheless, most of this land falls within the catchment area of either Lake Argyle or Lake Kununurra, and now all falls within the Ord Irrigation District. The south-east portion of the land is now included in Reserve 31165, the same reserve which incorporates the areas resumed from the Lissadell and Texas Downs pastoral leases in 1972. This reserve includes areas susceptible to inundation at times of maximum flood.

[437] As the pastoral lease was acquired under a bargain and sale transaction, there has been no declaration of the purpose of the acquisition under any Act. However, the trial judge noted that it appeared to be accepted that the land was acquired for the purposes of the Rights in Water and Irrigation Act. As a matter of fact that was plainly so as the

pastoral lease was required for the construction of the main dam, the centrepiece of the Ord Project. The trial judge found, and we agree, that the land, when acquired, vested in the minister under s 3(2) of the Rights in Water and Irrigation Act.

[438] The State contends that the acquisition of the Argyle Downs pastoral lease by contract, or alternatively the vesting of the lands in the minister pursuant to s 3(2) of the Rights in Water and Irrigation Act totally extinguished native title. The State contends that despite the form of the transaction, the purchase by the lessor of the lessee's unexpired term resulted in the expansion of the Crown's title to full beneficial ownership so that the leasehold and reversionary interests merged. Unless this was so, the State contends that legally unacceptable consequences would follow, namely that the law would have to recognise the Crown both as lessor and lessee of the same land, the Crown would be bound as lessee to use the land only for pastoral purposes, and the lease's terms as to rent and other obligations would become a nonsense. We are unable to accept that submission. As we have already observed, the statement of Brennan J in *Mabo (No 2)* at CLR 68 regarding the expansion of the Crown's radical title into a plenum dominium was rejected by four members of the High Court in *Wik*. It was there pointed out that pastoral leases are a creature of statute which operate without the creation in favour of the Crown of what at common law would be regarded as a reversionary estate: *Wik* at CLR 129 per Toohey J, at CLR 155 per Gaudron J, at CLR 189 per Gummow J, and at CLR 224-5 per Kirby J. Prior to the acquisition, the pastoral leases were Crown land, and they retained that character after the transaction. In our opinion the effect of the transaction was merely to terminate the pastoral lease so that the land was no longer subject to the interests granted to the pastoral lessee. The radical title of the Crown remained burdened by whatever native title rights and interests survived the former grant of the pastoral lease. Rights which had been extinguished prior to the acquisition, whether by the earlier grant of the pastoral lease or otherwise, were not revived. Once those rights were extinguished, they were forever destroyed: see *Fejo*.

[439] We consider that upon the acquisition of the interests of the pastoral lessee, and the vesting of the former Argyle Downs lands in the minister under s 3(2) of the Rights in Water and Irrigation Act, the surviving native title rights remained, but were susceptible to extinguishment in the event of use and occupation of the land for the public purpose giving rise to an operational inconsistency in the manner already discussed in relation to the land resumed from the Ivanhoe pastoral leases under s 109. We have earlier indicated our view that the mere declaration of the Ord Irrigation District is not in itself sufficient to extinguish native title. It appears to us that there are large parts of the former

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Argyle Downs pastoral lease, including the areas which are now inundated by water, which clearly form lands and "irrigation works" which are an integral part of the Ord Project such that administrative management and control give rise to operational inconsistency that wholly extinguishes native title.

[440] During the construction phase there were a number of houses built in the area of the main dam used by government employees and contractors. There was also a laboratory building, an area set aside for construction works, a rubbish disposal area and so on. Following the completion of the construction, the houses and the laboratory have been put to other uses. Included within the Alligator appellant group are parties who occupy those houses (save for one that has been demolished) and the laboratory building which is now used as a fish packing factory by Lake Argyle Industries Pty Ltd along with an adjoining yard. The Alligator appellant group contain parties who carry on a range of activities in and around Lake Argyle which are of a kind that require close management and control by the Water Corporation, namely the activities of the holders of a barramundi fish farm licence, fishing boat licences, a ferry licence, and licences to operate float aircraft. Further, there are extensive tourist activities in the area. All these human activities are required to be managed and regulated as an integral of the overall Ord Project.

[441] There may be areas, for example, in the north-east, north-west and western portions some distance removed from Lake Argyle where the requirements of management and control are perhaps not so obvious. But it does not follow that these should not be treated as, in truth, part of the Ord Project, with the consequent inconsistency with native title rights we have attributed to the other areas more obviously within the parameters of the Ord Project. Here also, the reasoning in the *Newcastle Hospital* case is in point. Moreover, it must be borne in mind that the north-east and other portions we have just mentioned were acquired by the minister, and used, for the purposes of the Rights in Water and Irrigation Act; and it is not suggested that this vesting, or use, was for any other purpose: see *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 ; 157 ALR 414 .

[442] Against this conclusion it may be argued that the Crown has created reserves within this area for purposes that do not appear to be inconsistent with the continued enjoyment of native title rights. To take one example, in 1990 Reserve 41273 was created and vested in the Shire, with power to lease subject to the minister's consent, for "Recreation" purposes. The reserve is a five hectare site near Lake Argyle which is now used by the Ord River Yacht Club. The

land is open bushland. However, the creation of the reserve for recreation purposes, and the use of it by the Yacht Club is not, in our opinion, inconsistent with the conclusion that the degree of management and control necessary over that area as part of the Ord Project is such as to wholly extinguish native title. With a project of this kind it can be expected that at times parts of the land will be put to a variety of uses, including recreation, which, as a matter of fact, are not only consistent with some of the traditional activities of the indigenous inhabitants of the area, but may even bear a close similarity to them. However, there remains an operational necessity for the Crown to have the legal right of complete control, to be exercised as and when necessary over human activity in the area, whether by members of the general public or by members of an Aboriginal community.

[443] The south and south-eastern portions of the former Argyle Downs pastoral lease beyond the flood levels of Lake Argyle, and the lands resumed

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from Lissadell and Texas Downs are now Reserve 31165 being lands reserved for "Government Requirements". In these areas strict controls are necessary to manage the erosion and to limit the concentration of grazing activities on those parts where grazing is permitted. In our view, even though some of this land is now leased for grazing purposes under strict terms that permit the Water Corporation to control the use of the land, the whole of it has been appropriated to the use of the Ord Project with the consequent inconsistency with native title rights. In our opinion native title rights are now wholly extinguished throughout this area.

Use of reserves

(i) Townsite reserves

[444] The trial judge considered whether the creation of individual reserves within the townsite (and also within the balance of the resumed areas) and whether the actual use of each of them, brought about extinguishment. His Honour conducted that exercise against the background of his finding that there could not be partial extinguishment of native title rights, and that extinguishment of native title would occur only where a permanent use gave rise to "adverse dominion". The conclusions about individual reserves reached by his Honour cannot be upheld in light of the conclusions which we have already expressed. In our opinion native title was partially extinguished in the resumed areas by reason of the grants of the pastoral leases, and the remaining native title was wholly extinguished in respect of all the areas resumed under s 109, save for the Mirima (Hidden Valley) National Park, in the Packsaddle Irrigation Area resumed under the Public Works Act and in land formerly within the Argyle Downs pastoral lease.

[445] In light of this conclusion it is unnecessary for us to address each of the reserves in these areas, particulars of which are discussed by the trial judge at ALR 589-96. It is necessary, however, that we refer to three matters.

