FEDERAL COURT OF AUSTRALIA

Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia [2023] FCAFC 75

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| File numbers: | NTD 43 of 2019 |
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| Judgment of: | **MORTIMER CJ, MOSHINSKY AND BANKS-SMITH JJ** |
|  |  |
| Date of judgment: | 22 May 2023 |
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| Catchwords: | **NATIVE TITLE** – claim for compensation under *Native Title Act 1993* (Cth) (**NTA**) – where the applicant, on behalf of the Gumatj Clan or Estate Group, contends that, in the period from 1911 to 1978, a number of grants or legislative acts took place in the Northern Territory which, if valid, would have been inconsistent with the continued existence of the claimants’ non-exclusive native title rights, and would have extinguished those non-exclusive native title rights at common law – where the applicant contends that the grants or acts purported to effect an acquisition of property within the meaning of s 51(xxxi) of the *Constitution*, and that they did not provide just terms within the meaning of that provision – where the applicant contends that, the NTA apart, the grants or acts were invalid by reason of the failure to provide just terms as required by s 51(xxxi) – where the applicant contends that each of the grants or acts falls within the definition of a “past act” in the NTA – where the applicant contends that, by operation of the NTA, the grant or act was effective to grant or vest the rights that it purported to grant or vest, and the claimants are entitled to compensation under the NTA in respect of the acquisition of property – where the Commonwealth contended that the applicant’s claim should fail on a number of bases – where separate questions considered and determined by a Full Court in the exercise of the Court’s original jurisdiction**NATIVE TITLE** – extinguishment – pastoral leases granted between 1886 and 1903 – reservations of minerals – where the Commonwealth contended that the effect of those reservations was to vest title to minerals in the Crown and thereby to extinguish the claimants’ native title mineral rights (if established) – held: any native title mineral rights not extinguished**NATIVE TITLE** – extinguishment – Mission Lease granted in 1938 – where the Commonwealth contended that the grant of the Mission Lease extinguished (or purported to extinguish) any native title rights in the claim area that then subsisted – where the Commonwealth contended that the legislative instrument provided for the grant of a common law lease and thus the lease conferred exclusive possession on the lessee – where the Commonwealth contended in the alternative that the Mission Lease was a statutory lease that granted rights that were inconsistent with the claimed non-exclusive native title rights – held: the Mission Lease did not extinguish or purport to extinguish the claimants’ claimed non-exclusive native title rights**CONSTITUTIONAL LAW** – s 51(xxxi) of the *Constitution* – acquisition of property on just terms – where the Commonwealth contended that the just terms requirement contained in s 51(xxxi) does not apply to laws enacted pursuant to s 122 of the *Constitution* – where the Commonwealth submitted that *Teori Tau v Commonwealth* [1969] HCA 62; 119 CLR 564 is the binding authority on this question – where the Commonwealth submitted that *Wurridjal v Commonwealth* [2009] HCA 2; 237 CLR 309 did not overrule *Teori Tau* – held: *Wurridjal* did overrule *Teori Tau* and the just terms requirement contained in s 51(xxxi) does apply to laws enacted pursuant to s 122**CONSTITUTIONAL LAW** – s 51(xxxi) of the *Constitution* – acquisition of property on just terms – where the Commonwealth contended that the relevant grants and acts were not capable of amounting to an acquisition of property within the meaning of s 51(xxxi) because native title was inherently susceptible to extinguishment by a valid exercise of the Crown’s sovereign power to grant interests in land and to appropriate to itself unalienated land – held: native title rights and interests are proprietary in nature and constitute “property” for the purposes of s 51(xxxi) – held: a grant or act that extinguishes native title rights and interests is capable of amounting to an acquisition of property within the meaning of s 51(xxxi) |
|  |  |
| Legislation: | *Constitution* ss 51(xxxi), 55, 96, 111, 122*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 71*Commonwealth Employees’ Rehabilitation and Compensation Act 1988* (Cth) s 44*Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth)*Federal Court of Australia Act 1976* (Cth) s 20(1A)*Fisheries Act 1952* (Cth)*Health Insurance Act 1973* (Cth) s 20*Health Insurance (Pathology Services) Amendment Act 1991* (Cth)*Judiciary Act 1903* (Cth) s 78B*National Parks and Wildlife Conservation Act 1975* (Cth) s 10*National Parks and Wildlife Conservation Amendment Act 1987* (Cth) s 7*Native Title Act 1993* (Cth) ss 4, 13A, 14, 15, 17, 18, 23A, 23B, 23C, 47A, 51, 51A, 53, 61, 66B, 223, 228, 238, 242*New Guinea Act 1920* (Cth)*Northern Territory Acceptance Act 1910* (Cth) ss 6, 10*Northern Territory (Administration) Act 1910* (Cth) ss 4U, 4X, 5, 9, 13, 21*Northern Territory National Emergency Response Act 2007* (Cth)*Northern Territory Self-Government Act 1978* (Cth) s 50*Papua and New Guinea Act 1949* (Cth)*Parliamentary Contributory Superannuation Act 1948* (Cth)*Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990* (Cth) s 24*Racial Discrimination Act 1975* (Cth) s 10*Remuneration Tribunal Act 1973* (Cth)*Sales Tax Assessment Act (No 1) 1930* (Cth)*Swimming Pools Tax Refund Act 1992* (Cth) s 4*Federal Court Amendment Rules 2007 (No 1)* (Cth)*Federal Court Rules 1979* (Cth) O 20, r 3*Federal Court Rules 2011* (Cth) rr 30.01, 38.01*High Court Rules 2004* (Cth) r 27.07*Land Act 1910* (Qld)*Land Act* *1898* (WA) s 62*Land Act 1933* (WA) s 32*Mining Act 1980* (NT)*Northern Territory Crown Lands Act 1890* (SA) ss 5, 6, 8, 31, 33, 63, 78, 90*Northern Territory Crown Lands Consolidation Act 1882* (SA)*Northern Territory Land Act 1872* (SA)*Northern Territory Land Act 1899* (SA) ss 1, 23, 24, 25*Western Lands Act 1901* (NSW) s 23*Work Health Act 1986* (NT)*Aboriginals Ordinance 1918*(NT) ss 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 19, 19A, 20, 21, 67*Crown Lands Ordinance 1927* (NT) s 102*Crown Lands Ordinance 1931* (NT)*Minerals (Acquisition) Ordinance 1953* (NT) ss 3, 4*Mining Ordinance 1939* (NT) ss 7, 106, 107*Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT)*Social Welfare Ordinance 1964* (NT)*Welfare Ordinance 1953* (NT)*Australian Colonies Act* *1861* (Imp)*New South Wales Constitution Act 1855* (Imp)*Queensland Constitution Act 1867* (Imp)*United States Constitution* |
|  |  |
| Cases cited: | *Akiba v Commonwealth* [2013] HCA 33; 250 CLR 209*Alcock v Commonwealth* [2012] FCA 524; 203 FCR 114*Alcock v Commonwealth* [2013] FCAFC 36; 210 FCR 454*Allpike v Commonwealth* [1948] HCA 19; 77 CLR 62*American Dairy Queen (Q’ld) Pty Ltd v Blue Rio Pty Ltd* [1981] HCA 65; 147 CLR 677*Attorney-General v Brown* (1847) 1 Legge 312*Attorney-General (NT) v Chaffey* [2007] HCA 34; 231 CLR 651*Attorney-General of New South Wales v Ohlsen on behalf of the Ngemba/Ngiyampaa People* [2022] FCAFC 38; 290 FCR 173*Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45; 177 CLR 106*Australian Tape Manufacturers Association Ltd v Commonwealth* [1993] HCA 10; 176 CLR 480*Bass v Permanent Trustee Co Ltd* [1999] HCA 9; 198 CLR 334*Berwick Ltd v Gray* [1976] HCA 12; 133 CLR 603*Bligh Consulting Pty Ltd v Ausgrid* [2017] NSWCA 95*Bodney v Westralia Airports Corporation Ltd* [2000] FCA 1609; 109 FCR 178*Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512*Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 66; 276 FCR 75*Commonwealth v WMC Resources Ltd* [1998] HCA 8; 194 CLR 1*Commonwealth v Yarmirr* [2001] HCA 56; 208 CLR 1*Congoo v Queensland* [2014] FCAFC 9; 218 FCR 358*Cunningham v Commonwealth* [2016] HCA 39; 259 CLR 536*Deakin v Webb* [1904] HCA 57; 1 CLR 585*Dickenson’s Arcade Pty Ltd v Tasmania* [1974] HCA 9; 130 CLR 177*Director of Fisheries (Northern Territory) v Arnhem Land Aboriginal Land Trust* [2001] FCA 98; 109 FCR 488*Director of Public Prosecutions v Lawler* [1994] HCA 10; 179 CLR 270*Director of Public Prosecutions (Cth) v JM* [2013] HCA 30; 250 CLR 135*Esposito v Commonwealth* [2015] FCAFC 160; 235 FCR 1*Federation Insurance Ltd v Wasson* [1987] HCA 34; 163 CLR 303*Fejo v Northern Territory* [1998] HCA 58; 195 CLR 96*Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* [2019] FCAFC 177; 273 FCR 350*Foster v Northern Territory of Australia* [1999] FCA 1235*Georgiadis v Australian and Overseas Telecommunications Corporation* [1994] HCA 6; 179 CLR 297*Goldsworthy Mining Ltd v Commissioner of Taxation (Cth)* [1973] HCA 7; 128 CLR 199*Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900; 337 ALR 362*Health Insurance Commission v Peverill* [1994] HCA 8; 179 CLR 226*Hepples v Commissioner of Taxation* [1992] HCA 3; 173 CLR 492*Homebush Pty Ltd v Property Council of Australia Ltd* [2005] FCA 1002*ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51; 240 CLR 140*JT International SA v Commonwealth* [2012] HCA 43; 250 CLR 1*Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* [1977] HCA 55; 139 CLR 117*Kruger v Commonwealth* [1997] HCA 27; 190 CLR 1*Lawson v Minister for Land and Water Conservation* *(NSW)* [2003] FCA 1127*Living and Leisure Australia Ltd v Commissioner of State Revenue (Vic)* [2018] VSCA 237; 108 ATR 736*Mabo v Queensland (No 1)* [1998] HCA 69; 166 CLR 186*Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141*Minister for Primary Industry v Davey* [1993] FCA 876; 47 FCR 151*Mutual Pools & Staff v Commonwealth* [1994] HCA 9; 179 CLR 155*Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* [1992] HCA 4; (1992) 173 CLR 450*New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; 260 CLR 232*Newcrest Mining (WA) Limited v Commonwealth* [1997] HCA 38; 190 CLR 513*Northern Territory v Griffiths* [2019] HCA 7; 269 CLR 1*O’Toole v Charles David Pty Ltd* [1990] HCA 14; 171 CLR 232*Queanbeyan City Council v ACTEW Corporation Ltd* [2011] HCA 40; 244 CLR 530*Queensland v Congoo* [2015] HCA 17; 256 CLR 239*R v Ludeke; Ex parte Australian Building Construction Employees’ and Builders Labourers’ Federation* [1985] HCA 84; 159 CLR 636*R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; 158 CLR 327*Radaich v Smith* [1959] HCA 45; 101 CLR 209*Re Minister for Immigration and Multicultural Affairs; Ex parte Te* [2002] HCA 48; 212 CLR 162*Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72; 218 CLR 28*Spencer v Commonwealth* [1907] HCA 82; 5 CLR 418*Telstra Corporation v Commonwealth* [2008] HCA 7; 234 CLR 210*Teori Tau v Commonwealth* [1969] HCA 62; 119 CLR 564*Theophanous v Commonwealth* [2006] HCA 18; 225 CLR 101*Ure v Commonwealth* [2015] FCA 241; 323 ALR 164*Ure v Commonwealth* [2016] FCAFC 8; 236 FCR 458*Victoria v Commonwealth* [1971] HCA 16; 122 CLR 353*Victoria v Commonwealth (Industrial Relations Act Case)* [1996] HCA 56; 187 CLR 416*Wade v New South Wales Rutile Mining Co Pty Ltd* [1969] HCA 28; 121 CLR 177*Western Australia v Brown* [2014] HCA 8; 253 CLR 507*Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47; 183 CLR 373*Western Australia v Ward* [2002] HCA 28; 213 CLR 1*Wik Peoples v Queensland* [1996] HCA 40; 187 CLR 1*Wilson v Anderson* [2002] HCA 29; 213 CLR 401*Wu v Minister for Immigration and Multicultural Affairs* [2000] FCA 1817; 105 FCR 39*Wurridjal v Commonwealth* [2009] HCA 2; 237 CLR 309*Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 |
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| Division: | General Division |
|  |  |
| Registry: | Northern Territory |
|  |  |
| National Practice Area: | Native Title |
|  |  |
| Number of paragraphs: | 499 |
|  |  |
| Date of hearing: | 24-28 October 2022  |
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|  |  |
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ORDERS

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|  | NTD 43 of 2019 |
|   |
| BETWEEN: | GALARRWUY YUNUPINGU (ON BEHALF OF THE GUMATJ CLAN OR ESTATE GROUP)Applicant |
| AND: | COMMONWEALTH OF AUSTRALIAFirst RespondentNORTHERN TERRITORY OF AUSTRALIASecond RespondentEAST ARNHEM REGIONAL COUNCIL (and others named in the Schedule)Third Respondent |
|  | ATTORNEY-GENERAL FOR THE STATE OF QUEENSLANDIntervener |

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| order made by: | MORTIMER CJ, MOSHINSKY and BANKS-SMITH JJ |
| DATE OF ORDER: | 22 may 2023 |

THE COURT ORDERS THAT:

1. The questions reserved for consideration be answered as follows:

(1) On the facts set out in the applicant’s statement of claim, does the whole of the applicant’s claim fail because:

a. the grant of a lease to the Methodist Missionary Society of Australia Trust on 1 July 1938 pursuant to the *Aboriginals Ordinance 1918-1937* (NT) (**Mission Lease**) (identified in paragraph [171] of the statement of claim) validly extinguished any native title rights in the claim area that then subsisted; and

b. the grant was not invalid as a result of the legislation empowering the grant being required to, but failing to, comply with s 51(xxxi) of the Constitution because:

i. the just terms requirement contained in s 51(xxxi) of the Constitution does not apply to laws enacted pursuant to s 122 of the Constitution, including the *Northern Territory (Administration) Act 1910* (Cth) (and Ordinances made thereunder); and, in any event,

ii. the grant was not capable of amounting to an acquisition of property within the meaning of s 51(xxxi) of the Constitution notwithstanding that any subsisting native title rights in the claim area (if established) were extinguished by the grant, because native title was inherently susceptible to extinguishment by a valid exercise of the Crown’s sovereign power – derived from its radical title – to grant interests in land and to appropriate to itself unalienated land.

*Answer:* **No**

(2) If the answer to question (1) is “no”, on the facts set out in the applicant’s statement of claim, does the applicant’s claim insofar as it relates to the enactment of s 107 of the *Mining Ordinance 1939* (NT) (**1939 Ordinance**) on 13 May 1939 (identified in paragraphs [190]-[191] of the statement of claim), which *inter alia* vested property in all minerals on or below the surface of land in the claim area in the Crown, fail because:

a. the vesting did not have any effect on native title in the claim area as any native title right in relation to minerals in the claim area (if established) had already been extinguished by the reservation of those minerals to the Crown in pastoral lease PL1095 granted on 26 January 1886, or pastoral lease PL1875 granted on 15 August 1896, or pastoral lease PL1991 granted on 13 October 1899, or pastoral lease PL2229 granted on 21 September 1903 (collectively, the **pastoral lease reservations**);

*Answer:* **No**

b. further and in the alternative, the vesting did not have any effect on native title in the claim area because all subsisting native title rights in the claim area (if established) had already been extinguished by the grant of the Mission Lease; and

*Answer:* **No**

c. in any event, for the reasons specified in paragraph 1(b) above.

*Answer:* **No**

(3) If the answer to question (1) is “no”, on the facts set out in the statement of claim, does the applicant’s claim insofar as it relates to the enactment of the *Minerals (Acquisition) Ordinance 1953* (NT) on 22 April 1953 (identified in paragraph [213] of the statement of claim), fail:

a. because the said enactment did not have any effect on native title in the claim area as:

i. any native title right in relation to minerals in the claim area (if established) was extinguished by the pastoral lease reservations;

ii. further and in the alternative, all subsisting native title rights in the claim area (if established) were extinguished by the grant of the Mission Lease;

iii. further and in the alternative, any subsisting native title right in relation to minerals in the claim area (if established) was extinguished by the 1939 Ordinance; and

*Answer:* **No**

b. in any event, because the just terms requirement contained in s 51(xxxi) of the Constitution does not apply to laws enacted pursuant to s 122 of the Constitution, including the *Northern Territory (Administration) Act 1910* (Cth) (and Ordinances made thereunder).

*Answer:* **No**

(4) If the answer to question (1) is “no”, on the facts set out in the statement of claim, does the applicant’s claim insofar as it relates to the grants of special mineral leases identified in paragraphs [232], [255] and [293] of the statement of claim, fail because the grants were not invalid as asserted in that:

a. none of the grants had any effect on native title in the claim area as all subsisting native title rights in the claim area (if established) were extinguished by the grant of the Mission Lease; and

*Answer:* **No**

b. in any event:

i. as per paragraph 1(b)(i) above, the Ordinances under which the special mineral leases were granted were not relevantly subject to the just terms requirement contained in s 51(xxxi) of the Constitution;

ii. none of these grants were capable of amounting to an acquisition of property within the meaning of s 51(xxxi) of the Constitution because native title (if established) was inherently susceptible to a valid exercise of the Crown’s sovereign power – derived from its radical title – to grant interests in land.

*Answer:* **No**

2. Within 28 days, each party file and serve a short written submission on any further orders that they contend should be made by the Full Court.

3. Subject to order 2, the proceeding otherwise be referred back to a docket judge for case management.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

THE COURT:

# INTRODUCTION

1 The **applicant**, Dr Yunupingu AM, on behalf of the Gumatj Clan or Estate Group of the Yolngu People, brought two applications under s 61 of the ***N****ative* ***T****itle* ***A****ct 1993* (Cth). One is a claimant application, seeking a determination of native title in favour of the Gumatj Clan or Estate Group. The second is a compensation application, seeking the payment of compensation for the alleged effects on native title of certain executive and legislative acts done after the Northern Territory became a territory of the Commonwealth in 1911, but prior to the coming into force of the *Northern Territory* ***Self-Government Act*** *1978* (Cth). In these reasons we shall call the group represented by the applicant the **claimants**. Dr Yunupingu passed away after judgment was reserved. The legal representatives for the claimants informed the Court that after ceremonial and sorry business is conducted, the claimants will authorise a new applicant, as s 66B of the NTA requires. Given the significant role played by Dr Yunupingu in these proceedings, in these reasons we have continued to refer to him as the applicant.

2 The two applications were filed in November 2019. The **claim area** is slightly different for each application; the compensation claim area is approximately 236 square kilometres. The claim area is located in the Gove Peninsula, in north-eastern Arnhem Land in the Northern Territory.

3 In the written submissions filed on behalf of the Northern Land Council and the Arnhem Land Aboriginal Land Trust (the **NLC parties**), the following uncontested background was given:

The case is the latest in a long campaign by Yolngu peoples for the recognition of their title. That includes *Milirrpum v Nabalco (Gove Land Rights Case)* where Blackburn J held that Yolngu society is founded on a government of laws, but concluded that the traditional rights and interests of the Yolngu clans in land on the Gove Peninsula within the Arnhem Land Reserve were not capable of recognition by the common law as property or, alternatively, had not survived the Crown’s acquisition of the radical title to the land in dispute. The decision of Blackburn J was the stimulus for the inquiry that led to the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) by which Crown land comprising the Aboriginal reserves in the Northern Territory were restored to traditional control.

(Footnotes omitted.)

4 As the NLC parties’ submissions then observe, the legal conclusion of Blackburn J in *Milirrpum v Nabalco Pty Ltd (****Gove Land Rights Case****)* (1971) 17 FLR 141 was overturned in ***Mabo*** *v Queensland* ***(No 2)*** [1992] HCA 23; 175 CLR 1. *Mabo (No 2)* forms a critical part of the Commonwealth’s and the Northern Territory’s constitutional issues raised on the separate questions.

5 Given the active parties in these current proceedings, it should be noted that in the *Gove Land Rights Case*,Blackburn J recorded the first plaintiff, Milirrpum, as “a member of the Rirratjingu clan”, and another plaintiff, Munggurrawuy, as a member of the Gumatj clan. Other Yolngu clans were also represented by other plaintiffs in the *Gove Land Rights Case*. As we explain below, several representatives of the Rirratjingu Clan are respondents to these proceedings.

6 Mining in the claim area has a long history, the early stages of which are relevant to the issues to be decided by the Court on the present application, but the most well-known stage of which continues to the present day, having commenced in 1968, as described by Blackburn J in the *Gove Land Rights Case* at 149:

On 22nd February, 1968, the two defendants, the Commonwealth and Nabalco Pty. Ltd. (which I shall call “Nabalco”) entered into an agreement whereby the Commonwealth promised to grant a special mineral lease to Nabalco, for a term of forty-two years, of land included in the subject land. The purpose of the agreement was to enable Nabalco to mine the bauxite. The Commonwealth also promised to grant special purposes leases to Nabalco for the establishment of a township and for other purposes ancillary to Nabalco’s mining operations. The agreement was expressed to come into effect upon the coming into effect of an Ordinance approving it. Such an Ordinance, the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968,* was duly passed and came into effect on 16th May, 1968. Leases were duly granted, Nabalco commenced operations accordingly, and the writ in this action was issued on 13th December, 1968.

7 The thirtieth respondent to the present proceedings, **Swiss Aluminium** Australia Limited (ACN 008 589 099), is the current lessee of one of the mineral leases granted pursuant to the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT) (the **1968 Ordinance**), described by Blackburn J in the extract above.

8 In broad outline, the applicant’s case is as follows. The applicant accepts that, by reason of the grant of a pastoral lease in respect of the claim area in 1886 (and three further pastoral leases in respect of the claim area in the years up to 1903), the claimants’ *exclusive* native title rights in respect of the claim area were extinguished. However, the applicant contends that the claimants continued to hold *non-exclusive* native title rights in respect of the claim area, including the right to access, take and use for any purpose the resources of the claim area. This is said to include resources below, on or above the surface of the claim area, such as minerals on or below the surface. The applicant then contends that, in the period from 1911 to 1978, a number of grants or legislative acts took place which, if valid: (a) may have been inconsistent with the continued existence of the claimants’ non-exclusive native title rights (either generally or in relation to minerals, depending on the particular grant or act); and (b) may have extinguished or impaired those non-exclusive native title rights at common law. The applicant contends that if the grants or acts had any extinguishing effect, then, the NTA apart, the grants or acts were invalid by reason of the failure to provide just terms as required by s 51(xxxi) of the ***Constitution***. On this basis, the applicant contends that each of the grants and acts falls within the definition of a “past act” in the NTA. The applicant then contends that, by operation of the NTA, the grant or act was effective to grant or vest the rights that it purported to grant or vest, and the claimants are entitled to compensation under the NTA in respect of the acquisition of property.

9 It was clear that there were a number of complexities with the compensation application, including (but not limited to):

(a) The claimant application has not yet been determined and there are claims by other First Nations groups, and individuals, that the claim area, or parts of it, was land in which they held native title. In particular, such claims were made by Rirratjingu People and a group of 21 other Indigenous respondents who identify as Yolngu.

(b) The claimants allege that under traditional law and custom they had a right to take and use for any purpose the resources of the claim area, which included all minerals in the claim area, and that the claimants had native title rights in the airspace above the claim area.

(c) There are substantial objections, including constitutional objections, by the Commonwealth and the Northern Territory to the fundamental basis for the claimants’ compensation claim.

10 Since the claims were filed, the parties debated whether and how some of the central issues in the compensation application might be dealt with separately. This process was case managed by a Judge and a Judicial Registrar of the Court. Agreeing on a process took a long time.

11 Eventually, it was agreed that the applicant would file a statement of claim in both proceedings in March 2022. In response, it was agreed that the Commonwealth would file an interlocutory application in the compensation proceeding, seeking orders to facilitate a hearing of a demurrer against the applicant’s claims for compensation.

12 Neither the applicant nor any other party contended that a demurrer would be an inappropriate procedure to deal with some of the central issues in relation to the compensation application.

13 However, a demurrer is not a form of pleading for which the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth) and the Court’s rules provide. Order 20 r 3 of the *Federal Court Rules 1979* (Cth) as enacted provided that “[n]o proceeding by way of demurrer shall be brought on any pleading”. Order 20 r 3 was amended by the *Federal Court Amendment Rules 2007 (No 1)* (Cth), and the amended rule contained no express prohibition on demurrers. The current iteration of the Court’s rules, being the ***Federal Court Rules*** *2011* (Cth), likewise contains no such express prohibition. However, there is also no express provision for the pleading of a demurrer in the Court, and in this respect the Court’s procedure stands in contrast to that of the High Court of Australia, which expressly permits and prescribes processes in relation to the filing of a demurrer: *High Court Rules 2004* (Cth) r 27.07.

14 The removal of a demurrer process reflected the changes in the Court’s rules to allow pleadings on questions of law. Thereafter, the processes for strike out and summary dismissal were available in respect of questions of law arising on the pleadings, as were the processes of separate questions (Federal Court Rules r 30.01) and case stated (r 38.01).

15 Notwithstanding the Court’s rules, the parties sought to use a demurrer process and the Court accepted the filing and service of the Commonwealth’s demurrer. On 20 April 2022, Jagot J made orders to incorporate the Commonwealth’s demurrer into the Court’s current processes by the use of separate questions stated under r 30.01 of the Federal Court Rules. This is the course some of the authorities suggest is appropriate: see, for example, *Direct Factory Outlets Homebush Pty Ltd v Property Council of Australia Ltd* [2005] FCA 1002; *Alcock v Commonwealth* [2012] FCA 524; 203 FCR 114; *Alcock v Commonwealth* [2013] FCAFC 36; 210 FCR 454; *Ure v Commonwealth* [2015] FCA 241; 323 ALR 164; *Ure v Commonwealth* [2016] FCAFC 8; 236 FCR 458.

16 Relevantly, the 20 April 2022 orders provided:

**THE COURT ORDERS THAT:**

1. By 4 pm on 29 April 2022, the Second Respondent (**Commonwealth**) is to file and serve a demurrer substantially in the form of annexure “A” to these orders.

…

**Disposal of demurrer**

3. For the purposes of determining the issues arising on the demurrer pursuant to rule 30.01 of the *Federal Court Rules 2011* (Cth), the following questions are to be determined separately from any other questions in the proceeding (**separate questions**):

(a) Should ground 1 in the demurrer be allowed?

(b) If the answer to question (a) is no:

(i) should ground 2 in the demurrer be allowed?

(ii) should ground 3 in the demurrer be allowed?

(c) Should ground 4 in the demurrer be allowed?

…

**ANNEXURE “A”**

**Demurrer**

1. The Second Respondent, Commonwealth of Australia (**Commonwealth**), demurs to the whole of the Applicant's statement of claim, and says that the facts alleged do not show any entitlement to compensation under the *Native Title Act 1993* (Cth) (**NTA**) because:

(a) the grant of a lease to the Methodist Missionary Society of Australia Trust on 1 July 1938 pursuant to the *Aboriginals Ordinance 1918-1937* (NT) (**Mission Lease**) (identified in paragraph [171] of the statement of claim) validly extinguished any native title rights in the claim area that then subsisted; and

(b) the grant was not invalid as a result of the legislation empowering the grant being required to, but failing to, comply with s 51 (**xxxi**) of the Constitution because:

(i) the just terms requirement contained in s 51 (**xxxi**) of the Constitution does not apply to laws enacted pursuant to s 122 of the Constitution, including the *Northern Territory (Administration) Act 1910* (Cth) (and Ordinances made thereunder); and, in any event,

(ii) the grant was not capable of amounting to an acquisition of property within the meaning of s 51 (**xxxi**) of the Constitution notwithstanding that any subsisting native title rights in the claim area (if established) were extinguished by the grant, because native title was inherently susceptible to extinguishment by a valid exercise of the Crown’s sovereign power - derived from its radical title - to grant interests in land and to appropriate to itself unalienated land.

2. The Commonwealth demurs to the Applicant’s statement of claim insofar as it relates to the enactment of s 107 of the *Mining Ordinance 1939* (NT) (**1939 Ordinance**) on 13 May 1939 (identified in paragraphs [190]-[191] of the statement of claim), which *inter alia* vested property in all minerals on or below the surface of land in the claim area in the Crown, and says that the facts alleged do not show any entitlement to compensation under the NTA because:

(a) the vesting did not have any effect on native title in the claim area as any native title right in relation to minerals in the claim area (if established) had already been extinguished by the reservation of those minerals to the Crown in pastoral lease PL 1095 granted on 26 January 1886, or pastoral lease PL 1875 granted on 15 August 1896, or pastoral lease PL 1991 granted on 13 October 1899, or pastoral lease PL2229 granted on 21 September 1903 (collectively, the **pastoral lease reservations**);

(b) further and in the alternative, the vesting did not have any effect on native title in the claim area because all subsisting native title rights in the claim area (if established) had already been extinguished by the grant of the Mission Lease; and

(c) in any event, for the reasons specified in paragraph 1(b) above.

3. The Commonwealth demurs to the Applicant’s statement of claim insofar as it relates to the enactment of the *Minerals (Acquisition) Ordinance 1953* (NT) on 22 April 1953 (identified in paragraph [213] of the statement of claim), and says that the facts alleged do not show any entitlement to compensation under the NTA:

(a) because the said enactment did not have any effect on native title in the claim area as:

(i) any native title right in relation to minerals in the claim area (if established) was extinguished by the pastoral lease reservations;

(ii) further and in the alternative, all subsisting native title rights in the claim area (if established) were extinguished by the grant of the Mission Lease;

(iii) further and in the alternative, any subsisting native title right in relation to minerals in the claim area (if established) was extinguished by the 1939 Ordinance; and

(b) in any event, because the just terms requirement contained in s 51 (xxxi) of the Constitution does not apply to laws enacted pursuant to s 122 of the Constitution, including the *Northern Territory (Administration) Act 1910* (Cth) (and Ordinances made thereunder).

4. The Commonwealth demurs to the Applicant’s statement of claim insofar as it relates to the grants of special mineral leases identified in paragraphs [232], [255] and [293] of the statement of claim, and says that the facts alleged do not show any entitlement to compensation under the NTA, because the grants were not invalid as asserted:

(a) none of the grants had any effect on native title in the claim area as all subsisting native title rights in the claim area (if established) were extinguished by the grant of the Mission Lease; and

(b) in any event:

(i) as per paragraph 1(b)(i) above, the Ordinances under which the special mineral leases were granted were not relevantly subject to the just terms requirement contained in s 51 (**xxxi**) of the Constitution;

(ii) none of these grants were capable of amounting to an acquisition of property within the meaning of s 51 (**xxxi**) of the Constitution because native title (if established) was inherently susceptible to a valid exercise of the Crown’s sovereign power – derived from its radical title – to grant interests in land.

17 Due to the significance of the issues raised, the former Chief Justice made a direction under s 20(1A) of the Federal Court Actin respect of the hearing of the demurrer by a Full Court.

18 At the commencement of the hearing on the separate questions, we raised with the parties whether the order for separate questions should be reformulated to set out, in terms, the questions raised by the statement of claim (**SOC**) and the demurrer that the Full Court was to determine. After discussion with the parties, we formed the view that it was appropriate to restate the separate questions in this way. Accordingly, on 26 October 2022, the Full Court ordered that:

1. Paragraph 3 of the orders made on 20 April 2022 be amended to read as follows.

Pursuant to rule 30.01 of the *Federal Court Rules 2011*, the following questions are to be determined separately from any other questions in the proceeding (**separate questions**):

(1) On the facts set out in the applicant’s statement of claim, does the whole of the applicant’s claim fail because:

a. the grant of a lease to the Methodist Missionary Society of Australia Trust on 1 July 1938 pursuant to the *Aboriginals Ordinance 1918-1937* (NT) (**Mission Lease**) (identified in paragraph [171] of the statement of claim) validly extinguished any native title rights in the claim area that then subsisted; and

b. the grant was not invalid as a result of the legislation empowering the grant being required to, but failing to, comply with s 51(xxxi) of the Constitution because:

i. the just terms requirement contained in s 51(xxxi) of the Constitution does not apply to laws enacted pursuant to s 122 of the Constitution, including the *Northern Territory (Administration) Act 1910* (Cth) (and Ordinances made thereunder); and, in any event,

ii. the grant was not capable of amounting to an acquisition of property within the meaning of s 51(xxxi) of the Constitution notwithstanding that any subsisting native title rights in the claim area (if established) were extinguished by the grant, because native title was inherently susceptible to extinguishment by a valid exercise of the Crown’s sovereign power – derived from its radical title – to grant interests in land and to appropriate to itself unalienated land.

(2) If the answer to question (1) is “no”, on the facts set out in the applicant’s statement of claim, does the applicant’s claim insofar as it relates to the enactment of s 107 of the *Mining Ordinance 1939* (NT) (**1939 Ordinance**) on 13 May 1939 (identified in paragraphs [190]-[191] of the statement of claim), which *inter alia* vested property in all minerals on or below the surface of land in the claim area in the Crown, fail because:

a. the vesting did not have any effect on native title in the claim area as any native title right in relation to minerals in the claim area (if established) had already been extinguished by the reservation of those minerals to the Crown in pastoral lease PL1095 granted on 26 January 1886, or pastoral lease PL1875 granted on 15 August 1896, or pastoral lease PL1991 granted on 13 October 1899, or pastoral lease PL2229 granted on 21 September 1903 (collectively, the **pastoral lease reservations**);

b. further and in the alternative, the vesting did not have any effect on native title in the claim area because all subsisting native title rights in the claim area (if established) had already been extinguished by the grant of the Mission Lease; and

c. in any event, for the reasons specified in paragraph 1(b) above.

(3) If the answer to question (1) is “no”, on the facts set out in the statement of claim, does the applicant’s claim insofar as it relates to the enactment of the *Minerals (Acquisition) Ordinance 1953* (NT) on 22 April 1953 (identified in paragraph [213] of the statement of claim), fail:

a. because the said enactment did not have any effect on native title in the claim area as:

i. any native title right in relation to minerals in the claim area (if established) was extinguished by the pastoral lease reservations;

ii. further and in the alternative, all subsisting native title rights in the claim area (if established) were extinguished by the grant of the Mission Lease;

iii. further and in the alternative, any subsisting native title right in relation to minerals in the claim area (if established) was extinguished by the 1939 Ordinance; and

b. in any event, because the just terms requirement contained in s 51(xxxi) of the Constitution does not apply to laws enacted pursuant to s 122 of the Constitution, including the *Northern Territory (Administration) Act 1910* (Cth) (and Ordinances made thereunder).

(4) If the answer to question (1) is “no”, on the facts set out in the statement of claim, does the applicant’s claim insofar as it relates to the grants of special mineral leases identified in paragraphs [232], [255] and [293] of the statement of claim, fail because the grants were not invalid as asserted in that:

a. none of the grants had any effect on native title in the claim area as all subsisting native title rights in the claim area (if established) were extinguished by the grant of the Mission Lease; and

b. in any event:

i. as per paragraph 1(b)(i) above, the Ordinances under which the special mineral leases were granted were not relevantly subject to the just terms requirement contained in s 51(xxxi) of the Constitution;

ii. none of these grants were capable of amounting to an acquisition of property within the meaning of s 51(xxxi) of the Constitution because native title (if established) was inherently susceptible to a valid exercise of the Crown’s sovereign power – derived from its radical title – to grant interests in land.

19 The separate questions set out above arise by reason of the filing of the SOC and the demurrer. Although the separate questions assume a particular set of facts, the questions are not hypothetical for reasons explained by the High Court in *Director of Public Prosecutions (Cth) v* ***JM*** [2013] HCA 30; 250 CLR 135 at [32]-[34].

20 In these reasons, we will refer to the subject matter of the Court’s orders and reasons as the **separate questions**.

21 At the conclusion of the hearing, the Court informed the parties that it proposed to reserve its decision and deliver judgment, with answers to the separate questions set out in the Court’s orders, and publish reasons for those answers. The Court indicated it would then hear the parties on any further or other relief. All parties indicated they were content with that course.

22 The active parties on the separate questions included the Commonwealth, the Northern Territory, Swiss Aluminium and the Attorney-General for the State of **Queensland**. Queensland intervened in the proceeding in response to notices given by the Commonwealth pursuant to s 78B of the *Judiciary Act 1903* (Cth) that the issues raised in the proceeding involved matters arising under the Constitution or involving its interpretation. In these reasons where we refer to the contentions made by the Commonwealth and the Northern Territory, we should be taken to be including the supporting submissions made by Queensland and Swiss Aluminium, except in relation to what we have described as the *Wurridjal* argument: ***Wurridjal*** *v Commonwealth* [2009] HCA 2; 237 CLR 309; see [46] below. On the *Wurridjal* argument, the Northern Territory and Swiss Aluminium did not support the Commonwealth. Queensland made no submissions on the *Wurridjal* argument.

23 The other active parties were the applicant, the NLC parties and four members of the Rirratjingu Clan – Bakamumu Alan Marika, Wanyubi Marika, Wurrulnga Mandaka Marika and Witiyana Matpupuyngu Marika (the **Rirratjingu parties**). The NLC parties supported the applicant’s position in relation to the separate questions. The Rirratjingu parties make their own claims to native title over parts of the claim area, but on the separate questions they supported the position of the applicant.

24 All parties made lengthy and detailed written submissions, and oral submissions were heard over five days. The Court is grateful for the comprehensive and detailed assistance provided by the legal representatives of all active parties.