[446] The first matter is Reserve 37883, Mirima (Hidden Valley) National Park. When that land was resumed from the Ivanhoe pastoral lease, the exclusivity of native title rights had already been extinguished by the grant of the pastoral lease. That extinguishment removed the exclusive right to control the use of the land. The proclamation of the Mirima (Hidden Valley) National Park classified the land as Class A under s 31 of the Land Act 1933, and the reserve was vested in the National Parks Authority (now the National Parks and Nature Conservation Authority). As a reserve classified as Class A, the land, by s 31(1)(a), is to remain dedicated to the declared purpose of a national park unless and until parliament otherwise specifies. Sections 42 and 43 of the current Land Administration Act 1997 (WA) contain a similar restriction. In *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 462 Higgins J said:

... there is no doubt, to my mind, that both expressions, "dedicate" and "set apart" -- "for some public use" -- connote the giving to the public of some rights in the land which subtract from the Crown's full ownership; the appropriation of the land for some definite public purpose, not for public purposes generally; and for some estate or interest better than at mere will.

See also *Randwick Corporation v Rutledge* at 74 per Windeyer J. The dedication of the land as a Class A reserve, to the extent that it created rights in the public, would also have the effect of extinguishing the exclusivity of native title rights to possess, occupy, use and enjoy. Under the National Parks Authority Act 1976

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(WA), s 22 required the authority to prepare a detailed written program, the objects of which were to include "the public utilisation, and the maintenance, study, care and restoration of the natural environment, the conservation of the indigenous flora and fauna, and such other matters as the Authority recommends and the Minister approves". Section 41 permitted the Authority to make regulations giving effect to the Act. Regulations were promulgated in 1977 which prohibited, without express permission from the Authority, such things as entry to the park except through provided access; entry to a cave; taking or injuring of flora; taking or disturbing fauna, except fish where it is for personal consumption; carriage of any weapon or means of taking fauna; the lighting of fires except in a stipulated fireplace in picnic and camping sites; marking of rocks; removal of earth, stone or gravel; camping in other than camping areas; and erection of permanent or semi-permanent structures. These regulations stringently control and regulate activities that may be carried out in the park. However, we do not think that the stringency of the regulations reaches the point of prohibition: see *Yanner* at 269. Stringent regulation alone is not sufficient to manifest a clear and plain intention that native title rights in respect of the land be wholly extinguished. Their enjoyment will be significantly curtailed as Aboriginal people are, like everyone else in the community, obliged to comply with the regulatory regime, but it is to be noted that the regulations permit otherwise prohibited activities to be conducted with the permission of the Authority which leaves room for the sensible accommodation of customary Aboriginal practices.

[447] The second matter that requires mention is an area designated as Reserve 40260. This small area of land adjoins the south-east corner of the land resumed for the Kununurra townsite. Aboriginal people from outside the area of the Ord Project requested the reservation of an area of land for their use. Cabinet agreed to the creation of a reserve which was proclaimed in 1987. It is immediately to the east of the land declared for the Kununurra townsite and adjoins Reserve 1063. It was then discovered that the small area, now Reserve 40260, had not been resumed from the Ivanhoe pastoral company. It was then resumed and created as a reserve for "Use and Benefit of Aboriginal Inhabitants", and vested in the Aboriginal Lands Trust. This is not land that was resumed for or was part of the Ord Project. The reservation for "Use and Benefit of Aboriginal Inhabitants" is inconsistent with an intention to extinguish native title rights.

[448] The third matter concerns the operation of s 47A of the NTA. Relevant to the circumstances of this case, s 47A(1) and (2) provide that where at the time a claimant application in relation to an area is made, the area is held expressly for the benefit of, or is held on trust, or reserved, expressly for the benefit of Aboriginal people, and one or more members of the claim group occupy the area, prior extinguishment caused by the creation of other prior interests is to be disregarded. Before the present claim was made, a number of reserves were created in parts of the lands resumed for the Ord Project under s 109, or in the former Argyle Downs pastoral lease, namely:

- o Reserve 26600: "Natives-Camping" (1963), later changed to "Use and Benefit of Aboriginal Inhabitants" (1986);
- o Reserve 31221: "Orchard and Horticultural Development" (1972), later changed to "Use and Benefit of Aborigines" (1975);
- o Reserve 31504: "Arts and Historical -- Aborigines" (1972), later changed to "Use and Benefit of Aboriginal Inhabitants -- (Arts and Historical)" (1983);
- o Reserve 32446: "Native Paintings" -- (1974);
- o Reserve 40536: "Use and Benefit of Aboriginal Inhabitants" (1988); and
- o Reserve 41401: "Use and Benefit of Aboriginal Inhabitants" (1990).

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[449] We think a broad view should be taken of the word "occupy" in the requirement in s 47A(1)(c) that one or more members of the native title claim group occupy the area. We think this requirement is met where a claimant member is one of many people who share occupancy, and that the land may be relevantly occupied even though the person is rarely present on the land so long as the person makes use of the land for the reserved purpose as and when that person wishes to do so. Although there is no finding by the trial judge on this topic, it seems to us that the evidence justifies the conclusion that one or more of the claimants occupied these reserve areas and that the claimants are entitled to the benefit of the non-extinguishment principle in relation to these reserves. There is a dispute about this in the case of Reserve 40536 as many Aboriginal people living there are said by the State to come from the Territory. However, there is evidence that at least Danny Wallace, a Miriuwung person, lives there, and that other Miriuwung people go there for traditional purposes, for example to collect bamboo. The statement of agreed facts states that "[s]ome of the Aborigines who continue to reside on Reserve 40260 are neither Miriuwung or Gajerrong" which implies that the others are Miriuwung or Gajerrong.

[450] However, it is necessary to consider the operation of s 47A(3)(a)(iii) which provides that a favourable determination of native title does not affect:

... any interest of the Crown in any capacity, or of any statutory authority, in any public works on the land or waters concerned ...

[451] "Public works" is an expression defined in s 253 of the NTA and includes a major earthwork established by or on behalf of the Crown, a local government body or other statutory authority of the Crown in any of its capacities. A reference to land or waters on which a public work is constructed, established or situated includes a reference to any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work: see s 251D.

[452] The Ord Project involved the construction or establishment of major earthworks. In our opinion all the lands resumed under s 109 of the Land Act 1933, and the Public Works Act, and the former Argyle Downs pastoral lease, come within the meaning of "public works on the land ... concerned", just as they come within the meaning of "irrigation works" under the Rights in Water and Irrigation Act. Section 47A(3)(a)(iii) therefore has the effect that a determination of native title in favour of the claimants in relation to lands within the above reserves does not affect the interest of the Crown or any statutory authority in the Ord Project.

(ii) Other reserves

[453] The trial judge considered other reserves at ALR 596-612. In so far as these reserves fall within the lands resumed from the Ivanhoe pastoral leases and in the former Argyle Downs pastoral lease in connection with the Ord Project, for reasons already given, we consider that native title has been wholly extinguished

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by the implementation of the Ord Project. However, a number of the reserves lie outside that area and it is necessary to deal with them. Further, a number of these reserves have been the subject of leases or licences. The effect of those transactions are separately considered after the discussion of reserves.

[454] *Reserve 1058: "Public utility"*. This reserve is outside the determination area.

[455] *Reserve 1059: "Public utility"*. This reserve was created in 1886, and is located near Goose Hill. The area of this reserve is approximately 1816 hectares, and it seems that the reserve was intended as a watering point for cattle on the stock route. There is evidence that it was used as a cattle depot including a dipping site, and an inn for stockmen and travellers was erected on this reserve: see Reserve 34724 below. The area was previously included in a pastoral lease. In 1970 the purpose of the reserve was changed to "Water and Conservation of Fauna". More recently this area has become part of Reserve 42155 save for the area in Reserve 34724. The general use of the area for watering cattle, and as a pastoral lease destroyed the exclusivity of native title rights. The close use of the area which is now Reserve 34724 would have wholly extinguished native title in that area.

[456] *Reserve 1060: "Public utility"*. This reserve was created in 1886 and used as a watering point for cattle on the stock route to Wyndham. The reserve area is approximately 987 hectares. It is not clear whether this land was ever the subject of a pastoral lease. The reserve is on the north bank of the Ord River, and is surrounded by land from the Carlton Hill pastoral lease. A stock watering dam is the only development on a small portion of the reserve. The trial judge held that neither the creation of the reserve nor its use for the reserve purpose effected extinguishment of native title. In our opinion, however, the creation and use of the reserve had the effect of extinguishing the exclusivity of the native title right to possess, occupy, use and enjoy the land, and to this extent had the same effect on native title as a pastoral lease.

[457] *Reserve 1061: "Public utility"*. This reserve was also created in 1886 and comprises approximately 3000 hectares situated on the Ord River south-west of reserve 1060. The reserve included a crossing point over the Ord River and was used for a similar purpose to reserve 1060. We consider that the creation of the reserve had the same effect on native title as the creation of reserve 1060, and it is immaterial whether the land was the subject of a pastoral lease prior to its proclamation. Reserve 1061 now incorporates an area once separately reserved as Reserve 1164 for the same purpose.

[458] *Reserve 1062: "Public utility"*. This is another reserve created in 1886 as a watering point on the stock route to Wyndham. It is of approximately 458 hectares situated on the Ord River north of Kununurra, known as Buttons Crossing. The creation of the reserve has the same consequence on native title as the creation of Reserve 1060. More recently, as the reserve is near Kununurra, it has been used by Kununurra residents and tourists for access to fishing areas and for boating. These public uses are treated as consistent with the reserve for "public utility". These uses do no more than indicate that the use and enjoyment of the land is to be shared with members of the public, demonstrating the extinguishment of the exclusivity of native title rights.

[459] *Reserve 1063: "Agricultural Research Station"*. This reserve was created in 1886 for similar purposes as the three preceding reserves, for "Public utility", with the same consequence upon native title. In 1968 the purpose of the reserve

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was changed to "Cattle Experiments (Department of Agriculture)" and the land was used by the Kimberley Research Station. In 1983 the purpose of the reserve was changed to "Agricultural Research Station" and the reserve vested in the Minister of Agriculture. The reserve is largely undeveloped. It is surrounded by the Ivanhoe pastoral lease on three sides, and on the fourth side adjoins the land that was declared as the Kununurra townsite. There is nothing about the use of the land since 1968 that brought about any further extinguishment of native title over and above the use which occurred when the area was a "Public utility" reserve.

[460] *Reserve 1064: "Public utility"*. This was another reserve created in 1886 on the stock route. The land was resumed from a pastoral lease. The reserve has since been cancelled. The reservation and use of land had no greater effect on native title than the pastoral lease. Both extinguished the exclusivity of native title rights.

[461] *Reserves 1165 and 1166: "Public utility"*. These reserves were created in 1886 for purposes connected with the stock route with the same consequences for native title as Reserve 1064.

[462] *Reserve 1600: "Public purposes"*. This reserve, created in 1890, is outside the determination area, and in any event is now included within Reserve 42155 -- "Conservation of Flora and Fauna".

[463] *Reserve 2049: "Public utility"*. Created in 1892 in connection with the stock route, it adjoined Reserve 1059. The purpose of the reserve was changed to "Travellers and Stock" in 1919. It was formerly part of a pastoral lease. The exclusivity of native title rights has been extinguished. Its use as Reserve 2049 did not further affect native title. It is now part of Reserve 42155.

[464] *Reserve 8662: "Resting place for Travellers and Stock"*. This reserve created in 1901 is within the area resumed under s 109 of the Land Act 1933 for the Ord Project and native title is wholly extinguished for that reason.

[465] *Reserve 8663: "Resting place for Travellers and Stock"*. Created in 1901 and cancelled in 1994, this land falls in the same category as Reserve 1064.

[466] *Reserve 14370: "Resting place for Travellers and Stock"*. This reserve was resumed for pastoral leases and reserved in 1912. It later became part of the land subject to the permit to occupy granted to the Wyndham Freezing, Canning and Meat Export Works in 1918 and for that reason, as enunciated earlier, is an area in which native title has been wholly extinguished.

[467] *Reserve 16729: "Use and Requirements of the Government of the State"*. This reserve, created in 1918, which is partly within the claim area, has been discussed under the heading "Permit to occupy Crown land prior to issue of Crown grant". The area became the subject of the permit to occupy granted to the Wyndham Freezing, Canning and Meat Export Works which wholly extinguished native title.

[468] *Reserve 18810: "Tropical Agriculture"*. This reserve of 4645 hectares was created in 1924. Prior to that it was the subject of pastoral leases. It is contiguous with land of the Ivanhoe pastoral lease. The area is also referred to as King Locations 736 and 744. It is not suggested that the land has ever been used for tropical agriculture. It has been the subject of leases under ss 32 and 116 of the Land Act 1933. In recent years it has formed part of a lease to Crosswalk. The significance of those leases on native title is considered below. The creation of the reserve and its use otherwise than by the lessees did not extinguish native title rights that survived the grant of pastoral leases.

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[469] *Reserves 21316 and 22256: "Stock Route"*. Created in 1934 and 1941 in the Goose Hill area. Exclusivity of native title had been extinguished by early grants of pastoral leases and then by use for the reserved purpose. They are now included in Reserve 42155.

[470] *Reserve 21422: "Aborigines"*. This reserve created in 1935 and cancelled in 1956 is also in the Goose Hill area and is largely outside the determination area. Use for the reserved purpose would not have extinguished native title. However, the grant of an early pastoral lease would have extinguished the exclusivity of native title. The area is now within Reserve 42155.

[471] *Reserve 29541: "Wildlife Sanctuary"*. This reserve covers Ngarmorr (Pelican Island). It was created in 1968 and vested in the Western Australian Wildlife Authority (now the National Parks and Nature Conservation Authority). It is a pelican breeding area, and the name "Pelican Island Nature Reserve" was applied in 1979. The relevance of regulation concerning the conservation of wildlife and flora is discussed separately below. Apart from the effect which that legislation may have on native title, there is nothing about the creation or subsequent use of this reserve which affects native title.

[472] *Reserve 30866: "Protection of Flora and Fauna"*. This reserve was created in 1971 and named the "Palm Springs Nature Reserve" in 1982. It is now part of Reserve 42155. The creation and use of Reserve 30866 raises no issues which are not raised in relation to Reserve 42155.

[473] *Reserve 31165: "Government Requirements"*. This is the reserve created in 1972 surrounding the southern limits of Lake Argyle, taking in the lands resumed from Lissadell and Texas Downs, and the south-east portion of the former Argyle Downs pastoral lease. The purpose was to control erosion and land use in the lands close to areas flooded by Lake Argyle. We have already discussed this reserve and expressed our conclusion that the appropriation of this land after its acquisition and resumption to the Ord Project has wholly extinguished native title throughout the area. Part of this reserve is presently leased to Baines River.

[474] *Reserve 31636: "Conservation of Fauna"*. Created in 1972 this reserve was named "Parry Lagoons Nature Reserve" in 1982. It is now part of Reserve 42155. The creation and use of Reserve 31636 raises no issues which are not raised in relation to Reserve 42155: see below.

[475] *Reserve 31967: "Conservation of Flora and Fauna"*. This reserve was created in 1973 and vested in the West Australian Wildlife Authority (now the National Parks and Nature Conservation Authority). The area covers the mud flats and inter-tidal zones on the eastern and northern edges of the Gulf, and was reserved to protect the mangrove wetlands and wildlife including the saltwater crocodile. It is a nominated area (a "Ramsar" site) under the Convention on Wetlands of International Importance Especially as Waterfowl Habitats, 1975, which involves international obligations for the protection of habitats of migratory birds.