# THE PLEADED COMPENSABLE ACTS

25 In these reasons, we use the term “compensable acts” to describe the acts identified by the applicant as those for which the claimants may seek compensation, depending on the findings of the Court. It is a shorthand phrase used by the parties in their submissions. By our use of it, we do not imply that we have formed any views about the claimants’ entitlements to the compensation claimed in the proceeding.

26 There are four sets of compensable acts to which the separate questions are addressed. On our reading of the SOC, the answers are unlikely to exhaust all of the claims for compensation, nor exhaust the issues in dispute between the parties in terms of any entitlement of the claimants or any other group to compensation. The effect of the answers to the separate questions on the compensation claim as a whole is a matter on which the parties will have the opportunity to be heard after the publication of the Court’s orders and reasons.

## Grant of the Mission Lease (SOC at [171]-[202])

27 By a lease dated 1 July 1938, the Administrator of the Northern Territory granted the **Mission Lease** to the Methodist **Missionary Society** of Australia Trust Association. Its commencement was backdated to 1 July 1936, which suggests the Missionary Society may have been in occupation of the land since that earlier date. The Mission Lease covered the whole of the claim area, and extended beyond it.

28 The Mission Lease was granted under s 14 of the ***Aboriginals Ordinance 1918*** (NT).

29 As enacted, s 14 of the Aboriginals Ordinance 1918 provided:

(1.) The Administrator may grant to any aboriginal institution leases of any Crown Lands for any term not exceeding twenty-one years, at such rent and on such terms as he thinks fit.

(2.) The lease may confer a right of renewal, providing it can be shown to the satisfaction of the Administrator that the lands therein described are required for and applied to the use and entirely for the benefit of aboriginals or half-castes, or both.

30 The construction and operation of s 14 of the Aboriginals Ordinance 1918 was central to several of the arguments about the Mission Lease. The applicant’s primary position is that the grant of the Mission Lease had no effect on the claimants’ native title, and there was no purported acquisition of property because the lease did not confer rights of exclusive possession on the lessee. His alternative position is that if exclusive possession was conferred, then the Mission Lease, if valid, would have extinguished the claimants’ non-exclusive native title rights: SOC at [180]-[182].

## Enactment of 1939 Ordinance (SOC at [190]-[202])

31 The *Mining Ordinance 1939* (NT) (**1939 Ordinance)** was made under s 21 of the ***N****orthern* ***T****erritory (****Administration****)* ***Act*** *1910* (Cth).

32 Section 107 of the 1939 Ordinance provided:

Subject to the provisions of this Ordinance and the regulations, gold, silver and all other minerals and metals on or below the surface of any land in the Territory, whether alienated or not alienated from the Crown, shall be and be deemed to be the property of the Crown:

Provided that this section shall not apply in the case of land granted by the Crown in fee simple, in which case the ownership of gold and minerals shall depend on the terms of any reservation (if any) of gold or other minerals.

33 The applicant contends (in summary) that, if valid, s 107 would have been inconsistent with the claimants’ native title mineral rights (see [43] below) and would have extinguished those rights at common law: SOC at [190]-[202], [505].

## Enactment of the 1953 Ordinance (SOC at [213]-[231])

34 The *Minerals (Acquisition) Ordinance 1953* (NT) (**1953 Ordinance**) was made by the Northern Territory Legislative Council, pursuant to s 4U of the NT Administration Act (as amended), and assented to by the Governor-General, pursuant to s 4X of the NT Administration Act.

35 Section 3 of the 1953 Ordinance provided:

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.

36 The applicant contends (in summary) that if s 107 of the 1939 Ordinance did not have the effect contended, then s 3 of the 1953 Ordinance, if valid, would have been inconsistent with the claimants’ native title mineral rights (see [43] below) and would have extinguished those rights at common law: SOC at [213]-[231], [507].

## The special mineral leases (SOC at [232]-[278], [293]-[315], [462]-[478])

37 There were five **special mineral leases** in issue on the separate questions. The first special mineral lease was purportedly granted by the Commonwealth to the Commonwealth Aluminium Corporation Pty Ltd over part of the claim area on 17 November 1958. The second, third and fourth special mineral leases were purportedly granted by the Commonwealth to the Gove Bauxite Corporation Ltd over parts of the claim area on 11 March 1963. Each of the first four special mineral leases was purportedly granted pursuant to the 1939 Ordinance, as amended.

38 The fifth special mineral lease was SML11. It was purportedly granted by the Commonwealth to Swiss Aluminium and Gove Alumina Ltd over parts of the claim area on 30 May 1969, pursuant to the 1968 Ordinance. As noted above, SML11 is still held by Swiss Aluminium today.

39 The applicant contends that, if valid, each of the special mineral leases would have “diminished and impaired” the surviving native title rights of the claimants: SOC at [246]-[248], [270]-[272], [308]-[310].

## The way the compensable acts are said to engage the NTA

40 In respect of each of the compensable acts, the applicant contends that each was a past act within the terms of s 228 of the NTA, although for the Mission Lease this is the applicant’s alternative argument. All of these acts occurred prior to 1975 and the commencement of the ***R****acial* ***D****iscrimination* ***A****ct 1975* (Cth).

41 The contention by the applicant which is largely responsible for the wider significance of this case is the way in which he deploys the term “invalid” in s 228. He contends that the compensable acts are invalid because they were acts done under the authority of s 122 of the Constitution, the Territories power, and that an exercise of that power engages s 51(xxxi) of the Constitution. Since there was an acquisition of property, without just terms being provided, he contends that each compensable act falls within the terms of s 228(2)(b), because:

apart from this Act, the act was invalid to any extent, but it would have been valid to that extent if the native title did not exist.

42 It is in response to this argument that the Commonwealth raises the two constitutional arguments referred to below.

# OUTLINE OF THE PARTIES’ CONTENTIONS

43 The applicant accepts that, by reason of the grant of a pastoral lease in respect of the claim area in 1886 (and three further pastoral leases in respect of the claim area in the years up to 1903), the claimants’ *exclusive* native title rights were extinguished. However, the applicant contends that the claimants continued to hold *non-exclusive* native title rights in respect of the claim area, including the right to access, take and use for any purpose minerals on or below the surface (which we will refer to as **native title mineral rights**).

44 Each of the four successive **pastoral leases** contained a reservation of minerals. The Commonwealth contends that the effect of those reservations was to vest title to minerals in the Crown and thereby to extinguish the claimants’ native title mineral rights (if established). This contention forms the basis of parts of separate questions 2 and 3. It should be noted that the Commonwealth’s contention in relation to the pastoral lease reservations concerns only the claimants’ *native title mineral rights*, as distinct from the claimants’ native title rights *generally*.

45 The positions of the applicant and the Commonwealth, respectively, in relation to the grant of the Mission Lease can be summarised as follows:

(a) The applicant’s primary case in relation to the Mission Lease is that it did not confer a right of exclusive possession on the lessee, was not inconsistent with the claimants’ non-exclusive native title rights, and did not purport to extinguish native title. However, in the alternative, the applicant contends that, if the Mission Lease did confer a right of exclusive possession on the lessee, then the grant, if valid, would have extinguished those native title rights and purported to effect an acquisition of property on other than just terms, contrary to s 51(xxxi) of the Constitution. On this alternative, the applicant contends that: the grant is a past act attributable to the Commonwealth for the purposes of the NTA; by operation of the NTA, the lease was effective to confer on the Missionary Society the rights as lessee provided for in the Mission Lease (including a right of exclusive possession) over the claim area; and the claimants are entitled to compensation from the Commonwealth in respect of the acquisition of property effected by the grant.

(b) The Commonwealth contends that the Mission Lease validly extinguished any native title rights in the claim area that then subsisted. This contention relates to the claimants’ native title rights *generally*, not only the claimants’ native title mineral rights. The Commonwealth’s contention has two (cumulative) limbs, which are reflected in paragraphs (a) and (b) of separate question 1. First, the Commonwealth contends that the grant of the Mission Lease extinguished (or purported to extinguish) any native title rights in the claim area that then subsisted. Secondly, the Commonwealth contends that the grant was not invalid as a result of the legislation empowering the grant being required to, but failing to, comply with s 51(xxxi) of the Constitution. Within the second limb, the Commonwealth advances two constitutional arguments:

(i) The Commonwealth contends that the just terms requirement contained in s 51(xxxi) of the Constitution does not apply to laws enacted pursuant to s 122 of the Constitution, including the legislation and legislative instrument under which the Mission Lease was granted.

(ii) The Commonwealth contends that, in any event, the grant was not capable of amounting to an acquisition of property within the meaning of s 51(xxxi) of the Constitution because native title was inherently susceptible to extinguishment by a valid exercise of the Crown’s sovereign power – derived from its radical title – to grant interests in land and to appropriate to itself unalienated land.

46 The first constitutional argument concerns the relationship between s 122 and s 51(xxxi). The Commonwealth submits that the latter does not condition the former, as the High Court held in ***Teori Tau*** *v Commonwealth* [1969] HCA 62; 119 CLR 564. The Commonwealth contends that this Court is bound by *Teori Tau* and the later High Court decision of *Wurridjal* did not overrule *Teori Tau*. We shall describe this as the ***Wurridjal* argument**.

47 The second constitutional argument is independent of the first. Even if this Court is bound by *Wurridjal* to find that s 122 is conditioned by s 51(xxxi), the Commonwealth submits that native title rights are inherently defeasible, such that the requirement for just terms in s 51(xxxi) does not condition an exercise of legislative power which adversely affects or extinguishes those rights. The Commonwealth relies on the line of authority most clearly articulated in three cases in 1994; namely, ***Mutual Pools*** *& Staff v Commonwealth* [1994] HCA 9; 179 CLR 155, *Health Insurance Commission v* ***Peverill*** [1994] HCA 8; 179 CLR 226 and ***Georgiadis*** *v Australian and Overseas Telecommunications Corporation* [1994] HCA 6; 179 CLR 297.

48 The Commonwealth contends that there is authority, at least described as seriously considered dicta, that the concept explained in these cases applies to native title rights. That authority is a paragraph in the reasons of Gummow J in ***Newcrest*** *Mining (WA) Limited v Commonwealth* [1997] HCA 38; 190 CLR 513 at 613. Considerable time was spent in written and oral argument on this paragraph, how the other judgments in *Newcrest* should be understood as relating to it, its treatment in subsequent cases, and the weight that should be given to it. We shall describe this as the **inherent defeasibility argument**.

49 We note that there was a second argument about *Newcrest* to which some attention was paid in written and oral submissions. In substance, that argument concerned the accepted ratio in *Newcrest* that if an exercise of power was supported by s 122 and another power in s 51 of the Constitution, then the s 51(xxxi) protection was attracted. In light of our conclusions, it is not necessary to consider the application of this contention to the compensable acts.

50 We turn now to the parties’ contentions on the next compensable act, namely the 1939 Ordinance. The key provision of that Ordinance has been set out above. The applicant contends (in summary) that, if valid, the making of the 1939 Ordinance would have extinguished the claimants’ native title mineral rights at common law and that in the premises, the 1939 Ordinance purported to acquire property on other than just terms within the meaning of s 51(xxxi) of the Constitution. The applicant contends that the making of the relevant provision of the 1939 Ordinance was a past act attributable to the Commonwealth for the purposes of the NTA, and that the claimants are entitled to compensation under the NTA.

51 In relation to the 1939 Ordinance, the Commonwealth advances three contentions, which are reflected in separate question 2. These are:

(a) the vesting did not have any effect on native title in the claim area as any native title mineral rights in the claim area (if established) had already been extinguished by the reservations of minerals in the pastoral leases;

(b) further and in the alternative, the vesting did not have any effect on native title in the claim area because all subsisting native title rights in the claim area (if established) had already been extinguished by the grant of the Mission Lease; and

(c) in any event, the Commonwealth relies on the *Wurridjal* argument and the inherent defeasibility argument.

52 The key provision of the 1953 Ordinance has been set out above. The applicant’s primary contention in relation to the 1953 Ordinance is that, in light of the 1939 Ordinance, all minerals on or below the surface of the claim area were already the property of the Crown in right of the Commonwealth, and that the relevant provision of the 1953 Ordinance therefore had no extinguishing effect with respect to the minerals on or below the surface of the claim area.

53 In relation to the 1953 Ordinance, the Commonwealth advances several contentions, which are reflected in separate question 3. These are:

(a) the enactment did not have any effect on native title in the claim area as:

(i) any native title right in relation to minerals in the claim area (if established) was extinguished by the pastoral lease reservations;

(ii) further and in the alternative, all subsisting native title rights in the claim area (if established) were extinguished by the grant of the Mission Lease; and

(iii) further and in the alternative, any subsisting native title right in relation to minerals in the claim area (if established) was extinguished by the 1939 Ordinance; and

(b) in any event, the Commonwealth relies on the *Wurridjal* argument. There is no express reliance on the inherent defeasibility argument in relation to the 1953 Ordinance.

54 As to the five special mineral leases, the applicant pleads in respect of each lease that: the NTA apart, the grant of the lease was not inconsistent with the continued existence of the claimants’ non-exclusive native title rights and did not extinguish those rights; the doing of any activity permitted or required to be done by or under the grant of the lease, when done, prevails over but does not extinguish the claimants’ non-exclusive native title rights; and the grant of the lease was thereby inconsistent with the continued *exercise* of the claimants’ non-exclusive native title rights. By reason of this impairment, the applicant contends, in respect of each special mineral lease, that the grant of the lease, if valid, would have resulted in an acquisition of property within the meaning of s 51(xxxi) of the Constitution, and that this was on other than just terms. The applicant contends that the grant of each lease is a past act for the purposes of the NTA, and that the claimants are entitled to compensation.

55 In relation to the special mineral leases, the Commonwealth advances the following contentions (at this stage of the proceeding), which are reflected in separate question 4:

(a) the Commonwealth contends that none of the grants had any effect on native title in the claim area as all subsisting native title rights in the claim area (if established) were extinguished by the grant of the Mission Lease; and

(b) in any event, the Commonwealth relies on the *Wurridjal* argument and the inherent defeasibility argument.

# SUMMARY OF OUR CONCLUSIONS

56 For the purpose of answering the separate questions, and only for that purpose, the Court has assumed that the applicant can prove at trial:

(a) a bundle of rights under traditional law and custom comprising the claimants’ non-exclusive native title rights;

(b) in particular, a right under traditional law and custom to take and trade in resources, including minerals (cf *Western Australia v* ***Ward*** [2002] HCA 28; 213 CLR 1at [382]); and

(c) that in respect of the whole claim area, these rights are held under traditional law and custom by the Gumatj Clan or Estate Group of the Yolngu People, and not any other group.

## Separate question 1

57 In our opinion, the Mission Lease did not confer a right of exclusive possession, and therefore did not extinguish the claimants’ non-exclusive native title rights. Thus, the applicant has made out the primary position pleaded at [174]-[178] of his SOC. Further, we reject the Commonwealth’s first and second constitutional arguments because:

(a) the manner in which it dealt with the three separate grounds of the demurrer before it demonstrates that the High Court in *Wurridjal* overturned the principle it had earlier set down in *Teori Tau*;

(b) this Court is bound by *Wurridjal* to find that s 122 of the Constitution is conditioned by s 51(xxxi);

(c) it is therefore unnecessary to decide the alternative argument that the compensable acts were done pursuant to ordinances made under a statutory power sourced not only in s 122 of the Constitution, but also in a placitum of s 51 (eg, s 51(xxvi));

(d) aside from the obiter dicta of Gummow J in *Newcrest*, the authorities have confined the application of the concept of inherent defeasibility to rights created by statute;

(e) this Court is not bound by Gummow J’s obiter dicta, and should instead apply the weight of authority in native title law about the character of native title rights; and

(f) native title rights are not inherently defeasible in the sense that description has been applied in the authorities.

58 Separate question 1 should therefore be answered “No”.

## Separate question 2

59 The reservations in the four pastoral leases constituted a withholding or keeping back of any rights that may exist in relation to minerals, to the Crown. That is the proper interpretation of the reservations. They were not the full assertion of beneficial ownership by the Crown in minerals in a way which was inconsistent with the continuation of the claimants’ native title mineral rights. Therefore, the claimants’ native title mineral rights (if established) continued after the grants of the pastoral leases, and separate question 2(a) should therefore be answered “No”.

60 Those rights were also unaffected by the grant of the Mission Lease, and separate question 2(b) should therefore also be answered “No”.

61 As noted above, we reject the Commonwealth’s two constitutional arguments. Separate question 2(c) should therefore be answered “No”.

## Separate question 3

62 In light of our conclusions in relation to the pastoral lease reservations issue, the Mission Lease issue and the effect of the 1939 Ordinance, the answer to separate question 3(a) is “No”. Further, in light of our conclusion in relation to the *Wurridjal* argument, the answer to separate question 3(b) is “No”.

## Separate question 4

63 As noted above, we conclude that the Mission Lease did not extinguish the claimants’ non-exclusive native title rights. Therefore, separate question 4(a) should be answered “No”.

64 As indicated above, we reject the Commonwealth’s two constitutional arguments. Separate question 4(b) should therefore be answered “No”.

# RELEVANT ASPECTS OF THE NTA

65 Section 4 of the NTA sets out a helpful guide to what is a complex legislative scheme. Its terms are of some importance to various aspects of the parties’ arguments. It provides:

**4 Overview of Act**

*Recognition and protection of native title*

(1) This Act recognises and protects native title. It provides that native title cannot be extinguished contrary to the Act.

*Topics covered*

(2) Essentially, this Act covers the following topics:

(a) acts affecting native title (see subsections (3) to (6));

(b) determining whether native title exists and compensation for acts affecting native title (see subsection (7)).

*Kinds of acts affecting native title*

(3) There are basically 2 kinds of acts affecting native title:

(a) ***past acts*** (mainly acts done before this Act’s commencement on 1 January 1994 that were invalid because of native title); and

(b) ***future acts*** (mainly acts done after this Act’s commencement that either validly affect native title or are invalid because of native title).

*Consequences of past acts and future acts*

(4) For past acts and future acts, this Act deals with the following matters:

(a) their validity;

(b) their effect on native title;

(c) compensation for the acts.

*Intermediate period acts*

(5) However, for certain acts (called ***intermediate period acts***) done mainly before the judgment of the High Court in *Wik Peoples v Queensland* (1996) 187 CLR 1, that would be invalid because they fail to pass any of the future act tests in Division 3 of Part 2, or for any other reason because of native title, this Act provides for similar consequences to past acts.

*Confirmation of extinguishment of native title*

(6) This Act also confirms that many acts done before the High Court’s judgment, that were either valid, or have been validated under the past act or intermediate period act provisions, will have extinguished native title. If the acts are ***previous exclusive possession acts*** (see section 23B), the extinguishment is complete; if the acts are ***previous non exclusive possession acts*** (see section 23F), the extinguishment is to the extent of any inconsistency.

*Role of Federal Court and National Native Title Tribunal*

(7) This Act also:

(a) provides for the Federal Court to make determinations of native title and compensation; and

(aa) provides for the Federal Court to refer native title and compensation applications for mediation; and

(ab) provides for the Federal Court to make orders to give effect to terms of agreements reached by parties to proceedings including terms that involve matters other than native title; and

(b) establishes a National Native Title Tribunal with power to:

(i) make determinations about whether certain future acts can be done and whether certain agreements concerning native title are to be covered by the Act; and

(ii) provide assistance or undertake mediation in other matters relating to native title; and

(c) deals with other matters such as the keeping of registers and the role of representative Aboriginal/Torres Strait Islander bodies.

66 Sections 13A to 18 of the NTA provide for the validation of certain past acts and (by s 17) provide for an entitlement to compensation. Section 18 concerns the operation of s 51(xxxi) in certain circumstances. The resolution of the separate questions does not depend on any consideration of those provisions, and the parties did not address them in any detail, so we do no more than note them.

67 Section 47A of the NTA is applicable to much of the claim area. It is a beneficial provision, which permits the recognition of native title in certain circumstances by “disregarding” prior extinguishment for the purposes of a determination of native title. However, its operation was not a matter said by any of the parties to affect the answers to the separate questions.

68 Sections 51, 51A and 53 of the NTA concern the calculation and payment of compensation. Their presence in the legislative scheme is in our view of some relevance to the inherent defeasibility argument, but they are otherwise of no direct relevance to the answers to the separate questions.

69 The nature and operation of s 223(1) assumes some prominence in the parties’ arguments, especially the inherent defeasibility argument.

**223 Native title**

*Common law rights and interests*

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

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

70 Section 228 of the NTA defines a past act for the purposes of the compensation provisions. It relevantly provides:

**228 Past act**

*Definition*

(1) This section defines past act.

*Acts before 1 July 1993 or 1 January 1994*

(2) Subject to subsection (10), if:

(a) either:

(i) at any time before 1 July 1993 when native title existed in relation to particular land or waters, an act consisting of the making, amendment or repeal of legislation took place; or

(ii) at any time before 1 January 1994 when native title existed in relation to particular land or waters, any other act took place; and

(b) apart from this Act, the act was invalid to any extent, but it would have been valid to that extent if the native title did not exist;

the act is a ***past act*** in relation to the land or waters.

71 It was common ground for the purposes of the separate questions that if the applicant’s contentions about the 1939 Ordinance were correct (including because the Court rejected the Commonwealth’s arguments about the four pastoral leases), *and* the Court rejected the Commonwealth’s two constitutional arguments, then (at least) the 1939 Ordinance was a past act within s 228(2) (T407-408).

# RELEVANT HISTORICAL BACKGROUND

72 In some of the following sections, there are titles to legislative instruments, provisions in those instruments or in statutes, and descriptions of powers and circumstances which resonate with the past injustices inflicted on First Nations Peoples in this country. The reproduction of them here is necessary because those are the historic facts relevant to the Court’s consideration of the parties’ arguments, but that reproduction should not occur without the Court expressly recognising the impact that the use of such terms and descriptions may have on First Nations Peoples, and the way those terms and descriptions may recall the trauma of their lived experiences, and those of past generations.

73 Some of the history of post-colonisation control of the Northern Territory and the claim area is set out by Blackburn J in the *Gove Land Rights Case* at 147-149. We have drawn on this in setting out the chronology below.

## The period from 1863 to 1910

74 In July 1863, by Letters Patent under the *Australian Colonies Act* *1861* (UK), the whole of what is now the Northern Territory was annexed to the colony of South Australia.

75 On 1 January 1901, the Commonwealth of Australia was established under the Constitution. The area that is now the Northern Territory remained part of the (now) State of South Australia.

76 In the period 1886 to 1903, four pastoral leases were granted over the claim area. These are identified at SOC [113]-[163] and copies are attached to the SOC. The four pastoral leases are:

 Pastoral Lease No 1095 dated 26 January 1886, granted pursuant to the *Northern Territory Land Act 1872* (SA) or the *Northern Territory Crown Lands Consolidation Act 1882* (SA);

 Pastoral Lease No 1875 dated 15 August 1896, granted pursuant to the *Northern Territory Crown Lands Act 1890* (SA) (the **1890 Crown Lands Act**);

 Pastoral Lease No 1991 dated 13 October 1899, also granted pursuant to the 1890 Crown Lands Act; and

 Pastoral Lease No 2229 dated 21 September 1903 (the **1903 Lease**), granted pursuant to the *Northern Territory Land Act 1899* (SA) (the **1899 Land Act**).

77 Each pastoral lease covered all of the claim area, although each also extended beyond it. In other words, the pastoral leases covered an enormous area of land and waters. As we have noted, all parties accepted that the pastoral leases extinguished any or any surviving *exclusive* native title rights in respect of the claim area.

78 Each pastoral lease contained a reservation of minerals and timber. Each reservation was expressed in different language, the differences being a matter the Commonwealth noted might be of some importance. The one which the Commonwealth identified as most favourable to its extinguishment argument about these reservations was in the 1903 Lease. The relevant part of that lease provided:

AND ALSO excepting and reserving out of this lease under His Majesty His Heirs and Successors all trees and wood standing and being on the said lands and all minerals metals (including Royal metals) ores and substances containing metals gems precious stones coal and mineral oils guano claystone and sand with full and free liberty of access ingress egress and regress to and for the said Minister and his agents lessees and workmen and all other persons authorised by him or other lawful authority with horses carts engines and carriages or without in over through and upon the said land to fell cut down strip and remove all or any trees wood or underwood or bark and to work or convert such trees word or underwood into charcoal and to dig try search for and work the said minerals metals (including Royal metals) ores and substances containing metals gems precious stones coal and mineral oils guano claystone and send [sic – sand] and to take the same from the said lands and to erect buildings and machinery and generally to do such other work as may be required…

79 When we explain our conclusions on the Commonwealth and Northern Territory’s arguments about the reservations in the pastoral leases, we use the 1903 Lease. This is because, if the Commonwealth and Northern Territory’s contentions are not correct in relation to this pastoral lease, it follows from the Commonwealth’s submissions that their contentions would not be correct for any of the four leases.

80 The Commonwealth and the Northern Territory contended the effect of these reservations was to extinguish any remaining non-exclusive native title in terms of a right to take and use resources for any purpose, including minerals.

81 The right to take and use resources for any purpose, including minerals, is relied upon heavily by the applicant in his pleadings in terms of the effects of the compensable acts. It appears that it is for the extinguishment of this right that particular compensation is sought.

82 In other words, the inclusion of the pastoral lease argument in the separate questions is because the Commonwealth and the Northern Territory contend that the pastoral lease reservations have such an extinguishing effect that, thereafter, no native title mineral rights over the claim area continued and therefore the later compensable acts did not “affect” the asserted native title mineral rights.

## The period from 1911 onwards

83 On 1 January 1911, South Australia surrendered the Northern Territory under s 111 of the Constitution, which provides:

**States may surrender territory.**

The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

84 The Commonwealth accepted that surrender by the ***N****orthern* ***T****erritory* ***Acceptance Act*** *1910* (Cth), which included in the recitals reference to s 122 of the Constitution. Section 6(1) of the NT Acceptance Act relevantly provided:

The Northern Territory is by this Act declared to be accepted by the Commonwealth as a Territory under the authority of the Commonwealth, by the name of the Northern Territory of Australia.

85 Section 10 of the NT Acceptance Act relevantly provided:

All estates and interests, held by any person from the State of South Australia within the Northern Territory at the time of the acceptance, shall continue to be held from the Commonwealth on the same terms and conditions as they were held from the State.

86 The NT Administration Act was enacted in 1910 to provide for the “Provisional Government of the Northern Territory”. Section 13 provided:

(1.) Until the Parliament makes other provision for the government of the Territory, the Governor-General may make Ordinances having the force of law in the Territory.

(2.) Every such Ordinance shall—

(a) be notified in the *Gazette*;

(b) take effect from the date of notification, or from a later date to be specified in the Ordinance;

(c) be laid before both Houses of the Parliament within fourteen days of the making thereof, or, if the Parliament is not then sitting, within fourteen days after the next meeting of the Parliament.

(3.) If either House of the Parliament passes a resolution, of which notice has been given at any time within fifteen sitting days after any such Ordinance has been laid before the House, disallowing the Ordinance, the Ordinance shall thereupon cease to have effect.

87 The NT Administration Act provided for the acquisition of land in the Northern Territory. Section 9 provided:

The provisions of the *Lands Acquisition Act* 1906 shall apply to the acquisition by the Commonwealth, for any public purpose, of any land owned in the Territory by any person:

Provided that, in determining the compensation to which the owner is entitled under that Act, the value of the land shall be taken not to exceed the unimproved value of the land, or the interest therein of the owner, at the date of the passing of this Act together with the value of his interest in the improvements on the land at the date of the acquisition of the land.

88 No party referred to this provision as having any relevance to the issues before the Court. In our opinion what s 9 establishes, at least, is that the exercise of federal legislative power in the enactment of the NT Administration Act, supported by s 122 of the Constitution, expressly included a power to acquire property, and to do so on just terms.

89 In 1918, the Aboriginals Ordinance 1918 was made under the NT Administration Act. This ordinance continued in force until its repeal in 1953 by the *Welfare Ordinance 1953* (NT).

90 The effect of the Aboriginals Ordinance 1918 was relevantly described in ***Kruger*** *v Commonwealth* [1997] HCA 27; 190 CLR 1 at 49-53 (Dawson J) and 74-76 (Toohey J), and later in ***Director of Fisheries*** *(Northern Territory) v Arnhem Land Aboriginal Land Trust* [2001] FCA 98; 109 FCR 488, where Sackville J said at [41]:

In its original form, the Ordinance said nothing about entry into waters on or near an Aboriginal reserve. The *Yirrkala Report*, however, noted that (at par 26):

“Having proclaimed the Arnhem Land Reserve, the Government considered that the fact that the *Aboriginal Ordinance* ... provided that persons should not enter the reserves without permission indicated that it was the intention of the Ordinance to ensure that **reserves should be used solely by Aborigines**.”

(Emphasis added.)

91 Section 6 of the Aboriginals Ordinance 1918 provided:

(1.) The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody.

(2.) Any person on whose premises any aboriginal or half-caste is, shall, on demand by the Chief Protector, or by any one acting on behalf of the Chief Protector on production of his authority, facilitate by all reasonable means in his power the taking into custody of the aboriginal or half-caste.

(3.) The powers of the Chief Protector under this section may be exercised whether the aboriginal or half-caste is under a contract of employment or not.

92 By s 7 of the Ordinance, the Chief Protector was made the guardian of “every aboriginal and of every half-caste child, notwithstanding that the child has a parent or other relative living”.

93 In 1931, the NT Administration Act was amended so that the power of the Governor-General to make ordinances in the Northern Territory was provided for in s 21 of the Act, in similar terms to s 13 of the Act as enacted, except that each ordinance was required to be laid before each House of Parliament within 30 sitting days of the making of the ordinance.

94 On 14 April 1931, the Arnhem Land Reserve was created “for the use and benefit of the aboriginal native inhabitants of North Australia”, pursuant to s 102 of the *Crown Lands Ordinance 1927* (NT). An earlier reserve had been created in 1920. As well as being important factual background to the circumstances of First Nations Peoples in the claim area after settlement, the history of the Arnhem Land Reserve was raised particularly by the NLC parties in their submissions about the proper interpretation of the effects of the Mission Lease.

95 The Arnhem Land Reserve covered approximately 80,000 square kilometres at the time of its pronouncement in 1931. It was extended in October 1940 and then effectively consolidated with two other reserves in 1963 (Darch and Croker Islands on the Coburg Peninsula), following an inquiry by a parliamentary committee established in response to the Yirrkala Bark Petition. The reserve continued after 1963 by proclamation under a different ordinance, the *Crown Lands Ordinance 1931* (NT), apparently because of some doubts about the validity of the earlier proclamation: *Director of Fisheries* at [33]-[40].

96 On the applicant’s case as pleaded, the Arnhem Land Reserve remained in place for the entire duration of the Mission Lease, and encompassed the entire claim area. At no point during the Mission Lease’s term was any part of the Arnhem Land Reserve resumed, notwithstanding the existence of the power to do so under s 102 of the *Crown Lands Ordinance 1927* (NT).

97 Before turning to the arguments about the compensable acts, we deal with the Commonwealth’s contentions about the early grants of pastoral leases.

# THE PASTORAL LEASE RESERVATIONS ARGUMENT

98 A copy of the 1903 Lease is annexed as Document 4 to the SOC. The relevant reservation appears at 1-2 of that document. The reservation has been set out above, but for ease of reference we set it out again:

AND ALSO **excepting and reserving out of this lease** under His Majesty His Heirs and Successors all trees and wood standing and being on the said lands and **all minerals** metals (including Royal metals) ores and substances containing metals gems precious stones coal and mineral oils guano claystone and sand **with full and free liberty of access** ingress egress and regress **to and for the said Minister and his agents lessees and workmen and all other persons authorised by him or other lawful authority** with horses carts engines and carriages or without in over through and upon the said land to fell cut down strip and remove all or any trees wood or underwood or bark and to work or convert such trees wood or underwood into charcoal and **to dig try search for and work the said minerals** metals (including Royal metals) ores and substances continuing metals gems precious stones coal and mineral oils guano claystone and send [sic – sand] and **to take the same from the said lands** and to erect buildings and machinery and generally to do such other work as may be required …

(Emphasis added.)

## Applicable principles

99 There does not appear to be any real dispute between the parties about the applicable principles as to when an executive act or grant extinguishes native title rights. In essence, the test is concerned with inconsistency of rights. In ***Akiba*** *v Commonwealth* [2013] HCA 33; 250 CLR 209, French CJ and Crennan J explained at [30]-[35]:

The early approach of this Court in *Mabo v Queensland* and *Mabo v Queensland [No 2]* to determine whether native title rights or interests had been extinguished by legislative or executive action focused upon the intention to be imputed to the legislature or the executive. For both legislative and executive action, a plain and clear intention to extinguish native title was required. Imputed legislative intention is, and always was, a matter of the construction of the statute. …

The identification of a statute’s purpose may aid in its construction. That identification may be done by reference to the apparent legal effect and operation of the statute, express statements of its objectives and extrinsic materials identifying the mischief to which it is directed. However, purposive construction to ascertain whether a statute extinguishes native title rights or interests is not without difficulty where the statute was enacted prior to this Court’s decision in *Mabo [No 2]* that the common law could recognise native title. The difficulty was described by Gummow J in *Wik Peoples v Queensland*. The Court in that case was, as his Honour pointed out, construing statutes “enacted at times when the existing state of the law was perceived to be the opposite of that which it since has been held then to have been”. That reality affected the application of the purposive approach to construction. The Court therefore focused on inconsistency as the criterion for extinguishment. In the case of competing rights – native title rights and interests on the one hand and statutory rights on the other – the question was:

“whether the respective incidents thereof are such that the existing right cannot be exercised without abrogating the statutory right. If it cannot, then by necessary implication, the statute extinguishes the existing right.”

His Honour observed that that notion of inconsistency included the effect of a statutory prohibition of the activity in question.

In *Fejo v Northern Territory* the plurality held that a grant of land in fee simple extinguished underlying native title because the two sets of rights were inconsistent with each other. Similarly, in *Yanner v Eaton* the plurality said: “native title is extinguished by the creation of rights that are inconsistent with the native title holders continuing to hold their rights and interests.” Nevertheless, “[t]he extinguishment of such rights must, by conventional theory, be clearly established”.

…

The pre-eminence of inconsistency as the criterion of extinguishment of native title rights by the grant of rights by the Crown or pursuant to statutory authority was reiterated by the plurality in *Western Australia v Ward*. Their Honours warned against misunderstanding the criterion of “clear and plain intention” to extinguish, which had been used in earlier decisions of the Court. The subjective states of mind of those whose acts were alleged to have extinguished native title were irrelevant:

“As *Wik and Fejo* reveal, where, pursuant to statute, be it Commonwealth, State or Territory, there has been a grant of rights to third parties, the question is whether the rights are inconsistent with the alleged native title rights and interests. That is an objective inquiry which requires identification of and comparison between the two sets of rights.”

(Footnotes omitted.)

In so saying, their Honours emphasised the need to identify and compare the two sets of rights. In so doing, they distinguished between activities on land and the right pursuant to which the land is used. Their Honours went on to reject the proposition that there could be degrees of inconsistency between rights or, absent statutory powers, suspension of one set of rights in favour of another and said: “Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment.” …

(Footnotes omitted.)

100 In *Akiba*, Hayne, Kiefel and Bell JJ stated at [52] that “inconsistency of *rights* lies at the heart of any question of extinguishment” (original emphasis). Their Honours discussed the notion of inconsistency of rights at [61]-[64]:

This Court held in *Western Australia v The Commonwealth (Native Title Act Case)* that, at common law, native title rights and interests can be extinguished by “a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title”. In *Yanner*, the plurality noted that the “extinguishment of such rights must, by conventional theory, be clearly established”. Likewise, as the plurality held in *Ward*, under the NTA, “[w]hether native title rights have been extinguished by a grant of rights to third parties or an assertion of rights by the executive requires comparison between the legal nature and incidents of the right granted or asserted and the native title right asserted”.

As was also noted, however, by the plurality in *Ward*, while it is often said that a “clear and plain intention” to extinguish native title must be demonstrated, it is important that this expression not be misunderstood. The relevant question is one of inconsistency, and that is an objective inquiry. The “subjective thought processes of those whose act is alleged to have extinguished native title are irrelevant”.

Hence, as the NTA acknowledges in s 211, and as was held in *Yanner*, “[r]egulating 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)”. Likewise, regulating particular aspects of the usufructuary relationship with traditional waters does not sever the connection of the Torres Strait Islanders concerned with those waters (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent).

Not only does regulation of a native title right to take resources from land or waters not sever the connection of the peoples concerned with that land or those waters, regulation of the native title right is not inconsistent with the continued existence of that right. Indeed, as was pointed out in *Yanner*, “regulating the way in which a right may be exercised presupposes that the right exists”. Of course, regulation may shade into prohibition, and the line between the two may be difficult to discern. But the central point made in *Yanner*, and reflected in each of *Wik, Fejo, Yarmirr* and *Ward*, is that a statutory prohibition on taking resources from land or waters without a licence does not conclusively establish extinguishment of native title rights and interests of the kind found to exist in this case: “the rights to access, to remain in and to use the native title areas”, and “the right to access resources and to take for any purpose resources in the native title areas”.

(Footnotes omitted.)

101 To similar effect, in ***Western Australia v Brown*** [2014] HCA 8; 253 CLR 507, French CJ, Hayne, Kiefel, Gageler and Keane JJ stated at [32]-[33] and [37]-[38]:

Did the grant of the mineral leases extinguish some or all of the claimed native title rights and interests?

To answer this question, it is necessary, as the plurality held in *Ward*, to ask “whether the rights [granted] are inconsistent with the alleged native title rights and interests”. This question is “an objective inquiry which requires identification of and comparison between the two sets of rights”. …

…

The determination of whether two or more rights are inconsistent is also an objective inquiry. The question of inconsistency of rights can always be decided at the time of the grant of the allegedly inconsistent rights. And it must be decided by reference to the nature and content of the rights as they stood at the time of the grant. At that time, were the rights as granted inconsistent with the relevant native title rights and interests? As these reasons will later demonstrate, to the extent to which the decision in *De Rose [No 2]* countenances a notion of contingent extinguishment (contingent on the later performance of some act in exercise of the “potentially inconsistent” rights granted), it is wrong and should not be followed. In the present case, then, the question of inconsistency is to be determined at the time of the grant of the relevant mineral leases. What the joint venturers did or did not do in exercise of the rights granted under the mineral leases is important only to the extent to which it directs attention to the nature and content of the rights which were granted.