[476] The trial judge concluded that there was uncertainty as to the extent, if any, to which any part of the reserve was formerly part of pastoral leases granted in the latter part of the last century. Presently, the boundary of pastoral leases is 40 metres from the high water mark. It seems that if pastoral leases ever covered this area, it was due to the fact that the true boundaries were not then known and estimated boundaries encroached into these areas which are quite unsuitable for pastoral purposes. There being no satisfactory evidence that the pastoral leases

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did so extend, the determination should be made on the basis that they did not. However, now being an area vested in the National Parks and Nature Conservation Authority, the area, and the exercise of native title rights, is subject to the legislative regime applying to reserves of this kind. The effect of that regime on native title is considered under the topic of "Conservation of Wildlife and Flora", below.

[477] *Reserve 34585: "Conservation of Flora and Fauna"*. This reserve of 303 hectares is situated outside, but on the northern boundary of, the fourth farm area resumed under s 109 of the Land Act 1933. The reserve is vested in the National Parks and Nature Conservation Authority and in 1982 was named the "Point Spring Nature Reserve". The reserve surrounds a natural water supply and a small area of rain forest, and contains a rare species of wallaby and a colony of bats. Since it was reserved, the land has been fenced off from the pastoral lease to exclude cattle. The grant of the Ivanhoe pastoral lease extinguished the exclusivity of native title. However, native title is now subject to the control arising under conservation legislation considered under "Conservation of Wildlife and Flora", below.

[478] *Reserve 34724: "Preservation of Historic Relics"*. This reserve was created in 1977, and is located near the western boundary of the Ord Irrigation District, near Goose Hill. The reserve is a remnant of the former Reserve 1059

and is the area around the ruins of an early depot consisting of a chimney, fireplace and cattle dip in respect of which we have held that native title was wholly extinguished by inconsistent use.

[479] *Reserve 35289: "Natural Regeneration"*. We have earlier referred to this reserve which is situated to the west and south of the irrigated areas of the Packsaddle Plains area. The northern section of this reserve is part of the land acquired under the Public Works Act 1902. To the south of that land, extending for about four kilometres, the reserve comprises part of the former Argyle Downs pastoral lease. The "natural regeneration" purpose of the reserve was to exclude cattle, prevent and control erosion, and to drain run-off water to the Dunham River on the northern border of the reserve. We have concluded above that the appropriation of this land to the Ord Project has wholly extinguished native title.

[480] *Reserve 36551: "Irrigation"*. This reserve, created in 1980, contains the spillway and the water course down which the outflow from the spillway returns to the Ord River. The reserve is vested in the Water and Rivers Commission. The area of the reserve is 800 hectares of open land near Lake Argyle. Although the proclaimed purpose of the reserve was "Irrigation" it is said that the reserve is used to control activities at the spillway and the creek, involving, principally, camping and white water rafting. This is necessary as the waterway at times carries high flows which can be dangerous, and there is also a need to minimise erosion of the banks. This reserve is within the area encompassed by the former Argyle Downs pastoral lease. The appropriation of this land to the Ord Project has wholly extinguished native title.

[481] *Reserve 38955: "Trigonometrical Station Site"*. This reserve was created in 1984 and occupies one hectare surrounding a bronze survey plaque set in concrete, and a stone cairn erected over the mark in 1967. It forms part of the State survey system. It is land that has never been the subject of a pastoral lease. The creation and use of the reserve does not affect native title.

[482] *Reserve 39016: "Repeater Station Site"*. The trial judge held that native title in this small reserve near Goose Hill, vested in the Australian

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Telecommunications Commission had been wholly extinguished by inconsistent use. There is no cross-appeal against that finding.

[483] *Reserve 40260: "Use and Benefit of Aboriginal Inhabitants"*. We have already discussed this reserve which falls just outside, and to the east of, the land resumed for the Ord Project under s 109 of the Land Act 1933. The creation and use of the reserve has not affected the non-exclusive native title rights which survived the grant of the earlier pastoral lease. By force of s 47A of the NTA the partial extinguishment of native title rights brought about by the grant of pastoral leases must now be disregarded in respect of land within this Reserve.

[484] *Reserve 40978: "Repeater Station Site"*. This reserve was created in 1989 and vested in the Australian Telecommunications Commission. It is a small area situated north of Lake Argyle near the Victoria Highway. The trial judge held that the use of the reserve wholly extinguished native title and there is no cross-appeal against that finding.

[485] *Reserve 41617: "Recreation"*. This reserve was created in 1991 from land resumed from the Ivanhoe pastoral lease which surrounds it. The reserve is an area of 61.5 hectares, situated about 10 kilometres south-east of Kununurra. Prior to the creation of the reserve, the land was informally used by a pony club for equestrian activities. This reserve is outside the area resumed under s 109 of the Land Act 1933 and the Public Works Act 1902. Neither the creation of this reserve, or the fact of use by a pony club give rise to inconsistency with the exercise of non-exclusive native title rights.

[486] *Reserve 42155: "Conservation of Flora and Fauna"*. This reserve was created in 1992 and occupies approximately 36,111 hectares incorporating the Goose Hill area. The reserve is vested in the National Parks and Nature Conservation Authority. Only part of this reserve is within the determination area as the trial judge held that the western portion, around Parry Lagoon, was not Miriuwung or Gajerrong territory. In our opinion the mere creation of the reserve, and the vesting of the reserve in the Authority did not wholly extinguish native title, but it remains to consider the effect of control arising under conservation legislation.

[487] The land within this reserve has a long history. It was initially blanketed by early pastoral leases. Then in 1886, Reserve 1059 was declared in respect of part of the area, and within Reserve 1059, as we have earlier indicated, yards, buildings and a cattle dip were erected which had the effect of wholly extinguishing native title in that portion of the reserve which is now Reserve 34724. Subsequently Reserve 2049 was declared for the same purpose, and with the same effect on native title, as Reserve 1059. These two reserves were in the northern portion of the area now comprising

Reserve 42155. The area to the west of Reserves 1059 and 2049 then became the subject of a special lease, then parts of the land became subject to conditional purchase leases, and a reserve set aside for a resting place for stock. Then the whole of the land to the west of Reserves 1059 and 2049 within the determination area, including the areas formerly subject to the conditional purchase leases and the reserve for a stock resting place, became the subject of the 1918 grant of the permit to occupy Crown land prior to the issue of a Crown grant held by the Wyndham Freezing, Canning and Meat Export Works. We have earlier expressed our view that this permit had the effect of wholly extinguishing native title over that area. Ultimately, notwithstanding the permit, a Crown grant did not issue. In 1971 most of that portion of the area was set aside as a reserve (Reserve 30866) for the protection

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of flora and fauna, and another reserve (Reserve 31636) for the conservation of fauna was created in 1972 in respect of part of the southern area of the land which is now wholly covered by Reserve 42155.

[488] In summary, within the area now covered by Reserve 42155, native title in Reserve 34724 -- "Preservation of Historical Relics" -- is wholly extinguished, as is native title in that portion of the reserve which was the subject of the permit to occupy. In respect of the balance of the land the exclusivity of native title was extinguished by the early pastoral leases, and also by the reserves created in 1886 for stock resting and watering points. The effect on native title of the conservation legislation is considered below.

[489] *Reserve 42710: "Quarantine Checkpoint"*. This reserve was created in 1993 and is now vested in the Agriculture Protection Board of Western Australia. It comprises an area of 45.4 hectares situated on the State/Territory border. Facilities have been constructed on the reserve. Such facilities were constructed before the present reserve was proclaimed, but at the time the land was reserved for "Government Requirements", and the facilities were for that purpose. The trial judge held that the creation of the reserve did not have the effect of extinguishing native title, but the use of part of the reserve for the facilities did so. The Second Schedule records that native title is extinguished in "that part of reserve 42710 (Quarantine Checkpoint) on which ablution blocks, a parking area, power generator, fuel and water tanks, a tourist information shelter, a shed and facilities for the Quarantine Checkpoint have been constructed".

[490] We agree with his Honour's conclusions that the creation of the reserve did not, in itself, extinguish native title rights, although the prior pastoral lease over this area had the effect of extinguishing the exclusivity of those rights. However, we consider that native title has been wholly extinguished by the use of the land for the reserved purpose. In our opinion extinguishment is not confined to the small areas actually covered by the facilities that have been erected, but extends to the whole reserve.