There cannot be “degrees of inconsistency of rights”. “Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment”. As counsel for the native title holders put the point in argument in this Court, inconsistency is that state of affairs where “the existence of one right necessarily implies the non-existence of the other”. And one right necessarily implies the non-existence of the other when there is logical antinomy between them: that is, when a statement asserting the existence of one right cannot, without logical contradiction, stand at the same time as a statement asserting the existence of the other right.

(Footnotes omitted.)

102 See also *Queensland v* ***Congoo*** [2015] HCA 17; 256 CLR 239 at [31]-[37] (French CJ and Keane J), [57]-[61] (Hayne J), [87]-[94] (Kiefel J), [130]-[131] (Bell J), [156]-[159] (Gageler J).

103 As submitted by the Northern Territory, without being exhaustive, native title may be extinguished by grant of inconsistent rights in land from the Crown to a third party or by the appropriation to the Crown of inconsistent rights in land: *Mabo (No 2)* at 63-64, Brennan J; ***Wik*** *Peoples v Queensland* [1996] HCA 40; 187 CLR 1 at 84-85, Brennan CJ. As to the extinguishing effect of an appropriation to the Crown, see *Bodney v Westralia Airports Corporation Ltd* [2000] FCA 1609; 109 FCR 178 at 189-191, Lehane J and *Lawson v Minister for Land and Water Conservation* *(NSW)* [2003] FCA 1127 at [21], Whitlam J.

## The Commonwealth’s submissions

104 The claimed native title right in issue is a non-exclusive “right to access, take and use for any purpose the resources of the Claim Area (including … minerals on or below the surface of the Claim Area)”: SOC at [52(b)(iv)].

105 The Commonwealth submits (in summary) that:

(a) Properly construed, the object of the minerals reservation in the 1903 Lease was to ensure that property in all minerals in the leased land was vested in the Crown and that rights to take those minerals were held by the Minister or agents or by authorised persons.

(b) At the time of the grant, it was likely assumed that the Crown already had full beneficial ownership of the claim area including all minerals. That assumption was overruled in *Mabo (No 2)*, which held that the Crown acquired only “radical title” rather than full beneficial ownership at settlement.

(c) If there were native rights in relation to minerals in the claim area, the minerals reservation was an assertion by the Crown of beneficial ownership in those minerals. The effect of the reservation was to appropriate to the Crown the minerals in the leased land.

(d) This view is supported by ***Attorney-General v Brown*** (1847) 1 Legge 312, a judgment of the Supreme Court of New South Wales (Stephen CJ, Dickinson and Therry JJ). In that case, the Crown brought an action for intrusion (which is similar to an action for trespass). A prerequisite was that the Crown had title by record under which it had a right of exclusive possession. It was held that the Crown had such title on the basis of a reservation in the lease.

(e) Although *Attorney-General v Brown* was overruled in *Mabo (No 2)*, that overruling does not affect its relevance for present purposes, as outlined above.

(f) This view is supported by a passage in the judgment of Gageler J in ***N****ew* ***S****outh* ***W****ales* ***Aboriginal Land Council*** *v Minister Administering the Crown Lands Act* [2016] HCA 50; 260 CLR 232 at [112], in which his Honour said:

Momentous as *Mabo [No 2]* was in the development of the common law of Australia, its significance for those aspects of *Attorney-General v Brown* [(1847) 1 Legge 312] that are of present relevance is minimal. Given that the land in question had been the subject of the grant of a Crown lease from which the coal in question had been expressly reserved, it is difficult to see how the result in *Attorney-General v Brown* could have been different even if the view which was to prevail in *Mabo [No 2]* had been applied. What would have been different would have been the steps in the analysis leading to that result: instead of the grant and reservation being seen as the exercise by the Crown of a proprietary right which the Crown had as the original absolute owner of all land in New South Wales on and from settlement in 1788, the grant and reservation would have been seen as an exercise by the Crown of non-statutory executive power which had the consequence of creating rights of ownership in respect of the land in question, in the Crown and in the lessee, on and from the time of the exercise of that non-statutory executive power in 1840. Either way, the Crown as represented by the Attorney-General would still have had the possession necessary to found an action for intrusion.

In that passage, Gageler J said that, although *Attorney-General v Brown* was overruled by *Mabo (No 2)*, the result of the case would have been the same if decided under the principles expressed in *Mabo (No 2)*. Gageler J referred to the grant and reservation being an example of the exercise by the Crown of non-statutory executive power which had the consequence of “creating rights of ownership” in respect of the land in question in the Crown. Further, Gageler J considered that the action for intrusion would have been successful post-*Mabo (No 2)*. That action required the Attorney-General on behalf of the Crown to have title by record under which it had a right to exclusive possession.

## Consideration

106 In our view, the Commonwealth has not established that any native title mineral rights in respect of the claim area were extinguished by the 1903 Lease.

107 First, although the term “reservation” in strict usage identifies something newly created out of the land or tenement demised, the term has often been used in Australia to identify that which is withheld or kept back: see ***Wade*** *v New South Wales Rutile Mining Co Pty Ltd* [1969] HCA 28; 121 CLR 177 at 194, Windeyer J; *Wik* at 200-201, Gummow J. In *Wade*, Windeyer J said that the terms “reservation”, “reserving” etc are “often used to mean a keeping back of a physical part of a thing otherwise granted: and so they are to be understood and have long been understood in the Australian law of real property”. It is true that, as the Commonwealth submits in its reply submissions, the judgment is predicated on the pre-*Mabo (No 2)* view that the Crown had ownership rights in respect of minerals. However, the observations of Windeyer J about the Australian usage of “reservation” or “reserving” remain apt in considering whether the reservation in the 1903 Lease constituted a mere holding back or the creation of property rights in the Crown.

108 Indeed, as the NLC parties submit, it would be paradoxical if the reservation extinguished any native title mineral rights given that the existence of reservations from a grant of a pastoral lease, including a reservation of timber and minerals, is a key reason why there is no necessary inconsistency between the grant of a pastoral lease and the continuance of non-exclusive native title rights to use the land and its resources: see, for example, *Wik* at 122 (Toohey J), 154 (Gaudron J), 200-201 (Gummow J), 229 (Kirby J); *Ward* at [178], [184], Gleeson CJ, Gaudron, Gummow and Hayne JJ.

109 Secondly, the text of the reservation in the 1903 Lease is consistent with a withholding or keeping back of any rights that may exist in relation to minerals, as distinct from a creation of rights in favour of the Crown. The words “excepting” and “reserving” appear to be used interchangeably or to express similar concepts. The words “out of this lease” suggest a holding back. The reservation of “liberty” to access and dig etc is made not only in respect of the Minister and those authorised by him, but also in respect of persons with “other lawful authority”. Thus, the lease contemplates persons other than the relevant servants of the Crown enjoying these aspects of the reservation. This is consistent with the reservation merely preserving whatever rights to access and dig etc otherwise exist from time to time.

110 Thirdly, the statutory context in which the 1903 Lease was granted (the 1899 Land Act) does not assist the Commonwealth’s contention, as set out in the applicant’s submissions at [196]-[200], which we adopt in the following paragraphs.

111 Section 1 of the 1899 Land Act provides that the Act must be read together with the 1890 Crown Lands Act. The following features of the 1890 Crown Lands Act are noted:

(a) The 1890 Crown Lands Act provides for the grant of various categories of leases, including perpetual leases, agricultural leases, pastoral leases and leases for special purposes. It also provides for sale of lands by public auction, the dedication of lands for public purposes, and the reservation of lands for various purposes.

(b) In relation to grants of fee simple and grants of perpetual leases under the 1890 Crown Lands Act, s 8:

(i) provides that such grants “shall not be construed to include or to convey any property in any gold, silver, copper, tin, or other metals, ore, mineral, or other substances containing metals, or any gems or precious stones, or any coal, or mineral oil in or upon such land, the same being reserved by the Crown”;

(ii) further provides that “it shall be lawful for the Minister, and for all persons authorised by him, at all times to enter upon any such land, and to search and mine for and remove therefrom any gold, metals, and other things reserved there found”;

but this provision does not apply to pastoral leases granted under the 1890 Crown Lands Act.

(c) In relation to perpetual leases granted under the 1890 Crown Lands Act, s 31 provides that every such lease “shall contain a reservation to the Crown of all gold, silver, copper, tin, and other metals, ores, minerals, and other substances containing metals, and all gems and precious stones, and all coal, timber trees (except dead fallen timber), and mineral oils in or upon the leased lands”. Again, this provision does not apply to other categories of leases such as pastoral leases.

(d) The only other respects in which the terms of the 1890 Crown Lands Act refer to mining or minerals are:

(i) one of the permitted purposes for reservation of lands is “for mineral reserves or reserves for gold mining purposes” (s 6(f)(iv));

(ii) one of the purposes for which land subject to a perpetual lease granted under the 1890 Crown Lands Act may be resumed is “for mining purposes” (s 33);

(iii) one of the purposes for which possession of land subject to a pastoral lease granted under the 1890 Crown Lands Act may be resumed is “for mineral purposes” (s 63(i));

(iv) one of the purposes for which special purpose leases could be granted is “for the working of mineral springs” (s 78(vii)); and

(v) section 90 provides that reserved or dedicated lands, and unalienated land under roads, “shall, for the purpose of mining, as well for gold as for other metals and minerals, and **for the purposes of all Acts relating to mining**, be deemed to be Crown lands, and **may be dealt with accordingly**” (emphasis added).

112 The 1890 Crown Lands Act is a statute directed at the grant of interests in land to third parties and the preservation of land for particular purposes. It is not a statute directed at mining generally, and does not provide a regulatory framework for mining, in contrast to legislation such as the 1939 Ordinance. It does not purport to vest title to minerals in the Crown or any person. Nor is the 1890 Crown Lands Act directed at appropriation of land by the Crown generally (as distinct from the resumption of leases granted under its terms).

113 Insofar as mining or minerals arise in the 1890 Crown Lands Act, it is in the context of describing the contours of the leases granted, not in a freestanding sense. Indeed, s 90 specifically contemplates that mining and mineral rights will be dealt with by other Acts that, unlike the 1890 Crown Lands Act, relate to mining. It leaves in place whatever position may obtain under those other Acts as regards mining and mineral rights, while clarifying that reserved and dedicated lands are to be considered “Crown lands” for this purpose. In this respect, “Crown lands” simply means lands that have not been alienated, dedicated or reserved, rather than lands that have been appropriated to the Crown’s absolute beneficial interest or the royal demesne. So much is clear from the definition of “Crown lands” in s 5 of the 1890 Crown Lands Act, which extends to “all lands in the Northern Territory” subject to specific exceptions.

114 The enactment of the 1899 Land Act does not alter this position. It merely replaces the provisions of the 1890 Crown Lands Act relating to pastoral leases with different and more comprehensive provisions. In particular, the 1899 Land Act contains provisions as to the terms and conditions of pastoral leases to be granted under that Act, including:

(a) section 23 provided that the term of such leases shall not exceed 42 years;

(b) section 24 provided that such leases “shall contain the covenants, exceptions, reservations, and provisions mentioned in Schedule A to [the 1899 Land Act]”;

(c) section 25 provided that no such lease “shall authorise the lessee to carry on mining operations of any description whatsoever upon the land leased”; and

(d) Schedule A relevantly included “an exception or reservation in favour of the Crown, and all persons authorised of all minerals, metals, gems, precious stones, coal, and mineral oils together with all necessary rights of access, search, procuration, and removal, and all incidental rights and powers”.

115 It is noteworthy that s 24 is expressed as a statutory requirement that pastoral leases contain particular terms, rather than a statutory prescription of the legal consequences of such leases. The text on its face is apt to impose a requirement that the instrument of grant contain the specified terms, but not to create any rights that would not follow under the general law from the fact that the terms of the lease are so expressed. Similarly, s 25 is expressed as a negative stipulation on the scope of rights conferred on a lessee by a pastoral lease; it is not expressed as a restriction or extinguishment of any rights the lessee (or another person) had independent of the pastoral lease.

116 Fourthly, it is difficult to see how *Attorney-General v Brown* can offer assistance in relation to this issue. The fundamental premise of the judgment is that the Crown had full beneficial ownership from the time of settlement (see 316-318). That part of the judgment was overruled in *Mabo (No 2)*. That premise is central to the reasoning in the case: see, for example, 323, lines 8-14.

117 Fifthly, while the passage in Gageler J’s judgment in *NSW Aboriginal Land Council* is supportive of the Commonwealth’s submissions, the observations were made in a very different context. The point being developed by Gageler J in the relevant passage concerned the existence of non-statutory executive power to create interests in land (see [100], [110]). The passage was not concerned with an issue of extinguishment of native title rights. In particular, his Honour did not express any view on whether the grant of a pastoral lease containing a reservation of minerals would have the effect of extinguishing any native title rights in respect of the minerals.

118 In light of the above, we do not consider it necessary to consider the applicant’s alternative argument that, even if the 1903 Lease reservation created rights in the Crown in respect of minerals, those rights could co-exist with any native title rights in respect of the minerals.

119 For these reasons, we reject the Commonwealth’s contentions in respect of the pastoral lease reservations. It follows that separate question 2(a) is to be answered “No”.

# THE MISSION LEASE

120 At [27]-[30] and [83]-[96] above, we have explained some of the background and tenure circumstances surrounding the grant of the Mission Lease on 1 July 1938. Conspicuous amongst those circumstances from the perspective of the applicant’s submissions is the existence of the Arnhem Land Reserve, the character of that reserve demonstrated by the extract at [90] above, and the fact that both tenures extended over the whole of the claim area.

121 In the *Gove Land Rights Case* at 148, Blackburn J described the arrival of Methodist missionaries in the area:

In November 1935 or thereabouts, the Reverend Wilbur Chaseling and others came ashore at Yirrkala, on the subject land (in about latitude 12 degrees 15 minutes south, longitude 136 degrees 53 minutes east) and founded the Mission which has existed there ever since. They were probably the first white men to establish permanent habitations on the subject land. The Methodist Missionary Society of Australia Trust Association had a lease of almost the whole of the subject land, together with other land, for a term of twenty-one years from 1st July, 1938.

122 At [174]-[178] of the SOC, it is alleged that the grant of the Mission Lease did *not* confer a right to exclusive possession on the Missionary Society. In other words, although the applicant identifies the grant of the Mission Lease as a compensable act, the effect of the pleading is that it is identified as no more than a *potentially* compensable act, and the applicant’s primary case is that the Gumatj non-exclusive native title was purportedly extinguished or impaired by later acts; namely either the 1939 Ordinance (at least as to mineral rights) or the grant of the special mineral leases (alleged to have impaired the broader native title rights and interests of the Gumatj).

123 Specifically, at [177]-[178] the applicant alleges:

By the reservation identified at paragraph 175 above and covenants identified at subparagraph 173(c) above, the Mission Lease:

a. had the effect that no rights to minerals, timber, timber trees, or other trees producing valuable substances were conferred upon the lessee; but

b. did not vest in the Crown title to such minerals, timber or trees; and

c. was not inconsistent with, and did not extinguish, the Non-Exclusive Native Title Rights in respect of such minerals, timber or trees.

In the premises of paragraphs 173 to 177 above, the grant of the Mission Lease was not inconsistent with, and did not extinguish, the Non-Exclusive Native Title Rights of the Gumatj and their predecessors in respect of the Claim Area.

124 To recall, the non-exclusive native title rights identified by the applicant are set out at [52(b)] of the SOC:

i. the right to live on the land, to camp, to erect shelters and other structures in the Claim Area;

ii. the right to travel over, move about and to have access to the Claim Area;

iii. the right to hunt, fish and forage on the Claim Area;

iv. the right to access, take and use for any purpose the resources of the Claim Area (including resources below, on or above the surface of the Claim Area, such as minerals on or below the surface of the Claim Area);

v. the right to have access to and use the natural water of the Claim Area, including subsurface water and aquifers;

vi. the right to have access to and use the airspace above the Claim Area;

vii. the right to engage in cultural and social activities on the Claim Area, including the transmission of cultural knowledge to younger generations; and to:

1. practice Yolngu law;

2. conduct, participate and control ceremonies;

3. conduct, participate in, and control cultural practices relating to birth and death, including burial rights;

4. hold and conduct meetings, events and conferences;

5. teach the physical and spiritual attributes of places and areas of importance on or in the land and waters;

6. participate in cultural practices relating to birth and death, including burial rights;

viii. the right to have access to, maintain and protect sites of significance, and areas or objects of cultural importance, on the Claim Area, and to enforce exclusion areas based on sacred aspects of Yolngu law.

125 Separate question 1(a) raises the issue whether the grant of the Mission Lease purported to extinguish any native title rights in the claim area that then subsisted. As the applicant recognised in his outline at [6.13], and the Commonwealth accepted in oral argument, the consequences of answering this issue affirmatively are that any right to compensation arises (if at all) only in respect of the Mission Lease, such that all other acts pleaded as compensable acts fall away. It is common ground that if the Mission Lease did purport to extinguish all non-exclusive native title in the claim area, then the two constitutional questions arise.

## The Commonwealth’s contentions

126 It is common ground that the source of power to grant the Mission Lease was s 14 of the Aboriginals Ordinance 1918. Section 14 has been set out above, but we reproduce it here for ease of reference. It provided:

(1) The Administrator may grant to any aboriginal institution leases of any Crown Lands for any term not exceeding twenty-one years, at such rent and on such terms as he thinks fit.

(2) The lease may confer a right of renewal, providing it can be shown to the satisfaction of the Administrator that the lands therein described are required for and applied to the use and entirely for the benefit of aboriginals or half-castes, or both.

127 The term “aboriginal institution” is defined in s 3 of the Aboriginals Ordinance 1918, which we discuss below. The Commonwealth makes the following principal contentions in support of an affirmative answer to separate question 1(a).

128 Taking the breadth of the operation of the Aboriginals Ordinance 1918, together with the absence of any prescribed form or content (other than as to maximum term), the Commonwealth submits the power in s 14 is to be construed as a power to grant a common law lease (also referred to as a general law lease) rather than a statutory lease. Therefore, the conditions of the lease were to be determined by agreement and by application of the common law. This leads, the Commonwealth contends, to the inevitable conclusion that the lease conferred a right to exclusive possession. No other party seriously disputed that if the correct characterisation of the Mission Lease was as a common law lease, then it should be understood to have conferred on the Missionary Society a right of exclusive possession.

129 The Commonwealth draws an analogy with one of the leases considered in *Ward*; namely a lease granted under s 32 of the *Land Act 1933* (WA). At [369]-[370], the plurality said:

The lease that was granted was not a statutory interest in land. The features of the interest granted were not prescribed by the Act but were determined by the nature of the agreement reached and the grant made. The rights thus granted to Ivanhoe were, therefore, rights as lessee of the land, as that term is understood in the general law. Ivanhoe was thus granted a right of exclusive possession of the land.

That being so it is not to the point to inquire, as the majority of the Full Court did, how it would be expected that the lessee would use the land or whether that use could be compatible with the continued exercise of native title rights or interests. The lessee having been granted a right of exclusive possession, the right thus granted was inconsistent with the continued existence of native title rights and interests and, subject to the operation of the RDA and the NTA, those latter rights were extinguished.

130 In the Commonwealth’s submission, despite the use of the phrase “on such terms as he thinks fit” in s 14, the power in s 14 conferred only a power to grant a common law lease and was not to be construed as a power to grant different types of leases.

131 Section 16 of the Aboriginals Ordinance 1918 is said by the Commonwealth to support its submission. The language used in, and the content of, this provision are obnoxious to present values in the Australian community, but the provision must be reproduced as enacted. Section 16 provided:

(1.) The Chief Protector may cause any aboriginal or half-caste to be kept within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any aboriginal reserve or institution, or to be removed from one reserve or aboriginal institution to another reserve or aboriginal institution, and to be kept therein.

(2.) Any aboriginal or half-caste who refuses to be removed or kept within the boundaries of any reserve or aboriginal institution when ordered by the Chief Protector, or resists removal, or who refuses to remain within or attempts to depart from any reserve or aboriginal institution to which he has been so removed, or within which he is being kept, shall be guilty of an offence against this Ordinance.

(3.) Sub-section (1.) of this section shall not apply to any aboriginal or half-caste—

(a) who is lawfully employed by any person; or

(b) who is the holder of a permit to be absent from the reserve or aboriginal institution in question; or

(c) who is a female lawfully married to and residing with a husband who is substantially of European origin or descent; or

(d) for whom, in the opinion of the Chief Protector, satisfactory provision is otherwise made.

132 The Commonwealth submits that s 16 conferred an in-person power on the Chief Protector, directed to the control of individuals. In *Kruger* at 40 (Brennan CJ), 51-52 (Dawson J) and 133 (Gaudron J), the High Court described how that power was used. For example, in *Kruger* at 51, Dawson J described the purpose of s 16 as being:

to enable the Chief Protector to place Aboriginals in those reserves or institutions, if necessary against their will, and thereby to restrict their freedom of movement.

133 The Commonwealth submits that the Aboriginal institution where people were “kept” would have been involved in this exercise of control by the Chief Protector, which in turn it contends supports a construction of s 14 as authorising only general law leases so that there could be full control over who could enter and who could leave the Aboriginal institution and the reserve. In other words, an Aboriginal institution in the place of the Missionary Society was authorised by s 16 to conduct the duties of the Chief Protector. Counsel continued:

the fact that contemporary standards would not regard any of this as acceptable or even consistent with what they were declared to be for, we say it cannot cloud the objective construction of the power in section 14 as it was enacted in 1918 and as it was enacted in 1938.

134 On its secondary and alternative contention, if the Mission Lease is properly to be characterised as a statutory lease, the Commonwealth submits the nature and circumstances of its grant, and its express and implied terms and conditions, lead to the conclusion that it was a statutory lease conferring exclusive possession.

135 The absence of a clause in the lease expressly conferring exclusive possession was said to be no barrier to this conclusion. Nor, the Commonwealth contended, were clauses that suggested the Missionary Society could not exclude “any and everyone from the land” (see *Western Australia v Brown* at [52]). Here the Commonwealth referred in particular to the reservation of a right of entry and inspection to the Crown. The Commonwealth submitted the statement in *Western Australia v Brown* has not been understood so literally in subsequent authorities, referring in particular to *Attorney-General of New South Wales v* ***Ohlsen*** *on behalf of the Ngemba/Ngiyampaa People* [2022] FCAFC 38; 290 FCR 173 and the reasons of Niall JA in ***Living and Leisure*** *Australia Ltd v Commissioner of State Revenue (Vic)* [2018] VSCA 237; 108 ATR 736.

136 The Commonwealth contended that none of the qualifications and reservations in the Mission Lease were of such a nature and quality to detract from the fundamental proposition that the power in s 14 was plenary in nature and intended to grant a lease with rights of exclusive possession, even if properly construed this was a statutory lease.

137 We note that the Mission Lease was not a “previous exclusive possession act” within the meaning of s 23B of the NTA (the effect of which would be to completely extinguish native title: see ss 23A, 23C), because of the terms of s 23B(9)(a) of the NTA, in that it was granted under legislation providing for the grant of leases for the benefit of Aboriginal peoples, the notion of “benefit” being said to incorporate historic concepts of what might “benefit” Aboriginal people: see [142] below. However, the Commonwealth submits:

that feature does not prevent the lease from extinguishing native title **at common law** if [the lease] was validly granted and conferred rights that were inconsistent with subsisting native title rights.

(Emphasis added.)

138 The reference to “validity” is, as we understand, a reference to whether s 51(xxxi) of the Constitution renders the grant invalid, there otherwise being no debate about the validity of past acts on the separate questions.

## The position of the other parties

139 The Northern Territory made no submissions about the effect of the grant of the Mission Lease. Queensland made no submissions on the Mission Lease issue. Swiss Aluminium supported the position of the Commonwealth.

140 The Rirratjingu parties supported the submissions of the applicant on this matter.

## The operation and purposes of the Aboriginals Ordinance 1918

141 As we have noted, the area covered by the Mission Lease as from 1938 (backdated to 1936) was, at the time of grant, already declared as an Aboriginal reserve under the *Crown Lands Ordinance 1927* (NT). That declaration had occurred in 1931. This is an important chronological and structural point to note: the Arnhem Land Reserve was in existence for some years prior to the grant of the Mission Lease, and continued in existence after the grant of the lease. The area remained an Aboriginal reserve subject to the terms of the Aboriginals Ordinance 1918. Thus, as the NLC submits, it is critical to assess the effect of the grant of the Mission Lease in the context of the existence of the Arnhem Land Reserve over the same area of land, and to understand the powers and duties conferred by the Aboriginals Ordinance 1918 in respect of Aboriginal reserves. To put the matter another way, the Mission Lease was imposed on land which had, and continued to have, the status of an Aboriginal reserve, and was to be regulated as such under the Aboriginals Ordinance 1918.

142 The Aboriginals Ordinance 1918 is an instrument directed, in the times in which it was enacted, at colonial conceptions about the “welfare” of Aboriginal people. The regime it created is now regarded as oppressive and wholly unacceptable. Nevertheless, in the historical context of 1918, the purpose of the regime has been construed as generally a beneficial but controlling one, with s 16 being construed as extending to non-beneficial purposes: see *Kruger* at 36-7, Brennan CJ.

143 Its short title was “An Ordinance relating to Aboriginals”. In its terms, it applied across the Northern Territory, and it sought to include in its reach those people that the Ordinance defined as Aboriginal: see s 3. It purported to capture many aspects of the lives of Aboriginal people in the Northern Territory, and by the establishment of an officer described as the “Chief Protector”, to confer wide powers of control and confinement of Aboriginal people on this officer and those whom the Chief Protector appointed pursuant to s 4(2) or to whom powers were delegated under s 4. The duties of the Chief Protector, as set out in s 5(1), were wide, and included a duty:

(e) to manage and regulate the use of all reserves for aboriginals; and

(f) to exercise a general supervision and care over all matters affecting the welfare of the aboriginals, and to protect them against immorality, injustice, imposition and fraud.

144 Property (such as blankets and bedding) issued to Aboriginal people was declared to remain the property of the Commonwealth: s 5(2).

145 By s 6, the Chief Protector could enter any premises in order to detain an Aboriginal person covered by the Ordinance. That would, in our view, include premises subject to any lease granted under s 14. Owners and occupiers of such premises had a positive duty to “facilitate” the detention of Aboriginal people on their premises by the Chief Protector: see s 6(2). That would include lessees under s 14 leases, such as the Missionary Society. By s 7, the Chief Protector was made the legal guardian of every Aboriginal child “notwithstanding that the child has a parent or other relative living”, unless the child was already a ward of the State. That would likely include at least some children living in the premises of the Missionary Society after the grant of the Mission Lease.

146 Part III of the Aboriginals Ordinance 1918 is entitled “Reserves and Institutions”. While this Part has been subject to some amendment, the purpose of the Part was to confer powers on the Administrator of the Northern Territory, as opposed to the Chief Protector. The office of the Administrator was established by s 4 of the NT Administration Act. As the name suggests, the role of the Administrator was a broad one, the office being intended to provide for the administration by the Commonwealth of the Northern Territory: see *Kruger* at 145, Gummow J. The Administrator could appoint a person as the Superintendent of a particular Aboriginal reserve (s 12 of the Aboriginals Ordinance 1918). An office with the same name was capable of being established for any “aboriginal institution” declared under s 13, and any Aboriginal people in that institution (described in the ordinance as “inmates”) were deemed to be “under the control and supervision” of the Superintendent: s 13(6).

147 Section 13 of the Aboriginals Ordinance 1918 is an important provision because it contains the power to establish, by the declaration of the Administrator, an entity as an “aboriginal institution” for the purposes of the Aboriginals Ordinance 1918. As sub-s (1) indicates, such institutions might be a school or an orphanage, or – relevantly – a mission station. Any declared institution is issued a licence: s 13(1). The provision assumes, we find, that a licence could be revoked by the Administrator, and this may affect any lease granted under s 14, because then the institution would no longer be an “aboriginal institution”.

148 Section 14 of the Aboriginals Ordinance 1918 authorises leases of Crown lands only to Aboriginal institutions. It does not authorise leases to any wider group than those institutions declared under s 13. By the link of the statutory concept of “aboriginal institution”, the purposes for the grant of the lease are plainly connected to the declaration under s 13. While s 14 does not compel the grant of a lease to an Aboriginal institution, it contemplates that a lease may be granted. The maximum term is fixed by s 14(1) at 21 years, with renewal being permitted under the terms of a particular lease by s 14(2). The right of renewal that may be inserted into a s 14 lease is not however at large. Rather, the Administrator must be satisfied that:

the lands therein described are required for and applied to the use and entirely for the benefit of aboriginals or half-castes, or both.

149 The NLC submitted, and we accept, that this was a limit on the right to renewal intended to benefit Aboriginal residents. We consider the limit is designed to ensure that any Aboriginal institution is operating in a way consistent with the views of the Administrator (and the Chief Protector) in terms of provision for the welfare of Aboriginal people in their charge. In other words, just as the declaratory power in s 13 is conferred for specific beneficial purposes, so too any lease granted under s 14 is intended to conform to those purposes, which are generally beneficial, but limited in their character.

150 As we have explained above, the Commonwealth contends that s 16 of the Aboriginals Ordinance 1918 supports its characterisation of s 14 as a power to grant a general law lease. Section 16(1) and (2) are extracted above.

151 We do not agree with the Commonwealth’s submission. As some of the judges in *Kruger* acknowledged, s 16 is a wider and coercive provision, not necessarily restricted to the beneficial purposes found in s 6 – or, we add, ss 13 and 14. Nevertheless, what s 16 indicates is the very limited control exercisable by any lessee over who comes onto the reserve, and therefore onto the leased land, and for what purpose. The decision about who is on the reserve, and who remains there, and how they are to be “kept” there, remains with the Chief Protector. A lessee such as the Missionary Society may be tasked to implement that confinement (through both its s 13 licence and its s 14 lease, we infer), but it carries out the instructions of the Chief Protector in this regard.

152 Section 19 of the Aboriginals Ordinance 1918 imposes a prohibition on all people entering and remaining on a reserve, except those specified in s 19. Those permitted to enter and remain are in limited categories – police and authorised officers, the Administrator, Chief Protector and Protectors, and Aboriginal people. It is a wide-ranging prohibition that also creates an offence for its contravention. The prohibition is effective to exclude all members of the Northern Territory community from a reserve unless they fall within one of the excepted categories. In 1924, s 19A was enacted to create the same prohibition in respect of land included in a lease to an Aboriginal institution, while adding two further excepted categories, including the person in charge of the Aboriginal institution.

153 In other words, in keeping with the (then thought to be) protective and beneficial purposes of creating reserves for Aboriginal people, creating “aboriginal institutions” regulated under the Aboriginals Ordinance 1918 and granting leases to facilitate the functioning of those Aboriginal institutions, the scheme of the Ordinance is to control, on pain of criminal punishment, access to the reserve and leased land. The control is not being exercised by, and is not contemplated to be exercised by, the lessee. The Ordinance itself imposes the controls on access, and does so for protective and beneficial purposes. That was the characterisation of the effect of the Ordinance adopted by Sackville J (Spender and Merkel JJ agreeing) in *Director of Fisheries* at [41]:

Over time, a series of ordinances has governed access to Aboriginal reserves in the Northern Territory. The earliest was the *Aboriginals Ordinance* 1918 (NT), the terms of which were discussed in *Kruger v Commonwealth* (1997) 190 CLR 1, especially at 49-53, per Dawson J; at 74-76, per Toohey J. The *Aboriginals Ordinance* required the Chief Protector of Aboriginals (later the Director of Welfare and the Director of Local Welfare) “to manage and regulate the use of all reserves for aboriginal people”, s 5(1)(e). See also *Welfare Ordinance*, s 8(e) and *Social Welfare Ordinance* 1964 (NT), s 10(b). The *Aboriginals Ordinance* also made it an offence for an authorised person, other than certain officials, police officers and Aboriginals, to enter or remain on a reserve (defined to mean a reserve declared by the Administrator for the purposes of the Ordinance): see ss 3 and 19. In its original form, the Ordinance said nothing about entry into waters on or near an Aboriginal reserve. The *Yirrkala Report*, however, noted that (at par 26):

“Having proclaimed the Arnhem Land Reserve, the Government considered that the fact that the *Aboriginal Ordinance* ... provided that persons should not enter the reserves without permission indicated that it was the intention of the Ordinance to ensure that reserves should be used solely by Aborigines.”

154 Sackville J noted at [43]-[44] that the Ordinances which replaced the Aboriginals Ordinance 1918 (the *Welfare Ordinance 1953* (NT) and the *Social Welfare Ordinance 1964* (NT)) “maintained the system of restrictions on entry into reserves”.

155 An example of the extent of control exercised by Protectors arises in s 21 of the Aboriginals Ordinance 1918. By that section, holders of miner’s rights are expressly excluded from reserves unless they have the written permission of a Protector. This provision is another illustration of the strict limits imposed on access to reserves and implicitly leases on reserves, even in respect of other holders of proprietary interests. However, the arbiter of those limits is not the lessee, but the Protector.

156 Finally, in terms of understanding the scheme of the Aboriginals Ordinance 1918, and the control of access to reserves and leased land on reserves, it is appropriate to note the scope of the regulation-making power conferred by s 67(1) of the Ordinance. By that section, the Administrator (or, as amended in 1930, the Minister) is empowered to make regulations about, amongst other matters, “the control of aboriginals … residing upon a reserve”, “authorizing entry upon a reserve by specified persons or classes of persons for specified objects” and imposing conditions on the grant of entry.

## The NLC’s argument about s 13 of the Aboriginals Ordinance 1918

157 At [44] of its written submissions, the NLC makes a contention not adopted by any other party: namely, that the Missionary Society was not an “aboriginal institution” within the terms of ss 3 and 13 of the Aboriginals Ordinance 1918, and so the Mission Lease “was simply not granted for the purposes of s 13” (at [45]). The NLC points to the absence in the evidence of any written declaration under s 13. As the NLC recognises, this submission is contrary to the submissions of the applicant.

158 The Commonwealth in reply objected to the NLC raising any submissions about the validity of the Mission Lease on the separate questions that were independent of the applicant’s case on the pleadings. We agree with the Commonwealth that it is not open to the NLC to do so. The separate questions proceed on the pleadings of the applicant, and the only invalidity pleaded by the applicant relates to the s 51(xxxi) arguments. In any event, we consider on the evidence before the Court that the Missionary Society was capable of falling within the terms of s 13, and the terms of the Mission Lease, which is before the Court, are sufficient evidence that in fact it did fall within the terms of s 13.

## Consideration of the Commonwealth’s principal argument

159 In our opinion, s 14 confers a power on the Administrator to grant a lease which is properly characterised as a statutory lease. The Mission Lease is a statutory lease. We reject the Commonwealth’s principal argument.

160 The Commonwealth’s argument invites an analysis that in substance has been rejected by the majority in *Wik* and by the majority in ***Wilson*** *v Anderson* [2002] HCA 29; 213 CLR 401. Save for the one isolated finding on which the Commonwealth relies, the approach now urged by the Commonwealth was not the approach adopted in *Ward*. The Commonwealth’s approach invites a return to a common law analysis dependent on the distinction between a lease and a licence, involving the analysis of a contract between two parties and the determination whether the agreement confers a right of exclusive possession: see ***Radaich v Smith*** [1959] HCA 45; 101 CLR 209 at 222, Windeyer J; *Goldsworthy Mining Ltd v Commissioner of Taxation (Cth)* [1973] HCA 7; 128 CLR 199 at 213, Mason J.

161 At common law, it was from the conclusion that a right of exclusive possession was conferred that courts determined an instrument to be a lease, and therefore a proprietary interest, rather than a licence, and therefore a personal interest. The conclusion that a contract or instrument was properly characterised as a lease flowed from a conclusion that the rights conferred included the right of exclusive possession. In that sense, the method at common law ended with a conclusion that an instrument was a “lease”, whereas as the plurality explain in *Wilson*, for the purposes of the NTA, the use of the word “lease” in historic statutory grants over land in Australia may say little about the nature of the rights conferred and whether they included exclusive possession.

162 In Australia since the mid-nineteenth century, interests in land were granted by the Crown through statute. In *Wik* at 108-112, Toohey J as a member of the majority traced the historical development of Crown grants, in particular pastoral leases, with a particular focus on how these interests came to be granted by statute rather than under prerogative power as was originally the case. Those passages repay careful reading and include aspects of Crown grants which travel beyond pastoral leases. From within these passages, a few of Toohey J’s findings should be extracted here. First, the overall summary by Dr TP Fry in his work ‘Land Tenures in Australian Law’ (1947) 3 *Res Judicatae* 158 at 160-161 of the move to giving the Governor of New South Wales statutory power to grant interests in land, which Toohey J extracts at 110:

It brought to an end the policy of concentration of settlement, which was to have been achieved by the Crown refusing to alienate the fee simple of, or to lease, any land outside ‘the nineteen counties’ around Sydney or outside small areas around Hobart, Melbourne and Brisbane. It also introduced a system of Crown leasehold tenures which led to the whole of Australia being transformed in subsequent decades into a patchwork quilt of freeholdings, Crown leaseholdings, and Crown ‘reserves’.

163 After referring to the grazing licence in issue in *R v Toohey; ex parte* ***Meneling Station*** *Pty Ltd* [1982] HCA 69; 158 CLR 327 and quoting a passage from Mason J (as his Honour then was), part of which we extract below, Toohey J says at 112:

These comments apply with particular force to Queensland where, at least at the time Dr Fry was writing, there were approximately seventy different kinds of Crown leasehold and Crown perpetual leasehold tenures. To approach the matter by reference to legislation is not to turn one’s back on centuries of history nor is it to impugn basic principles of property law. Rather, it is to recognise historical development, the changes in law over centuries and the need for property law to accommodate the very different situation in this country.

Pastoral leases lie in the grant of the Crown. They are the creature of statute and the rights and obligations that accompany them derive from statute. In light of this, it is pertinent to turn to the legislation pursuant to which the leases the subject of these appeals were granted.

164 In terms of the history of how the power to grant interests in land became statutory in nature, there is no basis to find that the situation in the Northern Territory was any different in substance to that discussed in *Wik*. While the Northern Territory was under the control of South Australia, there is no suggestion in any of the authorities that any different approach was taken to the grant of leasehold interests in land, or that it was done other than by statute. For example, the legislation granting the pastoral leases in issue in this proceeding was South Australian legislation, although operating in the Northern Territory. From the time of the NT Acceptance Act, the legislative authority for the Northern Territory was the Governor-General (or Governor-General in Council), whose powers derived from s 13 of the NT Administration Act, which contains the Ordinance-making power: see the *Gove Land Rights Case* at 284-285. Thus, from 1910 there remained a statutory basis for any grants of leasehold interest.

165 The argument made by the Commonwealth here is very much like the unsuccessful argument made by Queensland in *Wik*. In *Wik*, Queensland contended that the pastoral leases in question all conferred a right of exclusive possession *because* that was the character of a lease at common law, even if statute was the source of power to grant the interest. The majority in *Wik* (Toohey, Gaudron, Gummow and Kirby JJ) rejected this argument. We have already extracted the relevant passages from the reasons of Toohey J.

166 Gaudron J discusses the very early use of the prerogative to grant interests in land at 139-140, describing (at 140) that the:

prerogative power to dispose of land gave way to a power conferred by statute with the passage of the *Sale of Waste Lands Act* 1842 (Imp). Section 2 of that Act provided that the waste lands of the Crown in the Australian colonies were not to be alienated by the Crown either in fee simple or for any less estate or interest otherwise than by sale conducted in accordance with the regulations made under the Act.

(Footnotes omitted.)

167 Her Honour then describes the movement away from alienation of land by grant of fee simple to alienation by way of leasehold interests, and thereafter discusses the way in which statutes authorising the grant of various kinds of leases emerged in New South Wales and Queensland, noting (at 142) that both the *New South Wales Constitution Act 1855* (Imp) and *Queensland Constitution Act 1867* (Imp) provided for the vesting of the “entire management and control of the waste lands belonging to the Crown … in the Legislature of the … colony”. Gaudron J then proceeds to discuss the various iterations of statutory powers to grant leasehold interests over the years, and concludes at 149:

It is clear that pastoral leases are not the creations of the common law. Rather, they derive from specific provision in the Order-in Council of 9 March 1847 issued pursuant to the *Sale of Waste Lands Act Amendment Act* 1846 (Imp) and, so far as is presently relevant, later became the subject of legislation in New South Wales and Queensland. That they are now and have for very many years been entirely anchored in statute law appears from the cases which have considered the legal character of holdings under legislation of the Australian States and, earlier, the Australian Colonies authorising the alienation of Crown Lands. Thus, for example, it was said of such holdings in *O’Keefe v Williams* that “[t]he mutual rights and obligations of the Crown and the subject depend, of course, upon the terms of the Statute under which they arise”.

(Footnotes omitted.)

168 Taking this approach did not however prevent her Honour from referring to the character of common law leases. This is instructive when we come to consider the passage in *Ward* upon which the Commonwealth relies as the sole example supporting its primary contention. Having considered the particular leases in detail, and the statutory provisions necessary to determine – as a matter of construction – what kind of interest was conferred, her Honour said (at 150-151):

There are two features which point in favour of the view that the Mitchellton Pastoral Leases were true leases in the traditional common law sense and, thus, conferred rights of exclusive possession. The first is the language of the Act and of the Leases. In this regard, the use of the words “demise”, “lease” and derivatives of the word “lease” in the statutory provisions concerned with pastoral leases and in the Leases themselves, are to be noted. …

The second feature which points in favour of the view that pastoral leases under the 1910 Act were true leases is that the 1910 Act clearly distinguished between leases and licenses, thereby suggesting that it was maintaining the traditional common law distinction between a lease, which confers a right of exclusive possession, and a license, which does not.

169 Her Honour is not finding that the pastoral lease *is* a common law lease; she is treating it as a statutory lease but with characteristics that might suggest that features of common law leases (including exclusive possession) were being attributed to pastoral leases. Ultimately, over the next few pages of her Honour’s reasons, Gaudron J concludes that despite these two features, exclusive possession was not conferred. Her Honour reached that conclusion principally by reference to the authorising statute itself and the rights it conferred on others: see at 154. Her Honour concluded at 155, in a passage we also consider has relevance to the present question:

As Deane J and I explained in *Mabo [No 2]* the rule to which reference has just been made is not a special rule with respect to native title; it is simply a manifestation of the general and well settled rule of statutory construction which requires that “clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation”. Whether the rule be stated generally or by reference to native title rights, it dictates the conclusion that, whilst the grant of a pastoral lease under the 1910 Act certainly conferred the right to occupy land for pastoral purposes and s 204 conferred the right to bring action for the removal of persons in unlawful occupation, a pastoral lease did not operate to extinguish or expropriate native title rights, as would have been the case, had it conferred a right of exclusive possession.

(Footnotes omitted.)

170 Gummow J also noted (at 168) that:

Prerogative powers were supplanted in Queensland by statute as a result of constitutional development in the second half of the nineteenth century. As will appear in the course of these reasons, the issues on these appeals turn upon the proper construction of the *Land Act* 1910 (Q) (the 1910 Act) and the *Land Act* 1962 (Q) (the 1962 Act), and upon the terms of the grants of pastoral leases thereunder.

171 From there on, his Honour’s starting point was clearly expressed:

I begin with the proposition that for a statute such as the 1910 Act or the 1962 Act to impair or extinguish existing native title or to authorise the taking of steps which have that effect, it is necessary to show, at least, the intention, “manifested clearly and plainly”, to achieve that result. That is how the point was expressed in the joint judgment of six members of the Court in the *Native Title Act Case*.

(Footnotes omitted.)

172 After explaining that “intention” does not mean subjective intention, Gummow J turned, as Toohey and Gaudron JJ had done, to discuss the historical development of the alienation of Crown land in Australia, and the policy battle between the Imperial authorities and the local authorities over the control of land in Australia, culminating in the position that (at 173-174):

The result was to withdraw from the Crown, whether represented by the Imperial authorities or by the Executive Government of Queensland, significant elements of the prerogative. The management and control of waste lands in Queensland was vested in the legislature and any authority of the Crown in that respect had to be derived from statute.

There followed the enactment in Queensland and elsewhere of statutes designed to provide for conditions unknown in England and to meet local wants in a fashion unprovided for in England.

(Footnotes omitted.)

173 Gummow J continued (at 174-175):

Then there was the creation by statute of what Griffith CJ called “new forms of tenure”. This legislative activity illustrated the general propositions that statute may create interests in property which are unknown to the common law and that “there is nothing higher among legal rights than a right created by statute”. To these new forms of tenure the terms “lease” and “licence” applied in a new and generic sense. The legislation teemed with “proverbial incongruities” and Higgins J used the term “quasi-Crown lands” to identify those areas as to which there had been conferred a tenure short of a fee simple. Of the operation of that system in New South Wales in 1905, that is to say shortly before the enactment of the 1910 statute in Queensland, A C Millard and G W Millard wrote:

“The whole of the numerous and elaborate provisions of the Acts for the alienation and occupation of Crown lands are examples of the legislation which has been necessary to meet the peculiar conditions and wants of the colony. Nothing corresponding to the body of laws thereby created is found in English law, there being nothing in England analogous to the vast area of unoccupied lands in this colony, of which the Crown is the nominal, and the public the real owner, the settlement of which is necessary to the welfare and progress of the country.”

(Footnotes omitted.)

174 While Gummow J was here referring to the way statutory interests such as pastoral leases came to be developed, his Honour’s observations apply also to the circumstances of the Mission Lease. Tragically, another “peculiar condition and want” of the Australian colony was its subjugation of Aboriginal people. The systems designed to achieve that subjugation and control were enacted through statute and legislative instruments, as the Aboriginals Ordinance 1918 demonstrates. The Aboriginal reserve system was a key “peculiar” feature of this scheme. So were the creation and maintenance of Christian missions, and the way those missions were used to confine and control Aboriginal people. The lease presently under consideration was created as part of that statutory system.

175 Kirby J made similar observations about the distinct nature of interests in land granted by statute to suit Australian conditions and government policies, also relying on Dr Fry’s work: see at 243. His Honour asked rhetorically at 244:

Why, in such circumstances, it should be imputed to the Queensland Parliament in 1910 and 1962 that it had imported all of the incidents of the English common law of leases is not immediately plain. Pastoral leases covered huge areas as extensive as many a county in England and bigger than some nations. In these circumstances, it seems distinctly unlikely that there can be attributed to the Queensland Parliament an implied purpose of granting a legal right of exclusive possession to the pastoralist (including as against Aboriginals known to exist on the land and unmolested in their continuing use of it) where that Parliament held back from expressly so providing.

176 Later, his Honour observed (at 244-245):

But if the Crown’s power to make such a grant, properly analysed, exists simply because Parliament has said that it does, that is sufficient. Importing into the *Land Acts* notions of the common law apt for tenurial holdings under the Crown in medieval England, and attributing them to the Crown itself, piles fiction upon fiction. As it is not expressed in the legislation, I would not introduce it.

… As to the argument that the very word “lease” and the other words familiar to leasehold interests (“demise”, “rent”, “assigns”) are used in the *Land Acts*, I am quite unconvinced that they are sufficient to import all of the features of a common law lease.

177 The following passage from Kirby J’s reasons (at 249) could also be applied to the Mission Lease:

The exercise of the leasehold interests to their full extent would involve the use of the land for grazing purposes. This was of such a character and limited intensity as to make it far from impossible for the Aboriginals to continue to utilise the land in accordance with their native title, as they did. In that sense, the nature of the interests conferred by a pastoral lease granted under the successive *Land Acts*, was not, of its legal character, inconsistent with native title rights.

178 So too, the exercise by the Missionary Society, as an Aboriginal institution, of its leasehold interest to the fullest extent would involve no more than the running of the Mission. The rights conferred to enable that to occur are not of a nature that brings to an end the non-exclusive rights of the native title holders in the claim area.

179 In summary then, the majority in *Wik* look at the very particular conditions that had arisen in Australia after colonisation, with a focus on the undisputed move to requiring grants of Crown land to be made pursuant to statute, together with the fact those statutory grants were made for the purposes of creating interests, and permitting uses, quite different from those in England.

180 In contrast, the minority in *Wik* took an approach which is compatible with the approach the Commonwealth now urges on this Court. Brennan CJ (with whom Dawson and McHugh JJ agreed) held (at 75, referring to *Radaich v Smith*) that:

a true lease confers on the lessee a right to exclusive possession, albeit that right might be subject to particular reservations or exceptions.

(Footnotes omitted.)

181 At 76, Brennan CJ set some store by the language used in the instruments under consideration in *Wik* – that they were called a “lease”, and that they included phrases such as “demise for a term of years”, an obligation to pay rent and “surrender” and “forfeiture” of the lease. His Honour concluded (at 76, referring to his earlier decision in *American Dairy Queen (Q’ld) Pty Ltd v Blue Rio Pty Ltd* [1981] HCA 65; 147 CLR 677 and other authorities):

This is the language of lease.

182 By that conclusion, Brennan CJ meant, we infer, a grant that confers exclusive possession. Brennan CJ also used (at 80) the distinction in the *Land Act 1910* (Qld) between provisions dealing with licences and provisions dealing with leases:

If the 1910 Act intended the lease to confer no more than the rights expressed by the Act, there would have been little point in distinguishing between leases and licences which share many statutory features.

183 The minority approach in *Wik* was not revived in later cases. In *Wilson*, Gleeson CJ reiterated the majority approach in *Wik* at [12]:

What is relevant is that, objectively considered, there was an intention to create an estate that was inconsistent in its incidents with continuing native title rights and interests. The same applies to the creation of a leasehold estate which confers a right of exclusive possession in the lessee. That statement may appear tautologous. But the decision in *Wik* shows that “lease”, like “intention”, can be a slippery word. In a straightforward case, such as a residential tenancy, it may be easy to conclude that a lessee was intended to have a right of exclusive possession. Such a conclusion would then lead directly to the assignment of the case to category (ii) of Brennan CJ’s three categories.

184 At [14], the Chief Justice also clarified the correct approach to “intention”:

A majority of the Court in *Wik* accepted that if, as a matter of construction, the leases there in question conferred a right of exclusive possession, native title was extinguished. Partly because of the [size] and location of the subject land (one holding was 1,119 square miles in area; another was 535 square miles), the consequences for Aboriginal people were regarded by some members of the Court as having a bearing upon the question of construction. But, in so far as there was a question of intention to be decided, the **question was whether the intention was that the lessees should have exclusive possession of the land**.

(Emphasis added, footnotes omitted.)

185 This passage is instructive in understanding how the Commonwealth’s principal contention is inconsistent with the majority approach in *Wik* as reiterated by Gleeson CJ in *Wilson*. In form, the Commonwealth’s contention invites the Court to construe s 14. But it invites the Court to ask not whether the intention of s 14 was to grant exclusive possession through a lease, but whether the intention of s 14 was to grant a common law lease, and *therefore*, to grant exclusive possession.

186 That is to depart from the analysis preferred by most of the authorities, for the reasons explained and which are peculiar to Australian land law and colonial circumstances. The Commonwealth’s approach puts the cart (the ultimate character of the grant as a common law lease) before the horse (whether exclusive possession was intended to be conferred).

187 *Wik* was of course a claim outside the NTA, having been commenced before the NTA was enacted. In *Wilson* at [58]-[60], this time through the lens of the NTA but nevertheless consistently with *Wik*, the plurality explained how the definition of “lease” in s 242 of the NTA was to be understood:

It will be apparent that the expression “lease” as defined in s 242 is wide enough to encompass for the purposes of the NTA statutory interests which may not necessarily amount to a lease as understood by the common law. The Lease at issue in this case satisfies the above definition. It was granted under s 23(1)(a) of the *Western Lands Act*. This section was substituted for the original s 23 by s 8 of the *Western Lands (Amendment) Act* 1934 (NSW) (the 1934 Act). The new s 23(1)(a) provided that it was lawful for the Minister to grant “leases” of Crown lands as “leases in perpetuity”. Paragraph (c) of s 242(1) of the NTA therefore is satisfied.

The definition in s 242 of “lease” is of importance in the present proceedings because it demonstrates that the NTA postulates the existence of an interest which, although described as a “lease”, is not a lease at common law. Further, the scheme of Div 2B of Pt 2 is premised upon the fact that a “lease” under the NTA may or may not confer a right of exclusive possession. **These considerations illustrate the flaw in reasoning that as an interest was described as a “lease” it is to be presumed that a right of exclusive possession was conferred**.

It is possible that, as an exclusive pastoral lease or as a lease conferring a right of exclusive possession over particular land, the Lease, being a “lease in perpetuity” under the *Western Lands Act*, satisfies either or both of pars (iv) and (viii) of s 23B(2)(c) of the NTA; par (iv) engages the definition of “exclusive pastoral lease” in s 248A. It is in this way that the issue for determination arises — whether on grant in 1955 the Lease conferred a right of exclusive possession upon the grantee thereof. That issue turns upon the meaning of the statutory expression “lease in perpetuity” and requires an examination of the nature of the perpetual holdings created under the *Western Lands Act* and the Consolidation Act.

(Emphasis added, footnotes omitted.)

188 The NTA definition of “lease” in s 242 may not be directly engaged here because of the exclusionary effect of s 23B(9)(a) of the NTA. However, the point the plurality emphasises in these paragraphs remains relevant; namely that where the power to grant the lease in question is sourced to a statute, the nature of the interest granted will turn on the proper construction of the power and the particular instrument comprising the exercise of the power. Whether or not it is called a “lease” will signify very little. This was the point made by the majority Justices in *Wik* in the passages to which we have referred. Subject to the one example on which the Commonwealth relies, this was also the approach taken in *Ward*.

189 Section 23(1) of the *Western Lands Act 1901* (NSW), in issue in *Wilson*, was expressed as follows (see *Wilson* at [65]):

(1) It shall be lawful for the Minister to grant leases of Crown lands —

(a) as leases in perpetuity; or

(b) for any term expiring not later than the thirtieth day of June, one thousand nine hundred and seventy-three.

Any lease so granted shall except as otherwise provided in this Act be subject to the general provisions of this Act.

190 The Court in *Wilson* held this provision conferred a power to grant a statutory lease. The statute did not closely prescribe terms for the leases, but made the lease generally subject to the empowering Act. This empowering provision is not materially different from s 14 of the Aboriginals Ordinance 1918. Nor in any other native title case that the Commonwealth could identify, aside from the one example in *Ward*, has it been suggested that a statute conferring power to grant a lease of Crown lands should be construed as a power to grant a common law lease with the inevitable consequence that the lease confers exclusive possession on the lessee.

191 All of the leases in issue in *Ohlsen*, for example, were agreed to be statutory leases, even though some of the statutory powers authorising the leases bore some resemblance to s 14 because they were powers to grant leases for particular purposes. For example, in *Ohlsen* at [29], the Full Court described the seventh category of lease in issue in that appeal, special leases for a term, and said:

Section 90 of that [Crown Lands] Act prescribed that special leases for a term were to be granted for specified purposes, including for wharves, irrigation works, saw-mills, quarries and similar industrial development. Each of the special leases for a term that were in issue before the primary judge was granted under s 75 of the CLCA 1913. That provision imposed a statutory limit on the maximum term of the leases at 28 years, which was subsequently extended to 40 years and then effectively removed by an option to convert special leases for a term to leases in perpetuity. Regulations made under the CLCA 1913 set out a list of conditions that could be imposed on a special lease for a term, including 22 conditions that applied to a lease unless its Gazettal notice specified otherwise.

192 In *Ward*, some of the extinguishment issues related to pastoral and mining leases, but others related to three other kinds of lease: a conditional purchase lease under s 62 of the *Land Act* *1898* (WA), special leases under Pt VII of the *Land Act 1933* (WA) and leases of reserved land under s 32 of the *Land Act 1933* (WA). The plurality reasons are those of Gleeson CJ, Gaudron, Gummow and Hayne JJ, with Kirby J concurring.

193 It was a lease in the third category, the Ivanhoe lease, where the finding was made on which the Commonwealth relied: see [129] above. Other leases, also granted pursuant to powers in the *Land Act 1933* (WA) or its predecessor, were characterised as statutory leases. Some of them were found as a matter of fact to confer exclusive possession; some of them were not.

194 The Court’s reasoning on the Ivanhoe lease was relatively brief. The fact that the statutory power in question authorised the grant of a lease “for any purpose” the Governor thought fit was considered important: see [366]. The lease itself specified the purpose of grazing (see [368]), but it was the statutory power to grant for *any* purpose which seems to have been critical to the Court’s reasoning. It was this feature, in our opinion, which led the Court to characterise the lease as one “determined by the nature of the agreement reached and the grant made” (at [369]). In other words, the statutory power was general (for any purpose), and the parties had, by their contract in the lease itself, agreed on a lease for the purpose of grazing. All the key terms – such as it being an annual lease, renewable, and conditions about third party access – were contained in the agreement between the parties and were not imposed by, or referable to, the *Land Act 1933* (WA). That is the central aspect of the Court’s reasoning.

195 Because the Court’s reasons do not engage in any *comparison* between the various leases in issue in *Ward*, it is not possible to know how many, if any, of the other leases in question were granted under statutory powers where many of the terms and conditions of a particular lease were left to the agreement of the parties. The fact that the parties’ agreement contained a considerable number of restrictions on the rights of the lessee (see [368]) was no longer of concern to the Court, because the Court gave overwhelming priority to the fact the terms were agreed between the parties, disconnected (it seems) from the statute. Having made that finding – that what was granted was a common law lease – an inevitable conclusion then followed that the lessee had been granted exclusive possession, and so native title had been extinguished. Thus, all the features which otherwise needed to be weighed up in considering whether exclusive possession was granted (and which the Court weighed up in relation to many of the other leases in *Ward*, just as the Court in *Wik* had done and the Court in *Wilson* would subsequently do) did not need to be considered. The considerable list of restrictions at [368] was, the Court implicitly held, imposed only as a result of the parties’ agreement and could not alter the character of the interest granted, being exclusive possession *because* it was a common law lease.

196 The Ivanhoe lease is the only example the Commonwealth could find to illustrate a finding of this kind having been previously made, in respect of a historical lease granted under a statutory power.

197 In our view, the single finding in *Ward* does not bind us because it is a finding or conclusion about a particular lease.

198 Further, the finding is distinguishable because there is no analogy between the facts of the Ivanhoe lease and the facts of the Mission Lease. On the High Court’s findings, the Ivanhoe lease was granted pursuant to a bare and general power in the *Land Act 1933* (WA), devoid of a specific purpose, with no other terms or constraints in the empowering statute about the nature of the leasehold interests to be granted – instead with all those terms being the subject of agreement between the parties.

199 The facts of and surrounding the Mission Lease are quite different.

200 The power in s 14 was entirely tied to the purposes of the Aboriginals Ordinance 1918, and furthering the purposes and functions of the Arnhem Land Reserve as an Aboriginal reserve. The power in s 14 is not at large as the power in the *Land Act 1933* (WA) was. The parties to the Mission Lease did not, independently of the power conferred in s 14, agree on a particular use for the land. The use of the land was confined by the Missionary Society’s position as an Aboriginal institution, operating under the Aboriginals Ordinance 1918, on an Aboriginal reserve.

201 The Mission Lease was expressed as being granted “under and subject to” the Aboriginals Ordinance 1918 and “the Regulations for the time being in force thereunder”. We recall here our findings above about the subject matter and breadth of the regulation-making power, and how it extended to additional controls on access to reserves and therefore, through the lease conditions, to the potential for further controls on access to the land, once leased. We also recall that the duties of the Chief Protector included the management and regulation of the use of all reserves for Aboriginal people, which again, by reason of the subjection of the lease to the Aboriginals Ordinance 1918, included the leased land. Management and regulation of use clearly incorporates controls on access to the reserve, and therefore to the leased land.

202 The other features of the legislative scheme in the Aboriginals Ordinance 1918 which inform the nature of the power in s 14 and distinguish it from the Ivanhoe lease in *Ward*, as we have explained above, are:

(a) the control retained by the Chief Protector over children in an Aboriginal institution and on an Aboriginal reserve: see ss 6, 7, 15 and 16, all of which incorporate access without the need for any permission to the premises of an Aboriginal institution, including the land on which it is located; and

(b) the creation of restricted categories of people who could access an Aboriginal reserve, and therefore the leased land as well: see ss 19 and 20. There is no suggestion in the Mission Lease that the grant of the lease rendered these provisions inapplicable. To the contrary, the terms of the lease expressly contemplate their application.

203 In other words, the Aboriginals Ordinance 1918 itself contemplates very little control of access to land residing with a lessee under s 14.

204 The power in s 14 is entirely purposive, and facultative of the purposes of the Aboriginals Ordinance 1918. The power of the Administrator to grant a lease is itself restricted: it may only be granted to an Aboriginal institution, itself a defined term again limited by the purposes of the Aboriginals Ordinance 1918. Such an institution requires a licence issued under s 13, and as we observed earlier, if that licence was cancelled, then the resumption or forfeiture powers in the lease could be exercised to bring the lease to an end. The duration of the lease is prescribed by s 14. While it is true that rental and other terms are left to the discretion of the Administrator, we do not consider that in itself suggests that the nature of the power in s 14 is intended to authorise the Administrator contracting as they saw fit to confer exclusive possession on third parties occupying an Aboriginal reserve. All express and implied indications are to the contrary. Further, it is commonplace in many statutory leases of the time, as the leases in *Wik*, *Ward*, *Wilson* and *Ohlsen* reveal, for some mechanical terms of a lease, such as rental, to remain un-prescribed by the empowering legislation, without this depriving the lease of its character as a statutory lease.

205 The ability to include a right of renewal as a term of any lease (see s 14(2)) confirms the statute intends to control the grant of the lease, and that the lease is a creature of statute. Any right of renewal is limited by the statute to circumstances where the Administrator is satisfied that the leased land is “required for” the benefit of Aboriginal people, and will be used only for that purpose. This is avowedly the statute controlling not only what can be done on the land, but also how the lessee may exercise rights over the land, because activities under the lease are directly controlled not only by the terms of the Aboriginals Ordinance 1918 but also by the ongoing decision-making of the Chief Protector.

206 For these reasons, the proper construction of s 14 does not suggest that the power conferred is one to grant a common law lease conferring exclusive possession on the grantee, let alone that this is the only power conferred.

207 The power in s 14 is to be properly construed as a power to grant a statutory lease.

## Consideration of the Commonwealth’s alternative argument

208 The next question is: when this power was exercised to grant the Mission Lease, what was the nature of the leasehold interest conferred on the Missionary Society? In considering this question, there is some overlap with the matters we have already discussed above. In our opinion, the Mission Lease did not confer a right of exclusive possession on the Missionary Society, and the grant of a lease of this kind was not intended to be inconsistent with the continuation of native title in the co-extensive area of the Arnhem Land Reserve, the leased land and the claim area.

209 In *Congoo* at [168], Gageler J emphasised the importance of correctly characterising the statutory purpose of the power conferred (here, to grant a lease; in *Congoo*, to order the taking of possession of land by the Commonwealth):

The right of the Commonwealth or power of the Minister to exclude persons who had pre-existing rights to be on the land, on that alternative interpretation of reg 54, would still not have been to exclude anyone from any or all of the land for any purpose. It would at most have been a limited purposive right or power to exclude, relevantly indistinguishable from those conferred on the lessees of the mining leases whose “exclusive possession” for mining purposes was held not to extinguish native title rights in *Western Australia v Ward*. That holding illustrates the proposition that a right or power conferred for a statutory purpose, to be exercised for that purpose, is not inconsistent with native title holders continuing to hold rights or interests under their traditional laws and customs which remain recognised by the common law merely because an exercise of that right or power might prevent native title holders from exercising or enjoying those rights or interests.

(Footnotes omitted.)

210 That analysis is applicable here. The purpose of the power in s 14 is (relevantly to the area in issue) to aid and facilitate the maintenance of the Arnhem Land Reserve and the confinement and control of Aboriginal people on it, ostensibly for their benefit and in pursuit of their welfare as the government of the time saw those matters. The grant of the lease may have affected the way native title holders could exercise their native title rights on the reserve – as, no doubt, did other aspects of the regimes under the Aboriginals Ordinance 1918. But the grant of the lease said nothing about the continued existence of the claimants’ non-exclusive native title.

211 Thus, a lease granted under s 14 is a:

creature of statute forming part of a special statutory regime governing Crown land.

212 That description comes from the judgment of Mason J in *Meneling Station* at 344. It was cited with approval in *Wilson* at [109]. The “special statutory regime” under consideration in *Meneling Station* was the system of grazing licences in the Northern Territory, and in *Wilson* it was the regime providing for the pastoral settlement of land in western New South Wales so as to encourage settlers “by giving them an asset more likely to attract the provision and continuation of finance” (*Wilson* at [110]).

213 In the present case, the “special statutory regime” is a regime enacted for the confinement and control of Aboriginal people on reserves created for that purpose, ostensibly for their welfare and protection.

214 We have explained immediately above why the proper construction of s 14 is that it authorises the grant of a statutory lease, for limited purposes and subject to significant control by the Chief Protector of access to the leased land (as part of an Aboriginal reserve), especially in terms of entry under the authority of the Chief Protector for any purposes under the Aboriginals Ordinance 1918, extending to the taking of physical control of individual Aboriginal people. Only Aboriginal people, and non-Aboriginal people who were expressly authorised, were able to be on the reserve, and therefore on the leased land. If there was a right to exclude trespassers at all, it came from the Ordinance, not the lease, including the creation of criminal offences to which we have referred earlier. There was certainly no “right to exclude as trespassers persons exercising rights attached to their subsisting native title”: see Gummow J in *Wik* at 201. Indeed, native title holders were likely to be amongst the persons living on the reserve.

215 The lessee did not therefore control at all who could enter and remain on, and leave, the leased land. The Chief Protector controlled who could come onto the land and who could not. The lease was intended to facilitate the Aboriginal reserve system and the exercise of powers by the Chief Protector; that is, the lease was intended to further the public purposes of the Aboriginals Ordinance 1918. A right of exclusive possession in the Missionary Society would be antithetical to the statutory purposes of the Aboriginal reserve system, including the Arnhem Land Reserve. In no sense did the Mission Lease confer rights on the Missionary Society to “exclude any and everyone from access to the land for any reason or no reason” (*Western Australia v Brown* at [36]), even if this proposition is not understood literally, and is read in the qualified way explained by Niall JA in *Living and Leisure* at [92]-[93], and by the Full Court in *Ohlsen* at [149]-[152].

216 On this alternative analysis however, it is also necessary to examine the terms of the Mission Lease itself, to determine the nature of the rights conferred. The Mission Lease is annexed to the SOC. Relevantly:

(a) The Mission Lease itself expresses its purpose in the confined way of “Mission work”, which is consistent with the Missionary Society having a specific role to assist the Chief Protector in the administration of the Aboriginals Ordinance 1918. We reject the Commonwealth’s expansive interpretation of this term in the Lease. As the applicant submits, the Commonwealth’s expansive interpretation gives insufficient weight to the fact that the use of the land is expressly restricted.

(b) The Mission Lease was granted over a very large area: 175 square miles. The large size of the leased area may be an indicator that non-exclusive rights are being granted: see *Wik* at 154 (Gaudron J), 232 (Kirby J).

(c) The Mission Lease was not assignable – see Covenant 7 in the Lease. In *Wik*, Gummow J saw this as a factor tending against exclusive possession: *Wik* at 196. See also *Meneling Station* at 342-3, Mason J.

(d) The Mission Lease was liable to forfeiture, but also to resumption on 12 months’ notice without compensation, resumption being akin to the “cancellation” term that Gummow J in *Wik* saw as tending against exclusive possession: see *Wik* at 196. See also *Ward* at [170], [251] regarding the “precarious” nature of the interest in issue.

(e) The conditions imposed in the Mission Lease included strict control over the use of the land, and as we have explained above, a covenant to observe and comply with any regulations made under the Aboriginals Ordinance 1918. The interests of the lessee were in this way subjugated to the control of the Chief Protector and the Administrator.

(f) Any “profits derived from the land covered by the Lease” were not able to be applied by the lessee as it saw fit. Rather, the Missionary Society covenanted to expend profits only in direct connection with the Mission Station, unless the Administrator approved expenditure for another purpose. Gummow J in *Wik* at 176 considered the power to use profits or produce derived from the land to be indicative of a common law lease.

(g) The reservation for timber and trees was expressly agreed by the Missionary Society to include a “power to authorize any persons to enter upon the land and to cut or fell any timber … and to do all things necessary or convenient for these purposes”. This kind of reservation was relied on by Gaudron J in *Wik* at 154 as indicating no grant of exclusive possession.

(h) There were express rights of entry and inspection reserved, although this was not necessary given the terms of the Aboriginals Ordinance 1918 which allowed for essentially free access by the Chief Protector and their officers.

(i) No rental was payable. In our opinion that clause is significant; considered in context it reflects the fact that the Missionary Society was assisting the Chief Protector, performing a public role as part of what was then seen as a scheme for the protection, welfare and control of Aboriginal people.

217 While the grant of a lease to the Missionary Society no doubt gave it some security of tenure so that the Missionary Society could undertake its Methodist missionary work with Aboriginal people confined to the Mission with some certainty into the future, free perhaps of the threat that another denominational organisation might seek to intrude and work with the Chief Protector, the Mission Lease was expressly circumscribed so as to ensure the Missionary Society operated subject to the control of the Administrator and the Chief Protector in all aspects of its work. The Lease was no more than facultative to achieve the objects of the systems of confinement, control and “protection” imposed on Aboriginal people.

218 Even if the Mission Lease did not confer exclusive possession on the Missionary Society, it is also necessary to ask, consistently with the authorities, whether the rights it conferred were nevertheless inconsistent with any of the claimants’ claimed non-exclusive native title rights.

219 In the section of these reasons dealing with the pastoral lease reservations, we have referred to the authorities concerning the test for inconsistency of rights. We adopt the same approach here. The comparison to be undertaken is between the rights granted by the Mission Lease and the non-exclusive native title rights set out in the SOC and extracted at [124] above.

220 Given all of the features we have set out above, the answer is that the rights conferred by the Mission Lease were not inconsistent with the claimants’ non-exclusive native title rights. The land of the Mission Lease was intended at all times to remain as land to be used by and for the benefit of Aboriginal people. If the lease did anything, it compelled the lessee to preserve the land for the use of Aboriginal people, and to allow Aboriginal people to be the principal occupants of it. This feature, together with the other features of both the Aboriginals Ordinance 1918, s 14 and the Mission Lease itself that we have discussed above, means the rights granted under the Mission Lease could be described as positively consistent with continued recognition of non-exclusive native title over the land. This characterisation is consistent, as the applicant submits, with the overarching purpose of the creation of Aboriginal reserves, including the Arnhem Land Reserve, under s 102 of the *Crown Lands Ordinance 1927* (NT), “for the use and benefit of the aboriginal native inhabitants of North Australia”.

221 The applicant also submitted (at [172]-[173] of his written submissions):

Some insight as to the character of reservation “for the use and benefit of Aboriginal inhabitants” in the *Crown Lands Ordinance 1927* can be gleaned from s 21(e) of that Ordinance, which provided that in any lease under the Ordinance:

*[A] reservation in favour of aboriginal inhabitants of North Australia shall be read as a reservation giving to all aboriginal inhabitants of North Australia and their descendants full and free right of ingress, egress and regress into, upon and over the leased land and every part thereof and in and to the springs and natural surface water thereon, and to make and erect thereon such wurlies and other dwellings as those aboriginal inhabitants have before the commencement of the lease been 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 the lease had not been made.*

It is accepted that s 21(e) may not directly apply to the Mission Lease, as that lease was granted under the *Aboriginals Ordinance* rather than the *Crown Lands Ordinance*. However, the content of s 21(e) provides an indication of what is contemplated by “reservation in favour of aboriginal inhabitants” in the Crown Lands Ordinance, which bears on the significance of reservation under s 102 (and the matters identified in paragraph 171 above).

222 We accept that submission. We add that this context also illustrates why it is unlikely in the extreme that the proper construction of s 14 of the Aboriginals Ordinance 1918 is that it authorised the grant of a common law lease.

223 If by the Mission Lease the Missionary Society could exclude some persons from the Arnhem Land Reserve (being co-extensive with the leased land), it was in our opinion able to do so only in a limited sense to further the limited rights of use granted to it under the Lease, in the same way the majority in *Ward* described the limited purposes of a mining lease: see *Ward* at [308]. See also *Western Australia v Brown* at [57], and *Ohlsen* at [144]. However, given the terms of the Aboriginals Ordinance 1918, we doubt the Missionary Society even had this level of legal control conferred on it, irrespective of what might have been asserted in practice as a feature of Mission life.

224 For these reasons, we reject the Commonwealth’s alternative argument in relation to the Mission Lease.

## Conclusion in relation to the Mission Lease

225 We therefore reject the Commonwealth’s contention, reflected in separate question 1(a), that the grant of the Mission Lease extinguished (or purported to extinguish) any native title rights in the claim area that then subsisted.

226 Given that the propositions in paragraphs (a) and (b) of separate question 1 are cumulative, it follows from the above that separate question 1 is to be answered “No” and that it is not necessary to determine the Commonwealth’s two constitutional arguments for the purposes of answering separate question 1. Nevertheless, we consider those arguments in the following sections of these reasons for the sake of completeness (in relation to separate question 1) and because it is necessary to determine those arguments for the purposes of answering separate questions 2, 3 and 4.

# THE *WURRIDJAL* ARGUMENT

## Overview

227 In this section of these reasons, we deal with the Commonwealth’s first constitutional argument, namely that the just terms requirement contained in s 51(xxxi) of the Constitution does not apply to laws enacted pursuant to s 122 of the Constitution. This issue is raised by paragraphs (1)(b)(i), (2)(c), (3)(b) and (4)(b)(i) of the separate questions.

228 The Commonwealth’s primary contention on this issue is that *Teori Tau* continues to bind lower courts unless and until the High Court overrules it. The Commonwealth submits that the observations by various members of the High Court about *Teori Tau* in *Wurridjal* were not part of the ratio decidendi, with the result that it was not overruled by that decision. Accordingly, the Commonwealth submits that, applying *Teori Tau*, this Court is bound to hold that s 51(xxxi) does not apply to the NT Administration Act, or the ordinances made under it, and thus cannot invalidate them or the compensable acts the subject of the separate questions.

229 In response, the applicant, the NLC parties and the Rirratjingu parties contend that *Wurridjal* did overrule *Teori Tau*. Accordingly, they contend, the just terms requirement in s 51(xxxi) *does* apply to laws enacted pursuant to s 122.

230 Although the Northern Territory and Swiss Aluminium support the Commonwealth on other issues raised by the separate questions, they do not support the Commonwealth on this issue, and agree with the applicant’s position. Further, although Queensland supports the Commonwealth on other issues, it does not take a position on this issue.

231 It may be observed at the outset that the Commonwealth’s argument is somewhat surprising in light of the fact that the headnote for *Wurridjal* in the Commonwealth Law Reports, being an authorised report, states:

*Teori Tau v The Commonwealth* (1969) 119 CLR 564, overruled.

232 However, be that as it may, it is necessary for this Court to determine now whether or not *Wurridjal* overruled *Teori Tau.* This involves a consideration of the doctrine of precedent, and the application of that doctrine to the judgments in those cases.