[491] *Reserve 43140: "Power Station"*. This small reserve covers the area occupied by a power station constructed in 1969 to supply electricity during the construction of the main dam. His Honour held that native title was wholly extinguished in this area, and there is no cross-appeal against that finding. It is within the area of the former Argyle Downs pastoral lease.

[492] *Reserve 43196: "Water Supply and Electricity Generation"*. This reserve was created in 1994, and is vested in the Water Corporation. The area is approximately 234 hectares. The area contains the main dam, the hydro-electric power station, water outlets from the dam, access roads near the dam, the Ord River downstream from the dam, picnic area facilities, boat mooring and launching facilities in the dam, and an area covered by part of the dam which includes the area known as Coolibah Pocket. Although the reserve was not created until 1994, the main dam and associate works were constructed between 1969 and 1972. His Honour held that the carrying out of the works on the land, before the acquisition of the Argyle Downs pastoral lease, had the effect of excising the land from the pastoral lease for the purpose of the Ord Project, and the construction of the works, being of a permanent nature, had the effect of extinguishing native title in respect of that part of the land utilised by the Crown. However, his Honour held that the reserve is substantially larger than the land on which the works were constructed and adjacent land required for the purpose of the works. In respect of the balance of the land his Honour held that native title

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had not been extinguished. We are unable to agree with this narrow view as to use taken by his Honour. For the reasons given above, we consider native title rights which survived the former pastoral lease were wholly extinguished by the appropriation of the land acquired from Argyle Downs to the Ord Project.

Legislation

(i) Conservation of wildlife and flora

[493] The Wildlife Conservation Act 1950 (WA) (formerly the Fauna Protection Act 1950 (WA)) (and the Fauna Conservation Act 1950 (WA)) in s 14(1) provides:

Except to the extent which the Minister declares by notice published in the *Government Gazette* pursuant to the provisions of this section all fauna is wholly protected throughout the whole of the State at all times.

[494] Under s 14(2) the minister may from time to time declare that any of the fauna is not protected or is protected to such extent for such period of time throughout the whole or such part or parts of the State as he thinks fit. The minister is also empowered to declare a closed season or an open season in respect of any of the fauna, and place restrictions on either the taking or disposal of fauna. Section 15 makes provision for the grant of licences to take fauna. Section 16 makes it an offence for any person to infringe the protection conferred by s 14(1) or (2) by taking fauna while protected otherwise than by the authority of a licence. Section 22 provides:

- (1) The property in fauna, until lawfully taken is, by virtue of this Act, vested in the Crown.
- (2) The provisions of the last preceding subsection do not entitle any person to compensation.

[495] Section 23 provides that notwithstanding any other provisions of the Act a person who is a "person of Aboriginal descent" according to the interpretation in s 4 of the Aboriginal Affairs Planning Authority Act 1972 (WA) may take fauna or flora upon Crown land or upon any other land not being a nature reserve or wildlife sanctuary, but where occupied, with the consent of the occupier of that land, sufficient only for food for himself and his family but not for sale. A "nature reserve" means an area of land reserved by the Crown for the conservation of fauna or flora.

[496] Included in the reserves in the claim area are Reserve 29541 -- "Wildlife Sanctuary", Reserve 31967 -- "Conservation of Flora and Fauna", Reserve 34585 -- "Conservation of Flora and Fauna" and Reserve 42155 -- "Conservation of Flora and Fauna". The latter reserve replaced Reserve 30866 and Reserve 31636 which had earlier been declared for conservation of fauna in the Goose Hill area. It is accepted that these reserves are nature reserves for the purpose of s 23 of the Wildlife Conservation Act.

[497] The State contends that the foregoing provisions completely extinguished native title in the land contained in these reserves by depriving Aboriginal people of the right to gain sustenance from the land. The trial judge rejected this submission on the basis that the statutory provisions were regulatory in nature, were directed at the conservation of flora and fauna, not to the extinguishment of native title, and that particularly having regard to the recognition of an Aboriginal right to take fauna in s 23 did not evidence a clear and plain intention to extinguish native title.

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[498] The State has repeated its contention before this court. The decision in *Yanner* has also been handed down in the meantime.

[499] In *Yanner*, the court considered the meaning of s 7(1) of the Fauna Conservation Act 1974 (Qld) which provided "All fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority". The majority held that s 7(1) vested in the Crown no more than the aggregate of the various rights of control by the executive that the legislation created. The ownership was less than the rights of full beneficial, or absolute ownership, and the vesting of "property" in the Crown did not extinguish native title. The State seeks to distinguish *Yanner* on a number of grounds, including textual differences between the Fauna Conservation Act (Qld) and the Wildlife Conservation Act. It is true that there are a number of differences, but there are also a number of similarities. Of the several reasons identified by the majority to conclude that the "property" conferred on the Crown by s 7(1) is not accurately to be described as full beneficial or absolute ownership, the following apply to the Wildlife Conservation Act. First, the definition of "fauna" includes migratory birds and fauna that may move over State boundaries; cf *Yanner* at 265. Secondly, the subject matter dealt with in the Wildlife Conservation Act, with limited exceptions, is intended by the Act to remain outside the possession of and beyond disposition by humans. Thirdly, it seems that the provisions in the Western Australian legislation regarding the vesting of property in the Crown were introduced to support provisions in the legislation imposing a royalty on the

skins of animals: see s 18, and *Yanner* at 266-7 . These factors persuade us that the vesting of property in fauna in the Crown under s 22 of the Wildlife Conservation Act was for the purpose only of passing such powers of control and management and such proprietary interest as was necessary for the administration of the Act: see *Attorney-General (Quebec) v Attorney-General (Canada)* at 409, cited by Gummow J in *Yanner* at 285 . As the vesting of such property in the Crown was not absolute, the State's submission that the Act should be interpreted as a plain and clear intention to wholly extinguish native title fails.

[500] The Fauna Conservation Act 1974 (Qld) did not contain a provision, like s 23 of the Wildlife Conservation Act 1950 (WA) which excepted from the general prohibition against taking fauna a right in Aboriginal people to enter upon land and to take fauna sufficient for sustenance purposes. That exemption is a further reason to hold that the Wildlife Conservation Act is not a law which generally extinguishes native title rights to take fauna. However, s 23 by its terms does not exempt Aboriginal people from the prohibition against taking fauna in a nature reserve or wildlife sanctuary. Within such a reserve or sanctuary the prohibition is complete subject only to the other provisions of the Act.

[501] In 1967 s 12A was added to the Wildlife Conservation Act which empowered the Western Australia Wildlife Authority, with the approval of the minister to classify or reclassify nature reserves or parts thereof as either prohibited areas, limited access areas, shooting or hunting areas, unlimited access areas, or such other classes of area as the Authority thought necessary for the purpose of giving effect to the objects of the Act. This section, together with s 15 which is not, by its terms, restricted to granting licences only in respect of areas outside nature reserves, indicated that there may be circumstances in which fauna may be taken within a nature reserve.

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[502] Section 12D required the Authority in respect of any land of which it is owner to cause to be prepared a detailed written scheme of the operations that the Authority proposes to undertake in relation to the area.

[503] Under regulations promulgated in 1970 and amended in 1976, reg 42(2) applies to the nature reserves relevant to this case. It provides:

- (2)(a) A person shall not take any fauna, whether protected or not protected, on any nature reserve unless authorised to do so by the Conservator of Wildlife.
- (b) The Conservator of Wildlife may not give such authority except:
- (i) on the recommendation of the Authority pursuant to s 12E of the Act or in accordance with the terms of an approved management scheme or operations or working plan prepared pursuant to s 12D of the Act;
 - (ii) in the case of a sanctuary or part thereof classified as a shooting or hunting area pursuant to the provisions of the Act, he may issue the appropriate licence to take game in accordance with these regulations; or
 - (iii) in the case of an animal declared to be a declared animal under the Agriculture and Related Resources Act 1976, he may issue the appropriate licence for its destruction subject to such conditions as he thinks fit.