233 For the reasons that follow, we have concluded that *Wurridjal* did in fact overrule *Teori Tau*.

## Background to the issue

### The key constitutional provisions

234 Section 51(xxxi) of the Constitution provides that the Commonwealth Parliament has power to make laws with respect to:

The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

235 Section 122 provides:

**122 Government of territories.**

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

### Teori Tau

236 In 1969, a special case was stated to the Full Bench of the High Court raising the following question of law: whether ordinances of the Territory of New Guinea made pursuant to the *New Guinea Act 1920* (Cth) or the *Papua and New Guinea Act 1949* (Cth), providing for a compulsory acquisition of property, were invalid if they failed to provide just terms for such acquisition: *Teori Tau* at 566. The particular sections of the ordinances under challenge purported to vest title to minerals in any land (whether alienated or unalienated) in the Crown or the Administration of the Territory of Papua and New Guinea, which was asserted to have the effect of acquiring, without just terms, minerals within the lands traditionally held by the plaintiff from time immemorial: *Teori Tau* at 564-566. The plaintiff challenged the purported acquisitions on the ground that the ordinances conflicted with s 51(xxxi) of the Constitution and that the Commonwealth Parliament had no other power to authorise the said acquisitions without providing just terms therefor: *Teori Tau* at 566.

237 The judgment of the High Court was delivered by Barwick CJ shortly after the conclusion of oral argument on behalf of the plaintiff, and without those appearing for the defendants being called upon: see *Teori Tau* at 568-569.

238 The High Court defined, at 569, the question before it as:

whether the power to make laws for the government of a territory of the Commonwealth, whether it be the Australian Capital Territory, the Northern Territory or any other territory … includes a power akin to that possessed by the States of the Commonwealth to make laws for the compulsory acquisition of property without necessarily providing in those laws for terms of acquisition which can be seen in the circumstances to be just.

239 The High Court held, at 570, that s 122 is a general and unqualified power, which is “apt to confer, amongst other things, a power to make laws for the compulsory acquisition of property”.

240 The High Court noted, at 570, that it had been held, with respect to the heads of legislative power granted by s 51, that by reason of the presence in that section of par (xxxi) none of the other heads of power embraces a power to make laws for the acquisition of property. The High Court summarised the plaintiff’s submission as follows: because it had been so held and because the power given by s 51(xxxi) is so ample, s 122 should not be construed as conferring a power to make laws for the acquisition of property; that is to say, s 122 is subject to s 51(xxxi) and s 51(xxxi) is the only source of power to make laws for the acquisition of property to operate in or in connection with the government of any territory of the Commonwealth.

241 The High Court considered, at 570, that submission to be “clearly unsupportable”. The High Court held at 570:

Section 51 is concerned with what may be called federal legislative powers as part of the distribution of legislative power between the Commonwealth and the constituent States. Section 122 is concerned with the legislative power for the government of Commonwealth territories in respect of which there is no such division of legislative power. The grant of legislative power by s.122 is plenary in quality and unlimited and unqualified in point of subject matter. In particular, it is not limited or qualified by s 51(xxxi.) or, for that matter, by any other paragraph of that section.

242 The question asked in the special case was therefore answered “No”.

### The judgments in Newcrest

243 Before discussing *Wurridjal*, it is necessary to refer to the judgment of the High Court in *Newcrest*. In this case, the High Court considered the question whether *Teori Tau* should be overruled in the context of a challenge to the validity of proclamations made under the ***National Parks*** *and Wildlife Conservation* ***Act*** *1975* (Cth). While a majority comprising Toohey, Gaudron, Gummow and Kirby JJ made declarations that the proclamations were invalid to the extent they effected an acquisition of property, only three members of that majority (Gaudron, Gummow and Kirby JJ) held that *Teori Tau* should be overruled: at 565 (Gaudron J), 614 (Gummow J) and 661 (Kirby J).

244 The other member of the majority (Toohey J) did not agree that *Teori Tau* should be no longer be treated as authoritative: at 560. His Honour based his concurrence with the declarations on a narrower proposition, expressed in the judgment of Gaudron J (at 568-569), namely, that s 51(xxxi) fetters the legislative power of the Commonwealth where property is sought to be acquired “for any purpose in respect of which the Parliament has power to make laws” under s 51. In circumstances where a purpose of the National Parks Act was the performance of Australia’s obligations (being a purpose in respect of which the Commonwealth had power to make laws within the meaning of s 51(xxix)), *Teori Tau* was not an obstacle to giving effect to the guarantee in s 51(xxxi) in respect of that legislation. His Honour stated, at 561, that: “It will only be if a law can be truly characterised as a law for the government of a Territory, not in any way answering the description in par (xxxi), that *Teori Tau* will constitute such an obstacle.”

245 All members of the majority in *Newcrest* supported (at least) the proposition expressed by Gaudron J and accepted by Toohey J: see 560-561 (Toohey J), 568-569 (Gaudron J), 614 (Gummow J) and 661 (Kirby J). In these circumstances, *Newcrest* is authority for that proposition.

246 In light of the above, *Newcrest* may be seen to represent a qualification or narrowing of the principle expressed in *Teori Tau*. That is, if and to the extent that the High Court in *Teori Tau* held that s 51(xxxi) does not condition laws supported by both s 122 and another head of power, that proposition was narrowed by the majority in *Newcrest* to laws that are supported by *only* s 122.

### The judgments in Wurridjal

247 In *Wurridjal*, the High Court considered, in its original jurisdiction, a challenge to the validity of provisions of two Acts of the Commonwealth Parliament on the basis that they constituted an acquisition of property, within the meaning of s 51(xxxi) of the Constitution, otherwise than on just terms. The two Acts in question were the *Northern Territory National Emergency Response Act 2007* (Cth) and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth). Three acquisitions were alleged:

(a) first, that the grant of a five year lease to the Commonwealth constituted an acquisition of property of the fee simple held by the Arnhem Land Aboriginal **Land Trust** under the *Aboriginal* ***Land Rights*** *(Northern Territory)* ***Act*** *1976* (Cth);

(b) secondly, that the abolition of the permit system deprived the Land Trust of its entitlement to exclusive possession and enjoyment of common areas in that land; and

(c) thirdly, that rights held by two individuals under s 71 of the Land Rights Act to enter upon and use or occupy the Land Trust land (**s 71 rights**) were effectively suspended by the grant of the lease and thus were acquired.

We will refer to (a) and (b) as the **Land Trust claims**, and to (c) as the **s 71 rights claim**.

248 The Commonwealth demurred to the whole of the statement of claim on the ground that the facts alleged did not show any cause of action to which effect could be given by the Court as against the Commonwealth. The demurrer provided three bases (which it is convenient to refer to as grounds) for that contention. These were summarised by French CJ in *Wurridjal* at [12] as follows:

(a) the two Acts were not relevantly subject to the just terms requirement contained in s 51(xxxi) of the Constitution;

(b) in the alternative, even if they were subject to the just terms requirement, they provided for compensation constituting just terms; and

(c) finally, the property said by the plaintiffs to have been acquired was not property within the meaning of s 51(xxxi), and alternatively was not property capable of being acquired or which had been acquired by the two Acts within the meaning of s 51(xxxi) of the Constitution.

249 A majority of the High Court, comprising French CJ, Gummow, Hayne, Heydon, Crennan and Kiefel JJ, allowed the demurrer, for separate reasons. Kirby J dissented, concluding that the demurrer should be overruled.

250 Importantly for present purposes, while four Justices of the High Court (French CJ, Gummow, Hayne and Kirby JJ) held that *Teori Tau* should be overruled, one of those Justices – Kirby J – dissented in the orders made.

## The Commonwealth’s argument

251 The Commonwealth submits that the ratio decidendi of a decision is (as set out in R **Cross** and JW**Harris**, *Precedent in English Law* (Clarendon Press, 4th ed, 1991) at 72):

Any rul[ing on a point] of law expressly or implicitly treated by the [court] as a necessary step in reaching [its] conclusion having regard to the line of reasoning adopted by [it].

252 The Commonwealth notes that the above statement was cited in, *inter alia*, ***Bligh*** *Consulting Pty Ltd v Ausgrid* [2017] NSWCA 95 at [121], Sackville AJA (with whom McColl and Basten JJA agreed); ***Wu*** *v Minister for Immigration and Multicultural Affairs* [2000] FCA 1817; 105 FCR 39 at [26], Heerey, Moore and Goldberg JJ; and *Foster v Northern Territory of Australia* [1999] FCA 1235 at [30], French, Tamberlin and Sackville JJ.

253 The Commonwealth submits that the principles governing the identification of a ratio of a decision include the following:

(a) First, dissenting opinions are to be ignored in the identification of the ratio: ***Dickenson’s Arcade*** *Pty Ltd v Tasmania* [1974] HCA 9; 130 CLR 177 at 188, Barwick CJ; *Federation Insurance Ltd v Wasson* [1987] HCA 34; 163 CLR 303 at 314, Mason CJ, Wilson, Dawson and Toohey JJ; *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512 at [112], Gaudron, McHugh and Gummow JJ.

(b) Secondly, counting only the reasons of members of the majority, the ratio reflects only reasoning that is common to a numerical majority of the members of the court as a whole. If there are no such reasons, there is no ratio, for the ratio cannot be ascertained by adding together differing views of single judges to form a conglomerate reason for the decision: *Victoria v Commonwealth* [1971] HCA 16; 122 CLR 353 at 382, Barwick CJ; *Dickenson’s Arcade* at 188, Barwick CJ; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* [2002] HCA 48; 212 CLR 162 at [86], McHugh J.

(c) Thirdly, for the purpose of identifying a *ratio*, any reasoning that is not necessary to an individual judge’s decision is ignored. Reasoning is “necessary” for these purposes if it is an actual step in the reasoning to the ultimate conclusion adopted by the judge, notwithstanding that the issue might have been decided the same way for reasons narrower than those in fact relied upon: see *Bligh* at [121]; *Wu* at [24]-[30]; *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 66; 276 FCR 75 at [73]-[74], Katzmann, Mortimer and Bromwich JJ; *Deakin v Webb* [1904] HCA 57; 1 CLR 585 at 604-605; Cross and Harris, 49, 58-59, 72.

254 The Commonwealth submits that, applying the above principles, the question whether *Teori Tau* should be overruled did not form part of the ratio of *Wurridjal*. The Commonwealth makes the following submissions:

(a) Applying the first principle, the reasons for decision of Kirby J are not to be taken into account in any respect. As a result, his Honour’s views (at [287]) concerning *Teori Tau* cannot be taken into account. Specifically, they cannot be added to the view of some members of the majority in order to produce a majority in favour of overruling *Teori Tau*.

(b) Applying the second and third principles, the question is whether there is any reasoning on a point of law that is common to at least four of the six members of the majority that was an actual step in the reasoning that led to the demurrer being upheld.

(c) The first ground of the Commonwealth’s demurrer was that, the two Acts having been passed in reliance on s 122, they were not subject to the just terms requirement in s 51(xxxi). It is true that this ground of the demurrer was not upheld. But nor was it rejected. It *was* rejected by French CJ and Gummow and Hayne JJ, who held, in two separate judgments, that s 51(xxxi) did apply to laws of the Commonwealth Parliament passed pursuant to s 122 that provided for the acquisition of property in the Northern Territory. Those three Justices expressly concluded that *Teori Tau* should be overruled: at [13], [82]-[86] (French CJ), [189] (Gummow and Hayne JJ).

(d) Critically, however, no equivalent reasoning was adopted by any of the other three members of the majority. Instead, in separate judgments, both Heydon and Crennan JJ expressly held that it was unnecessary to determine the relationship between ss 122 and 51(xxxi): at [318] (Heydon J), [355], [446] (Crennan J). (Both of their Honours expressly assumed, without deciding, that s 51(xxxi) was relevant, in order to clear the way to upholding the demurrers on more straightforward grounds.) The final member of the majority, Kiefel J (as her Honour then was), applying *Newcrest*, held that s 51(xxxi) applied to the two Acts in question because they were also supported by a head of power in s 51: at [448], [456]-[457]. That line of reasoning meant that her Honour did not decide the status of *Teori Tau*, which her Honour analysed as being premised on s 122 being the only head of power that supported the challenged legislation: at [460].

(e) In the premises, there was no reasoning common to at least four members of the majority with respect to the question whether s 51(xxxi) applied to legislation enacted only pursuant to s 122. More specifically, there was no holding by at least four members of the majority that *Teori Tau* should be overruled.

(f) That is not to submit that *Wurridjal* lacks a ratio:

(i) In relation to the Land Trust claims, five members of the majority upheld the demurrer on the basis that the challenged legislation *afforded just terms*: at [104], [108] (French CJ), [197], [202] (Gummow and Hayne JJ), [318] (Heydon J), [448], [463], [470] (Kiefel J). (The exception was Crennan J, who held there was no acquisition.)

(ii) In relation to the s 71 rights claim, a different five members of the majority held that the relevant legislation *did not acquire* the s 71 rights: at [115] (French CJ), [157], [174] (Gummow and Hayne JJ), [408], [411] (Crennan J), [455] (Kiefel J). (The exception was Heydon J, who assumed an acquisition, and held that just terms were provided.)

On both those issues, *Wurridjal* has a *ratio*, the reasoning on those points being common to a majority of the Court and necessary to the decision.

255 In its reply submissions, the Commonwealth relies on ***Shaw*** *v Minister for Immigration and Multicultural Affairs* [2003] HCA 72; 218 CLR 28 at [33]-[36], Gleeson CJ, Gummow and Hayne JJ (with whom Heydon J agreed at [190]) to indicate what is required to overrule a previous authority of the High Court. In particular, at [36], the plurality rejected the notion that an existing authority can be overruled unless “that which purportedly has been overthrown has been replaced by some fresh doctrine”.

256 The Commonwealth further submits that one looks for the ratio decidendi of *the decision of the Court*, meaning the *order of the Court*; that is why one does not factor in the reasons of those in dissent in relation to the orders made.

## Consideration

257 The issue to be determined is whether it is a ratio decidendi of *Wurridjal* that s 51(xxxi) applies to acquisitions of property pursuant to laws made under s 122 of the Constitution. Specifically, the issue is whether *Wurridjal* overruled *Teori Tau* on that point. This is an issue of constitutional law of the highest significance.

258 Ultimately, we consider that the difference between the parties turns not so much on the principles for identifying the ratio decidendi of a case, but on whether those principles are to be applied to the conclusion reached on each ground of the demurrer in *Wurridjal*, or to the overall decision to allow the demurrer. For the reasons that follow, we consider the better view to be that those principles are to be applied to the conclusion reached on each ground of the demurrer.

259 By way of context, we note that, by the time *Wurridjal* was argued and decided, the question whether or not *Teori Tau* should be overruled had already been the subject of extensive consideration by members of the High Court in *Newcrest*. The lines of argument – on each side of that question – were already well-developed. In *Newcrest*, three members of the Court (Gaudron, Gummow and Kirby JJ) were of the view that *Teori Tau* should be overruled, and provided reasons for holding that view. Gaudron J stated, at 561, that she agreed generally with the reasons of Gummow J. Further, at 565, her Honour stated that “[i]n expressing my agreement with the judgment of Gummow J I include his Honour’s conclusion that *Teori Tau* should no longer be treated as authority denying the operation of the constitutional guarantee in par (xxxi) in respect of laws passed in reliance upon the power conferred by s 122”. As noted above, her Honour also set out an alternative approach that supported the conclusion that s 51(xxxi) operated in relation to the Act and proclamations in question. The judgment of Gummow J contains a detailed discussion of the relationship between ss 51(xxxi) and 122 and consideration of whether *Teori Tau* should be overruled: see at 591-614. Likewise, the judgment of Kirby J discusses in detail compulsory acquisitions in the territories, arguments for separating s 122 from s 51(xxxi), the application of s 51(xxxi) to territory laws under s 122, and the interpretive principle of conforming to fundamental rights: at 640-661.

260 Further, in *Newcrest*, three members of the Court (Brennan CJ, Dawson and McHugh JJ) were of the view that *Teori Tau* should not be overruled, and provided reasons for that view. Brennan CJ discussed the relationship between ss 51(xxxi) and 122 and the authority of *Teori Tau* at 533-545. Dawson J discussed these issues at 550-559. McHugh J considered the question whether the exercise of power under s 122 is subject to s 51(xxxi) at 574-586. (As noted above, the seventh member of the Court, Toohey J, relied on the alternative approach set out in the reasons of Gaudron J.)

261 The procedural framework of *Wurridjal* is important for present purposes. *Wurridjal* involved a demurrer with three grounds. The grounds of the demurrer were set out at [12] of the judgment of French CJ in *Wurridjal* (see [248] above).

262 The demurrer procedure is apt to isolate distinct questions of law for the Court’s determination: see *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* [1977] HCA 55; 139 CLR 117 at 125-126 (Barwick CJ), 135 (Gibbs J), 140 (Stephen J). The Court’s answers to those questions will determine whether the demurrer is allowed or overruled. It should be noted that an order allowing or overruling a demurrer does not dispose of a proceeding. That is, an order allowing or overruling a demurrer is not the same as a final order resolving a proceeding (even if its practical effect is decisive of the litigation). This is exemplified by the orders made by the High Court in *Wurridjal*. Those orders did not finally dispose of the proceeding; rather, they included an order that the further conduct of the action be a matter for direction by a Justice.

263 In this sense, the resolution of questions on a demurrer is analogous to the resolution of questions on a case stated or special case. This analogy between the two types of procedure was expressly recognised by the High Court in *JM* in the context of a power of a trial judge, in a criminal proceeding, to reserve questions for determination by the Court of Appeal: see *JM* at [32]-[34], French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ. That passage built on the High Court’s reasoning in ***Bass*** *v Permanent Trustee Co Ltd* [1999] HCA 9; 198 CLR 334, where Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ stated at [52]:

Preliminary questions may be questions of law, questions of mixed law and fact or questions of fact. Some questions of law can be decided without any reference to the facts. Others may proceed by reference to assumed facts, **as on demurrer or some other challenge to the pleadings**. In those cases, the judicial process is brought to bear to give a **final answer on the question of law** **involved**. Findings of fact are made later, if that is necessary. Where a preliminary question is a pure question of fact that, too, can be answered finally in accordance with the judicial process if the parties are given an opportunity to present their evidence and, also, to challenge the evidence led against them.

(Emphasis added.)

264 In the context of questions on a case stated or special case, a ratio decidendi may be extracted from the reasoning of those judges who constitute the majority on each question: see *O’Toole v Charles David Pty Ltd* [1991] HCA 14; (1990) 171 CLR 232 at 244-245 (Mason CJ), 280 (Deane, Gaudron and McHugh JJ), 303 (Dawson J).

265 We consider that a comparable approach should be adopted in respect of *Wurridjal*, where the demurrer crystallised three distinct questions of law. The question raised by the first ground of the demurrer was: were the Acts relevantly subject to the just terms requirement in s 51(xxxi) of the Constitution? French CJ, Gummow, Hayne, Kirby and Kiefel JJ answered that question “Yes”. Adopting the language of *Bass*, the Court thereby gave a “final” (in the sense of authoritative and binding) “answer on the question of law involved”.

266 For four of the judges who reached that conclusion (French CJ, Gummow, Hayne and Kirby JJ) a necessary step in their reasoning was the proposition that s 51(xxxi) applies to an acquisition of property pursuant to a law made only under s 122. Specifically, a necessary step in their reasoning was that *Teori Tau* should be overruled. We note the following:

(a) Although French CJ’s ultimate conclusion was that the demurrer should be allowed (see [13]), it is clear that an essential step in his Honour’s reasoning was that the just terms requirement in s 51(xxxi) applies to acquisitions of property pursuant to laws made under s 122, and that *Teori Tau* should be overruled: see [13], [46]-[86]. French CJ concluded at [86]:

The constructional considerations referred to earlier militate powerfully against the interpretation adopted in *Teori Tau*. The contrary interpretation is, in my respectful opinion, to be preferred. Given the isolation of the decision from the stream of prior and subsequent jurisprudence, its overruling would not effect any significant disruption to the law as it stands. The cautionary principle in this case does not stand against overruling. For these reasons I consider that *Teori Tau* should be overruled and that the acquisition of property from any person, pursuant to laws made under s 122, must be on just terms as required by s 51(xxxi).

(b) Although Gummow and Hayne JJ’s ultimate conclusion was that the demurrer should be allowed (see [118]), it was an essential step in their Honours’ reasoning in respect of the Land Trust claims (cf the s 71 rights claim – see [174]) that the just terms requirement in s 51(xxxi) applies to laws with respect to the acquisition of property made under s 122, and that *Teori Tau* should be overruled: see [175]-[189]. Their Honours concluded on this issue at [188]-[189]:

It has been well said of the reasoning in *Teori Tau* that it is “totally at odds” with that in *Lamshed v Lake*. Further, as the Territory, in particular, illustrated by the many instances given in its written submissions, the tenor of decisions since *Teori Tau* indicates a retreat from the “disjunction” seen in that case between s 122 and the remainder of the structure of government established and maintained by the Constitution. Further, s 128 of the Constitution since 1977 has engaged electors in the territories, and valid provision has been made by the Parliament for representation in both chambers of the Parliament of electors in the two populous territories.

To preserve the authority of *Teori Tau* would be to maintain what was an error in basic constitutional principle and to preserve what subsequent events have rendered an anomaly. It should be overruled.

(Footnotes omitted.)

(c) Kirby J’s ultimate conclusion was that the demurrer should be overruled (see [215]). It was an essential step in his Honour’s reasoning that the just terms requirement in s 51(xxxi) applies to laws that involve the acquisition of property made under s 122 and that *Teori Tau* should be overruled: see [281]-[288]. His Honour stated at [287]:

One day this Court will correct the unsatisfactory state of its doctrines in relation to the Territories, their people and courts. We should begin that process in these proceedings. *Teori Tau* should be overruled. In this respect I agree in the conclusions stated in the reasons of Gummow and Hayne JJ [Reasons of Gummow and Hayne JJ at [189]]. Because a like conclusion is expressed by French CJ in his reasons [Reasons of French CJ at [86]], this will be the first holding of this Court in the present case. It is a holding that is essential to my reasoning that follows.

267 It is noteworthy that, in the above passage, Kirby J considered that, having regard to the judgments of French CJ, Gummow and Hayne JJ and Kirby J himself, the “first holding” of the Court in *Wurridjal* would be that *Teori Tau* be overruled. It is apparent that Kirby J considered that the effect of the Court’s decision in *Wurridjal* would be the overruling of *Teori Tau*. (We infer that Kirby J described the holding as the “first” holding, because it was the first question raised by the Commonwealth’s demurrer.) Whether Kirby J’s view of the effect of *Wurridjal* was correct is, of course, the matter presently under consideration. Nevertheless, we consider it relevant that Kirby J expressed that view as to the effect to the Court’s decision in *Wurridjal*.

268 While Kiefel J answered the first question affirmatively, her Honour considered it sufficient to rely on Gaudron J’s alternative approach (with which Toohey, Gummow and Kirby JJ agreed) in *Newcrest*: see *Wurridjal* at [448], [456]-[460].

269 The other two members of the Court (Heydon and Crennan JJ) did not consider it necessary to reach a conclusion on the first ground of the demurrer. It is noteworthy, however, that Heydon J made the following observations, at [324]-[325], about the effect of the decision in *Wurridjal* in the course of providing reasons for rejecting an argument advanced on behalf of the plaintiffs that the legislation in issue did not provide just terms compensation because the right to compensation conferred by the legislation was contingent, including because the jurisprudence on the relationship between ss 51(xxxi) and 122 was unsettled (see [323]):

This argument must be rejected. First, it did not attempt to deal with the authorities which have held or said that legislation which provides for the payment of “reasonable compensation as determined by” a court is legislation which provides for just terms. Those authorities are inconsistent with the proposition that the right to reasonable compensation is only contingent.

Secondly, the argument lacks practical reality. **The fact is that in consequence of the approach of the plurality judgment in this case, there will in future be no doubt as to the relationship between ss 51(xxxi) and 122 of the Constitution**. It is not clear why the supposedly sui generis nature of the property rights claimed by the plaintiffs prevents courts of competent jurisdiction rather than this Court from resolving disputes about compensation for their acquisition, particularly since on the plurality view the property rights acquired do not include rights to sacred land.

(Emphasis added, footnotes omitted.)

270 The reference in the above passage to the “plurality judgment in this case” must be a reference to the joint judgment of Gummow and Hayne JJ, this being the only joint judgment in the case. It is unclear why Heydon J considered that, as a consequence of the approach of the plurality judgment, being a judgment of only two members of the Court, there would in future be no doubt as to the relationship between ss 51(xxxi) and 122. His Honour did not refer to the judgments of French CJ and Kirby J, which adopted the same approach. In any event, Heydon J was of the view that there would in the future be no doubt as to the relationship between the sections.

271 Having regard to these matters, we consider the better view to be that the principles regarding identification of a ratio decidendi are to be applied to the conclusion reached in respect of each ground of the demurrer in *Wurridjal*. The position should be treated as being in substance the same as if a question of law (reflecting the first ground of the demurrer) had been raised in a case stated or special case. If that had occurred, five of the Justices would have answered that question affirmatively, and an essential step in the reasoning of four of those Justices would have been the proposition that s 51(xxxi) applies to acquisitions of property pursuant to laws made only under s 122 of the Constitution.

272 While it may be accepted that, generally, the ratio decidendi is to be determined by reference to the *orders of the Court*, we consider some flexibility in the application of the principles is required in the circumstances of *Wurridjal*, given the procedural framework of the proceeding and the constitutional context. On the application of flexibility, see GW Paton and G Sawer, ‘Ratio Decidendi and Obiter Dictum in Appellate Courts’ (1947) 68 *Law Quarterly Review* 461, 480.

273 We do not consider the judgment of the High Court in *Shaw* to be inconsistent with the above approach. In that case, Gleeson CJ, Gummow and Hayne JJ (with whom Heydon J agreed at [190]) stated at [36] that “the Court should be taken as having departed from a previous decision, particularly one involving the interpretation of the Constitution, only where that which purportedly has been overthrown has been replaced by some fresh doctrine, the elements of which may readily be discerned by the other courts in the Australian hierarchy”. In the present case, if the approach that we prefer is adopted, there is no doubt that a “fresh doctrine” replaced *Teori Tau –* it is that the just terms requirement in s 51(xxxi) applies to an acquisition of property pursuant to a law made under s 122.

274 The view that we have expressed as to the effect of *Wurridjal* is supported by the judgments of Kirby J and Heydon J in *Wurridjal*, as discussed above. It is also consistent with the Commonwealth Law Reports headnote for *Wurridjal*, quoted above.

275 In *Queanbeyan City Council v ACTEW Corporation Ltd* [2011] HCA 40; 244 CLR 530, six members of the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), at [7], referred to *Berwick Ltd v Gray* [1976] HCA 12; 133 CLR 603 and stated that “it is established by subsequent authorities, the most recent of which is *Wurridjal*, that s 122 is not disjoined from the body of the Constitution”. The view that we have expressed above as to the effect of the decision in *Wurridjal* is consistent with that statement.

276 We note for completeness that, in *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51; 240 CLR 140, three members of the High Court (Hayne, Kiefel and Bell JJ) at [135] cited the judgment of Gummow and Hayne JJ in *Wurridjal* in the context of considering the relationship between ss 51(xxxi) and 96.

277 We also note for completeness that the applicant and the parties supporting him on this issue relied on ***Hepples*** *v Commissioner of Taxation* [1992] HCA 3; 173 CLR 492. We do not consider it necessary to discuss that case, as the passages relied upon are primarily concerned with how the orders of the Court should be framed, rather than the principles for identifying the ratio decidendi of a case. That said, we do not consider anything in *Hepples* to be inconsistent with the approach we have taken.

278 For these reasons, we conclude that *Wurridjal* did overrule *Teori Tau*. We therefore reject the Commonwealth’s first constitutional argument.

279 In light of that conclusion it is unnecessary for us to consider an alternative argument advanced by the applicant and the Rirratjingu parties, namely that the just terms requirement in s 51(xxxi) applies to the NT Administration Act on the basis of Gaudron J’s alternative approach (with which Toohey, Gummow and Kirby JJ agreed) in *Newcrest*.

# THE INHERENT DEFEASIBILITY ARGUMENT

## Overview

280 In this section of these reasons, we deal with the Commonwealth’s second constitutional argument. In broad terms, the Commonwealth and the other government respondents contend that native title is “inherently defeasible”, or “inherently susceptible” to extinguishment by a valid exercise of the Crown’s sovereign power – derived from its radical title – to grant interests in land and to appropriate to itself unalienated land. The inherent defeasibility is said to be sourced in the need for the common law to “recognise” native title for that title to be enforceable in the post-colonisation legal system, and from that recognition being conditional on the overriding power of the Crown to deal with the land (or waters).

281 This issue is raised by paragraphs 1(b)(ii), 2(c) and 4(b)(ii) of the separate questions.

282 Repeating our conclusions in summary on this question, we conclude that:

(a) aside from the obiter dicta of Gummow J in *Newcrest*, the authorities have confined the application of the concept of inherent defeasibility to rights created by statute;

(b) this Court is not bound by Gummow J’s obiter dicta, and should instead apply the weight of authority in native title law about the character of native title rights; and

(c) native title rights are not inherently defeasible in the sense that description has been applied in the authorities.

283 These conclusions rest on the position agreed between the parties that each of the alleged compensable acts raised in the separate questions occurred by reason of an exercise of statutory power. No party contended that any of the alleged compensable acts occurred by any exercise of prerogative or executive power. In the case of each alleged compensable act the source of power was statutory – the grant of the Mission Lease under the Aboriginals Ordinance 1918, and the vesting of minerals in the Crown (in right of the Commonwealth) by the various mining ordinances. What is raised by the constitutional aspects of the separate questions is whether these exercises of statutory power engaged s 51(xxxi) of the Constitution. No wider question than that about how native title may be extinguished or impaired arises on these aspects of the separate questions.

284 In explaining our conclusions, after setting out a summary of the government respondents’ contentions, we make some general observations about s 51(xxxi), relevant to the issue we must decide. Next, we describe the line of authority upon which the government respondents rely, commencing in substance in 1994. We then address some of the relevant later authorities, before turning to *Newcrest*. We explain our reading of Gummow J’s dicta in *Newcrest*, which differs from the reading given to it by the government respondents. If we are wrong about our understanding of the passage, and the government parties are correct about what it means, we then explain why we do not consider we are bound to, or should, apply that dicta. We then say something about the nature of native title. Finally we explain why we reject the government respondents’ contention that the statutory grants underlying the compensable acts are not invalid for an absence of just terms because native title rights are inherently susceptible to extinguishment and fall outside s 51(xxxi).

## The government respondents’ argument

### Commonwealth

285 The Commonwealth contends the proposition that native title is inherently defeasible, in the sense that term is used in *Mutual Pools, Peverill* and *Georgiadis*, is inherent or implicit in the reasons of Brennan J in *Mabo (No 2)*, being the analysis of the nature of native title that the Commonwealth submits has prevailed in Australia.

286 The Commonwealth accepts that none of the majority (or minority) Justices in *Mabo (No 2)* expressly held that native title is susceptible in the way the Commonwealth now contends. The Commonwealth accepts there is no express authority for that proposition until *Newcrest*.

287 Nevertheless, this is the Commonwealth’s submission about Brennan J’s reasons in *Mabo (No 2)*:

In summary, in the Commonwealth’s submission, Brennan J held that the common law’s recognition of native title was conferred on terms that the common law would not protect native title from extinguishment or impairment by the exercise of the Crown’s sovereign power, embodied in its radical title, to create or assert rights in land. Thus, the common law recognised native title on the basis that it was susceptible to an exercise of the Crown’s radical title in one or other of those ways, without any duty on the Crown to pay compensation.

…

Brennan J’s judgment should be understood as holding that native title was recognised by the common law on terms that:

(a) native title could be extinguished or impaired without compensation by a valid exercise (whether pursuant to statute or a prerogative) of the Crown’s sovereign power, embodied in its radical title, to grant interests in land and to appropriate to itself unalienated land required for the Crown’s purposes;

(b) native title could be extinguished or impaired by a valid exercise of other kinds of sovereign power (such as compulsory acquisition laws or statutes directed to its extinguishment), on the same terms afforded to other interests in land, including as to payment of compensation.

288 Thus, the Commonwealth contends that a susceptibility to extinguishment or impairment is a *characteristic* of the recognition of native title by the common law. In other submissions, the Commonwealth describes the position as being that susceptibility to defeasance or extinguishment was a *term* upon which the common law recognised native title. However expressed, the Commonwealth submits this is because “from the time of inception”, native title was defined in terms that make it susceptible to alteration or defeasance.

289 In oral argument, senior counsel Ms Kidson submitted:

And that susceptibility, because it occurs at that point of intersection and is a condition for the recognition, we say is integral to native title as a right, in the form in which it is recognised for the purposes of the general system of law. The coming into force of section 51(xxxi) of the Constitution upon federation didn’t alter the common law in any way. And so it didn’t alter the terms upon which native title was recognised and continues to be recognised and able to be enforced, because that is the function of the common law. Consequently section 51(xxxi) did not alter native title’s inherent susceptibility to diminution or to [de]feasance by consignment of the Crown’s radical title, because the common law principles continue to operate.

Because native title has, from the moment of its recognition, we say, always been susceptible to ability to be diminished or defeated by an exercise of the Crown’s radical title, when that occurs, it doesn’t amount to an acquisition of property within the meaning of section 51(xxxi) of the Constitution.

290 Subsequent decisions of the High Court are said by the Commonwealth to have supported and acknowledged the susceptibilities of native title to defeasance. The Commonwealth submits:

there are multiple occasions on which majorities of the High Court have both referred to the “inherent fragility” of native title, and (consistently with Brennan J’s analysis in *Mabo [No 2]*), have situated that fragility in the susceptibility of native title to extinguishment through the exercise of sovereign power to grant interests in land, being a power (analytically described as “radical title”) acquired upon the assertion of sovereignty over Australia.

291 The Commonwealth refers in this context to ***Fejo*** *v Northern Territory* [1998] HCA 58; 195 CLR 96, *Commonwealth v* ***Yarmirr*** [2001] HCA 56; 208 CLR 1 and *Ward*.

292 The Commonwealth relies heavily on a single passage from the reasons of Gummow J in *Newcrest*, at 613. It submits that Toohey J “impliedly agreed” with this passage, and Gaudron and Kirby JJ “expressly agreed” with it. The passage in Gummow J’s reasons is this:

The Commonwealth and the Director contended that the application of s 51(xxxi) to reduce the content of the legislative power conferred by s 122 “would potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the [Territory] since 1911 to the extent to which any such grant may be inconsistent with the continued existence of native title as recognised at common law”. Such apprehensions are not well founded. The characteristics of native title as recognised at common law include an inherent susceptibility to extinguishment or defeasance by *the* *grant* of freehold or of some lesser estate which is inconsistent with native title rights; this is so whether the grant be supported by the prerogative or by legislation. Secondly, legislation such as that considered in *Mabo v Queensland* and *Western Australia v The Commonwealth (Native Title Act Case)*, which is otherwise within power but is directed to the extinguishment of what otherwise would continue as surviving native title (or which creates a “circuitous device” to acquire indirectly the substance of that title), may attract the operation of s 51(xxxi). However, no legislation of that character, with an operation in the Territory, was pointed to in the submissions in this case.

(Footnotes omitted.)

293 The Commonwealth also relies on the footnote to this passage, which cites *Mabo (No 2)* at 69, 89, 110, 195-196; *Western Australia v Commonwealth (****Native Title Act Case****)* [1995] HCA 47; 183 CLR 373 at 422, 439, 459; *Wik* at 132-133; *R v Ludeke, Ex parte Australian Building Construction Employees’ and Builders Labourers’ Federation* [1985] HCA 84; 159 CLR 636 at 653 and *Peverill* at 235-237, 256, 264-265.

294 During oral argument, there was the following exchange:

MOSHINSKY J: Do you accept that native title is property for the purposes of 51(xxxi)?

MS KIDSON: We said, not to avoid the issue, but we said that in some ways it doesn’t really matter because the cases seem to go back and forth all over the place, whether something is assessed as property or assessed as an acquisition. And certainly we’ve accepted, for example, then when it comes to compulsory acquisition power or [s] 51(xxxi) is engaged, then clearly native title is property for those purposes or it wouldn’t be engaged. **We’re just hesitant to tie ourselves to a particular characterisation** because, for example, there are cases where property is said to be, well, it’s property except that it’s defeasible to this and therefore it’s not property which is capable of being acquired for the purposes of [s] 51(xxxi).

Now, whether one analyses that as the finding that it’s not property or a finding that there’s no acquisition because of the property of a certain kind, it’s a matter of much debate. **But we certainly accept that there are circumstances where native title would certainly be property for the purposes of section 51(xxxi).**

(Emphasis added.)

295 The Commonwealth’s position thus appeared to move towards a tentative acceptance that native title rights and interests were proprietary in character.

296 Contrary even to the method adopted in the three cases in which the inherent defeasibility concept originated, the Commonwealth did not clearly articulate whether the extinguishment assumed to be effected by the Mission Lease (to take that example) meant s 51(xxxi) was not engaged because:

(a) native title is not “property”;

(b) through the NT Administration Act and the Aboriginals Ordinance 1918, there was no “acquisition”; or

(c) even if there was an acquisition of property, it was not for the purposes of s 51(xxxi) but was for other purposes.

297 This is the point made by the Rirratjingu parties at [32] of their written submissions. We agree it is an important point. If the Commonwealth’s contention is to succeed, it must do so through the accepted method of approaching s 51(xxxi).

### The other government respondents

298 For convenience, we include Swiss Aluminium in our descriptive phrase “government respondents”. Queensland and Swiss Aluminium adopted the position of the Commonwealth and the Northern Territory.

299 The Northern Territory emphasised some matters differently from the Commonwealth. First, it emphasised that the feature of the common law which gave rise to the inherent susceptibility or defeasibility of native title was the “common law rule of *recognition* of native title rights” (original emphasis):

Prior to the assertion of British sovereignty, the traditional laws and customs of an Indigenous society gave rise to rights and interests which were enforceable under that legal regime. Upon the assertion of sovereignty, that legal regime ceased to be effective as a matter of domestic law and native title depended for its effectiveness upon its recognition by the common law. The common law recognised native title subject to a number of contingencies, the occurrence of any one of which (failure to maintain a continuous connection to country, incompatibility with the doctrines of the common law, and the exercise of sovereign power to grant or appropriate inconsistent rights) would result in the withholding or withdrawal of common law recognition.

(Footnotes omitted.)

300 Second, the Northern Territory describes “inherent defeasibility” as nothing more than an “analytical tool”:

which distinguishes extinguishment from acquisition, even if there is some countervailing benefit to the Commonwealth or a third party associated with the extinguishment. While the analytical tool has been developed and most commonly employed in the context of cases concerning amendment to or abrogation of purely statutory entitlements, it is not uniquely concerned with such things.

(Footnotes omitted.)

301 Further, the Northern Territory submitted the Court was bound to follow the view expressed by Gummow J in *Newcrest*, making similar submissions to the Commonwealth about there being three other Judges who endorsed that view. The Northern Territory also submitted that *Newcrest* has been endorsed in *Fejo* and *Congoo v Queensland* [2014] FCAFC 9; 218 FCR 358 (***Congoo FFC***).

302 In oral argument, senior counsel for the Northern Territory explained the position in this way:

So what do we mean by the common law rule of recognition. And this is where we use slightly different terminology from the Commonwealth, but in substance we’re saying the same thing. If I can seek to demonstrate what we mean by the common law rule of recognition by taking your Honours to two authorities. The first is *Queensland v Congoo* in the High Court … If I take your Honours to the decision of French CJ and Keane J at paragraph 31, there their Honours say:

The recognition of native title rights and interests translates aspect[s] of an indigenous society’s traditional relationship to land and waters into a set of rights and interests existing at common law. The metaphor of recognition reflects the proposition that the common law cannot transform traditional laws and customs, the relationship[s] to country [which] they define, or the rights and interests to which[,] in their own terms[,] they give rise.

So that’s consistent with my comment, that we recognise the robustness of the traditional law and custom. [“]Nor can it extinguish them[”] – extinguishment; so again, it can’t extinguish the traditional laws and customs. [“]“Extinguishment” describes the result of applying principles by which the common law recognition is withheld or withdrawn in the face of legislative or executive acts affecting the land or waters in which native title is said to subsist.[”]

303 In oral argument, senior counsel for the Northern Territory readily accepted that native title rights and interests are property for the purposes of s 51(xxxi). He added that the s 51(xxxi) cases could be analysed through the lens of whether a right was proprietary, or whether there was an acquisition, but the better view is to treat it as a composite phrase. Senior counsel submitted:

So what comes into focus, it all comes down to, as I say, in the context of this case, in our view, a question of is there an acquisition and we would say that properly characterised an extinguishment for a permanent native title is not an acquisition for the purpose of 51(xxxi) because of that congenital infirmity in its recognition by the common law.

…

… it’s not that every single extinguishment of a right constitutes an acquisition for 51(xxxi) purposes.

Something distinguish[es] some extinguishment as being an acquisition, and in other circumstances, extinguishment is not an acquisition. And that’s what we’re doing here. We’re trying to find which side of the line does native title fall on. And we’re not suggesting that there is some bright line test, but what we’re suggesting is that what comes out from the cases is that those cases that have found there is no acquisition, even though there is property, and even though there’s a benefit to the Commonwealth, what those cases focus on is something about the nature of the property at the point of its creation.

## Some brief points about s 51(xxxi)

304 Section 51(xxxi) contains both a direct grant of legislative power (to acquire property) with a limit imposed on that grant (just terms), and an indirect limitation on the exercise of other heads of legislative power: see *Mutual Pools* at 185, Deane and Gaudron JJ. Their Honours explained:

The cases establish that the effect of par. (xxxi)’s express conferral upon the Parliament of the power to make certain laws with respect to the acquisition of property subject to the safeguard of just terms is that the legislative power to make such laws without the safeguard is presumed to be excluded or abstracted from other grants of legislative power contained in that section.

305 See also their Honours’ more detailed explanations at 186-187. Gaudron J repeated this explanation in slightly different, but with respect similarly clear terms in *Commonwealth v* ***WMC Resources*** *Ltd* [1998] HCA 8; 194 CLR 1 at [75]:

Clearly, s 51(xxxi) is primarily a grant of legislative power. However and because it is a specific grant of power subject to a qualification or condition, other grants of legislative power are construed as not extending to the acquisition of property. At least that is so unless a contrary intention is manifest, as in the case of the taxation power, or the acquisition is of a kind that does not permit of just terms - for example, a penalty by way of forfeiture. Because it operates in the manner described, s 51 (xxxi) is, within its area of operation, a guarantee of just terms.

(Footnotes omitted.)

306 Taking the explanation given by Gaudron J in *Newcrest* at 568-569 in respect of a different head of legislative power, but post-*Wurridjal* equally applicable to s 122:

A purpose of the Conservation Act is the performance of Australia’s international obligations; that is a purpose in respect of which the Parliament has power to make laws under s 51(xxix); par (xxxi) operates to fetter the implementation of that purpose by means of a law with respect to the acquisition of property. The Commonwealth cannot enact laws for a purpose which falls within s 51 without the condition which attaches by par (xxxi).

(Footnotes omitted.)

307 In their joint reasons in *Mutual Pools*, Deane and Gaudron JJ also emphasised (at 188-189) that the “settled method” for determining whether or not a law is of a kind falling within s 51 (including s 51(xxxi)) is one of characterisation:

However, unless a law can be fairly characterized, for the purposes of par. (xxxi), as a law with respect to the acquisition of property, that paragraph cannot indirectly operate to exclude its enactment from the prima facie scope of another grant of legislative power. Put differently, “it is at least clear that before the restriction involved in the words ‘on just terms’ applies, there must be a law with respect to the acquisition of property (of a State or person) for a purpose in respect of which the Parliament has power to make laws”.

(referring to *Re Döhnert Müller Schmidt & Co; Attorney-General (Cth) v Schmidt* [1961] HCA 21; 105 CLR 361 at 372, and *Commonwealth v Tasmania* [1983] HCA 21; 158 CLR 1 at 282 (*Tasmanian Dam Case*).)

308 In *Peverill* at 241, Brennan J (as his Honour then was) explained the breadth of the “property” aspect of s 51(xxxi):

the characteristics of a proprietary right include its capacity to be assumed by third parties and its having “some degree of permanence or stability” although “[a]ssignability is not in all circumstances an essential characteristic of a right of property”.

(Footnotes omitted.)

309 Section 51(xxxi) thus extends to “every species of valuable right and interest including … choses in action”: see *Attorney-General (NT) v* ***Chaffey*** [2007] HCA 34; 231 CLR 651 at [21], citing *Victoria v Commonwealth (Industrial Relations Act Case)* [1996] HCA 56; 187 CLR 416 at 559.

310 The Rirratjingu parties submitted that both *Chaffey* and ***Cunningham*** *v Commonwealth* [2016] HCA 39; 259 CLR 536 suggest that, where the question of whether s 51(xxxi) is engaged arises, the conceptual tool of “inherent defeasibility” is applied in determining if the rights in question are correctly characterised as proprietary rights.

311 The plurality (including Gummow J) made this clear in *Chaffey* at [21] and [23]:

But these appeals do not turn upon the notion of “acquisition”. They depend upon the **identification of the “property”** to which s 50 of the Self-Government Act is said to apply.

…

The term “property” is used in various settings to describe a range of legal and equitable estates and interests, corporeal and incorporeal. In its use in s 51(xxxi) the term readily accommodates concepts of the general law. Where the asserted “property” **has no existence apart from statute** further analysis is imperative.

(Emphasis added.)

312 Then, in [24]-[25], by giving various examples from previous cases about how statutory rights have been treated, the plurality make it clear that the analytical tool of “inherent defeasibility” or “inherent susceptibility” is applied to the question whether rights conferred by statute are proprietary in nature or, to the contrary, do not have the enduring character of property and instead are dependent “upon the will from time to time of the legislature”: *Chaffey* at [25].

313 In *Chaffey* the plurality use neither of the “inherent” formulations but rather at [30] the formulation of statutory rights being “of a nature which rendered them liable to variation by [the legislature]”. The variations in language demonstrate in our opinion that all these terms are indeed nothing more than analytical tools, used in the authorities to explain the difference between statutory rights that have no enduring proprietary character so as to attract s 51(xxxi) and statutory rights that do.

314 In *Cunningham*, a majority of the Court expressly adopted the same approach as the plurality in *Chaffey*. In the *Cunningham* plurality reasons, the key passages are at [43]-[46], from which we have extracted below. In particular for present purposes, the plurality responds to the plaintiffs’ arguments by saying (at [46]):

The plaintiffs’ submissions overlook that these descriptions identify within particular statutory rights a feature which is critical to their nature as “property” for the purposes of the application of s 51(xxxi). If a right or entitlement was always, **of its nature**, liable to variation, apart from the fact that it was created by statute, a variation later effected cannot properly be described as an acquisition of property.

(Emphasis added.)

315 See also [124], [154]-[155], Keane J. The latter two paragraphs are a direct application of the plurality’s approach in *Chaffey*. Finally, in *Cunningham* at [289], [328]-[329], [335]-[336] and [357]-[358], Gordon J takes a similar approach, although her Honour also makes findings that there was no “acquisition”.

316 The Rirratjingu parties are correct to submit that in *Cunningham*, the primary way the Commonwealth defended the case was, consistently with *Chaffey*, to focus on whether the statutory rights in issue in *Cunningham* were proprietary in nature; see footnote 44 to the Rirratjingu submissions where the following summary is given:

See *Cunningham* (2016) 259 CLR 536 at 543 (J T Gleeson SC) (“As a matter of statutory construction, the plaintiffs’ entitlements to retiring allowances are not ‘property’ for the purposes of s 51(xxxi). The bundle of rights said to constitute the plaintiffs’ ‘property’ were created by legislation that is inherently liable to variation by Parliament from time to time”), 544 (D F C Thomas) (“the entitlements of the third and fourth plaintiffs as holders of a Life Gold Pass were not ‘property’ for the purposes of s 51(xxxi) and no property was acquired by either the 2002 LGP Act or the 2012 LGP Act. The plaintiffs’ entitlements were inherently unstable”).

317 We acknowledge that Gageler J’s approach in *Cunningham* does not suggest the concept of inherent defeasibility attaches only to the analysis of whether a statutory right is “property” – see for example [66]-[67]. And we also accept that Gordon J’s judgment in *Cunningham* demonstrates that the conceptual tool might also be employed in deciding if there has been an “acquisition”.

318 We consider the present state of authority from the High Court is that the conceptual tool of asking if an asserted right is “inherently defeasible” assists in deciding if the right is proprietary in nature, or instead is *not sufficiently certain and enduring to be characterised as proprietary in nature*. The alternative conclusion is that the asserted right is no more than a statutory right created by Parliament which can equally be altered, modified, or taken away by Parliament and *therefore* outside the protection of s 51(xxxi). Of course, as the authorities also make clear, some statutory rights will properly be described as proprietary in character (and not inherently defeasible), and in those circumstances there will still be a second step of analysis before s 51(xxxi) is engaged; namely whether those proprietary interests have been “acquired” by the Commonwealth or a third party and whether there is any incongruity in the application of the constitutional safeguard: see *Director of Public Prosecutions v Lawler* [1994] HCA 10; 179 CLR 270 at 285, Deane and Gaudron JJ. The acquisition analysis operates only once a right has been properly characterised as proprietary, and in that sense not outside s 51(xxxi).

319 However, whatever view is taken of the fine detail of the different analyses used by various Justices in the High Court, the unwavering and important proposition for present purposes is that this analytical tool has only been employed in relation to statutory rights. Native title is not a statutory right, hence why we describe the position of the government respondents as an invitation to the Court to extend existing law.

## The *Mutual Pools* line of authority

320 There was no real debate between the parties about the line of authority in which the High Court placed some limits around the kind of interference with existing rights that could attract s 51(xxxi). It was common ground that those limits were propounded and applied in a series of three cases, all handed down on the same day, 9 March 1994.

321 The circumstances of these cases, and the reasoning of each of the Justices, illustrate why there is no solid or justifiable analogy with native title rights and interests.

### Mutual Pools

322 This decision followed an earlier decision by the High Court that the *Sales Tax Assessment Act (No 1) 1930* (Cth) was invalid insofar as it imposed sales tax on any part of a swimming pool constructed in situ. A tax of that nature was held to be contrary to s 55 of the Constitution: see *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* [1992] HCA 4; (1992) 173 CLR 450. The Commonwealth subsequently enacted the *Swimming Pools Tax* ***Refund Act*** *1992* (Cth), which provided for refunds of sales tax amounts paid in certain circumstances, but not others. A single transaction for a single pool, involving the payment of $1,522 in sales tax, which was not refundable under the Refund Act, was the vehicle for the challenge by Mutual Pools to the validity of the Refund Act. Ultimately before the High Court, the parties agreed the Refund Act was supported by a head of legislative power in s 51 of the Constitution, and also agreed the Commonwealth was indebted to Mutual Pools in the amount of $1,522. In his reasons for judgment at 167, Mason CJ identified the following features of the Refund Act, both of which were legitimate features that did not render the Refund Act invalid:

(a) As s 4(1) of the Refund Act extinguished:

the Commonwealth’s liability to repay the in situ pool tax, except as provided by the section, its effect in that respect is to leave the payer in the same position as if the original exaction were lawful under the Constitution.

(Footnotes omitted.)

(b) The Refund Act operated retrospectively by authorising the retention of monies previously paid.

323 The reasoning of the Court was as follows. Mason CJ found (at 172) that:

because the Refund Act can be supported as a law that relates to the imposition of taxation and as a law that involves the adjustment of competing claims and obligations of individuals (namely, the pool builder and the pool owner), it almost certainly follows that it stands outside the constitutional conception of a law with respect to the acquisition of property for reasons already given.

324 Brennan J found that the Commonwealth’s debt was a common law chose in action and therefore was “property”; that s 4(1) extinguished the debt thereby providing a benefit to the Commonwealth, and thus (at 176):

The legislative extinction of such a debt constitutes an acquisition of property.

325 However, his Honour held it was not an acquisition of property “for the purposes of s 51(xxxi)” (at 178), but rather for other purposes, and the acquisition (extinguishment of the debt) was a “necessary or characteristic feature of the means which the law selects to achieve its objective” (at 181).

326 Deane and Gaudron JJ found it was arguable that the extinguishment of the debt to the Commonwealth (as a chose in action), with a benefit to the Commonwealth, was an acquisition of property. Their Honours found it unnecessary to decide this matter. That is because the Refund Act was, in their Honours’ opinion, “outside the reach” of the just terms guarantee. Rather, the Refund Act was a “law defining and regulating the entitlement of persons with possibly competing claims (ie builders and owners of in situ swimming pools) to a refund of amounts paid to the Commonwealth on account of taxes in circumstances where no tax was, in fact, payable”. That character meant the Refund Act “necessarily affects any rights to a refund which would have existed if it had not been enacted”. Their Honours explained (at 191):

In some cases, such pre-existing rights are transformed into rights under the Refund Act. In other cases, they are modified or extinguished, without compensation, in favour of some competing claim, such as the claim of a pool owner who has borne the burden of payment and received no refund from the builder who has merely made the actual payment. In the present case where Mr. and Mrs. Chaplin had borne the burden of the tax, the Refund Act extinguished Mutual Pools’ right to receive a refund of the amount paid in respect of Mr. and Mrs. Chaplin’s pool. Any such modification or extinguishment of pre-existing rights without compensation was, however, but an incident of the operation of the law as a law defining and regulating rights of refund and does not impart to any of the provisions of the Refund Act a distinct additional character. It follows that, even if such an extinguishment or modification of some pre-existing right does constitute or bring about an “acquisition of property” within the meaning of those words as used in s. 51(xxxi), that incidental operation of the Refund Act does not impart to all or any of its provisions the character of a law with respect to the acquisition of property. It follows that the Refund Act is not within the reach of the guarantee of just terms contained in s. 51(xxxi) of the Constitution.

327 Dawson and Toohey JJ accepted that Mutual Pools’ chose in action constituted property “within the meaning of s 51(xxxi)”: at 194. However, their Honours found (at 195) there had been no “acquisition” of this property by the Commonwealth, acquisition being integral to the operation of s 51(xxxi) (at 194):

If one person loses property rights, it does not necessarily follow that they are acquired by another … The distinction between extinguishing rights in property and acquiring them is one that must be maintained in the application of s. 51(xxxi).

328 Their Honours found further that the Refund Act effected a “transfer of value”, being concerned with the repayment of money, rather than an “acquisition of physical property, in particular land”, being what was envisaged in their Honours’ view by the drafters of s 51(xxxi): at 196. In their Honours’ opinion, “[n]either the creation nor the satisfaction of a chose in action, at least in the form of a debt, involves the acquisition of property”: at 197.

329 Despite previous reservations, McHugh J in *Mutual Pools* agreed that certain valid exercises of legislative power under s 51 (taxation, forfeiture) may involve an acquisition of property but not for the “purposes of s 51(xxxi)”, as it necessarily has as its objective a different purpose: see at 221-222. Like the other Justices, McHugh J accepted Mutual Pools had a chose in action, a debt owed by the Commonwealth, that was extinguished by the Refund Act. His Honour was prepared to find the chose in action had been acquired by the Commonwealth: at 222-223.

330 Like Brennan J, McHugh J held that the acquisition of property was not “for the purposes of s 51(xxxi)”. At 224 his Honour held:

The purpose of the Refund Act is to repay the “taxes” unlawfully obtained as the result of the enforcement of a law which was authorized by the taxation power but invalid because it breached s. 55 of the Constitution. It is correctly characterized as a law with respect to taxation for the purpose of s. 51(ii). What is validly within s. 51(ii) is outside s. 51(xxxi), for the two powers are mutually exclusive.

331 Thus, none of the Judges in *Mutual Pools* used the term “inherently defeasible” or “inherently susceptible” to describe the rights in issue in *Mutual Pools*. To the contrary, a majority of the Justices accepted a chose in action *was* property, capable of being acquired.

332 McHugh J used a concept that might be seen as equivalent when his Honour said (at 223):

Thus, when the Parliament legislates so as to extinguish a property right of a person or State **which is not dependent for its continued existence on federal law** and the effect of the extinguishment is to vest a corresponding benefit of commensurate value in the Commonwealth, the law should be characterized as one providing for the acquisition of the property of that person or State by the Commonwealth.

(Emphasis added.)

333 Thus, there was no one line of reasoning commending itself to all of the Justices which resulted in their conclusion that s 51(xxxi) was not engaged. All of the Justices however recognised that in creating (and later extinguishing) rights by statute, even if a proprietary interest might arise, the exercise of legislative power by Parliament might stand outside the protection of s 51(xxxi).

### Peverill

334 It was *Peverill* that expressly introduced the concept of inherent defeasibility, albeit that *Mutual Pools* became an example of the modification and alteration of rights by statute outside the protection of s 51(xxxi). Dr Peverill brought a challenge to the decision of the Health Insurance Commission not to pay him a rate of medicare benefits for the provision of pathology services to patients, being the rate that was current at the time the services were provided to those patients. The ***Health Insurance*** *(Pathology Services)* ***Amendment Act*** *1991* (Cth) purported to reduce the medicare rates payable for such services with retrospective effect.

335 The purpose of the Health Insurance Amendment Act was said to be to validate earlier advice given by the Health Insurance Commission that a different medicare item should be nominated for particular services. Despite this advice from the Commission, upon which the Commission, the public and many pathologists acted, a single Judge of the Federal Court had upheld Dr Peverill’s claim that the correct medicare item was one which offered a higher benefit per service. In the reasons of Mason CJ, Deane and Gaudron JJ at 234-235, their Honours explained:

According to the financial impact statement contained within the memorandum, the Amending Act would prevent additional expenditure of up to $100 million that could result from additional payments for ELISA tests if the fee recommendations of the Committee were not applied.

336 The plurality held that the Health Insurance Amendment Act did not effect an acquisition of property within the meaning of s 51(xxxi) (at 235-236):

Dr. Peverill’s argument is that the retrospective substitution of a statutory right to receive payment of a lesser amount in substitution for his earlier entitlement is an “acquisition of property” for the purposes of s. 51(xxxi). It may be accepted that the entitlement to payment for each service is a valuable “right” or “interest” of a kind which constitutes “property” for the purposes of that paragraph. But it does not follow that the legislative substitution of another and less valuable statutory right to receive a payment from consolidated revenue for that previously existing brings about an “acquisition” of the earlier right for the purposes of s. 51(xxxi).

…

…here, the extinguishment of the earlier right to receive payment of a larger amount has been effected not only by way of genuine adjustment of competing claims, rights and obligations in the common interests between parties who stand in a particular relationship but also as an element in a regulatory scheme for the provision of welfare benefits from public funds.

…

…the Amending Act **brought about a genuine legislative adjustment** of the competing claims made by patients, pathologists including Dr. Peverill, the Commission and taxpayers.

(Emphasis added, footnotes omitted.)

337 At 237, in a passage which introduces the concept of inherent defeasibility, although through the phrase “inherently susceptible of variation”, the plurality states:

It is significant that the rights that have been terminated or diminished are statutory entitlements to receive payments from consolidated revenue which were not based on antecedent proprietary rights recognized by the general law. Rights of that kind are rights which, as a general rule, are inherently susceptible of variation. That is particularly so in the case of both the nature and quantum of welfare benefits, such as the provision of medicare benefits in respect of medical services.

…

Where such change is effected by a law which operates retrospectively to adjust competing claims or to overcome distortion, anomaly or unintended consequences in the working of the particular scheme, variations in outstanding entitlements to receive payments under the scheme may result. In such a case, what is involved is a variation of a right which is inherently susceptible of variation and the mere fact that a particular variation involves a reduction in entitlement and is retrospective does not convert it into an acquisition of property.

338 Brennan J’s opinion was that a practitioner’s right to the payment of a medicare benefit assigned by a patient was not a proprietary right, because it is (at 241-242):

conferred by statute exclusively upon the assignee practitioner when the conditions prescribed by the Principal Act are satisfied. It is not capable of assumption by third parties. It is a right ultimately to be paid by the Commission a sum of money out of Consolidated Revenue. The Commission is under a corresponding statutory duty. That duty is enforceable by a public law remedy: by mandamus or mandatory order under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

339 Therefore, it was not a “debt recoverable as such in any court of competent jurisdiction”, nor was it “susceptible of any form of repetitive or continuing enjoyment” or able to be “exchanged for or converted into any kind of property”. It had no “degree of permanence or stability”: see generally 243-245.

340 In contrast to Brennan J’s approach, Dawson J (at 249) was prepared to assume that a law reducing the rate of a medicare benefit was a law with respect to the acquisition of property. His Honour noted (at 249-250) the voluntary nature of a decision to accept a medicare benefit as payment for services and this feature being inconsistent with an acquisition attracting s 51(xxxi), which would be a compulsory or non-voluntary one. Further, and consistently with his Honour’s approach in *Mutual Pools*, Dawson J found the chose in action (if it were one) was not acquired for any purpose in respect of which the Commonwealth has power to make laws and thus was outside s 51(xxxi). His Honour also repeated the approach he and Toohey J had taken in *Mutual Pools*, finding it applicable to Dr Peverill’s arguments; namely that the reduction or extinction of a liability, even if a financial or monetary advantage or benefit is conferred on the person whose liability is reduced or extinguished (here the Commission), does not result in the acquisition of property by that person because nothing in the character of property is acquired.

341 Toohey J emphasised as central the task of identifying what is the property that has been acquired: at 255. His Honour described the scheme for the payment of medicare benefits as a complex scheme which in its terms provides that (at 256):

Parliament may alter, whether by way of increase or decrease, prospectively or retrospectively, the benefits it pays as part of that scheme.

342 Although his Honour did not use the term “inherently defeasible”, he did cite an extract from the judgment of Latham CJ in in ***Allpike*** *v Commonwealth* [1948] HCA 19; 77 CLR 62 at 69 where the Chief Justice said:

In the case of the Commonwealth, therefore, such right as there is is the creation of Commonwealth statute or Commonwealth regulation. **That right may be altered by the authority which created it.**

(Emphasis added.)

343 Toohey J concluded (at 256):

[Dr Peverill] took the benefit of the assignment [from the patient], as he was entitled to do. However, the Parliament remained competent to alter the regime of health insurance and to provide a recoupment to Dr. Peverill in accordance with the regime as formulated from time to time, even if the consequence was a reduction in the Commission’s liability to make payments. That is not to say that Dr. Peverill’s entitlement to be paid the medicare benefit is not property. It constitutes a chose in action and, for reasons that appear in my judgment in *Georgiadis*, answers the description of property. But the Amending Act effects no acquisition of property, because it is impossible to identify any property or interest in property acquired by the Commission. Indeed, the operation of the Amending Act lies outside the scope of s. 51(xxxi) but within the scope of s. 51(xxiiiA). It is in truth a law regulating benefits for services of the kind identified in par. (xxiiiA). It is not a law relating to the acquisition of property for a purpose in respect of which the Parliament has power to make laws.

344 McHugh J described the medicare benefit assigned to Dr Peverill by his patients as a “gratuitous statutory entitlement” (at 260) conferred by Parliament, and then repealed or amended. Alteration of that kind of entitlement could not constitute an acquisition of property for the purposes of s 51(xxxi). McHugh J also relied on *Allpike*, and the approach in the United States courts to the Takings Clause of the Fifth Amendment to the *United States Constitution*. His Honour said (at 262-263):

The entitlement under s. 20 of the Principal Act must be taken to be conferred subject to repeal or alteration – including retrospective repeal or alteration – at the discretion of the Parliament.

…

The s. 20 entitlement is granted subject to the condition that it may be altered, reduced or revoked at any time. A law which gives effect to that condition does not acquire any property of the beneficiary of the entitlement.

345 Notwithstanding those findings, McHugh J also agreed (at 265) that, looking at the practitioner’s entitlement under s 20 of the *Health Insurance Act 1973* (Cth), having accepted an assignment of the benefit from a patient as payment for provision of medical services, a practitioner had a right enforceable at law against the Commission, therefore a chose in action that constitutes property for the purposes of s 51(xxxi). Making a distinction between a situation where there had been a contract between a practitioner and the Commission and where there had not (as in Dr Peverill’s case), McHugh J held the statutory entitlement “merely declared the current policy of the Parliament in respect of the payment of assignments of medicare benefits” (at 267). His Honour found:

a person has no right to the continuation of a mere statutory benefit.

346 Thus, although all judgments emphasised the impermanent and statutory character of the benefit payable to Dr Peverill, only the plurality used the term “inherently susceptible of variation”.

### Georgiadis

347 Mr Georgiadis sought to pursue a common law negligence action against the Commonwealth in relation to personal injuries allegedly sustained in the course of his employment. The Commonwealth contended his cause of action was barred by s 44 of the *Commonwealth Employees’ Rehabilitation and Compensation Act 1988* (Cth), which purported to extinguish the previous entitlement of employees such as Mr Georgiadis to bring common law actions. Mr Georgiadis had commenced his common law proceeding before the enactment of s 44. Mr Georgiadis contended in response that s 44 was invalid on the basis that it effected an acquisition of property (being his right to bring an action for damages) other than on just terms, contrary to s 51(xxxi) of the Constitution.

348 The Court split in *Georgiadis*. The majority comprised Mason CJ, Brennan, Deane and Gaudron JJ. Dawson and McHugh JJ dissented.

349 The plurality reasons were given by Mason CJ, Deane and Gaudron JJ, as in *Peverill*. The plurality repeated the distinction between a taking and an acquisition, therefore precluding any direct analogies with United States constitutional principles: at 304. Nevertheless, the plurality accepted that s 44 extinguished a vested cause of action under the general law and in doing so conferred a financial benefit on the Commonwealth and its agencies in terms of their pre-existing liabilities. The plurality accepted it could therefore be described as a “law for the acquisition of causes of action against the Commonwealth” (at 306).

350 At 306-307 the plurality described the established limits around the engagement of the guarantee aspect of s 51(xxxi):

Not every Commonwealth law with respect to the acquisition of property falls within s. 51(xxxi) of the Constitution. It may be outside that paragraph because, although it effects an acquisition of property, it is a law of a kind that is clearly within some other head of legislative power. That is the case with a law imposing taxation or a law providing for the sequestration of the estate of a bankrupt. Or it may be outside s. 51(xxxi) because it effects an acquisition of a kind that does not permit of just terms, as in the case of a law imposing a penalty by way of forfeiture. And, it may fall outside s. 51(xxxi) because it cannot fairly be characterized as a law for the acquisition of property for a purpose in respect of which the Parliament has power to make laws. That will generally be the case with laws directed to resolving competing claims or providing for “the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest”.

(Footnotes omitted.)

351 The plurality did not see the nature and operation of s 44 as falling easily into any of the categories they had described, and rejected the Commonwealth’s argument that s 44 was no more than a limitation provision. They described s 44 as a “borderline case” for the application of s 51(xxxi) (at 308). They found (at 308) that s 44 was properly characterised as a law with respect to the acquisition of property – namely the acquisition of causes of action vested in Commonwealth employees, in the context of a scheme that applies only to Commonwealth employees. Since it failed to provide just terms, it was invalid.

352 Brennan J agreed in the outcome, for different reasons. Applying his Honour’s reasoning from *Mutual Pools*, for s 51(xxxi) to be engaged, the question was whether Mr Georgiadis’ rights against the Commonwealth were proprietary in nature. His Honour found (at 311) that a claim in negligence for damages for personal injury is in its nature proprietary, as a chose in action, whether or not it was assignable (the basis for non-assignability being public policy):

It needs no extension of the meaning of “property” in s. 51(xxxi) to comprehend a chose in action for damages for negligence causing personal injury. That paragraph, which is construed liberally as befits a constitutional guarantee of just terms, protects common law choses in action which are vested in an individual.

353 In dissent, Dawson J was prepared to assume that a right to maintain an action for the recovery of unliquidated damages for personal injury constitutes property for the purposes of s 51(xxxi): at 314. The assumption was grounded in the beneficial nature of the s 51(xxxi) guarantee. His Honour accepted at 314 that s 51(xxxi):

extends to innominate and anomalous interests not recognized as proprietary either at law or in equity.

(Footnotes omitted.)

354 Relying again on the distinction between a taking and an acquisition, Dawson J’s view relied on his joint reasons with Toohey J in *Mutual Pools* that any benefit or advantage to the Commonwealth was not in the form of property (at 315):

The plaintiff’s right of action was extinguished, not acquired.

355 Toohey J accepted that Mr Georgiadis’ right to “receive money by way of damages” was a proprietary right: at 319-320. However, his Honour also considered there was no acquisition by the Commonwealth, in part it would seem relying on an analysis that is close to the inherent defeasibility approach (at 321):

The right to bring a suit against the Commonwealth in tort is conferred by Commonwealth legislation and it is hard to see how a law which affects that right, even a law diminishing or extinguishing it, can fall within s. 51(xxxi).

356 Toohey J concluded (at 321):

It is not possible to identify the acquisition of an interest in property by the defendant. What has happened is that a right which once existed no longer exists. It was said by the defendant that few persons stood to be affected by the provision. That may be so but it cannot be a touchstone by which to determine whether there has been an acquisition of property from the plaintiff.

357 McHugh J also accepted Mr Georgiadis had a chose in action, which was proprietary in nature. He accepted the Commonwealth had gained a “benefit”. However he also found there was no “acquisition” by the Commonwealth of the property of Mr Georgiadis: at 325. His Honour said:

A right which can be extinguished by a federal law enacted under a power other than s. 51(xxxi) is not a law which falls within the terms of that paragraph of the Constitution. To use the words of Dixon CJ in *Burton v Honan*, “the whole matter lies outside the power given by s. 51(xxxi)” of the Constitution.

(Footnotes omitted.)

358 Again the language of inherent defeasibility is not used, but the analysis is comparable.

359 Thus, the split in *Georgiadis* between the majority and the minority turned not on the characterisation of the right as proprietary, but on what had been acquired by the Commonwealth. The minority did not see the statutory extinguishment of a right, even if a benefit of some kind flowed to the Commonwealth (or presumably to a third party), as sufficient to constitute an acquisition of the property of Mr Georgiadis. The majority emphasised that the right in issue was a general law right, and not dependent for its existence on statute, and therefore not “susceptible to modification”. That was the key difference. The plurality said at 306:

There is no acquisition of property involved in the modification or extinguishment of a right which has no basis in the general law and which, of its nature, is susceptible to that course.

360 It is as clear as it can be, in our opinion, that although there is a variety of reasoning emerging in the three decisions which are accepted to have introduced the concept of inherent defeasibility into s 51(xxxi) jurisprudence, the single constant thread is that, in referring to the concept of inherent defeasibility, the Court was concerned with rights that had been created by Parliament, and then altered, adjusted or extinguished by Parliament. And in no case were they dealing with rights in land or waters.

## Later authorities

361 Putting *Newcrest* to one side, which we deal with below, it is sufficient to go to four other s 51(xxxi) cases: *Minister for Primary Industry v* ***Davey*** [1993] FCA 876; 47 FCR 151*,* *WMC Resources*, *Chaffey* and *Cunningham*.

### Davey

362 We consider it relevant to look at *Davey* in some detail because it predates the three 1994 High Court cases, yet adopts (in the reasons for judgment of Black CJ and Gummow J) the concept of inherent defeasibility, although not quite in that language. It should be carefully considered because of the subsequent views expressed in *Newcrest* by Gummow J.

363 *Davey* concerned amendments to a fisheries management plan made under the *Fisheries Act 1952* (Cth), by which the number of “units” allocated to licence holders was reduced. It is not necessary to set out how the units were calculated, but the reduction was imposed across the fishery, although as the Court recognised there were various mechanisms by which individual fishers could acquire more “units” to make up for their losses. A trial judge in this Court held that the provision in the management plan which introduced the unit reduction constituted an acquisition of property contrary to s 51(xxxi).

364 Black CJ and Gummow J were prepared to assume that the units were “property” for the purposes of s 51(xxxi) (at 160), but, after noting that the overwhelming majority of s 51(xxxi) cases “concerns the acquisition of land or property rights at general law”, turned to consider the ramifications of the fact that the units were statutory rights. After referring to both *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45; 177 CLR 106 and *Australian Tape Manufacturers Association Ltd v Commonwealth* [1993] HCA 10; 176 CLR 480 as recent examples, their Honours turned then to the question of whether a “proprietary benefit enjoyed either by the Commonwealth or by a third party as a consequence of the acquisition” could be identified in the management plan amendments. They concluded there was none, rejecting an argument that other fishers described as “corporate fishermen” received a benefit from the overall reduction in units.

365 The next argument, which their Honours considered “logically anterior” to the benefit argument, was whether the units were “defeasible, in the sense of being subject to alteration by the Minister, [so that] no acquisition can have occurred at all” (at 163).

366 Their Honours concluded (at 165):

In the instant case, the units may be transferred, leased, and otherwise dealt with as articles of commerce. **Nevertheless, they confer only a defeasible interest, subject to valid amendments to the NPF Plan under which they are issued**. The making of such amendments is not a dealing with the property; **it is the exercise of powers inherent at the time of its creation and integral to the property itself**.

Paragraph 20B of the NPF Plan confers no proprietary benefit upon the Commonwealth or a third party. **And instead of taking away something the fishermen possessed, it merely alters the statutory creatures in accordance with the statutory scheme creating and sustaining them**.

(Emphasis added.)

367 While the language might be slightly different, this was in our opinion the same conceptual approach adopted by the High Court the following year in *Mutual Pools*, *Peverill* and *Georgiadis*. What is important for the resolution of the separate questions is that the conceptual framework is plainly dependent on the premise that it was Parliament (directly, or indirectly through authorising legislation) that created the rights in the first place.

### WMC Resources

368 This decision came a year after *Newcrest*. It concerned the excision from the mining exploration permit held by WMC of “blocks” in the continental shelf between Australia and East Timor. The excision was effected by provisions in the *Petroleum (Australia-Indonesia Zone of Cooperation) (****Consequential Provisions****)* ***Act*** *1990* (Cth), as part of the consequences of the *Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, signed 11 December 1989, 1654 UNTS 105 (entered into force 9 February 1991). There was a just terms clause in the Consequential Provisions Act (s 24). WMC commenced proceedings in this Court for a declaration that the excision effected by terms of the Consequential Provisions Act would be an acquisition of property otherwise than on just terms if it were not for s 24 of the Consequential Provisions Act. It also sought compensation pursuant to s 24(3) of the Consequential Provisions Act. It was successful at first instance and on appeal, but the High Court by majority upheld the Commonwealth’s appeal.

369 The majority comprised Brennan CJ, Gaudron, McHugh and Gummow JJ. Toohey and Kirby JJ dissented. Again, *WMC Resources* concerned the statutory right of an exploration permit.

370 Drawing on his reasons in *Mutual Pools*, Brennan CJ focused on whether there was an *acquisition* by the Commonwealth or any other person (at [13]), which in his Honour’s view (referring to *Georgiadis*) included the extinguishment of (vested general law) rights against the Commonwealth. His Honour accepted the exploration permit was a proprietary right, but it was one created by statute. He explained (at [16]) that this would not preclude s 51(xxxi) being engaged:

If statutory rights were conferred on A and a reciprocal liability were imposed on B and the rights were proprietary in nature, a law extinguishing A’s rights could effect an acquisition of property by B. In the present case, where the rights of the permittee and of WMC, though created by statute, are properly to be regarded as proprietary in nature, a Commonwealth law which purported to effect a compulsory transfer of those rights to a third party would be a law for the acquisition of property.