[504] Notwithstanding that the Act and regulations recognise circumstances where a licence to take fauna in a nature reserve may be granted, we consider the terms of s 23 so clearly circumscribe the rights of Aboriginal people that native title rights to take fauna in a nature reserve or wildlife sanctuary are clearly and plainly extinguished by the Act. In so far as those rights were extinguished before the Racial Discrimination Act 1975 (the RDA), s 211 of the NTA (which preserves certain native title rights, including the right to hunt, where a licence would otherwise be required to do so) can have no application. However, where nature reserves or wildlife sanctuaries have been created after the RDA came into force, s 211 would by force of s 109 of the Constitution override the provisions of s 23 of the Wildlife Conservation Act, and the native title rights to take fauna would not be wholly extinguished. In our opinion the creation of the nature reserves and wildlife sanctuaries has an impact on native title holders in the area concerned that is much greater than the impact on other members of the Australian community who at most hold common law rights to hunt game, and is discriminatory.

[505] Reserve 42155 was created in 1992, but in so far as it included the earlier flora and fauna Reserves 30866 and 31636 the native title right to take fauna was already wholly extinguished.

[506] The State also contended that ss 104-106 of the Conservation and Land Management Act 1984 (WA) and regulations under the Wildlife Conservation Act have the aggregate effect of wholly extinguishing native title. Section

104 of the Conservation and Land Management Act makes it an offence to light fires "without lawful authority" in reserves. Section 105 prohibits the lighting of fires in a State forest or timber reserve without giving prior notice to a forest officer, and s 106 creates an offence of unlawful occupation of reserves without "a grant, lease, licence or other authority from the Crown".

[507] Regulations 44(2) and 46 made under the Wildlife Conservation Act provide:

44(2) A person shall not:

- (a) camp on any sanctuary; or
- (b) build, erect or transport any tent, shed, outhouse, cottage, building, or any structure whatsoever in any sanctuary,

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except by permission in writing of the Conservator of Wildlife and in a part set aside for such purpose pursuant to the Act and regulations.

...

46. Except as the Conservator of Wildlife may authorise in pursuance of a management scheme or working plan or in the administration of the Act and these regulations, a person shall not, in respect of any native reserve or wildlife sanctuary:

- (a) remove or disturb any humus, leaf mould, rotting vegetation, soil, stone, sand, rock or gravel;
- (b) cut, pick, pull, break, remove, injure, poison, strip or destroy any tree, shrub, herb, grass or other plant or part thereof, whether living or dead;
- (c) post, stick, stamp, stencil, paint, draw, or otherwise affix any mark, lettering, notice, advertisement, sign, or document of any description, or have in his possession on any sanctuary any material of any description capable of being used for such purposes;
- (d) cut or make any tracks, land strip or parking area, jetty, mooring, resting or launching area for any vehicle, vessel, aeroplane, helicopter or hovercraft, or use, operate or park such a vehicle, vessel, aeroplane, helicopter or hovercraft other than in a place lawfully set aside for that purpose;
- (e) interfere in any manner with the water supply in any sanctuary including any lake, swamp, watercourse, river, drainage flow, well, water hole, or dam, whether natural or artificial, or use any water therefrom;
- (f) sail, tow or operate any vessel of any description except in such part or parts lawfully set aside or reserved for that purpose;
- (g) drive, tow or operate any vehicle of any description except on a road or track lawfully set aside or reserved for that purpose;
- (h) misconduct himself or indulge in any riotous or indecent conduct;
- (i) in any way disturb, interfere with, frighten, drive, molest or take any fauna or other animal, whether by noise or any other means, in or in the vicinity of any sanctuary;
- (j) take, carry, operate, fire or use any firearm, throw or discharge any missile or explosives, except that a licensed shotgun may be used on a game reserve in the manner prescribed in these regulations;
- (k) take, ride or drive, graze or agist any dog, cat, fox, horse, cattle, ... or suffer or allow any such exotic bird or animal to remain on any sanctuary;
- (l) cut, construct or maintain any private track, road, tramway, railway or other means of transport or communication, or lay any telephone line, electric light or power line, water pipe line, gas pipe line or carry out any other works or drain or clear or prepare any part of any sanctuary for any purpose;
- (m) light any fire, other than in an authorised fireplace, or burn or clear by any means whatsoever any tree, shrub, grass or other plant, whether living or dead;
- (n) introduce, place, drop, spray, fog, mist or otherwise use or discharge any dangerous, poisonous or noxious substance;
- (o) do or take anything which may interfere in any manner with the natural environment; or
- (p) refuse to leave any sanctuary when so directed by any warden.

[508] The sections of the Conservation and Land Management Act and the regulations relied upon impose very stringent and extensive control over human activities within nature reserves and wildlife sanctuaries. However, they do not prohibit entry to or presence within nature reserves and wildlife sanctuaries and in our opinion do not impose a regime of control that wholly prevents the continued enjoyment of all native title rights and interests in relation to the land within them. Nevertheless, the exercise of control by the Authority evidences a clear and plain intention to control access to nature reserves and wildlife sanctuaries, and to make decisions regarding human activities on the land. The

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extinguishment of an exclusive native title right to control access also has the consequence of extinguishing an exclusive right of possession and occupancy that might otherwise have existed.

(ii) Noogoora Burr Quarantine Area

[509] By notice published in 1981 pursuant to the Agriculture and Related Resources Protection (Property Quarantine) Regulations 1981 it was stated that a person other than an owner or occupier of land, or an employee of an owner or occupier, shall not enter land specified in the notice except with the written approval of an inspector or authorised person. The notice was given as part of a measure to control an outbreak of Noogoora Burr on land between Kununurra and Wyndham, near the Ord River. It seems that the quarantine area was expanded by subsequent notices. The State appeals against the trial judge's rejection of their submission that prohibition of entry to the quarantine area under the control of departmental officers meant that native title had been extinguished in that area. We agree with his Honour's conclusion that the regulations were directed not to native title but to the eradication of the burr. Even though the notice prohibited entry without permission, it was regulatory in nature.

(iii) Aborigines Act 1905 (WA)

[510] The State also appeals against the trial judge's conclusion that a proclamation made under s 39 of the Aborigines Act 1905 (WA) declaring it unlawful for Aborigines to remain in an area specified in a proclamation, near Wyndham, did not extinguish native title. Again we agree with the conclusion of the trial judge. Section 39 of the Aborigines Act 1905 provided that:

The Governor may, by proclamation, whenever in the interest of the aborigines he thinks fit, declare any municipal district or town or any other place to be an area in which it shall be unlawful for aborigines or half-castes, not in lawful employment, to be or remain; and every such aboriginal or half-caste who, after warning, enters or is found within such area without permission, in writing, of a protector or police officer, shall be guilty of an offence against this Act.

[511] Even though the proclamation prohibited entry upon, and presence on land except for the purposes of employment, it was made pursuant to legislation plainly intended to be for the benefit of Aborigines generally. The Act authorising the publication of the notice makes it plain that it was not intended to have the effect that native title rights were abolished. Rather the purpose of the legislation was to regulate the exercise and enjoyment of native title rights in a way that was beneficial to Aboriginal people.

Interests in minerals (including petroleum)

(i) General

[512] Some parts of the Crown land within the claimed area are, as noted earlier, subject to tenements granted under the Mining Act 1978 (WA) or the Petroleum Act 1967 (WA). The claimed area incorporates a small part of the most significant tenement, on which diamond mining operations are carried out on Crown land south-west of Lake Argyle by the Argyle Diamond Mine Joint Venture. This area is within Reserve 31165 -- "Government Requirements" which we have discussed above.