371 So too if (but only if) a statute modified or extinguished “a reciprocal liability to which the party acquiring the right was subject”: at [17], referring to his Honour’s reasons in *Newcrest*. See also Gaudron J at [79].

372 In that part of his Honour’s reasons where he considers whether, in WMC’s case, there had been an “acquisition” of its property, there is a passage of some importance to the resolution of the present separate question. That is because, in considering the legal situation about the continental shelf, Brennan CJ goes back to what his Honour said in *Mabo (No 2)*. At [20], under the heading “The source of the rights of the permittee and WMC”, his Honour said:

It is erroneous to regard the P(SL) Act as the off-shore equivalent of those provisions which, in Australia, authorise the Crown to alienate interests in the waste lands of the Crown (provisions which I shall call “Land Acts”). If it were the equivalent of Land Acts, it would be arguable that the extinguishing of a permittee’s proprietary rights relieves the Commonwealth of a reciprocal burden on its title to land within the permit area and thus constitutes an acquisition of property. The Land Acts **assume the existence of the Crown’s radical title to land** lying above the low water mark, a title which is sufficient to support the alienation of interests in that land and to found the Crown’s full beneficial title to that land when there are no other interests or **when other interests have been extinguished or are exhausted**. In *Mabo v Queensland [No 2]* I examined the nature of that radical title and it is unnecessary now to repeat it. **It is sufficient to note that the extinguishing of an interest in land above the low water mark necessarily results in the enhancement of the title which was subject to the interest extinguished**. The position in relation to interests in or over the continental shelf is quite different.

(Emphasis added.)

373 This paragraph, and Brennan CJ’s description of what he decided in *Mabo (No 2)*, is incompatible with the government respondents’ submissions. It clearly posits that the extinguishment of native title, as an interest in land, is an acquisition of property because it “necessarily results in the enhancement of the [radical] title which was subject to the interest extinguished”.

374 His Honour concluded at [23]:

Although, by our municipal law the Commonwealth has the power to legislate in respect of the exploration of and the exploitation of the resources of the continental shelf, it has no property in the continental shelf at common law.

375 Gaudron J reached a similar conclusion; see [84]-[86]. McHugh J took a broad approach to inherent defeasibility (at [146]-[149]) and found that concept applicable to WMC’s exploration permit.

376 Gummow J was the last member of the majority. His Honour’s reasons assume particular importance, coming after his analysis in *Newcrest* on which the government respondents so heavily relied in the present case. His Honour accepted (at [179]) that the statutory grant of the exploration permit may have given WMC rights of a proprietary nature, but held (at [179] and [181]):

Such property rights as were involved were not, given their nature, susceptible of such acquisition. In particular, and contrary to the submissions for WMC, the P(SL) Act, under which the Permit was granted and continued in suspended existence, had not created any statutory rights which were susceptible of acquisition as a consequence of the changes made by the Cooperation Act.

…

The authority given under the Permit was, by reason of the terms of s 28 of the P(SL) Act, “subject to this Act” and the effect of s 5(8) thereof was that a reference to a permit was to a permit “as varied for the time being” under the P(SL) Act. Before further consideration of that aspect of the matter, reference should be made to a submission by the Commonwealth.

377 Gummow J went on to reject the Commonwealth’s broader contention that all statutory rights were inherently defeasible, by reference to various intellectual property rights: at [182], [194]-[195]. His Honour continued (at [196]):

The point of present significance is that in some circumstances, of which the statutory rights in this case are an instance, the nature of the property may be such that its defeasance or abrogation does not occasion any acquisition in the constitutional sense.

378 There is no reference to his Honour’s reasoning at 613 of *Newcrest* in these passages. While his Honour describes statutory mining rights in *WMC Resources* as “an instance”, his Honour does not repeat or emphasise that there is another kind of right, rights in land and waters, which can be abrogated without “any acquisition in the constitutional sense” (at [196]).

379 At [203] his Honour concluded:

The result was that, **from the moment of its grant in 1977**, the Permit suffered from the “congenital infirmity” that its scope and incidents **were subject to the P(SL) Act** in the form it might from time to time thereafter assume. Any proprietary rights which were created in respect of the Permit were liable to defeasance. By reason of their nature, upon such defeasance of those rights there would be no acquisition of property to which s 51(xxxi) applied.

(Emphasis added, footnotes omitted.)

380 The point to note about Gummow J’s reasoning, and his conclusion, is that it remains firmly confined to statutory rights. That is the sense in which his Honour uses the term “created”, and “grant”. He refers, in our respectful opinion, to rights, even with a proprietary character, created by Parliament. Further, he also continues to emphasise that there is nothing more than abrogation (or modification), and no “acquisition”. Neither of these two fundamental premises of his Honour’s reasoning can apply to native title rights in land and waters. The absence in *WMC Resources* of any references to, or development of, another category of proprietary rights, not created by statute but said to have a “congenital infirmity”, by Gummow J supports our view that at best, his Honour’s passage in *Newcrest* at 613 was not, with respect, such seriously considered dicta that this Court should proceed on the basis that it should follow it.

### Chaffey

381 *Chaffey* concerned amendments to statutory compensation available under a Northern Territory statute, the ***Work Health Act*** *1986* (NT), in response to a decision of the Northern Territory Court of Appeal that the term “normal weekly earnings” in the Work Health Act included superannuation contributions. The amendment inserted a definition of “normal weekly earnings” so as to *exclude* superannuation contributions made by an employer, and was given a retrospective operation so that it affected Mr Chaffey’s entitlements. The legislative power of the Northern Territory Legislative Assembly to enact the Work Health Act derived from the Self-Government Act. The plurality in *Chaffey* explained at [3] how the s 51(xxxi) issue arose:

As a general proposition, subject to any applicable constitutional qualification, the power of an Australian legislature to make laws, here conferred upon the Assembly by s 6 of the Self-Government Act, “includes the power to unmake them”. Statements to that effect were made in *Kartinyeri v The Commonwealth*. In the case of the Assembly that power is expressly subjected to the restraint imposed by s 50 of the Self-Government Act. This in turn calls for the application of the decisions which have construed s 51(xxxi) of the Constitution.

(Footnotes omitted.)

382 The Court held the Work Health Act amendments were valid, and the limit in s 50 of the Self-Government Act was not engaged. The plurality held that the resolution turned not on the notion of “acquisition” but on the identification of the “property” to which s 50 was contended to apply: at [21]. At [23]-[25], the plurality (which included Gummow J) introduced the additional considerations that arise where the property consists of statutory rights:

The term “property” is used in various settings to describe a range of legal and equitable estates and interests, corporeal and incorporeal. In its use in s 51(xxxi) the term readily accommodates concepts of the general law. **Where the asserted “property” has no existence apart from statute further analysis is imperative**.

It is too broad a proposition, and one which neither party contended for in these appeals, that the contingency of subsequent legislative modification or extinguishment removes all statutory rights and interests from the scope of s 51(xxxi). *Newcrest Mining (WA) Ltd v The Commonwealth* is an example to the contrary. That case concerned the use of statute to carve out mining interests from the radical title enjoyed by the Commonwealth upon the acceptance of the Territory pursuant to s 111 of the *Constitution*. Again, a law reducing the content of subsisting statutory exclusive rights, such as those of copyright and patent owners, would attract the operation of s 51(xxxi).

On the other hand, the statutory licensing scheme for off-shore petroleum exploration the validity of which was upheld in *The Commonwealth v WMC Resources Ltd* was constructed so as to subject the scope and incidents of licences to the form of the legislation from time to time. In *WMC*, as with Pt V of the *Work Health Act*, by express legislative stipulation in existence at the time of the creation of the statutory “right”, **its continued and fixed content depended upon the will from time to time of the legislature which created that “right”.**

(Emphasis added, footnotes omitted.)

383 The Court rejected the analogy put on behalf of Mr Chaffey with general law compensation rights for work-related injuries, instead accepting (see [18] and [30]) that the legislation created its own statutory scheme for the payment of compensation, subject to and in accordance with the legislative provisions enacted. It was this feature which led the plurality to conclude (at [30]):

The consequence is that his rights to compensation under that statute were of a nature which rendered them liable to variation by a provision such as that made by the 2004 Act. Once this nature of the “property” involved is understood it is apparent that **there was no “acquisition” spoken of in s 50 of the Self-Government Act**.

(Emphasis added.)

384 *Chaffey* confirms that where statutory rights owe their existence to, and are dependent for that existence upon, a legislative scheme, changes to those rights may not be capable of being characterised as the Commonwealth (or the Territory) “acquiring” anything.

### Cunningham

385 Four plaintiffs who were former members of federal Parliament challenged amendments made in 2011 to the *Parliamentary Contributory Superannuation Act 1948* (Cth) and the *Remuneration Tribunal Act 1973* (Cth) which they alleged adversely affected their entitlements to retiring allowances. Their case is summarised at [4] of the plurality reasons:

The plaintiffs contend that they have rights in the nature of property, within the meaning of s 51(xxxi) of the *Constitution*, in respect of their retiring allowances and, in the case of the third and fourth plaintiffs, their Life Gold Passes. The plaintiffs further contend that changes made by certain legislative provisions and by Determinations made by the Remuneration Tribunal pursuant to the *Remuneration Tribunal Act 1973* (Cth) effect alterations of those property rights or interests which amount to acquisitions of their property otherwise than on just terms, within the meaning of s 51(xxxi).

(Footnotes omitted.)

386 At [43]-[44] the plurality said:

The term “property” in s 51(xxxi) has always attracted a liberal construction in this Court. Some cases concerning s 51(xxxi) have drawn a distinction between rights recognised by the general law and those which have no existence apart from statute and whose continued existence depends upon statute. The dichotomy is useful. Rights which have only a statutory basis are more liable to variation than others. As was said in *Chaffey*, however, where the asserted “property” has no existence apart from statute, further analysis is imperative. It is a truism that statutory rights, which are not constitutionally protected, may be subject to variation or extinguished by legislative action. There are, however, some statutory rights which, having regard to their character and the context and purpose of the statute creating them, can be regarded as inherently variable. Statutory remuneration falls into that category. So too does an entitlement to a retiring allowance.

In the joint judgment in *Chaffey* it was pointed out that it could not be said that the prospect of subsequent modification, or extinguishment, removes all statutory rights from the scope of s 51(xxxi). The question whether that provision was attracted depended upon the nature of the right. In *The Commonwealth v WMC Resources Ltd*, as in *Chaffey* the right stipulated in the statute **depended for its content upon the will of the legislature from time to time**. The same may be said here of the provisions for calculating retiring allowances from time to time.

(Emphasis added, footnotes omitted.)

387 Again, there is no contemplation in these statements of principle that rights that are proprietary in nature but are not derived from statute fall within the concept of being “inherently variable”. What is emphasised in this passage is that the rights in question derive their existence and content from statute, and are thus susceptible to variation – as to both their existence and their content – by statute. What is also emphasised is that the distinctions made between these kinds of circumstances, and circumstances where statutory rights are held to be protected by s 51(xxxi), proceeds very much by a process of statutory construction, and an ascertainment of Parliament’s intention about the nature of the rights created: see [389] below. None of this is applicable to native title rights and interests in land and waters.

388 Gageler J dissented in respect of some of the entitlements in issue, but not all of them: see [74]. That is because his Honour found on the facts that there was no alteration of the plaintiffs’ statutory rights capable of being characterised as a taking of their property: at [104]. His Honour formed a different view about the “Life Gold Passes”, which his Honour found to be enforceable rights (at [107]) with nothing “inherently variable” about their character: at [111].

389 Relevantly to the applicable legal principles, at [66]-[67] his Honour said:

One potential characteristic of a statutory right of property created in the exercise of another grant of legislative power is that the right may be created on terms which make that right susceptible to administrative or legislative alteration or extinguishment without acquisition. That is to say, susceptibility to alteration or extinguishment by subsequent administrative or legislative action might be a characteristic of the right that is created – “**inherent at the time of its creation and integral to the property itself**”. Whether, and if so to what extent, a right of property created in the exercise of another grant of legislative power is inherently susceptible to administrative or legislative alteration or extinguishment necessarily turns on the construction of the legislation creating that right: on its text, read in its total context and in a manner which best achieves its legislative purpose or object.

Legislatively created rights in the nature of accrued entitlements to payments from consolidated revenue have been recognised to be rights of property. Their legislative alteration, if to the financial benefit of the Commonwealth or another person, may amount to an acquisition of property. Legislatively created rights of that nature have nevertheless been said to be proprietary rights of a kind “which, as a general rule, are inherently susceptible of variation”. That general rule can be no more than a **presumption of legislative intention which informs the construction of statutes by which such rights are created**. The strength of the presumption must vary with the context. The presumption is undoubtedly strong in relation to rights to receive pensions, allowances and benefits in the nature of social welfare payments, which can be regarded as having been conferred from the outset on the basis that they might be redistributed or withdrawn at any time. The presumption can apply at best weakly in relation to accrued entitlements to receive payments which can properly be regarded as having formed part of a package of remuneration for services rendered.

(Emphasis added, footnotes omitted.)

390 Two points should be noted about these passages. First, consistently with other judicial discussion of the concept, the discussion is restricted to statutory rights. As we explain below, the only two cases the government respondents pointed to that are said to have gone beyond statutory rights do not stand for any such proposition.

391 Second, and we return to this below, the focus of the analysis is on Parliament as the creator of rights, as it sees fit within legislative power, and therefore also as the entity capable of taking them away on the same basis. That said, Gageler J also emphasised that in an exercise of legislative power, Parliament could also decide to create statutory rights which were intended to be removed only with just compensation: see [70], and the reference to Gleeson CJ’s reasons in *Theophanous v Commonwealth* [2006] HCA 18; 225 CLR 101. As his Honour emphasised in the passages we have extracted above, and as other authorities have also emphasised, these are all matters of statutory construction.

### Authorities said to involve non-statutory rights: Telstra and Esposito

392 Contrary to the contentions of the government respondents, we accept the submissions of the applicant, the NLC and the Rirratjingu parties that ***Telstra*** *Corporation v Commonwealth* [2008] HCA 7; 234 CLR 210 and ***Esposito*** *v Commonwealth* [2015] FCAFC 160; 235 FCR 1 also concerned statutory rights. They thus provide no basis to see the “inherent defeasibility” or “inherent susceptibility” concepts as having already been extended beyond statutory rights.

393 We accept the following submissions of the Rirratjingu parties at [45]-[46], and therefore also accept the submissions of the applicant at [99] of his written submissions and the NLC at [85] of its written submissions. The Rirratjingu parties are correct to submit as follows:

The Commonwealth makes the fundamental error, in fact noted by the Court in *Telstra*, of assuming that property can usefully be conceived of as the tangible “subject matter of [a particular] legally endorsed concentration of power” (here the “physical infrastructure” comprising the local loops … But, as the Court sought to make clear, the putative property in issue in that case was in fact Telstra’s “rights of use of local loops”. In that context, a central plank of the argument against Telstra was that those rights were “statutory rights inherently susceptible of change”. Although the Court warned against using that label (and the notion of such rights being inherently susceptible to change) in an overly broad way, the Court went on to analyse the relevant “rights” through that lens. It is evident that the Court conceived of Telstra having a right, granted to it under statute, to use the local loops, but always “subject to the rights of its competitors to require access to and use of the assets”.

In other words, the putative property was Telstra’s right to use the local loops, which was both created and limited by statute … That analysis is reflected in Crennan J’s reasoning in *Wurridjal* (in a passage subsequently endorsed by Gummow J in *JT International SA v Commonwealth*), where her Honour cited *Telstra* as authority for the proposition that “[i]t may be clear from the scope of the rights conferred by the statute that what appears to be a new impingement on the rights was in fact always a limitation inherent in those rights”. That explanation is consistent with that given by Allsop CJ, Flick and Perram JJ in *Esposito v Commonwealth*, where their Honours said:

What was affected by the access regime was not Telstra’s property in the [physical asset] but rather the statutory rights which Telstra held (but also needed to hold) to operate it as a telecommunications network which had always been subject to the limitations which Telstra sought to impugn as effecting an acquisition.

(Original emphasis, footnotes omitted.)

394 The last part of this submission, in its reference to *Esposito*, explains why reliance on that case does not assist the government respondents.

395 Contrary to the picture the government respondents sought to paint, the extension urged upon the Court in the present proceeding is novel, and radical.

## *Newcrest*

396 Newcrest’s predecessors in title had been granted more than 20 mining leases in an area called Coronation Hill in the Northern Territory. Newcrest purchased those leases in 1987 from BHP. The leases were granted under the 1939 Ordinance, one of the ordinances in issue on the separate questions. After self-government for the Territory in 1978, some of the leases were renewed, either relying on the 1939 Ordinance or on the *Mining Act 1980* (NT). Kakadu National Park had been established in 1979, and although mining was not initially prohibited, in 1987 the ***National Parks*** *and Wildlife Conservation* ***Amendment Act*** *1987* (Cth) inserted s 10(1A) into the National Parks Actwhich provided that no operations for the recovery of minerals should occur in Kakadu. The National Parks Amendment Act also provided, in s 7, that the Commonwealth was not liable to pay compensation to any person by reason of the National Parks Amendment Act. In 1989 and 1991, by Proclamations made under s 7(8) of the National Parks Act which extended the Kakadu National Park, land covered by Newcrest’s mining leases was included in the park, and therefore those areas became subject to s 7 of the National Parks Amendment Act and s 10(1A) of the National Parks Act. Newcrest argued that the combined effect of the legislation and the Proclamations amounted to an acquisition of its property by the Commonwealth.

397 Newcrest relied, for its just terms argument, on either s 50 of the Self-Government Act or s 51(xxxi). For the latter alternative, one of the contentions put by Newcrest was that *Teori Tau* should be overruled and s 122 of the Constitution should be found to fall within the terms of s 51(xxxi), that is, within the phrase “for any purpose in respect of which the Parliament has power to make laws” in s 51(xxxi). The Commonwealth Law Report sets out Newcrest’s arguments about *Teori Tau* in some detail: see 520-521. The Northern Territory joined with Newcrest in seeking leave for *Teori Tau* to be reconsidered, and its arguments to this end are also set out in the CLR report at 521. The Commonwealth resisted Newcrest’s arguments on the basis, amongst other matters, that there was no acquisition but only an extinction or diminution of a property right: at 522. It opposed leave to re-open *Teori Tau*. In doing so, an argument is recorded in the following terms at 523 of the Commonwealth Law Report:

Further, the application of s 51(xxxi) to the Northern Territory would have the effect of invalidating significant provisions of Commonwealth legislation and would potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the Territory since 1911 to the extent to which any such grant may be inconsistent with the continued existence of native title as recognised at common law.

398 Of course, *Newcrest* was not a case about native title. However, the Commonwealth used this contention about native title, in terrorem, in support of its contention that *Teori Tau* should remain the law. In considering the dicta upon which the government respondents rely, it is important to appreciate how the example of native title arose in this case; namely as no more than an asserted (and at that stage hypothetical) consequence of overruling *Teori Tau*. We shall describe this as the **Commonwealth’s native title assertion**.

399 A majority of the Court (Toohey, Gaudron, Gummow and Kirby JJ) held that by the Proclamations and the operation of s 10(1A) the Commonwealth had acquired the property of Newcrest.

400 We commence with the reasons of Gummow J, as the other three Judges in the majority all expressed some concurrence with his Honour’s reasoning. The nature and extent of that concurrence is central to the weight the government respondents submit should be given to *Newcrest* in answering the inherent defeasibility issue.

401 The burden of Gummow J’s reasons lies elsewhere than the point on which the government respondents seek to rely. His Honour first rejects what he describes as the “statutory compensation” argument made by Newcrest, based on s 50 of the Self-Government Act (at 589). He then turns (at 591) to what he describes as the “threshold question”:

The threshold constitutional question is whether any acquisition by the respondents of property which was effected by the Proclamations, the enabling provisions thereof and s 10(1A) of the Conservation Act operated free from any constitutional imperative that the acquisition be accompanied by the provision of just terms. On the footing, mentioned earlier in these reasons, that the legislation in question is supported by s 122, the question thus becomes one of the interrelation between par (xxxi) of s 51 and s 122 of the Constitution.

402 From 591, his Honour considers the relationship between s 122 and s 51(xxxi) and explains his opinions about the scope and limitations of each provision, including a lengthy discussion about the parameters of s 51(xxxi).

403 At 597-598, his Honour says:

The basic proposition is that each provision of the Constitution, including s 122, is to be read with other provisions in the same instrument. Accordingly, and at least prima facie, par (xxxi) of s 51 and s 122 should be read together. Section 122 is not to be torn from the constitutional fabric.

(Footnotes omitted.)

404 From 598, his Honour then develops why this prima facie position is correct. At 600, his Honour concludes:

I conclude (i) that, upon its proper construction, in empowering the Parliament to make laws “for” the government of any territory, s 122 identifies a purpose, in terms of the end to be achieved, and (ii) that, within the meaning of par (xxxi), s 122 states a purpose in respect of which the Parliament has power to make laws. The question then becomes whether there is either expressed or made manifest by the words or content of the grant of power in s 122 sufficient reason to deny the operation of the constitutional guarantee in par (xxxi). There is none.

405 From this point, his Honour explains over several pages why there is no sufficient reason to deny the operation of s 51(xxxi) on s 122. His Honour makes four main points, through to 602, and then at 603 adds:

Nevertheless, the Commonwealth referred to various matters which it submitted supported a construction which excluded from the operation of par (xxxi) any law of the Parliament which was supported, solely or concurrently with another head of power, as a law made in exercise of the power conferred by s 122 of the Constitution.

406 Amongst those matters, but some 10 pages further on in his Honour’s reasoning, and after his Honour has worked through a number of other arguments by the Commonwealth in much greater detail, is the Commonwealth’s native title assertion. Included in these 10 pages is his Honour’s detailed analysis of *Teori Tau*, and why it is incorrect. Then at 613 appears the paragraph we have extracted at [292] above.

407 The second part of this paragraph casts light on the first. In the second part – the “circuitous device” reference – Gummow J contemplates that s 51(xxxi) **can** apply to native title rights and interests. This suggests the rights are not of the same character as those in *Mutual Pools*, *Peverill*, *Georgiadis,* *WMC Resources* or *Newcrest*. If his Honour regarded native title rights as no different to Dr Peverill’s medicare payment, then it would not matter whether the Parliament employed direct means, or a circuitous device; s 51(xxxi) would not be engaged.

408 Thus, the first part of this passage needs more careful evaluation. In our opinion, all his Honour is saying in the first part is that native title rights and interests are defeasible. That is why he italicises “the grant”. The Crown can override and extinguish them in whole or in part. The use in this passage of the word “inherently”, in our respectful opinion, could not have been intended to carry the meaning the reference to *Peverill* might otherwise suggest. There is certainly no indication his Honour is saying such rights are not “property” for the purposes of s 51(xxxi), nor that the grant of an inconsistent proprietary interest in land covered by native title would not be an acquisition.

409 Alternatively, if his Honour is to be taken as expressing an opinion that all native title rights and interests recognised by the common law are to be equated with Dr Peverill’s statutory entitlements to a medicare payment, or WMC Resources’ statutory exploration permit, not because they are created by Parliament and may be altered by Parliament, nor because s 122 is “incongruous” to the engagement of s 51(xxxi) as is the taxation power, but for some other reason, unexpressed in this passage, we respectfully consider the observation to be dicta that was not seriously considered by his Honour. It was in the nature of a summary retort to the Commonwealth’s in terrorem submission, which itself was put briefly, and amongst a number of other asserted adverse consequences. Of course neither the Commonwealth nor the Court had the benefit of any submissions from any native title holding parties about this proposition.

410 His Honour’s approach is also somewhat at odds with the prominence his Honour gave, in joint reasons with Hayne J, in *Wurridjal* at [178], to s 51(xxxi):

What was said by Barwick CJ in *Teori Tau* also does not sit well with his later statement in *Trade Practices Commission v Tooth & Co Ltd* that s 51(xxxi) is “a very great constitutional safeguard” whose “constitutional purpose is to ensure that in no circumstances will a law of the Commonwealth provide for the acquisition of property except upon just terms”.

(Footnotes omitted.)

411 In our view, it is clear that native title rights and interests are proprietary and concern land and waters. It is also clear, in our view, that *if* a grant of an inconsistent proprietary interest extinguished native title, it would do so in a way which was an “acquisition” as the s 51(xxxi) authorities describe that term – a proprietary benefit/interest in the claim area transferred to either the Crown or to third parties. Incongruously, the assurance in *Wurridjal* that “in no circumstances” will the “very great constitutional safeguard” in s 51(xxxi) fail to protect property is, on the government respondents’ contention, obliterated by one paragraph at 613 in *Newcrest*.

412 The footnoted references at 613 do not develop or disclose how they support the proposition made at 613. Instead, in the current proceeding the various parties (especially the Commonwealth, Northern Territory and NLC) have speculated about what his Honour meant by those footnoted references, and have developed complicated arguments based on those references. It is not appropriate to speculate about how his Honour’s reasoning process was constructed by those brief footnoted references. The references provide no real insight into such a novel extension of inherent defeasibility, if this is how the passage is to be understood.

413 There is not a single reference in Gummow J’s passage to the terms of the NTA, and how characterising native title as inherently defeasible sits with that legislative scheme. There is no attempted reconciliation with the then current characterisations of native title rights and interests, as expressed in the High Court, including by Gummow J. With the greatest respect, it cannot be described as seriously considered dicta.

414 We do not agree it is clear that any other judge in the majority in *Newcrest* agreed with Gummow J’s observations. Of the other three Judges in the majority, Kirby J expressed some agreement with the reasoning of Gummow J, which the government respondents suggest can be construed as including the passage at 613. That is, with respect, not immediately obvious. At 651, Kirby J said:

Various other arguments for holding to *Teori Tau* are collected in the opinions of Brennan CJ, Dawson and McHugh JJ in this matter. Some of them lay emphasis on the supposed consequences of the opposite theory for the validity of grants of freehold or leasehold title made by the Commonwealth in the Northern Territory after 1911. For the reasons given by Gummow J, I am not convinced that these apprehensions are well founded.

415 Yet in Brennan CJ’s reasons in *Newcrest* there is no reference to native title. That is telling, given his Honour wrote the leading judgment in *Mabo (No 2)*. At 545 there is a reference to the wider (adverse) consequences for previous compulsory acquisitions in the Northern Territory if s 122 is subject to s 51(xxxi). Nor is there any reference to native title in Dawson J’s reasons. Only McHugh J specifically addresses the Commonwealth’s in terrorem submissions: see 576. Therefore, it is difficult to know what Kirby J’s statement about “various other arguments” precisely encompasses. For it to encompass the passage at 613 sits poorly with Kirby J’s closing observations in his reasons at 661. It is not clear in our opinion that Kirby J expressly agreed with the passage at 613 of Gummow J’s reasons.

416 Toohey J expressed general agreement with the reasons of Gummow J, but expressly disagreed with Gummow J’s reasoning about the overruling of *Teori Tau*: at 560. Toohey J said:

I acknowledge the force of the critical analysis to which Gummow J has subjected the judgment in *Teori Tau*. **And I am not persuaded by the argument of the Commonwealth** that the application of s 51(xxxi) to reduce the content of the legislative power conferred by s 122 would potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the Northern Territory since 1911, to the extent to which any such grant may be inconsistent with the continued existence of native title as recognised at common law.

(Emphasis added.)

417 We do not read this passage as at all endorsing what Gummow J said in the passage at 613. Toohey J does not explain why his Honour is not persuaded by the Commonwealth’s in terrorem argument. He does *not* say it is for the reason given by Gummow J.

418 Finally, Gaudron J states that her Honour agrees “generally” with the reasons of Gummow J. A “general” agreement is capable of bearing several meanings. It certainly does not necessarily mean agreement with every aspect of the reasoning of another Judge. There is no further indication in Gaudron J’s judgment that her Honour intended this “general” agreement to include agreement with the passage at 613. If understood in the way submitted by the government respondents, that passage represents a novel and controversial extension of the inherent defeasibility concept beyond statutory rights. We consider it is unlikely her Honour would have agreed to such an extension without expressly adverting to it. All the more so because her joint judgment in *Mabo (No 2)* with Deane J tends in the opposite direction.

419 This analysis is sufficient to persuade us, as an intermediate court, that we are not bound to, nor should we, apply the dicta of Gummow J in *Newcrest*. Our opinion is that it is unclear that any other Judge endorsed the opinions expressed by his Honour. We have explained why we consider it to be in the style of a brief retort to the Commonwealth’s submissions, and to be somewhat internally inconsistent, with respect.

420 Gummow J himself does not appear to have subsequently repeated, let alone expanded upon or explained, the passage at 613 in *Newcrest*, whether in native title cases or in s 51(xxxi) cases. In contrast, in *JT International SA v Commonwealth* [2012] HCA 43; 250 CLR 1, his Honour’s last case about s 51(xxxi), at [102] Gummow J cites with approval a passage from the reasons of Crennan J in *Wurridjal* which confines the concept of inherent defeasibility to statutory rights.

421 The Rirratjingu parties submit (at [66]) that for this Court to apply the brief dicta in Gummow J’s paragraph in *Newcrest*:

would require this Court to take the step of applying the “inherent defeasibility” concept to rights that are recognised at general law. Again, that is not a step that has ever been endorsed by a High Court. In effect, the Commonwealth and the Territory seek to have this Court develop and apply a new principle, which would at the very least be in tension with the principles the High Court has laid down regarding both “property” and “acquisition” within the meaning of s 51(xxxi). There is no reason for this Court to take that step. Rather, this Court should apply those principles in an orthodox fashion, consistent with the position reached by Deane and Gaudron JJ in *Mabo [No 2]*.

422 We accept that submission. The statement of Deane and Gaudron JJ in *Mabo (No 2)* at 111 was:

There are, however, some important constraints on the legislative power of Commonwealth, State or Territory Parliaments to extinguish or diminish the common law native titles which survive in this country. In so far as the Commonwealth is concerned, there is the requirement of s. 51(xxxi) of the Constitution that a law with respect to the acquisition of property provide “just terms”. Our conclusion that rights under common law native title are true legal rights which are recognized and protected by the law would, we think, have the consequence that any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s. 51(xxxi).

423 As the applicant, the NLC and the Rirratjingu parties submitted, no member of the Court in *Mabo (No 2)* disagreed with, or considered, this proposition in the case of acts attributable to the Commonwealth.

424 Finally, we do not consider that any later references to Gummow J’s passage change the approach we should take. It is true that in *Congoo FFC* at [74]-[75] North and Jagot JJ said:

The susceptibility of native title to defeasance by a subsequent inconsistent grant or exercise of power is a given. The reasoning of Gummow J in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 613 would support the conclusion that extinguishment of native title does not necessarily involve an acquisition of property. So too, by analogy, would the reasoning in *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210. The contrary view of Gaudron and Deane JJ in *Mabo (No 2)* at 111 was referred to in *Griffıths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 at [36] but only in the context of the background case and statute law to the issue there arising under compulsory acquisition legislation. *Wurridjal v Commonwealth* (2009) 237 CLR 309, to which the applicants also referred, does not provide any real support for the applicants’ contentions in this regard.

If, however, it is the case that the extinguishment of native title does not involve any acquisition of property by reason of the inherent susceptibility of such title to subsequent inconsistent sovereign acts, it is not accepted that such susceptibility is material to the circumstances arising by reason of an exercise of power under reg 54(4). By reason of that exercise, the Bar-Barrum people as native title holders were prevented for the duration from enjoying their otherwise acknowledged rights to access the land, to camp, hunt, fish and gather on the land, to take and use natural resources and water from the land, to conduct ceremonies, hold meetings, teach, light fires on, and be buried on the land. Under the *National Security Act* regime, the Bar-Barrum people were in no different position from the tenant in *Dalziel*. That bundle of rights was “seized and taken away” from the Bar-Barrum people just as the rights associated with the tenancy in *Dalziel* were taken (at 286). If the fragility of native title to subsequent inconsistent sovereign acts arises from the fact that native title is founded on traditional laws and customs and is only recognised by, and not founded upon, the common law then it is not apparent how a sovereign act which is not inconsistent with the continued recognition of native tile can take advantage of the inherent fragility of native title so as to avoid an acquisition of property. In such a case, as here, the native title rights and interests are (as the Commonwealth otherwise maintained) in no different position from the non-native title rights and interests in the land. On this basis, and consistent with the reasoning in *Dalziel*, the Commonwealth did acquire property from the Bar-Barrum people by reason of its exercise of power under reg 54(4) and, even though not recognised at the time, the statutory scheme provided just terms compensation for that acquisition.

425 We make the following points. These passages must be read in light of what appears at [72]:

Given the view that the exercise of power did not extinguish native title and, in any event, that the scheme for compensation provided for just terms if any property was acquired, the question whether the extinguishment of native title involves an acquisition of property is twice removed from the conclusions reached. Thus it is appropriate to limit the following observations, notwithstanding the request of the parties.

426 Not only does this mean that [74]-[75] is dicta, but it means that their Honours were not required to give the issue any close consideration, in the way they might have had to do if they had found there had been an extinguishment of native title.

427 Next their Honours make the uncontentious point that native title is susceptible to defeasance, without the adjective “inherently”. We agree.

428 Third, their Honours do not go so far as to adopt and endorse the passage in *Newcrest*. They do no more than note it, and note what its effect “would” be. They are, we infer, conscious of the potential enormity of the consequences of the Commonwealth’s submission.

429 Fourth, their Honours note an “analogy” with the reasoning in *Telstra*, which is far from accepting that in *Telstra* there was an extension of the concept of inherent defeasibility to non-statutory rights.

430 *Congoo FFC* provides a small amount of support for the government respondents, in the sense that the relevant passages are not expressly adverse to those arguments (aside from parts of [75]). That is not enough to persuade us that the government respondents’ contentions represent the current law.

431 The other main subsequent authority relied on by the government respondents is *Fejo.* They submit that in *Fejo* the majority joint judgment gives “tacit approval” to the passage in *Newcrest*, and also rely on some observations by Kirby J, who wrote separately. The majority included Gummow J.

432 *Fejo* concerned a 1996 application under s 61 of the NTA by the Larrakia People. The application covered extensive areas of land around Darwin, Palmerston and Litchfield. Within the claim area were some particular parcels of land which were the subject of Crown leases by the Northern Territory government, for the purposes of a housing development. The leases were granted in 1997. The leases contained a clause allowing the lessee, on completion of development and payment of any sums owing, to surrender the lease in exchange for a freehold title at no further cost. In relation to some of these parcels, the Larrakia People commenced proceedings seeking injunctive relief against one lessee (Oilnet) restraining it from continuing the housing development, and seeking to enforce an asserted entitlement of the Larrakia People to negotiate with the Northern Territory about the grant of such leases. The proceedings were summarily dismissed by a single judge of this Court. On appeal, several grounds were removed to the High Court. The issue removed concerned whether previous acts of the Crown (in right of South Australia, when it controlled the Northern Territory) in granting interests in the land, more than a hundred years prior to the grant of the leases, were effective to extinguish all native title rights and interests in the land, so that when those various previous interests ceased, and the land was re-acquired by the Crown (in right of the Commonwealth) before the leases, no native title rights and interests could then be recognised by the common law. Accordingly, so the government’s argument went, the grant of the leases had no effect on the native title of the Larrakia People, which had already been extinguished.

433 At [42], the majority described the appellant’s argument:

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

434 The Court rejected this argument. At [43], the majority found:

Native title is extinguished by a grant in fee simple. And it is extinguished because the rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title. An estate in fee simple is, “for almost all practical purposes, the equivalent of full ownership of the land” and confers “the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination.” It simply does not permit of the enjoyment by anyone else of any right or interest in respect of the land unless conferred by statute, by the owner of the fee simple or by a predecessor in title.

(Footnotes omitted.)

435 The majority went on to explain (at [44]) that this proposition was not new, and could be found in Brennan J’s reasons in *Mabo (No 2)* at 69 and in the reasons of other members of the Court, as well as in the *Native Title Act Case* and *Wik*. In citing *Wik*, the majority in *Fejo* refer to a passage at 84 of *Wik*:

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

436 The footnote in *Fejo* (at footnote 157) states: “See also *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 612-613, per Gummow J.”. That reference includes the passage in Gummow J’s reasons in *Newcrest* at 613.

437 The majority continued (at [45]):

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

438 In our respectful opinion, these passages are concerned to emphasise that native title is *defeasible*. That is the effect of *Mabo (No 2)*, from which the majority quote extensively at [46]-[48]. That this is the point being made is apparent from the first part of [48]:

As Brennan J also said in *Mabo [No 2]*, “on a change of sovereignty, rights and interests in land that **may have been indefeasible** under the old regime become liable to extinction by exercise of the new sovereign power”.

(Emphasis added, footnotes omitted.)

439 The reference to “indefeasible”, we respectfully consider, makes it clear that this reasoning addresses the appellant’s argument in *Fejo* that, in substance, all that occurred on a grant of fee simple was a suspension of native title rights.

440 This reading of the majority judgment is consistent with our first reading of Gummow J’s reasons in *Newcrest*; namely that his Honour is making the point that native title rights are defeasible by exercises of sovereign power that create inconsistent proprietary interests (such as fee simple). The majority’s reasons in *Fejo* do not liken native title rights to a statutory medicare entitlement in *Peverill*, nor could they.

441 Similarly, the passages in Kirby J’s reasons at [105] also refer to Gummow J’s reasons in *Newcrest*. Speaking of the grant of proprietary rights in land conferring exclusive possession, Kirby J states:

Of its nature, that right cannot co-exist with native title. The inconsistency lies not in the facts or in the way in which the land is actually used. It lies in a comparison between the inherently fragile native title right, susceptible to extinguishment or defeasance, and the legal rights which fee simple confers.

(Footnotes omitted.)

442 In this passage, we respectfully consider Kirby J is doing no more than making the point that native title is defeasible.