[513] The trial judge (at ALR 577-81) rejected submissions by the State, and by parties holding mining interests, that the grant of these interests wholly

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extinguished any native title rights or interests within those areas. The State and these parties now appeal from this part of his Honour's decision. In order to understand the issues that arise on this aspect of the appeals, it will be necessary to recall the nature of the material native title claims before his Honour in this regard and his determination in this connection.

[514] In their pre-trial particulars of the customs, laws, practices and usages which, they said, gave them their connection with the subject lands, the applicants claimed (1) that they "dug for and used stones, ochres and minerals on and from the land"; and (2) that they "shared, exchanged and/or traded resources derived on and from the land".

[515] There was evidence led at the trial that the applicants dug for ochre at several special sites within the claim area and used the ochre recovered for ceremonial purposes.

[516] As required by s 225(b) of the NTA, para (3) of his Honour's determination stated, as has been noted that, subject to para (5) thereof, the nature and extent of the native title rights and interests found included:

- (a) a right to possess, occupy, use and enjoy the determination area;
- (b) a right to make decisions about the use and enjoyment of the determination area;
- (c) a right of access to the determination area;
- (d) a right to control the access of others to the determination area;
- (e) a right to use and enjoy resources of the determination area;
- (f) a right to control the use and enjoyment of others of resources of the determination area;
- (g) a right to trade in resources of the determination area;
- (h) a right to receive a portion of any resources taken by others from the determination area; ...

[517] The determination did not specify any particular meaning of the term "resources" in this connection. Its primary (singular) dictionary meaning is "a source of supply, support or aid": *The Macquarie Dictionary*, 3rd ed. The *Oxford English Dictionary*, 2nd ed, offers the following primary meaning: "1. A means of supplying some want or deficiency; a stock or reserve upon which one can draw when necessary. Now usu. pl.". *Webster's New International Dictionary*, 2nd ed, primary meaning is: "1. A new or a reserve source of supply or support; a fresh or additional stock or store available at need; something in reserve or ready if needed". Clearly, resources may be of a different kind, for instance, mineral resources. In the present context, that is, a claim based upon custom and tradition, it would seem that his Honour was referring to resources of a customary or traditional kind. Ochre would be picked up by this reference but, in our view, minerals that are mined by modern methods would not. We will return to this aspect when considering the statutory concept of minerals in Western Australia.

[518] The determination, as required by s 225(c), stated that the nature and extent of any other interests in relation to the determination area were the interests created by the Crown set out in the Third Schedule, para 4. The Third Schedule referred to interests of the following, among other, kinds:

- (c) ...
Interests of lessees under:
 - (iv) ...
Leases granted under the Mining Act 1978 (WA);
- (d) Interests of licensees under:
 - (iv) ...
Licences issued under the Mining Act 1978 (WA);
- (f) Interests of holders of tenements under the Mining Act 1904 (WA);
- (g) Interests of holders of tenements under the Petroleum Act 1936 (WA) and the Petroleum Act 1967 (WA).

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[519] It will be recalled that para (5) of the determination, as required by s 225(d), contained this reference to the Third Schedule interests:

(5) The relationship between the "native title rights and interests" described in para (3) and the "other interests" described in [the Third Schedule] is as follows:

The "native title rights and interests" described in para (3) hereof and the "other interests" described in [the Third Schedule] hereof are concurrent rights and interests in relation to that part of the "determination area" to which the "other interests" relate, but by operation of legislation or by reason of the nature and extent of the "other interests" created by the Crown, the exercise of

some of those concurrent rights, including "native title rights and interests", may be regulated, controlled, curtailed, restricted, suspended or postponed.

[520] His Honour's decision was the first consideration of the relationship between mineral or petroleum interests in the State and native title interests. That relationship, in the Queensland context, was considered by Drummond J in *Wik Peoples v Queensland* (1996) 63 FCR 450 ; 134 ALR 637 . His Honour held (at FCR 500-2) that any rights to use minerals or petroleum that might have existed, had been extinguished by Queensland mining and petroleum legislation vesting the property in all minerals and petroleum in the State Crown. This part of his Honour's judgment was not the subject of the appeal which was dealt with by the High Court in *Wik*. In *Yarmirr v Northern Territory* (1998) 82 FCR 533 ; 156 ALR 370 , Olney J held (at FCR 601) that by the Northern Territory legislation, which was similar to Queensland's, the Crown had appropriated to itself an interest in the minerals in question which amounted to full beneficial ownership. It necessarily followed, his Honour held, that no native title rights in minerals could have survived the acquisition.

[521] The State has counterparts to the Queensland and Northern Territory mining and petroleum legislation and in particular s 3 of the Western Australian Constitution Act 1890 (Imp), s 117 of the Mining Act 1904 (WA) and s 9 of the Petroleum Act 1936 (WA) to which we refer below.

[522] Before considering the effect of these provisions, and before turning to the status of the specific mining tenements considered by the trial judge, the earlier history of grants by the State concerning minerals should be mentioned and the position at common law recalled.

[523] The common law presumption that the owner of land is entitled to all that lies above and below the ground has been applied in an Australian mining context: see *Commonwealth v New South Wales* (1923) 33 CLR 1 per Knox CJ and Starke J at 23-4. The common law presumption was subject to an exception for the royal metals of gold and silver. Moreover, it is "a recognised principle of the construction of statutes that the prerogative rights of the Crown can be affected only by express words or necessary implication": *Woolley v Attorney-General (Vic)* (1877) 2 App Cas 163 at 167-8. However, prior to 1887, land granted in the State would have conveyed to the grantee the property in all other minerals. That is to say, the base minerals, including petroleum, passed with

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a fee simple grant. But in the Land Regulations 1887 (WA), the Governor was authorised to grant interests in land, but to reserve the royal metals and any other minerals, at the Governor's discretion.

[524] From 1 January 1899, all minerals were reserved from grants by virtue of the provisions of s 15 of the Land Act 1898. Accordingly, pastoral leases granted after 1898 reserved royal metals and other minerals in accordance with the Land Act 1898.

[525] The State and Argyle submitted that by virtue of s 117 of the Mining Act 1904 (WA) gold, silver and other precious metals, and all other minerals at or below the surface of any land in the State which was not alienated in fee simple from the Crown before 1 January 1891, are the property of the Crown. Similarly, the State contended that by s 9 of the Petroleum Act 1936 (WA) petroleum below the surface of all land in Western Australia is the property of the Crown. It is contended that by this legislation the Crown appropriated to itself an interest in those minerals, and in petroleum, which amounts to full beneficial ownership, and that accordingly any native title that may have existed in relation to minerals or petroleum has been extinguished.

[526] In our opinion the contentions of the State and Argyle are sound and should be accepted.

[527] The arguments of the State and Argyle accord with the reasoning of Drummond J in *Wik* and with Olney J in *Yarmirr* that the Crown intended, in this regard, to reserve to itself the full beneficial ownership of all minerals, both royal and base. We agree with their reasoning which, we think, applies to the counterpart legislation in Western Australia. However, before going to that legislation, consideration should be given to the possible application of the recent decision of the High Court in *Yanner* in the present connection.

[528] In *Yanner*, in considering the effect of the vesting of property in the Crown under the fauna legislation, Gleeson CJ, Gaudron, Kirby and Hayne JJ said (at 266-7):

Fourthly, it is necessary to consider why property in some fauna is vested in the Crown. Provisions vesting property in fauna in the Crown were introduced into Queensland legislation at the same time as provisions imposing a royalty on the skins of animals

or birds taken or killed in Queensland. A "royalty" is a fee exacted by someone having property in a resource from someone who exploits that resource. As was pointed out in *Stanton v FCT* ((1955) 92 CLR 630 at 641 per Dixon CJ, Williams, Webb, Fullagar and Kitto JJ):

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

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

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[529] Their Honours concluded (at 267), in the light of these considerations, that:

... the statutory vesting of "property" in the Crown by the successive Queensland fauna Acts can be seen to be nothing more than "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource".