443 In summary, the passages in *Fejo* go no further than making it clear native title is defeasible, by a grant that is inconsistent with the continuation of native title. That is the first and primary way we consider Gummow J’s reasons in *Newcrest* should be understood. Tellingly, in none of these passages do any of the Justices expressly state that where federal legislative power is the source of the inconsistent grant, s 51(xxxi) would not be engaged. They do not state, or even imply, that such grants, where sourced from federal statutes, are outside s 51(xxxi), and they do not analyse the provisions of the NTA which would be necessary to decide such a matter.

## The nature of native title

444 Native title rights are rights in land and waters. They are in that sense quintessentially proprietary in nature. Even dissenting Justices such as Dawson J in *Georgiadis* recognised that acquisition of land or rights in land constitutes an acquisition of rights of a proprietary nature: at 316. Although the Commonwealth was initially somewhat coy in its submissions about a concession to this effect, ultimately the Commonwealth tentatively accepted that, at least in some contexts, native title rights are proprietary in nature and are “property” for the purposes of s 51(xxxi).

445 In the *Native Title Act Case* at 480-481, the plurality described the consequences of *Mabo (No 2)* for the ability of a state government to deal with land within its borders:

Such practical difficulty as there may be in the administration of the legislation of Western Australia governing land, minerals and the pipeline transportation of petroleum products can be attributed to the realisation that land subject to native title is not the unburdened property of the State to use or to dispose of as though it were the beneficial owner. The notion that the waste lands of the Crown could be administered as the “patrimony of the nation” and that the traditional rights of the holders of native title could be ignored was said to be erroneous in *Mabo [No 2]* and the effect of the *Native Title Act* on State administration must be seen in that light.

(Footnotes omitted.)

446 Statements such as this plainly recognise the proprietary character of native title rights, although as has been noted, it is somewhat artificial and misleading to describe them simply as a proprietary right: see *Mabo (No 2)* at 178, Toohey J, and ***Griffiths*** *v Northern Territory of Australia (No 3)* [2016] FCA 900; 337 ALR 362 at [218], Mansfield J.

447 The recognised features of native title illustrate why there is no analogy with the creation by the federal legislature of statutory rights that are susceptible to change and adjustment. Native title is communally held. It comprises a bundle of rights, some of which only First Nations Peoples will ever hold and exercise – for example, to look after and protect sacred sites. Once land subject to native title is acquired by the Crown or non-Indigenous third parties, altogether different rights in that land will be exercised.

448 While difficult to describe fairly in English, native title is intertwined with and un-severable from the spiritual and lived experiences and beliefs of those people who hold it. We can do no better than adopt the words of Mansfield J in the *Griffiths* trial judgment at [217]-[221], including a passage which demonstrates the kind of rights held:

It is necessary to start with a fuller understanding of the nature of native title rights and interests in land. As was pointed out in *Geita Sebea*, the perspective of the willing but not anxious seller and the perspective of the willing but not anxious buyer is a contrived analysis where there is no willing but not anxious seller, and the only willing but not anxious buyer (in that case the Crown) was acquiring rights which the indigenous people (because their inherent rule in alienability) did not themselves have. The individual bundle of rights which the Territory received by the determination acts was different in character from the bundle of rights which the holders of native title enjoyed and exercised up to the time of the determination, but it was capable of indicating the economic value of the exclusive native title rights.

Native title is a *sui generis* right or interest. To describe native title as a proprietary right (or as equating with a proprietary right) is “artificial and capable of misleading”: *Mabo* at CLR 178; ALR 139 per Toohey J.

Native title, as the jurisprudence now clearly accepts, is a communal bundle of rights, and not an individual proprietary right. It depends for its existence on the continuing acknowledgment and observance of the relevant traditions, customs and practices of the community. Its content is principally usufructuary in nature. It is inalienable, except by surrender to or acquisition by the Crown, and in respect of a particular community’s estate, has boundaries which may not be precisely defined (except by a determination by the Court under the NTA). It is not necessary to go beyond the *Native Title Act case* (1995) 183 CLR 373 at 437; 128 ALR 1 at 24, and *Ward HC* to support that step.

Non-exclusive native title confers on the holder a bundle of rights in relation to the area. The nature of the interest in land denoted by the term non-exclusive native title is both defined and limited by this collection of rights. But just as it is not appropriate to treat exclusive native title as valued at less than freehold, so it is not routinely appropriate to treat non-exclusive native title rights as valued in the same way as if those rights were held by a non-indigenous person, or to reduce the value of those rights because they are inalienable even though that may be the proper analysis if the rights were held by a non-indigenous person.

The non-exclusive native title rights and interests presently under consideration are the matters described at para 3 of the Interim Statement of Agreed Facts dated 30 April 2012 and set out above in detail. They include the right to travel over, move about and have access to the area; to hunt, fish and forage on the area; to gather and to use the natural resources of the area; to have access to and use the natural water of the area; to live on the land, to camp, to erect shelters and other structures; the right to engage in cultural activities; to maintain and protect sites of significance on the area; and the right to share or exchange subsistence and other traditional resources obtained on or from the land or waters (but not for any commercial purposes).

449 We note it was agreed in *Griffiths* that exclusive rights such as controlling access to areas, and granting or withholding permission to enter, remain or use land, had been extinguished prior to the compensable acts, and that is why the list given by his Honour is restricted to non-exclusive rights.

450 Reference should also be made to Mansfield J’s description of native title rights at [294], [325] and [327] of *Griffiths*:

Native title rights and interests are understood as involving a perception of socially constituted fact, an important aspect of which is the spiritual, cultural and social connection with the land under laws and customs that define the Aboriginal community concerned and their relationship with country: *Yanner v Eaton* (1999) 201 CLR 351; 166 ALR 258; [1999] HCA 53 at [38]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; [2002] HCA 58 at [49]. Reference was made to the remark of Professor Stanner in his 1968 Boyer Lectures that a non-Aboriginal way of thinking can leave us “tongueless and earless towards this other world of meaning and significance”.

…

It is not possible to establish the comparative significance of one [compensable] act over another. That is simply not how things are viewed according to the traditional laws and customs, in particular by the *Ngaliwurru-Nungali* people. As the evidence of Palmer and Asche shows, one cannot understand hurt feelings in relation to a boxed quarter acre block. Rather, the effects of [compensable] acts have to be understood in terms of the pervasiveness of Dreaming.

…

In *Milirrpum v Nabalco Ltd* (1971) 17 FLR 141 at 167; [1972–73] ALR 65, Blackburn J said:

... the fundamental truth about Aboriginal[s’] relationship to the land is that whatever else it is, it is a religious relationship. ... [T]here is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything else that exists on it and in it, are organic parts of one indissoluble [whole].

That passage was quoted with approval in *Ward HC* at [14].

451 Even putting to one side the obvious distinction that these rights pre-date colonisation, and have not been created by the Australian Parliament, and no Parliament has decided what the content of the rights should be, how the rights described so clearly by Mansfield J can be said to fall into the same category for the purposes of s 51(xxxi) as a medicare benefit, a pension entitlement or a mining exploration permit is difficult to understand.

452 In *Members of the* ***Yorta Yorta*** *Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 at [75]-[76] the plurality issued a reminder about the nature of native title, and its origins in normative systems quite independent from, and antecedent to, Australian and British law:

To speak of the “common law requirements” of native title is to invite fundamental error. Native title is not a creature of the common law, whether the Imperial common law as that existed at the time of sovereignty and first settlement, or the Australian common law as it exists today. Native title, for present purposes, is what is defined and described in s 223(1) of the *Native Title Act*. *Mabo [No 2]* decided that certain rights and interests relating to land, and rooted in traditional law and custom, survived the Crown’s acquisition of sovereignty and radical title in Australia. It was this native title that was then “recognised, and protected” in accordance with the *Native Title Act* and which, thereafter, was not able to be extinguished contrary to that Act (s 11(1)).

The *Native Title Act*, when read as a whole, does not seek to create some new species of right or interest in relation to land or waters which it then calls native title. Rather, the Act has as one of its main objects (s 3(a)) “to provide for the *recognition* and *protection* of native title” (emphasis added), which is to say those rights and interests in relation to land or waters with which the Act deals, but which are rights and interests finding their origin in traditional law and custom, not the Act. It follows that the reference in par (c) of s 223(1) to the rights or interests being *recognised* by the common law of Australia cannot be understood as a form of drafting by incorporation, by which some pre-existing body of the common law of Australia defining the rights or interests known as native title is brought into the Act. To understand par (c) as a drafting device of that kind would be to treat native title as owing its origins to the common law when it does not. And to speak of there being common law elements for the *establishment* of native title is to commit the same error. It is, therefore, wrong to read par (c) of the definition of native title as requiring reference to any such body of common law, for there is none to which reference could be made.

(Original emphasis, footnotes omitted.)

453 While, as the plurality explain at [77] of *Yorta Yorta*, at the point of British sovereignty in Australia, there was an “intersection” between the normative legal systems practised by First Nations Peoples for thousands of years and the legal system of the colonisers, native title rights and interests:

survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected. It is those rights and interests which are “recognised” in the common law.

454 See also the discussion of exclusivity and the *recognition* of native title rights in *Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* [2019] FCAFC 177; 273 FCR 350 at [281]-[288] (Jagot and Mortimer JJ). In particular, their Honours explained at [287]-[288]:

it is to misunderstand the concept of native title rights and interests to require them to fit into non-Aboriginal concepts of property, the exercise of proprietary rights and the enforcement of property rights.

That is why what occurs is **recognition** of native title; not conferral, and not transformation into non-Aboriginal property rights. Whether or not others outside Aboriginal society believe the sanctions for transgression of the law will eventuate or not is beside the point. The very foundation of traditional Aboriginal law and customs, or “customary law” as Dr Palmer prefers to describe it, is in the spiritual, and the intermingling of the spiritual with the physical, with people and with land. That is how Aboriginal law works. The distinctions which might easily be made, at least in the 21st century, in Anglo-Australian law, between spiritual belief and real property rights, or personal property rights, are not to be imported into an assessment of the existence and content of Aboriginal customary law. To do so would be to destroy the fabric of that customary law.

(Original emphasis.)

455 Of course, the power of the Crown to extinguish this kind of proprietary interest is not doubted, just as the Crown might extinguish a person’s freehold title in land by compulsory acquisition. The effect of *Mabo (No 2)* was to place the rights and interests of native title holders into a similar category, requiring deliberate and conscious conduct by the Crown to acquire their property. See *Native Title Act Case* at 422-423:

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

(Footnotes omitted.)

456 The concept of the Crown’s “radical title” is a tool of analysis to give expression to the nature of the rights and interests the Crown obtained on its assertion of sovereignty over land in Australia, and to explain how it is that the Crown’s interest in land after sovereignty can co-exist with native title. In *Yarmirr* at [47]-[49], Gleeson CJ, Gaudron, Gummow and Hayne JJ said:

The analysis reveals how native title to land survived the Crown’s acquisition of sovereignty over the land. It does so by revealing that when the Crown acquired sovereignty over land it did not acquire beneficial ownership of that land in the same way as a subject may, by grant from the Crown, acquire beneficial ownership. What the Crown acquired was a “radical title” to land, a “substantial and paramount estate, underlying the [native] title”. The native title rights and interests could co-exist with that radical title and, although inherently fragile, could, so long as they existed, be seen as a burden on that radical title.

Again, however, it is of the very first importance to bear steadily in mind that native title rights and interests are not created by and do not derive from the common law. The reference to radical title is, therefore, not a necessary pre-requisite to the conclusion that native title rights and interests *exist*. The concept of radical title provides an explanation in legal theory of how the two concepts of sovereignty over land and existing native title rights and interests *co-exist*. To adopt the words of Brennan J in *Mabo [No 2]*, it explains how “[n]ative title to land survived the Crown’s acquisition of sovereignty” over a particular part of Australia.

It is, however, not right to say, as the Commonwealth contended, that native title rights and interests cannot exist without the Crown having radical title to the area in respect of which the rights and interests are claimed. This contention gives the legal concept of radical title a controlling role. The concept does not have such a role. It is a tool of legal analysis which is important in identifying that the Crown’s rights and interests in relation to land can co-exist with native title rights and interests. But it is no more than a tool of analysis which reveals the nature of the rights and interests which the Crown obtained on its assertion of sovereignty over land.

(Original emphasis, footnotes omitted.)

457 Their Honours describe native title as “inherently fragile”. A similar description – “inherently weaker” – is found in *Mabo (No 2)* at 194. We do not consider these descriptions are to be equated with the concept of inherent defeasibility employed in respect of some statutory rights. Rather, they are descriptions of how, in a post-European sovereignty world, the intersection between the two legal systems will play out. That was made clear in *Ward* at [91]:

An important reason to conclude that, before the NTA, native title was inherently fragile is to be found in this core concept of a right to be asked permission and to speak for country. The assertion of sovereignty marked the imposition of a new source of sovereign authority over the land. Upon that authority being exercised, by the creation or assertion of rights to control access to land, the right to be asked for permission or to use or have access to the land was inevitably confined, if not excluded. But because native title is more than the right to be asked for permission to use or have access (important though that right undoubtedly is) there are other rights and interests which must be considered, including rights and interests in the use of the land.

458 Post-colonisation, the language of “fragility” conveys no more than an acknowledgement that the Crown’s assertion and exercise of powers to control ownership of land will prevail over the rights of the native title holders, where a sufficiently clear intention by the Crown to grant rights inconsistent with native title is established. As counsel for the Rirratjingu parties said in oral submissions, native title is defeasible, just as common law property rights are, but this is a characteristic shared by many rights of a proprietary nature found to be protected by s 51(xxxi) against exercises of federal legislative power.

459 What is extinguished by a grant of rights intended to be inconsistent with native title in certain land is not the traditional laws and customs which give rise to the claimants’ native title. The normative systems of First Nations Peoples remain. Traditional laws and customs are not dependent for their existence on any recognition by the Crown. They have existed for generations prior to colonisation, they continue to exist, and they can be enforced as between First Nations Peoples. They can continue to have normative force amongst those who are bound by them. What (if anything) is extinguished is the *title* to certain land; the “title” is the nomenclature for what *is* recognised by Australian common law, and what may *cease* to be recognised by Australian law, with the corresponding effect or benefit that the burden on the Crown’s radical title is removed. As we explain below, that is why the analytical tool of inherent defeasibility is inapposite.

## Why we reject the extension of the *Mutual Pools* line of authority to native title

460 In its summary outline of submissions, the NLC submitted (at [7]):

Laws that diminish native title confer an identifiable proprietary benefit on others. That is an acquisition of property within s 51(xxxi). To posit a different characterisation by reference to the common law concept of radical title dealing with when Great Britain acquired sovereignty by prerogative act is an artificial refinement distorting the principles upon which s 51(xxxi) depends.

461 We accept that submission. It is made good by the authorities to which we have referred, and the many other statements referred to in the submissions of the applicant, the NLC and the Rirratjingu parties.

462 This proposition is also made good by *Northern Territory v Griffiths* [2019] HCA 7; 269 CLR 1 (***Griffiths HCA***) at [75]:

The point made in both the *Native Title Act Case* and *Ward* was that, although native title rights and interests have different characteristics from common law land title rights and interests, and derive from a different source, native title holders are not to be deprived of their native title rights and interests without the payment of just compensation any more than the holders of common law land title are not to be deprived of their rights and interests without the payment of just compensation. Equally, native title rights and interests cannot be impaired to a point short of extinguishment without payment of just compensation on terms comparable to the compensation payable to the holders of common law land title whose rights and interests may be impaired short of extinguishment. There was no suggestion in either the *Native Title Act Case* or *Ward* that the nature and incidents of particular native title rights and interests are irrelevant to their economic worth or to the determination of just compensation for extinguishment or impairment.

463 As the NLC submitted, the premise in *Griffiths HCA* was that native title was “acquired”: that is, the Northern Territory received a benefit because the claimants’ native title was “cleared” as a burden on the Territory’s radical title to the land, which in turn was taken into account by placing the Territory in the position of the hypothetical purchaser for the purposes of the test in *Spencer v Commonwealth* [1907] HCA 82; 5 CLR 418: see *Griffiths HCA* at [32], [85], [104] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [245] (Gageler J), [281]-[283] (Edelman J). The fact that compensation in *Griffiths HCA* was payable under the NTA (as it is claimed to be here) is irrelevant – the “native title” involved is the same native title as that identified in *Mabo (No 2)*.

464 The nature of native title has been recognised in at least two decisions of the High Court concerning s 10 of the RDA.

465 In the *Native Title Act Case* at 437, the plurality said:

Where, under the general law, the indigenous “persons of a particular race” uniquely have a right to own or to inherit property within Australia arising from indigenous law and custom but the security of enjoyment of that property is more limited than the security enjoyed by others who have a right to own or to inherit other property, the persons of the particular race are given, by s 10(1), **security in the enjoyment of their property “to the same extent” as persons generally have security in the enjoyment of their property**. Security in the right to own property **carries immunity from arbitrary deprivation of the property**. Section 10(1) thus **protects the enjoyment of traditional interests in land recognised by the common law**.

(Emphasis added, footnotes omitted.)

466 And in *Mabo v Queensland (No 1)* [1998] HCA 69; 166 CLR 186, Brennan, Toohey and Gaudron JJ said at 219:

… because s. 10(1) of the *Racial Discrimination Act* clothes the holders of traditional native title who are of the native ethnic group **with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community**.

(Emphasis added.)

467 We consider the existing authorities, and in particular *Griffiths HCA*, support the straightforward proposition as put by the NLC and extracted at [460] above. The authorities demonstrate what a large and significant step it would be to apply to native title the conceptual tool of “inherent defeasibility” or “inherent susceptibility”, currently only ever applied to certain kinds of statutory rights. The whole framework of the NTA, not just the compensation provisions, is built on the premise that native title is understood as proprietary in character and as capable of being acquired. Its acquisition is assumed to be compensable, and it can be valued in monetary terms, as the foundations of both the NTA and the decision in *Griffiths HCA* demonstrate.

468 It is not necessary to descend into any further detail, despite the twists and turns in the dense and complex submissions of the government respondents in particular. The contentions of the government respondents do not represent the present law. We decline the invitation to extend the conceptual tool of inherent defeasibility or inherent susceptibility from some statutory rights to native title.

469 A further problem with the government respondents’ approach is this notion of what characteristics native title had “at its inception”. That is a question posed in the *Mutual Pools* line of authorities, because the universe of discourse in those authorities are rights that Parliament created, and whose nature and content Parliament determined. In contrast, a question about “inception” in respect of native title is meaningless. The inception of native title is in pre-colonisation times, in “time immemorial”. Native title did not arise or originate on colonisation. The colonisers brought their own legal system and imposed it. Before they arrived in Australia, there were normative systems already in place and in use, and those systems provided, amongst other matters, for the existence and allocation of rights and interests in land and waters. The legal system brought by the colonisers, the common law, was able to recognise the normative systems already in place. That is what *Mabo (No 2)* establishes. As the NLC submits (see its outline at [7] and [8]), the very adoption of the noun “title” both in *Mabo (No 2)* and by the federal Parliament in the NTA resonates with a matter that falls within s 51(xxxi).

470 The government respondents submit that the States can acquire property without affording just terms, and that the present argument could not be run against a State. That may be so, but that does not signal any incongruity that demands a different answer to the separate questions. Section 51(xxxi) is a direct and indirect limit on federal legislative power. Its intersection with the extinguishment and acquisition of native title rights only arises if there is an inconsistent grant or act dependent for its authority on federal legislative power. That is the same for any other kind of exercise of federal legislative power affecting proprietary rights. The NTA apart, the legislative powers of the States are not limited in the same way, but that is simply a consequence of the federal compact. It is not an incongruity.

471 Further, we do not accept the Commonwealth’s contention that when it exercised sovereign power in the Northern Territory it did so not as a national government in a federal system; rather it was “essentially performing the role of a State (as is illustrated by the fact that, in the case of the Northern Territory, the Commonwealth “stepped into the shoes” of the South Australian government)”. The NT Administration Act was an exercise of power under s 122 of the Constitution. It was subject to s 51(xxxi). There is a clear distinction between the kind of legislative power exercised over the Northern Territory as between the Commonwealth and South Australia.

472 The government respondents sought to make a distinction between acts of *expropriation* (such as compulsory acquisition) and acts of *appropriation* (extinguishing native title to create rights for the Crown), apparently suggesting (as our summary of their arguments above extracts) that expropriation/compulsory acquisition under a federal law could give rise to an entitlement to compensation on just terms, but only as it would for any other property interests holder. In its written reply the Commonwealth contended (at [181]):

the terms “appropriation” and “expropriation” are used by the Commonwealth to demarcate which extinguishing acts engage the inherent susceptibility of native title (appropriations), and which do not (expropriations). They are convenient labels to explain the consequences of the inherent susceptibility doctrine.

473 Long and complex submissions were made on all sides about this matter, including speculation about what Brennan J meant in *Mabo (No 2)* at 56 when his Honour said:

We are not concerned here with compensation for expropriation but we are concerned with the survival of private rights and interests in land and their liability to be extinguished by action of the Crown.

474 The government respondents contend this is a reference to statutory compensation for compulsory acquisition. They contrasted this with one of Brennan J’s central propositions at 68-69 of *Mabo (No 2)*:

Where the Crown has validly and effectively appropriated land to itself and the appropriation 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 to parcels of the waste lands of the Crown that have been validly appropriated for use (whether by dedication, setting aside, reservation or other valid means) and used for roads, railways, post offices and other permanent public works which preclude the continuing concurrent enjoyment of native title. Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (e.g., land set aside as a national park).

475 Ms Kidson explained the Commonwealth position orally in the following way:

It’s all about whether the property has, effectively, been destroyed and, therefore, the Commonwealth is taking a point of form over substance. But the whole reason why we make that distinction – and it’s the distinction which, we say, comes from the judgment of Brennan J – it’s because we say that, when you’re trying to identify whether property, for the purposes of section 51(xxxi), is inherently defeasible, you have to identify what it is inherently defeasible to. You have to identify what is the contingency for the condition or the peril that that property is subject to. So the distinction we have made between what we’ve called appropriation and expropriation is a distinction between what we apprehend to be the exercises of power or the contingency that native title was made subject to as of time of recognition.

And we say there is a significant difference between those two types of powers and a significant difference between the underlying basis for them, that appropriation is the right of the Crown or, rather, is the power of the Crown to create rights – to create rights either for itself or to dispose of them to others. But it’s a power of creation out of something which was not otherwise there. Expropriation is exercising a power to bring known, existing rights to an – I shouldn’t say “known”, existing rights to an end. And when one conceptually thinks of sovereign power – as we say, [emerges] from *Mabo*, as there being a particular sovereign power embodied in the radical title, then that’s a power of creation. It’s a power of creating rights [out] of the radical title.

476 The distinction made by the government respondents does appear to involve an acceptance that s 51(xxxi) conditions one kind of sovereign power if exercised over native title rights – compulsory acquisition; but not another kind – the “creation” (to use senior counsel’s term) of (for example) third party rights in Crown land. With respect, accepting s 51(xxxi) is engaged in one kind of exercise of power, but not in another, appears incompatible with the *Mutual Pools* line of cases which made no such distinction. But perhaps this simply highlights that those cases were not dealing with interests in *land*, and therefore how difficult it is to conceive of an interference with title in land by a grant relying on federal legislative authority that does not attract s 51(xxxi).

477 We do not consider this “expropriation/appropriation” distinction is one reflected in the law as it stands.

## Conclusion in relation to the inherent defeasibility argument

478 For these reasons, we reject the Commonwealth’s contention, reflected in separate questions 1(b)(ii) and 2(c), that the relevant grants and acts were not capable of amounting to an acquisition of property within the meaning of s 51(xxxi) of the Constitution because native title is inherently susceptible to extinguishment by a valid exercise of the Crown’s sovereign power – derived from its radical title – to grant interests in land and to appropriate to itself unalienated land. In our view, consistently with the authorities on s 51(xxxi), native title rights and interests are proprietary in nature and constitute “property” for the purposes of s 51(xxxi). Further, a grant or act that extinguishes native title rights and interests is capable of amounting to an acquisition of property within the meaning of s 51(xxxi). To hold otherwise would be contrary to the principles established by the long line of authorities on s 51(xxxi) and inconsistent with the important protection afforded by s 51(xxxi). It would also be inconsistent with the authorities of this Court and the High Court about the nature of native title.

479 For the same reasons, we reject the Commonwealth’s contention, reflected in separate question 4(b)(ii), that the relevant grants were not capable of amounting to an acquisition of property within the meaning of s 51(xxxi) of the Constitution because native title (if established) was inherently susceptible to a valid exercise of the Crown’s sovereign power – derived from its radical title – to grant interests in land.

480 We therefore reject the Commonwealth’s second constitutional argument.

# THE 1939 ORDINANCE

481 As noted above, the 1939 Ordinance was made under s 21 of the NT Administration Act. The 1939 Ordinance created a consolidated scheme with respect to mining for gold and other minerals in the Northern Territory commencing on 1 August 1940. The 1939 Ordinance repealed the South Australian mining legislation, which had continued to operate pursuant to s 5 of the NT Administration Act, and various amending mining ordinances enacted after the Northern Territory’s surrender to the Commonwealth. The critical provision of the 1939 Ordinance for present purposes is s 107, which has been set out above. For ease of reference we set it out again:

Subject to the provisions of this Ordinance and the regulations, gold, silver and all other minerals and metals on or below the surface of any land in the Territory, whether alienated or not alienated from the Crown, **shall be and be deemed to be the property of the Crown**:

Provided that this section shall not apply in the case of land granted by the Crown in fee simple, in which case the ownership of gold and minerals shall depend on the terms of any reservation (if any) of gold or other minerals.

(Emphasis added.)

482 Section 107 is located in Pt VII, which deals with mining on private land. Section 106 sets out certain definitions that apply in Pt VII “unless the contrary intention appears”. Although s 106 includes a definition of “minerals”, comprising a list of specific minerals identified by name, the Commonwealth submits, and the applicant appears to agree (see the SOC at [194(a)], [195(a)], [219]), that a contrary intention does appear in s 107 and that the general definition of “minerals” in s 7 of the 1939 Ordinance applies instead. That definition is in the following terms:

“minerals” means all minerals other than gold, and all precious stones;

483 The applicant’s pleading in relation to the 1939 Ordinance appears at [190]-[202] of the SOC. In addition to setting out the substance of s 107, the applicant pleads that at the time of the making and coming into effect of the 1939 Ordinance, none of the claim area had been the subject of a grant by the Crown in fee simple. The applicant pleads (at [194]) that the 1939 Ordinance, and in particular s 107, purported to vest in the Commonwealth title to all minerals on or below the surface of the claim area, and did not provide any entitlement to compensation in respect of that vesting. The applicant pleads that, if valid, the making of the 1939 Ordinance, and in particular s 107, would have been inconsistent with the claimants’ native title mineral rights in the claim area, and would have extinguished those rights at common law. The applicant pleads that, in the premises, s 107 of the 1939 Ordinance purported to acquire property on other than just terms, within the meaning of s 51(xxxi) of the Constitution. This forms the foundation for the applicant’s pleading that: but for the operation of the NTA, the making of s 107 of the 1939 Ordinance would have been invalid by reason of the claimants’ native title rights and s 51(xxxi) of the Constitution; the NTA apart, the making of s 107 would have been valid if native title did not exist; the making of s 107 is a “past act” attributable to the Commonwealth for the purposes of the NTA; by operation of s 14 of the NTA, the making of s 107 is valid and taken always to have been valid; by operation of ss 15 and 238 of the NTA, the making of s 107 was effective to vest in the Commonwealth title to all minerals on or under the claim area; and, pursuant to ss 17 and 18 of the NTA, the claimants are entitled to compensation from the Commonwealth in respect of the acquisition of property effected by s 107.

484 There is no issue in relation to the purported effect of the 1939 Ordinance that requires determination for the purposes of answering the separate questions. The Commonwealth’s position is that, if it is not successful in relation to separate question 1 (which relates to the Mission Lease, discussed above), then the applicant’s claim for compensation based on the 1939 Ordinance should fail for three reasons:

(a) first, because the 1939 Ordinance did not have any effect on any native title mineral rights in the claim area because any such rights had already been extinguished by the reservation of minerals in the four pastoral leases granted between 1886 and 1903 (we have discussed and rejected this contention above);

(b) secondly, the just terms requirement in s 51(xxxi) of the Constitution does not apply to s 107 of the 1939 Ordinance because it is a law made under the NT Administration Act, being a law enacted under s 122 of the Constitution (this is the *Wurridjal* argument, which we have rejected); and

(c) thirdly, the vesting in the Commonwealth of property in all minerals in the claim area by s 107 of the 1939 Ordinance was not capable of amounting to an acquisition of property within the meaning of s 51(xxxi) of the Constitution because the enactment of s 107 was the exercise of a sovereign power to which native title was inherently susceptible (this is the inherent defeasibility argument, which we have rejected).

485 It follows that, subject to the Commonwealth’s arguments outlined above, it is common ground between the applicant and the Commonwealth that s 107 of the 1939 Ordinance, if valid, would have extinguished any native title rights in relation to the minerals held by the claimants.

486 We note that the NLC parties adopt a different position to the applicant in relation to the purported effect of s 107 of the 1939 Ordinance. At [145] of the NLC parties’ submissions, they contend that the legislative measures taken with respect to minerals (including s 107 of the 1939 Ordinance) were not inconsistent with the claimed non-exclusive native title right to access, take and use for any purpose the resources of the claim area, including mineral resources. They submit that there is no distinct claimed native title right to own property in mineral resources, or to control the use and enjoyment of such resources by others, that would be inconsistent with the vesting of property in minerals in the Crown in right of the Commonwealth by s 107 of the 1939 Ordinance. We do not consider it necessary or appropriate to determine this issue in the course of considering the separate questions. In circumstances where there is no issue as between the applicant and the Commonwealth as to the purported effect of s 107 of the 1939 Ordinance, and the separate questions do not raise any issue about this, it is not necessary or appropriate to determine this issue. Rather, as indicated above, we proceed for present purposes on the basis that, if valid, s 107 of the 1939 Ordinance would have extinguished any native title mineral rights. We do not consider this to foreclose the argument raised by the NLC parties being considered at a later stage of the proceeding.

487 Accordingly, given our conclusion on the pastoral lease reservations issue, separate question 2(a) should be answered “No”. Given our conclusion on the Mission Lease, separate question 2(b) should be answered “No”. Given our conclusions in relation to the Commonwealth’s two constitutional arguments, separate question 2(c) should be answered “No”. The effect of these conclusions is that the applicant’s argument that the 1939 Ordinance was a “past act” within the meaning of s 228(2) of the NTA remains available.

# THE 1953 ORDINANCE

488 As noted above, the 1953 Ordinance was made by the Northern Territory Legislative Council pursuant to s 4U of the NT Administration Act (as amended). The critical provision for present purposes is s 3 of the 1953 Ordinance. Although this has been set out above, we set it out here for ease of reference:

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.

489 Section 4 of the 1953 Ordinance provided that the Commonwealth was liable to pay compensation to a person who had an interest in minerals acquired under s 3, in an amount agreed or determined by the Supreme Court of the Northern Territory, but a person was not entitled to such compensation unless, within six months of the commencement of the 1953 Ordinance, they lodged a written claim with the Administrator specifying (among other things) the nature of their interest in the minerals and the amount of compensation claimed.

490 The applicant’s pleading in relation to the 1953 Ordinance is at [213]-[231] of the SOC. The applicant pleads that, in light of the pleadings relating to the 1939 Ordinance, all minerals on or below the surface of the claim area were already the property of the Crown in right of the Commonwealth immediately before the commencement of the 1953 Ordinance, and that s 3 of the 1953 Ordinance therefore had no operation with respect to the minerals on or below the surface of the claim area. Then, at [218] of the SOC, the applicant pleads that, if and to the extent that any minerals on or below the surface of the claim area were not the property of the Crown in right of the Commonwealth immediately prior to the commencement of the 1953 Ordinance, then [219]-[231] of the SOC apply. In those paragraphs, the applicant makes similar allegations to those advanced in relation to the 1939 Ordinance. Thus, the applicant’s claim for compensation based on the 1953 Ordinance is in the alternative to his claim based on the 1939 Ordinance.

491 The Commonwealth contends that the 1953 Ordinance effected no extinguishment of native title, because:

(a) all native title in the claim area had already been extinguished by the Mission Lease; or

(b) any native title mineral rights had been extinguished by the reservations in the pastoral leases; or

(c) any native title mineral rights had been extinguished by s 107 of the 1939 Ordinance.

492 We have rejected the contentions in (a) and (b) above. In relation to the contention in (c), in light of the conclusions we have reached in relation to the 1939 Ordinance, including in relation to the Commonwealth’s two constitutional arguments, the Commonwealth has not established that any native title mineral rights had been extinguished by s 107 of the 1939 Ordinance. In other words, the argument that the 1939 Ordinance did not validly extinguish the claimants’ native title mineral rights remains open to the applicants. Separate question 3(a) should therefore be answered “No”.

493 It follows from our conclusion in respect of the *Wurridjal* argument that separate question 3(b) should be answered “No”.

# THE SPECIAL MINERAL LEASES

494 A brief description of the special mineral leases has been set out above. The applicant’s contentions in relation to the special mineral leases have also been summarised above.

495 The Commonwealth’s primary position is that the applicant’s claim for compensation based on the special mineral leases should fail because all native title in the claim area was extinguished by the grant of the Mission Lease. We have rejected this argument above. The Commonwealth’s next contention is that these claims should fail because neither of the Ordinances under which the special mineral leases were granted (that is, the 1939 Ordinance and the 1968 Ordinance) were subject to the just terms requirement in s 51(xxxi) of the Constitution. This is the *Wurridjal* argument, which we have rejected. The Commonwealth’s third contention is that, in any event, native title was inherently susceptible to valid Crown grants of this kind, with the consequence that none of the grants of the special mineral leases were capable of amounting to an acquisition of property within the meaning of s 51(xxxi). This is the inherent defeasibility argument, which we have rejected.

496 The Commonwealth notes in its outline of submissions that, if the demurrer is not upheld (or, it would follow, if the Commonwealth is unsuccessful in relation to the separate questions), then at an appropriate time, the Commonwealth will also contend that the pleaded effect of the grants of the special mineral leases on the enjoyment or exercise of the non-exclusive native title rights did not amount to an “acquisition of property” within the meaning of those words in s 51(xxxi) of the Constitution. That issue is not before the Court now because the Commonwealth and the applicant were unable to reach agreement on a form of pleading that the Commonwealth considered could support a demurrer on that point.

497 It follows that separate questions 4(a) and 4(b) should each be answered “No”.

# CONCLUSION

498 It follows from our conclusions that the separate questions are to be answered:

(1) Separate question 1 – No;

(2) Separate question 2:

(a) Separate question 2(a) – No;

(b) Separate question 2(b) – No;

(c) Separate question 2(c) – No.

(3) Separate question 3:

(a) Separate question 3(a) – No;

(b) Separate question 3(b) – No.

(4) Separate question 4:

(a) Separate question 4(a) – No;

(b) Separate question 4(b) – No.

499 We will also make an order giving the parties the opportunity to file short written submissions on any further orders that they contend should be made by the Full Court. It may be that these matters can be determined on the papers. The parties can indicate in their submissions if they consider it necessary for there to be a further hearing before the Full Court. Depending on the submissions, we may give the parties the opportunity to file responding submissions.

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| I certify that the preceding four hundred and ninety-nine (499) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Mortimer and Justices Moshinsky and Banks-Smith. |

Associate:

Dated: 22 May 2023

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | NTD 43 of 2019 |
| Respondents |  |
| Fourth Respondent: | LAYILAYI BURARRWANGA |
| Fifth Respondent: | MILMINYINA VALERIE DHAMARRANDJI |
| Sixth Respondent: | LIPAKI JENNY DHAMARRANDJI (NEE BURARRWANGA) |
| Seventh Respondent: | BANDINGA WIRRPANDA (NEE GUMANA) |
| Eighth Respondent: | GENDA DONALD MALCOLM CAMPBELL |
| Ninth Respondent: | NAYPIRRI BILLY GUMANA |
| Tenth Respondent: | MARATJA ALAN DHAMARRANDJI |
| Twelfth Respondent: | RILMUWMURR ROSINA DHAMARRANDJI |
| Thirteenth Respondent: | WURAWUY JEROME DHAMARRANDJI |
| Fourteenth Respondent: | MANYDJARRI WILSON GANAMBARR |
| Fifteenth Respondent: | WANKAL DJINIYINI GONDARRA |
| Sixteenth Respondent: | MARRPALAWUY MARIKA (NEE GUMANA) |
| Eighteenth Respondent: | GUWANBAL JASON GURRUWIWI |
| Nineteenth Respondent: | GAMBARRAK KEVIN MUNUNGGURR |
| Twentieth Respondent: | DONGGA MUNUNGGURRITJ |
| Twenty First Respondent: | GAWURA JOHN WANAMBI |
| Twenty Second Respondent: | MANGUTU BRUCE WANGURRA |
| Twenty Third Respondent: | GAYILI BANUNYDJI JULIE MARIKA (NEE YUNUPINGU) |
| Twenty Fifth Respondent: | BAKAMUMU ALAN MARIKA |
| Twenty Sixth Respondent: | WANYUBI MARIKA |
| Twenty Seventh Respondent: | WURRULNGA MANDAKA GILNGGILNGMA MARIKA |
| Twenty Eighth Respondent: | WITIYANA MATPUPUYNGU MARIKA |
| Twenty Ninth Respondent: | NORTHERN LAND COUNCIL |
| Thirtieth Respondent: | SWISS ALUMINIUM AUSTRALIA LIMITED (ACN 008 589 099) |
| Thirty First Respondent: | TELSTRA CORPORATION LIMITED (ABN 33 051 775 556) |
| Thirty Second Respondent: | ARNHEM LAND ABORIGINAL LAND TRUST |
| Thirty Third Respondent: | AMPLITEL PTY LTD |