[530] The citation is from *Toomer v Witsell* 334 US 385 (1948) at 402 per Vinson CJ. Neither *Toomer*, nor *Hughes v Oklahoma* 441 US 322 (1979) where *Toomer* was cited (per Brennan J at 333-4), was concerned with minerals. Each dealt with the ownership of wild animals. And the passage from *Yanner* (at 267) which we have emphasised above shows, in our opinion, that a distinction is to be drawn between (a) the notional or artificial vesting in the state of property in a wild animal for the purposes of creating a situation which resembles one where, traditionally, a royalty is payable; and (b) the actual vesting which occurs in the case of minerals where a royalty is, in truth, payable.

[531] Section 3 of the Western Australia Constitution Act 1890 (Imp) provided that:

The entire management and control of the waste lands of the Crown in the colony of Western Australia, and of the proceeds of the sale, letting, and disposal thereof, including all royalties, mines, and minerals, shall be vested in the legislature of that colony.

In exercise of that power, the legislature enacted the Mining Act 1904 (WA) in which s 117 provided:

SUBJECT to the provisions of this Act and the regulations:

- (1) Gold, silver and other precious metals on or below the surface of all land in Western Australia, whether alienated from the Crown, and if alienated, whensoever alienated, are the property of the Crown.
- (2) All other minerals on or below the surface of any land in Western Australia which was not alienated in fee simple from the Crown before the first day of January, One thousand eight hundred and ninety-nine, are the property of the Crown.

[532] A like provision was made by s 9 of the Petroleum Act 1936 (WA) as follows:

Notwithstanding anything to the contrary contained in any Act, or in any grant, lease or other instrument of title, whether made or issued before or after the commencement of this Act, all petroleum on or below the surface of all land within this State, whether alienated in fee simple or not so alienated from the Crown is and shall be deemed always to have been the property of the Crown.

[533] As has been mentioned, the present determination did not define the term "resources". However, in describing aspects of the claimants' connection with the area, the trial judge had said (at ALR 538):

There was evidence of the contemporary use of natural resources found in and around the claim area for ceremonies and tool-making, in particular, ochre for the former. Consistent with the "primary" evidence, the archaeological evidence suggested that sources of ochre within Miriuwung and Gajerrong country were limited and that all locations of ochre were associated with sacred sites ...

[534] This is a specific indication that the reference in the determination to "resources" was intended to pick up ochre. We agree with his Honour's conclusion that this aspect of the applicants' traditional connection with the area *170 ALR 159 at 292* claimed was established on the evidence. In our view it should be regarded as one of the applicants' native title rights, unless ochre falls within the statutory concept of minerals.

[535] For the purposes of the Mining Act 1904 "minerals" were defined to mean "All minerals other than gold, and all precious stones": s 3. By s 115 of the 1904 Act, this general definition did not apply to Pt VI (which included s 117). Section 115 provided that in Pt VI the term "minerals" meant:

Antimony, bismuth, copper, iron, lead, manganese, mercury, silver, and tin, and the ores and earths of these metals, and gems and precious stones. The term also includes coal and oil, and any mineral which the Governor may from time to time by proclamation bring under the provisions of this Part of this Act.

[536] In our opinion, these definitions were not intended to pick up ochre, an earthy substance used by Aboriginal people for traditional ceremonial purposes.

[537] By s 8(1) of the Mining Act 1978, unless the contrary intention appears:

"minerals" includes all naturally occurring substances, not being soil or a substance the recovery of which is governed by the Petroleum Act 1967 or the Petroleum (Submerged Lands) Act 1982, obtained or obtainable from any land by mining operations carried out on or under the surface of the land, including evaporites, limestone, rock, gravel, shale (whether or not oil shale) sand and clay except that where:

- (a) limestone, rock or gravel;
- (b) shale, other than oil shale;
- (c) sand, other than mineral sands, silica sand or garnet sand; or
- (d) clay, other than kaolin, bentonite, attapulgite, or montmorillonite,

occurs on private land, that limestone, rock, gravel, shale, sand or clay shall not be taken to be minerals; ...

[538] Although this definition is more specific than in the case of the 1904 Act, it again appears that ochre used for traditional ceremonial purposes, does not fall within this statutory definition either.

[539] Petroleum was defined in s 5 of the Petroleum Act 1967 (WA) as follows:

"petroleum" means:

- (a) any naturally occurring hydrocarbon, whether in a gaseous, liquid or solid state;
- (b) any naturally occurring mixture of hydrocarbons, whether in a gaseous, liquid or solid state; or
- (c) any naturally occurring mixture of one or more hydrocarbons, whether in a gaseous, liquid or solid state, and one or more of the following, that is to say, hydrogen-sulphide, nitrogen, helium and carbon dioxide,

and includes any petroleum as defined by paragraph (a), (b) or (c) of this definition that has been returned to a natural reservoir, but excludes oil shale.

[540] Clearly, ochre was not comprehended by this definition.

[541] As we have said, in our view, essentially for the reasons given by Drummond J in *Wik* and by Olney J in *Yarmirr*, by virtue of the vesting provisions of s 3 of the Western Australia Constitution Act and by virtue of the proprietary provisions of s 117 of the 1904 Act, any native title rights to the minerals there specified within the State were wholly extinguished. In our opinion, those provisions were intended to reserve to the legislature and the Crown the full beneficial ownership of all the minerals specified. Similarly, we consider that if any native title right or interest existed in relation to petroleum within the State in the determination area that right or interest was wholly extinguished by virtue of s 3 of the Western Australia Constitution Act and s 9 of the Petroleum Act 1936. However, in this case there is no evidence of any

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traditional Aboriginal law, custom or use relating to petroleum either in the State or in the Territory and as a matter of fact any claim in relation to the possession, use or enjoyment of petroleum (if there is any in the determination area) is not established.

[542] No submissions were made by the parties regarding minerals in the Territory, perhaps for the reason that the evidence did not establish any traditional Aboriginal law, custom or use relating to minerals, apart from ochre. The Minerals (Acquisition) Ordinance 1953 (Cth) (now the Minerals (Acquisition) Act (NT)) in s 3, provides that:

All minerals existing in their natural condition, or in a deposit of waste material obtained from any underground or surface working, on or below the surface of any land in the Territory, not being minerals, which, immediately before the commencement of this Ordinance, were the property of the Crown or of the Commonwealth, are, by force of this Ordinance, acquired by, and vested absolutely in, the Crown in right of the Commonwealth.

Section 2 of the Ordinance defines minerals as follows:

In this Ordinance, "minerals" includes all mineral substances, gold, silver, copper, tin and other ... metals or minerals, and gems, precious stones, coal, shale, mineral oils, and valuable earths and substances.

The validity of s 3 of the Minerals (Acquisition) Ordinance 1953 was upheld in *Kean v Commonwealth* (1963) 5 FLR 432 and in *Milirrpum v Nabalco Pty Ltd*.

[543] From 1 July 1978 the Territory became a separate body politic in the right of the Crown. All interests in minerals (other than substances then within the Atomic Energy Act 1953 (Cth)) were transferred to the Crown in the right of the Territory: Northern Territory (Self Government) Act 1978 (Cth), s 69(4).

[544] In the absence of a submission from the Territory that ochre falls within the definition of the minerals now vested in the Territory under the above legislation, we draw no distinction regarding the use and enjoyment of ochre between the part of the claim area in the State, and the part in the Territory. However, in so far as there may once have been a native title right to use and enjoy any of the minerals that are now vested in the Territory, that right was extinguished by the Minerals (Acquisition) Ordinance.

[545] It will be convenient to consider the extinguishment issues in respect of the areas of land concerned in the sequence adopted by his Honour.

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